APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

March 6, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ADELSO BARNES,

Petitioner - Appellant,

v.

JANET DOWLING,

Respondent - Appellee.

No. 19-5101
(D.C. No. 4:19-CV-00097-JED-FHM)
(N.D. Okla.)

ORDER DENYING A CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **KELLY**, and **EID**, Circuit Judges.**

Petitioner-Appellant Adelso Barnes, a state inmate appearing pro se, seeks a certificate of appealability (COA) to appeal the dismissal of his habeas petition, 28 U.S.C. § 2254, as time-barred and not subject to statutory or equitable tolling. Barnes v. Dowling, No. 19-CV-0097-JED-FHM (N.D. Okla. Nov. 4, 2019). In 2011, Mr. Barnes pled guilty to second degree felony murder, first degree burglary, robbery with a

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

dangerous weapon, and knowingly concealing or receiving stolen property. He was sentenced to prison terms of 35 years, 20 years, 35 years, and 5 years, respectively, with all terms to run concurrently.

To obtain a COA, Mr. Barnes must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court dismisses a § 2254 petition on procedural grounds, the petitioner must demonstrate "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Here, Mr. Barnes delayed filing his habeas petition nearly seven years after his state conviction became final and is not saved by statutory tolling. See Harris v. Dinwiddie, 642 F.3d 902, 907 n.6 (10th Cir. 2011). Further, even if Mr. Barnes's argument that he discovered new evidence in 2017 is credited his filing still falls outside of the one-year statutory tolling period available under § 2244(d)(1)(D). See Clark v. Oklahoma, 468 F.3d 711, 713 (10th Cir. 2006).

Additionally, Mr. Barnes has failed to "show specific facts to support his claim of extraordinary circumstances and due diligence" sufficient to trigger equitable tolling of the limitations period. Yang v. Archuleta, 525 F.3d 925, 928 (10th Cir. 2008) (internal citations omitted). The district court thoroughly explained why equitable tolling would not apply. No reasonable jurist would find the district court's procedural ruling debatable, and it is therefore unnecessary to consider whether Mr.

Barnes made a substantial showing of the denial of a constitutional right under the Sixth Amendment.

We DENY a COA and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

April 23, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ADELSO BARNES,

Petitioner - Appellant,

v.

JANET DOWLING,

Respondent - Appellee.

No. 19-5101
(D.C. No. 4:19-CV-00097-JED-FHM)
(N.D. Okla.)

ORDER

Before **MATHESON**, **KELLY**, and **EID**, 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

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADELSO BARNES,	
Appellant,	**Case No. 19-5101**
v.	
JANET DOWLING,	**Appellant's Combined Opening Brief and Petition for Certificate of Appealibility**
Appellee.	

APPELLANT'S COMBINED OPENING BRIEF AND PETITION FOR CERTIFICATE OF APPEALIBILITY

1. **Statement of the Case.** (Briefly summarize the events that took place in the district court. For example, identify when you filed your habeas application and any significant motions and orders that were entered.)

   a) That Appellant made application to the Honorable Judge of the United States District Court for the District Court for the Northern District of Oklahoma on February 21, 2019, for a writ of habeas corpus, a copy of which application is attached.

   b) The said Judge of said United States District Court denied Appellant's application for a writ of habeas corpus by an order dated November 04, 2019, a copy of which order is attached.

   c) Appellant filed a notice of appeal from said order in said court on November 13, 2019. A copy of said notice of appeal is attached.

   d) The detention complained of by your Appellant in his application for a writ of habeas corpus arose out of process issued by a state court, to wit (name of court and statement of order): District Court of Tulsa County, Case No. CF-2009-5867

e) The above-named Judge of said United States District Court has refused to issue a Certificate of Appealibility upon Appellant's motion for the reasons stated in his order dated November 04, 2019, denying Appellant's motion for a Certificate of Appealibility. A copy of said order is attached.

f) Under Rule 22(b) of the *Federal Rules of Appellate Procedure*, it is necessary for a Certificate of Appealibility to be issued before your Appellant may appeal to this court from the denial of his application for a writ of habeas corpus.

g) In addition to the reasons stated in Appellant's application for writ of habeas corpus, a Certificate of Appealibility should be issued for the following reasons:

2. **Prior proceedings.** (Identify any prior state, federal, or administrative proceedings in which you also sought relief from the conviction and sentence at issue in this appeal.)

On December 29, 2011, Appellant filed a motion for judicial review pursuant to OKLA. STAT. tit. 22, § 982a;

On May 09, 2013, Appellant filed a motion for suspended sentence pursuant to OKLA. STAT. tit. 22, § 994;

On July 13, 2017, Appellant filed an application for postconviction relief in Tulsa County District Court pursuant to OKLA. STAT. tit. 22, § 1080.

3. **Statement of Facts Relevant to the Issues Presented for Review.** (State the facts necessary and relevant to understanding the legal issues you seek to raise on appeal.)

On July 13, 2017, Mr. Barnes, *pro se,* filed an "Application for Post-Conviction Relief/Application for an Appeal-Out-of-Time/Motions to Withdraw Guilty Plea Out-of-Time/Motion for Re-sentencing Hearing Pursuant to Montgomery's retroactive Ruling/ and Motion to Strike Information CF-2009-5867 as a Nullity" ("Application").

In the Application, the "state district court treated Petitioner's second proposition [that Petitioner did not receive any attorney so that he could make an 'informed decision' about an appeal and was uninformed about his appeal rights, and requests this [c]ourt to withdraw his pleas of guilty out of time] as a request for a recommendation to file an appeal out of time and denied that request." Attachment A, ("Opinion and Order") at 3.

The state district court "construe[d] this request as an application for post-conviction relief requesting a recommendation of a direct appeal out of time, as it is the only procedural mechanism by which Petitioner could withdraw his plea at this time. Rule 2.1(E), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2017). However, Petitioner has the burden of establishing that he was denied an appeal through no fault of his own. *Id.; see also Blades v. State,* 2005 OK CR 1, ¶ 4, 107 P.3d 607; *Smith v. State,* 1980 OK CR 43, ¶ 2, 611 P.2d 276, 277." Attachment C, Order Denying Application for Post-Conviction Relief ("Order Denying") at 3.

"The record clearly shows Petitioner was advised of his appeal rights. *See* [ ] Plea of Guilty: Summary of Facts; Court Minute of 2-28-2011." Id. at 4. The record also shows that Mr. Barnes answered "YES" when asked: "Do you want to remain in the county jail ten (10) days before being taken to the place of confinement?" Plea of Guilty: Summary of Facts at 6.

Based upon the record and absence of any communication, the District Court reaffirmed that "(1) the record demonstrated Petitioner was advised of his appeal rights, (2) the record contradicted Petitioner's 'claim that he had no access to an attorney to be able to file a motion to withdraw his pleas of guilty had he indicated he wished to do so,' and (3) Petitioner 'failed to allege any specific facts that support that he attempted to communicate with his attorney' regarding a desire to appeal. Doc. 8-6, at 4." Opinion and Order at 3.

The record ignores the fact that Appellant was clearly without counsel in the 10-day critical period requiring "effective assistance of counsel," when Mr. Barnes requested to "remain in the county jail." The record below is incomplete in that certain facts are missing: (1) Mr. Barnes was never "consulted" upon waiver of his appeal rights under federal standards and (2) trial counsel's "failure-to-consult" defaulted Mr. Barnes right to appeal where trial's counsel's "failure-to-file" a jurisdictional form is not purely ministerial under Oklahoma law pertaining to appeals from the change of plea process under Section IV, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2011 – 2019).

4. **Statement of Issues and Arguments.** (Identify each instance in which you think the district court was wrong and provide arguments as to why you think error occurred, keeping in mind the legal standard for granting a certificate of appealability. Wherever possible, cite authorities that support your claims. You may argue, for example, that the district court applied the law incorrectly, that the district court erred in its recitation or understanding of the facts, that the district court failed to consider some important argument that you raised with that court, or any other claims of error that you think warrants a different outcome.)

a. **First Issue. Claim of error and supporting arguments:**

A Certificate of Appealability should issue because the question of when a state conviction becomes final is a Federal question.

In the case of *Slack v. McDaniel,* 120 S.Ct. 1595, the United States Supreme Court held:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id. 120 S.Ct. at 1604 (2000). In the appeal at bar, "Respondent contends, and Petitioner concedes, that the habeas petition is untimely under § 2244(d)(1)(A)." Opinion and Order at 7. It is material fact that on February 28, 2011, Mr. Barnes was "convicted" via the Oklahoma

change-of-plea process in lieu of his waiver of jury trial. See generally Plea of Guilty, Summary of Facts at 3. However, due to the posture of Oklahoma's "post-conviction" *collateral* process, the Tulsa County District Court correctly points out, under a *liberal* construction, that Mr. Barnes' "Application" was—in fact—"an application for post-conviction relief requesting a recommendation of a direct appeal out of time." Order Denying at 3. Moreover, under this *substantial* question, Rule 2.1(E), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2017) (hereinafter "OCCA Rule 2.1(E)") "is the only procedural mechanism by which [Mr. Barnes] could withdraw his plea *at this time.*" Ibid.

The error in logic is that, when there is a fundamental right to "effective assistance of counsel for a first appeal as of right" and Mr. Barnes did not personally and affirmatively waive that right, then it was ERROR for the District Court to not hold an evidentiary hearing into whether Appellant "can establish 'cause and prejudice' to overcome his failure to comply with state procedural rules because his trial counsel abandoned him after sentencing and prevented him from making an informed decision as to filing an appeal." Opinion and Order at 13. In other words, "[o]nly by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." *Roe v. Flores-Ortega,* 120 S.Ct. 1029, 1036 (2000).

Of course, "relevant factors" must be applied to the Rules of the Oklahoma Court of Criminal Appeals, like their federal counterpart, "possess force of statute." 22 O.S. § 1051(b). In this *strict* legal sense, the Rules are "self-evident" and provide more than sufficient "supporting evidence" that Mr. Barnes was "abandoned" in the ten-day critical period requiring the assistance of competent counsel. *Carnley v. Cochran,* 369 U.S. 506, 513 (1962) (The record

must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.).

As a counterpoint in federal law, 28 U.S.C. § 2254(c) states: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, **if he has the right under the law of the Sate to raise, by any available procedure the question presented.**" Id. (emphasis added). Under this "exhaustion" rule, the "available procedure" of OCCA Rule 2.1(E), did not realize nor satisfy Mr. Barnes' right to counsel on appeal. *Cf. Landreth v. Harvanek,* 2014 WL 1390803 (W.D. Okla. 2014) (unpublished) (According to Judge Erwin, Petitioner should have attempted to obtain leave to file a direct appeal out of time in state court prior to pursuing this habeas action.).

1. **Rule 2.1(E), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, Appendix is "inadequate and ineffective" as to the Fourteenth Amendment guarantee to "effective assistance of counsel on first appeal as of right."**

Because "application" of OCCA Rule 2.1(E) is not consistently and regularly followed and evenly applied, as a *pro se* litigant seeking to assert his FUNDAMENTAL federal right to "effective assistance of counsel for his first appeal as of right," Mr. Barnes' reliance on "the only procedural mechanism" available as a matter of law did not satisfy that right under 28 U.S.C. § 2254(d). *See* generally *Williams v. Taylor,* 120 S.Ct. 1495, 1510 (2000) ("... but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails."). *See also Orange v. Calbone,* 318 F.3d 1167, 1171 (10th Cir. 2003) (Indeed, our review of Oklahoma case law suggests that an application for a direct appeal out of time is rarely granted, and respondent does not dispute this conclusion at oral argument.).

To the contrary, by attempting to comply with the proper procedures and exhaust Mr. Barnes' state remedies in his *first* verified application for post-conviction relief as to why

"Petitioner did not receive an attorney so that he could make an 'informed decision' about an appeal and was uninformed about his appeal rights, and requests this Court to withdraw his pleas of guilty out of time", the Oklahoma courts departed from the correct legal standard of *Roe v. Flores-Ortega,* 120 S.Ct. 1029 (2000). The *Flores-Ortega* Court held that, "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* 120 S.Ct. at 1038. Without measuring the substantive issue under *constitutional* guarantee "that criminal defendant is entitled to effective assistance of counsel on first appeal as of right," under *clearly* established law of *Eviits v. Lucey,* 105 S.Ct. 830, 833 – 841 (1985), the "inadequate and ineffective" standard of "through no fault of his/her own" *doubly* barred the only vehicle of relief available under the only "available State corrective" process of OCCA Rule 2.1(E).

The Oklahoma courts ultimately determined and affirmed "Petitioner did not timely file motion to withdraw his plea, and Section 1086 of the Post-Conviction Procedure Act of the Oklahoma Statutes bars relief on issues which clearly could have been raised in a direct appeal." Opinion and Order at 5. See also Attachment D, Order Affirming Denial of Post-Conviction Relief ("Order Affirming") at 3 (Judge Musseman noted that Barnes failed to allege any specific facts supporting his claim that he was denied an appeal through no fault of his own ... As for the remaining claims, Judge Musseman found that the claims presented in Barnes' postconviction application could have been raised on direct appeal but no such appeal was filed.).

Although certainly factually distinguished from *Baker v. Kaiser,* 929 F.2d 1495 (10th Cir. 1991), the "due process" right to counsel is absolute and cannot be waived without notice by attorney under Oklahoma law. Therefore, Mr. Barnes did not "waive" Appellant's "Due

Process" right to effective assistance of counsel for his "first appeal as of right." See Rule 1.14(D)(1), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2019) (The trial attorney in all cases shall be responsible for completing and filing the Notice of Intent to Appeal and Designation of Record required by Rule 1.14(C). If a defendant does not direct the trial attorney to initiate an appeal, the attorney shall prepare and file the form set out in Section XIII, Form 13.5, stating the defendant has been fully advised of his/her appeal rights and does not want to appeal the conviction.).

Undoubted, operation of OCCA Rule 1.14(D)(1) "belonged to Petitioner alone, and it was his responsibility to communicate any wish to do so" where the Trial Counsel Responsibility is not "ambiguous." It is "clear and obvious" that the District Court's opinion and order lacked such a *critical* finding. Of course, there is no dispute that the "procedural bar" of OCCA Rule 4.2(A) is "independent and adequate" and "consistently and evenhandedly applied." Under this "due process" theory, there must be a presumption of regularity in following the Rules of the Oklahoma Court of Criminal Appeals. It is clear that there is fatally lacking a "presumption of regularity" of OCCA Rule 1.14(D)(1) in Mr. Barnes case at bar. In light of OCCA Rule 1.14(D), the inference to "waiver" by default is clearing erroneous to the fundamental right to "effective counsel."

The *Baker* Court held that "(1) right to counsel applies to period between conclusion of trial proceedings and date by which defendant must perfect appeal, and thus defendant's right to assistance of counsel applied to statutory ten-day period for filing notice of intent to perfect appeal, even though defendant did not express to appointed counsel his decision to appeal; (2) defendant was denied right to counsel during ten-day period for filing notice of appeal; (3) defendant did not waive right to counsel by failing to contact and direct court-appointed attorney

to file notice of appeal; and (4) denial of defendant's motion for out of time appeal deprive defendant of his due process rights."

To the opposite of the holdings of *Baker, supra,* the District Court factual findings are incorrect and premature for its conclusions did NOT encompass the "presumption of regularity" of OCCA Rule 1.14(D). Instead, the District Court relied on the erroneous state court presumption that Mr. Barnes was (1) "advised of his appeal rights [by the sentencing court], (2) the record contradicted Petitioner's 'claim that he had no access to an attorney to be able to file a motion to withdraw his pleas of guilty had he indicated he wished to do so,' and (3) Petitioner 'failed to allege any specific facts that support that he attempted to communicate with his attorney' regarding a desire to appeal. Doc. 8-6, at 4. Thus, the court concluded, Petitioner 'fail[ed] to provide a sufficient reason for his failure to perfect an appeal.' *Id.*" Opinion and Order at 3. *Stare decisis* is applicable into the exceptions of 28 U.S.C. § 2244(d)(1)(A) and 28 U.S.C. § 2244(d)(1)(D):

> In *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), the Supreme Court held that the appellant's first appeal as of right was not adjudicated in accord with due process of law because the appellant did not have the effective assistance of counsel of an attorney. In this case, Mr. [Barnes] was denied his right to counsel, yet his Motion for an Out of Time Appeal was overruled. We believe that, like the circumstances in *Evitts,* the refusal of the Oklahoma court to grant Mr. [Barnes] an out of time appeal deprived him of due process of law.

Baker v. Kaiser, supra, 929 F.2d at 1500. As to the duties of "effective assistance of counsel" the distinguishing case of *United States v. Reyes-Espinoza,* 754 Fed.Appx. 752 (10th Cir. 2018). There Reyes-Espinoza argued that his was entitled to relief under *Baker v. Kaiser,* however, this Court disagreed and found that the record was to the contrary, in the context of *constitutionally* effective assistance of counsel:

> After sentencing, Mr. Reyes-Espinoza's attorney followed him back to his holding cell and "explained to him the significance of the district judge's downward departure." *Id.* at 96. The attorney then "discussed with [Mr.] Reyes-Espinoza his appellate rights and offered to file a notice of appeal on his behalf," but Mr. Reyes-Espinoza did not respond or instruct his attorney to file an appeal. *Id.* at 96 – 97. Before he left, the "attorney asked [Mr.] Reyes-Espinoza if he had any other questions, thoughts or concerns, and made sure that [Mr.] Reyes-Espinoza knew how to contact him if necessary." *Id.* at 97.

Reyes-Espinoza, 754 Fed.Appx. 752, 752 (10th Cir. 2018). If such is the *constitutional* standard, unlike *Reyes-Espinoza,* Mr. Barnes was not "consulted" upon "after sentencing" in clear violation of the Rules of the Court of Criminal Appeals, possessing "force of statute," 22 O.S. § 1051(b). Because "the right to effective counsel on appeal does not arise from state law, and state law cannot operate to limit or restrict it," *Jones v. Cowley,* 28 F.3d 1067, 1072 (10th Cir. 1994).

The United States Supreme Court recently stated: "The more administrable and workable rule, rather, is the one compelled by our PRECEDENT: When counsel's deficient performance forfeits an appeal that a defendant otherwise would have taken, the defendant gets a new opportunity to appeal ... That rule does no more than restore the status quo that existed before counsel's deficient performance forfeited the appeal, and it allows an appellate court to consider the appeal as that court otherwise would have done—on direct review, and assisted by counsel's briefing." *Garza v. Idaho,* 139 S.Ct. 738, 749 (2019).

2. In light of OCCA Rule 2.1(E), the procedural ruling is NOT plain as a federal question.

There is no question that Mr. Barnes did not "timely" move to withdraw his plea. Under Oklahoma law, "in all cases" before the "ministerial" notice of appeal is filed on any defendant's behalf, there is a "pleading barrier" of OCCA Rule 4.2(A) to be submitted, *strictly* by the defendant, before the right to appeal can even be realized. Irrespective of Oklahoma law, the *Garza* Court explained that "[a] notice of appeal also fits within a broader division of labor between defendants and their attorneys. While 'the accused has the ultimate authority' to decide whether to 'take an appeal,' the choice of what specific arguments to make within that appeal belongs to appellate counsel." *Id.* 139 S.Ct. at 746.

Although Mr. Barnes did not file a timely motion to withdraw his pleas of guilty, OCCA Rule 2.1(E) allows Appellant to file an application for postconviction relief requesting an appeal out of time in the trial court where the final order denying relief was imposed. As provided above, Mr. Barnes' Application was construed likewise. See Opinion and Order at 3.

a. "Cause and Prejudice" by the disjunctive "or" is distinct from "Miscarriage of Justice."

The District Court points out that the United States Supreme Court has determined that the AEDPA statute of limitations could be "reset" through grant of the "appeal-out-of-time" process. Opinion and Order at 7. However, because OCCA Rule 2.1(E) is "independent" of federal law, the subjective standard of "through no fault of his/her own" cannot be overcome with "ineffective of counsel" as *cause* and the *actual prejudice* suffered is the loss of an entire appellate proceeding to which "effective assistance of counsel" attaches. Of course, "constructive" denial of counsel or "abandonment" is a "factual dispute." *See generally Banks v. State,* 953 P.2d 344 (Okla.Crim.App. 1998) (Under our appeal out of time procedure, a delay in filing the appeal or even the inability to file the appeal—for any reason, not just late mailing by prison officials—that is not the fault of the *pro se* prisoner, can result in relief.).

"On habeas review, this Court will not consider issues that have been defaulted in state court on an independent and adequate state procedural ground, unless the petitioner can demonstrate *cause and prejudice* or a fundamental miscarriage of justice." *Hickman v. Spears,* 160 F.3d 1269, 1271 (10th Cir. 1998). "Independent state procedural grounds are those that rely exclusively on state law as a basis of decision." *Smith v. Mullin,* 379 F.3d 919, 925 (10th Cir. 2004). However, a state procedural default rule is adequate to preclude federal review only if it is consistently and evenhandedly applied. *Id.* Whether the state procedural bar is adequate "is itself a federal question." *Lee v. Kemna,* 122 S.Ct. 877 (2002) (quotation omitted).

In the appeal at bar, the District Court acknowledged that Mr. Barnes did not comply with the "independent and adequate" OCCA Rule 4.2(A) and as a result, *liberally,* complied with Oklahoma's "state corrective process" of OCCA Rule 2.1(E). However, since the District Court did not address the "equitable" means to vindicate a federal constitutional entitlement to "effective assistance of counsel for a first appeal as of right," the "circumstances in *Holland* and *Fleming* were quite different than those here." Opinion and Order at 14. *Holland* involved a federal habeas petition and *Fleming* involved an attorney retained in seeking state postconviction relief. Unlike Mr. Barnes' "of right proceeding," both cases do not implicate the *constitutional* requirement of due process of law for a state created statutory appeals process requiring effective assistance of counsel. *See Baker v. Kaiser,* 929 F.2d at 1499 (Having determined that [Mr. Barnes] had a constitutional right to counsel during the ten-day period for filing a notice of appeal, we must next decide whether he was denied that right.); *See also Hickman v. Spears,* 160 F.3d at 1272 (We find that the short time frame in which petitioner had to perfect a certiorari appeal under Oklahoma law did not give him sufficient opportunity to discover and develop his ineffective assistance of counsel claim. Therefore, we find these procedural rules to be

inadequate grounds for denying review of [Mr. Barnes'] ineffective assistance of counsel claim. Accordingly, we address the merits of this claim despite [Mr. Barnes'] state procedural default.).

As stated above, because the State of Oklahoma applied a "subjective" standard without an evidentiary hearing, Mr. Barnes was denied the right to file an "out-of-time" direct appeal—under Oklahoma law, a belated motion to withdraw plea—when in fact, his attorney clearly abandoned him in the ten-day critical period. Because of such erroneous finding, the Oklahoma Court of Criminal Appeals affirmed that "the claims presented in Barnes' post-conviction application could have been raised on direct appeal but no such appeal was filed." Order Affirming at 3. Nevertheless, Mr. Barnes' *pro se* attempt to vindicate Appellant's fundamental right to "effective assistance of counsel on first appeal as of right" proved unavailing and the State of Oklahoma barred Mr. Barnes' claims that should have been raised with the "assistance of counsel for his defence." U.S.C.A. Const. amdts. VI, XIV.

The United States Supreme Court explained, given that past PRECEDENTS call for a presumption of prejudice whenever "the accused is denied counsel at a critical stage," it makes even greater sense to presume prejudice when counsel's deficiency forfeits an "appellate proceeding altogether." *Flores-Ortega, supra,* 120 S.Ct. at 1038. After all, there is no disciplined way to "accord any 'presumption of reliability' ... to judicial proceedings that never took place." *Ibid.* (quoting *Smith v. Robbins,* 120 S.Ct. 746).

b. Mr. Barnes suffered actual prejudice without counsel in the ten-day critical period.

Under the legal premise of the "ten-day critical period", the State of Oklahoma, "contrary to" *Evitts v. Lucey, supra,* applied a presumption of "finality" to Mr. Barnes' conviction when Mr. Barnes' in fact did not intelligently, knowingly and voluntarily waive his right to appeal under "force of statute" OCCA Rule 13, Form 13.5 in an "inadequate and ineffective"

proceeding of OCCA Rule 2.1(E) where Mr. Barnes' asserted attorney error as "cause" and the "prejudice" suffered was Appellant's inability in the "State corrective process" to obtain a fair decision on the merits under constitutionally compelled standard of review implicating "effective counsel" rather than the subsequent "postconviction" stage which does NOT invoke the Constitution but does invoke, first and foremost, a procedural bar; 22 O.S. § 1086 according to Oklahoma law.

As a "collateral" proceeding OCCA Rule 2.1(E) is not evenhandedly applied and State courts did not pass upon the holding of *Evitts v. Lucey* in denying Mr. Barnes relief to file an out of time appeal. "For the state ground to be adequate, it must be 'strictly or regularly followed,' and applied 'evenhandedly to all similar claims.'" *Hickman v. Spears,* 160 F.3d at 1271 (internal quotation marks omitted). On the contrary, the Oklahoma courts rejected the *pro se* proposition that "Petitioner did not receive any attorney so that he could make an 'informed decision' about an appeal and was uniformed about his appeal rights, and requests this [Tulsa County District] Court to withdraw his pleas of guilty out of time." Order Denying at 2. The proceeding in question is the "critical" ten-day period *after* sentencing, where Mr. Barnes chose to remain in the county jail during that period, by inference to await consultation.

The legal authority that Mr. Barnes was abandoned during the ten-day critical period is grounded upon OCCA Rule 1.14(D)(1) to overcome the bar of OCCA Rule 4.2(A). The argument is that no statute of limitations bars a grant, for any reason, of a direct appeal out of time. Thus "factual inquiry" OCCA Rule 2.1(E) is *distinguished* from OKLA. STAT. tit. 22, § 1080 *et. seq.,* where "an Appellant being granted and/or denied an appeal through no fault of his/her own is not one of the enumerated provisions of Section 1080, which allows the District Court to apply the provisions of Section 1085." *Blades v. State,* 107 P.3d 607, 608

(Okla.Crim.App. 2005). Since application of OCCA Rule 2.1(E) can lead to relief, the District Court's § 2244(d)(1) is premature given the violation of a fundamental federal right to Due Process of Law entitling Mr. Barnes to "effective assistance of counsel" as analyzed by *Baker v. Kaiser*:

> Mr. Baker was advised of his right to appeal his burglary conviction during the sentencing proceeding. By itself, however, this advice is *insufficient* to satisfy the right to counsel...
> Defense counsel *must* explain the advantages and disadvantages of an appeal...
> The attorney should provide the defendant with advice about whether there are meritorious grounds for appeal and about the probabilities of success...
> Counsel *must* also inquire whether the defendant wants to appeal the conviction; if that is the client's wish, counsel *must* perfect an appeal.

Id. 929 F.2d at 1499 (emphasis added) (citations and footnote omitted). The factual finding of the District Court is opposite from the *Baker* Court's analysis and the conclusion did not rest upon: "If a defendant does not direct the trial attorney to initiate an appeal, the attorney shall prepare and file the form set out in Section XIII, Form 13.5, stating the defendant has been fully advised of his/her appeal rights and does not want to appeal the conviction." OCCA Rule 1.14(D)(1). Moreover, the State of Oklahoma utilized the silent record to infer that Mr. Barnes' waiver was sufficient under federal standards. However, the silent record is also, in Mr. Barnes' favor, devoid of the affirmative waiver form to be "verified" by trial counsel "in all cases." The federal law is clear on this point: "[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506, 513 (1962)

Conclusion

Wherefore, the actual controversy for REMAND, as sufficient reason, to be settled is whether Mr. Barnes is *actually* entitled to a first appeal as of right and to effective assistance of counsel for his first appeal as of right, where it is clear and not by inference that Mr. Barnes never *affirmatively* waived his right to appeal. It is subject to reasonable debate that "ineffective assistance of counsel" can be "any reason" justifying the Mr. Barnes was denied an "appeal through no fault of his own." As such, OCCA Rule 2.1(E)'s "State corrective process" is not evenly applied to "ineffective assistance of counsel" claims during the ten-day critical period requiring the presence of counsel, according to OCCA Rule 1.14(D) of Oklahoma law "having force of statute."

b. Second Issue. Claim of error and supporting arguments:

The nature of Appellant's claims is an exception to AEDPA's statute of limitations bar.

The District Court determined that § 2244(d)(1) applied to Mr. Barnes' "double-jeopardy" claims. The District Court relied on the unpublished proposition that "due process claims are subject to dismissal for untimeliness on habeas review," citing *Morales v. Jones,* 417 F.App'x. 746, 749 (10th Cir. 2011). Order and Opinion at 12. In the Petition, Mr. Barnes raised two issues: "I. The information filed by the [S]tate violated the Double Jeopardy Clause of the Sixth Amendment because it resulted in multiple convictions and sentences for one single impulse and crime; and II. The plea wasn't a knowing, intelligent, and deliberate choice, and there isn't a factual basis and understanding that makes the plea questioned and the verdict suspect." Opinion and Order at 5; see also Ibid. n. 5. Of course, in the change of plea proceeding, "[i]t is beyond dispute that a guilty plea must be both knowing and intelligent. See, e.g., *Boykin,* 395 U.S. at 242, 89 S.Ct., at 1711; *McCarthy v. United States,* 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969)." *Parke v. Raley,* 113 S.Ct. 517, 523 (1992).

In *Coleman v. Thompson,* the United States Supreme Court made explicit that "federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* 111 S.Ct. 2546, 2565 (1991). *See also Trevino v. Thaler,* 133 S.Ct. 1911, 1921 (2013) (applying narrow exception of *Coleman v. Thompson* "to state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.); *cf. Hill v. Lockhart,* 106 S.Ct. 366, 370 (1985) (We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.).

In the appeal at bar, *distinguished* from *Coleman v. Thompson,* Mr. Barnes seeks the remedy of a belated appeal "as of right" implicating "effective assistance of counsel" which *constitutionally* "allows an appellate court to consider the appeal as that court otherwise would have done—on direct review, and assisted by counsel's briefing." *Garza v. Idaho,* 139 S.Ct. at 749. Due to the distinction of "cause for the default and actual prejudice as a result of the alleged violation of federal law," Mr. Barnes asserts the "failure-to-consult" standard under *Roe v. Flores-Ortega,* 120 S.Ct. 1029 (2000). The *Flores-Ortega* Court held "that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal where there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* 120 S.Ct at 1036. As demonstration, the facts infer that Mr. Barnes chose to stay in the county jail during the ten-day, presumptively to be provided "counsel to explain the advantages and disadvantages" about filing

an "application to withdraw plea setting forth in detail the grounds for withdrawal of the plea." OCCA Rule 4.2(A).

The "Double-Jeopardy" at issue in Mr. Barnes particular case, under its particular facts is that the State of Oklahoma initially charged Appellant "in Count 2 with first degree felony murder, in violation of OKLA. STAT. tit. 21, § 701.7, but the State orally amended the charge to second degree felony murder as part of the plea agreement." Id. at 2, n. 1. However, "second degree felony murder" in violation of OKLA. STAT. tit. 21, § 701.8(2), is predicated upon "a person engaged in the commission of any felony **other than the unlawful acts set out in Section 1, subsection B, of this act.**" Id. To be sure, the District Court acknowledged that Mr. Barnes "entered negotiated pleas of guilty to second degree felony murder; first degree burglary; robbery with a dangerous weapon; and knowingly concealing or receiving stolen property." Ibid. Because Mr. Barnes' "Due Process of Law" claim goes to the validity and unconstitutionality of his conviction, *Morales v. Jones,* 417 F.App'x. 746, 749 (10th Cir. 2011) is inapposite.

1. **As a matter of law, Mr. Barnes's pleas of guilty are in fact involuntary and unintelligent under clearly established federal law thus constituting a structural error without the adequate notice requirement.**

No doubt without actual notice of "elements" of the charge of "second degree felony murder" and the consequences of that punishment, Mr. Barnes' pleas were not *truly* voluntary. *See Henderson v. Morgan,* 96 S.Ct. 2253, 2260 (1976) (Since respondent did not receive adequate notice of the offense to which he pleaded guilty, his plea was involuntary and the judgment of conviction was entered without due process of law.); *Hicks v. Franklin,* 546 F.3d 1279, 1287 (2008) (In sum, the record contains no evidence to support a finding that Mr. Hicks received notice that a depraved mind was an element of murder in the second degree. Therefore,

the state court applied existing Supreme Court precedent by refusing to apply the principles of *Henderson* to these facts, given that the context of this case is closely analogous to *Henderson.*).

This Court has determined, in accordance with Oklahoma law, that "[o]nce the state has established that a defendant used a dangerous weapon in the course of a robbery that results in death, the offense of second degree murder is no longer an option under Oklahoma law." *Wilson v. Sirmons,* 536 F.3d 1064, 1103 – 04 (citations omitted); *Lambert v. Workman,* (Not Reported) 2009 WL 1941971, at *15. In the Plea of Guilty, Summary of Facts Form, Mr. Barnes—with assistance of counsel—waived the right [redacted] to have a record made of the proceedings. The bare record reflects that the only "notice" was "Felony Murder, 2ND" next to the question "Is there a plea agreement?" on page 3 and "Amended to Felony Murder, 2" on page 5. To the opposite, Mr. Barnes' misunderstanding is evident on page 1: "Felony Murder, 21 O.S. 701.7" and page 2: "minimum Life maximum LWOP."

However, without "real notice," in an amended information or record colloquy, Mr. Barnes clearly did not have an understanding of (1) "Homicide is murder in the second degree ... When perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in Section 1, subsection B, of this act," OKLA. STAT. tit. 21, § 701.8(B) and (2) "A person who is convicted or pleads guilty to or nolo contendere to murder in the second degree shall be guilty of a felony punishable by imprisonment in a state penal institution for not less than ten (10) years nor more than life," OKLA. STAT. tit. 21, § 701.9(B).

In contrary to clearly established law, Mr. Barnes' did not receive "real notice" of the charge when he was NOT "informed of both the nature of the charge to which he is pleading guilty and its elements." *Hicks v. Franklin,* 546 F.3d at 1284 (citing *Henderson,* 426 U.S. at 644-47, 96 S.Ct. 2253.). Accordingly, "[w]here a defendant pleads guilty to a crime without

having been informed of the crime's elements, [the voluntary, knowing, and intelligent] standard is not met and the plea is invalid." *Ibid.* Subsequently, the conviction is *constitutionally* impermissible and cannot stand.

As a structural matter, any conviction predicated upon an invalid plea cannot stand for "a plea of guilty and the ensuing conviction comprehended all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *United States v. Broce,* 109 S.Ct. 757, 762 (1989). According to the principles set forth in *Henderson v. Morgan, supra* and *Hicks v. Franklin, supra* "real notice" is a prerequisite to the "basic protections, without which a criminal [change of plea proceeding] cannot reliably serve the function as a vehicle for determination of guilt or innocence." *United States v. Pearson,* 203 F.3d 1243, 1260 (10th Cir. 2000).

Similar to the "actual innocence" exception to AEDPA, Mr. Barnes' exception is predicated upon *constitutional* principles concerning Appellant's "invalid" conviction predicated upon his "pleas of guilty" to a crime that no longer became an option under Oklahoma law in violation of both *Henderson* and *Hicks, supra.* Surely "factual innocence" must comprehend the "legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." Similarly, "[i]n this case the defendant's factual guilt of second-degree murder has never been established in any fashion permitted by the Due Process Clause of the Fourteenth Amendment." *Henderson, supra,* 96 S.Ct. at 2260. *Cf. McQuiggin v. Perkins,* 133 S.Ct. 1924 (2013) (The miscarriage of justice exception, our decision bear out, survived AEDPA's passage.).

Under authority of *Henderson,* "such a plea cannot support a judgment of guilt unless it was voluntary in the constitutional sense. And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the

defendant received 'real notice of the true nature of the charge [of second degree felony murder] against him, the first and most universally recognized requirement of due process." *Id.* 96 S.Ct. at 2257 (footnote omitted) (citation omitted).

As a matter of law, a certificate of appealability should issue as to the fact that Mr. Barnes was initially charged with Count 2: FELONY MURDER, a Felony, by unlawfully, feloniously, and willfully which acting in concert each with the other and during the commission of a Robbery With a Dangerous Weapon and First Degree Burglary without authority of law; Count 3: BURGLARY – FIRST DEGREE; Count 4: ROBBERY WITH A WEAPON; and Count 5: KNOWINGLY CONCEALING/RECEIVING STOLEN PROPERTY; but pled guilty to SECOND DEGREE FELONY MURDER without the required notice, when the state sought to establish—by concession—that a dangerous weapon was utilized in the course of a robbery that results in death.

2. One reason a rational defendant might want to appeal is if there are nonfrivolous grounds for doing so.

With regard to prejudice, *Flores-Ortega* held that, to succeed in an ineffective-assistance of counsel claim in this context, Mr. Barnes need only make only one showing: "that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* 120 S.Ct. at 1039. However, under Oklahoma law, before the "appeal" can be realized, there must be a "hearing" on the application to withdraw plea, OCCA Rule 4.2(A), which does not necessarily provide for a separate attorney. This Court has determined that "[c]ritically, in determining whether a rational defendant would want to appeal, 'courts must take into account all the information counsel knew or should have known." *Smith v. Allbaugh,* 921 F.3d 1261, 1269 (10th Cir. 2019). It must be noted that *Smith, supra* applied for and was denied an appeal out of time as well.

Here, Barnes contends that his attorney had a duty to consult with him about an appeal because the attorney knew or should have known about a nonfrivolous ground for appeal—namely, that Barnes' attorney was ineffective in providing him with an incorrect understanding of the law in relation to the facts of his case under clearly federal established law of *Henderson v. Morgan,* 96 S.Ct. 2253 (1976) and applied by this Court in *Hicks v. Franklin,* 546 F.3d 1279 (10th Cir. 2008). *See Smith v. Allbaugh,* 921 F.3d at 1270 (A rational defendant would have wanted to appeal because there was a nonfrivolous issue to raise in that appeal. *See Flores-Ortega,* 528 U.S. at 480, 120 S.Ct. 1029. And because Smith's second attorney knew or should have known about this nonfrivolous issue, she had a duty to consult with Smith about an appeal.).

Therefore, Barnes' attorney had a *constitutional* duty to inform him that the Tulsa County District Court was without authority to adjudge Appellant guilty of "second degree felony murder" without first providing him notice of the elements and apprising him of the underlying felonies "other than the unlawful acts set out in Section 1, subsection B, of this act." OKLA. STAT. tit. 21, § 701.8(B). Moreover, "taking account into what counsel knew or should have known" *Henderson v. Morgan, supra* and *Hicks v. Franklin, supra* were PRECEDENT prior to Mr. Barnes' conviction.

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, representation that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. See *Missouri v. Frye,* 132 S.Ct. 1399, 1407 (2012). "Similarly, it is too late in the day to permit a guilty plea to be entered

against a defendant solely on the consent of the defendant's agent, his lawyer." *Henderson, supra,* 96 S.Ct. at 2260.

Conclusion

Respectfully, the District Court erred in its analysis of Mr. Barnes' inartful *pro se* "double-jeopardy" claim. Because Mr. Barnes' waived his right to trial, the "factual guilt" to be established is "by the defendant's own solemn admission 'in open court that he is in fact guilty of the offense with which he is charged,' by plea of guilty. This rule, federal and state, is limited to attacks on the voluntary and intelligent nature of the plea. Because Mr. Barnes' plea is involuntary as a matter of law, his conviction cannot stand as a matter of constitutional law under the miscarriage of justice exception to AEDPA.

5. **Do you think the District Court applied the wrong laws?** ☒ **Yes** ☐ **No**
   If so, what law do you want applied?

Evitts v. Lucey, 105 S.Ct. 830 (1985); *Baker v. Kaiser,* 929 F.2d 1495 (10th Cir. 1991); *United States v. Reyes-Espinoza,* 754 Fed.Appx. 752 (10th Cir. 2018); *Roe v. Flores-Ortega,* 120 S.Ct. 1029 (2000). *Smith v. Allbaugh,* 921 F.3d 1261, 1269 (10th Cir. 2019); *McQuiggin v. Perkins,* 569 U.S. 383, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013); *Henderson v. Morgan,* 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); *Hicks v. Franklin,* 546 F.3d 1279 (10th Cir. 2008).

6. **Did the District Court incorrectly decide the facts?** ☒ **Yes** ☐ **No**
   If so, what facts?

Mr. Barnes deliberately chose to remain in the county jails during the ten-day critical period.

7. **Did the District Court fail to consider important grounds for relief?** ☒ **Yes** ☐ **No**
   If so, what grounds?

Mr. Barnes was charged by information to first-degree felony murder with the underlying offense of robbery with a weapon and first degree burglary. Mr. Barnes pled guilty to "second-degree felony murder" without the notice requirement of the "elements" and "direct

consequences." Mr. Barnes was convicted of a crime to which there is no legal basis, or that his plea was invalid as a matter of law.

8. **Do you feel that there are any other reasons why the District Court's judgment was wrong?** ☒ **Yes** ☐ **No**
If so, what?

The Court acknowledged that the State of Oklahoma could "reset" AEDPA's statute of limitations, however, it did not pass upon the question where attorney error—federal question—and lack of affirmative waiver—federal question—could overcome OCCA Rule 2.1(E).

9. **Do you think the Court should hear oral argument in your case?** ☒ **Yes** ☐ **No**
If so, why?

If the right to effective assistance of counsel for defendant's first appeal as of right is grounded in the Due Process Clause, then does OCCA Rule 4.2(A) require a separate counsel where filing of the "motion to withdraw plea" is not purely "ministerial" but "substantial." In addition, because Mr. Barnes' defaulted OCCA Rule 4.2(A), considered part of the direct review process, whether OCCA Rule 4.2(A) is in fact "a critical period" entitling Mr. Barnes to "effective counsel during that period available for, not appeal, but to file a pleading "setting forth in detail" "the errors of law urged as having been committed during the proceeding in the trial court which were raised in the application to withdraw plea." OCCA Rule 4.3(C)(5).

Subsequently, because OCCA Rule 4.2(A) is "consistently and evenhandedly" applied as an adequate "Rule," whether implication of another rule, OCCA Rule 1.14(D)(1), entitled "Trial Counsel Responsibility" is also self-determinate as "consistently and evenhandedly" applied through the principle of "presumption of regularity," and whether violation of OCCA Rule 1.14(D)(1) can be equated to "cause and prejudice" rather than "through no fault of his/her own."

10. Relief Requested. (State what you are asking this court to do.)

Mr. Barnes respectfully request that this Honorable Court issue a Certificate of Appealability into (1) the inadequacy of Rule 2.1(E), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2011) to vindicate Appellant's right to effective of assistance of counsel for his first appeal as of right and (2) Mr. Barnes' invalid plea as a matter of law is an exception to AEDPA under the miscarriage of justice standard.

As a remedy, Mr. Barnes seeks REMAND back to the District Court for determination that Appellant's appeal should be reinstated on the ground that Mr. Barnes received ineffective assistance of counsel and whether the simplistic reference to "Felony Murder, 2ND" is sufficient to provide actual notice; or any relief this Court deems just and proper.

Date: 01/10/2020.

Respectfully Submitted,

Adelso Barnes

Adelso Barnes ODOC# 641200
DCCC
129 Conner Road
Hominy, Oklahoma 74035

FILL OUT AND SIGN EACH OF TH E FOLLOWING TWO SECTIONS

I affirm under the penalty of perjury that I placed this Appellant's Combined opening Brief and Application for Certificate of Appeal ability with first-class postage prepaid in the prison mail system or, if I was not incarcerated, in the United States Mail, addressed to the Clerk of The U.S. Court of Appeals for the Tenth Circuit, 1823 Stout Street, Denver Colorado 80257. In addition, I hereby certify that a copy of this form was placed with first class postage prepaid I the prison mail system or, if I was not incarcerated, in the United States Mail, addressed to:

Tessa L. Henry, OBA #33193
Assistant Attorney General
State of Oklahoma
313 NE 21st Street
Oklahoma City, OK 73105

(identify the name and address of the opposing governmental attorney)

on the following date:

January 16 2020 Adelso Barnes
month day year signature

I certify that the total number of pages I am submitting as my Appellant's Combined Opening Brief and Application for a Certificate of Appealability is 30 pages or less or alternatively, if the total number of pages exceeds 30, I certify that I have counted the number of words and the total is 8,102, which is less than 14,000. I understand that if my Appellant's Combined Opening Brief and Application for a Certificate of Appealibility exceeds 14,000 words, my brief may stricken and the appeal dismissed.

January 16 2020 Adelso Barnes
Month day year signature

Barnes v. Dowling
United States District Court, N.D. Oklahoma. November 4, 2019 Slip Copy 2019 WL 5697187 *(Approx. 9 pages)*

2019 WL 5697187
Only the Westlaw citation is currently available.
United States District Court, N.D. Oklahoma.

Adelso **BARNES**, Petitioner,

v.

Janet **DOWLING**, Respondent.

Case No. 19-CV-0097-JED-FHM
Signed 11/04/2019

Attorneys and Law Firms

Adelso **Barnes**, Hominy, OK, pro se.

Diane L. Slayton, Office of the Attorney Genera, Tessa L. Henry, Attorney General of Oklahoma, Oklahoma City, OK, for Respondent.

OPINION AND ORDER

JOHN E. DOWDELL, CHIEF JUDGE

*1 Petitioner Adelso **Barnes**, a state inmate appearing *pro se*, brings this 28 U.S.C. § 2254 habeas corpus action to challenge the constitutional validity of the judgment and sentence entered against him in the District Court of Tulsa County, Case No. CF-2009-5867. In that case, Petitioner pleaded guilty to second degree felony murder, first degree burglary, robbery with a dangerous weapon, and knowingly concealing or receiving stolen property. In accordance with the negotiated plea agreement, the trial court imposed prison terms of 35 years, 20 years, 35 years, and 5 years, with all sentences to be served concurrently. Before the Court is Respondent's motion (Doc. 7) to dismiss the petition as time-barred under 28 U.S.C. § 2244(d)(1)'s one-year statute of limitations. Respondent filed a brief in support of the motion (Doc. 8), and Petitioner filed a response (Doc. 9). On consideration of the parties' briefs and the case materials, the Court grants Respondent's motion and dismisses the petition for writ of habeas corpus, with prejudice, as time-barred.

I.

On February 28, 2011, in the District Court of Tulsa County, Case No. CF-2009-5867, Petitioner, represented by counsel, entered negotiated pleas of guilty to second degree felony murder, in violation of OKLA. STAT. tit. 21, § 701.8 (Count 2);[1] first degree burglary, in violation of OKLA. STAT. tit. 21, § 1431 (Count 3); robbery with a dangerous weapon, in violation of OKLA. STAT. tit. 21, § 801 (Count 4); and knowingly concealing or receiving stolen property, in violation of OKLA. STAT. tit. 21, § 1713 (Count 5). Doc. 1, at 1-2; Doc. 1-1, at 93-100; Doc. 8-6, at 2.[2] That same day, the trial court accepted his pleas, adjudged him guilty, and, in accordance with the plea agreement, imposed prison terms of 35 years, 20 years, 35 years, and 5 years, with all sentences to be served concurrently. Doc. 1-1, at 96-97; Doc. 8-6, at 2. The trial court advised Petitioner of his appeal rights, and Petitioner indicated on his written plea form that he understood those rights. Doc. 1-1, at 98; Doc. 8-6, at 2, 4. Petitioner did not move to withdraw his pleas within 10 days of sentencing or otherwise pursue a timely certiorari appeal with the Oklahoma Court of Criminal Appeals (OCCA). Doc. 1, at 2; Doc. 8-6, at 2.

Ten months after his sentencing, on December 29, 2011, Petitioner filed a motion for judicial review, pursuant to OKLA. STAT. tit. 22, § 982a, asking the state district court to reduce his sentence. Doc. 8-2, at 1-6. The court denied the motion on January 6, 2012. Doc. 8-3, at 1.[3] Petitioner filed a motion for suspended sentence on May 9, 2013, pursuant to OKLA. STAT. tit. 22, § 994, citing his status as a first-time offender and prison overcrowding and asking the state district court to suspend his sentence. Doc. 8-4, at 1. The court denied that motion on June 21, 2013. Doc. 8-5, at 1.

*2 Just over four years later, on July 13, 2017, Petitioner filed an application for postconviction relief in state district court, pursuant to OKLA. STAT. tit. 22, § 1080, and submitted several supporting documents and affidavits. Doc. 1-1, at 17-179. Petitioner styled

his application as one seeking: postconviction relief, an appeal out of time, to withdraw his guilty pleas out of time, an evidentiary hearing, a resentencing hearing, and "to strike information CF-2009-5867 [as] a nullity." *Id.* at 18. By order filed October 24, 2017, the state district court denied his application. Doc. 8-6, at 1-10. In doing so, the court construed the application as raising five propositions:

I. Ineffective assistance of counsel resulted in an unknowing, unintelligent, and so very not voluntary guilty plea being entered.

II. Petitioner did not receive any attorney so that he could make an "informed decision" about an appeal and was uninformed about his appeal rights, and requests this [c]ourt to withdraw his pleas of guilty out of time.

III. Newly discovered evidence shows that the factual basis for Petitioner's pleas is insufficient.

IV. Petitioner deserves to demonstrate that he belongs in the protected class of offenders who committed their crimes due to transient immaturity and impetuosity because their brains had not yet developed and therein are not as culpable as an adult.

V. Petitioner makes motion to strike the Information as a nullity (void on its face).

Doc. 8-6, at 2-3. The state district court treated Petitioner's second proposition as a request for a recommendation to file an appeal out of time and denied that request. *Id.* at 3-4. The court found (1) the record demonstrated Petitioner was advised of his appeal rights, (2) the record contradicted Petitioner's "claim that he had no access to an attorney to be able to file a motion to withdraw his pleas of guilty had he indicated he wished to do so," and (3) Petitioner "failed to allege any specific facts that support that he attempted to communicate with his attorney" regarding a desire to appeal. Doc. 8-6, at 4. Thus, the court concluded, Petitioner "fail[ed] to provide a sufficient reason for his failure to perfect an appeal." *Id.* The court further found that Petitioner was not entitled to postconviction relief because his "propositions could have been raised within a petition for writ of *certiorari* following the denial of an application to withdraw plea, and [were] thus waived." *Id.* at 5. Alternatively, the court found that Petitioner's third and fourth propositions lacked merit. *Id.* at 6-8. As to the third proposition, the court found Petitioner "failed to demonstrate how the factual basis for the plea and the circumstances underlying the crime could not have been discovered before trial with due diligence." Doc. 8-6, at 6-7. As to the fourth proposition, the court found Petitioner was not entitled to relief because he was "eighteen years of age when he committed [his] crimes, and he was not sentenced to life without the possibility of parole." *Id.* at 7-8. Finally, the court denied Petitioner's requests for counsel and an evidentiary hearing. *Id.* at 8.

Petitioner filed a timely postconviction appeal. Doc. 1-1, at 215-36. In an order filed March 13, 2018, in Case No. PC-2017-1106, the OCCA affirmed the order denying postconviction relief and denying Petitioner's request for leave to file an appeal out of time. Doc. 8-7, at 1-6. The OCCA found that Petitioner "provid[ed] no facts or supporting evidence indicating that he sought and was denied counsel, that he expressed an interest in contacting counsel to facilitate an appeal and the request was ignored, or that he expressed any desire, prior to the filing of [his] request for post-conviction relief, to withdraw his guilty plea." *Id.* at 2. Like the state district court, the OCCA found Petitioner's "claims of newly discovered evidence and entitlement to treatment status in some category other than an adult ... to be without merit." *Id.* at 4-5.

*3 Petitioner filed the instant federal habeas petition (Doc. 1) on February 21, 2019,[4] along with supporting documents (Doc. 1-1). In the petition, he identifies two specific grounds for federal habeas relief:

I. The information filed by the [S]tate violated the Double Jeopardy Clause of the Sixth Amendment because it resulted in multiple convictions and sentences for one single impulse and crime.

II. The plea wasn't a knowing, intelligent, and deliberate choice, and there isn't a factual basis and understanding that makes the plea questioned and the verdict suspect.

Doc. 1, at 12, 14.[5]

Respondent contends the habeas petition should be dismissed as time-barred under 28 U.S.C. § 2244(d)(1)(A) because Petitioner failed to file the petition within one year of the date his conviction became final, even with the benefit statutory tolling under 28 U.S.C. §

2244(d)(2), and Petitioner has not demonstrated any circumstances that would support equitable tolling of the one-year limitation period. Doc. 8, at 3-10.

*4 Petitioner contends his petition cannot be time-barred because (1) he alleges a *Brady* claim arising from the prosecutor's failure to disclose exculpatory evidence, (2) the *Menna-Blackledge* doctrine permits him to bring his double-jeopardy claim, and any other challenges to the trial court's subject matter jurisdiction "at any time," and (3) he is entitled to equitable tolling because his trial counsel's ineffectiveness constitutes "cause and prejudice" for his failure to comply with state procedural rules. Doc. 1, at 14, 21; Doc. 9, at 1-11.

II.

The Antiterrorism and Effective Death Penalty Act (AEDPA), enacted in April 1996, imposes a one-year limitation period for a state prisoner seeking federal habeas relief from a state-court judgment. 28 U.S.C. § 2244(d)(1). Generally, that limitation period commences 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." *Id.* § 2244(d)(1)(A). Under some circumstances, the one-year limitation period may commence on a later date. *Id.* § 2244(d)(1)(B), (C), (D). Regardless of when the one-year limitation period commences, that period is tolled by statute 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." *Id.* § 2244 (d)(2). Because the AEDPA's one-year limitation period is not jurisdictional, federal courts have discretion to toll the limitation period for equitable reasons, *Holland v. Florida*, 560 U.S. 631, 645 (2010), and to excuse non-compliance with the statute of limitations if the prisoner makes "a credible showing of actual innocence," *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013).

A. The petition is untimely under § 2244(d)(1)(A).

Respondent contends, and Petitioner concedes, that the habeas petition is untimely under § 2244(d)(1)(A). Doc. 1, at 14, 21; Doc. 8, at 1-3. The Court agrees. Because Petitioner did not move to withdraw his pleas within 10 days of his February 28, 2011 sentencing hearing or otherwise pursue a timely certiorari appeal, and did not obtain leave to file an out of time appeal, his conviction became final on March 10, 2011, ten days after sentencing. *See Clark v. Oklahoma*, 468 F.3d 711, 713 (10th Cir. 2006) (discussing Oklahoma law); *see also Jimenez v. Quarterman*, 555 U.S. 113, 120-21 (holding 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," the state-court judgment does not become final under § 2244(d)(1)(A) until "the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that appeal"). Applying § 2244(d)(1)(A), Petitioner therefore had until March 12, 2012, to file a timely federal habeas petition. *See Harris v. Dinwiddie*, 642 F.3d 902, 907 n.6 (10th Cir. 2011) (discussing calculation of AEDPA's one-year limitation period).[6] He did not file his federal habeas petition until February 21, 2019, nearly seven years after the filing deadline.

And, as Respondent contends, statutory tolling does not render the petition timely. As previously stated, the one-year limitation period is statutorily tolled 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). Petitioner filed a motion for judicial review within the one-year period. *See Clark*, 468 F.3d at 714 ("Only state petitions for post-conviction relief filed within the one year allowed by AEDPA will toll the statute of limitations."). But that motion was pending for only nine days because Petitioner filed it on December 29, 2011, and the state district court denied it on January 5, 2012. Doc. 8-2, at 1; Doc. 8-3, at 1. This extended Petitioner's deadline for filing a timely federal habeas petition to March 21, 2012. And neither the motion for suspended sentence Petitioner filed on May 9, 2013, nor the application for postconviction relief he filed on July 13, 2017, had any tolling effect because Petitioner filed both after his one-year limitation period expired. *See Clark*, 468 F.3d at 714. As a result, even with the benefit of statutory tolling, Petitioner's federal habeas petition, filed on February 21, 2019, is untimely under § 2244(d)(1)(A).

*5 Absent a later commencement date or a basis for equitable tolling, the habeas petition is time-barred.

B. The petition is untimely under § 2244(d)(1)(D).

Generously construing Petitioner's arguments in his petition and response, Petitioner may be seeking a later commencement date under 28 U.S.C. § 2244(d)(1)(D). Under that provision, the one-year limitation period commences on "the date on which the factual predicate of the

claim or claims presented could have been discovered through the exercise of due diligence."

Petitioner contends his one-year limitation period commenced on April 27, 2017, when "these claims and the facts and information that trigger them ... [were] revealed post-trial when the girlfriend of **Barnes**, Precious Isaac, found and mailed [to Petitioner] the OCCA Opinion of *Sulvetta v. State*, No. F. 2011-591." Doc. 1, at 14. In context, Petitioner seems to allege that he discovered new "facts and information" in April 2017, relating to his claim that his guilty pleas were not knowing and voluntary and that there is no factual basis for his guilty pleas. *Id.* at 14-16. But it is clear from the record that Sulvetta was Petitioner's co-defendant and that the OCCA issued its decision affirming her convictions in March 2013. Doc. 1-1, at 101-10. The Court finds it highly doubtful that Petitioner could not have, with reasonable diligence, discovered the *Sulvetta* opinion or the "facts and information" therein before April 2017.

Nevertheless, accepting for the sake of argument that § 2244(d)(1)(D) applies and that Petitioner's one-year period commenced on April 27, 2017, Petitioner would be eligible for statutory tolling of that one-year period for 78 days—between July 13, 2017, when he filed his application for postconviction relief in state district court, and March 13, 2018, when the OCCA affirmed the denial of postconviction relief. *See* 28 U.S.C. § 2244(d)(2); *Clark*, 468 F.3d at 714. Beginning the next day, March 14, 2018, Petitioner would have had 287 days, or until December 26, 2018,[7] to file a timely federal habeas petition. As discussed, Petitioner did not file his habeas petition until February 21, 2019. Thus, even assuming the one-year period commenced at a later date under § 2244(d)(1)(D), and giving Petitioner the benefit of statutory tolling for that one-year limitation period, Petitioner filed his habeas petition 58 days too late.[8]

Thus, to the extent Petitioner seeks application of § 2244(d)(1)(D), his habeas petition is untimely.

C. The nature of Petitioner's habeas claims does not bar application of § 2244(d)(1). Next, Petitioner contends that § 2244(d)(1)'s one-year statute of limitations does not apply to his habeas petition based on the nature of his claims. In his petition, he specifically asserts that the one-year limitation period "does not apply" because he raises "two issues of law which can NEVER BE WAIVED and can be raised and argued in the initial collateral proceeding: (1) Failure to show jurisdiction (subject or venue) and (2) Failure to charge an offense ... and also, ... the State's failure to meet evidencing the material essential elements required at best." Doc. 1, at 5. Though not clear, these assertions appear to refer to Petitioner's double-jeopardy claim, which he alleges implicates the trial court's subject-matter jurisdiction, and his claim that there is no factual basis to support his guilty pleas. *Id.* at 12-14. To support his position, Petitioner cites the *Menna-Blackledge* doctrine and *Class v. United States*, 138 S. Ct. 798 (2018). *Id.* at 4-5, 12, 21-22. In his response, Petitioner further asserts that the statute of limitations does not apply because he raises a *Brady* claim. Doc. 9, at 1-5.

***6** For two reasons, the Court rejects Petitioner's argument that the AEDPA's statute of limitations does not apply. First, contrary to his contention, there is no time-bar exception for double-jeopardy claims. As a general rule, "a voluntarily and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *United States v. Broce*, 488 U.S. 563, 574 (1989) (quoting *Mabry v. Johnson*, 467 U.S. 504, 508 (1984)). As Petitioner contends, there are exceptions to this general rule. Under the *Menna-Blackledge* doctrine, "a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one which the State may not constitutionally prosecute." *Broce*, 488 U.S. at 575 (emphasis in original) (quoting *Menna*, 423 U.S. at 62). In *Class*, the Supreme Court considered "whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal." 138 S. Ct. at 803. The Court held that it did not. *Id.* In reaching that holding, the Supreme Court stated that it "reaffirmed the *Menna-Blackledge* doctrine and refined its scope" in *Broce* where it "repeated that a guilty plea does not bar a claim on appeal 'where on the face of the record the court had no power to enter the conviction or impose the sentence.' " *Class*, 138 S. Ct. at 804 (quoting *Broce*, 488 U.S. at 569). Nonetheless, to the extent Petitioner relies on *Class*, *Broce*, or the *Menna-Blackledge* doctrine to support his contention that the AEDPA one-year limitation period does not apply to double-jeopardy claims, that reliance is misplaced. These cases hold that a guilty plea does not, in and of itself, preclude a criminal defendant from raising certain constitutional claims to collaterally attack his or her convictions. *See, e.g.*, *Class*, 138 S. Ct. at 803-07. But none of these cases

required the Supreme Court to determine whether a habeas petitioner's claims challenging the constitutional validity of a state-court judgment entered following a guilty plea were, or could be, barred by § 2244(d)(1)'s statute of limitations. In *Blackledge*, the Supreme Court considered whether a state prisoner's guilty plea barred him from raising constitutional claims in a federal habeas proceeding. 417 U.S. at 29-32. But that case was decided in 1974, over 20 years before Congress enacted the AEDPA's statute of limitations in 1996. *See* 28 U.S.C. § 2244(d)(1); *Blackledge*, 417 U.S. at 21. Like Petitioner, the defendant in *Menna* challenged a state-court judgment, but he did so by seeking direct review in state court and direct review of the state court's decision in the United States Supreme Court, not by seeking federal habeas relief under § 2254. *See Menna*, 423 U.S. at 62. Finally, both *Broce* and *Class* involved double-jeopardy claims raised by federal prisoners, either on direct appeal (*Class*) or through a Fed. R. Crim. P. 35(a) motion to vacate sentence (*Broce*). *See Class*, 138 S. Ct. at 802-03; *Broce*, 488 U.S. at 565-69. In short, none of the authorities Petitioner relies on to argue that double-jeopardy claims are not subject to the AEDPA's one-year limitation period support that argument.

Second, to the extent Petitioner argues the time bar does not apply to *Brady* claims or claims implicating a state trial court's subject matter jurisdiction, Petitioner's position is contrary to Tenth Circuit precedent and prior rulings of the federal district courts in this circuit. *See Morales v. Jones*, 417 F. App'x. 746, 749 (10th Cir. 2011) (unpublished) (rejecting habeas petitioner's argument that "subject matter jurisdiction can never be waived and therefore he can never be barred from raising the issue" as "without support in the law" and concluding that "[a]s with any other habeas claim, [a claim that the trial court lacked subject matter jurisdiction] is subject to dismissal for untimeliness"); *Murrell v. Allbaugh*, No. 18-CV-0341-JHP-FHM, 2019 WL 2130144, at *5 (N.D. Okla. 2019) (unpublished) (citing *Morales* and rejecting habeas petitioner's argument that "ALL jurisdictional issues can NEVER be forfeited or waived & MUST be addressed on their merits always"), *certificate of appealability denied sub nom. Murrell v. Crow*, No. 19-5051, 2019 WL 5405940 (10th Cir. Oct. 22, 2019) (unpublished); *McIntosh v. Hunter*, No. CIV-16-460-RAW-KEW, 2017 WL 3598514, at *3 (E.D. Okla. 2017) (unpublished) (citing *Morales* and rejecting habeas petitioner's argument that jurisdictional claim is not subject to AEDPA's time-bar); *Lockett v. Rudek*, No. CIV-11-184-R, 2011 WL 2634216, at *2 (W.D. Okla. 2011) ("There is no exception in 28 U.S.C. § 2244(d)(1)(A) for a habeas claim based on a trial court's alleged lack of subject matter jurisdiction, nor does [p]etitioner cite any federal case law which recognizes such exception."); *Walker v. Calbone*, No. 06-CV-294-TCK-SAJ, 2007 WL 845926, at *3 (N.D. Okla. 2007) ("Neither 28 U.S.C. § 2244(d) nor federal case law makes such an exception for jurisdictional issues arising under state law."). Though these unpublished decisions are not binding on this Court, the Court finds them persuasive and adopts their reasoning here to reject Petitioner's contention that the nature of his claims bars application of the AEDPA's one-year statute of limitations.

D. Petitioner has not demonstrated any circumstances warranting equitable tolling.
Finally, Petitioner contends he can establish "cause and prejudice" to overcome his failure to comply with state procedural rules because his trial counsel abandoned him after sentencing and prevented him from making an informed decision as to filing an appeal. Doc. 1, at 5-8, 16-17, 21; Doc. 9, at 1-2, 6-11. Given Petitioner's pro se status, the Court construes Petitioner's argument as one seeking equitable tolling based on attorney misconduct.[9]

*7 To obtain 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" of his federal habeas petition. *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). This is a "strong burden" and requires the prisoner "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) (quoting *Brown v. Barrow*, 512 F.3d 1304, 1307 (11th Cir. 2008)). While equitable tolling is available to permit review of untimely habeas claims, it "is a rare remedy to be applied in unusual circumstances." *Al-Yousif v. Trani*, 779 F.3d 1173, 1179 (10th Cir. 2015) (quoting *Yang*, 525 F.3d at 929).

Petitioner appears to seek equitable tolling on the basis of attorney misconduct. In some cases, an attorney's conduct, if sufficiently egregious, may support tolling of the AEDPA's one-year limitation period. *Holland*, 560 U.S. at 651; *Fleming v. Evans*, 481 F.3d 1249, 1256 (10th Cir. 2007). But the circumstances in *Holland* and *Fleming* were quite different than those here. In *Holland*, the habeas petitioner alleged his attorney committed misconduct by failing to file a timely federal habeas petition, the task he was expressly retained to perform, despite the petitioner's repeated and consistent communications with the attorney regarding the filing deadline. 560 U.S. at 652-54. Similarly, in *Fleming*, the habeas petitioner alleged

the attorney he retained to assist him in seeking state postconviction relief misled him into believing the attorney was actively pursuing legal remedies in state court when the attorney was not and thus prevented him from filing a timely federal habeas petition. 481 F.3d at 1255-57. Here, in contrast, Petitioner alleges his trial counsel performed deficiently before, during and immediately after Petitioner's plea hearing. Specifically, he claims counsel failed to investigate the facts of his case, deficiently permitted Plaintiff to plead guilty to felony murder and the underlying felony, and abandoned him "during the critical ten day appellate window" in which he could have filed a motion to withdraw his plea thereby depriving him of his opportunity to file a direct appeal. Doc. 1, at 5-9, 14-17, 19-20; Doc. 9, at 6-11. Absent from his petition and response though are any allegations that trial counsel's conduct, either before or immediately after the February 2011 plea hearing, prevented Petitioner from filing a federal habeas petition before his one-year deadline expired on March 21, 2012. Thus, even assuming trial counsel's conduct was sufficiently egregious and prejudicial in that it caused Petitioner to default his federal claims in state court, Petitioner cannot demonstrate that trial counsel's conduct prevented him from complying with § 2244(d)(1)'s one-year statute of limitations.

Moreover, even if he could rely on trial counsel's conduct as an "extraordinary circumstance" that prevented him from filing a timely habeas petition, Petitioner has not shown that he diligently pursued his habeas claims. As previously discussed, Petitioner sought collateral review on only one occasion during the one-year period after his conviction became final. And, on that occasion, Petitioner's request singularly sought a reduced sentence. Doc. 8-2, at 1-6. Just over one year after his AEDPA deadline expired, Petitioner filed a motion requesting modification of his sentence on the bases that he was a first-time offender and his prison facility was overcrowded. Doc. 8-4, at 1. Petitioner first presented his federal habeas claims in state court when he filed his application for postconviction relief in July 2017, more than six years after his conviction became final. Doc. 1-1, at 17. On this record, the Court cannot find that Petitioner diligently pursued his federal habeas claims.

*8 Based on the foregoing, Petitioner cannot make the showings necessary to support equitable tolling of the one-year limitation period. [10]

III.

Under 28 U.S.C. § 2244(d)(1)(A) Petitioner's one-year limitation period commenced on March 12, 2011, and, even with the benefit of statutory tolling, expired on March 21, 2012. Further, generously assuming 28 U.S.C. § 2244(d)(1)(D) applies and Petitioner's one-year limitation period instead commenced on April 17, 2017, his petition remains untimely, even with the benefit of statutory tolling for the period his application for postconviction relief was pending in state court. And, Petitioner has not identified any circumstances warranting equitable tolling of either one-year limitation period. The Court therefore grants Respondent's motion, and dismisses the petition for writ of habeas corpus, with prejudice, as time-barred under 28 U.S.C. § 2244(d)(1). Based on the dismissal, the Court denies as moot Petitioner's requests for an evidentiary hearing and appointment of counsel.

IV.

Rule 11, *Rules Governing Section 2254 Cases in the United States District Courts*, instructs that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A district court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court dismisses a habeas petition on procedural grounds, the petitioner may obtain a certificate of appealability only by showing both "[1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Under the circumstances of this case, reasonable jurists might debate whether the petition states any valid constitutional claims. Nonetheless, the Court finds reasonable jurists would not debate its conclusion that the petition is time-barred under 28 U.S.C. § 2244(d)(1) or its conclusion that Petitioner's circumstances do not warrant equitable tolling. The Court therefore declines to issue a certificate of appealability.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss (Doc. 7) is **granted**.
2. The petition for writ of habeas corpus (Doc. 1) is **dismissed with prejudice** as time-barred.

3. Petitioner's requests for an evidentiary hearing and appointment of counsel are **denied** as moot.

4. A certificate of appealability is **denied**.

5. A separate judgment shall be entered in this matter.

ORDERED this 4th day of November, 2019.

All Citations

Slip Copy, 2019 WL 5697187

Footnotes

1 The State initially charged Petitioner in Count 2 with first degree felony murder, in violation of OKLA. STAT. tit. 21, § 701.7, but the State orally amended the charge to second degree felony murder as part of the plea agreement. Doc. 8-6, at 2 n.1.

2 Throughout this opinion, the Court's record citations refer to the CM/ECF header page numbers found in the upper right-hand corner of each document.

3 The state district court's letter denying the motion for judicial review is dated January 5, 2012, but was filed January 6, 2012. Doc. 8-3, at 1.

4 The Clerk of Court received the federal habeas petition on February 21, 2019. Doc. 1, at 1. The petition includes a "certificate of mailing" indicating that Petitioner deposited the petition "in the U.S. Mail, first class postage prepaid" on February 8, 2019. *Id.* at 23. Without more, this statement does not reflect that Petitioner used his facility's legal mailing system and thus is not sufficient to invoke the prison mailbox rule. *See Price v. Philpot*, 420 F.3d 1158, 1163-64 (10th Cir. 2005) ("[A]n inmate seeking to take advantage of the mailbox rule must use the prison's legal mail tracking system where one is in place."); Rule 3(d), *Rules Governing Section 2254 Cases in the United States District Courts* ("If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of [the prison mailbox] rule."); Fed. R. App. P. 4(c) (providing requirements for compliance with prison mailbox rule in context of filing appeal). Moreover, while the certificate of mailing indicates the petition was placed in the U.S. Mail on February 8, 2019, a letter included in the same packet as the petition is dated February 12, 2019, and the envelope that contained the letter and the petition is postmarked February 19, 2019. Under these circumstances, the Court declines to apply the prison mailbox rule. And, as further discussed below, even if the Court generously applied the rule, a filing date of February 8, 2019, would not aid Petitioner in showing that he timely filed his federal habeas petition.

5 These are the two claims Petitioner clearly identifies in his habeas petition. Because Petitioner appears *pro se*, the Court must liberally construe his petition without becoming an advocate on his behalf. *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009). Applying the rule of liberal construction, Petitioner also appears to allege violations of his rights to due process and equal protection, the evidence is insufficient to support his convictions, he did not receive a fair trial by an impartial tribunal, the prosecutor violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to turn over exculpatory evidence, and he received ineffective assistance of trial counsel. Doc. 1, generally.

6 Petitioner's one-year limitation period commenced on March 11, 2011, the day after his conviction became final, and expired on March 11, 2012. *See Harris*, 642 F.3d at 907 n.6. However, because March 11, 2012, fell on a Sunday, Petitioner had until the following Monday, March 12, 2012, to file a timely federal habeas petition. *See* Fed. R. Civ. P. 6(a)(1)(C).

7 Because the last day to file his petition would have fallen on December 25, 2018, the Court calculates the filing deadline as December 26, 2018. *See* Fed. R. Civ. P. 6(a)(1)(C).

8 The Court previously concluded it would not apply the prison mailbox rule to deem the habeas petition filed on February 8, 2019. *See supra* n. 4. But even

if the Court did apply the prison mailbox rule, the habeas petition would still be untimely by 45 days.

9 In both his petition and response, Petitioner argues, and cites relevant authority, to support his position that he can establish "cause and prejudice" to overcome the procedural default of his habeas claims in state court—i.e., his failure to comply with state procedural rules for moving to withdraw his pleas and seek direct appellate review. *See* Docs. 1, 9. But those arguments are not relevant to the question before this Court. Respondent moves for dismissal of the habeas petition on the basis that Petitioner failed to comply with the AEDPA's statute of limitations—a federal procedural rule, not a state procedural rule. Docs. 7, 8. Petitioner's arguments regarding "cause and prejudice" are thus premature unless and until he can make the showings necessary to overcome the time-bar. And as discussed below, even construing his "cause and prejudice" argument as one seeking equitable tolling, he cannot make the necessary showings.

10 Petitioner also alleges the trial court "failed to ensure that [he] is guilty in fact." Doc. 9, at 9. Even liberally construed, the Court does not read this bare assertion as alleging, much less demonstrating, that Petitioner's untimely filing could be excused through a credible claim that he is actually innocent. *See Perkins*, 569 U.S. at 386, 392 (discussing actual-innocence exception to the AEDPA's statute of limitations).

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IN AND FOR THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

1014921458

STATE OF OKLAHOMA,
Plaintiff,

CASE NUMBER CF-04586?

VS

Adelso Barnes

Defendant,

[NOTE: The trial judge shall ensure the defendant is sworn either prior to completing the Summary of Facts or prior to inquiry by the Court on the Plea. If the defendant is entering a nolo contendere, or other type guilty plea, correct by pen change where term "guilty" used.]

SS# 440-02-5220 D.O.B. 6-19-91
1225 S Rockford
Tulsa OK 74120
(Home Address)

DISTRICT COURT
FILED
MAR 07 2011
SALLY HOWE SMITH, COURT CLERK
STATE OF OKLA. TULSA COUNTY

PLEA OF GUILTY
SUMMARY OF FACTS

PART A: Findings of Fact, Acceptance of Plea

1. Is the name just read to you your true name? (YES) NO
   If No, what is your correct name? _____
   I have also been known by the name(s) _____
2. My lawyer's name is Carlos William
3. (a) Do you wish to have a record made of these proceedings by a Court Reporter? YES (NO)
   (b) Do you wish to waive this right? (YES) NO
4. Age: 19 Grade completed in school: 8th
5. Can you read and understand this form? (YES) NO
   (If the answer above is no, ADDENDUM A is to be completed and attached)
6. Are you currently taking any medications or substances which affect your ability to understand these proceedings? YES (NO)
7. Have you been prescribed any medication that you should be taking, but you are not taking? YES (NO)
   If so, what kind and for what purpose? _____
8. Have you ever been treated by a doctor or health professional for mental illness or confined in a hospital for mental illness? YES (NO)
   If yes, list the doctor or health professional, place and when occurred:
9. Do you understand the nature and consequences of this proceeding? (YES) NO
10. Have you received a copy of the Information and read its allegations? (YES) NO
11. Does the State move to dismiss or amend any case(s) or count(s) in the information or on page 2 of the information? YES NO
    If so, set forth the cases/counts dismissed or amended.
12. A. Do you understand you are charged with:

	Crime	Statutory Reference		
(1)		O.S.	YES	NO
(2)	Felony Murder	21 O.S. 701.7	YES	NO
(3)	Robbery I	21 O.S. 1431	YES	NO
(4)	Felony Unlawful Poss. of Firearm	21 O.S. 1283	YES	NO
(5)				

For additional charges: List any additional charges on a separate sheet and label as PLEA OF GUILTY ADDENDUM B

40a

B. Are you charged after former conviction of a felony? YES (NO)
If yes, list the felony(ies) charged: _____

13. Have you previously been convicted of a felony? If so, when, where and for what felony/felonies?

14. ____(Check if applicable) Do you understand you are subject to the Delayed Sentencing Program for Young Adults and what that sentencing program involves? YES NO

____(Check if applicable) Do you understand that upon a conviction on a plea of guilty to the offense(s) of _____ you will be required to serve a minimum sentence of: _____

√ 85% of the sentence of imprisonment imposed before being eligible for parole consideration and are not eligible for earned or other type of credits which will have the effect of reducing the length of sentence to less than 85% of the sentence imposed? (YES) NO

____% of the sentence of imprisonment imposed or received prior to becoming eligible for state correctional earned credits toward completion of your sentence or eligibility for parole? YES NO

____(Check if applicable) Do you understand that a conviction on a plea of guilty to the offense(s) of _____ will subject you to mandatory compliance with the Oklahoma Sex Offender Registration Act? YES NO

15. What is the charge(s) to which the defendant is entering a plea today?
guilty

16. Do you understand the range of punishment for the crime(s) is/are:
(List in same order as in No. 15 above)

(1) minimum —	maximum —	and/or a fine $ —	YES	NO
(2) minimum 1 yr	maximum Life	and/or a fine $ 10,000	YES	NO
(3) minimum 7	maximum 20	and/or a fine $ 5,000	YES	NO
(4) minimum 5 10	maximum Life 5	and/or a fine $ 5,000	YES	NO

For additional charges: List any additional punishments on a separate sheet, with additional crimes and labeled as PLEA OF GUILTY ADDENDUM B.

17. Read the following statements:

You have the right to a speedy trial before a jury for the determination of whether you are guilty or not guilty and if you request, to determine sentence. (If pleading to capital murder, advise of procedure in 21 O.S. §701.10(B)). At the trial:

(1) You have the right to have a lawyer represent you, either one you hire yourself or if you are indigent a court appointed attorney.

(2) You are presumed to be innocent of the charges.

(3) You may remain silent or, if you choose, you may testify on your own behalf.

(4) You have the right to see and hear all witnesses called to testify against you and the right to cross-examine them.

(5) You may have your witnesses ordered to appear in court to testify and present evidence of any defense you have to these charges.

(6) The state is required to prove your guilt beyond a reasonable doubt.

(7) The verdict of guilty or not guilty decided by a jury must be unanimous; however, you can waive a jury trial and, if all parties agree, the case could be tried by a Judge alone who would decide if you were guilty or not guilty and if guilty, the appropriate punishment.

Do you understand each of these rights? (YES) NO

18. Do you understand by entering a plea of guilty you give up these rights? **(YES)** NO

19. Do you understand that a conviction on a plea of guilty could increase punishment in any future case committed after this plea? **(YES)** NO

20. Have you talked over the charge(s) with your lawyer, advised him/her regarding any defense you may have to the charges and had his/her advice? **(YES)** NO

21. Do you believe your lawyer has effectively assisted you in this case and are you satisfied with his/her advice? **(YES)** NO

22. Do you wish to change your plea of not guilty to guilty and give up your right to a jury trial and all other previously explained constitutional rights? **(YES)** NO

23. Is there a plea agreement? Felony Murder, 2nd **(YES)** NO

What is your understanding of the plea agreement? Ct 2 35 yrs DOC, 60,150 [illegible]
Ct 3 [illegible] 20 60,150 Ct 4 35 yrs/c/c Ct 1 60,150
Ct 5 - 5 yrs c/c Ct 1 60,150

24. Do you understand the court is not bound by any agreement or recommendation and if the court does not accept the plea agreement you have the right to withdraw your plea of guilty? **(YES)** NO

25. Do you understand that if there is no plea agreement the court can sentence you within the range of punishment stated in question 16? **(YES)** NO

26. Do you understand your plea of guilty to the charge(s) is after: (Check one)

- ☒ no prior felony convictions
- ☐ one (1) prior felony conviction
- ☐ two or more prior felony convictions

List prior felony convictions to which pleading: ________

27. What (is) (are) your plea(s) to the charge(s) (and to each one of them)? Guilty

28. Did you commit the acts as charged in the Information? **(YES)** NO

State the factual basis for your plea(s) (attach additional page as needed, labeled as ADDENDUM C):
On 12/11/2004 I was present and in concert with the co-defendant [illegible] and rob a [illegible] the victim, during the commission of the crime the victim was killed, and items were stolen from the home.

29. Have you been forced, abused, mistreated, or promised anything by anyone to have you enter your plea(s)? YES **(NO)**

30. Do you plead guilty of your own free will and without any coercion or compulsion of any kind? **(YES)** NO

31. If you are entering a plea to a felony offense, you have a right to a Pre-Sentence Investigation and Report which would contain the circumstances of the offense, any criminal record, social history and other background information about you. Do you want to have the report? YES **(NO)**

32. (A) Do you have any additional statements to make to the court? YES **(NO)**

(B) Is there any legal reason you should not be sentenced now? YES **(NO)**

HAVING BEEN SWORN, I, the Defendant whose signature appears below, make the following statements under oath: (Check one)

(1) ☒ A. I have read, understood and completed this form

☒ B. My attorney completed this form and we have gone over the form and I understand its contents and agree with the answers. See ADDENDUM A.

☐ C.The Court completed this form for me and inserted my answers to the questions.

(2) The answers are true and correct.

(3) I understand that I may be prosecuted for perjury if I have made false statements to this court.

X _____
Defendant

Acknowledged this _____ day of _____, 20____.

33. I, the undersigned attorney for the Defendant, believe the Defendant understands the nature, purpose and consequence(s) of this proceeding. (S)He is able to assist me in formulating any defense to the charge(s). I am satisfied that the Defendant's waivers and plea(s) of guilty are voluntarily given and he/she has been informed of all legal and constitutional rights.

_____
Attorney for Defendant

34. The sentence recommendation in question 23 is correctly stated. I believe the recommendation is fair to the State of Oklahoma.

35. Offer of Proof (Nolo contendere plea) _____

_____

_____

_____

_____
ASSISTANT DISTRICT ATTORNEY

THE COURT FINDS AS FOLLOWS:

36. A. The Defendant was sworn and responded to questions under oath.

B. The Defendant understands the nature, purpose and consequences of this proceeding.

C. The Defendant's plea(s) of_____ is/are knowingly and voluntarily entered and accepted by the court.

D. The Defendant is competent for the purpose of this hearing.

E. A factual basis exists for the plea(s) (and former conviction[s], if applicable).

F. The Defendant is guilty as charged: (Check as appropriate)

☐ after no prior felony convictions.

☐ after one (1) prior felony conviction.

☐ after two (2) or more prior former felony convictions.

G. Sentencing or order deferring sentence shall be:

☐ imposed instanter, or

☐ continued until the _____ day of _____, 20____, at _____ __.M.

☐ If the Pre-Sentence Investigation and Report is requested; it shall be provided to the court by the _____ day of _____, 20____, at _____ __.M.

H. Defendant is committed to:

_____The RID Program

_____The Regimented Training Program

_____The Delayed Sentencing Program for Young Adults

DONE IN OPEN COURT this 28th day of Feb, 20 11.

Christy Legg
Court Reporter Present

Wm M
JUDGE OF THE DISTRICT COURT

Cheryl D. Packer
Deputy Court Clerk

Wm Mussman
NAME OF JUDGE TYPED OR PRINTED

Part B: Sentence on Plea Case No. _____
State v._____
Date: _____

[NOTE ON USE: Part B to be used with the Summary of Facts if contemporaneous with the entry of plea or may be formatted as a separate sentencing form if sentencing continued to future date.]

THE COURT SENTENCES THE DEFENDANT AS FOLLOWS:

TIME TO SERVE

1. You are sentenced to confinement under the supervision of the Department of Corrections for a term of years as follows: (List in same order as in question No. 15, Part A)

2. Amended to felony murder 2 35 years DOF 150 YCA 85% Crime
3. 20 years DOF 150 YCA
4. 35 Years DOF 150 YCA
5. 5 years DOF 150 YCA
all counts C/C CFAS

2. The sentence(s) to run ☐ Concurrently ☐ Consecutively ☐ Not applicable

3. Defendant shall receive: ☐ Credit for time served ☐ No credit for time served

DEFERRED SENTENCE

1. The sentencing date is deferred until _____, 20____ at _____ __.M.

2. You (will/will not) be supervised. The terms set forth in the Rules and Conditions of Probation found in Addendum D shall be the rules you must follow during the period of deferment.

SUSPENDED SENTENCE or SUSPENDED AS TO PART

1. You are sentenced to confinement under the supervision of the Department of Corrections for a term of years as follows:

_____
_____
_____
_____ to be suspended as follows:

(a) ALL SUSPENDED YES _____ NO _____

(b) Suspended ***except*** as to the first _____ (months) (years) of the term(s) during which time you are to be held in the custody of the Department of Corrections, the remainder of the sentence(s) to be suspended under the terms set forth in the Rules and Conditions of Probation found in Addendum D.

____Said period of incarceration shall be in the custody of the Department of Corrections, to be served in the _____County Jail, in lieu of the Department of Corrections, pursuant to the Community Service Sentencing Program, 22 O.S. Section 991a-4.1.

____ Defendant's term of incarceratin shall be calculated as:
____Calendar days with credit for good behavior only (57 O.S. Section 65).
____As calculated by the Sheriff with all implemented and allowable credits allowed by law.

2. The sentence(s) to run ☐ Concurrently ☐ Consecutively ☐ Not applicable

3. Defendant shall receive: ☐ Credit for time served ☐ No credit for time served

FINES AND COSTS

You are to pay a fine(s), costs, fees and/or restitution as follows: (Addendem E which is attached and made a part of this order)

☐ To the Tulsa County District Court Clerk as set out in the *Order of the Court - Rule 8 Hearing* Addendum.

☐ To the Tulsa County District Attorney's Office as set out in the *Restitution Schedule* Addendum.

☐ To the Department of Corrections as set out in the Pre-Sentence Investigation Report and/or the Rules and Conditions of Probation Addendum.

NOTICE OF RIGHT TO APPEAL

Sentenced to Incarceration, Suspended or Deferred:

To appeal from this conviction, or order deferring sentence, on your plea of guilty, you must file in the District Court Clerk's Office a written Application to Withdraw your Plea of Guilty within ten (10) days from today's date. You must set forth in detail why you are requesting to withdraw your plea. The trial court must hold a hearing and rule upon your application within thirty (30) days from the date it is filed. If the trial court denies your Application, you have the right to ask the Court of Criminal Appeals to review the District Court's denial by filing a Petition for Writ of Certiorari within ninety (90) days from the date of the denial. Within ten (10) days from the date the Application to Withdraw Plea of Guilty is denied, Notice of Intent to Appeal and Designation of Record must be filed pursuant to Oklahoma Court of Criminal Appeals Rule 4.2(D). **If you are indigent, you have the right to be represented on appeal by a court appointed attorney and the right to a record and transcript at public expense.**

Do you understand each of these rights to appeal? (YES) NO

Do you want to remain in the county jail ten (10) days before being taken to the place of confinement? N/A (YES) NO

Have you fully understood the questions that have been asked? (YES) NO

Have your answers been freely and voluntarily given? (YES) NO

I ACKNOWLEDGE UNDERSTANDING OF RIGHTS AND SENTENCE IMPOSED.

X Adelso Barrios
Defendant

I, the undersigned attorney, have advised the Defendant of his appellate rights.

Attorney for Defendant

Done in open court, with all parties present, this 28th day of Feb, 20 11.

Christy Legg
Court Reporter Present

JUDGE OF THE DISTRICT COURT

Cheri D. Jackson
Deputy Court Clerk

ADDENDUM "A"
CERTIFICATE OF DEFENSE COUNSEL

As the attorney for the Defendant, Adelso Dames, I certify that:

1. The Defendant has stated to me that he/she is ☐ able ☐ unable to read and understand the attached form, and I have: (Check appropriate option)

   ☒ determined the Defendant is able to understand the English language.

   ☐ determined the Defendant is unable to understand the English language and obtained _____ to interpret.

2. I have read and fully explained to the Defendant the allegations contained in the Information in this case.

3. I have read and fully explained to the Defendant all of the questions in the Plea of Guilty/Summary of Facts and the answers to the questions set out in the Summary of Facts are the Defendant's answers.

4. To the best of my knowledge and belief the statements and declaration made by the Defendant are accurate and true and have been freely and voluntarily made.

Dated this 28th day of February, 2011.

Attorney for the Defendant

10a

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY,

STATE OF OKLAHOMA.

STATE OF OKLAHOMA, Plaintiff,	)	
vs.	)	Case No. CF-09-5867
ADELSO SHADRICK BARNES, Defendant.	)	

* * * * *

TRANSCRIPT OF PROCEEDINGS

PLEA AND SENTENCING

HAD ON THE

28TH DAY OF FEBRUARY, 2011

BEFORE THE

HONORABLE BILL MUSSEMAN

* * * * *

Appearances:

FOR THE STATE OF OKLAHOMA:
MR. STEVE KUNZWEILER, District Attorney
Tulsa County District Attorney's Office
500 S. Denver, Suite 900
Tulsa, Oklahoma 74103

FOR DEFENDANT BARNES:
MR. CARLOS WILLIAMS, Attorney at Law
616 S. Boston Ave., Suite 404
Tulsa, Oklahoma 74119

Reported by: Christy Smith, CSR, RPR

PROCEEDINGS

THE COURT: Let's go on the record in Case Number CF-2009-5867, State of Oklahoma versus Adelso Barnes. Also today is the State of Oklahoma versus Mr. Hunt. Mr. Hunt is ready to plead. He's told me that and he will be next after Mr. Barnes.

Mr. Barnes, I've just been handed a plea of guilt summary of facts form which appears to me to have your signature on it. Is this, in fact, your signature, sir?

DEFENDANT BARNES: Yes, sir.

THE COURT: That tells me that you have read all of this information and filled it out correctly; is that true?

DEFENDANT BARNES: Yes.

THE COURT: It tells me that, with the assistance of your attorney, you have negotiated a recommendation with the State of Oklahoma, that you are going to be pleading guilty today for that recommendation, which I show to be 35 years in the Department of Corrections. There is some fines and assessments that come along with that. Is that what you are here to do today?

DEFENDANT BARNES: Yes, sir.

THE COURT: It says that you have completed the eighth grade in school; is that true?

DEFENDANT BARNES: Yes, sir.

THE COURT: Can you read and write?

DEFENDANT BARNES: Yes, sir.

THE COURT: Did you read this form or did your attorney read it to you?

DEFENDANT BARNES: I read it.

THE COURT: You read it. Did your attorney answer any questions you had as you went through it?

DEFENDANT BARNES: Huh?

THE COURT: Pardon?

DEFENDANT BARNES: Did he answer questions for me?

THE COURT: No. If you had questions, were you able to ask them?

DEFENDANT BARNES: Yeah.

THE COURT: It says here -- which one is true, you read, understand, and completed this form or your attorney completed this form and you have gone over the form and understand the contents and agree with the answers?

DEFENDANT BARNES: Both, basically.

THE COURT: So you guys went through it together?

DEFENDANT BARNES: (Nods head.)

THE COURT: Is that right?

DEFENDANT BARNES: Yes, sir.

THE COURT: All right.

DEFENDANT BARNES: That's correct.

THE COURT: I'm going to check them both then, consistent with what you told me.

And I'll show this to you.

MR. WILLIAMS: That's fine, Judge.

THE COURT: Do you feel like you had enough time to go through this form with your counsel?

DEFENDANT BARNES: Yes, sir.

THE COURT: Is there anything about this form that you did not understand?

DEFENDANT BARNES: No, sir.

THE COURT: It tells me that you understand the nature and consequences of this proceeding; is that true?

DEFENDANT BARNES: Yes, sir.

THE COURT: It tells me you have not ever been treated for mental health issues or mental health illness.

DEFENDANT BARNES: No, sir.

THE COURT: You've been charged in Count -- looks like Count 1, felony murder; Count 2 --

MR. WILLIAMS: I'm sorry, Judge. It's Count 2.

THE COURT: Count 2, felony murder; Count 3, burglary first degree; Count 4, robbery with a weapon; and Count 5, knowingly concealing stolen property.

Are there any announcements to the charges, State?

MR. KUNZWEILER: Yes, sir.

Your Honor, pursuant to plea negotiations, at this time, Count 2 we're amending to allege with regard to Mr. Barnes that he committed the crime of felony murder in the second degree. Pursuant to that amendment, we expect him to plead guilty to that offense and we'll recommend 35 years regarding that particular count.

THE COURT: You heard the announcements of the State of Oklahoma. Is that your understanding?

DEFENDANT BARNES: Yes, sir.

THE COURT: With the amendment to second degree murder, you'll be entering a plea of guilty and that's what you will be getting the 35 years on. Is that what you understood it to be?

DEFENDANT BARNES: Yes, sir.

THE COURT: This -- I'm looking on the form and I don't see it. It's not answered. This, sir, is what's called an 85-percent crime. Do you understand that?

DEFENDANT BARNES: Yes, sir.

THE COURT: Which means that of the 35 years,

you'll be required by law to serve 85 percent of that time before being eligible for parole or some type of relief. Do you understand that?

DEFENDANT BARNES: Yes, sir.

THE COURT: Did you go over that with your attorney?

DEFENDANT BARNES: Yes, sir.

THE COURT: This wasn't answered.

MR. WILLIAMS: We did go over that.

THE COURT: Pardon?

DEFENDANT BARNES: I probably skipped it on accident. I signed it, if that's what you need.

THE COURT: I'm going to go ahead right here and check this one. Do you see on 14 where I checked 85 percent of the sentence of imprisonment imposed before being eligible for parole consideration? I circled yes. Did you understand that?

DEFENDANT BARNES: Uh-huh.

THE COURT: This form tells me that you understand the rights that you're giving up to enter a plea; is that true?

DEFENDANT BARNES: Yes, sir.

THE COURT: That you're presumed innocent, you have a right to a jury trial, and you have a right to require the State of Oklahoma to prove your guilt beyond

a reasonable doubt. By this plea, you'll be giving up all of those rights. Is that what you want to do today?

DEFENDANT BARNES: Yes, sir.

THE COURT: I've told you, and the State announced, that my understanding of the recommendation is, on that second degree murder charge, 35 years in the Department of Corrections. It will be CC with some other stuff and there will be fines and costs. Is that what you have worked out with your attorney?

DEFENDANT BARNES: Yes, sir.

THE COURT: It says on the form that on 12-11 --

MR. WILLIAMS: That's correct.

THE COURT: -- 2009 you were present and -- Does it say, "and in concert with the co-defendant listed"?

MR. WILLIAMS: Yes, sir.

THE COURT: -- did rob and burglarize the victim during the commission of these crimes. The victim was killed and items were stolen from the home. Do you adopt that statement I just read as true, sir?

DEFENDANT BARNES: Yes, sir.

THE COURT: Is there anything you need to add to that, Mr. Kunzweiler, or not?

MR. KUNZWEILER: Your Honor, I would certainly

add as part of the fact basis the preliminary hearing which was conducted in his presence and that that evidence could certainly support what we would submit as an appropriate factual basis.

THE COURT: What I'm saying is, do you remember the preliminary hearing that you had in this matter, sir?

DEFENDANT BARNES: Do I remember the preliminary hearing?

THE COURT: Yeah.

DEFENDANT BARNES: I remember the preliminary.

THE COURT: And that's -- you understand then what evidence is against you?

DEFENDANT BARNES: Yes, sir.

THE COURT: All right. Has anybody forced, threatened, or beat you to get you to enter this plea of guilty?

DEFENDANT BARNES: No, sir.

THE COURT: Are you entering this plea of guilty because you are guilty and for no other reason?

DEFENDANT BARNES: Yes, sir.

THE COURT: In other words, has anybody promised you something above and beyond this 35-year recommendation I've discussed with you?

DEFENDANT BARNES: No, sir.

THE COURT: Is there any reason I should not accept his plea of guilty at this time, Mr. Williams?

MR. WILLIAMS: No, Your Honor.

THE COURT: I'll accept your plea of guilty. I'll find it's knowingly and voluntarily entered and I will assess the sentences worked out through negotiations. That is, Count 2 will be 35 years in the Department of Corrections, $600 fine, $150 Victim of Crime Fund Assessment. Count 3, is that 20 years?

MR. KUNZWEILER: Yes.

THE COURT: So 20 years in the Department of Corrections, $600 fine, $150 Victim of Crime Fund Assessment; Count 4, 35 years in the Department of Corrections, $600 fine, $150 Victim of Crime Fund Assessment; and Count 5, five years in the Department of Corrections with $600 fine, $150 Victim of Crime Fund Assessment. All of those counts run concurrently, or at the same time, and I will give you credit for the time you've served waiting for sentencing and trial. Did I repeat that to you and the sentences that you understood it to be, sir?

DEFENDANT BARNES: Yeah, I understand.

THE COURT: Is that correct, Mr. Williams?

MR. WILLIAMS: That's correct, Judge.

THE COURT: In addition to the things we've

discussed, sir, you have the right to appeal. Your signature is here on this form under what's called the notice of rights to appeal. Do you remember signing that section?

DEFENDANT BARNES: Yes, sir.

THE COURT: Do you understand your rights to appeal?

DEFENDANT BARNES: Yes, sir.

THE COURT: Do you need me to explain them again?

DEFENDANT BARNES: No, sir.

THE COURT: The important part that starts all the appeal rights is 10 days from today's date. If you think something legally went wrong, you need to file what's called an application to withdraw your plea within 10 days of today's date. Now, you do not just get to change your mind and say I want to do it over. There has to be some legal problem.

DEFENDANT BARNES: Yes, sir.

THE COURT: Knowing you just don't get buyer's remorse, I'll ask you one more time, is this what you want to do today?

DEFENDANT BARNES: Yes, sir.

THE COURT: Is there anything else, Mr. Williams?

MR. WILLIAMS: No, Your Honor.

THE COURT: Mr. Kunzweiler?

MR. KUNZWEILER: No, sir, other than, at some point, I have victim impact statements for the Court to entertain. I ask you go ahead and do Mr. Hunt and then at some point before imposition of sentencing we do that.

THE COURT: There is something else I think I need to do.

Thank you, bailiff.

Sir, I did not swear you in. Raise your right hand. Do you swear the testimony you will give today in court will be truth, the whole truth, and nothing but the truth, so help you God?

DEFENDANT BARNES: Yes.

THE COURT: I've just gone over this plea of guilty with you. Is everything that you have told me true and correct?

DEFENDANT BARNES: Yes, sir.

THE COURT: Is there anything you did not understand about this plea?

DEFENDANT BARNES: No, sir.

THE COURT: You told me that you were entering a knowing and voluntary plea for a 35-year recommendation, that you were not forced, coerced, or

abused in any way to enter that plea. Is all of that true?

DEFENDANT BARNES: Yes, sir.

THE COURT: You told me you knew what you were doing and understand the nature and consequences and are clear-headed today. Is all of that true?

DEFENDANT BARNES: Yes, sir.

THE COURT: I, likewise, sentenced you and you verified that that 35-year sentence, concurrent on all those counts, is what you were expecting; is that true?

DEFENDANT BARNES: Yes, sir.

THE COURT: And you told me you understand your rights to appeal; is that true?

DEFENDANT BARNES: Yes, sir.

THE COURT: Most importantly, that you need to start by filing an application to withdraw your plea within 10 days of today's date, if you think something legally went wrong. Is that all correct?

DEFENDANT BARNES: Yes, sir.

THE COURT: Is there anything further, sir? Anything you want to say to the Court before I close the record?

DEFENDANT BARNES: I apologize for that man losing his life. You know what I mean?

THE COURT: Yes, sir.

DEFENDANT BARNES: That's all I have to say.

THE COURT: Anything else, State?

MR. KUNZWEILER: No, sir.

THE COURT: Defense?

MR. WILLIAMS: No, Your Honor.

THE COURT: We'll be off the record in the matter of Mr. Barnes.

(Proceedings concluded.)

C E R T I F I C A T E

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

I, Christy Smith, a Certified Shorthand Reporter and Registered Professional Reporter, within and for the State of Oklahoma, CSR No. 01332, do hereby certify that the foregoing is a true and correct transcription of my shorthand notes of proceedings held in Case Number CF-09-5867, held on the 28th of February, 2011, before the Honorable Bill Musseman.

I further certify that I am neither related to, nor attorney for any interested party, nor otherwise interested in the event of said action.

WITNESS MY HAND AND SEAL this 22nd day of January, 2020.

Christy Smith, CSR

Christina D. Smith
State of Oklahoma
Certified Shorthand Reporter
CSR # 1332
My Certificate Expires 12-31-20

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADELSO BARNES, **Petitioner/Appellant,** **v.** **JANET DOWLING,** **Respondent/Appellee.**	**Case No. 19-5101** **REQUEST IN PETITION FOR REHEARING AND SUGGESTION FOR EN BANC CONSIDERATION**

PETITION FOR REHEARING AND
SUGGESTION FOR EN BANC CONSIDERATION

COMES NOW, Adelso Barnes, the Petitioner/Appellant herein, *pro se*, timely moves for Request in Petition for Rehearing and Suggestion for En Banc Consideration pursuant to U.S.Ct. of App. 10th Cir. Rules 35.1 and 35.2, 28 U.S.C.A. Accordingly, the Order and Judgment entered on March 6, 2020 is attached hereto.

As set out below, Mr. Barnes' case should be remanded to the District Court for an evidentiary hearing.

ARGUMENT AND AUTHORITY

The petition must begin with a statement that the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and

consideration by the full court is therefor necessary to secure and maintain uniformity of the court's decisions. F.R.A.P. Rule 35. In addition, the petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. F.R.A.P. Rule 40.

1. The Procedural Ruling Is Not Plain Without Assessing Petitioner's Entitlement To Counsel For His First Appeal As Of Right Under Constitutional Guarantees In Light Of The Exhaustion Doctrine.

The panel decision conflicts with the holding of *Slack v. McDaniel,* 120 S.Ct. 1595, 1604 (2000). Clearly established is: "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Ibid.* Petitioner's case is distinguished from *Slack* because that District Court's procedural ruling dealt with "a second or successive habeas petition," of which the *Slack* Court determined that the District Court's "conclusion was wrong." *Id.* 120 S.Ct., at 1604.

Title 28 U.S.C. § 2254(c) prescribe: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the

meaning of this section, **if he has the right under the law of the Sate to raise, by any available procedure the question presented.**" Id. (emphasis added). Accordingly, a petitioner cannot bring a federal habeas claim without first exhausting state remedies. *See Rose v. Lundy,* 102 S.Ct. 1198 (1982). Under this "exhaustion" rule, the "available procedure" of OCCA Rule 2.1(E), did not realize nor satisfy Mr. Barnes' right to counsel on appeal. *Cf. Landreth v. Harvanek,* 2014 WL 1390803 (W.D. Okla. 2014) (unpublished) (According to Judge Erwin, Petitioner should have attempted to obtain leave to file a direct appeal out of time in state court prior to pursuing this habeas action.).

Because the "right to appeal" is grounded upon the "due process of law" clause to the Fourteenth Amendment, the procedural ruling was not "plain" without assessing the "state corrective process" of OCCA Rule 2.1(E). Contrary to the Oklahoma Post-Conviction Procedures Act is that "I was denied a direct appeal through no fault of my own" is NOT an enumerated provision in which "Post-Conviction Relief" can be granted, according Oklahoma Statutes title 22, § 1085. Of course, it would prove absurd to argue "I was denied a direct appeal" during the "direct appeal" proceedings. See 22 O.S. § 1086 (Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for subsequent

application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.).

However, due to the posture of Oklahoma's "post-conviction" *collateral* process, the Tulsa County District Court correctly points out, under a *liberal* construction, that Mr. Barnes' "Application" was—in fact—"an application for post-conviction relief requesting a recommendation of a direct appeal out of time." Order Denying at 3. Moreover, under this *substantial* question, Rule 2.1(E), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2017) (hereinafter "OCCA Rule 2.1(E)") "is the only procedural mechanism by which [Mr. Barnes] could withdraw his plea *at this time.*" Ibid.

The error in logic is that, when there is a fundamental right to "effective assistance of counsel for a first appeal as of right" and Mr. Barnes did not personally and affirmatively waive that right, then it was ERROR for the District Court to not hold an evidentiary hearing into whether Appellant "can establish 'cause and prejudice' to overcome his failure to comply with state procedural rules because his trial counsel abandoned him after sentencing and prevented him from making an informed decision as to filing an appeal." Opinion and Order at 13. In other words, "[o]nly by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or

that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." *Roe v. Flores-Ortega,* 120 S.Ct. 1029, 1036 (2000).

Of course, "relevant factors" must be applied to the Rules of the Oklahoma Court of Criminal Appeals, like their federal counterpart, "possess force of statute." 22 O.S. § 1051(b). In this *strict* legal sense, the Rules are "self-evident" and provide more than sufficient "supporting evidence" that Mr. Barnes was "abandoned" in the ten-day critical period requiring the assistance of competent counsel. *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) (The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.). See also Appellant's Opening Brief at 5 – 6.

Undoubted, operation of OCCA Rule 1.14(D)(1) "belonged to Petitioner alone, and it was his responsibility to communicate any wish to do so" where the Trial Counsel Responsibility is not "ambiguous." It is "clear and obvious" that the District Court's opinion and order lacked such a *critical* finding. Of course, there is no dispute that the "procedural bar" of OCCA Rule 4.2(A) is "independent and adequate" and "consistently and evenhandedly applied." Under this "due process" theory, there must be a presumption of regularity in following the Rules of the Oklahoma Court of Criminal Appeals. It is clear that there is fatally lacking a "presumption of regularity" of OCCA Rule 1.14(D)(1) in Mr. Barnes case at bar.

In light of OCCA Rule 1.14(D), the inference to "waiver" by default is clearing erroneous to the fundamental right to "effective counsel." See also Appellant's Opening Brief at 8.

In this case, the "extraordinary circumstance" at issue involve an attorney's failure to satisfy professional standards of care. Specifically the "Rules of the Oklahoma Court of Criminal Appeals." Undoubtedly, the "supporting evidence" that Mr. Barnes chose to remain in the county jail for the "ten days" for the critical period in which "due process of law" attaches is subject to debate among reasonable jurists. That is, the ten-day period was especially critical for Mr. Barnes because he was not subject to a "notice of appeal" proceeding but rather an "adversary" hearing initiated by "an application to withdraw plea." In other words, without constitutionally competent assistance by trial counsel, Petitioner—without waiving his right to counsel on appeal—cannot *pro se* "set forth in detail" the grounds for withdrawing the plea. In this instance, the panel overlooked the "substantial showing" of Petitioner's right to effective assistance of counsel on his first appeal as of right and found "equity" would not stand for Mr. Barnes', inartful, *pro se* "Double Jeopardy" claims.

2. *Henderson v. Morgan*, 96 S.Ct. 2253 (1976) And *Hicks v. Franklin*, 546 F.3d 1279 (2008) Provides Federal Support For Petitioner's Invalid State Conviction.

In support of the "Double Jeopardy" claim, Petitioner was not provided adequate notice of the charge of Second Degree Felony Murder nor the direct consequences of that charge. See also Appellant's Opening Brief at 18.

This Court has determined, in accordance with Oklahoma law, that "[o]nce the state has established that a defendant used a dangerous weapon in the course of a robbery that results in death, the offense of second degree murder is no longer an option under Oklahoma law." *Wilson v. Sirmons,* 536 F.3d 1064, 1103 – 04 (citations omitted); *Lambert v. Workman,* (Not Reported) 2009 WL 1941971, at *15. In the Plea of Guilty, Summary of Facts Form, Mr. Barnes—with assistance of counsel—waived the right to have a record made of the proceedings. The bare record reflects that the only "notice" was "Felony Murder, 2ND" next to the question "Is there a plea agreement?" on page 3 and "Amended to Felony Murder, 2" on page 5. To the opposite, Mr. Barnes' misunderstanding is evident on page 1: "Felony Murder, 21 O.S. 701.7" and page 2: "minimum Life maximum LWOP."

However, without "real notice," in an amended information or record colloquy, Mr. Barnes clearly did not have an understanding of (1) "Homicide is murder in the second degree ... When perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in Section 1,

Conclusion

There is clearly established law that provides for due process when a State provides a statutory right to appeal. See Oklahoma Statutes Title 22, § 1051. In the case at bar, the challenged action attacks the legitimacy of Rule 2.1(E), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2011). Mr. Barnes NEVER waived his right to "effective assistance of counsel" on his "first appeal as of right." The panel overlooked this "due process" protection in both "the notice of appeal" stage and the "waiver of that right to appeal." As a "collateral" proceeding, OCCA Rule 2.1(E) is not evenhandedly applied and State courts did not pass upon the holding of *Evitts v. Lucey,* 105 S.Ct. 830 (1985) in denying Mr. Barnes relief to file an out of time appeal. In fact, it is "rarely granted." *Orange v. Calbone,* 318 F.3d 1167, 1171 (10th Cir. 2003). "For the state ground to be adequate, it must be 'strictly or regularly followed,' and applied 'evenhandedly to all similar claims.'" *Hickman v. Spears,* 160 F.3d at 1271 (internal quotation marks omitted). On the contrary, the Oklahoma courts rejected the *pro se* proposition that "Petitioner did not receive any attorney so that he could make an 'informed decision' about an appeal and was uniformed about his appeal rights, and requests this [Tulsa County District] Court to withdraw his pleas of guilty out of time." Order Denying at 2.

Furthermore, the case of *Henderson v. Morgan,* 96 S.Ct. 2253 (1976) supports Petitioner's argument that his State conviction is invalid as a matter of constitutional law and provides an exception to AEDPA's statute of limitations because it is "fundamentally unfair" to convict a plea defendant for a crime to which there is lacking sufficient notice requirement to comprehend a *truly* knowing and voluntary plea.

WHEREFORE the panel should GRANT the instant petition and issue a COA on the issues presented.

March 16, 2020

Respectfully Submitted,

Adelso Barnes

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VERIFICATION/CERTIFICATE OF MAILING

I declare under penalty of perjury that he foregoing is true and correct. 28 U.S.C. § 1746.

I hereby certify that a true and correct copy of the foregoing instrument was mailed on March 16, 2020, by placing the same in the U.S. mail here at Dick Conner Correctional Center; 129 Conner Road; Hominy, Oklahoma 74035, with first class postage prepaid to:

Tessa L. Henry OBA# 33193

Office of the Attorney General
State of Oklahoma
313 NE 21st Street
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Adelaide Brenner