NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ERROL WILLOCK, *PETITIONER*

vs.

William Sperfslage, *RESPONDENT*

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD PROCEED TO ESTABLISH A PRECEDENT AS TO THE CORRECT CALCULATION OF THE STATUTE OF LIMITATIONS IN A HABEAS CORPUS ACTION UNDER 28 USC 2254 WHERE THE PETITIONER HAS FILED FOR STATE POSTCONVICTION RELIEF BEFORE HIS DIRECT APPEAL HAS REACHED FINALITY, OR WHETHER THE COURT SHOULD SUMMARILY RULE THE RECORD OF THE INSTANT CASE REQUIRES A REMAND DIRECTING THE CIRCUIT COURT TO ISSUE A CERTIFICATE OF APPEALABILITY TO INITIATE ADJUDICATION OF THE QUESTION IN THE LOWER COURT.

II.

WHETHER THIS COURT WILL FIND IT NECESSARY TO ESTABLISH A PRECEDENT AS TO WHETHER THE RULE OF LENITY WILL BE APPLIED TO STATUTES GOVERNING HABEAS REVIEW.

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PETITION FOR WRIT OF CERTIORARI

Petitioner David E. Willock respectfully prays the Court issue a Writ of Certiorari to address the errors below on a Petition for Writ of Habeas Corpus. The procedural record available to this Court in the process of this application for certiorari will be adequate to allow for a summary disposition reversing the Eighth Circuit.

CITATION FOR OPINIONS BELOW

The rulings in the lower courts are not reported. The pertinent rulings of the district court are in the attached appendix at pages 1 and 7. The pertinent rulings from the appellate court are in the appendix at page 9.

JURISDICTION STATEMENT

This Petition arises from denial of a Certificate of Appealability after judgment on summary dismissal against Petitioner in an action seeking a Writ of Habeas Corpus. The action attacked a criminal prosecution in the state courts of Iowa and was initiated under 28 U.S.C. 2254 (d). After the Eighth Circuit panel also denied the Certificate, and denied Mr. Willock's Petition for Rehearing En Banc by a ruling filed January 22, 2018. This Court's jurisdiction is conferred by Rule 10 of this Court's rules.

STATUTORY PROVISIONS INVOLVED

Mr. Willock properly raised the jurisdiction of the federal court under **28 U.S.C. 2253 (a)**, to challenge his custody imposed in the state court by alleging a violation of the Constitution of the United States. There was no dispute that Mr. Willock did exhaust the remedies available in the courts of the state as required by **Section 2254 (b)(1)**. The federal courts summarily dismissed the claims that there was an unreasonable application of Federal law in the State courts, and that the State courts made unreasonable determinations of the facts in light of the evidence presented. Those standards are set out in **28 U.S.C. 2254 (d)(1) and (2).** The district court concluded Mr. Willock had filed his Petition for Writ of Habeas Corpus outside the limitation period prescribed in **28 USC 2244 (d)(1)(A)**.

STATEMENT OF THE CASE

This prosecution arose in the state district court after the victim of a horrible home invasion was bound and gagged and subjected to sexual abuse. David Willock was a friend of hers at the time and the paramour of her best friend. The victim could not see the faces of the attackers because they wore masks. In a police interview just five days after the crimes, the victim specifically excluded Mr. Willock as one of the three intruders. Police arrested Mr. Willock several months later when his DNA profile, among others persons' profiles, was identified in a swab taken from a water bottle that had been kept in the victim's refrigerator and was taken out during the assault. The victim readily admitted that David had been welcomed into her home with her best friend on an occasion less than two weeks before the night in question. The victim never changed that part of the story. The victim did change her story to say she always believed the voice of one of the attackers sounded like Mr. Willock. Her initial exclusion of David had been based on immutable characteristics of height and build. Mr. Willock admitted he drank water directly out of the water bottle in the refrigerator when he was in the home on the previous social occasion. After Mr. Willock's arrest, the police videotape of the victim's exculpation of Mr. Willock disappeared. It was the only one of several witness interview videos placed in the police evidence custody system that disappeared. (See: *Willock v. State,* 2014 WL 73443)

Federal constitutional issues arising under the Petitioner's Sixth Amendment right

to the effective assistance of counsel were first raised in an Application for Postconviction Relief (PCR) filed in the state district court. The issues raised in the federal Petition were fully exhausted through the trial and appellate courts of Iowa.

The Petition : Mr. Willock filed his Petition under Section 28 USC 2254 for Writ of Habeas Corpus on February 1, 2017, in the Northern District of Iowa. The Petition set out all pertinent dates connected to Petitioner's direct appeal in the state courts, as well as his PCR proceedings in the state trial and appellate courts. Specifically, the Petition states: "Petitioner filed an Application for Postconviction Relief in the Iowa District Court for Black Hawk County on May 15, 2008, six days before Further Review was denied on the direct appeal." (Doc. 2, p.3)

Mr. Willock has always proclaimed his innocence, and he has vigorously litigated claims to show his trial was unfair. Petitioner set out five grounds assigning violations of his constitutional right to the effective assistance of counsel. (Doc. 2) The Honorable Linda R. Reade reviewed the Petition. She did not address the merits of any of Petitioner's constitutional claims. The judge erred in the interpretation and application of case law that is used to calculate the statute of limitation for filing a 2254 petition. By the Initial Review Order filed May 2, 2017, the judge ordered dismissal of the Petition. (Appendix pp.1-5)

Initial Review Order **:** The crux of Judge Reade's error is first found on page 2 of the Initial Review. The error begins with this conclusion:

> It is clear that the statute of limitation started to run in 2008, that is the year in which all of the petitioner's direct appeal proceedings concluded and his convictions became final. (App. p.2)

The judge's foregoing conclusion failed to incorporate the rule that she had stated on the next page in the Initial Review:

> A state PCR action "filed before or during" the limitation period tolls the limitation period. (App. p.3)

The Initial Review order makes no statement concerning the procedural impact of the fact the PCR was filed before the Iowa Supreme Court denied Further Review on the direct appeal. The Order makes no statement as to whether the ninety days following the last order in the direct appeal was tolled. The central defect in the district court decision is that it confuses the ninety-day period following direct review with the ninety-day period following PCR review. Judge Reade stated the bottom line in this way:

> Due to the one-year statute of limitation under 28 USC 2244, the petitioner's

> application for a writ of habeas corpus
> is only timely if the period was "tolled"
> for all but a period of less than one year
> between 2008, that is, the year petitioner's
> conviction became final, and February 1,
> 2017, the date that the petitioner filed the
> instant action. (App. p. 3)

The order also denied appealability pursuant to 28 USC 2253 (c) (2). (App. 6)

In response to Judge Reade's dismissal in the Initial Review Order, Mr. Willock filed a Motion to Amend and Correct Judgment under Rules 59 (e) and 60 (b)(1), F R. Civ P. In addition to pointing out the judge's miscalculation of the limitations period, Petitioner averred that the proper calculation of the limitations was certainly "a point upon which reasonable jurors could disagree", and asked the judge to correct the order to grant a Certificate of Appealability. The judge reaffirmed her previous interpretation of the limitations and declined to grant appeability in an Order filed May 31, 2017. (App. 7-8) Mr. Willock filed a timely Notice of Appeal on June 30, 2017, and requested a Certificate of Appealability from the Eighth Circuit as permitted by 2253 (c)(1). A panel denied the request without analysis, and on January 22, 2018, the Eighth Circuit clerk entered an order denying Mr. Willock's timely filed Petition for Rehearing En Banc. (App. pp. 9-10)

REASON FOR GRANTING CERTIORARI

The instant case presents a critical procedural issue for habeas corpus actions under 28 U.S.C. 2254 in regard to the Statute of Limitation on the time for filing the petition for relief in the federal district court. No federal court in the nation, including this Court, has analyzed or provided an answer to this question. Certiorari should be granted pursuant to the criterion set out in this Court's Rule 10 (c) . The determination of the question is of exceptional importance, not only in guiding a correct rule in the Eighth Circuit, but for establishing a rule to be applied nationwide. The preliminary question can be answered in summary proceedings. A simple order can direct the Eighth Circuit to grant appealability and proceed to determine the question regarding the proper application of the law governing the statute of limitations to the procedural facts of Mr. Willock's pursuit of habeas corpus relief. In the process of further litigation, this Court may have the opportunity to also establish precedent as to whether the Rule of Lenity should be applied to statutes governing habeas review.

STANDARDS OF REVIEW

The interpretation of a statute is guided first by giving the words their "ordinary, contemporary and common meaning." *US v. Smith,* 756 F3d 1070, 1073 (8th Cir. 2014)

In that process, the Court must read the entire statute so that no word is left void, superfluous or insignificant, and meaning and effect are given to every word in the statute. *Duncan v. Walker, 533 US 167, 174, 121 S.Ct. 2120, 2125 (2001).* Even if the statute in question in the instant case could somehow be found to be ambiguous, the rule of lenity should apply to resolve the ambiguity in favor of the Petitioner, as questions regarding the proper calculation of the limitations period would clearly create a grievous ambiguity or uncertainty. *Muscarello v. US,* 524 US 125, 138-139, 118 S.Ct. 1911, 1919 (1998) The procedural question that now precedes analysis on the merits of the statute of limitations calculation is whether the courts below should have issued a Certificate of Appealability (COA). "The COA inquiry… is not co-extensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis,* 137 S.Ct. 759, 773 (2017)

THE ARGUMENT

The simple irony in the result of the district court's reasoning shows that reasonable jurists could disagree with that analysis. The district court's interpretation of the tolling of the statute leads to an illogical and unfair result that is inconsistent with statutory intent. Mr. Willock got his PCR on file before the Iowa Supreme Court had

issued its ruling on his Application for Further Review filed in his direct appeal. Because he had filed the PCR before the direct appeal was finalized, Judge Reade gave him no credit for the first ninety days that are provided to all petitioners in the full period of ninety days plus one year. Under the judge's interpretation, a petitioner who waited until one year plus eighty-nine days after the ruling on Further Review to file his PCR would get the benefit of those first ninety days, while Mr. Willock's highly expedient filing of his PCR would forfeit those ninety days. The intent of statutes of limitation is to encourage litigants to submit their claims promptly. The ruling derogates from that intent.

Strict Statutory Interpretation

Mr. Willock first raised and preserved the issue raised herein when he filed his Motion to Amend or Correct the Initial Review Order that Judge Reade filed in the Northern District of Iowa. Rule 59(e), Fed. R. Civ. P. is used by the federal courts to correct a manifest error of law or fact. *U.S. v. Metropolitan, 440 F. 3d 930, 933 (8th Cir. 2006)* The motion is appropriately filed in a habeas corpus action. See: *Williams v. Hobbs, 658 F. 3d 842 (8th Cir. 2011)* Rule 60(b), Fed R. Civ. P. allows the Court to correct a ruling that resulted from oversight or mistake. In the instant case, the Court overlooked the fact that a habeas petitioner who properly pursues correction of the

decision of a lower state appellate court, by seeking further review in the state's highest court, is entitled to a ninety-day extension, or grace period, on the statute of limitations of one year that applies under the AEDPA act. Under Section 28 USC 2244 (d)(1)(A), the statute of limitations starts running at the conclusion of the state court proceedings. This Court, however, has held that the 90 days in which a state court decision could have been contested in a petition for certiorari is added to the one year in determining the statute of limitations. That ninety-day period runs from the date in which the state's highest court denies further review in the state direct appeal. *Gonzalez v. Thaler, 565 US 134, 148-150, 132 S. Ct. 641, 652-654 (2012)* The one-year statute of limitation is extended for those ninety days.

The key fact in the instant case is that Mr. Willock filed his PCR in the state court before the ninety-day time period began to run. Under 28 USC 2244(d)(2), that ninety day period does not begin to run, and is "not counted toward any period of limitation." :

> The time during which a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward *any* period of limitation under this subsection. (emphasis added)

In order to give all language in the statute meaning, the use of "any" when referring "any period of limitation" must be interpreted to mean any type of credit, grace

period or other benefit that the Congress or the courts have awarded in calculation of the statute of limitation.

In the instant case, Mr. Willock filed for PCR before the 90-day period for which he would be credited had even begun. He preserved that credit against "any period of limitation" in full. The full period of limitation created by his early filing of his PCR in the State court was ninety days plus one year. Judge Reade first neglected to give Mr. Willock credit for those first 90 days:

> Due to the one-year statute of limitation under 28 USC 2244, the petitioner's application for a writ of habeas corpus is only timely if the period was "tolled" for all but a period of less than one year between 2008, that is, the year petitioner's conviction became final, and February 1, 2017, the date that the petitioner filed the instant action. (App. p.3)

The judge then proceeded to point out Petitioner did not file a second PCR action that would have tolled time running between November 2015 and February 2017. The Court relied on a chain cite that included *Lawrence v. Florida,* 549 US 327, 332 (2007) and *Snow v. Ault,* 238 F.3d 1033, 1035-1036 (8th Cir. 2001). In both of those cites, the Court referred to rules that don't apply to Mr. Willock's procedural status. For *Lawrence,* Judge Reade wrote: "28 USC 2244(d)(2) does not toll the [one-year

limitation] period during the pendency of a petition for certiorari." The petitioner in *Lawrence* was attempting to gain credit for a tolling for the time his petition for certiorari complaining about the result in his state PCR was pending in the United States Supreme Court. For *Snow,* Judge Reade's chain cite related that case's inapposite result "concluding that 28 USC 2244(d)(2) does not toll the limitation period for the ninety days during which a petitioner could seek certiorari from a state court's denial of post-conviction relief." (App. pp. 3-4) Mr. Willock had never filed for certiorari, and he had not attempted to claim there was a tolling in the 90 days following the state court's final order denying postconviction relief.

In the post-ruling motion and brief, the Petitioner redirected the district court to the ninety-day period that "runs from the date the state's highest court denies further review in the state *direct appeal.*" Mr. Willock explained that giving meaning to the statutory use of "*any* period of limitation" led to the conclusion that the 90 days following direct appeal would be credited to Petitioner in addition to the one year. Undisputed case law grants a grace period of sorts for the ninety-days following the state court ruling on Further Review, and that is added to the one-year limitation. The statute tolling *any limitation* tolls the ninety days plus the one year. (Doc. 5, p. 1; Doc. 6, p. 2-3) (emphasis added) Further, Mr. Willock pointed out that if 2244 were ambiguous on whether the ninety-day period plus the one year were all credited to him as "tolled", the Rule of Lenity would require an interpretation in his favor. (Doc. 5, p. 2; Doc 6, pp. 2-5)

Judge Reade denied the post-ruling motion on the fact "petitioner makes no attempt whatsoever to explain why his case falls outside" *Lawrence* and *Snow.* For that reason, the judge saw nothing to correct in her ruling. (App. 7) It is true Petitioner did not pick those two cases out of the chain cite by name and explain the inapplicability. Judge Reade had pointed out in the chain cite of her Initial Review ruling, however, that the procedural status and questions in those cases were not on point with Mr. Willock's. (App. pp. 3-4) The post-ruling motion quite clearly redirected the judge to the time periods tolled by the *filing* of the PCR and not to anything that occurred after the PCR was final in the Iowa Supreme Court. The judge did no analysis to demonstrate that Petitioner's argument was misapplied and did nothing to address the Rule of Lenity.

Statutory Construction -- The Rule of Lenity

This Court has not clearly stated whether a habeas statute would fall under the ambit of cases that are subject to the rule of lenity. In *Barber v. Thomas,* 560 US 474, 130 S.Ct. 2499 (2010), the Court assumed without deciding that the rule would apply to a case where prisoners were challenging calculations of good time credit based on time served in prison. In his dissent, Justice Kennedy pointed out that the Court had assumed the statute was "penal in nature" in reference to the applicability of a construction in lenity. He maintained the statute *must* be subject to lenity construction. The dissenting opinion noted the intent of the statute to encourage prisoners to proceed with good conduct to reduce prison time was thwarted by the Court's interpretation. He

added that the statute was clearly penal in nature: " To a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying. Survival itself may be at stake." 560 US at 503-504, 130 S.Ct. at 2517. The intent of the tolling of limitation statute under Section 2244 in the instant case is clearly to encourage the prisoner to begin pursuit of state collateral relief as soon as possible. The holding of *Thaler* also gives Mr. Willock credit for seeking full exhaustion of state remedies by filing for further review in the State court. That intent is vitiated if the prisoner cannot rely on the preservation of that 90-day credit when he acts in a highly timely fashion.

CONCLUSION

The issue regarding the correct calculation of the statute of limitations Mr. Willock raised in the district court certainly could be decided differently by reasonable jurists. There is no precedent guiding that issue in any court, and it appears Petitioner would prevail on the issue if given the chance. A Certificate of Appealability must be granted in the circuit court, or this Court must proceed directly to establish this precedent of great importance to the Great Writ.

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CERTIFICATE OF FILING

I, Kent A. Simmons hereby certify that on April 20, 2018, I filed the foregoing Petition by depositing the original and ten copies thereof in the mail of the United States Postal Service to:

Clerk of the United States Supreme Court,
1 First Street NE.
Washington, DC 20543.

Kent A. Simmons

CERTIFICATE OF SERVICE

I, Kent A. Simmons hereby certify that on April 20, 2018, I served the foregoing Petition by mailing one copy to the following:

Kevin Cmelik
Assistant Attorney General
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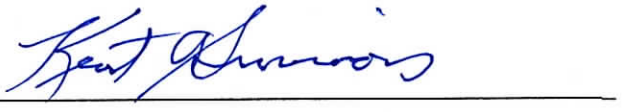

Kent A. Simmons

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

DAVID ERROL WILLOCK, Petitioner, vs. WILLIAM SPERFSLAGE, Respondent.	No. C17-2005-LRR INITIAL REVIEW ORDER

This matter is before the court pursuant to the petitioner's application for a writ of habeas corpus (docket no. 2). The petitioner filed such application on February 1, 2017. The petitioner paid the $5.00 filing fee. *See* 28 U.S.C. § 1914(a) (requiring $400.00 filing fee for civil actions, except that on application for a writ of habeas corpus the filing fee is $5.00).

Rule 4 of the Rules Governing Section 2254 Cases requires the court to conduct an initial review of the application for a writ of habeas corpus and summarily dismiss it, order a response or "take such action as the judge deems appropriate." *See* Rule 4, Rules Governing Section 2254 Cases. The court may summarily dismiss an application for a writ of habeas corpus without ordering a response if it plainly appears from the face of such application and its exhibits that the petitioner is not entitled to relief. *See id.*; 28 U.S.C. § 2243; *Small v. Endicott*, 998 F.2d 411, 414 (7th Cir. 1993). For the reasons set forth below, summary dismissal is appropriate in this case.

Applications for habeas corpus relief are subject to a one-year statute of limitation as provided in 28 U.S.C. § 2244(d)(1). "By the terms of [28 U.S.C. §] 2244(d)(1), the one-year limitation period [. . .] begins to run on one of several possible dates, including the date on which the state court judgment against the petitioner became final." *Ford v.*

Bowersox, 178 F.3d 522, 523 (8th Cir. 1999).[1] It is clear that the statute of limitation started to run in 2008, that is, the year in which all of the petitioner's direct appeal proceedings concluded and his convictions became final.[2] *See State v. Willock*, 2008 Iowa App. LEXIS 188 (Iowa Ct. App. Mar. 26, 2008); *State v. Willock*, 2007 Iowa App. LEXIS 278 (Iowa Ct. App. Mar. 14, 2007); *State v. Willock*, 2004 Iowa App. LEXIS 1333 (Iowa Ct. App. Dec. 22, 2004); *State v. Willock*, Case No. FECR111914 (Black Hawk Cty. Dist. Ct. 2006);[3] *see also* 28 U.S.C. § 2244(d)(1)(A) (specifying that the 1-year period of limitation runs from "the date on which the judgment became final by the

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[1] 28 U.S.C. § 2244(d)(1) provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

[2] The Iowa Supreme Court denied the petitioner's application for further review on May 21, 2008. Hence, the petitioner's direct appeal became final later that year or on the last date he could have sought a petition for a writ of certiorari. *See* Sup. Ct. R. 13 (setting forth time for petitioning for a writ of certiorari).

[3] Iowa state court criminal and civil records may be accessed online at: http://www.iowacourts.gov/For_the_Public/Court_Services/Docket_Records_Search/index.asp. *See Stutzka v. McCarville*, 420 F.3d 757, 760 n.2 (8th Cir. 2005) (addressing court's ability to take judicial notice of public records).

conclusion of direct review or the expiration of the time for seeking such review"); *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (explaining 28 U.S.C. § 2244(d)(1)(A)); *Riddle v. Kemna*, 523 F.3d 850, 855 (8th Cir. 2008) (stating that the 90 days is not applicable and the one-year statute of limitation under 28 U.S.C. § 2254 runs from the date procedendo issued if the petitioner's direct appeal does not contain a claim that is reviewable by the Supreme Court); *Snow v. Ault*, 238 F.3d 1033, 1035 (8th Cir. 2001) (stating that the running of the statute of limitation for purposes of 28 U.S.C. § 2244(d)(1)(A) is triggered by: (1) the conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings; or (2) the conclusion of all direct criminal appeals in the state system followed by the expiration of the 90 days allowed for filing a petition for a writ of certiorari in the United States Supreme Court) (citing *Smith v. Bowersox*, 159 F.3d 345, 348 (8th Cir. 1998)).

Due to the one-year statute of limitation under 28 U.S.C. § 2244, the petitioner's application for a writ of habeas corpus is only timely if the period was "tolled" for all but a period of less than one year between 2008, that is, the year that the petitioner's conviction became final, and February 1, 2017, that is, the date that the petitioner filed the instant action. *See Peterson v. Gammon*, 200 F.3d 1202, 1204 (8th Cir. 2000). Post-conviction relief actions filed before or during the limitation period for habeas corpus actions are "pending" and the limitation period is tolled during: (1) the time "a properly filed" post-conviction relief action is before the district court; (2) the time for filing of a notice of appeal even if the petitioner does not appeal; and (3) the time for the appeal itself. *See Williams v. Bruton*, 299 F.3d 981, 983 (8th Cir. 2002) (discussing application of 28 U.S.C. § 2244(d)(2)); *see also Lawrence v. Florida*, 549 U.S. 327, 332 (2007) ("[28 U.S.C.] § 2244(d)(2) does not toll the [one-year limitation] period during the pendency of a petition for certiorari."); *Evans v. Chavis,* 546 U.S. 189, 191 (2006) (holding that an application is tolled during the interval "between (1) a lower court's adverse determination, and (2) the prisoner's filing of notice of appeal, *provided that* the filing of the notice of

appeal is timely under state law"); *Snow*, 238 F.3d at 1035-36 (concluding that 28 U.S.C. § 2244(d)(2) does not toll the limitation period for the 90 days during which a petitioner could seek certiorari from a state court's denial of post-conviction relief).

Before the petitioner's conviction became final, the petitioner filed a state post-conviction relief action on May 15, 2008, and procedendo issued with respect to such action on November 20, 2015. *See Willock v. State*, 2014 Iowa App. LEXIS 1219 (Iowa Ct. App. Dec. 24, 2014); *Willock v. State*, Case No. PCCV105547 (Black Hawk Cty. Dist. Ct. 2013); *see also* 28 U.S.C. § 2244(d)(2) (explaining that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending [is not counted] toward any period of limitation"). The petitioner, however, did not pursue any type of state post-conviction relief from November 20, 2015 to February 1, 2017. Given the period of time that the petitioner sought state post-conviction relief, it is clear that over one year, that is, more than 14 months, passed without any portion of the applicable period being tolled.

Because the one-year statue of limitation contained in 28 U.S.C. § 2244(d)(1) is a statute of limitation rather than a jurisdictional bar, equitable tolling may apply. *See King v. Hobbs*, 666 F.3d 1132, 1136 (8th Cir. 2012); *Jihad v. Hvass*, 267 F.3d 803, 805 (8th Cir. 2001); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Moore v. United States*, 173 F.3d 1131, 1135-36 (8th Cir. 1999). However, "[e]quitable tolling is proper only when extraordinary circumstances beyond a prisoner's control make it impossible to file [an application] on time." *Kreutzer*, 231 F.3d at 463; *see also Delaney v. Matesanz*, 264 F.3d 7, 14 (1st Cir. 2001) ("In the AEDPA environment, courts have indicated that equitable tolling, if available at all, is the exception rather than the rule; resort to its prophylaxis is deemed justified only in extraordinary circumstances."); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (observing that equitable tolling is "reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and

gross injustice would result"); *Paige v. United States*, 171 F.3d 559, 561 (8th Cir. 1999) (stating that equitable tolling is reserved for extraordinary circumstances beyond a prisoner's control). "[E]quitable tolling may be appropriate when conduct of the [respondent] has lulled the [petitioner] into inaction." *Kreutzer*, 231 F.3d at 463 (citing *Niccolai v. United States Bureau of Prisons*, 4 F.3d 691, 693 (8th Cir.1993)).

In this case, the petitioner presents no extraordinary circumstances justifying the application of equitable tolling. *See Delaney*, 264 F.3d at 14 (clarifying that a party who seeks to invoke equitable tolling bears the burden of establishing the basis for it). Hence, there is no basis to toll the applicable period. *See, e.g.*, *Gordon v. Ark.*, 823 F.3d 1188, 1194-96 (8th Cir. 2016) (determining that mental condition did not cause statute to be equitably tolled); *Bear v. Fayram*, 650 F.3d 1120, 1123-25 (8th Cir. 2011) (deciding that no state-created impediment entitled the petitioner to equitable tolling); *Rues v. Denney*, 643 F.3d 618, 621-22 (8th Cir. 2011) (reaffirming that attorney's miscalculation of filing deadline does not warrant equitable tolling); *Nelson v. Norris*, 618 F.3d 886, 892-93 (8th Cir. 2010) (explaining that a petitioner must establish that he diligently pursued his rights); *Earl v. Fabian*, 556 F.3d 717, 724 (8th Cir. 2009) (reiterating that "lack of access to legal resources does not typically merit equitable tolling"); *Shoemate v. Norris*, 390 F.3d 595, 598 (8th Cir. 2004) (explaining that confusion about limitations period or the failure to recognize the legal ramifications of actions taken in prior post-conviction proceedings did not warrant equitable tolling); *Cross-Bey v. Gammon*, 322 F.3d 1012, 1015-16 (8th Cir. 2003) (concluding that lack of understanding of the law and the effect of a voluntary dismissal does not amount to an extraordinary circumstance); *Nichols v. Dormire*, 11 F. App'x 633, 634 (8th Cir. 2001) (determining that mental impairment did not constitute an extraordinary circumstance justifying the tolling of the limitations period).

Based on the foregoing, the petitioner's application for a writ of habeas corpus shall be denied as untimely.[4] Judgment shall be entered in favor of the respondent. As for a certificate of appealability, the petitioner has not made the requisite showing. *See* 28 U.S.C. § 2253(c)(2). Accordingly, a certificate of appealability shall be denied.

IT IS THEREFORE ORDERED:

(1) The petitioner's application for a writ of habeas corpus (docket no. 2) is denied.

(2) The clerk's office is directed to enter judgment in favor of the respondent.

(3) A certificate of appealability is denied.

(4) If the respondent deems it appropriate to waive the statute of limitations as an affirmative defense, he is directed to notify the court by no later than May 15, 2017 that he prefers to file an answer that waives the statute of limitations as a defense.

(5) The clerk's office is directed to send a copy of this order to the respondent and the Iowa Attorney General.

DATED this 1st day of May, 2017.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

[4] In light of the record, the court finds that pre-service dismissal is appropriate. Nonetheless, if the respondent deems it appropriate to waive the statute of limitations as an affirmative defense, he shall notify the court by no later than May 12, 2017 that he prefers to file an answer that waives the statute of limitations as a defense. *Cf. Martinez v. United States*, 423 F. App'x 650 (8th Cir. 2011) (observing that, although it is clear that a court may sua sponte consider the timeliness of a § 2255 motion, the government may waive the statute of limitations defense because it is a non-jurisdictional affirmative defense). The clerk's office shall send the respondent and the Iowa Attorney General a copy of this order.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

DAVID ERROL WILLOCK, Petitioner, vs. WILLIAM SPERFSLAGE, Respondent.	No. C17-2005-LRR ORDER

This matter is before the court pursuant to the petitioner's motion to amend or correct judgment (docket no. 5). The petitioner filed such motion on May 15, 2017. The petitioner states nothing that leads the court to a different determination. The petitioner's instant motion confirms that: (1) the one-year limitation period expired in November of 2016, not 90 days later or sometime in February of 2017, and (2) extraordinary circumstances do not justify equitable tolling. The petitioner's erroneous extension of law associated with 28 U.S.C. § 2244(d)(1) (direct review) and/or failure to apply well-established law associated with 28 U.S.C. § 2244(d)(2) (post-conviction or other collateral review), does not provide a valid basis to set aside the judgment. Despite the fact that the court relied on *Lawrence v. Florida*, 549 U.S. 327, 332 (2007) (explaining that "[28 U.S.C.] § 2244(d)(2) does not toll the [one-year limitation] period during the pendency of a petition for certiorari."), and *Snow v. Ault*, 238 F.3d 1033, 1035-36 (8th Cir. 2001) (concluding that 28 U.S.C. § 2244(d)(2) does not toll the limitation period for the 90 days during which a petitioner could seek certiorari from a state court's denial of post-conviction relief), the petitioner makes no attempt whatsoever to explain why his case falls outside such jurisprudence. *Cf. Martin v. Fayram*, 849 F.3d 691, 697-98 (8th Cir. 2017) (applying 28 U.S.C. § 2244(d)(2) and addressing the appropriateness of equitable tolling).

As the court's prior order explained, the petitioner failed to adequately account for the amount of time that passed between November of 2015 and February of 2017; the 90 days that 28 U.S.C. § 2244(d)(1) allows for filing a petition for a writ of certiorari in the United States Supreme Court had no bearing on this case because the petitioner sought state post-conviction relief before his conviction became final. Because it is clear that: (1) the court did not overlook anything or make a mistake when resolving the petitioner's application for a writ of habeas corpus and (2) counsel miscalculated the date that the limitation period ended by erroneously extending the one-year period by 90 days, the petitioner's motion to amend or correct judgment (docket no. 5) is denied.

IT IS SO ORDERED.

DATED this 31st day of May, 2017.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2466

David Errol Willock

Petitioner - Appellant

v.

William Sperfslage

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Waterloo
(6:17-cv-02005-LRR)

JUDGMENT

Before WOLLMAN, GRUENDER and SHEPHERD, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

December 06, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2466

David Errol Willock

Appellant

v.

William Sperfslage

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Waterloo
(6:17-cv-02005-LRR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 22, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans