

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

MICHAEL KELLY,
Petitioner,

No. 20-CV-2081-LRR

vs.

ORDER

JEREMY LARSON,
Respondent.

Presently before the court is a 28 U.S.C. § 2254 petition (docket no. 1) filed by Michael Kelly.¹ Petitioner paid the filing fee² and filed a motion to appoint counsel (docket no. 2).

I. PROCEDURAL HISTORY

On February 7, 2005, Kelly was charged by criminal complaint in Black Hawk County, Iowa, with sexual abuse in the third degree. *State v. Kelly*, FECR129311 (Black Hawk Cnty. D. Ct. 2005). On July 22, 2005, an amended trial information was filed. *Id.* On October 7, 2005, a jury found Kelly guilty of sexual abuse in the third degree as a sexual predator, a violation of Iowa Code sections 709.4 and 901A.2(3). *Id.* Kelly was sentenced to 25 years in prison. *Id.* On November 16, 2006, Kelly's conviction and sentence were affirmed. *State v. Kelly*, No. 05-2078 (Iowa Ct. App. 2006). On January

¹ This is Kelly's second petition, his first was dismissed without prejudice in 2010. *See Kelly v. Fayram*, 10-CV-0142-LRR (N.D. Iowa 2010).

² The § 2554 fee is a \$5.00 statutory fee set out in 28 U.S.C. § 1914(a).

11, 2007, Kelly's application for further review was denied. *Id.* On January 22, 2007, procedendo issued.

On October 27, 2007, Kelly filed his first application for postconviction relief in the Iowa District Court for Black Hawk County. *Kelly v. State*, PCCV103580 (Black Hawk Cnty. D. Ct. 2007). In his application, Kelly argued that his appellate counsel was ineffective for failing to argue that his trial counsel was ineffective. On July 19, 2009, Kelly's application for postconviction relief was denied. *Id.* He appealed. *Kelly v. State*, 789 N.W.2d 437 (Table), No. 09-1261 (Iowa Ct. App. 2010). On August 25, 2010, Kelly's appeal was denied. *Id.* On September 22, 2010, procedendo issued. In September and October of 2010, Kelly attempted to further appeal the outcome of the petition to no avail.

On November 8, 2010, Kelly filed his first petition under 28 U.S.C. § 2254 before this court. *Kelly v. Fayram*, No. 10-CV-0142-LRR, docket no. 5 (N.D. Iowa 2010). The petition contained a mixture of claims exhausted and unexhausted before the state courts, so the court gave Kelly the option to pursue only the exhausted claims or to return to state court to exhaust all claims. *Id.*, docket no. 4 at 7. Kelly was cautioned that if he returned to state court, he should be mindful of the statute of limitations set forth in 28 U.S.C. § 2244. *Id.* at 7, n.5. On March 7, 2011, the petition was dismissed without prejudice because Kelly failed to follow the court's directive to either proceed on the exhausted claims or return to state court. *Id.*, docket no. 11.

On December 22, 2011, Kelly filed his second petition for postconviction relief in state court. *Kelly v. State*, PCCV 117917 (Black Hawk Cnty. D. Ct. 2011). On April 30, 2012, Kelly's second petition was dismissed as untimely. *Id.* On August 27, 2014, the Iowa Court of Appeals affirmed the finding that Kelly's second petition was untimely and did not qualify for an exception. *Kelly v. State*, 856 N.W.2d 2 (Table), No. 12-0838 (Iowa Ct. App. 2014). On October 28, 2014, Kelly's application for further review was denied. *Id.* On October 31, 2014, procedendo issued.

On November 9, 2015, Kelly filed a third application for postconviction relief. *Kelly v. State*, PCCV 128544 (Black Hawk Cnty. 2015). On February 1, 2016, the application was dismissed, but, on May 2, 2016, it was reinstated. *Id.* On February 17, 2017, the application was dismissed for a second time as time-barred. *Id.* On August 1, 2018, the dismissal of Kelly's third postconviction petition was affirmed in part and reversed in part. *Kelly v. State*, 924 N.W.2d 532 (Table), No. 17,0382 (Iowa Ct. App. 2018). Specifically, the Iowa Court of Appeals held that Kelly could argue at any time that his sentence was illegal, and that sole issue was remanded. On November 15, 2018, Kelly's application for further review was denied and procedendo issued.

On July 29, 2019, Kelly's motion to correct an illegal sentence that had been remanded was denied. *Kelly v. State*, PCCV128544 (Black Hawk Cnty. D. Ct. 2019). On March 10, 2020, Kelly's petition for a writ of certiorari to the Iowa Supreme Court on his illegal sentence claim was denied, and on June 2, 2020, procedendo issued. *Kelly v. State*, No. 19-1357 (Iowa 2020).

On August 5, 2020, Kelly mailed his second petition under 28 U.S.C. § 2254 to the Clerk's Office. *Kelly v. Larson*, No. 20-CV-2081 (N.D. Iowa 2020). In his petition he raises sixteen grounds for relief. The petition is before the court for initial review.

II. § 2254 INITIAL REVIEW STANDARD

Rule 4 of the Rules Governing Section 2254 Cases requires the court to conduct an initial review of an 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).

There are three primary reasons summary dismissal can be granted in 28 U.S.C. § 2254 cases. The first reason that often leads to summary dismissal is that the petition

obviously fails on its merits. The second reason is that the petitioner failed to exhaust the available remedies in the state court system. See *Grass v. Reitz*, 643 F.3d 579, 584 (8th Cir. 2011). The final reason is the strict one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1).

The calculation regarding the statute of limitations is often complicated. “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). See 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 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 limitations 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 limitations under 28 U.S.C. § 2244, a 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 when the grace-period started, and 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).

III. INITIAL REVIEW ANALYSIS

Kelly’s case has a lengthy procedural history spanning more than 15 years from trial to the filing of this petition. On January 22, 2007, procedendo issued for Kelly’s direct appeal. He did not seek a writ of certiorari from the United States Supreme Court, and therefore, on April 22, 2007, his one-year deadline to file a federal habeas petition under § 2244(d)(1) began to accrue. On October 27, 2007, Kelly filed his first application for postconviction review in Iowa state court, stopping the clock 188 days after it began to run. On September 22, 2010, Kelly’s first application for postconviction review was denied by the Iowa courts and procedendo issued. The one-year deadline accrued from September 22, 2010 until November 8, 2010, when Kelly filed his first habeas petition with this court—thus another 47 days accrued, for a total of 235 days. On March 7, 2011, this court dismissed Kelly’s petition without prejudice because it contained a mixture of exhausted and unexhausted claims. The one-year deadline accrued from March 7, 2011, until December 22, 2011, when Kelly filed his second application for

postconviction review in state court. From March 7, 2011 to December 22, 2011, 290 days accrued, for a total of 525 days. Thus, by December 22, 2011, Kelly's one-year deadline had already expired.

On October 31, 2014, procedendo issued in the denial of Kelly's second application for postconviction relief. On November 9, 2015, Kelly filed a third application for postconviction relief. From October 31, 2014 thru November 9, 2015, 374 days elapsed. So, even if Kelly's one-year deadline had not previously accrued, it would have accrued from October of 2014 to November of 2015. Kelly's third application for postconviction relief, and his motion to challenge his sentence as illegal were denied in their entirety by June 2, 2020. Kelly waited from June 2, 2020 until August 5, 2020, to mail his second pro se motion under 28 U.S.C. § 2254 to this court. Thus, at least a final 64 days accrued. In total 963 days have passed from the conclusion of Kelly's direct appeal to his initiation of his second pro se petition before this court. Given this calculation, there is no doubt that Kelly's petition is untimely.

Because the one-year statute 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 *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) (equitable tolling “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) (equitable tolling reserved for extraordinary circumstances beyond a prisoner's control). “[E]quitable tolling may be appropriate when conduct of the defendant has lulled the plaintiff 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 the instant case, Kelly presents no extraordinary circumstances justifying the application of equitable tolling. *See Delaney*, 264 F.3d at 14 (party who seeks equitable tolling bears the burden of establishing the basis for it).

In sum, Kelly did not file his second petition for habeas corpus relief within the applicable one-year period provided by 28 U.S.C. § 2244(d)(1). Approximately 963 days accrued between his various appeals and attempts at postconviction relief and the filing of this petition. This court warned Kelly with the dismissal of his first petition before this court (which would have been timely), that he may later face timeliness problems with § 2244 and Kelly did not heed that warning. His second petition is untimely and he has not demonstrated that he qualifies for equitable tolling so Kelly's petition shall be dismissed.

IV. MOTION TO APPOINT COUNSEL

Except in capital cases, “there is neither a constitutional nor statutory right to counsel in habeas proceedings; instead, it is committed to the discretion of the trial court.” *McCall v. Benson*, 114 F.3d 754, 756 (8th Cir. 1997).” *Morris v. Dormire*, 217 F.3d 556, 558 (8th Cir. 2000).

District courts may appoint indigent habeas petitioners counsel in the interests of justice. 18 U.S.C. § 3006A(a)(2)(b); *see* 28 U.S.C. § 2254(h). In exercising its discretion to appoint counsel, however, the district court “should first determine whether ... [the] petitioner has presented a nonfrivolous claim,” *Abdullah v. Norris*, 18 F.3d 571, 573 (8th Cir. 1994), and then “should consider the legal complexity of the case, the factual complexity of the case, and the petitioner's ability to investigate and present his claims, along with any other relevant factors,” *see Hoggard v. Purkett*, 29F.3d 469, 471 (8th Cir. 1994).

Martin v. Fayram, 849 F.3d 691, 699 (8th Cir. 2017). Kelly's petition is being dismissed as untimely, so his motion for counsel will be denied as moot.

V. CERTIFICATE OF APPEALABILITY

"In a habeas corpus proceeding ... before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." 28 U.S.C. § 2253(a). "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. . . ." Id. § 2253(c)(1). A district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Federal Rule of Criminal Procedure 22(b). See *Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may only issue if a petitioner "has made a substantial showing of the denial of a constitutional right." *Reed v. Ross*, 468 U.S. 322, 335-36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997); *Tiedeman*, 122 F.3d at 522. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox*, 133 F.3d at 569 (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (1994)); *Reed v. Ross*, 468 U.S. at 335-36 (reiterating standard).

Courts reject constitutional claims either on the merits or on procedural grounds. "[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Lewis v. Casey*, 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When a federal habeas petition is dismissed on procedural grounds without reaching the underlying constitutional claim, "the [petitioner must show], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason

would find it debatable whether the district court was correct in its procedural ruling.”
Slack, 529 U.S. at 484.

Having thoroughly reviewed the record in this case, the court finds that Kelly failed to make the requisite “substantial showing” with respect to the claims that he raised in his application for a writ of habeas corpus. See 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). Because there is no debatable question as to the resolution of this case, an appeal is not warranted. Accordingly, the court shall not issue a certificate of appealability pursuant to 28 U.S.C. § 2253.

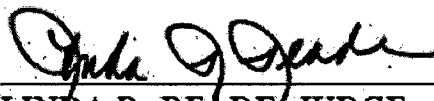
If Kelly desires further review of his claims, he may request issuance of the certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with Tiedeman, 122 F.3d at 520–22.

VI. CONCLUSION

IT IS THEREFORE ORDERED:

- (1) Kelly’s pro se petition under 28 U.S.C. § 2254 (docket no. 1) is **dismissed with prejudice** because it is plainly untimely.
- (2) Kelly’s motion for appointment of counsel (docket no. 2) is **denied as moot**.
- (3) A certificate of appealability **shall not issue**.
- (3) The Clerk of Court is directed to close this case.

DATED this 5th day of August, 2021.



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

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

No: 21-2968

Michael Kelly

Petitioner - Appellant

v.

Jeremy Larson, Warden

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(6:20-cv-02081-LRR)

JUDGMENT

Before GRUENDER, SHEPHERD, and STRAS, 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.

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

December 21, 2021

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: 21-2968

Michael Kelly

Appellant

v.

Jeremy Larson, Warden

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(6:20-cv-02081-LRR)

ORDER

The petition for rehearing by the panel is denied.

March 21, 2022

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

/s/ Michael E. Gans