

APPENDIX "A"  
U.S. APPEAL COURT JUDGEMENT  
8TH CIR.

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No: 18-1878

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Michael Keith Henley

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

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Appeal from U.S. District Court for the District of South Dakota - Rapid City  
(5:18-cv-05005-KES)

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**JUDGMENT**

Before LOKEN, SHEPHERD and STRAS, Circuit Judges.

The motion to proceed on appeal in forma pauperis is denied as moot.

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.

August 08, 2018

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

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/s/ Michael E. Gans

**APPENDIX "B"**

**U.S. DISTRICT COURT REPORT  
AND RECOMMENDATION.**

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

MICHAEL KEITH HENLEY,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

5:18-CV-05005-KES

REPORT AND RECOMMENDATION

**INTRODUCTION**

Movant, Michael Keith Henley, a federal inmate at the Big Sandy United States Penitentiary in Inez, Kentucky, has filed a *pro se* motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. This matter was referred to this magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) & (B) and the October 16, 2014, standing order of the Honorable Karen E. Schreier, United States District Judge.

**FACTS**

Mr. Henley pled guilty to possession with the intent to distribute a controlled substance. On March 18, 2011, he was sentenced to 117 months' imprisonment. Mr. Henley did not file a direct appeal. Mr. Henley filed this § 2255 action over five years later, on January 23, 2018.

**DISCUSSION**

This Court conducted a preliminary review of Mr. Henley's petition as required by Rule 4. Believing that Mr. Henley's petition may be time-barred, the court issued an order to show cause directing both the government and Mr. Henley

to file briefs with the court, setting forth documentation and other appropriate authority as to whether Mr. Henley's petition should be dismissed on statute of limitations grounds. See Docket No. 8. The court set forth in its order the relevant law applicable to the statute of limitations for § 2255 motions, including the law of equitable tolling. Id. The deadline for the parties' briefs was February 26, 2018. Id.

Mr. Henley filed a brief with the court pursuant to the order to show cause on February 5, 2018, arguing that his § 2255 motion should be considered timely. See Docket No. 9. The government filed a brief indicating its agreement with the court's analysis that Mr. Henley's motion was time-barred. See Docket No. 10.

There is a one-year statute of limitations relevant to Section 2255 motions:

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

See 28 U.S.C. § 2255(f).

Motions under § 2255 are subject to a one-year statute of limitation that runs from the *latest* of four specified dates. See 28 U.S.C. § 2255(f). Only one is relevant here—"the date on which the judgment of conviction becomes final." Id. A

judgment is deemed final "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed [or a petition for certiorari finally denied...]." United States v. Johnson, 457 U.S. 537, 543, n. 8 (1982) (citation omitted); see also Clay v. United States, 537 U.S. 522, 527 (2003) (for the purpose of starting § 2255's one-year limitation period, "[f]inality attaches when [the Supreme] Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). The time for filing a petition for certiorari is 90 days after entry of the court of appeals' judgment. Clay, 537 U.S. at 525.

In Mr. Henley's case, the statute of limitations began to run on April 1, 2011 (14 days following the entry of his judgment), and he had until April 2, 2012, to file a § 2255 motion. See 28 U.S.C. § 2255(f). Mr. Henley did not file his § 2255 motion until January 23, 2018. His motion is clearly time-barred unless equitable tolling applies.

The doctrine of equitable tolling has been extended to § 2255 motions. United States v. Martin, 408 F.3d 1089, 1092 (8th Cir. 2005). Equitable tolling is an extraordinary remedy used only in rare circumstances and "affords the otherwise time-barred petitioner an exceedingly narrow window of relief." Jihad v. Hvass, 267 F.3d 803, 805 (8th Cir. 2001); United States v. Riggs, 314 F.3d 796, 799 (5th Cir. 2002). "[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." Jihad, 267 F.3d at 806 (quoting Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000)).

Equitable tolling is only applicable in two instances: "(1) if there are 'extraordinary circumstances' beyond a movant's control that would keep him from filing in a timely fashion or (2) if the government's conduct ' lulled' the movant into inaction through reliance on that conduct." United States v. Hernandez, 436 F.3d 851, 858 (8th Cir. 2006) (internal citations omitted). "Equitable tolling only applies when the circumstances that cause the delay in filing are 'external to the plaintiff and not attributable to his actions.' " Id. at 858 (citing Maghee v. Ault, 410 F.3d 473, 476 (8th Cir. 2005)) (additional citation omitted). Further, [t]he petitioner must also demonstrate that he acted with due diligence in pursuing his [§ 2255] petition." E.J.R.E. v. United States, 453 F.3d 1094, 1097 (8th Cir. 2006).

Mr. Henley has not satisfied his burden to demonstrate the applicability of equitable tolling to his case. Mr. Henley has not shown extraordinary circumstances beyond his control kept him from timely filing his motion. He has also failed to demonstrate that the government's actions lulled him into not filing.

The court finds that Mr. Henley did not act with due diligence by waiting over 5 years to file the instant motion. Mr. Henley has therefore failed to make the required showing in order for the doctrine of equitable tolling to apply to his case. Accordingly, the court recommends dismissal of Mr. Henley's motion with prejudice.

### **CONCLUSION**

This magistrate judge respectfully recommends dismissing Mr. Henley's motion to vacate, correct or set aside his sentence for the reason that the motion is untimely and Mr. Henley has not demonstrated grounds for the application of the

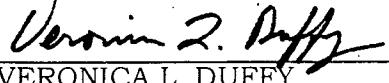
doctrine of equitable tolling. Dismissal for statute of limitations grounds is dismissal with prejudice.

**NOTICE TO PARTIES**

The parties have fourteen (14) days after service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require de novo review by the District Court. Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990); Nash v. Black, 781 F.2d 665 (8th Cir. 1986).

DATED March 7, 2018.

BY THE COURT:

  
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VERONICA L. DUFFY  
United States Magistrate Judge

APPENDIX B

**APPENDIX "C"**

**U.S. DISTRICT COURT ORDER**

**ADOPTING REPORT AND RECOMMENDATION AND JUDGMENT ORDER.**

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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MICHAEL KEITH HENLEY, Movant, vs. UNITED STATES OF AMERICA, Respondent.	5:18-CV-05005-KES JUDGMENT
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Under to the Order Adopting the Report and Recommendation and  
Dismissing Motion, it is

ORDERED, ADJUDGED, AND DECREED that judgment is entered in  
favor of respondent and against movant, Michael Keith Henley.

Dated April 3, 2018.

BY THE COURT:

/s/ Karen E. Schreier  
KAREN E. SCHREIER  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

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MICHAEL KEITH HENLEY,  Movant,  vs.  UNITED STATES OF AMERICA,  Respondent.	5:18-CV-05005-KES  ORDER ADOPTING REPORT AND RECOMMENDATION AND DISMISSING MOTION
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Movant, Michael Keith Henley, filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Docket 1. The matter was assigned to United States Magistrate Judge Veronica L. Duffy under 28 U.S.C. § 636(b)(1)(B) and this court's October 16, 2014 standing order. Magistrate Judge Duffy recommends that Henley's motion be dismissed. Docket 12.

Magistrate Judge Duffy recommends dismissal because Henley's motion is time-barred under the 1-year statute of limitation in 28 U.S.C. § 2255(f). *Id.* Magistrate Judge Duffy found that equitable tolling did not apply. *Id.*

Henley objects to the report and recommendation. Docket 14. He argues that the 1-year statute of limitation does not apply because he has raised constitutional issues, namely that he was denied effective assistance of competent counsel.

All habeas petitions that are filed to vacate a sentence are subject to a one-year statute of limitations. 28 U.S.C. § 2255(f). "The one-year statute of limitation may be equitably tolled 'only if [the movant] shows (1) that he has

been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.’” *Muhammad v. United States*, 735 F.3d 812, 815 (8th Cir. 2013) (quoting *Holland v. Florida*, 560 U.S. 631 (2010). Magistrate Judge Duffy found that Henley did not pursue his rights diligently, and his objection does not present an argument that he did. Henley’s claims concerning his attorney’s deficiencies do not constitute an “extraordinary circumstance” that prevented him from timely filing his motion. These allegedly deficient actions were taken before Henley’s judgment became final and therefore before his 1-year statute of limitation began to run. For these reasons, Henley is not entitled to equitable tolling.

Before denial of a § 2255 motion may be appealed, a movant must first obtain a certificate of appealability from the district court. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). A certificate may be issued “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(2). A “substantial showing” is one that demonstrates “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The court finds that Henley has not made a substantial showing that the district court’s assessments of his claims are debatable or wrong. Consequently, a certificate of appealability is not issued.

Thus, it is ORDERED

1. Henley’s objections to the report and recommendation (Docket 14) are overruled.

2. The report and recommendation (Docket 12) is adopted in full.

Henley's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Docket 1) is dismissed.

3. A certificate of appealability is not issued.

4. Henley's motion to proceed in forma pauperis (Docket 4) is denied as moot.

Dated April 3, 2018.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER  
UNITED STATES DISTRICT JUDGE

APPENDIX C