

**Case Name:** United States v. Joseph R. Kirkham  
**Date Decided:** February 25th, 2010  
**Originally Filed in:** Texas (Federal)  
**Decided by:** U.S. Court of Appeals, Fifth Circuit (Federal)  
**Court:** U.S. Court of Appeals, Fifth Circuit  
**Judge:** Judge Jolly, Judge Dennis, Judge Jordan  
**Citation:** 2010 WL 667439 (C.A.5(Tex.))

**Background:**

This appeal involved the issue whether plaintiff, Joseph R. Kirkham, was entitled to the equitable tolling of FELA's statute of Limitation. In the underlying action, in 2003, a jury convicted Kirkham of health care fraud and was sentenced to 120 months of imprisonment. Five days before the end of the limitation period, for filing a Â§2255 motion (habeus corpus petition), Kirkham delivered his motion to prison officials for mailing. However, Kirkham, used the address of the clerk of a Texas *state court* rather than the address of the *federal district court*. The state court returned the motion, and he mailed it to the proper federal court. Kirkham stated that the late filing was done through his clerical error. The district court dismissed Kirkham's motion as untimely and denied a certificate of appealability (COA). The Court did grant Kirkham with a COA no whether he was entitled to equitable tolling in light of *Burnett v. New York Central R. Co.*, 380 U.S. 424. In its holding, the court examined a [FELA](#) (Federal Employers' Liability Act) case involving a FELA action in state court and service of process.

**Issue:**

Was Kirkham entitled to equitable tolling?

**Overall Issues Discussed or Touched Upon in this Case:**

- *Statute of Limitations*
- *Ruling on Summary Judgment*
- *Procedural Issues - Federal*

**Held:**

This Court noted that Equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented, in some extraordinary way, from asserting his rights. In *Burnett*, the petitioner filed an action against the railroad in Ohio state court under FELA. The state-court action was dismissed for improper venue, although the court had subject matter jurisdiction and the railroad was properly served with process. The plaintiff filed an identical action in state court. Ultimately, the Supreme Court found that when a plaintiff begins a timely FELA action in state court of competent jurisdiction, service of process is made upon the opposing party, and the state court action is later dismissed because of

improper venue, the FELA limitation is tolled during the pendency of state actions. The Court found that tolling the statute of limitations under these circumstances effectuated the basic congressional purpose in enacting FELA. This Court, however, found this action distinguishable than the FELA cause of action in *Burnett*. In *Burnett*, the action *was filed* in state court, here the action was *never filed* in state court but rather, was returned immediately. Accordingly, this Court affirmed the district court's finding and found that the district court did not abuse its discretion in refusing to apply the doctrine of equitable tolling.

**Comments:**

**Although the underlying case did not involve a FELA action, this Court looked to a FELA case in *Burnett* for some guidance. In *Burnett*, the Supreme Court reasoned that tolling the limitation period during the pendency of the state court action would promote the desired uniformity in FELA cases between states with transfer rules and states without transfer rules. Steve Gordon**