

SUPREME COURT OF THE UNITED STATES

KEVIN DANN,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

DEFENDANT.

) S. Ct. No. _____

) Appeal No. 17-6330

PRO SE PRISONER'S MOTION FOR EXTENSION OF TIME TO FILE FOR
A PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT

NOW COMES the Petitioner, Kevin Dann, pro se and pursuant to S. Ct. Rule 13.5, 28 U.S.C. § 2106, *Haines v Kerner*, 404 U.S. 519 (1972), and any and all other applicable legal authority, hereby moves the Court for a 30-day extension of time (until October 18, 2018) in which to file his petition for writ of certiorari, and for the following reasons.

1. Dann wishes to file a petition for writ of certiorari in the Supreme Court from the Sixth Circuit Court

of Appeal's June 18, 2018, Order denying his appeal from the dismissal of his complaint under the Federal Tort Claims Act, 28 U.S.C. § 1346, by the United States District Court for the Eastern District of Kentucky.

2. Dann is a pro se prisoner currently incarcerated at the United States Penitentiary in Pine Knot, Kentucky.

3. The Sixth Circuit denied Dann's appeal on June 18, 2018, and therefore, Dann has until September 18, 2018, in which to file his petition for a writ of certiorari in the Supreme Court pursuant to S. Ct. Rule 13.3. See Attachment-A (Sixth Circuit June 18, 2018, Order denying appeal).

4. USP McCreary has, and continues to go on prison lockdowns that prevents inmates from access to the law library, law clerks, copier etc., thereby effectively preventing Dann from timely preparing and filing his petition for writ of certiorari in this Court by September 18, 2018. See Attachment-B.

5. Due to the repeated prison lockdowns, Dann is not able to meet the time limit for filing his certiorari petition, and therefore, must request a 30-day extension of time in which to file his petition for a writ of certiorari.

6. Dann's anticipated petition has merit and presents grounds that the Supreme Court may very well hear.

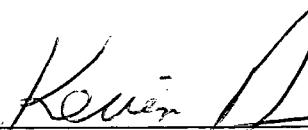
7. Without the extension of time, Dann cannot possibly meet the deadline for filing, and due to circumstances beyond his control.

8. The extension of time is necessary in this case,

and no party will be prejudiced by the extension.

WHEREFORE Dann respectfully requests a 30-day extension of time until October 18, 2018, in which to file his petition for a writ of certiorari in this Court.

Respectfully submitted



Kevin Dann, Pro Se
Reg. No. 11044-029
USP McCreary
P.O. Box 3000
Pine Knot, KY 42635

CERTIFICATE OF SERVICE

I, Kevin Dann, hereby certify under 28 U.S.C. § 1746 that I served a true and correct copy of the instant motion for extension of time, via the institutional legal mail system and first-class postage prepaid, on this _____ day of September 2018, on: U.S Attorney's Office, Eastern District of Kentucky, London.



Kevin Dann, Pro Se

ATTACHMENT-A

A. Sixth Circuit Order Dated June 18, 2018.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-6330

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jun 18, 2018

DEBORAH S. HUNT, Clerk

ORDER

Before: COLE, Chief Judge; STRANCH and LARSEN, Circuit Judges.

Kevin Dann, a federal prisoner, appeals pro se a district court order dismissing his complaint under the Federal Tort Claims Act, 28 U.S.C. § 1346, as time-barred. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a).*

Dann filed a complaint in February 2017 about medical treatment he had received while in federal prison. His administrative claim had been denied in March 2016. The complaint alleged that Dann had filed a similar complaint in August 2016, and had inquired about the status of his case in January 2017, when he was told that no such complaint had been received by the court. He then filed the instant complaint. The district court reviewed the complaint and determined that it was time-barred under 28 U.S.C. § 2401(b) because it had not been filed within six months of the denial of the administrative claim and that the facts alleged did not entitle Dann to equitable tolling of the filing period. The complaint was therefore dismissed sua sponte. Dann's motion for reconsideration was also denied.

On appeal, Dann argues that he was entitled to equitable tolling, and that the district court erred in raising the issue of timeliness of the complaint *sua sponte*.

The six-month period for filing a complaint under the Federal Tort Claims Act may be equitably tolled. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015). We ordinarily review a district court's decision on the applicability of equitable tolling for an abuse of discretion. *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010). The party filing the complaint bears the burden of demonstrating entitlement to equitable tolling. *Id.* Circumstances beyond the litigant's control that prevented timely filing typically must be shown. *Id.* at 783.

Because Dann made no argument that he was unaware of the filing requirement, *see Jackson v. United States*, 751 F.3d 712, 719 (6th Cir. 2014), the district court relied on Dann's lack of diligence in concluding that equitable tolling should not be applied. The district court noted that Dann did not establish diligence in pursuing his claim where he waited five months into the six-month period before allegedly attempting to file his complaint, and then waited another five months before inquiring about the status of his case and learning that no complaint had been received. Neither of these time periods was out of Dann's control. Such a lack of diligence is a proper basis for finding that equitable tolling is not warranted. *See Chomic v. United States*, 377 F.3d 607, 615-16 (6th Cir. 2004).

As for Dann's argument that the district court should not have raised this issue *sua sponte* before serving the complaint on the defendant, *sua sponte* dismissal for failure to state a claim is proper where the complaint shows that it is untimely. *See Jones v. Bock*, 549 U.S. 199, 215 (2007). No abuse of discretion has been demonstrated.

We therefore **AFFIRM** the district court's order dismissing this complaint.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

ATTACHMENT-B

B. Prison Memorandums (re: prison lockdowns, lack of law library etc.)



**U.S. Department of Justice
Federal Bureau of Prisons
United States Penitentiary
McCreary**

Pine Knot, Kentucky 42635

September 12, 2018

MEMORANDUM FOR: WHOM IT MAY CONCERN

FROM: R. Brooks, Correctional Counselor

SUBJECT: Institutional Lock-Down

This letter is being forwarded to your office for informational purposes. Please allow this memorandum to serve as notification that USP McCreary has been on Institutional lock-down status from August 09 through August 23, 2018 and again on September 06 through September 13, 2018. During this time period inmates had little to no resources to resolve any pending legal issues. Due to institutional lock-down pending deadlines may have been affected.

If you require additional information, I can be reached at (606) 354-7000.

Sincerely,

//s//

R. Brooks, Correctional Counselor