

10-2593

To Be Argued By:
ERIC J. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-2593

—————
CARLOS F. RIVERA,

Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA,

Respondent-Appellee.

—————
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

=====

BRIEF FOR THE UNITED STATES OF AMERICA

=====

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Statement of Jurisdiction

On June 9, 2010, the United States District Court for the District of Connecticut (Kravitz, J.) denied appellant Carlos Rivera's Motion to Vacate a Sentence pursuant to 28 U.S.C. § 2255. A100; *Rivera v. United States*, 719 F. Supp. 2d 230 (D. Conn. 2010).¹ Rivera filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on June 15, 2010. A111. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

¹ Citations beginning with "A" refer to pages in the defendant-appellant's appendix.

**Statement of Issue
Presented for Review**

Did the district court err in deciding, without holding an evidentiary hearing, that Rivera's habeas petition was not timely filed and was not entitled to equitable tolling?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-2593

CARLOS F. RIVERA,

Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Carlos Rivera was convicted after a jury trial on five counts of sexually exploiting minors and possession and production of child pornography. As a result of his prior conviction for sexual exploitation of a minor, he was sentenced to a mandatory term of life imprisonment. This Court affirmed his conviction. *See United States v. Rivera*, 546 F.3d 245, 248 (2d Cir. 2008). The Supreme

Court denied his petition for a writ certiorari on February 23, 2009.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Rivera had one year from the date of Supreme Court’s decision to file a habeas petition. *See* 28 U.S.C. § 2255(f)(1). He did not do so. Instead, he filed a motion for an extension of time and then filed his petition after the one-year period had expired.

Rivera claimed that rare and exceptional circumstances warranted equitably tolling his time to file his petition, but the district court correctly rejected this claim. The court concluded that an evidentiary hearing was not necessary and that the reasons provided for the delay were not extraordinary. The court also found that the defendant had not exercised reasonable diligence in pursuing his claims.

This decision should be affirmed. Even assuming the truth of facts set forth by Rivera, he had sufficient time to file a petition after he received the documents he had requested from his attorney. The circumstances present were not rare and exceptional, and Rivera did not exercise reasonable diligence in getting his petition filed in a timely manner.

Statement of the Case

On April 19, 2006, a federal grand jury indicted the defendant on two counts of coercion and enticement, one count of travel with intent to engage in illicit sexual conduct, one count of production of child pornography,

and one count of possession of child pornography, all in violation of 18 U.S.C. §§ 2422(b), 2423(b), 2251(a), and 2552A(a)(5)(B). A4.

On July 11, 2006, Rivera was convicted on all five counts. He was sentenced on October 20, 2006 to a total effective term of life in prison, which, as a result of his previous state court conviction for first-degree sexual assault against a minor, was a mandatory sentence. *See* 18 U.S.C. § 3559(e). A97-A98.

Rivera timely filed a notice of appeal of his conviction. This Court affirmed his conviction on October 15, 2008. *See United States v. Rivera*, 546 F.3d 245 (2d Cir. 2008). Rivera then filed a petition for a writ of certiorari to the Supreme Court, which was denied on February 23, 2009. *See Rivera v. United States*, 129 S. Ct. 1395 (2009).

On February 16, 2010, Rivera delivered to prison authorities a Motion to Enlarge Time to File 28 U.S.C. § 2255 Motion Under Equitable Tolling. A11. The motion was filed on February 23, 2010, exactly one year after his petition for a writ of certiorari was denied. A11. Two days later, the United States District Court (Kravitz, J.) denied the motion without prejudice and instructed Rivera to file a habeas petition as soon as possible and to argue in the petition or in a separate motion that rare and exceptional circumstances justified equitably tolling the mandatory one-year time limit governing the filing of § 2255 motions. A14. On March 11, 2010, Rivera filed his § 2255 motion and reiterated his request for equitable tolling. A28.

On June 9, 2010, the district court rejected Rivera's § 2255 petition as untimely and declined to issue a certificate of appealability. A108; *see United States v. Rivera*, 719 F. Supp.2d 230, 236 (D. Conn. 2010). Rivera filed a timely notice of appeal on June 15, 2010. A111. Rivera moved for a certificate of appealability, and this Court granted a certificate of appealability on September 15, 2010. A110.

Rivera is currently in custody serving his sentence.

Statement of Facts

A. The Initial Motion to Enlarge Time to File a Petition Under § 2255

The Supreme Court denied Rivera's petition for a writ of certiorari on February 23, 2009. Thereafter, Rivera states that he wrote to his attorney to obtain "transcripts and other documents" he felt that he needed in order to file a § 2255 motion challenging his conviction. A10, ¶ 5. Failing to receive a response to his letters, he received permission to call his attorney and reiterated the request to his attorney by telephone, after which the attorney mailed the documents to Rivera. A10, ¶ 5. Initially, the prison did not turn over the papers to Rivera because it incorrectly believed they contained material that violated Bureau of Prison regulations.² A10, ¶ 6. Rivera made his

² Specifically, Rivera states that authorities believed the mailing contained copies of a Pre-Sentence Report, which
(continued...)

attorney aware of the prison's error. When the attorney contacted prison officials to clarify the papers' contents and purpose, the prison officials released the documents to Rivera. A10, ¶¶ 6-7.

Once Rivera received his documents, his attorney told him that he had only "a couple of weeks" in which to file the § 2255 motion. A10, ¶ 7. On February 16, 2010, Rivera delivered a Motion to Enlarge Time to File 28 U.S.C. § 2255 Motion Under Equitable Tolling to prison authorities for forwarding to the district court. A9. The court received the motion on February 23, 2010 (the deadline for the filing of the habeas petition) and denied it on February 25, 2010. *See Rivera*, 719 F. Supp.2d at 232. Relying on *Green v. United States*, 260 F.3d 78, 82 (2d Cir. 2001), which held that a district court could only grant an equitable tolling request "upon or after filing an actual section 2255 motion," the court denied the motion without prejudice and instructed Rivera to re-submit the request for equitable tolling along with his actual § 2255 petition as soon as possible. A14-A15.

² (...continued)

Bureau regulations permit prisoners to view, but not possess themselves. A75.

B. The § 2255 Motion and Request for Equitable Tolling.

On March 11, 2010, “within days” of receiving the district court’s order, *see* Def.’s Br. at 24, Rivera gave prison authorities a § 2255 motion, a memorandum of law, and a renewed motion for equitable tolling. A16-A49. The district court docketed the materials on March 30, 2010. A16.

Rivera’s equitable tolling claim rested on his assertion that he did not receive his necessary documents until shortly before the expiration of the one-year AEDPA statute of limitations. According to Rivera, soon after receiving these documents, his attorney advised him that he had only two weeks in which to timely file his petition.

Rivera’s chronology of events has been inconsistent. In his initial Motion to Enlarge Time to File, he wrote that he “received his transcripts and other need[ed] documents . . . , after weeks of un-successfully trying to . . . reach his attorney, and *when he did he was informed that he had only a couple of weeks* for when his § 2255 motion is due.” A10, ¶ 7 (emphasis added). This would have given him, at a minimum, approximately two weeks with the documents before his deadline for filing his petition. In his subsequent Motion to Enlarge Time to File, included with his actual habeas petition, Rivera altered this description and stated, “Finally the *petitioner received his transcripts* and other needed documents . . . , *and then after weeks* of trying to reach his attorney . . . , *he was then informed that he only had a couple of weeks* before his §

2255 motion was due.” A48, ¶ 7 (emphasis added). According to this more recent description, Rivera had at least four weeks with the documents before the deadline for filing the petition (“weeks” of trying to reach his attorney plus “a couple of weeks” once he learned of the deadline).

On March 30, 2010, the district court ordered the government to respond to the equitable tolling arguments raised by Rivera so that the court could determine whether the habeas petition was timely filed. A101. The government argued that Rivera’s own admissions in his equitable tolling motions showed that he had plenty of time while in possession of his documents to file a petition within the one-year time period, and that his failure to do so was a result of his failure to act with reasonable diligence. A62.

In response to the government’s filing, Rivera submitted a “travers” which further amended his account. A65. He claimed that he was actually informed of the impending deadline only when discussing the prison mail delay with his attorney, so that there was some lag between his learning of the deadline and his receipt of his papers. A70 (“During the telephone conversation . . . to re-send the transcripts, that’s when petitioner was informed that he only had two weeks before the § 2255 motion was due.”). According to this revised version,

Rivera still had at least one week with the papers before the filing deadline.³

C. The District Court's Ruling

The district court found the § 2255 motion untimely because it was filed more than one year after Rivera's case became "final" under the meaning of 28 U.S.C. § 2255(f)(1). It also denied Rivera's motion for equitable tolling. Following this Court's decisions in *Hizbullahankhamon v. Walker*, 255 F.3d 65, 75 (2d Cir. 2001) and *Baldayaque v. United States*, 338 F.3d 145, 150 (2d Cir. 2003), the court determined that Rivera had failed to show extraordinary circumstances that prevented him from timely filing the petition, and that Rivera had not acted with the requisite diligence in pursuing his rights. *See Rivera*, 719 F. Supp.2d at 233-36; A104-A106. The district court concluded that an evidentiary hearing was unnecessary because the facts were undisputed and it could decide the question of equitable tolling on the record before it. A101, n. 2. Specifically, the court stated:

The Court notes that it did not hold an evidentiary hearing on the issue of equitable tolling, even though it had the authority to do so. *See Valverde v. Stinson*, 224 F.3d 129, 135 (2d Cir. 2000).

³ Rivera's brief continues to offer inconsistent accounts. *Compare* Def.'s Br. at 15 ("Only then were the materials finally delivered to appellant. By this time there was only a couple of weeks left in the AEDPA limitations period.") *with id.* at 23 (reiterating the version in appellant's traverse).

Because the facts relevant to equitable tolling are entirely undisputed, the Court concluded that a hearing was unnecessary and it could decide this question on the record before it. As discussed below, while an evidentiary hearing might have shed some light on the precise timing of events, it would not have changed the outcome of this case.

Id.

On the extraordinary circumstances question, the district court contrasted the circumstances in Rivera's case with the circumstances in cases in which petitioners had been deemed entitled to equitable tolling. A104-A105. The district court noted that the circumstances in cases in which equitable tolling had been applied were "both unusual and completely prevented the petition from filing in a timely fashion." A104-A105. "In contrast, the circumstances faced by Mr. Rivera – difficulty in contacting his attorney and delays caused by the prison mail system – were consistent with the ordinary inconveniences experienced by all prisoners." A105. Although these regular inconveniences might conceivably rise to the level of extraordinary circumstances in a different context, the court stated that "to do so they would have to impose a significant obstacle preventing petitioner from filing in a timely manner." A105. "[T]he delays experience[d] by Mr. Rivera in this case did not prevent him from filing his petition within the one-year deadline." A105.

The district court also found, in the alternative, that the circumstances surrounding Rivera's difficulty in obtaining documents from his attorney were not "extraordinary." A105. Once Rivera reached his lawyer by telephone, "his attorney provided him with the requested documents and even intervened with the prison on his behalf to ensure that he received those documents." A105. "This behavior by his attorney can hardly be described as 'so outrageous or so incompetent as to render it extraordinary.'" A105-A106.

Finally, the court concluded that Rivera failed to exercise reasonable diligence in pursuing his petition. The court explained, "Because the Court concludes that Mr. Rivera did not face extraordinary circumstances that prevented him from filing his petition on time, it need not reach the issue of reasonable diligence. However, for the purposes of completeness, the Court will rule on this issue as well." A106. The court provided "three reasons" for concluding that "Rivera has not shown that he was diligent in his attempts to file his petition." A107. First, it was "not clear when [Rivera] first attempted to obtain documents from his attorney, nor when his documents were delayed by the prison mail system, nor how long any of these delays were." A107. It was "Rivera's burden to establish reasonable diligence," and he did not provide "the information necessary for the Court to conclude that he was diligent throughout the period that he seeks to have tolled and thereafter." A107.

Second, "by his own admission," once Rivera received the documents from his attorney, he "had a couple of weeks before his § 2255 motion was due." A107. Rivera

“could have used this time to file an ‘unpolished – but timely – petition,’ . . . and then sought to amend the petition at a later date if necessary.” A107 (citing *Belot v. Burge*, 490 F.3d 201, 204 (2d Cir. 2007)).

Third, Rivera “did not need the documents from his attorney in order to file his petition.” A107. The court found that, because Rivera had “[a]ll of the information necessary to raise most – if not all – of [the] claims [in his petition] even without access to trial transcripts and other materials,” he had not shown reasonable diligence in attempting to raise them in a timely manner. A107.

Finally, the district court addressed what it viewed as “[t]he only remaining question,” i.e., whether it should have treated Rivera’s “initial motion for extension of time as a § 2255 motion for purposes of timeliness under the AEDPA.” A108. The court explained,

In this case, because Mr. Rivera’s initial motion was filed on the day his § 2255 petition was due, were the Court to construe that motion as his petition it would be timely. However, the initial motion did not even hint at the grounds for the petition he ultimately filed. Because Mr. Rivera ‘had not articulated any basis in fact or in law for relief under section 2255,’ the Court simply cannot treat his initial motion for extension of time as a substantive petition under § 2255.

A108.

Because the court concluded that Rivera's § 2255 motion was untimely and did not merit equitable tolling, it denied the petition. A108. The court also did not issue a certificate of appealability. A108-A109. On this issue, it held,

The Court is confident that Mr. Rivera's claims are time-barred. While the doctrine of equitable tolling must be decided on a case-by-case basis, and so in many cases reasonable jurists may well reach differing conclusions on the same record, the Court believes that the straightforward and undisputed record in this case precludes the conclusion that Mr. Rivera faces extraordinary circumstances or was reasonably diligent.

A109. After advising Rivera of his appellate rights, the court advised him that this Court could issue a certificate of appealability if he "can make the necessary showing that jurists of reason would find it debatable whether the district court was correct in its . . . ruling." A109 (internal quotation marks omitted).

D. Issuance of Certificate of Appealability

Rivera moved *pro se* for a certificate of appealability, and on September 15, 2010, this Court issued a certificate of appealability. In granting the motion, the Court stated,

The certificate of appealability is limited to the question of equitable tolling, and the parties shall brief the following issue: whether the district court

erred in concluding that appellant was not entitled to equitable tolling without conducting an evidentiary hearing, in light of the fact that appellant filed a timely, but otherwise defective, motion requesting an extension of time to file a motion under 28 U.S.C. § 2255, and later raised certain factual questions regarding his ability to timely file a petition that was not defective.

A110.

Summary of Argument

The district court correctly concluded on the record before it that Rivera was not entitled to equitable tolling and that his petition under § 2255, which was filed more than one year after the denial of his petition for certiorari, was not timely. Given the undisputed nature of the facts alleged concerning the circumstances surrounding the untimely petition, there was no need for the district court to hold an evidentiary hearing. Taking the facts alleged as true, Rivera failed to demonstrate either that extraordinary circumstances prevented the timely filing of his petition, or that he exercised reasonable diligence throughout the period he sought to toll.

First, Rivera failed to show that any of the facts he alleged concerning the delay in getting his documents rose beyond the ordinary delay and inconvenience attendant in all prisoners' lives. Absent any showing of intentional or misleading acts, the attorney and prison mail delays alleged here are not extraordinary in the course of normal

prison operations. Moreover, those circumstances did not “prevent[] him from filing the petition on time” because there was no “causal relationship between the extraordinary circumstances” and “the lateness of [the] filing.” *Hizbullahankhamon*, 255 F.3d at 75.

Second, the district court correctly concluded that Rivera did not act with reasonable diligence during the period of time for which he sought equitable tolling. Rivera concedes that he had “a couple of weeks left in the AEDPA limitations period” when he received his documents. *See* Def’s Br. at 15. Rivera could have used that time to file timely an unpolished petition and amend it later if necessary. Moreover, a review of the petition Rivera did file reveals that he did not need access to the documents from his lawyer to file the petition. Given these undisputed facts, there was no need for the district court to hold an evidentiary hearing before concluding that Rivera was not entitled to equitable tolling.

Argument

I. The district court correctly concluded without an evidentiary hearing that the circumstances alleged by Rivera did not warrant equitable tolling.

A. Governing law and standard of review

Subsection (f)(1) of 28 U.S.C. § 2255 requires that a § 2255 motion be filed within one year of the date that the

judgment of conviction becomes final.⁴ A conviction becomes final one year after the Supreme Court denies certiorari. *See Green v. United States*, 260 F.3d 78, 84 (2d Cir. 2001).

A court may equitably toll the one-year statute of limitations for § 2255 petitions “only if the petitioner shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing.” *Jenkins v. Greene*, 630 F.3d 298, 302 (2d Cir. 2010) (internal citations and emphasis omitted); *see also Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010); *Baldayaque v. United States*, 338 F.3d 145, 150 (2d Cir. 2003).

The standard for determining whether a circumstance is extraordinary is “based not on ‘how unusual the circumstance alleged to warrant tolling is among the universe of prisoners, but rather, how severe an obstacle it is for the prisoner endeavoring to comply with AEDPA’s limitations period.’” *Dillon v. Conway*, ___ F.3d ___, 2011 WL 1548955 at *4 (2d Cir. April 26, 2011) (quoting *Diaz v. Kelly*, 515 F.3d 149, 154 (2d Cir. 2008)). The standard for determining whether the petitioner has diligently pursued his rights is one “not [of] ‘extreme diligence’ or ‘exceptional diligence’, [but] reasonable diligence.” *Baldayaque*, 338 F.3d at 153 (emphasis omitted).

⁴ 28 U.S.C. § 2255(f)(2)-(4) provides alternative start dates for calculating the one-year period, but none of these provisions are relevant to Rivera’s claims.

As this Court explained in *Jenkins*, there is no blanket standard of review that applies to a district court’s denial of equitable tolling. Rather, different standards apply depending on the nature of the claim at issue. Where the lower court’s decision stems from a conclusion of law, that legal conclusion is reviewed *de novo*; where its decision is based on factual finding, by contrast, that finding is reviewed for clear error; and, where the decision is based on the exercise of discretion, this Court’s review is for abuse of discretion. *See Jenkins*, 630 F.3d at 302; *see also Belot v. Burge*, 490 F.3d 201, 206-07 (2d Cir. 2007).

In assessing an equitable tolling claim, “[t]he decision as to whether an evidentiary hearing is warranted is . . . consigned to the district court.” *Bolarinwa v. Williams*, 593 F.3d 226, 232 (2d Cir. 2010); *see also Chang v. United States*, 250 F.3d 79, 86 (2d Cir. 2001) (affirming denial of a 2255 and stating that it was not “an abuse of discretion on the part of the district court to conclude that . . . a hearing would not offer any reasonable chance of altering its view of the facts”). Moreover, because the district court “understood the governing law correctly,” and Rivera’s challenge is addressed to whether the district court’s “decision is one of those within the range of possible permissible decisions,” appellate review should be “not only in name, but also in operation, for abuse of discretion.” *Belot*, 490 F.3d at 206-07 (holding that failure to file an “unpolished–but timely–petition” was a “discretionary ground . . . within the court’s reasonable discretionary parameters”).

Rivera argues that a district court's denial of a § 2255 petition without a hearing is reviewed for clear error as to findings of fact and *de novo* as to conclusions of law. *See Puglisi v. United States*, 586 F.3d 209, 215 (2d Cir. 2009). *Puglisi*, however, was not an equitable tolling case. There, the timeliness of the filing was undisputed, and the question was whether the district court erred by denying petitioner's ineffective assistance of counsel claim without a hearing.⁵

Here, by contrast, neither party disputes that Rivera filed his petition after the one-year deadline imposed under § 2255(f)(1), and neither party (at this juncture) disputes the factual claims provided by Rivera in support of his equitable tolling argument. The question, therefore, is whether the district court erred by denying the equitable tolling claim without a hearing. This decision is reviewed under the abuse of discretion standard. *See Belot*, 490 F.3d at 206 (“The balancing of factors involved in determining what result is equitable and the appraisal of whether the circumstances are sufficiently extraordinary seem to contemplate that in the same set of facts, different results could be acceptable.”); *see also Puglisi*, 586 F.3d at 213 (holding that the district court should determine whether, making all inferences in favor of the petitioner, he can make out a *prima facie* case for relief).

⁵ 28 U.S.C. §2255(b) provides that a court shall grant a hearing unless “the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.”

B. Discussion

1. No evidentiary hearing was required because Rivera did not allege any “extraordinary circumstances” that, if true, would justify equitable tolling

The district court correctly found that no evidentiary hearing was necessary in order to conclude that there were no “extraordinary circumstances” which justified equitable tolling in this case. As the district court noted, “[b]ecause the facts relevant to equitable tolling [were] entirely undisputed,” it “concluded that a hearing was unnecessary and it could decide this question on the record before it.” A101, n.2.

The district court did not abuse its discretion in so deciding. *See Bolarinwa v. Williams*, 593 F.3d 226, 232 (2d Cir. 2010) (stating that in assessing an equitable tolling claim, “[t]he decision as to whether an evidentiary hearing is warranted is . . . consigned to the district court”). The factual circumstances alleged by Rivera, even taken as true, did not constitute extraordinary circumstances under the case law of this Court. As set forth below, this Court has found extraordinary circumstances only in the most egregious cases. These cases involved circumstances which were unusual and which completely prevented the petitioner from filing a petition in a timely manner.

In *Baldyague v. United States*, 338 F.3d at 152, for example, this Court recognized that “attorney error normally will not constitute the extraordinary

circumstances necessary to toll the AEDPA limitations period.” While *Baldayaque* did allow that “at some point, an attorney’s behavior may be so outrageous or so incompetent as to render it extraordinary,” *id.*, in the rare instances where this has been the case, the court has found either intentional, affirmative misconduct or complete failure to inform petitioner of relevant facts. *See Dillon*, 2011 WL 1548955 at *5 (petitioner’s attorney breached a specific promise to file the petition before the deadline); *Baldayaque*, 338 F.3d 145, 152 (attorney hired specifically for purpose of filing §2255 failed to perform any legal research or communicate with client); *cf. Torres v. Barnhart*, 417 F.3d 276, 279-80 (2d Cir. 2005) (evidentiary hearing for equitable tolling appropriate where attorney “misled” client that he would file an SSA disability appeal on his behalf).

Here, the conduct of Rivera’s attorney was not “so outrageous or so incompetent as to render it extraordinary.” *Baldayaque*, 338 F.3d at 152. In contrast to the utter failure to perform on the client’s behalf in *Baldayaque* or the affirmative breaches in *Dillon*, Rivera’s attorney delivered his legal documents with sufficient time left to file a petition in a timely manner. Although allegedly unresponsive to his client’s initial mailings, the attorney sent the requested legal papers once he was contacted by phone. A10. He did not mislead his client or fail to communicate with him. Rather, he contacted the prison on his client’s behalf after the papers were delayed, and he also informed Mr. Rivera of the upcoming limitations deadline. A10. As Rivera himself stated in his motion to enlarge time, “the petitioner received his

transcripts and other need[ed] documents in the Inmate Legal mail System . . . and when he did he was informed that he had only a couple of weeks for when his § 2255 motion [was] due in court.” Def.’s Br. at 5 (quoting A10).⁶

Similarly, the circumstances surrounding the mistake by the prison in withholding Rivera’s documents from him for a period of time were not extraordinary. This Court has normally required government officials to engage in intentional misconduct before concluding that their behavior rises to the level of extraordinary circumstances. *See Hizbullahankhamon*, 255 F.3d at 75 (court would consider equitable tolling where “*discretionary* deprivation of prisoner’s access to his own legal materials . . . prevented a prisoner from petitioning”) (emphasis added); *Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000) (“[I]ntentional confiscation of a prisoner’s . . . legal papers by a corrections officer is ‘extraordinary’ as a matter of law) (emphasis added). Rivera does not allege, nor is there any evidence of, intentional misconduct by prison officials in initially refusing to turn over his papers. Indeed, when Rivera’s attorney intervened with prison officials to ensure that he receive the documents, the prison provided the documents over to him. A10. As the district court stated, “difficulty in obtaining court records,

⁶ In fact, it is not even clear that Rivera ever intended to allege extraordinary delay by his attorney. *See* A70 (“As the governments inserts concerning Attorney delays, this is not the case here. Petitioner ‘NEVER EVER’ cited as use of attorney delys concerning his Equitable Tolling argument” [sic]).

and receiving mail at the facility . . . are not ‘extraordinary,’ as they apply to most inmates.” A105 (collecting cases). Moreover, where this Court has found extraordinary circumstances without intentional government misconduct, the deprivation has been much more severe than a temporary delay in the release of papers. *See Diaz v. Kelly*, 515 F.3d 149, 155-56 (2d Cir. 2008) (holding that equitable tolling justified where petitioner missed deadline because state court delayed six months before sending notice of its ruling exhausting state court remedies and restarting limitations clock).

Rivera argues that the Supreme Court’s recent decision in *Holland v. Florida* shows that lack of access to legal papers may constitute extraordinary circumstances. *See* Def.’s Br. at 16. But *Holland* involved an attorney who failed to file a petitioner’s timely petition despite many letters to the attorney repeatedly emphasizing the importance of his doing so. *See id.*, 130 S. Ct. at 2564. The Court in *Holland* specifically noted that “the case before us does not involve, and we are not considering, a ‘garden variety claim’ of attorney negligence.” *Id.*, 130 S.Ct. at 2564.⁷ Furthermore, both *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003), and *United States v. Martin*, 408 F.3d 1089 (8th Cir. 2005), which Rivera also cites for this

⁷ Indeed, *Holland*’s principal holding resolved a circuit split in favor of a *Baldyague*-type standard, which, as has already been discussed, cuts against Rivera in this case. *See Holland*, 130 S. Ct. at 2559 (describing the conflict between the categorical approach of the Eleventh Circuit and the more flexible approach exemplified by Second and Ninth Circuits).

proposition, involved factors beyond “garden variety claims” – namely, utterly failing to respond or prepare a petition and refusing to release the requested papers, respectively. That is far from what happened here with Rivera.

Rivera maintains that, even if neither the prison mail delay nor the attorney delay justified equitable tolling individually, taken together they are extraordinary. *See* Def.’s Br. at 19, 21. This “convergence of factors” theory is not supported by the case law. Rivera’s only authority is a magistrate judge’s Report and Recommendation whose conclusion was rejected on *de novo* review by the district judge. *See Williams v. Ercole*, 09 Civ. 5169(DAB), 2010 WL 3785523 (S.D.N.Y. Sept. 28, 2010) (district court opinion); *Williams v. Ercole*, 2010 WL 3785521 (S.D.N.Y. Sept. 10, 2010) (magistrate report).

But taken together or alone, the circumstances alleged by Rivera simply did not have a causal effect on his ability to file a timely petition. *See Hizbullahankhamon*, 255 F.3d at 75. The circumstances alleged, while perhaps obstacles that he had to overcome in the one year that he had to file his petition, did not prevent him from filing his petition on time. As set forth below, he could have filed a petition setting out his claims without his documents, and in any event he had his documents sufficiently in advance of the time to file to have been able to prepare a timely “bare bones” petition, which he could have amended later. Accordingly, the circumstances that he alleges cannot be said to have “prevented him from filing his petition on time.” *Id.*

As this Court recently recognized, “Congress’s decision to impose a limitations period on petitions” may have “harsh” consequences for individual petitioners. *See Jenkins v. Greene*, 630 F.3d at 305 (holding that petitioner’s misreading of state law that caused him to miss the 28 U.S.C. § 2244 limitations period was not extraordinary). Nevertheless, even though “equitable procedure demands flexibility in the approach to equitable intervention . . . that flexibility cannot stretch beyond the requirement that an extraordinary circumstance prevent timely filing.” *Id.* Rivera alleges no such circumstances here, and consequently the district court did not err in rejecting his claim without an evidentiary hearing.

2. The district court correctly concluded without an evidentiary hearing that Rivera failed to exercise reasonable diligence in failing to file an “unpolished” but timely § 2255 petition

By failing to submit a timely, if unpolished, petition before the expiration of the limitations period, Rivera did not act reasonably diligently for two reasons: (1) there is no evidence that he required the transcripts and legal papers to construct the type of unpolished motion contemplated by *Belot v. Burge*, 490 F.3d at 207, and (2) even if he needed the papers to file his petition (which he did not), he still had ample time to submit a petition once the documents arrived.

First, Rivera had the ability to outline the claims in his § 2255 motion without access to the documents he

requested, as the district court correctly decided without an evidentiary hearing. As the district court explained, the petitioner bears the burden of “demonstrat[ing] . . . that he pursued his rights diligently.” A106 (internal quotation marks omitted). The traverse Rivera submitted in response to the government’s reply contained only the conclusory statement that “common sense” demonstrated he needed the paperwork to prepare the motion. A70.

A plain reading of Rivera’s petition, however, shows that he clearly did not need the transcripts of the two-day trial, as he makes no citation to them in his petition. A29-A45. Indeed, most of the petition is filled with various expositions about the case law and very little about the particulars of Rivera’s trial or his case in general. While Rivera refers to some particular dates in setting out the basic procedural history of the case (A30-A31), he sets forth very few particulars regarding the trial or the case in connection with his discussion of the basic claims in the petition. A31-A45 (setting forth claims concerning ineffective assistance of trial counsel, prosecutorial misconduct, multiplicitous indictment, and double jeopardy, most of which focus on the purported violation of his speedy trial rights through the return of superseding indictments). Nor was there any need for the district court to hold an evidentiary hearing to make the determination that “he did not need the documents from his attorney in order to file his petition,” as the district court could make this determination from the petition itself. A107.

Second, even assuming *arguendo* that Rivera needed the materials to prepare his petition, the time during which

Rivera admittedly had the documents prior to the filing deadline was sufficient to allow him to submit a petition like the one in *Belot*. Rivera had ample time to file a petition informing the court of the general nature of his claims. He thereafter could have requested an extension to amend the petition and provide further argument about them. He did not do so. Rivera was able to file a 14-page *pro se* motion and accompanying 17-page memorandum of law only “days” after receiving the lower court’s order dismissing his initial request and instructing him to file a § 2255 motion as soon as possible. *See* Def.’s Br. at 24-25. After receiving his papers, he had *more* time to draft a *less* intricate motion (which, of course, could be supplemented at a later date) than the petition he later submitted on days’ notice. Moreover, Rivera was free at all times to work on aspects of the motion that did not require access to his legal papers. *See Belot*, 490 F.3d at 207-08 (stating that “[i]t was not error for the district court to make a discretionary assessment that Belot ought to have started his preparation earlier and filed an unpolished petition within the allotted time”). Although Rivera alleges that he only learned of the pending deadline when it was a matter of weeks away, unfamiliarity with the legal process does not merit equitable tolling. *See Jenkins*, 630 F.3d at 305 (fact that petitioner must face “daunting procedural obstacles . . . without the assistance of counsel” does not warrant tolling).

The district court correctly determined on these grounds that Rivera did not exercise reasonable diligence, and it did not abuse its discretion in failing to hold an evidentiary hearing before making that determination. In

assessing an equitable tolling claim, “[t]he decision as to whether an evidentiary hearing is warranted is . . . consigned to the district court.” *Bolarinwa v. Williams*, 593 F.3d 226, 232 (2d Cir. 2010); *see also Chang v. United States*, 250 F.3d 79, 86 (2d Cir. 2001) (affirming denial of a 2255 and stating that it was not “an abuse of discretion on the part of the district court to conclude that . . . a hearing would not offer any reasonable chance of altering its view of the facts”); Rule 8(a), Fed. R. Governing Section 2255 Proceedings (district court is to review record “to determine whether an evidentiary hearing is warranted”). “District courts have limited resources (especially time), and to require them to conduct further evidentiary hearings when there is already sufficient evidence in the record to make the relevant determination is needlessly wasteful.” *Roberts v. Marshall*, 627 F.3d 768, 773 (9th Cir. 2010) (affirming district court’s ruling that equitable tolling did not apply and stating that “a district court is not obligated to hold evidentiary hearings to further develop the factual record” where a sufficient record exists on which to rule).

Although the district court stated that an evidentiary “might have shed some light on the precise timing of events,” it made clear that an evidentiary hearing would “not have changed the outcome of this case.” A101, n.2. For example, as to the timing of events, Rivera’s version of how long he had with his legal documents before the one-year filing deadline varied, but none of those variations were materially different to the district court’s decision that he did not exercise reasonable diligence in failing to timely file his petition. It simply did not, and

does not, matter ultimately whether Rivera had his legal documents for two weeks (A10, ¶ 7), four weeks (A48, ¶ 7), or one week (A70) prior to the filing deadline. He did not need the documents to file a petition raising the claims he ultimately raised, and, in any event, he had the documents long enough under any of the timing scenarios he alleged to file an unpolished petition.

In asserting that he was entitled to an evidentiary hearing, Rivera relies heavily on the district court's comments in its ruling that the record did not contain certain facts related to the equitable tolling claim. *See* Def.'s Br. at 19-21. The district court did state that "it is not clear when [Rivera] first attempted to obtain documents from his attorney, nor when his documents were delayed by the prison mail system, nor how long any of these delays were." A107. This statement, however, was made in the context of the district court's point that it was Rivera's burden to show that he was reasonably diligent in trying to file the petition. As the district court concluded, Rivera failed to allege sufficient facts to allow for a finding that he was reasonably diligent throughout the entire period he sought to have tolled.

More fundamentally, however, those facts were simply not necessary to the district court's decision that equitable tolling did not apply. Taking as true all of the facts that Rivera provided, he had sufficient time within which to file a timely petition, both because he did not need his legal documents to file the petition he ultimately filed, and because even if he needed those documents, he received them in time to prepare and file a petition based on them.

The district court did not have to hold an evidentiary hearing to make factual findings about events it clearly stated “would not have changed the outcome of this case.” A101, n.2.

Rivera also argues that he “likely could have raised additional issues or made the arguments . . . stronger” had he been given earlier access to the files. *See* Def.’s Br. at 25. This may be true—indeed, any statute of limitations will sometimes have the effect of preventing a petitioner from filing as strong a claim as he otherwise might have—but it simply does not speak to Rivera’s ability to file the kind unpolished complaint discussed in *Belot*. Given Rivera’s failure to point to any reasons why he needed his legal papers to craft the outlines of a complaint, and the time during which he had his documents and could have but did not file an unpolished motion, the district court was well within the bounds of discretion in concluding that the petitioner did not act with reasonable diligence, and there was no need to hold an evidentiary hearing to so conclude.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

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Respectfully submitted,

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