

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-3553

HARL A. GARRETT

Appellant

v.

DEXTER PAYNE

Appellee

Appeal from U.S. District Court for the
Eastern District of Arkansas – Central
(4:20-cv-01252-LPR)

ORDER

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

Judge Smith, Judge Grasz, Judge Stras, and Judge
Kobes would grant the petition for rehearing en banc.

February 09, 2026

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

/s/ Susan E. Bindler

2a

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-3553

HARL A. GARRETT

Plaintiff - Appellant

v.

DEXTER PAYNE

Defendant - Appellee

Appeal from United States District Court
for the Eastern District of Arkansas - Central

Submitted: April 16, 2025

Filed: October 3, 2025

(Corrected: October 7, 2025)

Before KELLY, ERICKSON, and STRAS, Circuit
Judges.

KELLY, Circuit Judge.

After a jury convicted Harl Garrett of sexual assault, he asked his lawyer to file an appeal. But weeks later, after Arkansas' window for filing a direct appeal had closed, Garrett was informed that his lawyer had instead withdrawn from representing him. Garrett's subsequent pro se motion to file a

belated appeal was denied. Before us is Garrett's federal petition for habeas corpus under 28 U.S.C. § 2254, in which he alleges a violation of his right to pursue a direct appeal. The district court denied Garrett's petition, finding that it was time-barred, but granted a certificate of appealability on whether Garrett's motion to file a belated appeal in Arkansas tolled the statute of limitations under 28 U.S.C. § 2244(d)(2). We answer that question in the affirmative, and we reverse and remand.

I.

On August 27, 2019, Garrett was convicted of second-degree sexual assault after a trial in Garland County, Arkansas. He received a 20-year sentence the same day. At the time, Garrett was represented by a lawyer named Ben Hooten, and Garrett asked Hooten to appeal his case. However, on September 11, 2019, Hooten instead filed a motion seeking to withdraw as Garrett's counsel. In the motion, Hooten admitted that Garrett "ha[d] requested that an appeal be entered," but Hooten felt that "[a]nother attorney would be better suited to look for errors that may have occurred at trial [sic], and not having to argue against the self interest of counsel." Hooten added that Garrett had "been given copies of *Rules of Appellate Procedure- Criminal, and Rules of the Supreme Court and Court of Appeals of the State of Arkansas*. . . . downloaded and printed off the Arkansas Supreme Court page." Hooten's withdrawal motion was hand-delivered to Garrett.

The same day, the trial court granted Hooten's motion to withdraw. However, Garrett never received the court's withdrawal order. So, Garrett did not learn Hooten was no longer on the case until October 8, 2019, when he received a letter from Hooten

informing him that he was “on his own,” “explaining . . . what the word *Pro se* means,” and enclosing a pro se notice of appeal. By this point, Garrett’s 30-day window to appeal his conviction had run. *See Ark. R. App. P.–Crim. 2(a)* (2019). On October 15, 2019, Garrett nonetheless signed a pro se notice of appeal and a request to proceed in forma pauperis, and mailed these papers to Hooten for filing. But two weeks later, Hooten returned the documents, informing Garrett that he would need to file the papers on his own, through the prison mail system. Hooten added that he was “doubtful they will accept them because they are too late being filed, but try it anyway.”

On December 16, 2019, Garrett filed motions in both the Garland County Circuit Court and the Arkansas Supreme Court, seeking a belated appeal and to proceed in forma pauperis. *See Ark. R. App. P.–Crim. 2(e)* (2019). The Circuit Court declined Garrett’s motions the following day, informing him that the Arkansas Supreme Court was the proper recipient. About a week later, the Arkansas Supreme Court also informed Garrett that his submissions were deficient because they lacked a “certified copy of the sentencing order and any other documents that . . . are relevant such as the order relieving [his] attorney of representation.” In turn, on March 25, 2020, Garrett filed the motions again, with properly certified documentation.

Garrett’s motion for belated appeal was denied in an order dated April 15, 2020. The court provided no explanation for its decision. Garrett next tried mailing a state postconviction petition to the Garland County Circuit Court. *See Ark. R. Crim. P. 37.1(a)*. His motion claimed three errors: first, that Hooten

“did not follow through with contract to defend”; second, that the prosecution had failed to properly investigate his case; and third, that the P.A. system had malfunctioned, harming Garrett’s ability to hear what was going on during his trial.¹ But on September 17, 2020, the circuit court denied Garrett’s petition as well, finding it was untimely. *See* Ark. R. Crim. P. 37.2(c)(iii) (2015). Garrett did not appeal this denial.

Acting pro se, Garrett filed a federal habeas petition under 28 U.S.C. § 2254 on October 19, 2020. The district court appointed him a lawyer, who filed an amended petition raising a single claim: that Garrett had been denied his constitutional right to a direct appeal. The petition stressed that despite Garrett asking to appeal his conviction, Hooten failed to file a notice of appeal on his behalf, and that both Hooten and the court failed to inform Garrett of Hooten’s withdrawal or appoint a new lawyer to represent him in time to file a direct appeal. *See* Ark. R. App. P.–Crim 16(b); *see also Ahumada v. United States*, 994 F.3d 958, 960 (8th Cir. 2021) (“A criminal defendant has a constitutional right to counsel on the first direct appeal.”).

The district court denied Garrett’s habeas petition as time-barred under the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2244(d)(1). The timeliness of Garrett’s petition hinged on whether AEDPA’s statute of limitations had been tolled during the three-week pendency of Garrett’s motion for a belated appeal, and the district court concluded that it had not. The district court

¹ At the time of trial, Garrett was 74 years old.

acknowledged, however, that “reasonable jurists could disagree as to whether a motion for belated appeal in Arkansas qualifies as a basis for statutory tolling” under 28 U.S.C. § 2244(d)(2). In the district court’s view, “the proper categorization of a motion for a belated appeal in Arkansas is not free from doubt,” and a circuit split existed on the question. Accordingly, the district court “issue[d] a certificate of appealability on the statutory tolling issue related to the motion for a belated appeal.”

Garrett appeals.

II.

“On an appeal from the denial of a habeas petition, we review the district court’s findings of fact for clear error and its conclusions of law de novo.” *Howard v. Braun*, 862 F.3d 706, 709 (8th Cir. 2017).

A one-year limitations period applies to § 2254 petitions and “run[s] from the latest of,” among other events, “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)(D). The district court found that Garrett’s limitations period began running on October 8, 2019, when Garrett learned that his lawyer had abandoned him and his appeal period had expired. Garrett’s § 2254 petition, which was filed on October 19, 2020, thus appeared to come eleven days after the deadline had passed.

However, AEDPA’s limitations period is tolled for “[t]he 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.” 28 U.S.C. § 2244(d)(2). Because Garrett’s motion for a belated appeal was pending for about

20 days before it was denied, his petition is timely if a belated-appeal motion in Arkansas constitutes “collateral review with respect to the pertinent judgment or claim.”² *Id.*

In *Wall v. Kholi*, 562 U.S. 545 (2011), the Supreme Court defined the term “collateral review” as used in § 2244(d)(2). The Court first defined “collateral” as “a form of review that is not part of the direct appeal process.” *Id.* at 552. Then, the Court turned to the term “review,” which it explained was “best understood as an ‘act of inspecting or examining,’” “a ‘judicial reexamination,’” or “a looking over or examination with a view to amendment or improvement.” *Id.* at 553 (citations omitted). Summing up, the Court defined “‘collateral review’ of a judgment or claim [as] a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process.” *Id.*

Applying this definition, the Court in *Wall* held that a sentence-reduction motion in Rhode Island sought “collateral review” under § 2244(d)(2). *Id.* at 555–56. The motion was “collateral”—it happened outside the direct appeal process and “undoubtedly call[ed] for ‘review’ of the sentence,” because it “involve[d] judicial reexamination of the sentence to determine whether a more lenient sentence [wa]s proper.” *Id.* The Court added the following distinction in a footnote: “[a] motion to reduce sentence is unlike a motion for post-conviction discovery or a motion for appointment of counsel, which generally are not direct requests for judicial review of a judgment and do not provide a state court with authority to order relief from a judgment.” *Id.* at 556 n.4.

² The parties do not dispute that Garrett’s belated-appeal motion was “properly filed.”

Garrett argues that a belated-appeal motion qualifies for statutory tolling under § 2244(d)(2) because it entails judicial review of “a ‘claim’ that an inmate’s constitutional right to a direct appeal has been violated,” and that such a motion “invites a reexamination of a judgment” because it seeks to reopen proceedings to appeal a conviction. In contrast, the State argues that a belated-appeal motion is more like a motion to appoint counsel or motion for discovery, which *Wall* indicated did not constitute “collateral review.” 562 U.S. at 556 n.4.

In Arkansas, a belated-appeal motion allows “[t]he Supreme Court [to] act upon and decide a case in which the notice of appeal was not given or the transcript of the trial record was not filed in the time prescribed, when a good reason for the omission is shown by affidavit.” Ark. R. App. P.–Crim. 2(e). A defendant may file such a motion up to 18 months after the entry of judgment, *id.*, and has “good reason” when “the court makes the error causing the appeal to be untimely,” or “the attorney has failed to timely file the notice of appeal,” *McDonald v. State*, 146 S.W.3d 883, 888–89 (Ark. 2004). When a belated-appeal motion is granted, “the clerk of . . . court [is] ordered to accept the notice of appeal or record, and the appeal . . . proceed[s] without delay.” *Id.* at 892.

A belated-appeal motion in Arkansas falls somewhere between the types of motions explicitly addressed in *Wall*. On one hand, by definition, a belated-appeal motion directly “le[ads] to new . . . proceedings” aimed solely at “gaining . . . relief from the judgment of conviction” or sentence. *Streu v. Dormire*, 557 F.3d 960, 965 (8th Cir. 2009) (holding that motion to reopen postconviction proceedings

constituted “collateral review”).³ In this way, a motion for belated appeal is not attenuated from an attack on the judgment or sentence in the same way as a motion for counsel or discovery. On the other hand, a belated-appeal motion is unlike the sentencing-reduction motion at issue in *Wall*, because it fails to put an Arkansas court in a position to immediately alter the underlying judgment in resolving the motion. Instead, a successful motion reopens an appeal of the underlying conviction.

In turn, our sister circuits have disagreed as to whether belated-appeal motions constitute “collateral review.” The Sixth Circuit has assumed that belated-appeal motions, while pending, toll AEDPA’s limitations period. See *Board v. Bradshaw*, 805 F.3d 769, 771–72 (6th Cir. 2015) (holding “a motion for leave to file a delayed appeal . . . is considered part of the collateral review process for purposes of tolling AEDPA’s statute of limitations”); see also *DiCenzi v. Rose*, 452 F.3d 465, 468 (6th Cir. 2006) (“[A] motion for delayed appeal . . . if properly filed . . . does toll the statute during the time the motion was pending.”). Contrarily, the Eleventh Circuit has held that such motions do not constitute “collateral review” under the definition provided in *Wall*. See *Espinosa v. Sec’y, Dep’t of Corr.*, 804 F.3d 1137, 1138–39 (11th Cir. 2015) (“[Petitioner]’s petition for belated appeal did not involve ‘collateral review’ of his conviction . . .

³ Our opinion in *Streu* predates the Supreme Court’s decision in *Wall*. But we have not overruled *Streu*’s holding, and as described below, we read *Wall* as consistent with *Streu*’s assessment. See *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (“This panel is bound by previous panel opinions of our own Court, but we are not so bound if an intervening expression of the Supreme Court is inconsistent with those previous opinions.”).

.”); *Danny v. Sec’y, Fla. Dep’t of Corr.*, 811 F.3d 1301, 1302 (11th Cir. 2016) (same).

We conclude that an Arkansas motion for belated direct appeal constitutes “collateral review.”⁴ First, as the Arkansas Supreme Court has clarified, a belated-appeal motion falls outside the direct appeal process. *Dodson v. Norris*, 288 S.W.3d 662, 665 (Ark. 2008) (holding that “a motion for belated appeal is not part of the ordinary appellate review process”). The State thus does not appear to dispute that it is at least “collateral” within *Wall*’s meaning. *See Wall*, 562 U.S. at 553 (noting that “collateral” proceedings are those “separate from the direct review process”).⁵

Second, we conclude that a belated-appeal motion invites “review” under § 2244(d)(2). When the Arkansas Supreme Court determines that good cause

⁴ Both a motion to reopen an appeal—which is necessarily filed after a judgment has become final—and a motion for postconviction relief predicated on the denial of a direct appeal are filed “outside of the direct review process.” And the remedy for both is the same: to reinstate the direct appeal. The two motions, in both posture and remedy, appear to be materially indistinguishable, and we see no principled reason that the latter would be “collateral” and the former “direct.”

⁵ We recognize that unlike the motion to reopen postconviction proceedings we considered in *Streu*, which was “designed to further the ultimate goal of gaining *collateral* relief from the judgment of conviction,” 557 F.3d at 965 (emphasis added), the aim of a motion for belated direct appeal is to reinstate *direct* review. But this does not affect the collateral nature of the latter motion. It is collateral because it necessarily occurs outside of the direct review process, not because the relief it seeks involves reinstatement of an appeal. *See, e.g., Koenig v. North Dakota*, 755 F.3d 636, 642 (8th Cir. 2014) (granting collateral relief under § 2254 for denial of right to counseled direct appeal, and remanding for either new appeal or, “[i]f such an appeal is not granted” to the petitioner, for the judgment to be vacated).

exists for a defendant's failure to perfect an appeal, the Court reopens the appeal. *See Mangiapane v. State*, 862 S.W.2d 258, 259 (Ark. 1993) ("The motion for belated appeal is granted. The Clerk of the Supreme Court is directed to reinstate the appeal for a determination on the merits."); *see also Brown v. State*, 644 S.W.3d 247, 249 (Ark. 2022) (same). The only result of a defendant's successfully moving for a belated appeal is to pursue one, and a belated-appeal motion reinstates a state court's jurisdiction to hear it, "provid[ing] . . . [it] with authority to order relief from a judgment." *Wall*, 562 U.S. at 556 n.4. Because a meritorious motion *requires* a state court to entertain the defendant's attack on his judgment, a request for a belated direct appeal is a "direct request[] for judicial review of a judgment" and thus constitutes "collateral review." *Id.*; *see also Kares v. Morrison*, 77 F.4th 411, 421 (6th Cir. 2023) (holding motion for postconviction DNA testing was "collateral review" under *Wall* because, despite being "sequential in nature," it "provides a mechanism for review of the underlying judgment by setting forth the procedures that a court *must follow* after receiving the results of postconviction DNA testing"); *Hutson v. Quarterman*, 508 F.3d 236, 239 (5th Cir. 2007) (drawing same conclusion, noting "the motion for post-conviction DNA proceedings is seeking to challenge that judgment by potentially *requiring* that the trial court hold a hearing to determine whether it was reasonably probable that the convicted person would have been acquitted given the DNA results" (emphasis added)). This mandatory result from a successful belated-appeal motion—the requirement that the court reconsider the underlying conviction by entertaining the movant's contemplated appeal—further distinguishes it from a typical motion for

discovery or counsel. *See Streu*, 557 F.3d at 965 (finding that Streu’s motion was “collateral review” because it “*would have* led to new post-conviction proceedings in the circuit court . . . to further the ultimate goal of gaining collateral relief from the judgment of conviction” (emphasis added)).

The State argues, in line with the Eleventh Circuit, that a belated-appeal motion is not “collateral review” because it does not provide the court with authority to “immediately bring about” relief from the defendant’s underlying judgment and does not entail review of the merits of the underlying conviction. *See Espinosa*, 804 F.3d at 1141 (“The appellate court considering the petition [for belated postconviction appeal] does not reexamine the underlying judgment or claim, and a ruling on the petition cannot make ‘amendment[s] or improvement[s]’ to the terms of custody.” (quoting *Wall*, 562 U.S. at 553)); *Danny*, 811 F.3d at 1304 (noting “petition for a belated appeal does not qualify as an application for collateral review because, under Florida law, it ‘does not reach the merits of the anticipated appeal’” (quoting *Espinosa*, 804 F.3d at 1141)).⁶ The State’s argument

⁶ Notably, it appears that Arkansas courts, at least in some cases, *do* address the underlying merits of a contemplated appeal when denying belated-appeal motions. *See Bryant v. State*, 575 S.W.3d 547, 549 (Ark. 2019) (noting that in adjudicating a motion for belated appeal under Rule 2(e), “this court need not consider the reasons for the petitioner’s failure to file a timely notice of appeal when it is clear from the record that the postconviction petition denied was wholly without merit”); *Latham v. State*, 2018 Ark. 44, 2018 WL 897481, at *1 (2018) (refusing to consider petitioner’s “reasons for not filing a timely notice of appeal because it is clear from the record that [his] petition was wholly without merit,” and claiming that “an appeal from an order that denied a petition for postconviction relief . . . will not be permitted to go forward when it is clear that there would be no merit to the

finds support in the dicta in *Wall*'s footnote distinguishing a sentence-reduction motion from motions for appointment of counsel or discovery because the latter two "generally are not direct requests for judicial review of a judgment and do not provide a state court with authority to order relief from a judgment." 562 U.S. at 556 n.4.

We do not read *Wall* so narrowly. *Wall* did not hold that to constitute "collateral review," a motion must place the state court in a position to *immediately* order relief from a judgment. Rather, *Wall* described "collateral review" as the "reexamination of a judgment or claim," "with a *view* to amendment or improvement." *Id.* at 553 (emphasis added) (quotation omitted). Indeed, *Wall* stressed a broad definition of "review," noting that "[j]ust because the phrase 'collateral review' encompasses proceedings that challenge the lawfulness of a prior judgment, it does not follow that other proceedings may not also be described as involving 'collateral review.'" *Id.* at 557–58; *see also Hardin v. Genovese*, No. 21-5867, 2023 WL 1992036, at *7 (6th Cir. Feb. 14, 2023) (Kethledge, J., dissenting) (noting that *Wall* "broadly defined the term 'review' as used in § 2244(d)(2)").

Our reading of *Wall* also comports with the principles of comity underlying § 2244(d)(2). We have noted that "the purpose of § 2244(d)(2) . . . is to 'encourage petitioners to seek relief from state courts in the first instance,' thereby giving 'an opportunity to the state courts to correct a constitutional violation.'" *Polson v. Bowersox*, 595 F.3d 873, 875 (8th

appeal"). Because the Arkansas court provided no explanation for its denial of Garrett's belated-appeal motion, we cannot say whether it reasoned similarly here.

Cir. 2010) (citation modified) (quoting *Streu*, 557 F.3d at 963–64); see also *Rivers v. Guerrero*, 145 S. Ct. 1634, 1645 (2025) (noting that “[t]he 1-year deadline for filing a § 2254 petition . . . promotes exhaustion of claims and respects state-court processes”). Arkansas’ belated-appeal procedure is a mechanism to ensure the court can correct any errors underlying a judgment, and it only applies in situations where the defendant would have pursued one but for some failure of the court or counsel to file an appeal notice in time. See *McDonald*, 146 S.W.3d at 888–89.

And while *Wall* counseled against “complicat[ing] the work of federal habeas courts” through hinging a definition of “collateral review” on individualized inquiries, see *Wall*, 562 U.S. at 558–59 (rejecting interpretation of § 2244(d)(2) that would require making “difficult distinctions” in individual cases as to whether motion for sentence reduction “challenge[d] a sentence on legal grounds” or “merely ask[ed] for leniency”), we note our decision is especially appropriate in Garrett’s case. Thirty days from the entry of judgment in his case, Garrett lost the ability to appeal, see Ark. Code Ann. § 16-91-105(a)(1), after the trial court and Garrett’s lawyer allegedly failed to secure him that right. Garrett’s belated-appeal motion asked the Arkansas Supreme Court to reconsider that failure; it was plainly a “direct request[] for judicial review” of the only claim he has brought in federal habeas proceedings—that he was denied a direct appeal due to both counsel and court error—and it “provide[d] a state court with authority to order [immediate] relief” in the form of a new appeal. See *Wall*, 562 U.S. at 556 n.4; see also *Collins v. Ercole*, 667 F.3d 247, 251 (2d Cir. 2012) (“Read straightforwardly, this passage [in *Wall*] says that ‘review’ occurs when a reviewing court recon-

siders the work of the original court to correct any error or infelicity committed by that original court—or rather, submits that original court’s work to examination for potential revision.”). Indeed, both § 2244(d)(2) and *Wall* reference “collateral review with respect to the pertinent judgment *or claim*.” 28 U.S.C. § 2244(d)(2) (emphasis added); *see also Wall*, 562 U.S. at 553 (“Viewed as a whole, then, ‘collateral review’ of a judgment or claim means a judicial reexamination of a judgment *or claim* in a proceeding outside of the direct review process.” (emphasis added)). Garrett’s motion gave Arkansas the opportunity to correct in its *entirety* the constitutional violation he now alleges in federal court. Put differently, in Garrett’s case, “the need for federal habeas review [would have] be[en] . . . obviated,” “further[ing] principles of ‘comity, finality, and federalism.’” *Wall*, 562 U.S. at 558 (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)).⁷

Wall’s definition of “collateral review” encompasses statutory tolling for a motion for belated appeal.

⁷ The State argues that comity concerns do not support Garrett’s argument, because he “could have exhausted his denial of direct appeal and denial of counsel claims in a properly filed petition under” Rule 37, “before, or contemporaneously with, the filing of his motion for a belated direct appeal.” Indeed, Arkansas has held that, to preserve state postconviction relief, an “appellant should have filed [a] Rule 37 petition within ninety days of his judgment of conviction despite the possibility that a motion for belated appeal might be filed.” *Shoemate v. State*, 5 S.W.3d 446, 448 (Ark. 1999). But the State does not suggest that Garrett was prohibited from filing only a belated-appeal motion or filing one before a postconviction petition; nor does the State contest that under Arkansas law, Garrett’s belated-appeal motion—whether or not accompanied by a Rule 37 petition—provided the state courts with authority to provide the relief Garrett now seeks in federal court.

If meritorious, such a motion mandates review of the underlying conviction. And for Garrett, whose federal habeas claim is predicated exclusively on the denial of his right to take a direct appeal, the motion plainly sought a judicial review of the “pertinent judgment or claim.” 28 U.S.C. § 2244(d)(2).

We reverse the judgment of the district court and remand Garrett’s case for further proceedings.

STRAS, Circuit Judge, dissenting.

When an Arkansas prisoner files his direct appeal late and asks the court to consider it anyway, is the request an “application for . . . collateral review”? 28 U.S.C. § 2244(d)(2). The answer, as the question would suggest, is no.

I.

Harl Garrett had to file his federal habeas petition within one year of “the date on which the [state] judgment became final by . . . the expiration of the time for seeking [direct] review.” *Id.* § 2244(d)(1)(A). Certain events can pause the clock, like a timeout in sports. Garrett claims that he called one when he filed a motion for belated appeal. *See* Ark. R. App. P.—Crim. 2(e) (2019). The question for us is whether the motion triggers “direct review,” the end of which starts the one-year clock, or “collateral review,” which pauses it after it starts. 28 U.S.C. § 2244(d)(1)(A), (2). Only the latter would allow Garrett to beat the deadline by a few days.

II.

The text provides the answer. *See Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). One way to pause the clock—what courts call tolling—is to file an “application for State post-conviction” relief.

28 U.S.C. § 2244(d)(2). Arkansas has a procedure for filing one, *see* Ark. R. Crim. P. 37.1(a), but the court and I agree that a belated-appeal motion is not it.

We part ways on the second possibility, whether it is an “application for . . . other collateral review.” 28 U.S.C. § 2244(d)(2). “[C]ollateral review” consists of a “judicial *reexamination* of a judgment or claim in a proceeding *outside* of the *direct review* process.” *Wall v. Kholi*, 562 U.S. 545, 553 (2011) (emphasis added). For the court, the exception squeaks Garrett’s petition across the line before the buzzer. In my view, it confirms that it had already sounded.

Any state-court judge knows that direct and collateral review provide different tracks. The typical order is that a trial and direct appeal come first, then collateral review. As the Supreme Court has explained, “something that is ‘collateral’ is ‘indirect,’ separate “from the main review” process. *Id.* at 551–52 (citation omitted); *see id.* at 552 (comparing “collateral review” to “collateral attack,” defined as an “attack on a judgment in a proceeding *other than a direct appeal*” (citation omitted)). We do not have to look far for an example: habeas corpus is itself a form of collateral review. *See id.* (noting that “[w]e have used the terms habeas corpus and ‘collateral review’ interchangeably”); *Teague v. Lane*, 489 U.S. 288, 306 (1989) (plurality opinion) (“Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final.” (citation omitted)).

The catch-all phrase, “other collateral review,” 28 U.S.C. § 2244(d)(2), must refer to other forms of postconviction review that share the same basic characteristics. Otherwise, it would “ascrib[e] to [the] word[s] a meaning so broad that [they are] incon-

sistent with [their] accompanying words.” *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion) (citation omitted) (discussing the canon *noscitur a sociis*, “a word is known by the company it keeps”). To keep from “giving unintended breadth to” the words Congress used,⁸ it must capture procedures that function the same way but go by a different name. *Id.* (citation omitted). Just like Arkansas’s Rule 37 proceedings. *See* Ark. R. Crim. P. 37. Or perhaps *coram nobis* in states like Arkansas, Nebraska, and South Dakota. *See Howard v. State*, 403 S.W.3d 38, 42–43 (Ark. 2012) (explaining the requirements for seeking a writ of error *coram nobis*); *State v. El-Tabech*, 610 N.W.2d 737, 747–48 (Neb.

⁸ Getting the distinction right has implications beyond this case. Littered within the federal habeas statutes are references to both direct and collateral review, often in the same or adjoining provisions, so not blurring the line between the two is critical to their operation. *See* 28 U.S.C. § 2244(b)(2)(A) (requiring dismissal of a second-or-successive habeas claim unless it relies on “a new rule of constitutional law, made retroactive to cases on *collateral review* by the Supreme Court” (emphasis added)); *id.* §§ 2244(d)(1)(A), (C), 2255(f)(3) (recognizing that the limitation period runs from the latest of when the judgment becomes “final by the conclusion of *direct review*,” or the Supreme Court makes a new rule “retroactively applicable to cases on *collateral review*” (emphasis added)); *id.* §§ 2254(e)(2)(A)(i), 2255(h)(2) (referencing a “new rule of constitutional law, made retroactive to cases on *collateral review* by the Supreme Court” (emphasis added)); *id.* § 2255(a), (b) (referring to a “*collateral attack*” (emphasis added)); *id.* § 2263(a) (requiring petitioners to seek habeas corpus review no later than 180 days after the “final State court affirmance of the conviction and sentence on *direct review*” (emphasis added)); *id.* § 2263(b)(1)–(2) (tolling the limitation period for petitions for certiorari filed to challenge a “final State court decision on *direct review*” and petitions for “post-conviction review or other *collateral relief*” (emphasis added)).

2000) (same); *Garcia v. State*, 843 N.W.2d 345, 348 (S.D. 2014) (same).

Kholi confirms this understanding. After the conclusion of direct review, the defendant there asked the court to “reconsider” the possibility of running his sentences concurrently rather than consecutively. *Kholi*, 562 U.S. at 548–49. The question was whether the Rhode Island-specific motion he used was an “application . . . for ‘collateral review.’” *Id.* at 554–56 (discussing R.I. Super. Ct. R. Crim. Proc. 35). The answer was yes. It was collateral because consideration of the motion occurred “outside of the direct review process.” *Id.* at 553. And it was a review because it called for “a judicial reexamination . . . with a view to amendment or improvement” through “correct[ion]” or “reduc[tion]” of his sentence. *Id.* at 553–54 (citations omitted).

III.

This procedure looks nothing like that one. At most, a motion for a belated appeal is an “application” for reinstatement of “*direct* review,” which is what Garrett would have received if it had been successful. *Id.* at 551–52 (emphasis added). Indeed, when the Supreme Court confronted a nearly identical Texas procedure for authorizing an “out-of-time appeal,” it concluded that it “restore[d] the pendency of the direct appeal,” rather than started “collateral review.” *Jimenez*, 555 U.S. at 120–21 (alteration in original) (citation omitted). It “reset” the clock from the beginning, as opposed to stopping it. *Id.* at 120. Given that what is direct cannot be collateral, the same motion cannot do both. *See Kholi*, 562 U.S. at 552 (noting that collateral review stands “aside from” direct review (citation omitted)).

Even if it could, Garrett’s belated-appeal motion still would not qualify as a “review” of a “pertinent judgment or claim.” 28 U.S.C. § 2244(d)(2). Unlike the sentence-reduction motion in *Kholi*, which could result in a “correct[ion]” or “reduc[tion]” of the defendant’s sentence, granting a belated-appeal motion does not “order *relief* from a judgment.” 562 U.S. at 554, 556 n.4 (emphasis added) (citation omitted). It is a step in that direction, kind of like requesting instant-replay review. See *Danny v. Sec’y, Fla. Dep’t of Corr.*, 811 F.3d 1301, 1304 (11th Cir. 2016). But just as a coach must follow the proper procedures and have challenges left to get it, see, e.g., *2025 NFL Rulebook*, NFL Football Operations, Rule 15, § 1, art. 1, <https://operations.nfl.com/the-rules/nfl-rulebook/#rule15>, so must a belated-appeal applicant follow Arkansas’s procedures and show good reason for the delay before the actual review can begin, see *McDonald v. State*, 146 S.W.3d 883, 888–89 (Ark. 2004).

Habeas is not horseshoes. Close doesn’t count. If it did, then the hypothetical postconviction discovery and appointed-counsel motions in *Kholi* should have qualified too. See *Kholi*, 562 U.S. at 556 n.4 (explaining that neither would); see also *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1216 (8th Cir. 2023) (explaining that “we are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings” (citation omitted)). After all, both are a step toward getting review, with the latter motion inviting the same type of cursory look at the merits that Garrett’s belated-appeal motion purportedly does. But cf. *Blue v. Medeiros*, 913 F.3d 1, 7 (1st Cir. 2016) (explaining that “[e]ven [if] a judge must take a peek at the underlying claim to see if the merits are hopeless,”

there is no collateral review without “authority to either alter the judgment or change the sentence”). But none of these motions, neither the ones identified there nor Garrett’s, is a “direct request[] for judicial review of a judgment” or “provide[s] a state court with authority to order relief from” one. *Kholi*, 562 U.S. at 556 n.4. It may get him closer, but it still falls short.

What little Arkansas courts have said about belated-appeal motions supports my view. *Dodson v. Norris*, upon which the court relies, says that filing one is “not part of the *ordinary* appellate review process” for exhausting state remedies before federal habeas review. 288 S.W.3d 662, 665 (Ark. 2008) (emphasis added); see *O’Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999) (explaining that exhaustion requires “one complete round of the State’s established appellate review process,” but “state prisoners do not have to invoke extraordinary remedies”). Rather, it is what happens when a party “fail[s] to follow” it. *Dodson*, 288 S.W.3d at 665. Failing to follow the direct-review process, however, does not somehow transform a motion to reinstate it into an “application for . . . collateral review.” 28 U.S.C. § 2244(d)(2). If anything, the discussion in *Dodson* strongly suggests that a belated-appeal motion is neither “collateral” nor a “review,” exactly the conclusions I would reach today.⁹ *Id.*

⁹ The court’s concerns about comity are puzzling. After all, it is hard to see how comity favors cutting Garrett more slack for his federal habeas petition than he would have received in state court, where Rule 37 petitions must be filed “within ninety days of [a] judgment of conviction *despite* the possibility [of] a motion for belated appeal.” *Shoemate v. State*, 5 S.W.3d 446, 448 (Ark. 1999) (emphasis added). Besides, although “comity, finality, and

IV.

Without a pause in the one-year clock, Garrett’s habeas petition was untimely the moment he filed it. For that reason, the district court made the right call by dismissing it.

federalism” are no doubt important in the habeas context, *Williams v. Taylor*, 529 U.S. 420, 436 (2000), they cannot “trump the best interpretation of the statutory text,” *Patel v. Garland*, 596 U.S. 328, 346 (2022). *See Jimenez*, 555 U.S. at 118 (recognizing that we enforce “plain” statutory text “according to its terms”).

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

Case No. 4:20-cv-01252-LPR

HARL A. GARRETT
ADC #174125

Plaintiff

v.

DEXTER PAYNE

Defendant

ORDER

The Court has received the Proposed Findings and Recommendation (PFR) submitted by United States Magistrate Judge Patricia S. Harris, the Plaintiff's Objections, and the Defendant's Response.¹ After a *de novo* review of the PFR and careful consideration of the Plaintiff's Objections and the entire record in this case, the Court approves and adopts the PFR in its entirety as this Court's findings and conclusions in all respects—with the exception of the PFR's certificate-of-appealability analysis. In light of this, the Amended Petition for Writ of Habeas Corpus (Doc. 22) is DISMISSED as untimely, and Plaintiff's requested relief is denied.

Pursuant to 28 U.S.C. § 2253 and Rule 11 of the Rules Governing Section 2254 Cases in the United

¹ Docs. 31, 36, & 37.

States District Courts, the Court must determine whether to issue a certificate of appealability. In Section 2254 cases, a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make such a showing, the applicant “must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are ‘adequate to deserve encouragement to proceed further.’”² Where, as here, the Petition is denied based on a procedural bar, the foregoing test creates a double hurdle for the applicant. The applicant must show the test is met as to both the procedural basis for the decision and the substantive merits of the Petition.³

With respect to the procedural basis for the ruling, the Court finds that the applicant has carried his burden to obtain certification on one issue. Although the Court agrees with the PFR’s conclusion that the Petition is untimely (and the PFR’s analysis as to why this is so), the Court also believes reasonable jurists could come out the other way. Specifically, reasonable jurists could disagree as to whether a motion for belated appeal in Arkansas qualifies as a basis for statutory tolling. As relevant to § 2244(d)(2), the proper categorization of a motion for a belated appeal in Arkansas is not free from doubt. Is it an application for post-conviction or other collateral review? Is it part of the direct appeal process? Or is it some other *sui generis* animal entirely? As the PFR explains, there’s a circuit split on the issue, and the

² *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (quoting *Gordon v. Willis*, 516 F. Supp. 911, 913 (N.D. Ga. 1980)).

³ *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Eighth Circuit has repeatedly side-stepped it. While not necessarily dispositive of the certification question, these are both strong signs that point to the difficulty of the procedural question and the ample room for disagreement with the Court's conclusion.

With respect to the merits of the Petition, the Court finds—based on the information set out at pages 8-9 of the PFR and given the preliminary stage of this proceeding—that there is potential merit to the claim. The applicant has shown enough (at this early stage) on the merits question to deserve encouragement to proceed further. Additionally, jurists of reason would find it debatable as to whether the applicant was denied his constitutional rights (including effective assistance of counsel and due process for his first appeal of right).

Accordingly, the Court finds that Plaintiff has made a substantial showing of the denial of a constitutional right. The Court hereby issues a certificate of appealability on the statutory tolling issue related to the motion for a belated appeal.⁴

IT IS SO ORDERED this 2nd day of November 2023.

/s/ Lee P. Rudofsky
LEE P. RUDOFISKY
UNITED STATES DISTRICT JUDGE

⁴ See Proposed Findings and Recommendation (Doc. 31) at 11–23.

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

No. 4:20-cv-01252 LPR/PSH

HARL GARRETT

Petitioner

DEXTER PAYNE, Director,
Arkansas Division of Correction (“ADC”)

Respondent

FINDINGS AND RECOMMENDATION

INSTRUCTIONS

The following Recommended Disposition has been sent to United States District Judge Lee P. Rudofsky. You may file written objections to all or part of it. If you do so, those objections must: (1) specifically explain the factual and/or legal basis for your objection; and (2) be received by the Clerk of this Court within fourteen (14) days of this Recommendation. By not objecting, you may waive the right to appeal questions of fact.

DISPOSITION

Harl Garrett (“Garrett”), who is in the custody of the ADC, filed his *pro se* application for writ of habeas corpus pursuant to 28 U.S.C. §2254 on October 19, 2020. In it, Garrett challenges his 2019 conviction in

Garland County Circuit Court for sexual assault in the second degree. The conviction followed a jury trial where Garrett was represented by retained counsel Ben Hooten (“Hooten”). Garrett was sentenced to twenty years’ imprisonment.

Original Petition and Response

In his original petition, Garrett advanced three claims for relief in his petition: (1) Hooten broke their contractual agreement by failing to represent Garrett on direct appeal; (2) Prosecutorial misconduct (allowing the victim to testify); and (3) Prosecutorial misconduct (failure to fully investigate the case). Garrett concedes that his petition was filed more than one year after his conviction became final – he explains that his appeal was denied in April 2020, and he later filed a Rule 37 petition (denied in September 2020) in an attempt to exhaust his state court remedies before the one year limitation period expired. Doc. No. 2, page 13.

Respondent Dexter Payne (“Payne”) argued that Garrett’s first claim was procedurally defaulted due to his failure to raise his counsel’s performance in a timely Rule 37 petition, and that claims two and three were procedurally defaulted due to Garrett’s failure to raise the claims on direct appeal. In the alternative, Payne argued claims two and three were without merit. Doc. No. 11.

Amended Petition and Response

Walter Craig Lambert, appointed to assist Garrett, filed an amended petition for writ of habeas corpus, alleging that Garrett was denied his right to a direct appeal and his right to counsel on direct appeal. Doc. No. 22

In response, Payne now contends that Garrett's claims are barred by the statute of limitations.¹ Doc. No. 23.

Relevant Procedural History

The following dates are relevant in calculating whether Garrett filed his federal habeas petition in a timely fashion and, if not, whether the statute of limitations was tolled.

- **August 26, 2019** – Garrett, represented by retained counsel Hooten, was convicted in Garland County Circuit Court. Doc. No. 11-14, page 327.
- **August 27, 2019** – Garrett was sentenced by the trial court. Doc. No. 11-2. At this time, the trial court advised Garrett of his appellate rights, including the 30 day deadline to file a notice of appeal.
- **August 28, 2019** – The trial court's sentencing order was filed. Doc. No. 11-2. The order affirms that Garrett was notified of his appellate rights.
- **September 11, 2019** – Hooten filed a motion to be relieved as counsel, noting that Garrett desired to appeal the conviction. This motion was electronically filed and hand-delivered to Garrett. Doc. No. 11-3;

¹ In an Order dated December 6, 2021, the Court stated that speculation was required to determine if the petition was timely filed. Doc. No. 27. This was incorrect. Speculation was not required since Garrett conceded he was aware of the factual predicate of his claim on or about October 8, 2019. Doc. No. 26, page 2. This date is more than one year prior to the filing of Garrett's federal habeas petition.

September 11, 2019 – Hooten filed an amended motion to be relieved, adding that Garrett had been given copies of the *Rules of Appellate Procedure—Criminal*, and *Rules of the Supreme Court and Court of Appeals of the State of Arkansas*. This motion was electronically filed and hand-delivered to Garrett. Doc. No. 11-15; and

September 11, 2019 – The trial court granted Hooten’s amended motion to withdraw. The trial court’s order was not served on Garrett. Doc. Nos. 11-4 & 11-5.

- **September 30, 2019** – The time for filing a notice of direct appeal expired.
- **October 8, 2019** (on or about) – Garrett received a letter from trial counsel informing him he was “on his own” regarding an appeal and enclosing a *pro se* Notice of Appeal for Garrett to use. Doc. No. 26, page 2.
- **October 15, 2019** – Garrett signed a Notice of Appeal and Designation of the Record. Doc. No. 11-7, pages 11-13.
- **November 1, 2019** – Hooten sent a letter returning papers and informing Garrett that Hooten could not file a motion to proceed *in forma pauperis* and a motion for belated appeal, and directing Garrett to route the pleadings through the prison mail system. Doc. No. 11-7, page 16.
- **December 16, 2019** – Garrett filed motions in Garland County and with the Arkansas Supreme Court seeking *in forma pauperis*

status and permission to file a belated appeal. Doc. No. 23, page 2.

- **December 23, 2019** – The Arkansas Supreme Court returned the documents to Garrett, informing him that he must submit certified copies of the sentencing order and other documents, such as the order relieving his trial attorney from the case. Doc. No. 11-6, page 2.
- **March 25, 2020** – Garrett filed a timely motion for belated appeal with the Arkansas Supreme Court. Doc. No. 11-7.
- **April 14, 2020** – The Arkansas Court of Appeals summarily denied the motion for belated appeal. Doc. No. 11-8.
- **August 3, 2020** – Garrett filed a Rule 37 petition with the Garland County Circuit Court. Doc. No. 11-9.
- **September 17, 2020** – The Rule 37 petition was dismissed as untimely. Doc. No. 11-10. (Garrett did not appeal this decision.)
- **October 13, 2020** – According to Garrett, he placed a motion to proceed *in forma pauperis* and his federal habeas petition in the prison mail system. Doc. No. 26 at 2.
- **October 19, 2020** – Garrett’s motion to proceed *in forma pauperis* and federal habeas petition were filed with this Court. The motion to proceed *in forma pauperis* was dated October 13, 2020, and the petition for writ of habeas corpus was neither signed nor dated. Doc. Nos. 1 & 2.

Statute of Limitations

Payne contends that the statute of limitations bars consideration of the claims advanced in the amended petition. The parties have fully briefed this argument.

28 U.S.C. § 2244(d) imposes a one year period of limitation on petitions for writ of habeas corpus:

(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.

(2) 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 shall not be

counted toward any period of limitation under this subsection.

The Court is required to answer three questions in determining if Garrett timely sought federal habeas corpus relief: (1) When did the limitations period begin?; (2) In the year after the onset of the limitations period, was the period paused due to statutory tolling?; and (3) In the year after the onset of the limitations period, was the period paused due to equitable tolling? The Court concludes the limitations period began on October 8, 2020, and expired one year later without any time excluded due to statutory or equitable tolling. As a result, Garrett's October 19, 2021, petition for federal habeas corpus relief was untimely, and the Court recommends dismissal on that basis.

Start of the Limitations Period

The statute provides that the limitations period starts from the latest of four dates. 28 U.S.C. § 2244(d)(1)(A)–(D). In this instance, the parties agree that 2244(d)(1)(D) is the governing provision – “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” The factual predicate constitutes the “vital facts underlying” the claims. *Jimerson v. Payne*, 957 F.3d 916, 924 (8th Cir. 2020) (quoting *McAleese v. Brennan*, 483 F.3d 206, 214 (3rd Cir. 2007).

Garrett's claims, that he was denied counsel on direct appeal and that he was denied a direct appeal, did not exist and therefore could not have been discovered by him in the weeks following his conviction. The time for direct appeal had not elapsed. The September 11, 2019 order granting Hooten's amended motion to withdraw as counsel was not

provided to Garrett. As a result, Garrett was not aware that he was “on his own” for purposes of a direct appeal until on or about October 8, 2019, *after* the appeal deadline had passed, when he received a letter from Hooten along with a Notice of Appeal for his use. While Garrett was given notice of his appeal rights by the trial judge at sentencing and by the sentencing order,² he was not made aware that those rights were not being protected by his attorney until after the time to appeal had expired. All he knew is that his attorney had filed a motion to withdraw as counsel. The record is devoid of evidence concerning whether Hooten made efforts to notify Garrett that he had been relieved as counsel before the expiration of the time to appeal. Likewise, there is no evidence of record concerning whether Garrett made efforts to contact Hooten to ensure that Hooten would file a timely notice of appeal.

Garrett concedes that he became aware of his claims on or about October 8, 2019:³

Garrett first learned that he would be “on his own” on or about October 8, 2019, when he received a letter from his trial counsel so informing him and enclosing a *pro se* Notice of Appeal for Garrett to file by himself. The

² The trial judge informed Garrett on August 27, 2019 that he “was entitled to appeal the judgment just pronounced by filing your Notice of Appeal to a higher Court. Your attorney can advise you on how to perfect this appeal. This procedure must be accomplished within thirty days from the date of the judgment in this case or your right to appeal is lost forever.” Docket entry no. 11-14, page 348.

³ Garrett, at another point, fixes the starting point of the limitations period as October 7, 2019. Doc. No. 26, page 5. This one day difference is not determinative.

Notice of Appeal prepared by counsel for Garrett was attached as Exhibit 3 to Garrett's belated appeal motion filed in the Arkansas Supreme Court. *See* Respondent's Exhibit 7 (docket Entry 11). (We are searching for the accompanying letter that counsel wrote to Garrett.) Based on these facts and circumstances, the earliest that Garrett's one year limitations period would have started to run would have been on or about October 8, 2019 because that is the date the "factual predicate" of his claim "could have been discovered through the exercise of due diligence" under 28 U.S.C. §2244(d)(1)(D).

Petitioner's Reply, Doc. No. 26, page 2.

Accepting October 8, 2019 as the commencement of the limitations period, the Court finds that Garrett had until October 8, 2020, to timely file his federal habeas petition, absent statutory or equitable tolling.⁴

Statutory Tolling

"As with any question of statutory interpretation, the Court's analysis begins with the plain language of the statute" and "when the statutory language is plain, we must enforce it according to its terms." *Jimenez v. Quaterman*, 555 U.S. 113, 118 (2009) (citations omitted).

⁴ Garrett argues that the date of filing his federal petition should be calculated using the "mailbox rule." *See Houston v. Lack*, 487 U.S. 266 (1988), and Rule 3(d), Rules Governing Section 2254 Cases in the United States District Courts. A petitioner bears the burden of proving his entitlement to the benefit of the mailbox rule. *Porchia v. Norris*, 251 F.3d 1196, 1198 (8th Cir. 2001). Even generously assuming the applicability of the mailbox rule and assuming Garrett placed his petition in the prison mail system on October 13, 2020, the petition was still untimely.

The statutory language at issue here provides that 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 shall not be counted toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2).

In Garrett’s case this language comes into play in two instances. First, Garrett sought Rule 37 relief in state court, filing his petition with the trial court on August 3, 2020. The petition was dismissed as untimely on September 17, 2020. Doc. No. 11-10. The Rule 37 petition fits within the statutory description since Rule 37 is the typical path to postconviction relief in Arkansas – it is clearly an “application for State post-conviction or other collateral review with respect to the pertinent judgment.” In Arkansas, a Rule 37 petition is the appropriate avenue for postconviction review, and all grounds for postconviction relief are to be brought in a Rule 37 petition. *See* Ark. R. Crim. P. 37.1(a), 37.2(b) (2007); *McCoy v. Norris*, No. 07-CV-1038, 2008 WL 5263645, at 2 (W.D. Ark. Dec. 18, 2008). However, the statute requires the application to be “properly filed” and an untimely Rule 37 petition fails this test. As a result, the 45 days during which the Rule 37 petition was pending did not toll the statute of limitations because the petition was not “properly filed” as required by the plain language of the statute. *Pace v. DeGuglielmo*, 544 U.S. 408, 417 (2005)(untimely state post-conviction petition is not a “properly filed application for State post-conviction or other collateral review” that would toll one year statute of limitations of § 2244(d)(2)).

Second, and more problematic, Garrett contends the time during which he was pursuing a belated appeal (the twenty day period from March 25 through April

14, 2020) should be excluded from the limitations period. The statute requires the Court to answer a series of questions to determine whether the limitations period was tolled: one, was the motion for belated direct appeal “properly filed?”; two, was the motion for belated direct appeal an “application for State post-conviction or other collateral review?”; and three, did the motion for belated direct appeal relate to “the pertinent judgment or claim?” If all three of these questions are answered affirmatively, then the twenty day period would be excluded from the limitations period, and Garrett’s federal habeas petition was timely filed.

With respect to the first of the three questions, the Court finds that Garrett’s motion for belated direct appeal was properly filed – Arkansas law allows eighteen months for the filing of such a motion, and Garrett timely filed the March 2020 motion in the proper forum with the Arkansas Supreme Court. *See* Ark. R. App. P. Crim. 2(e). The third question is also answered affirmatively – the motion for belated direct appeal was related to Garrett’s judgment or claim. With regard to the second question, however, the Court finds that the motion for belated direct appeal was not, under the plain language of the statute, an “application for State post-conviction or other collateral review.” Since post-conviction review in Arkansas is synonymous with Rule 37, the motion for belated direct appeal does not fit in the “post-conviction” category. Ark. R. Crim. P. 37.1(a) describes the scope of Rule 37, while Ark. R. Crim. P. 37.2(b) provides that all grounds for relief must be raised in a Rule 37 petition. *See also Calianno v. Hobbs*, 2013 WL 628595, at 2 (W.D. Ark. Jan. 28, 2013) (“In Arkansas, all grounds for post-conviction relief are to be brought in a Rule 37 petition filed in the appropriate state circuit court.”).

The remaining question, then, is if the motion for belated direct appeal was an application for “other collateral review.”

The United States Supreme Court provides crucial guidance in determining whether Garrett’s motion for belated direct appeal is an application for “collateral review” within the meaning of 28 U.S.C. § 2244(d)(2). In *Wall v. Kholi*, 562 U.S. 545 (2011), the Court considered whether a Rhode Island state court motion to reduce sentence was an application for collateral review. Noting that “collateral review” was not a defined term in the statute, the Court turned to the ordinary understanding of the phrase. The Court found “collateral” ordinarily meant “indirect” or “ancillary,” i.e., not part of direct review. 562 U.S. at 551-552. According to the Court, the meaning of “review” is best understood as “judicial reexamination.” Combining the two terms, the Court held the phrase “collateral review” in § 2244(d)(2) means “a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process.” 562 U.S. at 553. Since the Rhode Island motion to reduce sentence was not part of the direct review process, and since it required the trial judge to reexamine the sentence imposed, the Court found it qualified as an application for collateral review, triggering statutory tolling.

In Garrett’s case, the Supreme Court’s definition of collateral review yields a different result from that in *Wall v. Kholi*. Two key factors dictate this conclusion. First, Garrett’s motion was related to the direct review process, not an ancillary or indirect proceeding. Both the style of Garrett’s pleading and the substance of the pleading evidence his intent to secure a direct appeal of his conviction. The Arkansas rule itself provides

relief for a failure to pursue a direct appeal, without reference to other proceedings.⁵ “The Supreme Court may act upon and decide a case in which the notice of appeal was not given or the transcript of the trial record was not filed in the time prescribed, when a good reason for the omission is shown by affidavit.” Ark. R. App. P. Crim. 2(e).

Second, the motion to file a belated direct appeal does not call for a reexamination of the sentence, as in *Wall*, where the statute directed the trial judge to consider at least five factors⁶ to assess whether the sentence was appropriate. Instead, only one question is posed by Garrett’s motion, and this question does not involve the judgment or sentence – does good reason exist for the failure to properly appeal? Arkansas cases dealing with motions for belated direct appeal consistently consider only whether good reason was established for the failure to appeal. See *McDonald v. State*, 356 Ark. 106, 111 (2004); *Porter v. State*, 287 Ark. 359, 360 (1985); and *Jones v. State*, 334 Ark. 236, 236-237 (1998). These cases do not delve into the merits of any claims which might be raised if the belated appeal is granted. Thus, the motion for belated

⁵ The Arkansas rule also applies to a failure to appeal a Rule 37 postconviction application. Garrett did not appeal his Rule 37 denial, nor did he file a motion for belated postconviction appeal. So this provision does not apply in this case. However, this Court has recognized that a properly filed motion for belated *post-conviction* appeal tolls the limitation period. *Murry v. Norris*, No. 5:06CV00014 WRW, 2006 WL 1342809, at 4 (E.D. Ark. May 16, 2006). This highlights the meaningful distinction between direct and postconviction proceedings.

⁶ The Rhode Island trial judge was to examine several factors, including the severity of the crime, the defendant’s background and potential for rehabilitation, the element of social deterrence, and the appropriateness of the punishment. 562 U.S. at 556.

direct appeal provided Garrett a limited opportunity to establish why he failed to properly appeal. The motion for belated direct appeal did not invite re-examination, or review, of Garrett’s judgment or claim.

The Eighth Circuit Court of Appeals has not had occasion to interpret *Wall v. Kholi* and has not squarely addressed the question of statutory tolling during the pendency of a motion for belated direct appeal.⁷ Other Circuits have interpreted *Kholi* with regard to various state court motions, with differing outcomes. The general trend of these cases is that motions to reduce, review, revise, or modify a sentence have been reckoned to be collateral review applications.⁸ On the other hand, Courts guided by *Kholi* have regarded the following motions as *not* collateral in nature: to stay execution; for postconviction

⁷ In 2006, the Court, for the fourth time, was faced with this issue. “Thrice before we have alluded to this issue, but for various reasons have not yet directly resolved it. *See Watts v. Norris*, 356 F.3d 937, 942 (8th Cir.2004); *Wright v. Norris*, 299 F.3d 926, 928 (8th Cir.2002); *Mills v. Norris*, 187 F.3d 881, 884 n. 4 (8th Cir.1999). This case makes a fourth time, as we affirm the district court’s dismissal . . . on an alternative ground.” *Lewis v. Norris*, 454 F.3d 778, 779 (8th Cir. 2006).

⁸ E.g., a motion to reduce sentence in Rhode Island, Florida, Maryland, Massachusetts, Wyoming, Montana, Oklahoma, Georgia, and Colorado are deemed to be collateral review petitions. *See Wall v. Kholi, supra*; *Rogers v. Secretary, Department of Corrections*, 855 F.3d 1274 (11th Cir. 2017) (Florida); *Mitchell v. Green*, 922 F.3d 187 (4th Cir. 2019) (Maryland); *Holmes v. Spencer*, 685 F.3d 51 (1st Cir. 2012) (Massachusetts); *Najera v. Murphy*, 462 F.App’x 827 (10th Cir. 2012) (Wyoming); *Branham v. Montana*, 996 F.3d 959 (9th Cir.), cert. denied, 142 S. Ct. 454 (2021) (Montana); *Doby v. Dowling*, 632 F. App’x 485 (10th Cir. 2015) (Oklahoma); *Westmoreland v. Warden*, 817 F.3d 751 (11th Cir. 2016) (Georgia); and *Lomax v. Davis*, 484 F. App’x 206 (10th Cir. 2012) (Colorado).

discovery or for appointment of counsel; for belated postconviction appeal; for DNA evidence; for transcripts and exhibits; and to reinstate postconviction proceedings.⁹

The case most comparable, and most instructive, is the Eleventh Circuit Court of Appeals' consideration of a Florida motion for belated direct appeal. In *Danny v. Secretary, Florida Department Of Corrections*, 811 F.3d 1301 (11th Cir. 2016), the Court held that Danny's pending motion for belated direct appeal did not toll the federal limitations period. Danny entered a guilty plea in September 2010 and filed a petition for belated direct appeal in February 2011, arguing that his attorney had disregarded his instructions to file a motion to withdraw the plea and a notice of appeal. The motion for belated direct appeal was decided in October 2011. Danny's federal habeas corpus petition would have been timely filed had the motion for belated direct appeal operated to toll the limitations period. As in this case, the pivotal question was whether the petition for belated direct appeal qualified as an "application . . . for State collateral review." 28 U.S.C. § 2244(d)(2). Citing *Kholi, supra*, and its interpretation of "collateral review," the Court determined that Danny's petition for belated direct appeal did not invite "a judicial reexamination of a judgment or claim." 811 F.3d at 1304. Instead, the Court noted that a Florida motion for belated direct appeal, if successful, only revived a petitioner's right

⁹ See *Blue v. Medeiros*, 913 F.3d 1 (1st Cir. 2019); *Collins v. Ercole*, 667 F.3d 247 (2nd Cir. 2012); *Espinosa v. Sec'y, Dep't of Corr.*, 804 F.3d 1137 (11th Cir. 2015); *Woodward v. Cline*, 693 F.3d 1289 (10th Cir. 2012); *Levering v. Dowling*, 721 F. App'x 783 (10th Cir. 2018); and *Cantu v. Fla.*, 778 F. App'x 760 (11th Cir. 2019), respectively.

to pursue a direct appeal. This is consistent with the Arkansas rule – had Garrett succeeded with his motion for belated direct appeal, he would have only won the right to an appeal. “In contrast, to qualify for statutory tolling, a collateral pleading must ‘request[] . . . judicial review of a judgment and . . . provide a state court with authority to order relief from a judgment.’ *Kholi*, 131 S.Ct. at 1286 n.4. Danny’s petition did neither.” *Id.* For the same reasons, Garrett’s motion for belated direct appeal did not qualify as an application for collateral review under 28 U.S.C. § 2244(d)(2).

Garrett urges the Court to go a different direction and follow *Board v. Bradshaw*, 805 F.3d 769 (6th Cir. 2015), and other Sixth Circuit Court of Appeals cases. In *Board*, the Court found that a petitioner’s motion for leave to file late notice of appeal tolled the federal habeas limitations period. Ohio Appellate Rule 5(A) allows a petitioner to seek leave to appeal and directs the petitioner to “set forth the reasons” for his failure to perfect an appeal as of right. Ohio App. Rule 5(A)(2). The Ohio rule is similar to Ark. R. App. P. Crim. 2(e) and to the Florida rule at issue in *Danny*, but has no time limit for filing motions for leave to file a delayed appeal. *Board v. Bradshaw*, 805 F.3d at 773. The holding in *Board* is straightforward and departs from *Danny*, finding that an Ohio motion for leave to file a delayed appeal is *not* part of the direct review process. Instead, the Court deemed the motion to be a “collateral” application under the federal statute, tolling the limitations period. The *Board* decision cites a string of Sixth Circuit opinions, beginning with *Searcy v. Carter*, 246 F.3d 515 (6th Cir. 2001), holding an Ohio motion for delayed appeal to be an application for collateral relief that tolled the limitations period. *See also Anderson v. Brunsman*, 562 Fed.Appx 426 (6th

Cir. 2014), *Applegarth v. Warden N. Cent. Corr. Inst.*, 377 Fed.Appx. 448 (6th Cir. 2010), and *DiCenzi v. Rose*, 452 F.3d 465 (6th Cir. 2006).

The Eleventh Circuit’s decision in *Danny*, founded upon *Kholi*’s analysis of the statutory language, persuades the Court that Garrett’s motion to file a belated direct appeal did not toll the limitations period. In declining to follow *Board*, the Court notes that three of the four cases cited by the Sixth Circuit (*Searcy* in 2001, *DiCenzi* in 2006, and *Applegarth* in 2010) predate *Kholi*.¹⁰ Further, the *Board* decision does not discuss *Kholi*.¹¹ *Board* and other Sixth Circuit cases do not compel the result Garrett seeks.

Payne argues that *Jimenez v. Quarterman*, 555 U.S. 113 (2009) and *Streu v. Dormire*, 557 F.3d 960 (8th Cir. 2009) compel a finding that the limitations period was not statutorily tolled while Garrett’s motion was pending. The Court need not, and does not, rely on these cases.

¹⁰ In an opinion which also predated *Kholi* the Eighth Circuit Court of Appeals invited clarification of the nature of the motion for belated direct appeal from the Arkansas Supreme Court. “[i]t will help the federal courts in Arkansas apply AEDPA’s one-year statute of limitations in the future if the Supreme Court of Arkansas further clarifies” if the motion for belated appeal is part of the ordinary appellate review procedure. *Wright v. Norris*, 299 F.3d 926, 929 n. 3 (8th Cir. 2002). While clarification from the Arkansas Supreme Court has not been forthcoming, the Court finds that *Kholi* amply clarifies the proper view of a motion for belated direct appeal.

¹¹ In a later unreported decision, the Sixth Circuit Court of Appeals made clear that not all motions are collateral petitions tolling the limitations period. Citing *Kholi*, the Court noted that filings which do not attack the underlying judgment would not toll the limitations period. *Fears v. Noble*, 2018 WL 1401806 (6th Cir. Feb. 14, 2018).

In *Jimenez*, the United States Supreme Court considered a Texas state habeas corpus petition which resulted in the granting of a belated appeal for the petitioner. The question was whether the granting of a motion for belated direct appeal might change, or reset, the date on which a judgment was deemed “final” under § 2244(d)(1)(A). The Court found that the granting of a motion for belated appeal restored the pendency of the appeal, resulting in a new “final” date of judgment. 555 U.S. at 120. The Court stressed the limited nature of the decision:

Our decision today is a narrow one. We hold that, where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet “final” for purposes of § 2244(d)(1)(A). In such a case, “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review” must reflect the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that appeal.

555 U.S. at 121.

Payne stresses the *Jimenez* phrase that granting the motion for belated direct appeal *restores the pendency* of the appeal. While Payne is technically correct, the restoration of an appeal is not the issue before the Court. Garrett sought but was denied his belated direct appeal. Had he succeeded in his motion for belated appeal, *Jimenez* dictates his appeal would have been restored and the date on which his conviction became final would have been re-calculated.

Thus, *Jimenez* provides an academic exercise on what might have been if Garrett's motion had been granted. The answer is that, under § 2244(d)(1)(A), the pendency of Garrett's appeal would have been restored. The pendency of his appeal is not the issue, however. The relevant provision is § 2244(d)(2), and the relevant question is whether Garrett's pending motion for belated direct appeal tolled the limitations period. A clear distinction between the *pendency of his appeal* and the *pendency of his motion* is necessary. The narrow holding of *Jimenez* addressed the finality of a conviction but does not answer the question regarding the tolling effect of Garrett's motion for belated direct appeal.¹²

Like *Jimenez*, *Streu v. Dormire*, 557 F.3d 960 (8th Cir. 2009) is educational but does not address whether an Arkansas motion for belated direct appeal tolls the limitations period. In *Streu*, a Missouri petitioner filed a motion for leave to file a belated notice of appeal of the denial of his state *postconviction* petition. Streu's motion for leave was granted and he filed a notice of appeal with respect to his postconviction application. When he later sought federal habeas corpus relief, one of the issues was whether the limitations period was tolled by the filing of his motion for leave to file a belated notice of appeal. The Court held that Streu's motion to reopen state postconviction proceedings was "a properly filed application for State post-conviction or other collateral review" and, as such, the limitations

¹² Any temptation to suggest that Garrett's motion for belated direct appeal was not "pending" unless and until it was granted runs counter to the proposition which began the Court's analysis – reliance upon the plain statutory language and the ordinary meaning of the word "pending." Upon filing, Garrett's motion for belated appeal was pending for twenty days until denied.

period was tolled while the motion was pending. This holding, however, sheds no light on whether Garrett's motion for belated *direct* appeal pauses the limitations clock. Streu's petition was clearly a postconviction application fitting neatly in the statutory framework. As a result, the *Streu* Court did not consider the possible tolling effect of a motion for belated *direct* appeal.

In summary, *Wall v. Kholi*, 562 U.S. 545 (2011), provides the most useful framework for analyzing Garrett's motion for belated direct appeal and its effect on the limitations period. Such a motion is not one for "other collateral review" under the statute. Consequently, Garrett's motion for leave to file belated direct appeal did not trigger statutory tolling.^{13 14}

¹³ The Court is also aware of an unpublished 2012 opinion authored by United States Magistrate Judge Jerome T. Kearney, where this Court declined to toll the limitations period after the filing of an Arkansas motion for belated appeal:

In this case, Petitioner's motions for belated appeal did not toll the statute of limitations. *Jimenez v. Quarterman*, 555 U.S. at 120 (a timely and successful motion for belated appeal restores the pendency of the direct appeal process); *Young v. Hobbs*, 2011 WL 1480312, at 3 E.D. Ark. Mar. 29, 2011); *Shoemate v. Norris*, 2003 WL 23989923, at 6 (E.D. Ark. July 25, 2003) (holding "a motion for belated appeal does not equate with an appeal. No appeal would be pending until—and unless—the motion was granted."). Thus, the petition is barred as untimely.

Gray v. Hobbs, No. 5:10CV00218 JTK, 2012 WL 1648401, at 3 (E.D. Ark. May 10, 2012).

The *Gray* opinion reaches the same result as in this Finding and Recommendation, but based upon a different approach.

¹⁴ Garrett also argues that the doctrine of comity requires this Court to toll the limitations period based upon the mere filing of

Equitable Tolling

The Court recognizes that equitable tolling may provide an excuse for the failure to file a timely federal habeas petition under some circumstances:

Equitable tolling is appropriate where extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time, or where a defendant's conduct lulls the prisoner into inaction. *Id.* The doctrine applies "only when some fault on the part of the defendant has caused a plaintiff to be late in filing, or when other circumstances, external to the plaintiff and not attributable to his actions, are responsible for the delay." *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir.2002). Equitable tolling is an "exceedingly narrow window of relief." (*Citation omitted*).

Maghee v. Ault, 410 F.3d 473, 476 (8th Cir. 2005). The Court must determine if Garrett's failure to file a timely federal petition should be excused due to equitable tolling.

Garrett contends he was diligent in pursuing his rights and that he was lulled into inaction by the Arkansas procedure for seeking a belated appeal. This argument is without merit.

Garrett made efforts in state court, as outlined in the timeline herein. Notably, he took some steps toward a belated appeal in December 2019 and in

his motion for belated appeal. While the statute's goal of promoting comity, finality, and federalism is promoted by giving state courts the initial opportunity to address claims and correct constitutional errors, comity is not so broadly construed to cover every filing in state court to toll the limitations period.

March 2020. The denial of his motion for belated appeal on April 14, 2020 concluded his pursuit of a direct appeal well in advance of the expiration of the federal limitations period. Garrett's Rule 37 petition was both filed and decided prior to the expiration of the federal limitations period (filed on August 3, 2020, and denied on September 17, 2020). Even assuming that Garrett was under the mistaken impression that he had to await decisions from the Arkansas courts he still had time to file his federal petition in a timely fashion. More importantly, Garrett cannot cite his state court efforts to establish diligence regarding the filing of his federal petition because he could have protectively filed his federal petition while proceeding in state court.¹⁵ See *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005), and *Gordon v. Arkansas*, 823 F.3d 1188, 1195 n.4 (8th Cir. 2016). Though Garrett may be credited for some state court efforts, he did not exercise the diligence required to warrant equitable tolling. A petitioner must make "good use of the time available to him within the limitations period . . . to justify equitable tolling." *Coulter v. Kelley*, 871 F.3d 612, 623 (8th Cir. 2017) judgment vacated, appeal dismissed, 876 F.3d 1112 (8th Cir. 2017).

In addition, the Arkansas procedure for seeking a belated appeal did not lull him into inaction that excuses his tardy filing. Garrett does not expand

¹⁵ In Arkansas, a motion for belated appeal can be filed within eighteen months after a conviction. A federal petitioner could therefore file a timely motion for belated appeal in state court *after the expiration of the federal limitations period*. A petitioner claiming diligence under those circumstances would not be entitled to equitable tolling since he neglected to act in federal court during the limitations period. See *Painter v. Iowa*, 247 F.3d 1255 (8th Cir. 2001) (no limitations period to toll after the one-year period has run).

greatly on this argument. The Arkansas procedure is not inherently deceptive. In addition, the eighteen month time frame in which to file a motion for belated appeal does not lull a petitioner into inaction. There is no shortage of post-conviction and collateral proceedings in Arkansas and elsewhere, and there is no requirement that the time limits with these proceedings mirror the one year federal limitations period. The available time frame in which to file the motion for belated direct appeal is not a factor which activates equitable tolling.

Garrett next argues that *Holland v. Florida*, 560 U.S. 631 (2010) works in concert with *Martinez v. Ryan*, 566 U.S. 1 (2012) and *McQuiggin v. Perkins*, 569 U.S. 383 (2013), to equitably toll the limitations period. Equitable tolling was warranted in *Holland* because the court-appointed attorney for the petitioner failed to file a timely federal habeas corpus petition. The petitioner's diligence was demonstrated by repeated letters to his attorney, which typically went unanswered, as well as legal research performed by the petitioner and letters to the Florida Supreme Court. Both the attorney's failures and Holland's efforts extended over the better part of five years. Notably, Holland's attorney also provided blatantly incorrect advice about the running of the limitations period. Noting that a "garden variety claim" of attorney negligence would not warrant equitable tolling, the Supreme Court found Holland's attorney's misconduct to be egregious, satisfying the test for equitable tolling. 560 U.S. at 652.

To the extent that Garrett relies upon *Holland* to establish equitable tolling, this argument is without merit. Unlike in *Holland*, Hooten's acts and omissions did not extend throughout the limitations period. Hooten's interaction with Garrett concluded around

November 1, 2019. Also, Garrett’s diligence did not match that of the petitioner in *Holland*. The result is that there was no causal connection between Hooten’s behavior in September-November 2019 and Garrett’s inability to file his federal petition in a timely fashion on or before October 8, 2020. To the contrary, Garrett could have filed a timely federal petition in spite of Hooten’s withdrawal from his criminal case.

It appears that the general notion underlying Garrett’s argument regarding *Holland*, *Martinez*, and *McQuiggin* is that the doctrines espoused in *Martinez* and *McQuiggin* excuse some types of procedural defaults and they should likewise excuse a petitioner from his failure to timely file his federal petition. The Court understands Garrett’s arguments as an invitation to extend *Martinez* and *McQuiggin* because Hooten’s acts and omissions produced a result worse than the result in *Holland*.

Garrett’s argument fails for two reasons.

First, these cases, both dealing with procedural default and not with equitable tolling, are exceedingly narrow holdings by their own terms. The *Martinez* Court emphasized it was recognizing a “narrow exception” whereby cause for procedural default might be shown by proving inadequate assistance of counsel at an initial postconviction proceeding, and the *McQuiggin* Court stressed that the actual innocence exception it was recognizing might overcome a procedural default but the exception would be “rare” and seldom met. 566 U.S. at 9, and 569 U.S. at 386. The admittedly narrow nature of these cases render them unsuitable candidates as a foundation for expanding the doctrine of equitable tolling as urged by Garrett.

Second, the Eighth Circuit explicitly rejected the argument that actual innocence should warrant equitable tolling because it excuses some procedural defaults. *See Flanders v. Graves*, 299 F.3d 974 (8th Cir. 2002):

Petitioner argues that [the doctrine of actual innocence], which excuse[s] some types of procedural defaults, should likewise excuse his failure to file his petition within the period fixed by Act of Congress, a failure which he characterizes as a similar “procedural default.” We cannot agree with this assertion, at least as a broad concept. We are dealing here with a statute. It is our duty to apply statutes as written. The statute fixes a one-year period of limitations, and says nothing about actual innocence, even though other parts of AEDPA, enacted at the same time, do refer to this doctrine. Compare 28 U.S.C. § 2244(d)(1), with 28 U.S.C. § 2244(b)(2)(B)(ii). It is not our place to engraft an additional judge-made exception onto congressional language that is clear on its face.

299 F.3d at 977. The Court also notes that Garrett does not argue actual innocence in this matter.

In summary, equitable tolling is infrequently appropriate, and requires extraordinary circumstances beyond a prisoner’s control which made it impossible to file a petition on time. In addition to alleged errors made by Hooten and the trial court, Garrett made unfortunate choices in navigating his way through state court proceedings. There were, however, no “extraordinary circumstances beyond [his] control that made it impossible for him to file a timely [federal habeas] petition, and nothing in [the state’s] conduct

can be said to have lulled [him] into inaction.” *Cross-Bey v. Gammon*, 322 F.3d 1012, 1015 (8th Cir. 2003). *See also Shoemate v. Norris*, 2003 WL 23989923 (E.D. Ark. July 25, 2003) (*pro se* status, lack of legal knowledge or legal resources, confusion about or miscalculation of the limitations period, or failure to comprehend the ramifications of previous postconviction actions are inadequate to warrant equitable tolling). Equitable tolling does not apply in this case.

Conclusion

A number of issues are *not* before the Court. For example, should Hooten have filed a notice of appeal on Garrett’s behalf? Should the trial court have appointed substitute counsel for Garrett’s appeal? Should the Order granting Hooten’s motion to withdraw have been served on Garrett? Was Garrett entitled to a direct appeal with the assistance of counsel? On what basis did the Arkansas Court of Appeals deny Garrett’s motion for belated appeal? And unfortunately, these questions cannot be addressed in this matter.

The precise issues before the Court are whether Garrett filed a timely petition and, if not, whether his untimeliness was excusable. Garrett’s petition was untimely, and neither statutory nor equitable tolling excuse his tardiness. As a result, the Court recommends that the petition be dismissed as untimely and the relief requested be denied.

Pursuant to 28 U.S.C. § 2253 and Rule 11 of the Rules Governing Section 2554 Cases in the United States District Court, the Court must determine whether to issue a certificate of appealability in the final order. In § 2254 cases, a certificate of appealability may issue only if the applicant has made a

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substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(1)-(2). The Court finds no issue on which petitioner has made a substantial showing of a denial of a constitutional right. Thus, we recommend the certificate of appealability be denied.

IT IS SO ORDERED this 25th day of May, 2022.

/s/ Patricia S. Harris

UNITED STATES MAGISTRATE JUDGE

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APPENDIX E

IN THE CIRCUIT COURT OF GARLAND COUNTY,
ARKANSAS CRIMINAL DIVISION

No. CR 2018-670-IV

STATE OF ARKANSAS

Plaintiff

vs.

HARL GARRETT

Defendant

ORDER

The above referenced case was presented to this court on Petitioner's Rule 37 Petition filed in this court August 3, 2020. The Sentencing Order in this case was filed in this court August 28, 2019. Petitioner's conviction for Sexual Assault in the Second Degree was the result of a jury verdict on August 27, 2019. Petitioner filed a Notice of Belated Appeal on December 16, 2019. By Formal Order of the Arkansas Court of Appeals in their case number App CR 20-191 Appellant's pro se Motion for Belated Appeal was denied on April 15, 2020.

THE COURT FINDS the Rule 37 Petition is untimely filed as it is filed more than sixty (60) days of the date the appeal was dismissed. ARCrP Rule 37.2 (c) (iii). THE COURT FURTHER FINDS the Rule 37 Petition is untimely pursuant to ARCrP Rule 37.2 (g) as it was deposited into the mail at the Grimes Unit of

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the Arkansas Department of Corrections on July 17, 2020 and this date is beyond the sixty (60) day time limit as well. This court cannot grant relief on an untimely petition.

THE RULE 37 PETITION IS DISMISSED WITH
PREJUDICE

/s/ Marcia R. Hearnberger
Marcia R. Hearnberger
Circuit Judge

DATE 9-19-20

Distribution:

Prosecuting Attorney (via E-Flex)

Hari Garrett, ADC#174125
300 Corrections Drive
Newport, AR 72112

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AND AFFIX THE SEAL OF SAID COURT
OF APPEALS, AT MY OFFICE IN THE
CITY OF LITTLE ROCK, THIS 15TH DAY
OF APRIL, 2020.

/s/ Stacey Pectol
CLERK

BY: _____
DEPUTY CLERK

ORIGINAL TO CLERK

CC: HARL GARRETT

DARNISA EVANS JOHNSON,
DEPUTY ATTORNEY GENERAL

HONORABLE MARCIA R. HEARNSBERGER,
JUDGE

SENTENCING ORDER

IN THE CIRCUIT COURT OF Garland COUNTY, ARKANSAS,
Eighteenth East JUDICIAL DISTRICT 4 DIVISION

On 8/27/2019 the Defendant appeared before the Court, was advised of the nature of the charge(s), of Constitutional and legal rights, of the effect of a guilty plea upon those rights, and of the right to make a statement before sentencing.

Defendant [Last, First, MI]	Garrett, Harl Allen	DOB	11/10/1944	Sex	☒ Male ☐ Female	Total Number of Counts	1
SID#	413180	Race & Ethnicity	☒ White ☐ Black ☐ Pacific Islander ☐ Unknown	Asian	☐ Asian ☐ Hispanic	Native American	
Supervision Status at Time of Offense	N/A						

Judge	Marcia Hearnberger	File Stamp
Prosecuting Attorney/Deputy	Ron Jones	
Defendant's Attorney	Ben Hooten	☒ Private ☐ Appointed
Change of Venue	☐ Yes ☒ No	☐ Public Defender ☐ Pro Se
If Yes, from:	N/A	

☐ Pursuant to A.C.A. 16-93-301 et seq., or ☐ this Court, without making a finding of guilt or entering a judgment of guilt and with the consent of the Defendant defers further proceedings and places the Defendant on probation.

There being no legal cause shown by the Defendant, as requested, why judgment should not be pronounced, a judgment:

☐ is hereby entered against the Defendant on each charge enumerated, fines levied, and court costs assessed. Defendant was advised of the conditions of the sentence and/or placement on probation and understands the consequences of violating those conditions. The Court retains jurisdiction during the period of probation/suspension and may change or set aside the conditions of probation/suspension for violations or failure to satisfy Department of Community Correction (D.C.C.) rules and regulations.

☒ of conviction is hereby entered against the Defendant on each charge enumerated, fines levied, and court costs assessed. The Defendant is sentenced to the Arkansas Department of Correction (A.D.C.) for the term specified on each offense shown below.

Defendant made a voluntary, knowing and intelligent waiver of right to counsel. ☐ Yes ☒ No

A.C.A. # / Name of Offense	5-14-125 - SEXUAL ASSAULT IN THE SECOND DEGREE (8/13/2001 and thereafter)	Case #	2018-670-IV
A.C.A. # Orig. Charge	5-14-103	ATN	GAR004482755
Offense Date	3/1/2017	Appeal from District Court	☐ Yes ☒ No
Criminal History Score	0	Seriousness Level	6
Offense is	☒ Felony ☐ Misd.	Violation	☐ Y ☐ A ☒ B ☐ C ☐ D ☐ U
Presumptive Sentence	☒ Prison Sentence of 24 to 24 months	Community Corrections Center	☒ Alternative Sanction
Number of Counts	1	Defendant	☐ Attempted ☐ Solicited ☐ Conspired to Commit the Offense
Defendant Sentence	☒ ADC ☐ Jud Trans ☐ Cnty Jail	If probation or SIS accompanied by period of confinement, state time:	_____ days _____ mths
Imposed	240 months	Sentence was enhanced	_____ months, pursuant to A.C.A.
Probation	0 months	Enhancement(s) is to run	☐ Concurrent ☐ Consecutive
SIS	0 months	Defendant was sentenced as a habitual offender, pursuant to A.C.A. 5-4-501, subsection	
Other	☐ Life ☐ LWOP ☐ Death	Defendant	☐ (a) ☐ (b) ☐ (c) ☐ (d)
Victim Information	☐ N/A ☒ Yes ☐ No	Age	10
Multiple Victims	☐ Male ☒ Female	Race & Ethnicity	☒ White ☐ Black ☐ Asian ☐ Native American
Defendant voluntarily, intelligently and knowingly entered a		Defendant	☐ 16-93-301 et seq. ☐ Other
☐ negotiated plea of	☐ guilty ☐ nolo contendere	☐ was sentenced pursuant to	☐ court ☐ jury
☐ plea directly to the court of	☐ guilty ☐ nolo contendere	☒ was found guilty by the court & sentenced by	☐ court ☒ jury
		☐ was found guilty at a jury trial & sentenced by	☐ court ☐ jury
		☐ was found guilty of lesser offense by	☐ court ☐ jury
Sentence is a Departure	☐ Yes ☐ No ☒ N/A	Sentence Departure	☐ Durational ☐ Dispositional ☐ Both
Departure Reason	Mitigating # _____	If Durational, state how many months above/below the Presumptive Sentence	0
	or Aggravating # _____	(For Agg #17, Mit #9 or departure from guidelines, explain)	
Sentence will run	☐ Consecutive ☐ Concurrent	to Offense # _____	or to Case # _____

Respondent's Exhibit 1

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Defendant's Full Name: Garrett, Harl Allen

Special Conditions		Sex Offenses		Domestic Violence Offenses	
Defendant has been adjudicated guilty of an offense requiring sex offender registration and must complete the Sex Offender Registration Form and pay the Mandatory Sex Offender Fee. ☒ Yes ☐ No		Defendant has committed an aggravated sex offense as defined in A.C.A. 12-12-903 ☐ Yes ☒ No		Defendant has been adjudicated guilty of a domestic-violence related offense and must pay additional court costs of \$25 under Act 583 of 2017. ☐ Yes ☒ No	
Defendant is alleged to be a sexually dangerous person and is ordered to undergo an evaluation at a facility designated by A.D.C. pursuant to A.C.A. 12-12-918. ☐ Yes ☒ No		Defendant has been adjudicated guilty of an offense requiring registration and has previously been adjudicated guilty of a prior sex offense under a separate case number. If yes, list prior case numbers. ☐ Yes ☒ No Case Number(s)		Defendant was originally charged with a domestic-violence related offense. ☐ Yes ☒ No If Yes, state the A.C.A. # of the Offense	
Defendant has been adjudicated guilty of an offense requiring registration and has previously been adjudicated guilty of a prior sex offense under a separate case number. If yes, list prior case numbers. ☐ Yes ☒ No Case Number(s)		DNA Sample / Qualifying Offenses Defendant has been adjudicated guilty of a qualifying offense or repeat offense as defined in A.C.A. 12-12-1103. ☒ Yes ☐ No Defendant is ordered to have a DNA sample drawn at ☐ a D.C.C. Facility ☒ the A.D.C. ☐ Other		Drug Crime Defendant has been adjudicated guilty of a drug crime as defined in A.C.A. 12-17-101. ☐ Yes ☒ No	
Court Costs \$150.00		Restitution Payable to [If multiple beneficiaries, give names and payment priority]			
Fines \$2,017.00					
Booking/Admin Fees (\$20) \$40.00					
Drug Crime Assessment Fee (\$125) \$0.00					
DNA Sample Fee (\$250) \$250.00		Terms ☐ Due Immediately ☐ Installments of:		☐ Yes ☒ No	
Children's Advocacy Center Fund Fee \$0.00		☐ Payments must be made within _____ days of release from A.D.C.		☐ Yes ☒ No	
Public Defender User Fee (\$25) \$0.00		☐ Upon release from confinement, Defendant must return to court to establish payment of restitution.		☐ Yes ☒ No	
Public Defender Attorney Fee \$0.00		☐ Restitution is joint and several with co-defendant(s) who was found guilty. List name(s) and case number(s).		☐ Yes ☒ No	
Other (explain below) \$250.00					
Sex Offender Fee \$250.00					
Sentence Options					
Defendant was convicted of a target offense(s) and is sentenced pursuant to provisions of the Community Punishment Act. ☐ Yes ☒ No The Court hereby orders a judicial transfer to the Department of Community Correction. ☐ Yes ☒ No Pursuant to Community Punishment Act, the defendant shall be eligible to have his/her records sealed. ☐ Yes ☒ No					
JAIL TIME CREDIT In days: 1		TOTAL TIME TO BE SERVED FOR ALL OFFENSES In months: 240 ☐ Life ☐ LWOP		Death Penalty ☐ Yes ☒ No	
DEFENDANT IS ASSIGNED TO: ☒ ADC ☐ ADC, Admin. Transfer Authorized		☐ CCC ☐ COUNTY JAIL ☐ PROBATION ☐ SIS		If Yes, State Execution Date	
Conditions of disposition or probation are attached. ☐ Yes ☒ No		☐ Defendant has previously failed a drug court program			
A copy of the Pre-sentence investigation on sentencing information is attached		☐ Yes ☒ No			
A copy of the Prosecutor's Short Report is attached		☒ Yes ☐ No			
DEFENDANT WAS INFORMED OF APPELLATE RIGHTS ☒ Yes ☐ No Appeal Bond \$					
The County Sheriff is hereby ordered to : ☐ transport the defendant to county jail ☐ take custody for referral to CCC ☒ transport to ADC					
Defendant shall report to DCC probation officer for report date to CCC ☐ Yes ☒ No					
Signature Prosecuting Attorney/Deputy Signature: 		Date: 8/25/2019 Print Name: Ron Jones			
Circuit Judge Signature:		Date: Print Name: Marcia Hearnberger			
Additional Info					

Fines, Fees, Restitution

Sentence Options

Signature

ARKANSAS SENTENCING COMMISSION **CRIMINAL HISTORY WORKSHEET**

Offender Name (Last, First, Middle) Garrett, Harl, Allen		Date of Birth 11/10/1944	Sex M	SID # 413180	Date of Worksheet 08/28/2019
Offense Sexual Assault 2nd Degree		Statute # 5-14-125	Date of Offense 03/01/2017-06/01/2017	Circuit Case # 2018-670-IV	County Garland
☐ Criminal History Supplement Attached to Report Additional Prior Offenses		☐ Multiple Offenses -- Circle Prior Convictions with Multiple Offenses		Person Completing Form Ron Jones ☐ Attempt ☐ Conspiracy ☐ Solicitation	

Offense Title	Level	Disp. Date	Points	Felony Points Levels VI - X
Adult Felonies Levels VI-X				
1.				0
2.				
3.				
4.				
5.				
Adult Felonies Levels I-V				
1.				
2.				
3.				
4.				
5.				
Class A Misdemeanors				
1.				
2.				
3.				
4.				
5.				
Juvenile Adjudications				
1.				
2.				
3.				
4.				
5.				
Custody Status: If offender was on any type of custody supervision at the time of the current offense, add 1 point.				
☐ Probation / SIS ☐ Parole / Post Prison Supervision ☐ Temp. Release ☐ Bond ☒ No CJ Control				
5-14-125 6 0 AS/CCC/ADC24 TO				
Current Offense	Seriousness Level	History Score	Presumptive Sentence	Low Presumptive Sentence Range
				High Presumptive Sentence Range
TOTAL CRIMINAL HISTORY POINTS (Round Down To Nearest Whole Point)				0

We Request That A Copy Of This Form Be Forwarded To:

ARKANSAS SENTENCING COMMISSION
 101 East Capitol, Suite 206
 Little Rock, AR 72201
 501-682-5001

This information is provided pursuant to A.C.A. § 12-27-113 (C) (1) & (2) (Supp. 1993).

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Defendant's Name: Garrett, Harl, Allen

SID #: 413180

Case #: 2018-670-IV

COUNTY: Garland

I. SUMMARY OF THE FACTS: Defendant being 18 years old or older engaged in sexual contact with a 9 year old female.

II. FACTORS:

AGGRAVATING

- ☐ Production or use of any weapon during the criminal episode.
- ☐ Threat or violence toward witness(es) or victim(s)
- ☐ Defendant knew or had reason to know the victims were particularly vulnerable (aged, handicapped, very young, etc.)
- ☐ Ability to make restitution, reparation or return property and failed to do so.
- ☐ Violation of position of public trust or recognized professional ethics.
- ☐ Degree of property loss, personal injury or threatened personal injury substantially greater than characteristic for the crime.
- ☐ There is a single conviction for a crime involving multiple victims or incidents.
- ☐ Defendant on probation or parole at the time of the crime.
- ☐ Persistent involvement in similar criminal offenses.
- ☐ Repetition of behavior pattern which contributes to criminal conduct, e.g., return to drug or alcohol abuse.
- ☐ Prior record of similar offenses.
- ☐ Serious prior record
- ☐ Pursuant to a Guilty or No Contest plea, other crimes were dismissed or not prosecuted.
- ☐ New criminal activity while on pretrial release.
- ☐ Persistent criminal misconduct while under supervision.
- ☐ Efforts to conceal crime.
- ☒ Other: Jury Trial

MITIGATING

- ☐ Victim(s) provoked the crime to substantial degree or other evidence that misconduct by victim contributed to the criminal episode.
- ☐ Cooperation with criminal justice agencies in resolution or other criminal activity.
- ☐ Effort to make restitution or reparation(particularly before required to do so by sentencing).
- ☐ Degree of property loss, personal injury or threatened personal injury substantially less than characteristic for the crime.
- ☐ Special effort on part of perpetrator to minimize the harm or risk.
- ☐ Peripheral involvement in criminal episode (e.g., passive accessory).
- ☐ Evidence of withdrawal, duress, necessity or lack of sustained criminal intent or diminished mental capacity (e.g., mental retardation) which is insufficient to constitute a defense but is indicative of reduced culpability.
- ☐ No prior parole or probation difficulty.
- ☐ Efforts to deal with problems associated with past criminal conduct.
- ☐ No, or minimal, prior record.
- ☐ Other:

SIGNED _____

Circuit Judge

SIGNED _____

Prosecuting Attorney or Deputy

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[GREAT SEAL OF THE STATE OF ARKANSAS]

Arkansas Judiciary

Case Title: STATE V HARL A GARRETT

Case Number: 26CR-18-670

Type: SENTENCING ORDER

So Ordered

/s/ Marcia Hearnberger

HON. MARCIA HEARNSBERGER

Electronically signed by MRHEARNSBERGER on
2019-08-28 14:00:36 page 5 of 5