

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-1884

Charles James

Appellant

v.

Jeffrey Kruger, Warden, USP Terre Haute

Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:17-cv-00303-RGE)

ORDER

The petition for rehearing by the panel is denied.

August 29, 2018

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

/s/ Michael E. Gans

APPENDIX "C"

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-1884

Charles James

Petitioner - Appellant

v.

Jeffrey Kruger, Warden, USP Terre Haute

Respondent - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:17-cv-00303-RGE)

JUDGMENT

Before GRUENDER, BOWMAN and ERICKSON, 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.

July 03, 2018

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

/s/ Michael E. Gans

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CHARLES JAMES,

Petitioner,

v.

JEFFREY KRUGER,¹
Warden, U.S.P. Terre Haute,

Respondent.

No. 4:17-cv-00303-RGE

**ORDER GRANTING
MOTION TO DISMISS**

Petitioner Charles James filed a pro se petition for a writ of habeas corpus. ECF No. 1. He is a state prisoner currently held at a federal facility in Terre Haute, Indiana. ECF No. 1 at 1. Respondent Jeffrey Kruger is the warden at the United States Penitentiary in Terre Haute.² Kruger moves to dismiss the petition as untimely. ECF No. 6. Because James's petition is untimely and not entitled to equitable tolling, the Court grants Kruger's motion and dismisses the case.

I. BACKGROUND

The chronology of relevant events is undisputed. *See* Resp't Br. Supp. Mot. Dismiss 3–5, ECF No. 6-1 (listing timeline). The Court also takes judicial notice of the public records available in the electronic case databases maintained by the Iowa Judicial Branch. *See Stutzka v. McCarville*, 420 F.3d 757, 760 n.2 (8th Cir. 2005) (addressing federal court's ability to take judicial notice of public records); Fed. R. Evid. 201 (judicial notice). The timeline is as follows.³

¹ In responding to the petition, counsel has provided the full name of the Respondent Kruger. Notice of Appearance, ECF No. 5. The Court now uses the Warden's first and last name in the caption, and directs the Clerk of Court to make the change on the official docket sheet as well.

² For purposes of this proceeding, Kruger is represented by the Iowa Attorney General. ECF No. 5.

³ These events and dates are set forth in table format as Attachment A to this Order.

APPENDIX "E"

James was convicted of first degree murder. *State v. James*, No. 00-831, 2001 WL 803814, at *1 (Iowa Ct. App. July 18, 2001). The Court of Appeals affirmed, *id.* at *7, and James's claims concluded when the Iowa Supreme Court denied further review on October 26, 2001. *See* Resp't Ex. 2 at 1, ECF No. 6-3 (order denying application for further review).

James filed the first of his state postconviction relief actions on April 22, 2003. Resp't. Ex. 3 at 6, ECF No. 6-4 (*James v. State*, No. PCCE046174 (Iowa D. Ct. Polk Cty)). The Iowa Supreme Court dismissed the appeal as frivolous and issued procedendo in September 2006. *Id.* at 1.

James filed his second postconviction relief action on October 2, 2006. PCR Appl., *James v. State*, No. PCCE054412 (Iowa D. Ct. Polk Cty.). The Court of Appeals affirmed the district court's dismissal of two of his claims, but remanded to the district court as to a statute of limitations issue. *James v. State*, No. 08-0021, 2009 WL 1492701, at *1 (Iowa Ct. App. May 29, 2009). Upon remand, the district court again dismissed the postconviction relief action, and the Iowa Court of Appeals affirmed without opinion. *James v. State*, No. 09-1762, 2011 WL 1136437, at *1 (Iowa Ct. App. Mar. 30, 2011). Further review was denied on May 27, 2011. Order Den. Further Rev., *James v. State*, No. 09-1762 (Iowa).

James filed a third postconviction relief action on June 20, 2011, which was summarily dismissed by the district court on February 3, 2012. Order, *James v. State*, No. PCCE068830 (Iowa D. Ct. Polk Cty.). James did not appeal.

His fourth postconviction relief action, filed August 28, 2012, was summarily dismissed by the district court on November 12, 2013. Order, *James v. State*, No. PCCE072364 (Iowa D. Ct. Polk Cty.). Again, James did not appeal.

Finally, James filed his fifth postconviction relief application on March 17, 2014. PCR Appl., *James v. State*, PCCE076188 (Iowa D. Ct. Polk Cty.). After the district court denied relief, James appealed, and the Iowa Supreme Court summarily affirmed. Order, *James v. State*, No. 14-1428 (Iowa March 6, 2017).

This federal habeas petition was placed in the prison mailbox on August 4, 2017. *See Grady v. United States*, 269 F.3d 913, 916 (8th Cir. 2001) (extending benefits of prison mailbox rule to § 2254 petitioners).

II. DISCUSSION OF APPLICABLE LAW

Kruger moves to dismiss this petition as untimely. James resists, arguing his petition is timely, and even if it is not, he is entitled to equitable tolling.⁴

A. Timeliness

A petitioner has a one-year period, known as a statute of limitations, to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1); *see also Painter v. Iowa*, 247 F.3d 1255, 1256 (8th Cir. 2001). The one-year period runs from the latest of the following:

(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

⁴ James also argues Kruger is barred from asserting the timeliness issue because it was never raised or preserved in state court. Pet'r's. Br. Resp. 6, ECF No. 10. This argument fails. The federal statute of limitations is not applicable to state postconviction relief actions, and it would not have been appropriate for the State to raise it prior to this proceeding.

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Kruger contends for purposes of this case, the one-year period began to run on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). Direct review in this case concluded on October 26, 2001, when the Iowa Supreme Court denied further review. James did not seek certiorari from the United States Supreme Court, and in this case, the judgment is final when the time for seeking such review expires. *See Gonzalez v. Thaler*, 565 U.S. 134, 150–151 (2012). The time for seeking review from the Supreme Court is ninety days. Sup. Ct. Rule 13.1 (“A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.”). Ninety days from further review was January 24, 2002. He then had one year from that date to file a timely petition for federal habeas relief. *See* 28 U.S.C. § 2244(d)(1).

More than one year passed without James filing any pleading in either state or federal court. James filed his first postconviction relief action on April 22, 2003, three months after the one-year limitations period had already expired. He did not place this federal habeas petition in the prison mail system until August 4, 2017.

“The limitation is tolled during ‘the 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.’” *Painter*, 247 F.3d at 1256 (quoting 28 U.S.C. § 2244(d)(2)). James filed five postconviction relief actions after the statute of limitations expired, but before he filed this federal

habeas action. Nonetheless, the limitation period cannot be tolled to save an already expired deadline. *Jackson v. Ault*, 452 F.3d 734, 735 (8th Cir. 2006).

James argues the triggering date for the statute of limitations is not the date on which the judgment became final, as set forth in § 2244(d)(1)(A), but on the date on which the factual predicate of the claim could have been discovered through due diligence, or § 2244(d)(a)(D). James contends three of his five postconviction relief petitions were based on new law or newly discovered evidence. *See* Pet'r's Br. Resp. 9–10, ECF No. 10 (describing postconviction relief claims based on (1) *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006) (“if the act causing willful injury is the same act that causes the victim’s death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes”); (2) *Nguyen v. State*, 829 N.W.2d 183, 188 (Iowa 2013) (holding *Heemstra* was ground of law that could not have been raised within the applicable time period for filing state postconviction relief); and (3) an affidavit presenting new evidence).⁵

Using a different starting date does not help James. A change in the interpretation of law is not a “factual predicate” for purposes of § 2244(d)(1)(D). *See Keller v. Pringle*, 867 F.3d 1072, 1075 (8th Cir. 2017) (“If legal decisions were ‘factual predicates’ under § 2244(d)(1)(D), then the limitations in § 2244(d)(1)(C) would be superfluous.”). Accordingly, his claims based on *Heemstra* and *Nguyen* do not reset the statute of limitations.

James also urges the Court to consider the affidavit of Richard Jones as a new factual predicate which triggers § 2244(d)(1)(D). James contends this affidavit contained new information unknown at the time of his trial. ECF No. 1 at 11 (affiant stating victim was armed at time of

⁵ The Iowa Court of Appeals affirmed the district court’s summary dismissal of all *Heemstra*-based claims based on timeliness and new evidence. *See James v. State*, 2009 WL 1492701, at *1. The Iowa Supreme Court affirmed the district court’s conclusion finding the *Nguyen* claim was also time barred. Order, *James v. State*, No. 14-1428 (Iowa March 6, 2017).

shooting and gun “removed from his person prior to police arriving” at scene). Even if this affidavit could serve as a factual predicate to restart the limitations period, this federal habeas petition is still untimely. The newly discovered affidavit was raised and considered in James’s second postconviction relief action. *See James v. State*, 2009 WL 1492701, at *1 (determining affidavit was both cumulative and would not change the outcome of case). The statute of limitations was tolled during those state proceedings. Once the second postconviction relief action fully concluded on May 27, 2011, James had one year to file a federal habeas claim based on the Jones affidavit. He did not do so until August 2017. Thus, even using the Jones affidavit as the factual predicate in § 2244(d)(1)(D) to restart the statute of limitations, James’s federal petition was untimely.

James argues he was unable to timely file this claim because he did not consistently receive court papers or received them in an untimely manner. Pet’r’s Br. Supp. Pet.. 4, ECF No. 1-1 (“Several times during these filings, Mr. James did not receive the court’s judgment and/or order with respect to his pleadings due to his incarceration under the custody of the Federal Bureau of Prisons.”). Despite this inconsistency in legal mail, however, James was able to file three additional state postconviction relief actions after the Iowa Court of Appeals ruled on the new evidence claim. James does not explain how or why he could file state postconviction relief actions but not pursue a § 2254 petition in federal court. James has failed to demonstrate due diligence with respect to this claim.

Applying either subsection (A) or (D) of 28 U.S.C. §2244(d)(1), James’s petition is untimely.

B. Equitable Tolling

An untimely petition must be dismissed unless the petitioner is able to show he is entitled to equitable tolling of the time period by demonstrating he pursued his rights diligently and some extraordinary circumstance prevented his timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010) (recognizing equitable tolling available only in extraordinary circumstances). “[E]quitable

tolling affords the otherwise time-barred petitioner an exceedingly narrow window of relief.” *Jihad v. Hvass*, 267 F.3d 803, 805 (8th Cir. 2001). James argues he is entitled to equitable tolling. For the reasons explained below, James does not show extraordinary circumstances existed to prevent him from timely filing his petition. Nor does he establish he pursued his rights diligently.

James states he was held in administrative segregation from the time he entered prison until the time expired to apply for a writ of certiorari from the Supreme Court (January 24, 2002). ECF No. 10 at 3. During this time, he had no access to any of his legal paperwork, no access to a law library, and “it was impossible for [him] to meet the certiorari deadline.” *Id.* at 3–4. The statute of limitations did not begin to run until after January 2002, and therefore, James’s access to legal materials prior to this date is irrelevant for purposes of establishing equitable tolling.

James continued to be housed in segregation throughout 2002, where he had “a very sketchy and inconsistent law access program that basically consisted of inmates helping other inmates get [to] cases from time to time.” *Id.* at 4. He alleges he did not realize his appeal had been ruled on until after he was released from administrative segregation. *Id.* In April 2003, James was “finally” able to file a petition for postconviction relief with the help of another inmate. *Id.*

In June 2004, prison officials rotated James between lockup units and the critical care unit at the prison, and finally transferred him to the federal system. During his incarceration in federal custody, delivery of legal mail to and from state courts was sporadic, time for legal research was extremely limited, and he had no access to any Iowa legal materials. ECF No. 1-1 at 27–28.

Confinement in a prison facility where the prisoner is denied complete access to legal and personal materials could “constitute an extraordinary circumstance warranting the application of equitable tolling” in some situations. *Muhammad v. United States*, 735 F.3d 812, 815 (8th Cir. 2013). In *Muhammad*, the petitioner spent five months in a special housing unit where “he was not permitted to visit the prison’s law library and did not have access to his personal, legal materials.” *Id.* Nonetheless, the Eighth Circuit did not hold such conditions constituted extraordinary

circumstances to support equitable tolling because Muhammad was able to send letters during confinement, did not claim he was prohibited from contacting the court, and did not claim he was denied mail sent from the court. *Id.*; see also *Earl v. Fabian*, 556 F.3d 717, 724 (8th Cir. 2009) (“[L]ack of access to legal resources does not typically merit equitable tolling.”).

Similarly here, James does not claim he lacked all access to legal materials in 2002. Although his mail was delayed, he does not claim he was prevented from sending or receiving correspondence with the Court but was prevented from doing so either by lack of resources or physical restraint. He does not state he was completely without legal materials, or that he did not have access to writing materials.

James also asserts he learned of his appellate court ruling only after he was released from administrative segregation. James was represented by counsel throughout his direct appeal. See ECF No. 6-3 at 5. Insofar as he is contending his lack of notice was due to his attorney’s failure to forward the ruling, his argument fails. “An attorney’s negligence or mistake is not generally an extraordinary circumstance, however serious attorney misconduct, as opposed to mere negligence, may warrant equitable tolling.” *Muhammad*, 735 F.3d at 816 (citation and quotation marks omitted). James does not allege his attorney failed to notify him due to intentional conduct.

Even if counsel’s conduct and James’s lack of legal resources were considered an extraordinary circumstance, this Court finds James failed to act with due diligence once he did learn of the ruling. James filed his first state postconviction relief action in 2003, and in the next eleven years, filed four more postconviction relief actions. His lack of consistent access to legal materials or legal mail did not prevent him from pursuing multiple postconviction relief actions in state court. James provides no explanation of why he could not or did not file his § 2254 petition during this time and instead waited until 2017 to pursue his federal habeas claims.

As explained above, James has failed to show exceptional circumstances prevented him from filing his federal habeas petition. Nor has he pursued his claims with due diligence. For these reasons, he is not entitled to equitable tolling of his claims.

III. CONCLUSION

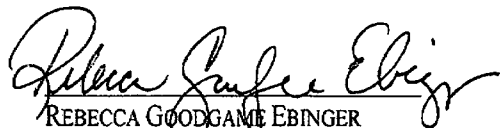
This federal habeas petition is untimely, and James has shown no basis for equitable tolling of the statute of limitations. Therefore, the Court grants Respondent's Motion to Dismiss the petition as untimely.

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States Courts, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the petitioner. District courts have the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). "A certificate of appealability may issue under [this section] only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). James has not made a substantial showing of the denial of a constitutional right, therefore a certificate of appealability must be denied. James may request issuance of a certificate of appealability by a judge on the Eighth Circuit Court of Appeals. *See* Fed. R. App. P. 22(b).

IT IS SO ORDERED that Respondent's Motion to Dismiss, ECF No. 6, is **GRANTED**.

This case is dismissed.

Dated this 4th day of April, 2018.


REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE