UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-1361

Marcus Jones

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Central
(3:22-cv-03025-LTS)

JUDGMENT

Before GRUENDER, BENTON, 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 motion for leave to proceed in forma pauperis is denied as moot.

The appeal is dismissed.

April 12, 2024

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

/s/ Stephanie N. O'Banion

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

MARCUS JONES, Movant, vs. UNITED STATES OF AMERICA, Respondent.	No. C22-3025-LTS (Crim. No. CR19-3058-LTS) **INITIAL REVIEW ORDER**

process

I. INTRODUCTION

This matter is before me on Marcus Jones' pro se motion (Doc. 1) to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Jones also filed three supplements (Docs. 3, 6, 7), a pro se motion (Doc. 4) to appoint counsel and correspondence (Docs. 2, 5, 9). He alleges he is entitled to relief based on one claim of ineffective assistance of counsel.

On December 18, 2019, Jones was indicted on two counts related to drugs and firearms. Crim. Doc. 1. A stipulated discovery order, filed January 15, 2020, stated: "Discovery material may be shown to and discussed with the defendant but must remain at all times in the sole custody of the defendant's attorney or any person retained by or working on behalf of defendant's counsel. Under no circumstances may any discovery material be left with or given to the defendant or any other person." Crim. Doc. 12 at 2-3.

On February 19, 2020, Jones' counsel filed a motion (Crim. Doc. 21) to suppress evidence seized from a vehicle after Jones' arrest, arguing officers lacked probable cause to search the vehicle before obtaining a warrant and the search warrant application contained material omissions. The next month, however, I granted Jones' motion to

withdraw the motion to suppress on grounds that "[t]he parties have reached a plea agreement to resolve this matter." Crim. Doc. 33 at 1; Crim. Doc. 36. Pursuant to that plea agreement, Jones pleaded guilty on August 25, 2020, to Count 1 of the indictment, possession with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), and Count 1 of the information, possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). Crim. Docs. 1, 50, 52.

Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the plea agreement specified a sentence of 120 to 162 months' imprisonment, which varied from the Sentencing Guideline Range of 188 to 235 months' imprisonment. Crim. Doc. 38 at 22. On August 25, 2020, I sentenced Jones to 162 months' imprisonment and five years of supervised release, consistent with the terms of the plea agreement. Crim. Doc. 53. He did not file a direct appeal.[1] Jones signed the present motion on August 5, 2022.

II. INITIAL REVIEW STANDARD

A prisoner in custody under sentence of a federal court may move the sentencing court to vacate, set aside or correct a sentence. 28 U.S.C. § 2255(a). To obtain relief, a federal prisoner must establish:

> [T]hat the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or [that the judgment or sentence] is otherwise subject to collateral attack.

Id.; *see also* Rule 1 of the Rules Governing § 2255 Proceedings (specifying scope of § 2255). If any of the four grounds are established, the court is required to "vacate and

[1] The plea agreement contains a waiver of appeal that waives the right to file post-conviction relief actions, including actions pursuant to 28 U.S.C. § 2255, but does not "prevent defendant from challenging the effectiveness of defendant's attorney after conviction and sentencing." Crim. Doc. 48 at 11.

set the judgment aside and [to] discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

Rule 4(b) of the Rules Governing § 2255 Proceedings requires the court to conduct an initial review of the motion and dismiss the motion if it is clear that it cannot succeed. Three reasons generally give rise to a preliminary Rule 4(b) dismissal. First, summary dismissal is appropriate when the allegations are vague or conclusory, palpably incredible, or patently frivolous or false. *See Blackledge v. Allison*, 432 U.S. 63, 75-76 (1977).

Second, summary dismissal is appropriate when the motion is beyond the statute of limitations. Section 2255(f) states that a one-year limitations period shall apply to motions filed under 28 U.S.C. § 2255. *See, e.g., Taylor v. United States*, 792 F.3d 865, 869 (8th Cir. 2015). 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. 28 U.S.C. § 2255(f). The most common limitation period is the one stemming from final judgment. If no appeal is taken, judgment is final fourteen days after entry. *See* Federal Rule of Appellate Procedure 4(b) (giving defendants fourteen days to file a notice of appeal in a criminal case). If an appeal is taken, the time to file begins to run either 90 days after the denial if no further appeal is taken or at the denial of certiorari if a petition for certiorari is filed. *See Clay v. United States*, 537 U.S. 522, 532 (2003) ("We hold that, for federal criminal defendants who do not file a petition for certiorari with this Court on direct review, § 2255's one-year

limitation period starts to run when the time for seeking such review expires."); *see also* U.S. Sup. Ct. R. 13.

This is a strict standard with only very narrow exception. As set out by the Eighth Circuit Court of Appeals:

> The Antiterrorism and Effective Death Penalty Act of 1996 imposed, among other things, a one-year statute of limitations on motions by prisoners under section 2255 seeking to modify, vacate, or correct their federal sentences. *See Johnson v. United States*, 544 U.S. 295, 299 (2005). 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." *Holland v. Florida*, 560 U.S. 631 (2010) (*quoting Pace v. DiGuglielmo,* 544 U.S. 408, 418 (2005)) (applicable to section 2254 petitions; *see also United States v. Martin,* 408 F.3d 1089, 1093 (8th Cir. 2005) (applying same rule to section 2255 motions).

Muhammad v. United States, 735 F.3d 812, 815 (8th Cir. 2013).

Third, summary dismissal is appropriate when the movant has filed a previous § 2255 motion. Under the rules, movants are prohibited from filing a second 28 U.S.C. § 2255 motion unless they are granted leave from the Eighth Circuit Court of Appeals. *See* 28 U.S.C. § 2255(h), 28 U.S.C. § 2244(b)(3)(A); *see also United States v. Lee*, 792 F.3d 1021, 1023 (8th Cir. 2015). Dismissal is appropriate if the movant has failed to obtain leave to file a second or successive habeas motion. *Id.*

III. INITIAL REVIEW ANALYSIS

Jones was sentenced on August 25, 2020. Because he did not file a direct appeal, his one-year limitation period began to run 14 days later, on September 8, 2020. Under § 2255(f)(1), Jones' one-year period expired on September 8, 2021. Jones did not file the present motion until August 5, 2022. As such, unless an exception applies, his motion is untimely. Jones asserts that § 2255(f)(4) applies based on his discovery of new

evidence on or about May 3, 2022, and July 18, 2022, rendering his motion timely. Doc. 1 at 1-2.

Under § 2255(f)(4), a habeas petitioner may file an otherwise untimely § 2255 motion within one year of "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." To be entitled to invoke § 2255(f)(4), "a petitioner must show the existence of a new fact, while also demonstrating that he acted with diligence to discover the new fact." *Anjulo-Lopez v. United States,* 541 F.3d 814, 817 (8th Cir. 2008) (internal quotation marks omitted). Due diligence requires "that a prisoner make *reasonable* efforts to discover the facts supporting his claims." *Id.* at 818. "The government's failure to provide the documents does not affect his obligation to work diligently to obtain them." *Deroo v. United States*, 709 F.3d 1242, 1245 (8th Cir. 2013).

Jones argues that "the statute of limitations began to run on 5/3/22 and 7/18/22,. . . thereby making this 2255(f)(4) timely due to the fact that the newly discovered facts couldn't have been discovered with greater diligence than the petitioner has shown." Doc. 1 at 1-2. Jones asserts that "[b]ecause counsel only showed petitioner a few documents behind a glass at the county jail, the entire time he represented Jones, Jones requested a copy of his case file on 4/18/22 from his current attorney Mr. Maloney." *Id.* at 3. Maloney sent him a copy of the motion to suppress and the discovery order, which he received May 3, 2022. *Id.*

Jones asserts that from those documents he learned (1) the identity of the confidential informant (CI); (2) that the CI made statements about Jones; and (3) that the CI was given money that officers took from Jones. *Id.* Jones asserts that on May 14, 2022, he spoke to his mother about that information and she informed him that family friend Mike Harris exchanged messages with the CI a couple of days after Jones' arrest. *Id.* at 3-4. Jones filed a pro se motion to lift the discovery restriction on May 24, 2022 – his first filing with this court since August 2020. Crim. Doc. 57.

Jones asserts that on or about July 18, 2022, he received documentation of the Facebook message exchanges between Harris and the CI, which he has attached to his § 2255 motion. *See* Doc. 1 at 19-34. Generally, the messages discuss whether the CI and Jones are able to phone each other, whether the CI put money on Jones' prison account, and how the CI felt about Jones. The CI also states that "when [Jones] ran, the cops ran after him and I ran right to the truck and I tried my hardest to get the stuff out. But I couldn't there was too many screws and I damn near got caught searching through the truck before the cops got to it. I tried, I'm sorry I wasn't able to get everything fast enough." *Id.* at 26.

Jones characterizes the motion to suppress and Facebook messages as newly discovered evidence that "prove[s] that CI#1 not only framed [Jones], but told police she would do so, received payment from police in the form of petitioner's funds, and was inside the vehicle tampering with evidence prior to police request." *Id.* at 4. He compares the assertion in the motion to suppress that "it is unknown what she[CI#1] did while at the vehicle without supervision" with the CI's statement in the Facebook messages that she tried to get the "stuff" out of the car but there were too many screws. *Id.* at 4. Jones argues that "[h]ad counsel investigated the case thoroughly, he would've consulted with petitioner about this CI and investigated thoroughly and uncovered that the CI did in fact enter the vehicle and tamper with evidence as he suspected. Not only did petitioner have a chance at the suppression hearing but at trial contrary to counsel's assertions." *Id.*

To qualify for the exception, Jones must have shown the existence of a new fact relevant to his claim. *Ingram v. United States*, 932 F.3d 1084, 1089 (8th Cir. 2019). The one claim Jones asserts in his § 2255 motion is: "[i]n light of the newly discovered evidence, the petitioner was denied effective assistance of counsel during the plea process where counsel failed to investigate issues, misinformed him as to the existence of exculpatory evidence, and wrongly advised him to plead guilty despite his plea being

unknowing and involuntary in violation of the 6th Amendment of the [C]onstitution." Doc. 1 at 2. However, trial counsel recognized and argued the issues with the CI in the February 2020 motion to suppress. That motion argued that officers lacked probable cause to search the vehicle before obtaining a warrant because they unreasonably disregarded evidence, including information "suggesting that the confidential informant may have framed" Jones and noted that "CI#1 had unusually profound motivations to get Mr. Jones in as much trouble as possible." Crim. Doc. 21-1 at 2.

In addition, the motion argued the search warrant application contained material omissions, including the confidential informant's motivations and access to the vehicle that was searched. *Id.* at 12. Specifically, the motion argued that texts between the CI and officers make the CI's motivations clear: animosity toward Jones, a desire to make the CI's pending charges go away and assistance with retrieving money from Jones. *Id.* at 1-2, 9. The motion argued that the application for the search warrant failed to explain that officers "facilitated the transfer of the money to CI #1, or that CI #1 was essentially paid for assisting with the arrest of Mr. Jones at his/her insistence." *Id.* at 6. The motion also noted that the CI had stated in a text to officers that the CI would "make sure" drugs were "in his things" and then argued that "perhaps CI #1's willingness to 'make sure' that Mr. Jones possessed methamphetamine would not be so concerning if police had not allowed him/her unfettered access to the vehicle after Mr. Jones's arrest." *Id.* at 5, 10. Thus, the motion to suppress and its underlying factual allegations of CI's animosity toward Jones and motivations, as well as unsupervised access to the vehicle, do not constitute new facts.

Next, even if the CI's statement in the Facebook messages that she entered the vehicle and tampered with the console constituted a new fact, Jones did not exhibit due diligence in unearthing that fact. Jones was aware that a motion to suppress was filed but withdrawn in his case. He was also aware of his purported limited access to documents as a result of the discovery order. Yet he waited until April 2022 to request

his case file from his trial counsel and until May 2022 to request anything from the court. He received a copy of the motion to suppress within two weeks of requesting it from trial counsel. He could have made that request any time within the year after his judgment became final yet he did not do so. *See Anjulo-Lopez*, 541 F.3d at 819 ("[W]e think it clear from the face of the motion and record here that a duly diligent person in Anjulo–Lopez's circumstances could have unearthed that information anytime after the deadline for filing the appeal passed. . . . Indeed, as Anjulo–Lopez himself alleged in his original petition, when he finally *did* attempt to contact his attorney via letter (albeit, a letter that did not, apparently, directly ask whether an appeal had been filed), counsel responded by sending copies of the judgment and commitment order.").

Jones focuses on the date he actually learned about the details of the motion to suppress and the date he received the Facebook messages. Yet the relevant date is when he could have learned this information through due diligence. *Gillis v. United States*, 729 F.3d 641, 644-45 (6th Cir. 2013) (requiring a petitioner to provide evidence establishing the date on which he could have discovered the factual predicate through due diligence). Jones does not attempt to explain his delay in making any attempt to gather or review parts of his case file. *See Beckman v. United States*, No. 4:21-CV-01342-AGF, 2023 WL 2734081, at *3 (E.D. Mo. Mar. 31, 2023), *certificate of appealability denied,* No. 23-2328, 2023 WL 8251987 (8th Cir. Sept. 15, 2023) ("A duly diligent person in Beckman's circumstances could have obtained a copy of the plea hearing transcript at any point after the plea hearing was held on November 2, 2017. Beckman has not shown any exercise of due diligence in obtaining the transcript of his plea hearing."). Jones did not request any documents from his counsel, or request any action by the court until long after the statute of limitations had run. In addition, with reasonable diligence he could have obtained the Facebook messages that had purportedly been exchanged within days of his January 13, 2020, arrest. Doc. 1 at 3-4; Crim. Doc. 8. As

without reaching the underlying constitutional claim, the movant must show "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." *See Slack*, 529 U.S. at 484.

In this case, I find that it is not debatable whether Jones' claim is time barred. Accordingly, I decline to grant a certificate of appealability. If Jones desires further review of his 28 U.S.C. § 2255 petition, 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.

V. CONCLUSION

For the reasons set forth herein:

1. This action is hereby **dismissed with prejudice** because the motion is untimely and there are no exceptional circumstances that excuse the late filing.
2. A certificate of appealability shall **not issue**.
3. The Clerk of Court shall close this case.
4. Jones' motion (Doc. 4) to appoint counsel is **denied** as moot.

IT IS SO ORDERED.

DATED this 26th day of January, 2024.

Leonard T. Strand, Chief Judge

such, he has not exercised due diligence and § 2255(f)(4) does not extend the one-year filing period beyond the date Jones' judgment became final.

Based on my initial review of Jones' motion, I find that it is untimely and does not qualify for an exception. Thus, I decline to consider the merits of his claim and will dismiss his motion.[2]

IV. CERTIFICATE OF APPEALABILITY

In a § 2255 proceeding before a district judge, the final order is subject to review on appeal by the court of appeals for the circuit in which the proceeding is held. *See* 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. *See* 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b). *See also Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). 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 (8th Cir. 1994)).

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 § 2253(c) is straightforward: the [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El*, 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

[2] Because Jones' § 2255 motion is untimely, his motion (Doc. 4) to appoint counsel will be denied as moot.

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I. INTRODUCTION

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Id.; *see also* Rule 1 of the Rules Governing § 2255 Proceedings (specifying scope of § 2255). If any of the four grounds are established, the court is required to "vacate and

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To qualify for the exception, Jones must have shown the existence of a new fact relevant to his claim. *Ingram v. United States*, 932 F.3d 1084, 1089 (8th Cir. 2019). The one claim Jones asserts in his § 2255 motion is: "[i]n light of the newly discovered evidence, the petitioner was denied effective assistance of counsel during the plea process where counsel failed to investigate issues, misinformed him as to the existence of exculpatory evidence, and wrongly advised him to plead guilty despite his plea being

unknowing and involuntary in violation of the 6th Amendment of the [C]onstitution." Doc. 1 at 2. However, trial counsel recognized and argued the issues with the CI in the February 2020 motion to suppress. That motion argued that officers lacked probable cause to search the vehicle before obtaining a warrant because they unreasonably disregarded evidence, including information "suggesting that the confidential informant may have framed" Jones and noted that "CI#1 had unusually profound motivations to get Mr. Jones in as much trouble as possible." Crim. Doc. 21-1 at 2.

In addition, the motion argued the search warrant application contained material omissions, including the confidential informant's motivations and access to the vehicle that was searched. *Id.* at 12. Specifically, the motion argued that texts between the CI and officers make the CI's motivations clear: animosity toward Jones, a desire to make the CI's pending charges go away and assistance with retrieving money from Jones. *Id.* at 1-2, 9. The motion argued that the application for the search warrant failed to explain that officers "facilitated the transfer of the money to CI #1, or that CI #1 was essentially paid for assisting with the arrest of Mr. Jones at his/her insistence." *Id.* at 6. The motion also noted that the CI had stated in a text to officers that the CI would "make sure" drugs were "in his things" and then argued that "perhaps CI #1's willingness to 'make sure' that Mr. Jones possessed methamphetamine would not be so concerning if police had not allowed him/her unfettered access to the vehicle after Mr. Jones's arrest." *Id.* at 5, 10. Thus, the motion to suppress and its underlying factual allegations of CI's animosity toward Jones and motivations, as well as unsupervised access to the vehicle, do not constitute new facts.

Next, even if the CI's statement in the Facebook messages that she entered the vehicle and tampered with the console constituted a new fact, Jones did not exhibit due diligence in unearthing that fact. Jones was aware that a motion to suppress was filed but withdrawn in his case. He was also aware of his purported limited access to documents as a result of the discovery order. Yet he waited until April 2022 to request

his case file from his trial counsel and until May 2022 to request anything from the court. He received a copy of the motion to suppress within two weeks of requesting it from trial counsel. He could have made that request any time within the year after his judgment became final yet he did not do so. *See Anjulo-Lopez*, 541 F.3d at 819 ("[W]e think it clear from the face of the motion and record here that a duly diligent person in Anjulo–Lopez's circumstances could have unearthed that information anytime after the deadline for filing the appeal passed. . . . Indeed, as Anjulo–Lopez himself alleged in his original petition, when he finally *did* attempt to contact his attorney via letter (albeit, a letter that did not, apparently, directly ask whether an appeal had been filed), counsel responded by sending copies of the judgment and commitment order.").

Jones focuses on the date he actually learned about the details of the motion to suppress and the date he received the Facebook messages. Yet the relevant date is when he could have learned this information through due diligence. *Gillis v. United States*, 729 F.3d 641, 644-45 (6th Cir. 2013) (requiring a petitioner to provide evidence establishing the date on which he could have discovered the factual predicate through due diligence). Jones does not attempt to explain his delay in making any attempt to gather or review parts of his case file. *See Beckman v. United States*, No. 4:21-CV-01342-AGF, 2023 WL 2734081, at *3 (E.D. Mo. Mar. 31, 2023), *certificate of appealability denied,* No. 23-2328, 2023 WL 8251987 (8th Cir. Sept. 15, 2023) ("A duly diligent person in Beckman's circumstances could have obtained a copy of the plea hearing transcript at any point after the plea hearing was held on November 2, 2017. Beckman has not shown any exercise of due diligence in obtaining the transcript of his plea hearing."). Jones did not request any documents from his counsel, or request any action by the court until long after the statute of limitations had run. In addition, with reasonable diligence he could have obtained the Facebook messages that had purportedly been exchanged within days of his January 13, 2020, arrest. Doc. 1 at 3-4; Crim. Doc. 8. As

without reaching the underlying constitutional claim, the movant must show "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." *See Slack*, 529 U.S. at 484.

In this case, I find that it is not debatable whether Jones' claim is time barred. Accordingly, I decline to grant a certificate of appealability. If Jones desires further review of his 28 U.S.C. § 2255 petition, 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.

V. CONCLUSION

For the reasons set forth herein:

1. This action is hereby **dismissed with prejudice** because the motion is untimely and there are no exceptional circumstances that excuse the late filing.
2. A certificate of appealability shall **not issue**.
3. The Clerk of Court shall close this case.
4. Jones' motion (Doc. 4) to appoint counsel is **denied** as moot.

IT IS SO ORDERED.

DATED this 26th day of January, 2024.

Leonard T. Strand, Chief Judge

such, he has not exercised due diligence and § 2255(f)(4) does not extend the one-year filing period beyond the date Jones' judgment became final.

Based on my initial review of Jones' motion, I find that it is untimely and does not qualify for an exception. Thus, I decline to consider the merits of his claim and will dismiss his motion.[2]

IV. CERTIFICATE OF APPEALABILITY

In a § 2255 proceeding before a district judge, the final order is subject to review on appeal by the court of appeals for the circuit in which the proceeding is held. *See* 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. *See* 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b). *See also Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). 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 (8th Cir. 1994)).

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 § 2253(c) is straightforward: the [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El*, 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

[2] Because Jones' § 2255 motion is untimely, his motion (Doc. 4) to appoint counsel will be denied as moot.

Additional material from this filing is available in the Clerk's Office.