

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

Lamont R. Reed - PETITIONER

VS.

Scott Frakes, Director - RESPONDENT  
Nebr. Dept. of Corr. Svcs. -

APPENDICES

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

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No: 20-2202

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Lamont R. Reed

Petitioner - Appellant

v.

Scott Frakes, Director of the Nebraska Dept. of Corr. Svcs.

Respondent - Appellee

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Appeal from U.S. District Court for the District of Nebraska - Omaha  
(8:19-cv-00448-RGK)

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**JUDGMENT**

Before LOKEN, BENTON, and KOBES, 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.

August 25, 2020

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 A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

LAMONT R. REED,

Petitioner,

vs.

SCOTT FRAKES, Director of the  
Nebraska Dept. of Corr. Svcs.;

Respondent.

**8:19CV448**

**MEMORANDUM AND ORDER**

Pending before me is Respondent's motion for summary judgment claiming Petitioner's habeas petition is barred by the limitations period set out in 28 U.S.C. § 2244(d). Respondent is correct, and the motion will be granted. Also pending before me is Petitioner's motion for additional documents. Since Respondent voluntarily produced four of the six documents requested and the two that were not produced are either irrelevant or the reason for production has been mooted, that motion will be denied.

*Facts*

1. After entering into a plea agreement regarding six felony charges, a state trial judge found Petitioner guilty after a plea of no-contest and sentenced him to a long prison sentence.<sup>1</sup> Filing no. 10-4 at CM/ECF pp. 4-8.

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<sup>1</sup> Reed was arrested after he sold heroin and oxycodone pills to a cooperating individual on several occasions. A search of his home revealed a brick of heroin weighing 99.5 grams, over 100 oxycodone pills, digital scales, \$10,000 in U.S. currency, three handguns, and 86 rounds of ammunition. Reed admitted he had been selling heroin and "pills" for about a year and a half, making approximately \$6,000 per week. Filing no. 10-7 at CM/ECF p. 1.

2. With new counsel, Petitioner perfected a timely direct appeal on February 22, 2016. Filing no. 10-2 at CM/ECF p. 2. On December 2, 2016, the Nebraska Court of Appeals affirmed the conviction and sentence. Filing no. 10-6. Petitioner did not file a petition for further review. Under Nebraska law, the Court of Appeal's decision was not final until 30 days after the opinion was issued and the time for filing the petition expired.<sup>2</sup> In this case, that date was January 3, 2017 (given an intervening Sunday and Monday, New Year's Day.)<sup>3</sup>
3. On December 11, 2017, 342 days later, Petitioner filed his motion for post-conviction relief. Filing no. 10-5 at CM/ECF p. 1.
4. Ultimately, the post-conviction motion was denied, Filing no. 10-5 at CM/ECF pp. 13-21, and his appeal was unsuccessful, Filing no. 10-7. The Nebraska Supreme Court<sup>4</sup> issued its mandate on September 9, 2019. Filing no. 10-3 at CM/ECF p. 2. At that point, Petitioner had until October 2, 2019—23 days—to file his federal habeas petition.
5. He placed his federal habeas petition in the prison mailbox on October 9, 2019. Filing no. 1 at CM/ECF p. 17. His petition was filed in this court on October 11, 2019. Filing no. 1 at CM/ECF p. 1.
6. If one applies the prison mailbox rule, at least 372 days had run on the federal statute of limitations by the time Petitioner's federal habeas action was commenced.

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<sup>2</sup> Neb. Ct. R. App. Prac. § 2-102(F) (setting forth 30-day deadline to file a petition for further review).

<sup>3</sup> Neb. Rev. Stat. § 25-2221 (West) (Time; how computed).

<sup>4</sup> The Nebraska Supreme Court elected to bypass the Court of Appeals and placed Petitioner's appeal on the Supreme Court's docket.

### *Analysis*

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) imposed a one-year statute of limitations on petitions for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. 28 U.S.C. § 2244(d)(1). 28 U.S.C. § 2244(d) states in pertinent part:

- (1) 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.

Respondent submits that Petitioner’s habeas petition must be dismissed because it was not timely filed and is barred by the limitations period set forth in 28 U.S.C. § 2244(d). Respondent is correct. Giving Petitioner every benefit of the doubt, he missed the filing deadline by seven days. Petitioner’s inventive arguments to the contrary, no statutory basis saves Petitioner. Neither does equitable tolling.

First, Petitioner in effect argues that his judgment on the direct appeal did not become final until 90 days after the filing of the decision of the Court of Appeals on direct appeal. In other words, he argues the clock didn't start until on or about March 3, 2017 and not January 3, 2017. He would be correct if the Nebraska Supreme Court had ruled on the matter. But since Petitioner did not file a petition for further review with the Nebraska Supreme Court, under the United States Supreme Court's clear holding in *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012), for a state prisoner who does not seek review in a State's highest court, the judgment becomes "final" for purposes of § 2244(d)(1)(A) on the date that the time for seeking such review expires.

Petitioner also argues that he filed a motion seeking discovery of his presentence report in the state trial court before he filed his post-conviction action and that any time taken up by that motion and its ultimate denial (once again before any filing of a post-conviction action) is not counted. It is true that Petitioner sought discovery of the contents of his PSR (specifically the opportunity to read it) by filing a motion in state court on July 13, 2017, Filing no. 16-1, and that the motion was denied on September 12, 2017, Filing no. 16-3.

But under Nebraska law, Petitioner was not entitled to any discovery without first filing a post-conviction action. *Id.* More importantly, under federal law Petitioner's premature discovery request did not stop the federal clock from ticking. *Hodge v. Greiner*, 269 F.3d 104, 107 (2d Cir. 2001) (holding that a petitioner's motion to obtain discovery was not an "'application for State post-conviction or other collateral review' within the meaning of subsection 2244(d)(2)"). The Ninth Circuit has come to the same conclusion based upon the reasoning in *Greiner*. *Ramirez v. Yates*, 571 F.3d 993, 1000 (9th Cir. 2009) (discovery motions filed in state court by habeas petitioner convicted of residential burglary did not statutorily toll the habeas limitations period, since they did not challenge his conviction, but simply sought material that could help in later state proceedings; if it were otherwise, prisoners could circumvent the AEDPA limitations period). *See also Woodward v. Cline*, 693 F.3d 1289, 1294 (10th Cir. 2012) (a defendant's state-court postconviction

motion for DNA testing regarding murder did not toll AEDPA's one-year limitations period).<sup>5</sup>

Additionally, Petitioner argues that equitable tolling (or a state created impediment to a timely federal filing pursuant to 28 U.S.C. § 2244(d)(1)(B)) saves him. He complains that he was transferred for a period of time to a county jail that lacked adequate legal resources<sup>6</sup>, that he was transferred to different facilities within the Nebraska Department of Corrections, that time was "wasted" when the state trial judge denied his motion for discovery after first setting the matter for a hearing and then deciding that a hearing was unnecessary, and that his trial attorney misadvised him about the factual basis when he entered his plea of no contest. I do not agree that these complaints excuse the tardy filing.

As the Eighth Circuit has made clear, "equitable tolling is proper only when extraordinary circumstances beyond a prisoner's control make it *impossible* to file a petition on time." *Runyan v. Burt*, 521 F.3d 942, 945 (8th Cir. 2008) (emphasis in original) (citing and quoting *Finch v. Miller*, 491 F.3d 424, 427-428) (8th Cir. 2007)). Nothing alleged here comes close to that standard. Moreover, none of Petitioner's complaints rise to the level of a state created impediment to the filing of a timely federal petition. The language of § 2244(d)(1)(B), concerns impediments to the pursuit of federal habeas relief, not state postconviction relief. Indeed, when all is said and done, after the last state court ruling became final, Petitioner had over three

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<sup>5</sup> Petitioner wants the Respondent's "Outgoing Legal Mail" logs from September 12, 2017 to September 25, 2017 to show when Petitioner mailed his motion to alter or amend the trial judge's denial of his discovery request. As discussed in the text, under federal law discovery motions submitted prior to post-conviction actions do not stop the clock. So, the requested document is irrelevant.

<sup>6</sup> Petitioner alleges that he was at the jail from August 29, 2016 to December 28, 2016 and from January 11, 2017 to January 20, 2017. Filing no. 12 at CM/ECF p. 12. I assume those dates are accurate. I also assume that the dates he alleges he was housed in various Department of Corrections' facilities are accurate. Therefore, his motion for production of the prisoner movement logs is moot.

weeks to file his federal habeas corpus petition and he alleges nothing during those 23 days that interfered with his ability to file a timely federal habeas petition.

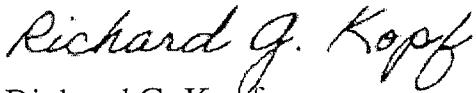
To summarize, although Petitioner nearly made the deadline, close is not good enough. *See, e.g., Modrowski v. Mote*, 322 F.3d 965, 966 (7th Cir. 2003) (affirming dismissal of habeas petition that was one day late). Therefore, Petitioner's habeas petition will be dismissed as untimely.

Finally, a petitioner cannot appeal an adverse ruling on his petition for writ of habeas corpus under § 2254 unless he is granted a certificate of appealability. 28 U.S.C. § 2253(c)(1); 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b)(1). The standards for certificates (1) where the district court reaches the merits or (2) where the district court rules on procedural grounds are set forth in *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). I have applied the appropriate standard and determined that Petitioner is not entitled to a certificate of appealability.

IT IS ORDERED that the petition for habeas corpus, Filing no. 1, is dismissed with prejudice. The motion for summary judgment, Filing no. 9, is granted. The motion for production of documents, Filing no. 13, is denied. No certificate of appealability has been or will be issued. A separate judgment will be filed.

Dated this 13<sup>th</sup> day of April, 2020.

BY THE COURT:

  
Richard G. Kopf  
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

LAMONT R. REED,

Petitioner,

vs.

SCOTT FRAKES, Director of the  
Nebraska Dept. of Corr. Svcs.;

Respondent.

**8:19CV448**

**JUDGMENT**

IT IS ORDERED that the Petition for Writ of Habeas Corpus (and any amendments or supplements thereto) is denied and dismissed with prejudice. No certificate of appealability has been or will be issued.

Dated this 13<sup>th</sup> day of April, 2020.

BY THE COURT:

*Richard G. Kopf*  
Richard G. Kopf  
Senior United States District Judge

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

No: 20-2202

Lamont R. Reed

Appellant

v.

Scott Frakes, Director of the Nebraska Dept. of Corr. Svcs.

Appellee

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Appeal from U.S. District Court for the District of Nebraska - Omaha  
(8:19-cv-00448-RGK)

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**ORDER**

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

October 20, 2020

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 C**