

# **APPENDIX F**

**United States District Court For The Western District Of Oklahoma**

**Report And Recommendation**

**September 1, 2017**

**CIV-17-838-HE**

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

JEFFREY RAMIREZ, )  
                          )  
Petitioner,           )  
                          )  
vs.                    )                   Case No. CIV-17-838-HE  
                          )  
JOE ALLBAUGH, Director, )  
                          )  
Respondent.           )

**REPORT AND RECOMMENDATION**

Petitioner, a state prisoner appearing pro se, seeks a writ of habeas corpus under 28 U.S.C. § 2254. Doc. 1. United States Chief District Court Judge Joe Heaton has referred the matter to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). Doc. 4. In accordance with Rule 4 of the Rules Governing Section 2254 Cases, the undersigned has examined the petition and its attachments, and has taken judicial notice of various state court records.<sup>1</sup> After thorough review, the undersigned recommends the court dismiss the petition as untimely.

**I. Background.**

In Oklahoma County District Court, Case No. CF-2012-5232, a jury convicted Petitioner of murder in the first degree and the trial court sentenced

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<sup>1</sup> See *United States v. Pursley*, 577 F.3d 1204, 1214 n.6 (10th Cir. 2009) (exercising discretion “to take judicial notice of publicly-filed records in [this] court and certain other courts concerning matters that bear directly upon the disposition of the case at hand”) (citation omitted).

him to life imprisonment. Doc. 1, at 1 & Ex. 1, at 1-2.<sup>2</sup> Petitioner appealed, and the Oklahoma Court of Criminal Appeals (“OCCA”) affirmed his conviction on December 5, 2014. *Id.* at 2 & Ex. 1, at 2. Petitioner then asked the trial court for a suspended sentence on December 10, 2014, *id.* at 3, which the trial court denied on August 17, 2015. Doc. 1, at 3.<sup>3</sup>

Petitioner alleges he next filed an application for post-conviction relief on November 5, 2015. Doc. 1, at 4. While the state court docket reflects Petitioner did file an application for post-conviction on that date, the district court struck the document approximately a week later. Petitioner did not refile it until August 25, 2016.<sup>4</sup> *See also* Doc. 1, Ex. 1, at 1 (noting Petitioner filed his application for post-conviction relief on August 25, 2016). In that application for post-conviction relief, Petitioner alleged in part his actual innocence. Doc. 1, at 4 & Ex. 1, at 1. The district court denied relief, finding

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<sup>2</sup> All page citations refer to the court’s CM/ECF pagination. Unless otherwise indicated, quotations are reprinted verbatim.

<sup>3</sup> *See* Okla. State Courts Network, *State v. Ramirez*, Case No. CF-2012-5232, District Court in and for Oklahoma County, Oklahoma. <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-2012-5232&cmid=2905438>, docket entry dated Aug. 17, 2015 (last visited August 31, 2017).

<sup>4</sup> *See* Okla. State Courts Network, *State v. Ramirez*, Case No. CF-2012-5232, District Court in and for Oklahoma County, Oklahoma; <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-2012-5232&cmid=2905438>, docket entries dated Nov. 5th & 17th, 2015 and August 25, 2016 (last visited August 31, 2017).

Petitioner's proffered evidence was not "new" and did not establish his actual innocence, and the OCCA affirmed on July 7, 2017. *Id.* Ex. 1, at 11-12 & Ex. 2.

Petitioner filed the instant petition on August 4, 2017.<sup>5</sup>

## **II. Petitioner's claims.**

Petitioner alleges: (1) hearsay rendered his trial fundamentally unfair; (2) he received ineffective assistance of trial counsel; (3) cumulative error; (4) actual innocence; (5) failure to instruct on a lesser-included offense; and (6) he received ineffective assistance of appellate counsel. Doc. 1, *passim*.

## **III. Analysis.**

The undersigned finds Plaintiff's claims are time-barred.

### **A. The starting date for the statute of limitations.**

On April 24, 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA) which establishes a one-year statute of limitations for federal habeas petitions. *See* 28 U.S.C. § 2244(d)(1); *see also Gibson v. Klinger*, 232 F.3d 799, 803 (10th Cir. 2000) (discussing the AEDPA's enactment date and one-year statute of limitations). Here, that clock began to run from "the date on which the judgment became final by the conclusion of direct review

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<sup>5</sup> The court deems the petition filed on the date Petitioner gave it to prison officials for mailing. *See generally Fleming v. Evans*, 481 F.3d 1249, 1255 n.2 (10th Cir. 2007) (citation omitted). Petitioner verifies that date as August 4, 2017. Doc. 1, at 29.

or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

The OCCA affirmed Petitioner’s conviction on December 5, 2014, and because he did not petition for certiorari in the United States Supreme Court, Doc. 1, at 2, his conviction became final on March 5, 2015, when the ninety-day time period for filing a certiorari petition expired. *See Locke v. Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001). The AEDPA’s one-year period of limitation began to run the following day, March 6, 2015, and expired one year later, on March 6, 2016. *See United States v. Hurst*, 322 F.3d 1256, 1259-61 (10th Cir. 2003) (holding the one-year limitation period is calculated using the “anniversary date” method). Because that day was a Sunday, Petitioner’s limitations period expired on March 7, 2016, assuming the absence of statutory or equitable tolling. *See* Fed. R. Civ. P. 6(a)(1)(C).

**B. Statutory tolling.**

Statutory tolling is available when, during the one-year limitations period, a petitioner properly files a petition for collateral review in state district court. *See* 28 U.S.C. § 2244(d)(2). Petitioner filed three pleadings in state court: (1) a motion for a suspended sentence on December 10, 2014; (2) an application for post-conviction relief on November 5, 2015; and, (3) an application for post-conviction relief on August 25, 2016. The court should find

the first pleading extended his limitations period, but the second and third did not.

### **1. Motion for suspended sentence.**

The court does not have Petitioner's motion for a suspended sentence, but the trial court referred to it as a "motion for suspended sentence after appeal"<sup>6</sup> and thus the undersigned presumes he filed it under Okla. Stat. tit. 22, § 994 (allowing the trial court to "suspend the judgment and sentence" "[a]fter appeal"). With this interpretation, the undersigned assumes the motion entitled Petitioner to statutory tolling. *See, e.g., Watie v. Aldridge*, No. CIV-16-117-RAW-KEW, 2017 WL 499967, at \*2 (E.D. Okla. Feb. 7, 2017) (unpublished order) (assuming petitioner's motion for suspended sentence filed under Okla. Stat. tit. 22, § 994 "qualifies as a motion for collateral review and serves to trigger" statutory tolling) (citation omitted). However, Petitioner filed his motion *before* his conviction was final and thus he is only entitled to statutory tolling for the time it pended *after* the statute of limitations began to run – or 166 days.<sup>7</sup> *See, e.g., Oliver v. Zenon*, 174 F. App'x 440, 442 (10th Cir.

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<sup>6</sup> Okla. State Courts Network, *State v. Ramirez*, Case No. CF-2012-5232, District Court in and for Oklahoma County, Oklahoma, <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-2012-5232&cmid=2905438>, docket entry dated Aug. 17, 2015 (last visited August 31, 2017).

<sup>7</sup> Petitioner's conviction was final on March 5, 2015, and the trial court ruled on his motion for a suspended sentence on August 17, 2015 – or 166 days

2006) (holding a motion filed before a conviction becomes final “[does] not toll the statute of limitations”); *Hurt v. Dowling*, No. 17-CV-005-JED-TLW, 2017 WL 2786474, at \*2 (N.D. Okla. June 27, 2017) (unpublished order) (holding petitioner’s motion for post-conviction relief, filed before his conviction became final, entitled petitioner to statutory tolling, but only until the deadline “to commence a post-conviction appeal,” which was “twenty [20] days after Petitioner’s conviction became final”). With an extra 166 days of statutory tolling, Petitioner’s statute of limitations was extended to August 20, 2016.

**2. November 9, 2015 application.**

However, Petitioner is not entitled to any statutory tolling for his November 5, 2015, application for post-conviction relief, which the trial court struck from the docket, because it was obviously not properly filed. *See* 28 U.S.C. § 2244(d)(2); *see also Hymel v. Harvanek*, No. CIV-15-0197-F, 2015 WL 4167601, at \*3 (W.D. Okla. July 9, 2015) (unpublished order) (finding when petitioner improperly filed a post-conviction application, the “limitations period was not tolled for any time”), *appeal dismissed*, 626 F. App’x 217 (10th Cir. 2015).

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later. Petitioner is not entitled to tolling for time he could have spent appealing the trial court’s ruling because “Oklahoma law governing motions for suspended sentence or for judicial review does not provide for appellate review of a trial judge’s ruling.” *Hackett v. Parker*, No. 11-CV-322-GKF-TLW, 2012 WL 1029545, at \*4 (N.D. Okla. Mar. 26, 2012) (unpublished order).

**3. August 25, 2016 application.**

Finally, the undersigned finds Petitioner is not entitled to statutory tolling for his August 25, 2016, application for post-conviction relief, as he filed it *after* his statute of limitations expired on August 20, 2016. *See Fisher v. Gibson*, 262 F.3d 1135, 1142-43 (10th Cir. 2001) (“Fisher’s petitions cannot be tolled for time spent in state post-conviction proceedings because his applications for post-conviction relief were not filed until [his limitations period had already expired]”); *see also Minor v. Chapdelaine*, 678 F. App’x 695, 696-97 (10th Cir. 2017) (holding petitioner was not entitled to statutory tolling for application for post-conviction relief filed after “the one-year period [runs] in full”).

**C. Equitable tolling.**

In appropriate circumstances, the limitations period may also be tolled for equitable reasons. *See Holland v. Florida*, 560 U.S. 631, 644 (2010). However, equitable tolling would be available only if an extraordinary circumstance stood in Petitioner’s way and prevented timely filing. *See id.* at 648; *Gibson*, 232 F.3d at 808 (holding equitable tolling is available only in “rare and exceptional circumstances” (citation omitted)). Petitioner must also show “diligent pursuit of his claim[s].” *Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006) (holding equitable tolling does not apply unless a petitioner shows both “extraordinary circumstances preventing timeliness and diligent pursuit

of his claim"). Circumstances appropriate for equitable tolling include "when an adversary's conduct—or other uncontrollable circumstances—prevents a prisoner from timely filing, or when a prisoner actively pursues judicial remedies but files a defective pleading during the statutory period." *Gibson*, 232 F.3d at 808.

Here, Petitioner presents no extraordinary circumstance that prevented his timely pursuit of federal habeas corpus relief. He did file a defective application for post-conviction relief in November 2015, but he then waited approximately nine-months to file it again. With such a lack of diligence, the court should find Petitioner is not entitled to equitable tolling and his statute of limitations expired on August 20, 2016—approximately one year before filed the present action. *See, e.g., Penn v. Kline*, 348 F. App'x 344, 347 (10th Cir. 2009) (concluding petitioner's nine-and-a-half-month delay in filing document "does not establish the diligence required for equitable tolling").

#### **D. Equitable exceptions.**

Having found Petitioner's statute of limitations has expired, the court must consider whether Petitioner has alleged an exception to the statute of limitations bar.

Petitioner does raise an actual innocence claim, and such an argument can be a "gateway through which a petitioner may pass" when confronted with the expiration of his statute of limitations period. *McQuiggin v. Perkins*, 133

S. Ct. 1924, 1928 (2013). That is, “a ‘credible showing of actual innocence’ provides an outright equitable *exception* to AEDPA’s statute of limitations.” *Doe v. Jones*, 762 F.3d 1174, 1182 (10th Cir. 2014) (quoting *McQuiggin*, 133 S. Ct. at 1928, 1931-33). But “[t]o be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Further, Petitioner must “show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *McQuiggin*, 133 S. Ct. at 1935 (quoting *Schlup*, 513 U.S. at 327).

To support his actual innocence claim, Petitioner points to “never before seen, or heard, statements of his girlfriend, Gina Saulcedo” “obtained by an Investigator for the Oklahoma Indigent Defense System, Jolene Perhan.” Doc. 1, at 16. According to Petitioner, Ms. Saulcedo’s statements “tend[] to indicate a coverup, or conspiracy on the part of the State’s witnesses” and would “substantiate[] the fact Petitioner was not, and could not have been the shooter of the victim, and he did not do the things he was accused of prior to the shooting of the victim.” *Id.* at 17. However, in reviewing this actual innocence claim under state law, the Oklahoma courts found his proffered evidence was

not new and did not “establish [P]etitioner’s innocence.” *Id.* Ex. 1, at 12 & Ex. 2, at 3-5. The trial court found specifically:

The petitioner bases his claim of actual innocence on the Interoffice Memorandum of Jolene Perham, dated April 18, 2014, to the petitioner’s appellate counsel. Ms. Perham was an investigator in the Homicide Direct Appeals Division of the Oklahoma Indigent Defense System. This memorandum reports the substance of Ms. Perham’s interview of Gina Saulcido on April 11, 2014, about Ms. Saulcido’s relationship with the petitioner and the death of Homero Macias. Ms. Saulcido’s statements indicate that: she, the petitioner and her two children were at Ms. Saulcido’s mother’s house for a barbecue on July 15, 2012; they left her mother’s house sometime between 2:30 a.m. and 3:00 a.m. (July 16, 2012), and drove home; Ms. Saulcido and the petitioner took the children back to her mother’s house around 3:00 a.m.; Ms. Saulcido and her mother went over to Mr. Macias’ mother’s house, while the petitioner stayed with the children at Ms. Saulcido’s mother’s house, and then drove back to Ms. Saulcido’s mother’s house; Ms. Saulcido, the petitioner, and the children went back home, they put the children back to bed, and they went to sleep around 4:00 a.m.; and Ms. Saulcido woke up later that morning from a phone call from Mr. Macias’ mother telling Ms. Saulcido that Mr. Macias had been killed. This is not newly discovered evidence. Furthermore, this information doesn’t account for the whereabouts of the petitioner at the time of the homicide, around 6:30 a.m., and does not establish the petitioner’s innocence. If this information is true, the petitioner would have known of these facts at the time of trial, and this evidence could have been presented at the trial by subpoenaing Ms. Saulcido and her mother to testify as witnesses at the trial.

Furthermore, there is an issue as to the credibility of Ms. Saulcido’s statements to Ms. Perham who reports in the memorandum that Ms. Saulcido wants to help the petitioner but that neither she or her mother are comfortable with filling out an affidavit or testifying in court, expressing fear of retaliation. Ms. Perham’s attempts to communicate with Ms. Saulcido to go over her report to make sure the information was accurate were futile. Ms. Perham reports in the memorandum that on April 21, 2014, at

10:30 a.m., she contacted Ms. Saulcido to go over her report, but Ms. Saulcido indicated it was not a good time to talk and to call back at noon, but Ms. Perham wasn't able to get through. Ms. Perham sent a text to Ms. Saulcido on April 24, 2014, asking Ms. Saulcido to call her, but there was no response.

Doc. 1, Ex. 1, at 11-12. The OCCA agreed with this assessment and affirmed the denial of post-conviction relief based on actual innocence. *Id.* Ex. 2, at 3-5.

This Court must presume the state court findings to be correct. *See Love v. Roberts*, 259 F. App'x. 58, 60 (10th Cir. 2007) (citing 28 U.S.C. § 2254(e)(1)); *see also Johnson v. Hooks*, 138 F. App'x 207, 208 (11th Cir. 2005) (addressing whether petitioner had sufficiently alleged his actual innocence for purposes of overcoming the statute of limitations and holding: "Included in the record were the state appellate court's opinion, the affidavits from the additional witnesses, the reports, and the recorded statements that were submitted with petitioner's traverse. We give deference to the facts set out in the state appellate court's opinion and presume them to be correct because petitioner Johnson failed to prove them incorrect by clear and convincing evidence. 28 U.S.C. § 2254(e)(1)"). Under such weight, Petitioner cannot show he is equitably exempt from the statutes of limitations bar. That is, Petitioner has not challenged the state court's interpretation of his evidence or otherwise explained how it is incorrect. Doc. 1, at 16-19. So, presuming the evidence is not "new" and does not show it is more likely than not that no reasonable juror

would have convicted Petitioner, he cannot rely on his actual innocence claim as a gateway past the statute of limitations bar under *McQuiggin* and *Schlup*.

**E. Summary.**

With statutory tolling, Petitioner's statute of limitations expired on August 20, 2016, and he is not entitled to equitable tolling or an equitable exemption based on actual innocence. Because Petitioner did not file the instant petition until August 4, 2017, the undersigned recommends the court dismiss Petitioner's habeas petition as untimely.

**IV. Recommendation and notice of right to object.**

The undersigned finds Petitioner's petition is untimely and recommends the court dismiss the petition on screening.

The undersigned advises Petitioner of his right to object to this report and recommendation no later than September 21, 2017, under 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). The undersigned further advises Petitioner that failure to make timely objection to this report and recommendation waives his right to appellate review of both factual and legal issues contained herein. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991). Finally, this recommendation serves as Petitioner's opportunity to further address any arguments related to the statute of limitations issue. *See Smith v. Dorsey*, No. 93-2229, 1994 WL 396069, at \*3 (10th Cir. July 29, 1994) (unpublished op.) (noting no concerns with magistrate judge raising an issue

sua sponte where “petitioner had an opportunity to address the matter” in an objection to the report and recommendation).

The Clerk of the Court is instructed to electronically forward this report and recommendation to the Oklahoma Attorney General on behalf of Respondent at the following address: [fhc.docket@oag.state.ok.us](mailto:fhc.docket@oag.state.ok.us).

This report and recommendation disposes of all issues referred to the undersigned Magistrate Judge in this matter.

ENTERED this 1st day of September, 2017.



Suzanne Mitchell  
SUZANNE MITCHELL  
UNITED STATES MAGISTRATE JUDGE

# **APPENDIX G**

**United States District Court For The Western District Of Oklahoma**

**Order**

**October 19, 2017**

**Document 13**

**CIV-17-838-HE**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

JEFFREY RAMIREZ, )  
vs. )  
Petitioner, )  
vs. ) NO. CIV-17-0838-HE  
JOE ALLBAUGH, Director of the )  
Oklahoma Department of Corrections )  
vs. )  
Respondent )

**ORDER**

Petitioner is a state prisoner seeking habeas relief pursuant to 28 U.S.C. § 2254. His petition was referred to Magistrate Judge Suzanne Mitchell for initial proceedings. Judge Mitchell conducted a preliminary review of the petition, concluded it was untimely, and has submitted a Report and Recommendation recommending the petition be dismissed on that basis. Petitioner objected has objected to the recommendation, triggering *de novo* review by this court.

The judgment being challenged here was pronounced on October 1, 2013, and filed on October 7, 2013. Petitioner appealed to the Oklahoma Court of Criminal Appeals (“OCCA”), which affirmed his conviction and sentence on December 5, 2014. Petitioner requested a suspended sentence from the trial court on December 10, 2014. That request was denied on August 17, 2015. On November 5, 2015, petitioner filed an application for post-conviction relief in state district court, but the court struck that pleading on November 17, 2015, for exceeding the page limit prescribed by the local rules of court. On November 30, 2015, petitioner filed a motion for leave to exceed the page limit. The state court did

not immediately rule on that motion but eventually denied it on August 5, 2016. On August 25, 2016, petitioner filed a second post-conviction application which apparently complied with the rules. The state district court denied that application on February 21, 2017, which denial was affirmed by the OCCA on July 7, 2017. Petitioner filed the present habeas motion in this court on August 4, 2017.

As the Report noted, applications for a writ of habeas corpus by a person in state custody must be filed within a one year period. That period generally runs, subject to exceptions not involved here, from the date on which the judgment of conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). In calculating the one year period, 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” is excluded. *Id.* § 2244(d)(2). The one year limitation is also subject to equitable tolling where the prisoner can show that he pursued his rights diligently, and that his failure to timely file the action was “caused by extraordinary circumstances beyond his control.” Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000).

The Report concluded that the presumptive deadline for filing a federal habeas petition was March 6, 2016, and petitioner does not challenge that. Further, the Report concluded statutory tolling, based on petitioner’s motion to suspend the sentence, applied and would extend the filing deadline by 166 days, to August 20, 2016. That also is not challenged. So the question becomes whether some further basis for tolling the statutory period exists, such that a filing roughly a year later, on August 4, 2017, would be timely.

The Report's conclusion that petitioner's state applications for post-conviction review do not provide a basis for statutory tolling would ordinarily be correct, for substantially the reasons stated in the Report. However, the Report also concluded no basis for equitable tolling was shown. Petitioner's objection takes issue with that conclusion and essentially argues that his filing of a request for leave to exceed the page limit is a ground for equitable tolling, and the court is inclined to agree. A *pro se* litigant could reasonably view the request for leave to exceed the page limit and to, in effect, reconsider the non-complying application, as something that needed to be resolved before further filings or proceedings would be necessary or appropriate. And the timing of the state court's disposition of the motion for leave was beyond petitioner's control. The court concludes these circumstances are sufficiently extraordinary to be a basis for equitable tolling. Further, it appears that petitioner promptly and diligently pursued his new state application once the status of the motion for leave was resolved. The court therefore concludes that a basis for equitable tolling has been shown.

The time during which the motion for leave was pending with the state court totaled 248 days (November 30, 2015 to August 5, 2016). The addition of 248 days results in the August 2016 state post-conviction application being timely filed. And under § 2244(d)(2), petitioner is entitled to further *statutory* tolling during the pendency of that application.<sup>1</sup> Giving effect to that additional statutory tolling, the present petition was timely filed.

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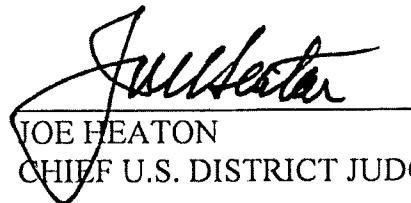
<sup>1</sup> *The Report did not view that application as being a basis for tolling under § 2244(d)(2), because it was filed after expiration of the deadline which was otherwise applicable. That conclusion was correct, assuming that equitable tolling did not apply. However, as the court has*

**Conclusion**

The court concludes that both equitable and statutory tolling are applicable here, and therefore concludes the petition was timely filed. The Report [Doc. #9] is not adopted and the court concludes dismissal is not appropriate at this time. The case is re-referred to Judge Mitchell for further proceedings.

**IT IS SO ORDERED.**

Dated this 19th of October, 2017.



JOE HEATON  
CHIEF U.S. DISTRICT JUDGE

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*concluded that equitable tolling does apply, the later application becomes a basis for statutory tolling.*

# **APPENDIX I**

**United States Court Of Appeals For The Tenth Circuit**

**Order**

**No. 18-6127**

UNITED STATES COURT OF APPEAL  
FOR THE TENTH CIRCUIT

JEFFREY RAMIREZ,

Petitioner - Appellant,

v.

JOE ALLBAUGH, Director of the  
Oklahoma Department of Corrections,

Respondent - Appellee.

FILED  
United States Court of Appeals  
Tenth Circuit

December 12, 2018

Elisabeth A. Shumaker  
Clerk of Court

No. 18-6127  
(D.C. No. 5:17-CV-00838-HE)  
(W.D. Okla.)

ORDER

Before MORITZ, Circuit Judge.

Jeffrey Ramirez, an Oklahoma prisoner proceeding pro se, filed a 28 U.S.C. § 2254 habeas corpus petition in federal district court. The district court dismissed the petition and refused to grant a certificate of appealability (“COA”). Ramirez seeks to appeal that dismissal. In accordance with § 2253(c), we granted a COA as to issues raised in Ramirez’s opening brief.

On August 8, 2017, the district court granted Ramirez’s Motion for Leave to Appeal In Forma Pauperis pursuant to § 1915. Based upon that ruling, this court finds that Ramirez is financially eligible for the appointment of counsel under 18 U.S.C. § 3006A.

In light of Ramirez's financial eligibility for the appointment of counsel, and because the interests of justice so require, we appoint The Office of the Federal Public Defender for the Western District of Oklahoma ("FPD") as counsel for Ramirez pursuant to § 3006A(a)(2)(B). The FPD shall file an entry of appearance on behalf of Ramirez within 14 days from the date of this order.

On or before Tuesday, January 22, 2019, the FPD shall file a supplemental opening brief addressing the issues that have been certified for appeal. The supplemental opening brief shall comply with all applicable Federal Rules of Appellate Procedure and this Court's local rules regarding the filing of formal opening briefs. Respondent-Appellee shall file a formal response brief within 30 days of the filing of Ramirez's supplemental opening brief. Any optional reply brief will be due within 14 days of service of Respondent-Appellee's response brief.

The record on appeal was filed on July 13, 2018, and is available via CM/ECF and PACER. The FPD and/or counsel for the Respondent-Appellee may move to supplement the record on appeal as may be needed. No appendix need be filed.

The Clerk shall send a copy of this order to all counsel currently of record, to Ramirez, and to the FPD.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

# **APPENDIX J**

**United States Court For The Western District Of Oklahoma**

**Order**

**No. 17-0838**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

JEFFREY RAMIREZ, )  
vs. )  
Petitioner, )  
vs. ) NO. CIV-17-0838-HE  
JOE ALLBAUGH, Director of the )  
Oklahoma Department of Corrections )  
vs. )  
Respondent )

**ORDER**

Upon receipt of petitioner's habeas petition, the court referred it to U.S. Magistrate Judge Suzanne Mitchell for initial proceedings consistent with 28 U.S.C. § 636(b). The magistrate judge conducted the preliminary review contemplated by Rule 4 of the Rules Governing Section 2254 Cases, concluded that the petition was not timely filed, and recommended its dismissal on that basis. The court declined to accept that recommendation, concluding that a combination of factors warranted both statutory and equitable tolling sufficient to make petitioner's petition timely filed, and re-referred the matter to Judge Mitchell for further proceedings.

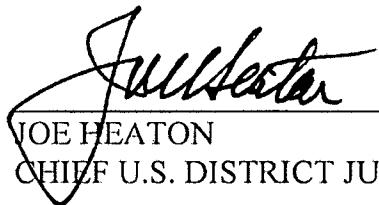
Respondent then filed a motion to dismiss the petition on timeliness grounds, correctly noting that he had not had the opportunity to present his position on the timeliness issue since the earlier determination was based on preliminary screening rather than full briefing by the parties. Judge Mitchell has since filed a supplemental report recommending that the respondent's motion be granted.

Upon fuller consideration of the issues now fully briefed, the court concludes the supplemental report should be adopted and the petition dismissed. Loftis v. Chrisman, 812 F.3d 1268 (10th Cir. 2016), is persuasive here, particularly its suggestion that extraordinary circumstances warranting equitable tolling may be found where a state court has led a petitioner to believe that he had done all that was required under the circumstances. The various state court filings referenced in the motion to dismiss suggest no basis for such a finding. Rather, the pertinent state court orders made clear that petitioner's filing was not sufficient. They did nothing to suggest that plaintiff had done all that was necessary for state collateral review or that petitioner's submissions were otherwise "properly filed" as discussed in Loftis. 812 F.3d at 1272.

With the benefit of the parties' additional briefing and the related exhibits, the court concludes the Supplemental Report and Recommendation [Doc. #25] should be **ADOPTED** and the petition **DISMISSED** as non-timely, for substantially the reasons stated in the supplemental report and its application of the Loftis standard.

**IT IS SO ORDERED.**

Dated this 6th day of July, 2018.



JOE HEATON  
CHIEF U.S. DISTRICT JUDGE

# **APPENDIX K**

**District Court Of Oklahoma**

**Order Denying Application For Post-Conviction Relief**

**February 21, 2017**

**CF-2012-5232**