

**FILED**

**United States Court of Appeals  
Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

**August 24, 2020**

**Christopher M. Wolpert  
Clerk of Court**

KENNETH R. HEDDLESTEN,

Petitioner - Appellant,

v.

SCOTT CROW, Director,

Respondent - Appellee.

No. 20-6102  
(D.C. No. 5:20-CV-00438-R)  
(W.D. Okla.)

**ORDER DENYING CERTIFICATE OF APPEALABILITY\***

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

Petitioner, an Oklahoma state prisoner proceeding pro se, filed a habeas petition pursuant to 28 U.S.C. § 2254 in the Western District of Oklahoma. Therein, he alleged: (1) he received ineffective assistance of counsel during his state criminal and appellate proceedings; (2) the judge who presided over his criminal proceedings should have recused; (3) the prosecuting attorney was biased; and (4) his sentence is in violation of ex post facto laws. Thereafter, the magistrate judge issued a Report and Recommendation, which sua sponte recommended that the district court dismiss the habeas petition as untimely. After overruling Petitioner's objections to the magistrate judge's

\* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

*Appendix A.*

recommendation, the district court adopted the recommendation in its entirety, dismissed Petitioner's habeas application as time-barred, and denied a certificate of appealability ("COA"). Now, Petitioner seeks a COA from this court.

If the district court dismisses a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claims, a COA will issue when the petitioner shows "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). The petitioner must satisfy both parts of this threshold inquiry before we will hear the merits of the appeal. *Gibson v. Klinger*, 232 F.3d 799, 802 (10th Cir. 2000).

For the reasons explained below, no reasonable jurist could conclude the district court's procedural ruling was incorrect. Petitioner's claims are untimely under 28 U.S.C. § 2244(d), and he is not entitled to statutory or equitable tolling. Therefore, exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we deny Petitioner's application for a COA and dismiss this appeal.

\* \* \*

A petitioner must generally seek habeas relief within one year from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]" 28 U.S.C. § 2244(d)(1)(A). In this case, Petitioner's convictions became "final" on April 11, 2011, when the time for Petitioner to seek certiorari review with the United States Supreme Court expired. *See Locke v. Saffle*, 237

F.3d 1269, 1271 (10th Cir. 2001) (holding that a judgment becomes final when the Supreme Court denies review, or if no petition for certiorari is filed, after the time for filing such petition has passed). Thus, absent statutory or equitable tolling, Petitioner must have filed his habeas petition by April 12, 2012. *See* 28 U.S.C. § 2244(d)(1)(A). Petitioner did not file this action until May 2, 2020—more than eight years after the one-year limitations period expired. Accordingly, Petitioner's habeas application is untimely unless he is entitled to statutory or equitable tolling.

Turning first to statutory tolling, the one-year limitations period will be tolled during the time in which “a properly filed application for State post-conviction or other collateral review” is pending. 28 U.S.C. § 2244(d)(2). In this case, Petitioner did not file for state post-conviction review until January 3, 2013—more than six months *after* the one-year limitations period expired. Thus, Petitioner is not entitled to statutory tolling.

With respect to equitable tolling, we will toll a petitioner's otherwise untimely claims in “rare and exceptional circumstances.” *See Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003) (quoting *Gibson*, 232 F.3d at 808). A petitioner may be entitled to equitable tolling if he shows: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way” of timely filing. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

Here, Petitioner's sole claim to equitable tolling arises from his counsel's allegedly deficient performance. Petitioner suggests counsel did not properly investigate his constitutional claims nor present them on direct review. Petitioner thus contends the one-  
*Counsel failed to seek appellate review in Supreme Court?*

year time bar must be excused because no court has reviewed “all constitutional issues related to [his] conviction[s].”

Petitioner’s claim for equitable tolling is without merit. His argument regarding counsel’s allegedly deficient performance goes to the merits of his habeas petition—it does not justify his eight-year delay in filing. *See Vue v. Dowling*, 716 F. App’x 749, 752 (10th Cir. 2017) (unpublished) (requiring a petitioner to “provide sufficient evidence that his lawyer’s purported negligence prevented him from filing a habeas application within the one-year limitations period”); Petitioner does not explain why counsel’s failure to raise certain issues on appeal impacted his ability to seek § 2254 relief, and from our independent review, it did not. The district court thus correctly concluded Petitioner is not entitled to equitable tolling.

*Answer  
Facts*

\* \* \*

For these reasons, no reasonable jurist could conclude the district court’s procedural ruling was incorrect. Petitioner’s claims are time-barred, and he is not eligible for statutory or equitable tolling. We therefore deny Petitioner’s application for a COA and dismiss this appeal. Petitioner’s motion to proceed *in forma pauperis* is granted.

Entered for the Court

Bobby R. Baldock  
Circuit Judge

THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

KENNETH R. HEDDLESTEN,

Petitioner,

v.

SCOTT CROW, Director,

Respondent.

CIV-20-438-R

ORDER

Petitioner, a state prisoner appearing pro se, filed this action pursuant to 28 U.S.C. § 2254, seeking a writ of habeas corpus. Pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) the matter was referred to United States Magistrate Judge Gary M. Purcell for preliminary review. On May 29, 2020, Judge Purcell issued a Report and Recommendation wherein he recommended that the petition be dismissed as untimely. The matter is currently before the Court on Petitioner's timely objection to the Report and Recommendation, which gives rise to this Court's obligation to undertake a *de novo* review of those portions of the Report and Recommendation to which Petitioner makes specific objection. Having conducted this *de novo* review, the Court finds as follows.

Judge Purcell sets forth the timeline of Petitioner's state conviction following entry of a blind plea and his unsuccessful attempt to withdraw his plea, as well as his unsuccessful appeals and multiple applications for post-conviction relief. Beyond the proceedings identified in the Report and Recommendation, the records of this Court reveal that Petitioner previously filed a § 2254 challenge to these same convictions. See

Appendix B.

*Heddlesten v. Miller*, CIV-11-430-M (Doc.No. 37). Petitioner requested and the Court complied with his request to dismiss that petition without prejudice, as discussed further below. Petitioner now returns to this Court, eight years after expiration of the one-year statute of limitations period under the AEDPA, and seeks to pursue his § 2254 claims. As noted, Judge Purcell concluded the petition was untimely, a conclusion that Petitioner does not challenge. Similarly, he does not challenge Judge Purcell's conclusion that he is not entitled to statutory tolling. Petitioner argues, however that he is entitled to equitable tolling. The Court disagrees.<sup>1</sup>

*Ineffective  
Murphy v. Comer*  
(Petitioner asserts that his appellate counsel's failure to file a petition for certiorari review or to inform him of the one-year statute of limitations period for filing a § 2254 petition entitles him to equitable tolling.) As noted in the Report and Recommendation, the standard for equitable tolling requires a Petitioner to establish that he has been pursuing his rights diligently and that some extraordinary circumstance stood in his way. Here, the Court's earlier § 2254 proceedings belie any attempt by Mr. Heddlesten to rely on equitable tolling.

Petitioner filed CIV-11-430-M on April 19, 2011, eight days after his conviction became final. In a Report and Recommendation dated July 15, 2011, Magistrate Judge Valerie Couch recommended dismissal of the § 2254 petition because it presented both exhausted and unexhausted claims. Petitioner was advised that he could amend his petition and omit unexhausted claims, in which case the petition could proceed. (Doc.No. 14). In

<sup>1</sup> Judge Purcell also concluded that Petitioner had not alleged factual innocence as a basis for tolling, a finding that Petitioner does not challenge in his objection.

the Report and Recommendation Judge Couch recommended the Court not employ the stay and abeyance procedure sometimes applied to mixed petitions:

Petitioner has not demonstrated a stay is warranted by addressing the appropriate *Rhines* [*v. Weber*, 544 U.S. 269 (2005),] factors. Significantly, the one-year limitations period has not expired. See 28 U.S.C. § 2244(d)(1)(A). Without conducting any analysis of the limitations issue, the Court notes the OCCA Summary Opinion was filed on January 20, 2011. Therefore, the recommended dismissal of the instant period does not come at a time after the expiration of the limitations period or close to the end of the one-year period.

*Id.* at p. 5. A footnote accompanying the text warned Petitioner that the limitations period was not tolled while the federal habeas petition was pending. *Id.* at note 1. In response Petitioner chose to amend his petition, omitting the unexhausted claims.

Thereafter, on April 4, 2012, mere days before the one-year period under § 2244(d) expired, Petitioner sought leave to supplement his petition to add new, unexhausted, claims. (Case No. CIV-11-430-M, Doc.No. 30). He was again warned about the statute of limitations issue in a July 23, 2012 Order from Magistrate Judge Bana Roberts denying his request that the Court excuse exhaustion of his unexhausted claims and denying leave to supplement his claims because doing so would create a "mixed" petition.)<sup>2</sup> Petitioner was given the opportunity to clarify whether he sought dismissal without prejudice of the entire action or whether he wished to proceed with his one exhausted claim. (*Id.* at Doc.No. 36, p. 3, note 1). Despite these warnings Petitioner concluded that he wished to proceed on all of his claims and sought voluntary dismissal without prejudice. Consistent with his request,

*This denial forced the Petitioner to seek relief thru the State's Post conviction procedures.*

<sup>2</sup> By this time the statute of limitations had expired.

the Court dismissed his action on September 25, 2012 and Petitioner did not return to this Court until May 2, 2020.

This additional factual background undercuts Petitioner's contention that he is entitled to equitable tolling, given that he twice ignored this Court's admonitions that the one-year statute of limitations was running while he was pursuing his initial § 2254.

Furthermore, Petitioner's arguments related to the alleged ineffectiveness of his counsel

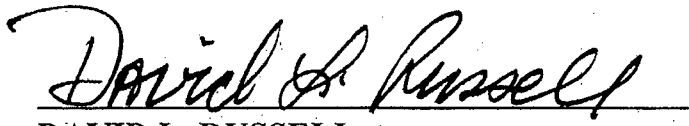
and counsel's failure to raise certain arguments do not support a finding of equitable tolling, rather they are arguments in support of the merits of his claims. See *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) ("[I]gnorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing." (quoting *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999))); *Vue v. Dowling*, 716 F. App'x 749, 752 (10th Cir. 2017) (requiring a petitioner "to provide sufficient evidence that his lawyer's purported negligence prevented him from filing a habeas application within the one-year limitations period"). Petitioner was able to file his initial § 2254 action within days of his conviction becoming final and was informed in those proceedings of the one-year statute of limitations period. Counsel's alleged failure to file a petition for certiorari review does not implicate Petitioner's ability to seek § 2254 relief. Similarly, counsel's failure to raise certain issues in the District Court of Caddo County does not implicate Petitioner's ability to timely seek § 2254 relief. As such, the Court concludes Petitioner is not entitled to equitable tolling.

In a habeas proceeding, when the Court issues a final ruling that is adverse to the petitioner, it must consider whether to issue or deny a certificate of appealability. 28 U.S.C. § 2253(c); Rule 11(a), Rules Governing Section 2254 Cases in the United States District

Courts. When the adverse ruling rests on a procedural ground, the petitioner must show that reasonable jurists could debate (1) whether the petition asserted a viable constitutional claim and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Court finds reasonable jurists would not debate the Court's determinations (1) that the habeas petition is time-barred under § 2244(d)(1)(A) and (2) Petitioner is not entitled to tolling of the statute of limitations period. The Court therefore declines to issue a certificate of appealability.

For the reasons set forth above, the Court hereby ADOPTS Magistrate Judge Purcell's conclusion that the Petition is untimely, and Petitioner is not entitled to tolling of the statute of limitations period, and therefore the Petition is hereby DISMISSED.

**IT IS SO ORDERED** this 19th day of June 2020.

  
DAVID L. RUSSELL  
UNITED STATES DISTRICT JUDGE

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

**KENNETH R. HEDDLESTEN,**

**Petitioner,**

**v.**

**SCOTT CROW, Director,**


**Respondent.**

**CIV-20-438-R**

**JUDGMENT**

Petition filed herein is DISMISSED AS UNTIMELY.

**ENTERED** this 19th day of June 2020.

  
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DAVID L. RUSSELL  
UNITED STATES DISTRICT JUDGE



Court of Caddo County, Case No. CF-2009-51.<sup>1</sup> On February 10, 2010, the state court sentenced Petitioner to 30 years imprisonment on the first charge and 30 years imprisonment suspended on the second. *Id.* The court ordered the sentences to run consecutively. *Id.*

On February 22, 2010, Petitioner filed an application to withdraw his plea. Pet. at 3; Oklahoma State Courts Network, District Court of Caddo County, Case No. CF-2009-51.<sup>2</sup> The trial court denied the same on March 10, 2010. *Id.* Petitioner appealed the denial to the Oklahoma Court of Criminal Appeals (“OCCA”) and it affirmed the trial court’s decision on January 20, 2011. Oklahoma State Courts Network, Oklahoma Court of Criminal Appeals, Case No. C-2010-234.<sup>3</sup>

Petitioner filed an application for post-conviction relief on January 3, 2013. Pet. at 3; Oklahoma State Courts Network, District Court of Caddo County, Case No. CF-2009-51.<sup>4</sup> Therein, he argued that his plea was not knowingly, voluntarily, and intelligently entered, he received ineffective assistance of counsel, the trial judge should have recused, the prosecuting attorney was biased against him, the trial court

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<sup>1</sup> See <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=caddo&number=CF-2009-51>.

<sup>2</sup> See <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=caddo&number=CF-2009-51>.

<sup>3</sup> See <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=C-2010-234&cmid=104098>.

<sup>4</sup> See <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=caddo&number=CF-2009-51>.

lacked jurisdiction, his rights were violated during the initial investigation, and prosecutors violated both state and federal law. Pet. at 3. The state court denied his application on August 16, 2013. *Id.* at 4; Oklahoma State Courts Network, District Court of Caddo County, Case No. CF-2009-51.<sup>5</sup> Petitioner appealed to the OCCA and it affirmed the denial on November 7, 2013. Pet. at 4; Oklahoma State Courts Network, Oklahoma Court of Criminal Appeals, Case No. PC-2013-865.<sup>6</sup>

Petitioner also filed a second, third, fourth and fifth application for post-conviction relief and/or application to appeal out of time. Pet. at 4-5; Oklahoma State Courts Network, District Court of Caddo County, Case No. CF-2009-51.<sup>7</sup> The state court denied each of them. *Id.* Petitioner appealed the denial of his third application for post-conviction relief to the OCCA, which affirmed the denial and explained that each of Petitioner's grounds for relief were or could have been raised in his previous applications. Pet. at 4; Oklahoma State Courts Network, Oklahoma Court of Criminal Appeals, Case No. PC-2019-333.<sup>8</sup>

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<sup>5</sup> See <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=caddo&number=CF-2009-51>.

<sup>6</sup> See <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=PC-2013-865&cmid=112845>.

<sup>7</sup> See <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=caddo&number=CF-2009-51>.

<sup>8</sup> See <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=PC-2019-333&cmid=126230>.

By the current action, Petitioner raises the same or substantially similar challenges to his convictions that he raised in his first application for post-conviction relief. Pet. at 3, 6, 8, 10, 13, 15, 17-22. He requests this Court “reverse the Caddo County District Court’s Judgment and Sentence and remand with instructions consistent with the rudimentary demands of fundamental fairness.” *Id.* at 16.

## II. Screening Requirement

Under Rule 4 of the Rules Governing Section 2254 Cases, the Court is required to promptly examine a habeas petition and to summarily dismiss it “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief . . . .” Rule 4, Rules Governing § 2254 Cases. “[B]efore acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions.” *Day v. McDonough*, 547 U.S. 198, 210 (2006). Petitioner has such notice by this Report and Recommendation, and he has an opportunity to present his position by filing an objection to the Report and Recommendation. Further, when raising a dispositive issue *sua sponte*, the district court must “assure itself that the petitioner is not significantly prejudiced . . . and determine whether the interests of justice would be better served by addressing the merits . . . .” *Id.* (quotations omitted); *Thomas v. Ulibarri*, 214 F. App’x 860, 861 n.1 (10th Cir. 2007); *Smith v. Dorsey*, No. 93-2229, 1994 WL 396069, at \*3 (10th Cir. July 29, 1994) (noting no due process concerns with the magistrate judge raising an issue *sua*

*sponte* where the petitioner could “address the matter by objecting” to the report and recommendation).

### III. Timeliness

#### A. Applicable Limitations Period

Under 28 U.S.C. § 2244(d)(1)(A), a petitioner must seek habeas relief within one-year and said limitations period generally begins to run from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” Petitioner was sentenced on February 10, 2010, following his entry of a no contest plea. *See, supra*. [Petitioner timely requested to withdraw his plea on Monday, February 22, 2010. *Id.* Petitioner’s request was denied on March 10, 2010. *Id.* Petitioner timely appealed and the OCCA affirmed the state court decision on January 10, 2011. *Id.* Petitioner’s convictions therefore became “final” under 28 U.S.C. § 2244(d)(1)(A) on Monday, April 11, 2011, when the time for Petitioner to seek certiorari review, which he did not do, with the United States Supreme Court expired.] *See Locke v. Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001) (“Under the statute, a petitioner’s conviction is not final and the one-year limitation period for filing a federal habeas petition does not begin to run until . . . ‘after the United States Supreme Court has denied review, or, if no petition for certiorari is

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<sup>9</sup> *See* Sup. Ct. R. Rule 13(1) (providing that applicant for certiorari has 90 days from date of judgment to file petition for writ of certiorari); 28 U.S.C. § 2101(d).

filed, after the time for filing a petition for certiorari with the Supreme Court has passed.”) (quoting *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999)).

Thus, Petitioner had one year beginning on April 12, 2011, to file his federal habeas petition commensurate with 28 U.S.C. § 2244(d)(1)(A). Absent statutory or equitable tolling, his one-year filing period expired on April 12, 2012. Petitioner did not file this action until May 2, 2020.

B. Statutory Tolling

As noted, Petitioner did not file his first Application for Post-Conviction Relief until January 3, 2013. Under 28 U.S.C. § 2244(d)(2), “The time during which a *properly filed* application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending” will generally toll the statute of limitations applicable to filing a habeas petition. (emphasis provided). Petitioner did not file his post-conviction application until after his statute of limitations had already expired. See *Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006) (“Only state petitions for post-conviction relief filed within the one year allowed by [the Antiterrorism and Effective Death Penalty Act] will toll the statute of limitations.”). Thus, Petitioner is not entitled to statutory tolling.

C. Equitable Tolling

28 U.S.C. “§ 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling.” *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). “Generally,

a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Generally, equitable tolling is warranted only in situations where the petitioner was actively misled or is prevented in some extraordinary way from asserting his rights. *Id.* at 418-19.

(Petitioner has not presented any grounds indicating that he was misled or otherwise prevented from asserting his rights.) While Petitioner may argue that he has been diligently pursuing his rights, (the undersigned notes that his initial application for post-conviction relief was not filed until almost one year after the statute of limitations to file a habeas action had already expired.) Moreover, Petitioner did not file the current action seeking habeas relief until well over nine years after the OCCA affirmed his underlying convictions.

ineffective assistance  
failure to consult/advise

C The Supreme Court has also held that “actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . [or] expiration of the statute of limitations.” *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). However, such tolling of the limitations period for actual innocence is appropriate only in rare instances in which the petitioner shows that “in light of the new evidence [presented by the petitioner], no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.”

*Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

Here, Petitioner does not rely on any new evidence indicating he was innocent of the underlying crimes in this matter. [Thus, Petitioner has not alleged any extraordinary circumstances that warrant the application of equitable tolling principles to extend the limitations period.] Because the Petition is not timely filed, the Court should decline to review the merits and dismiss the action.

#### RECOMMENDATION

Based on the foregoing findings, it is recommended the Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 be dismissed as untimely. Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by June 18<sup>th</sup>, 2020, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Report and Recommendation would waive appellate review of the recommended ruling. *Moore v. United States*, 950 F.2d 656 (10th Cir. 1991); *cf. Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) (“Issues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.”).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not specifically addressed herein is denied.

ENTERED this 29<sup>th</sup> day of May, 2020.

  
GARY M. PURCELL  
UNITED STATES MAGISTRATE JUDGE