

WESTLAW**Leatherwood v. Braggs**

United States Court of Appeals, Tenth Circuit. | October 6, 2020 | 829 Fed.Appx. 363 | (Approx. 6 pages)

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This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.

United States Court of Appeals, Tenth Circuit.

Michael Don **LEATHERWOOD**, Petitioner-Appellant,

v.

Jeorld BRAGGS, Jr., Respondent-Appellee.

No. 20-6106

FILED October 6, 2020

Synopsis

Background: Following state court's revocation of his suspended sentence for convictions on six counts of rape, and affirmance of the denial of his first federal application for habeas relief, 861 F.3d 1034, state prisoner filed second application for habeas relief. The United States District Court for the Western District of Oklahoma, Joe Heaton, Senior District Judge, 2020 WL 3470310, adopted report and recommendation of Shon T. Erwin, United States Magistrate Judge, 2020 WL 5352006, and dismissed the application as untimely and declined to grant a certificate of appealability (COA). The District Court later denied prisoner's motion for relief from judgment. Prisoner then requested a COA from the Court of Appeals with respect to both dismissal of his application and the denial of his motion for relief from judgment.

Holdings: The Court of Appeals, Hartz, Circuit Judge, held that:

- 1 state court's revocation of remaining 15 years of prisoner's suspended sentence did not violate prisoner's due process rights;
- 2 prisoner's counsel was not ineffective at the revocation hearing; and
- 3 prisoner's claim that state courts violated his right to due process in improperly disposing of his claims during postconviction proceedings was not a cognizable federal habeas claim.

Appeal dismissed.

Appellate ReviewPost-Conviction Review

West Headnotes (4)

Change View

APPENDIX A

1 Constitutional Law  Conditions

Sentencing and Punishment  Announcement of and advice as to conditions

State court's revocation of remaining 15 years of state prisoner's suspended sentence for rape convictions, while prisoner was incarcerated due to the prior revocation of the first five years of the suspended sentence, did not violate prisoner's due process rights, although prisoner claimed that he did not receive notice that he was subject to conditions of probation while he was in prison; statements made by judge at first revocation hearing made it sufficiently clear that prisoner was subject to the same condition of probation while incarcerated, namely the condition that prohibited him from having romantic relationship with any person who had minor children. U.S. Const. Amend. 14.

2 Criminal Law  Sentencing in General

State prisoner's counsel did not perform deficiently, at hearing to revoke the remaining 15 years of prisoner's sentence for rape convictions, in failing to advance argument that probation conditions did not apply to prisoner while he was incarcerated after prior revocation of the first five years of his suspended sentence, and instead stipulating to State's argument on the case law, and thus counsel was not ineffective, although State subsequently conceded that two cases upon which it had relied did not unequivocally support its argument; state appellate court in effect held on appeal that counsel had stipulated to correct statement of law, and counsel could not be deemed ineffective for failing to advance a legally incorrect argument. U.S. Const. Amend. 6.

3 Criminal Law  Sentencing in General

Criminal Law  Presentation of evidence regarding sentencing

At hearing to revoke the remaining 15 years of state prisoner's suspended sentence for rape convictions, counsel was not ineffective in failing to call former director of state's Department of Corrections or judge who had revoked the first five years of prisoner's sentence to testify as witnesses, although the former director and judge subsequently provided affidavits in support of prisoner's habeas application alleging that he did not know that conditions of probation applied to him while incarcerated; in the habeas proceedings, prisoner claimed that the evidence provided in the former director's and judge's affidavits only became available several years after the revocation hearing. U.S. Const. Amend. 6; 28 U.S.C.A. § 2241.

4 Habeas Corpus  Review; Post-Conviction Relief and New Trial

State prisoner's claim that state courts violated his right to due process, in rejecting his postconviction claims as barred by res judicata without adequately considering his new evidence, was not a cognizable federal habeas claim; constitutional error alleged by prisoner focused only on state's postconviction remedy and not the judgment which provided the basis for his incarceration. U.S. Const. Amend. 14; 28 U.S.C.A. § 2241.

*365 (D.C. No. 5:19-CV-01140-HE) (W.D. Oklahoma)

Attorneys and Law Firms

Michael D. **Leatherwood**, Pro Se

Keeley L. Miller, Office of the Attorney General for the State of Oklahoma, Litigation Department, Oklahoma City, OK, for Respondent-Appellee

Before HARTZ, BALDOCK, and CARSON, Circuit Judges.

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Harris L Hartz, Circuit Judge

Michael **Leatherwood**, a state prisoner proceeding pro se, requests a certificate of appealability (COA) to appeal the dismissal by the United States District Court for the Western District of Oklahoma of his application for relief under 28 U.S.C. § 2241. See 28 U.S.C. § 2253(c)(1)(A) (requiring COA for state prisoner to appeal); *Dulworth v. Jones*, 496 F.3d 1133, 1135 (10th Cir. 2007) ("[A] state prisoner seeking to appeal the denial of habeas relief in a § 2241 proceeding must obtain a COA to appeal."), *abrogated in part on other grounds by Harbison v. Bell*, 556 U.S. 180, 129 S.Ct. 1481, 173 L.Ed.2d 347 (2009). We deny the request for a COA and dismiss the appeal.

In 2009 Mr. **Leatherwood** pleaded guilty to six counts of rape in Oklahoma state court and was sentenced to 20 years in prison, with all but 90 days to be suspended. After Mr. **Leatherwood** violated a condition of his probation prohibiting him from having a romantic relationship with any person who has minor children, Judge Kenneth Watson revoked five years of the suspended sentence. Several months later, in August 2010, another Oklahoma state judge revoked the remaining 15 years of Mr. **Leatherwood's** suspended sentence because Mr. **Leatherwood** had continued to maintain a relationship with a person who had minor children.

In 2013 Mr. **Leatherwood** filed his first application for habeas relief under 28 U.S.C. § 2241, challenging the second revocation of his suspended sentence—the one for 15 years. The district court denied the application, and we affirmed. See *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1051 (10th Cir. 2017).

On December 6, 2019, Mr. **Leatherwood** filed a second application for habeas relief under § 2241. He raised three claims in his application: (1) he was denied due process when the state court based the revocation of his suspended sentence on violations of the conditions of his probation while he was incarcerated; (2) his counsel at the revocation hearing was constitutionally ineffective; and (3) the state courts violated his right to due process in improperly disposing of his claims during postconviction proceedings. Recognizing that this court had ruled against him on his first application under § 2241, Mr. **Leatherwood** contends that his second application is justified by three pieces of new evidence: (1) a 2015 affidavit of Justin Jones, former director of the Oklahoma Department of Corrections, stating his opinion that Mr. **Leatherwood** would not have been subject to conditions of probation while in prison; *366 (2) a 2016 affidavit of Judge Watson attesting that the judge did not warn Mr. **Leatherwood** that his probation conditions would apply while Mr. **Leatherwood** was incarcerated; and (3) a “concession” by counsel for Oklahoma made during the March 23, 2017 oral argument in Mr. **Leatherwood**’s first appeal to this court that two cases upon which the State had previously relied did not unequivocally hold that a probation condition can apply to an incarcerated individual.

The district court concluded that Mr. **Leatherwood**’s second application was untimely, dismissed the application, and declined to grant a COA. Mr. **Leatherwood** then filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b), which concerned the timeliness of his § 2241 application. It was denied by the district court. Mr. **Leatherwood** now seeks a COA from this court with respect to both the initial dismissal of his application and the denial of his Rule 60(b) motion.

A COA will issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This standard requires “a demonstration that ... includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (internal quotation marks omitted). In other words, the applicant must show that the district court’s resolution of the constitutional claim was either “debatable or wrong.” *Id.* If the application was denied on procedural grounds, as was the case here, the applicant faces a double hurdle. Not only must the applicant make a substantial showing of the denial of a constitutional right, but he must also show “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

We deny Mr. **Leatherwood**’s request for a COA, although our reasons do not precisely track those of the district court. See *Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005) (“[W]e have discretion to affirm on any ground adequately supported by the record.”).

A. Due Process

1 Mr. **Leatherwood** asserts that his due-process rights were violated when the Oklahoma court revoked the remaining 15 years of his suspended sentence, because he

did not receive notice that he was subject to conditions of probation while he was in prison. He raised this same claim in his initial § 2241 application, and we rejected it on the merits, largely because of statements made by Judge Watson at the first revocation hearing. See **Leatherwood**, 861 F.3d at 1046–48. We do so once again. Mr. **Leatherwood's** “new evidence” does not undermine the reasoning of our prior opinion. The affidavit of Judge Watson regarding what he did not say at the revocation hearing is of no moment, because we had, and relied on, a transcript of the hearing during our prior review. As for the Jones affidavit and the State's concession at oral argument, Mr. **Leatherwood** suggests that they prove that he could not have known he was subject to those conditions. But they prove no such thing. They are irrelevant to what Mr. **Leatherwood** had been informed of; he could have known nothing of the affidavit or the concession when he violated the conditions of probation. They may be relevant to the state of the law in Oklahoma at the time of his violations, but that is not at issue. The Oklahoma courts have resolved against Mr. **Leatherwood** his *367 claim that the revocation of his probation was contrary to state law. The only question is whether he was adequately apprised of what the law was. And we have no reason to change our analysis on that issue from what we decided in Mr. **Leatherwood's** earlier appeal.

B. Ineffective Assistance of Counsel

2 Mr. **Leatherwood's** second claim is that his counsel was constitutionally ineffective in two respects at the August 2010 revocation hearing. First, relying on the State's “concession,” he alleges that his attorney was ineffective because the attorney “stipulated to the State's argument on the case law, which the State now concedes is incorrect.” Aplt. Br. at 39. But in affirming Mr. **Leatherwood's** sentence after the second revocation, the Oklahoma Court of Criminal Appeals in effect held that his counsel had stipulated to a correct statement of the law. Counsel is not ineffective for failure to advance a legally incorrect argument. See *Miller v. Mullin*, 354 F.3d 1288, 1298 (10th Cir. 2004) (“[O]f course, if the issue is meritless, its omission [by counsel] will not constitute deficient performance.”).

3 Mr. **Leatherwood's** second basis for alleging ineffective assistance of counsel is that his attorney was ineffective for failing to call Mr. Jones and Judge Watson to testify at the August 2010 revocation hearing. But in arguing that his second § 2241 application is not untimely, Mr. **Leatherwood** has asserted that the evidence provided in the Jones and Watson affidavits only became “available subsequent to the [2015] resignation of Judge Watson, and subsequent to the [2013] resignation of Justin Jones as Director of the Oklahoma Department of Corrections.” Aplt. App., Vol. I. at 24. Of course, if, as Mr. **Leatherwood** contends, Mr. Jones and Judge Watson were not available to give evidence until several years after the August 2010 revocation hearing, then Mr. **Leatherwood's** attorney could not have been ineffective for failing to call them as witnesses at that hearing.

C. Due Process II

4 Mr. **Leatherwood's** third claim for habeas relief is that the Oklahoma courts violated

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

November 30, 2020

Christopher M. Wolpert
Clerk of Court

MICHAEL DON LEATHERWOOD,

Petitioner - Appellant,

v.

JEORLD BRAGGS, JR.,

Respondent - Appellee.

No. 20-6106
(D.C. No. 5:19-CV-01140-HE)
(W.D. Okla.)

ORDER

Before **HARTZ**, **BALDOCK**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

APPENDIX B

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

MICHAEL DON LEATHERWOOD,)
)
Petitioner,)
)
v.) **Case No. CIV-19-1140-HE**
)
JEORL德 BRAGGS, Warden,)
)
Respondent.)

REPORT AND RECOMMENDATION

Petitioner Michael Don Leatherwood, appearing through counsel, brings this, his second 28 U.S.C. § 2241 habeas petition,¹ challenging revocation of fifteen years of his suspended sentence. (ECF No. 1). United States District Judge Joe Heaton referred this matter for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B)-(C). Respondent has moved to dismiss the Petition as untimely. (ECF No. 8). Mr. Leatherwood responded to the Motion to Dismiss. (ECF No. 11). Because Mr. Leatherwood filed his habeas petition on December 6, 2019, after the relevant limitation period had expired on March 24, 2018, it is recommended that Respondent's Motion to Dismiss (**ECF No. 8**) be **GRANTED**.

I. BACKGROUND AND PROCEDURAL HISTORY

On May 18, 2009, Mr. Leatherwood pled guilty in the Oklahoma County District Court to two counts of Rape in the First Degree and four counts of Rape by Instrumentation in the First Degree. (ECF No. 1-6). The same day, District Judge Kenneth Watson sentenced Petitioner to concurrent terms of twenty years' imprisonment on each

¹ This Court denied Mr. Leatherwood's first 2241 habeas petition in Case No. CIV-13-1149-HE. The Tenth Circuit Court of Appeals affirmed the denial of habeas relief. *See Leatherwood v. Allbaugh*, 861 F.3d 1034 (10th Cir. 2017).

count. The sentencing order required Mr. Leatherwood to serve the first ninety days of his sentence in the Oklahoma County Jail. The remainder of his sentences were to be suspended, subject to certain conditions of probation. (ECF No. 1-6 at 2). "The rules and conditions [of] probation as ordered by the court and signed by the defendant, acknowledging his/her understanding of the rules and conditions, are incorporated as Exhibit B." (ECF No. 1-6 at 2). Additionally, Exhibit B incorporated the Special Probation Conditions for Sex Offenders. One of the Special Probation Conditions, Rule 17, prohibited Mr. Leatherwood from "dat[ing], socializ[ing], or enter[ing] into a romantic or sexual relationship with any person who has children under the age of eighteen (18) years present in their residence or custody at any time." *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1040 (10th Cir. 2017). Mr. Leatherwood did not enter jail immediately after his sentencing; Judge Watson ordered him to report to jail on January 8, 2010.

But on September 23, 2009, before the scheduled start of his ninety-day jail term, the State filed an application to revoke Mr. Leatherwood's suspended sentence, alleging he had violated several parole conditions. Mr. Leatherwood was immediately jailed, and on January 8, 2010, Judge Watson presided at the revocation hearing. Mr. Leatherwood's counsel stipulated to five of the alleged probation violations, including a violation of Rule 17, based on Mr. Leatherwood's relationship with Regina Wood, the mother of two minor children. The sentencing judge revoked five years of Mr. Leatherwood's suspended sentence. Mr. Leatherwood did not appeal from the five-year revocation. *Id.*²

² Mr. Leatherwood was transferred to a Lexington Correctional Center in Lexington, Oklahoma on September 3, 2010.

Mr. Leatherwood also did not end his relationship with Ms. Wood when he entered prison, prompting the State to file a second application to revoke his suspended sentences on April 14, 2010. Judge Watson recused himself from the hearing, and Judge Tammy Bass-LeSure presided. Mr. Leatherwood admitted his ongoing relationship with Ms. Wood. Based on the evidence and Mr. Leatherwood's statements, Judge Bass-LeSure revoked the remaining fifteen years of his suspended sentence. *Id.*

Mr. Leatherwood filed a direct appeal to the OCCA challenging the fifteen-year revocation on due process grounds. He first argued that Rule 17 failed to warn him that the terms of probation applied while he was incarcerated. He asserted that the revocation was so arbitrary as to be fundamentally unfair. He contended that Judge Bass-LeSure was biased. Finally, he alleged cumulative error required reversal. The OCCA affirmed the revocation on January 13, 2012. (ECF No. 9-2).

On April 11, 2012, Mr. Leatherwood filed his first application for post-conviction relief in the sentencing court challenging the revocation of his suspended sentences. The court denied his application for post-conviction relief on June 18, 2012. (ECF No. 9-1 at 24-25). Mr. Leatherwood appealed to the OCCA which affirmed denial of post-conviction relief on May 15, 2013. (ECF No. 9-3).

On October 28, 2013, Mr. Leatherwood filed his first § 2241 Petition for Writ of Habeas Corpus in Case No. CIV-13-1149-HE, challenging the revocation of his suspended sentences. (ECF No. 9-4). On July 25, 2016, this Court denied his petition along with his request for an evidentiary hearing and his motion to supplement the record with affidavits from former Oklahoma District Judge Watson and former Director of the Oklahoma

Department of Corrections, Justin Jones. (ECF No. 9-5). The court did, however, issue a Certificate of Appealability solely on the claim challenging imposition of conditions of probation while Mr. Leatherwood was incarcerated. *Leatherwood*, 861 F.3d at 1041.

Mr. Leatherwood appealed this Court's decision to the United States Court of Appeals for the Tenth Circuit in Case No. 16-6251 on August 4, 2016. (ECF No. 9-6). The Tenth Circuit panel assigned to decide the appeal heard oral arguments on March 23, 2017. The panel affirmed this Court's denial of Mr. Leatherwood's petition on June 27, 2017. (ECF No. 9-7).

On August 24, 2017, Mr. Leatherwood filed a Petition for Writ of Habeas Corpus and an Application for Evidentiary Hearing in Payne County District Court, again challenging the validity of the revocation of his suspended sentences in Oklahoma County. (ECF No. 9-8). The Payne County District Court dismissed the Petition on October 6, 2017, finding the action barred by the doctrine of *res judicata* and further finding Mr. Leatherwood should have sought post-conviction relief in the sentencing court. (ECF No. 9-9).

On September 18, 2017, while the Payne County Petition for Writ of Habeas Corpus was pending, Mr. Leatherwood filed his Second Application for Post-Conviction Relief in Oklahoma County District Court, Case No. CF-07-4162 (ECF 9-1:26-27). The next day, the State filed a Motion to Strike the application based on its excessive number of pages being a violation of local rules. Mr. Leatherwood responded to the Motion to Strike, but on April 23, 2018, the Oklahoma County District Court struck Mr. Leatherwood's application from the record for being in violation of Local Rule 37(B) governing the length

of documents. The court granted him leave to file a proper application for post-conviction relief. (ECF No. 9-10). Mr. Leatherwood filed an Amended Second Application for Post-Conviction Relief in Oklahoma County District Court, Case No. CF-07-4162 on May 18, 2018. The district court denied the application on November 29, 2018. (ECF No. 9-1:28-29).

Mr. Leatherwood appealed the State district court's denial of his Amended Second Application for Post-Conviction Relief on January 25, 2019, Case No. PC-19-52. (ECF 9-11). The OCCA affirmed the denial of post-conviction relief on June 12, 2019. (ECF 9-12).

On December 6, 2019, Mr. Leatherwood filed the instant Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241. (ECF No. 1).

II. GROUNDS FOR HABEAS RELIEF

In this petition, Mr. Leatherwood raises the following grounds for relief based both on the United States Constitution and the Constitution of the State of Oklahoma.³

Ground One: The revocation of petitioner's suspended sentences constitutes a denial of his right to due process guaranteed by the fifth and fourteenth amendments to the United States Constitution and the Oklahoma Constitution, art. 2, § 7.

Ground Two: Petitioner was denied his right to effective assistance of counsel in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article II §§ 7, 9, 20 of the Oklahoma Constitution.

Ground Three: The court erred in finding that Petitioner's claim that probation rule 17 did not apply while he was in prison was *res judicata*, and Petitioner's right to due process was violated.

³ Mr. Leatherwood's Oklahoma Constitutional claims must be dismissed without prejudice because such claims are not based on the Constitution of the United States, the jurisdictional basis of federal habeas claims. *See* 28 U.S.C. § 2241(c)(3).

III. ANALYSIS

Mr. Leatherwood challenges the revocation of the remaining fifteen years of his suspended sentences. The crux of his argument is that the conditions of probation included in his original sentence should not have been applied to him while he was incarcerated.

In its Motion to Dismiss, the State contends this § 2241 Petition for Writ of Habeas Corpus was filed after the applicable one-year limitation period had expired.

A. Applicable Law Regarding Statute of Limitations

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), an application for a § 2241 writ of habeas corpus challenging the execution of a state sentence is subject to a one-year limitation period. *Burger v. Scott*, 317 F.3d 1133, 1138 (10th Cir. 2003). Section 2244(d), sets the date the limitation period begins to 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. 28 U.S.C. § 2244(d)(1).

The one-year limitation period is tolled during “the time in which a properly filed application for State post-conviction or other collateral review . . . is pending.” 28 U.S.C. § 2244(d)(2). But tolling applies only to the pendency of properly filed *State* applications for collateral review—not for the pendency of a federal petition for habeas corpus or an appeal from the denial of such action. *Duncan v. Walker*, 533 U.S. 167, 181–82 (2001).

The limitation period may also be subject to equitable tolling in “rare and exceptional circumstances.” *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (quotations omitted). To qualify for equitable tolling, a petitioner must show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quotations omitted). “An inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence.” *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (brackets and quotations omitted).

B. Date Mr. Leatherwood’s Limitations Period Began to Run

In his response to the Motion to Dismiss, Mr. Leatherwood first contends that his conviction did not become “final” until the OCCA affirmed the state district court’s decision denying his second application for post-conviction relief. (ECF No. 11:14). This argument runs counter to the plain language of AEDPA—that the limitations period begins to run “on the date on which the judgment became final by the conclusion of *direct review* or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A) (emphasis added). The OCCA’s affirmation of denial of post-conviction relief does not constitute part

of the “direct review” process. Direct review of this case ended on January 13, 2012, with the OCCA’s opinion affirming revocation of his sentences on direct appeal. (ECF No. 9-2).

In the alternative, Mr. Leatherwood contends § 2244(d)(1)(D) is applicable to his Petition based on newly discovered evidence—the State’s concession during oral argument on March 23, 2017, before the Tenth Circuit that the two cases upon which the state had consistently relied do not squarely hold that terms of probation apply while a prisoner is incarcerated. Mr. Leatherwood also presents two affidavits he would like for this Court to consider, one signed by Kenneth Watson, the former Oklahoma County District Judge that sentenced Mr. Leatherwood, and one signed by Justin Jones, formerly director of the Oklahoma Department of Corrections. But these affidavits were obtained before the March 23, 2017, oral argument and have no effect on the date the limitations period began to run. Thus, March 24, 2017, is the latest possible date from which to calculate the expiration of AEDPA’s one-year limitation period.

Absent statutory or equitable tolling, Mr. Leatherwood’s limitation period was set to expire on March 24, 2018. *See Harris v. Dinwiddie*, 642 F.3d 902, 907 n.6 (10th Cir. 2011) (anniversary method for computing limitations period and providing that the year begins to run the day after conviction is final).

C. Statutory Tolling

Mr. Leatherwood filed two collateral actions attacking the revocation of his sentence which, he contends, tolled the running of the limitation period. The first was the Petition for Writ of Habeas Corpus and Application for Evidentiary Hearing that Mr. Leatherwood filed in the Payne County District Court, challenging the revocation of his

suspended sentences in the Oklahoma County District Court. (ECF No. 9-8). That action was pending from August 24, 2017, to October 6, 2017. The State contends the forty-four days during which this state habeas action was pending does not toll the statute of limitations because it was not "properly filed." The State bases this conclusion on the fact that the Payne County Court dismissed the petition "in part because his claims were improperly brought in the county that was not the situs of the original judgment and sentence." (ECF No. 9:11).

Mr. Leatherwood counters that argument by citing Oklahoma law regarding state habeas actions. *See Okla. Stat. tit. 12, § 1331.* ("Every person restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal."). Additionally, Rule 10.6(C)(1), Rules of the Oklahoma Court of Criminal Appeals, states that absent an extreme emergency, the OCCA "will not entertain an original application for a writ of habeas corpus where such application has not been presented to and refused by the District Court of the county *where petitioner is restrained.*" Rule 10.6 (C)(1) (emphasis added). The rule specifically states:

The writ of habeas corpus has not been suspended or altered by the Post-Conviction Procedure Act so long as the statutory appeal procedures enacted by the Legislature have been first exhausted. The writ of habeas corpus is not an authorization to bypass the statutory appeal process."

It appears, therefore, that a state petition for writ of habeas corpus meets the definition of "other collateral review" for purposes of statutory tolling. In this case, however, Mr. Leatherwood has not demonstrated, and this Court has not been able to establish, that

he was ever incarcerated in Payne County. Thus, the days the Payne County habeas application was pending did not toll the limitation period.

As noted, Mr. Leatherwood filed his Second Application for Post-Conviction Relief on September 18, 2017, in Oklahoma County District Court, Case No. CF-07-4162, (ECF 9-1:26-27). The State moved to strike the application from the record the very next day, based on non-compliance with Local Rule 37(B), governing the length of documents. Mr. Leatherwood responded to the State's motion on September 22, 2017. On January 23, 2018, Mr. Leatherwood filed a motion for status conference. The Oklahoma County District Court ultimately struck his Application for Post-Conviction Relief on April 23, 2018. The Oklahoma County District Court granted Mr. Leatherwood leave to file a proper application for post-conviction relief. (ECF No. 9-10). Mr. Leatherwood filed an "Amended Second Application for Post-Conviction Relief" in Oklahoma County District Court, Case No. CF-07-4162 on May 18, 2018. The court denied the application on November 29, 2018. (ECF No. 9-1:28-29), and the OCCA affirmed on June 12, 2019.

Respondent contends Mr. Leatherwood's Second Application for Post-Conviction Relief did not toll the statute of limitations because it was not "properly filed." Respondent based this argument on the fact that the application exceeded the number of pages allowed by Local Rule 37(b). And when Mr. Leatherwood filed the page-compliant Revised Second Application for Post-conviction Relief, Respondent continues, the limitations period had already expired.

Regardless of the fact that the Oklahoma County District Court granted Mr. Leatherwood leave to amend his application in order to comply with the local rules, his

limitation period was not tolled for the time period between the filing of his second application for post-conviction relief and the date it was stricken from the record because the application was not properly filed. The tolling provision in 28 U.S.C. § 2244(d)(2) provides that the one-year limitation period is tolled only while “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) (emphasis added). To meet the “properly filed” requirement, an inmate must comply with state procedural requirements. *Habteselassie v. Novak*, 209 F.3d 1208, 1210-11 (10th Cir. 2000) (defining a “properly filed” application as “one filed according to the filing requirements for a motion for state post-conviction relief” and giving examples of such requirements). According to the Supreme Court, “[a]n application is ‘properly filed’ when its delivery and acceptance are in compliance with the applicable laws and rules governing filings,” including “the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.” *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). State procedural law is applied to determine whether an application for state post-conviction relief is “properly filed.” *Garcia v. Shanks*, 351 F.3d 468, 471 (10th Cir. 2003).

There is no doubt that in this case, Mr. Leatherwood failed to comply with the relevant state court filing requirements when, on September 18, 2017, he attempted to file an application for post-conviction relief that exceeded the page limitation set forth in Rule 37 of the Rules of the District Court, Seventh Judicial District.

The state district court struck Mr. Leatherwood’s September 18, 2017 application for post-conviction relief as not “properly filed” pursuant to the district court’s procedural

requirements. Therefore, Mr. Leatherwood did not “properly file” his second post-conviction action during the applicable one-year limitation period. It follows that his September 18, 2017 application for post-conviction relief did not serve to toll the limitation period. *See Pratt v. Mullin*, No. 05-6008, 2006 WL 895501 (10th Cir. April 7, 2006) (unpublished decision) (implicitly agreeing with the district court’s finding that § 2244(d)(2) tolling was inapplicable to petitioner’s first post-conviction application which was stricken by the state district court because it exceeded page limits established by local rule).⁴ Accordingly, Petitioner is not entitled to statutory tolling pursuant to § 2244(d)(2) based on the application for post-conviction relief filed September 18, 2017.

D. Equitable Tolling

The remaining issue is whether equitable tolling applies to Mr. Leatherwood’s Petition for Writ of Habeas Corpus under § 2241—filed over eight months after the statutory deadline.

AEDPA’s limitation period “may be subject to equitable tolling” under circumstances where application of the period of limitation would possibly render the habeas remedy “inadequate and ineffective.” *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Holland v. Florida*, 560 U.S. 631, 645 (2010) (“hold[ing] that § 2244(d) is subject to equitable tolling in appropriate cases”). “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Sigala v.*

⁴ *See also Levering v. Dowling*, 721 F. App’x 783, 787 (10th Cir. 2018) (finding a post-conviction application filed in Oklahoma district court and stricken based on State’s motion that application exceeded page limitations of Local Rule 37, was not a properly filed application and did not trigger statutory tolling).

Bravo, 656 F.3d 1125, 1128 (10th Cir. 2011) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Even assuming a petitioner has been diligently pursuing his rights, the one-year limitation period “is subject to equitable tolling . . . only in rare and exceptional circumstances.” *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (citation omitted). The petitioner must “demonstrate[] that the failure to timely file was caused by extraordinary circumstances beyond his control.” *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000). The burden of demonstrating that equitable tolling applies is on the petitioner. *Sigala*, 656 F.3d at 1128; *Miller*, 141 F.3d at 977. “Simple excusable neglect is not sufficient.” *Gibson*, 232 F.3d at 808.

Mr. Leatherwood contends that his motion for status conference demonstrates his diligence. But this action, alone, does not create the “rare and exceptional circumstances” required for equitable tolling. Mr. Leatherwood was aware, or became aware, of the state district court’s page limitation when Respondent filed the motion to strike his application—the day after Mr. Leatherwood filed it. The fact that the state district judge did not rule on Respondent’s motion to strike until after AEDPA’s one-year limitation period had run, does not constitute an “uncontrollable circumstance [that] prevent[ed] Mr. Leatherwood from timely filing” *Gibson*, 232 F.3d at 808 (10th Cir. 2000). The state district judge did nothing to prevent or prohibit Mr. Leatherwood from properly filing an application for post-conviction relief that complied with the local rules. It was always within Petitioner’s control to properly file an application for post-conviction relief. Nothing “stood in his way and prevented timely filing.” *Holland*, 560 U.S. at 649 (internal quotation marks omitted).

Additionally, Mr. Leatherwood could have filed a Petition in this Court and moved for stay and abeyance while he finished exhausting his state court remedies. *See Rhines v. Webber*, 544 U.S. 269 (2005).

Because Mr. Leatherwood has failed to demonstrate some extraordinary circumstance stood in the way of his filing a timely § 2241 Petition, his Petition for Writ of Habeas Corpus should be dismissed with prejudice.

RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

Based on the foregoing, the undersigned magistrate judge recommends that Respondent's Motion to Dismiss (**ECF No. 8**) be **GRANTED**.

Any objection to this Report and Recommendation must be filed with the Clerk of the District Court by **April 17, 2020**. *See* 28 U.S.C. § 636(b)(1); and Fed. R. Civ. P. 72(b)(2). Failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal questions contained herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

STATUS OF THE REFERRAL

This Report and Recommendation terminates the referral to the undersigned magistrate judge in the captioned matter.

ENTERED on March 31, 2020.



SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE

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

MICHAEL DON LEATHERWOOD,)
)
)
Petitioner,)
)
)
vs.) NO. CIV-19-1140-HE
)
)
JEORLD BRAGGS, JR., Warden,)
)
)
)
Respondent.)

ORDER

Petitioner Michael Don Leatherwood, appearing through counsel, has filed a second habeas petition pursuant to 28 U.S.C. § 2241.¹ He again challenges the revocation by the state district court of fifteen years of the suspended sentence imposed by that court. He again argues the revocation was wrongful because the basis for it — violation of the terms of his probation when he was not actually on probation — was incorrect. The court uses the term “again” advisedly, because essentially all of the substantive arguments now relied on by petitioner have been offered previously and rejected by this court and the Court of Appeals as a basis for habeas relief. In any event, petitioner now claims there is new “evidence” that warrants revisiting this again.

The petition was referred to U.S. Magistrate Judge Shon T. Erwin for initial proceedings, pursuant 28 U.S.C. § 636(b)(1)(B) & (C). Respondent moved to dismiss the

¹ As the Court of Appeals noted in its prior order, petitions like this one are viewed as §2241 petitions in the Tenth Circuit, rather than §2254 petitions as they are viewed elsewhere. The repetitive “second and successive” nature of the present petition, without good cause, is perhaps a good argument for reevaluating the rule.

petition as untimely, and Judge Erwin has recommended that it be granted. Petitioner has objected to the Report and Recommendation (the “Report”), which triggers *de novo* review by this court.

The Report concludes that the relevant limitations period for the filing of the petition expired on March 24, 2018, but that the petition was not filed until December 6, 2019. Petitioner objects to the Report’s calculation of the relevant period and to its conclusion that neither statutory nor equitable tolling warrant an extension of the pertinent deadline.

The court concludes the Report correctly identified the latest possible filing deadline, March 24, 2018. As noted in the Report and as applicable here, the one year limitation period runs from the later of the date on which the judgment became final by the conclusion of direct review (28 U.S.C. § 2244(d)(1)(A)) or the date on which the factual predicate for the claim could have been discovered through the exercise of due diligence (28 U.S.C. § 2244(d)(1)(D)). Direct review in this case ended many years ago, long before the December 6, 2019, filing of this petition. The “factual predicate” upon which petitioner relies is a “concession” as to the state of the law in Oklahoma, made by the State at oral argument before the Tenth Circuit Court of Appeals, and two affidavits by former Oklahoma officials. Oral argument was held on March 23, 2017. The affidavits were known to petitioner at the time of the oral argument (indeed, he was trying to get them considered by this court and the Court of Appeals then). So, the last event arguably qualifying as a new factual predicate was the concession at oral argument. One year from that date is March 24, 2018, as the Report correctly concluded.

Petitioner contends he is entitled to statutory tolling based on two post-conviction proceedings he commenced in state court. He filed a petition for writ of habeas corpus in the District Court of Payne County, which was pending there for 46 days, and a second application for post-conviction relief in the District Court of Oklahoma County. The Oklahoma County application was filed September 18, 2017, and stricken by the court on April 23, 2018. The Report concluded the Payne County proceeding did not qualify for tolling because it depended on petitioner being incarcerated in that county at the time and that fact had not been shown. It concluded the Oklahoma County proceeding did not qualify because the petition was not “properly filed” within the meaning of 28 U.S.C. § 2244(d)(2).

With respect to the Payne County proceeding, the court concludes petitioner should be credited with the pertinent time. The Report noted that, under Oklahoma law, a properly filed habeas petition must be filed in the county where the petitioner is incarcerated. It concluded that fact had not been shown. And indeed, it appears not to have been shown as of the time the magistrate judge generated the Report. There is no reference to the Payne County proceeding in the petition filed in this court and the petitioner’s response to the motion to dismiss does nothing more than assert he complied with the applicable state statute. However, he has since referenced an allegation in the petition filed in Payne County to the effect that he was incarcerated there and has also submitted other evidence that he was, in fact, incarcerated in Payne County at the time of filing that petition. The court therefore concludes Mr. Leatherwood could establish the Payne County petition was

properly filed and that he therefore qualifies for 46 days of statutory tolling due to the pendency of that proceeding.

With respect to the Oklahoma County proceeding, the Report concluded it was not “properly filed” and therefore did not qualify for statutory tolling. The conclusion as to proper filing was based on violation of the local court rules. Local Rule 37(b) for Oklahoma County District Court states that “[a]ll motions, applications and responses thereto . . . shall not exceed twenty (20) pages in length, excluding exhibits, without prior permission of the assigned judge.” The State immediately moved for dismissal of the application based on violation of that rule and the court eventually struck it on that basis. Petitioner does not dispute that his application exceeded the 20-page limit and that he did not have permission to exceed it from the assigned judge. Rather, he argues that the court improperly struck the oversized application under then Rule 37(D) (now Rule 37(E)) which states: “Any motion and/or brief filed in violation of this rule shall not be considered by the assigned judge and shall be stricken from the record.”

It may well be, as petitioner argues, that the mandatory “striking” required by Rule 37(D) applies only to “motions and briefs” and not to “applications” like what he filed. But it is nonetheless clear that the application he filed violated the twenty-page limit of 37(B), which applied to applications as well as motions. It was thus not properly filed under the rule and the striking of it was justified by the rule, whether due to the mandatory language of 37(D) or the judge’s action separately. The Report correctly concluded the Oklahoma County proceeding does not qualify for statutory tolling.

Petitioner also argues, for the first time in his objection to the Report,² that an application for an evidentiary hearing was filed on the same date as his second application for post-conviction relief and that it serves to toll the limitations period even if the petition was stricken. The court has considerable doubt whether a motion filed in a proceeding invoked by a defective application has independent significance in this context, but it is unnecessary to resolve the issue here. Arguments raised for the first time in an objection to a Magistrate Judge's recommendation are deemed to have been waived. Standing Akimbo, LLC v. United States, 955 F.3d 1146, 1159 (10th Cir. 2020) (citations omitted).

The court will therefore not consider whether this filing tolls the limitations period.

The result is that petitioner is entitled to statutory tolling only as to the Payne County proceeding, which was for 46 days. That is not enough to fill the approximately twenty-month gap between March 24, 2018, and his filing of the petition here on December 6, 2019. So, the question becomes whether the Report is correct that no basis for equitable tolling has been shown.

Under 28 U.S.C. § 2244(d), the one-year time limit is “subject to equitable tolling in appropriate cases.” Holland v. Florida, 560 U.S. 631, 645 (2010). “[A] petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented

² Petitioner's response to respondent's motion to dismiss does mention that an application for evidentiary hearing was filed the day after his oversized second application for post-conviction relief was filed, but he does not present any argument in that response as to why that filing should statutorily toll the limitations period. Doc. # 11, pp. 9-15.

timely filing.” *Id.* at 649 (quotations and citation omitted). “[T]he exercise of a court’s equity powers must be made on a case-by-case basis”, permitting flexibility to avoid the mechanical application of rules. *Id.* at 649-50 (quotations and citations omitted). The Report concluded that petitioner failed to demonstrate extraordinary circumstances sufficient to justify equitable tolling.

Petitioner objects to that conclusion, arguing that extraordinary circumstances exist because the Oklahoma County district court abused its discretion in striking his oversized second application. As noted above, the application did not comply with the local rules, and, while it may not have been subject to mandatory striking, it was nonetheless within that court’s power to strike the application for noncompliance with the rules. There was no abuse of discretion and hence no “extraordinary circumstance” based on the striking of the application.

Petitioner also argues that extraordinary circumstances exist in his case due to the delay between the state’s filing its motion to strike his second application on September 19, 2017, and the court’s ruling on that motion April 19, 2018. Petitioner contends that he diligently sought relief before that court by filing a response to that motion on September 22, 2017, as well as a motion for a status conference on January 23, 2018, sufficient to demonstrate that extraordinary circumstances prevented him from timely filing his petition.

While plaintiff, who was represented by counsel throughout all relevant proceedings, appears to have diligently pursued his position in various ways, that does not mean the “extraordinary circumstance” element is satisfied. The Report correctly notes that nothing prevented him from timely filing a habeas petition with this court and,

potentially, seeking a stay and abeyance while he exhausted his state court remedies. The court concludes that petitioner has failed to demonstrate that extraordinary circumstances prevented him from timely filing his petition.

Accordingly, after *de novo* review, the Report and Recommendation [Doc. # 12] is **ADOPTED**. Respondent's Motion to Dismiss [Doc. # 8] is **GRANTED** and the petition is **DISMISSED**. Further, in the circumstances of this case, the court concludes petitioner has not made a substantial showing of the denial of a constitutional right and therefore **DECLINES to GRANT** a certificate of appealability. In reaching that conclusion, the court notes again that virtually all of petitioner's current arguments have been presented and rejected in prior proceedings. He sought to offer the affidavits from Judge Watson and Mr. Jones in the prior proceeding. This court declined to permit that supplementation of his petition and the Court of Appeals affirmed, noting that the affidavits did not ultimately go to any issue cognizable in a federal habeas case. Leatherwood v. Allbaugh, 861 F.3d 1034, 1043 & fn.8 (10th Cir. 2017). Further, the new "evidence" doesn't appear to offer any new fact of consequence. The affidavits are essentially legal or lay opinions as to what Oklahoma law requires or permits, not new factual evidence of any sort,³ and the "concession" at oral argument is nothing more than legal argument as to what Oklahoma law required, permitted or allowed.

³ Petitioner views Judge Watson's affidavit as showing what he told Mr. Leatherwood and what he intended by his statements. What the judge told Mr. Leatherwood is a matter of record, which has already been reviewed and ruled on by this court and the Court of Appeals. Whatever intention the judge may have had different from that is of no moment in evaluating what petitioner was on notice of.

IT IS SO ORDERED.

Dated this 25th day of June, 2020.


JOE HEATON
UNITED STATES DISTRICT JUDGE

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