

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 29, 2021

Christopher M. Wolpert
Clerk of Court

EDDIE DEWAYNE LEE,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 21-6028
(D.C. No. 5:20-CV-00950-SLP)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MORITZ, BALDOCK**, and **EID**, Circuit Judges.

Petitioner-Appellant Eddie Lee, an Oklahoma state prisoner proceeding pro se, filed a habeas petition under 28 U.S.C. § 2254 in the Western District of Oklahoma challenging his sentences for (1) murder in the first degree, (2) two counts of burglary in the first degree, (3) two counts of rape in the second degree, (4) two counts of forcible oral sodomy, and (5) robbery with firearms. He pled guilty to these offenses at fifteen years of age and was subsequently sentenced to two life sentences and 20 years of imprisonment, to be served consecutively. The district court dismissed Lee's habeas application as time-barred and denied a certificate of appealability ("COA"). Now, Lee seeks a COA from this court.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

~~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. Lee's petition is untimely under 28 U.S.C. § 2244(d), and he is not eligible for statutory or equitable tolling. Therefore, exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we deny his application for a COA and dismiss this appeal.

* * *

A petitioner must generally seek habeas relief within one year from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

~~(D) the date on which the factual predicate of the claim or claims presented~~
could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). That one-year limitation period is tolled during the time in which “a properly filed application for State post-conviction or other collateral review” is pending. 28 U.S.C. § 2244(d)(2). In addition, we may toll the one-year limitation period “in rare and exceptional circumstances.” *See Gibson*, 232 F.3d at 808. A habeas petitioner is only entitled to equitable tolling, however, “if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010). “Simple excusable neglect is not sufficient.” *Gibson*, 232 F.3d at 808.

Here, Lee argues the one-year limitation period should run from the date the Supreme Court decided *Montgomery v. Louisiana*, 577 U.S. 190 (2016), which made the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012), retroactive on state collateral review. Because Lee’s habeas application is untimely even under his argument, we assume without deciding that the one-year limitation period ran from the time *Montgomery* was decided, on January 25, 2016. Under this assumption, Lee must have filed his habeas petition by January 25, 2017. He did not file until February 13, 2018, well after the one-year period expired. Nonetheless, Lee contends his petition is subject to equitable tolling because he was denied access to his legal materials and the law library.

“Equitable tolling is a rare remedy to be applied in unusual circumstances,” and the petitioner “bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence.” *Al-Yousif v. Trani*, 779 F.3d 1173, 1179

(10th Cir. 2015) (internal citations and quotations omitted). “[A]llegations regarding insufficient library access, standing alone, do not warrant equitable tolling.” *Weibley v. Kaiser*, 50 F. App’x 399, 403 (10th Cir. 2002) (unpublished). When a petitioner alleges that prison officials withheld his legal materials, he must provide specific facts to show how the alleged denial of his legal materials impeded his ability to file a federal habeas petition. *Id.*¹

In this case, Lee submits several articles suggesting the prison he is incarcerated at had multiple lockdowns between 2015 and 2017. He also provides requests for his legal materials dated September 17, 2017; September 20, 2017; September 26, 2017; October 2, 2017; and October 18, 2017. While these exhibits demonstrate some restriction on Lee’s ability to access legal research and his legal documents, “[t]emporary absence of [legal materials or law library access] does not automatically warrant equitable tolling.” *Winston v. Allbaugh*, 743 F. App’x 257, 259 (10th Cir. 2018) (unpublished). Moreover, prison officials consistently responded to Lee’s grievances telling him how to access his legal materials and that legal research would be provided upon request. Even if we assume Lee could not access his legal materials during September and October 2017 (the months during which his requests were filed), this only accounts for two months. Lee’s habeas petition

¹ We note that Lee’s argument that prison officials withheld his legal materials is better analyzed as an impediment under 28 U.S.C. § 2244(d)(1)(B), which provides that the one-year period runs from the date on which the impediment to filing an application created by state action is removed, if the applicant was prevented from filing by such state action. *See Weibley*, 50 F. App’x at 403. But in either event, Lee fails to allege specific facts to demonstrate how the alleged denial of his legal materials impacted his ability to file a federal habeas petition.

~~was filed approximately thirteen months after the one-year limitation period expired.~~ His allegations do not evince extraordinary circumstances or due diligence. Accordingly, Lee is not entitled to equitable tolling.

* * *

For these reasons, no reasonable jurist could conclude the district court's procedural ruling was incorrect. We therefore deny Lee's application for a COA and dismiss this appeal. We grant Lee's motion to proceed in forma pauperis.

Entered for the Court

Bobby R. Baldock
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 24, 2021

Christopher M. Wolpert
Clerk of Court

EDDIE DEWAYNE LEE,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 21-6028
(D.C. No. 5:20-CV-00950-SLP)
(W.D. Okla.)

ORDER

Before **MORITZ, BALDOCK**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

UNITED STATES COURT OF APPEALS

FILED
United States Court of Appeals
Tenth Circuit

FOR THE TENTH CIRCUIT

April 8, 2021

Christopher M. Wolpert
Clerk of Court

EDDIE DEWAYNE LEE,
Petitioner - Appellant,

v.

SCOTT CROW,
Respondent - Appellee.

No. 21-6028
(D.C. No. 5:20-CV-00950-SLP)
(W.D. Okla.)

ORDER

This matter is before the court on pro se appellant Eddie DeWayne Lee's *Motion Challenging Anti-Terrorism and Effective Death Penalty of 1996*, which filing the court construes and accepts as Mr. Lee's combined opening brief and application for certificate of appealability ("COA").

The court has before it all of the information it needs to decide whether to grant Mr. Lee a COA and will decide that issue in due course.

Entered for the Court
CHRISTOPHER M. WOLPERT, Clerk



by: Lisa A. Lee
Counsel to the Clerk

Case No. CIV-20-950-SLP

1 United States District Judge Scott L. Palk has referred this matter to
the undersigned Magistrate Judge for proceedings consistent with 28 U.S.C. §
636(b)(1)(B), (C). See Doc. 4.

~~within twenty-one (21) days of any order adopting this Report and~~
Recommendation. ~~See~~ Local Civil Rule 3.3(e).

The undersigned advises Petitioner that he may file an objection to this Report and Recommendation with the Clerk of Court on or before Wednesday, October 7, 2020. The undersigned further advises Petitioner that failure to timely object to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. ~~See~~ *Moore v. United States*, 950 F. 2d 656, 659 (10th Cir. 1991).

The undersigned directs the Clerk of Court to transmit a copy of this Report and Recommendation through electronic mail to the Attorney General of the State of Oklahoma at the following address: fhc.docket@oag.ok.gov.

This Report and Recommendation disposes of all issues and terminates the referral to the undersigned Magistrate Judge in this matter.

ENTERED this 23rd day of September, 2020.


SUZANNE MITCHELL
UNITED STATES MAGISTRATE JUDGE

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

EDDIE DEWAYNE LEE,

Petitioner,

v.

SCOTT CROW,

Respondent.

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Case No. CIV-20-950-SLP

ORDER

Petitioner, Eddie DeWayne Lee, a state prisoner appearing pro se, filed this action pursuant to 28 U.S.C. § 2254 for a writ of habeas corpus. He challenges the constitutionality of his state court convictions and sentences in the District Court of Oklahoma County, State of Oklahoma, Case Nos. CF-1986-5774, murder in the first degree; CF-1986-5783, burglary in the first degree; and CF-1986-5788, burglary in the first degree, two counts of rape in the second degree, two counts of forcible oral sodomy, and robbery with firearms. Petitioner was 15-years old at the time he committed the offenses. The state district court sentenced Petitioner to two life sentences and 20 years of imprisonment, to be served consecutively.

Pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), this matter was referred for initial proceedings to United States Magistrate Judge Suzanne Mitchell, and later reassigned to United States Magistrate Judge Amanda Maxfield Green. Judge Green conducted an initial review of the Petition, *see* Rule 4 of the Rules Governing § 2254 Cases, and issued a Report and Recommendation [Doc. No. 10] (R&R) finding the Petition should be dismissed as

untimely filed under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d). Judge Green further found that Petitioner is not entitled to statutory or equitable tolling of the limitations period.

Petitioner timely filed an Objection [Doc. No. 11] to the R&R.¹ Thus, the Court must make a de novo determination of the portions of the R&R to which a specific objection is made, and may accept, reject, or modify the recommended decision, in whole or in part. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). As set forth, Petitioner challenges only Judge Green's finding that there is no basis for equitable tolling of the limitations period. Review of all other issues addressed by Judge Green is waived. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991); *see also United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996).

The AEDPA imposes a one-year statute of limitations for Section 2254 habeas petitions brought by state prisoners. *See* 28 U.S.C. § 2244(d)(1). The period begins to run from "the latest of" four dates:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

¹ Petitioner's filing is entitled "Challenging Anti-Terrorism and Effective Death Penalty Act of 1996." Petitioner mailed his filing on February 11, 2021. *See* Envelope [Doc. No. 11-2]. The R&R provides any objections must be filed on or before February 16, 2021. The Court construes this filing as Petitioner's timely objection to the R&R.

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims could have been discovered through the exercise of due diligence.

Id. Unless a petitioner alleges facts implicating the provisions set forth in § 2244(d)(1)(B), (C) or (D), the limitations period generally begins to run from the date on which the conviction became final. *See Preston v. Gibson*, 234 F.3d 1118, 1120 (10th Cir. 2000).

As stated, Petitioner does not challenge the Magistrate Judge's finding that, for purposes of § 2244(d)(1)(A), his conviction became final on March 22, 1987. He further does not dispute that he did not timely file his Petition on or before April 24, 1997, the expiration of the one-year period for prisoners, like Petitioner, whose convictions became final prior to the effective date of the AEDPA. *See* R&R at 4 (citing *United States v. Hurst*, 322 F.3d 1256, 1260 (10th Cir. 2003)).²

The Magistrate Judge also addressed the timeliness of the Petition under § 2244(d)(1)(C) based on Petitioner's reliance upon *Graham v. Florida*, 560 U.S. 48 (2010) made retroactive by *Montgomery v. Louisiana*, -- U.S. --, 136 S.Ct. 718 (2016) as grounds for habeas relief. The Magistrate Judge concluded the Petition was untimely under that

² As Magistrate Judge Green noted, pursuant to the prison mailbox rule, the Court deems the Petition filed on June 21, 2018, the day Petitioner signed the Petition and placed it in the prison mailing system, even though it was received and file-stamped in this Court on June 27, 2018. *See* R&R at 3, n. 4.

triggering provision as well. *See* R&R at 5-8.³ Petitioner makes no challenge to that finding.

Additionally, Petitioner does not dispute that he is not entitled to any statutory tolling of the limitations period. As the Magistrate Judge found, he did not attempt to file any form of state post-conviction relief until after expiration of the respective limitations periods and, therefore, he is not entitled to statutory tolling. *See* R&R at 4-5, 7-8.

Finally, the Magistrate Judge found Petitioner is not entitled to equitable tolling of the limitations period. Petitioner's objection is addressed only to the issue of equitable tolling.

Petitioner argues that his facility has been on lockdown. He also argues his facility does not have an "individual with some-type knowledge dealing with the Court's Procedures or Rules of Law." *See* Obj. at 7. He states these factors prohibited his access to a law library so that he could "work on [his] case" and "make [his] filing in a timely fashion." *Id.* He also points to certain policies of the Oklahoma Department of Corrections providing for the number of hours per week the law libraries are to be open. These allegations are missing from the Petition and were not addressed by Magistrate Judge Green.⁴

³ As set forth in the R&R, Magistrate Judge Green "assume[d], favorably to Petitioner, that his argument relies on the new rule of law recognized by *Miller* [*v. Alabama*, 567 U.S. 460 (2012)] and made retroactive by *Montgomery*." *Id.* at 6-7.

⁴ In the Petition, Petitioner referenced the doctrine of equitable tolling but stated no facts to support why equitable tolling should apply. Instead, Petitioner argued equitable tolling is warranted because the "State Court's opinion involved an unreasonable determination of the United States Supreme Court's determination of *Graham v. Florida*, 560 U.S. 48 (2010) made retroactive by

Section 2244(d)'s limitations period "may be equitably tolled if the petitioner

'diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control.'" *Loftis v. Chrisman*, 812 F.3d 1268, 1272 (10th Cir. 2016) (quoting *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000)). "Equitable tolling is a rare remedy to be applied in unusual circumstances" and "[a]n inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence." *Al-Yousif v. Trani*, 779 F.3d 1173, 1179 (10th Cir. 2015) (internal quotation marks and citations omitted)).

"[I]t is well established that ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing [of a petition for writ of habeas corpus]." *Marsh*, 223 F.3d at 1220 (internal quotation marks and citation omitted). Moreover, "allegations regarding insufficient library access, standing alone, do not warrant equitable tolling." *Weibley v. Kaiser*, 50 F. App'x 399, 403 (10th Cir. 2002). Petitioner must provide "specificity regarding the alleged lack of [law library] access and the steps he took to diligently pursue his federal claims." *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). "It is not enough to say that the [prison] facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate." *Id.*; see also *Mayes v. Province*, 376 F. App'x 815, 816-17 (10th Cir. 2010) ("In order to establish a

Montgomery v. Louisiana, [-- U.S. --, 136 S.Ct. 718 (2016)] which announced a new rule of constitutional law applying to cases on collateral review." See Pet. [Doc. No. 1] at 21 (citing 28 U.S.C. § 2244(d)(1)(C)). Petitioner's citations reference a triggering date for the commencement of the statute of limitations period. As set forth, Magistrate Judge Green considered whether the Petition was timely under § 2244(d)(1)(C) and found it was not – a finding Petitioner does not challenge.

violation of the constitutional right of access, an inmate must demonstrate, among other things, how the alleged shortcomings in the prison actually hindered his efforts to pursue a legal claim.” (internal quotation marks and citation omitted)).

Additionally, “[w]hile prison lockdowns are uncontrollable, they merely impede access to the relevant law, which [the Tenth Circuit] ha[s] continuously ruled insufficient to warrant equitable tolling.” *Winston v. Allbaugh*, 743 F. App’x 257, 258 (10th Cir. 2018) (citations omitted). Thus, “equitable tolling is not justified by prison lockdowns in the absence of a showing of additional circumstances that prevented timely filing.” *Id.* at 259; *see also Jones v. Taylor*, 484 F. App’x 241, 242-43 (10th Cir. 2012) (although “a complete denial of access to materials at a critical time may justify equitable tolling” no such tolling was warranted based on allegations that defendant was “a layman with limited knowledge of the law”, prison law library had “only some law books on a few shelves”, prisoners could access law library “only with pre-approval and then only for limited periods of time” and that “he was denied access to the library during a facility lockdown lasting nearly six months”).

Here, Petitioner does not provide any specificity with respect to his allegations of his denial of access to a law library. He does not state whether he requested legal materials, or what legal materials were needed. He also does not provide any dates as to when he was denied access. Additionally, Petitioner does not describe the circumstances of the lockdown or the dates during which he was subject to any lockdown. Finally, Petitioner fails to show how he otherwise diligently pursued his claims. In this regard, and most

fundamentally, Petitioner fails to explain why he waited over five and a half years after *Miller* and more than one year after *Montgomery* to pursue his applications for state post-conviction relief. For all these reasons, Petitioner has not satisfied his strong burden to demonstrate with specific facts that grounds for equitable tolling of the limitations period exist.⁵

IT IS THEREFORE ORDERED that the Report and Recommendation [Doc. No. 10] is ADOPTED and the action is dismissed with prejudice as untimely pursuant to 28 U.S.C. § 2244(d).⁶ A separate judgment shall be entered accordingly.


IT IS FURTHER ORDERED that pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court must issue or deny a certificate of appealability (COA) when it enters a final order adverse to a petitioner. A COA may issue only upon “a substantial showing of the denial of a constitutional right.” *See* 28 U.S.C. § 2253(c)(2). When the district court dismisses a habeas petition on procedural grounds, the petitioner must make this showing by demonstrating 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

⁵ Magistrate Judge Green further found no basis to bypass the statute of limitations based on a fundamental miscarriage of justice and the Court concurs with this analysis. *See* R&R at 10. Petitioner raises no objection to this finding.

⁶ A dismissal on grounds the Petition is untimely should be with prejudice. *Taylor v. Martin*, 757 F.3d 1122, 1123 (10th Cir. 2014) (denying COA and dismissing appeal of § 2254 habeas petition dismissed with prejudice as untimely under § 2244(d)); *see also Davis v. Miller*, 571 F.3d 1058, 1061 n. 2 (10th Cir. 2009) (recognizing that dismissal under Fed. R. Civ. P. 41(b) of § 2254 habeas petition without prejudice was tantamount to dismissal with prejudice because “the one-year statute of limitations bars [petitioner] from refiling his [habeas] petition”); *Brown v. Roberts*, 177 F. App’x 774, 778 (10th Cir. 2006) (“Dismissal of a [§ 2254 habeas] petition as time barred operates as a dismissal with prejudice[.]”).

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). The Court finds that reasonable jurists would not debate the correctness of the Court’s determinations that the Petition is time-barred and that Petitioner has not demonstrated any circumstances excusing the untimeliness of his Petition. The Court therefore denies a COA.

IT IS SO ORDERED this 25th day of February, 2021.



SCOTT L. PALK
UNITED STATES DISTRICT JUDGE

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

EDDIE DEWAYNE LEE,

Petitioner,

v.

SCOTT CROW,


Respondent.

Case No. CIV-20-950-SLP

JUDGMENT

In accordance with the Order entered this 25th day of February, 2021, this matter is
DISMISSED WITH PREJUDICE. Further, a certificate of appealability is denied.

IT IS SO ORDERED this 25th day of February, 2021.



SCOTT L. PALK
UNITED STATES DISTRICT JUDGE

**~~IN THE COURT OF CRIMINAL APPEALS~~
OF THE STATE OF OKLAHOMA**

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT - 8 2019

JOHN D. HADDEN
CLERK

EDDIE DEWAYNE LEE,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

No. PC-2019-168

**ORDER AFFIRMING DENIAL
OF POST-CONVICTION RELIEF**

The Petitioner has appealed to this Court from an order of the District Court of Oklahoma County denying his third application for post-conviction relief in Case Nos. CRF-1986-5774, CRF-1986-5783, and CRF-1986-5788.

On March 12, 1987, Petitioner entered pleas of guilty to the charges in all three cases. In Case No. CRF-1986-5774, Petitioner was convicted of Murder in the First Degree and was sentenced to life imprisonment. In Case No. CRF-1986-5783, Petitioner was convicted of Burglary in the First Degree and was sentenced to twenty years imprisonment. In Case No. CRF-1986-5788, Petitioner was convicted and sentenced as follows: Count 1, Burglary in the First Degree,

~~twenty years imprisonment; Count 2, Rape in the Second Degree,~~
fifteen years imprisonment; Count 3, Forcible Oral Sodomy, twenty
years imprisonment; Count 4, Forcible Oral Sodomy, twenty years
imprisonment; Count 5, Rape in the Second Degree, fifteen years
imprisonment; and Count 6, Robbery With Firearms, life
imprisonment. The District Court ordered the sentences in all counts
in Case No. CRF-1986-5788 to run concurrently with each other, but
the sentences in the three cases were ordered to run consecutively
with each other. Petitioner was fifteen years old when the crimes in
these cases were committed.

Petitioner did not seek to withdraw his guilty pleas within
applicable time periods, and thus failed to perfect direct appeal
proceedings from his Judgments and Sentences. Petitioner has
previously filed applications for post-conviction relief that were
denied by the District Court. Relief was also denied on Petitioner's
post-conviction appeals to this Court. *Lee v. State*, No. PC-1997-638
(Okl.Cr. May 27, 1997); *Lee v. State*, No. PC-1997-1620 (Okl.Cr.
December 18, 1997).

Petitioner's arguments in this matter are primarily based on the
Graham/Miller/Montgomery trilogy of United States Supreme Court

~~cases holding the Eighth Amendment's cruel and unusual~~
punishments clause forbids a sentencing scheme that mandates life in prison without the possibility of parole for all juvenile offenders, and applying the new substantive rule of constitutional law retroactively in cases on collateral review. *See Martinez v. State*, 2019 OK CR 7, 442 P.3d 154. Petitioner acknowledges that he was not sentenced to life in prison without the possibility of parole in these cases; and that he has been considered for parole five times during his almost thirty-three years of incarceration. Petitioner complains that he is not being given a meaningful or realistic opportunity for release and his parole is not being objectively reviewed due to the lack of measurable parole guidelines. Petitioner also complains that he has never been afforded an individualized sentencing hearing, as discussed in *Luna v. State*, 2016 OK CR 27, 387 P.3d 956; and *Stevens v. State*, 2018 OK CR 11, 422 P.3d 741. Finally, Petitioner claims he was subjected to an unconstitutional reverse certification process in these cases.

Petitioner has failed to establish entitlement to any relief in this post-conviction proceeding. Post-conviction review provides petitioners with very limited grounds upon which to base a

~~collateral attack on their judgments. *Logan v. State*, 2013 OK CR 2,~~
¶ 3, 293 P.3d 969, 973. All issues that were previously raised and ruled upon by this Court in Petitioner's direct appeal are procedurally barred from further review under the doctrine of *res judicata* and all issues that could have been previously raised but were not are waived for further review. 22 O.S.2011, § 1086; *Logan*, *supra*. Such issues may not be the basis of a post-conviction application unless the court finds that there is sufficient reason why the otherwise procedurally barred or waived issues were not previously asserted or adequately raised. *Id.*

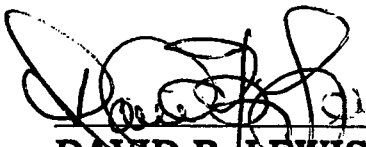
First, Petitioner's claims concerning the constitutionality of his reverse certification process are waived or procedurally barred because they could have and should have been raised during his guilty plea proceedings, in direct appeal proceedings, or in his previous post-conviction proceedings. *Id.* Second, individualized sentencing hearings are only applicable to situations where the State has or is trying to sentence a juvenile offender to life imprisonment without the possibility of parole. The State has not and is not trying to sentence Petitioner to life imprisonment without the possibility of parole and thus his arguments are without merit.

Finally, “[a] State is not required to guarantee eventual freedom to a juvenile offender. *Graham*, 560 U.S. at 74, 130 S.Ct. at 2030; *Miller*, 567 U.S. at 479, 132 S.Ct. at 2469.” *Martinez v. State*, 2019 OK CR 7, ¶ 8, 442 P.3d 154, 157. Based upon the length of Petitioner's sentences and the current status of the law, we find that Petitioner has some meaningful opportunity to obtain release on parole in these cases during his lifetime. *Id.*

Therefore, the order of the District Court of Oklahoma County denying Petitioner's subsequent application for post-conviction relief in Case Nos. CRF-1986-5774, CRF-1986-5783, and CRF-1986-5788 should be, and is hereby, **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the MANDATE is ORDERED issued upon the filing of this decision with the Clerk of this Court.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this
8th day of October, 2019.


DAVID B. LEWIS, Presiding Judge Writing Attached

Dana Kuehn - Dissent (separate writing)

DANA KUEHN, Vice Presiding Judge

Gary L. Lumpkin

GARY L. LUMPKIN, Judge

Robert L. Hudson

ROBERT L. HUDSON, Judge

Scott Rowland

SCOTT ROWLAND, Judge

ATTEST:

Clerk
PA/F

LEWIS, PRESIDING JUDGE, DISSENTING:

I respectfully dissent. This case is effectively indistinguishable from *Martinez v. State*, 2019 OK CR 7, in which a majority of the Court adopted what I regard as an unreasonable application of clearly established federal law, as set forth in *Miller v. Alabama*, 567 US 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), in dealing with consecutive life-without-parole equivalent sentences.

Petitioner is forty-eight years old. He has served more than 32 years of a life sentence for murder, and has been denied parole five times. Should he be granted parole on the current life sentence, it appears that he must serve at least one-third of his consecutive twenty-year sentence (6 years, 8 months), and one-third of his consecutive life sentence (15 years), before he is actually eligible for release from prison on parole. *Detwiler v. State*, 2019 OK CR 20, ¶ 2 (Lewis, P.J., dissenting).

Discounting the possibilities that (1) Petitioner receives parole on each of his remaining sentences on the earliest possible date, and (2) some five decades of imprisonment would have no negative impact on his current life expectancy, I conclude that his chances

of any meaningful opportunity to obtain actual release from prison on parole are at best slim, and, more realistically, none.

This life-without-parole-equivalent punishment, imposed without a judicial finding that Petitioner was an irreparably corrupt or permanently incorrigible juvenile, clearly violates the Eighth Amendment as interpreted in *Miller*, even though his sentences have long been final. *Montgomery v. Louisiana*, ___ US ___, 135 S.Ct. 1546, 191 L.Ed.2d 635 (2015).

Like Judge Kuehn, I would remedy this constitutional error by affirming the controlling sentence of life imprisonment with the possibility of parole for murder, and modifying the remaining terms to be served concurrently. *Montgomery*, 577 U.S. at ___, 136 S.Ct. at 736 (holding that a State may remedy a *Miller* violation, without re-litigating the sentence, by affording the offender an opportunity for eventual release on parole).

~~KUEHN, V.P.J., DISSENTING:~~

While Petitioner was a juvenile, he received consecutive sentences in three cases, totaling two life sentences and a sentence of twenty years. Taken together, these sentences do not afford Petitioner a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham v. Florida*, 580 U.S. 48, 75 (2010).

Petitioner may not have been specifically sentenced to life without the possibility of parole, but these sentences will keep Petitioner incarcerated beyond any reasonable possibility of release. Unlike the Majority, I consider the effect of these sentences in the aggregate. I continue to maintain that the Supreme Court’s clear intention is to prohibit lifetime incarceration of persons who commit crimes as juveniles, without an individualized determination that the offender was irreparably corrupt or permanently incorrigible, or any reasonable chance for release. *Martinez v. State* 2019 OK CR 7, ¶ 3, 442 P.3d 154, 157-58 (Lewis, P.J., dissenting). I would affirm the sentence of life imprisonment for murder, and modify the other

sentences to be served concurrently, thus affording Petitioner an opportunity for eventual release on parole. *Id.*, ¶ 5, 442 P.3d at 158.

I further disagree with the Majority's inexplicable conclusion that Petitioner waived this claim. Petitioner's claim is explicitly based on *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Mongomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718 (2016). It is beyond question that these cases were decided long after Petitioner's convictions and sentences were imposed, and after his direct appeal was decided. We cannot fault Petitioner for failing, in previous proceedings, to bring a claim that was not then recognized as a ground for relief.

JAN 11 2019

~~IN THE DISTRICT COURT OF OKLAHOMA COUNTY~~
STATE OF OKLAHOMA

RICK WARREN
COURT CLERK

EDDIE DEWAYNE LEE,
a.k.a. EDDIE DEWAYNE THOMAS

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

Case Nos. CRF-1986-5774
CRF-1986-5783
CRF-1986-5788

46

ORDER DENYING THIRD APPLICATION FOR POST-CONVICTION RELIEF

This matter comes on for consideration of the Petitioner's third Application for Post-Conviction Relief filed in the above-referenced case and the State's Response thereto, and the Court being fully advised finds as follows:

MATERIALS REVIEWED FOR DECISION

The Court has reviewed the following materials in reaching its decision: Petitioner's Application for Post-Conviction Relief, filed February 13, 2018; the State's Response to Third Application for Post-Conviction Relief, and attachments thereto, filed March 15, 2018; Petitioner's Supplement to Application for Post-Conviction Relief, filed March 23, 2018; Petitioner's Reply to State's Response to Third Application for Post-Conviction Relief, filed March 29, 2018; and district court files for Oklahoma County Case Nos. CRF-1986-5774, CRF-1986-4783, and CRF-1986-5788.

FINDINGS OF FACT

1. On March 12, 1987, Petitioner, represented by counsel, entered pleas of guilty to the crimes charged in the above-referenced cases¹ and was sentenced as follows pursuant to negotiated plea agreement:

CRF-1986-5774: 1. Murder in the First Degree Life imprisonment

CRF-1986-5783: 1. Burglary in the First Degree Twenty (20) years imprisonment

CRF-1986-5788: 1. Burglary in the First Degree Twenty (20) years imprisonment

¹ Petitioner (DOB 6/19/71) was 15 years old at the time he committed these crimes. He was initially charged as a juvenile in Oklahoma County Juvenile Petition Nos. JF-1986-1094, JF-1986-1096, and JF-1986-1162. On October 27, 1986, the District Court certified him to stand trial as an adult in each case. Petitioner, by and through counsel, perfected an appeal to the Court of Criminal Appeals from the certification orders. However, while that appeal was pending, he entered his guilty pleas to the adult charges. Upon motion of Petitioner, the Court of Criminal Appeals dismissed the appeals in Case No. J-86-926, with prejudice, on April 20, 1987.

- | | |
|------------------------------|---------------------------------|
| 2. Rape in the Second Degree | Fifteen (15) years imprisonment |
| 3. Forcible Oral Sodomy | Twenty (20) years imprisonment |
| 4. Forcible Oral Sodomy | Twenty (20) years imprisonment |
| 5. Rape in the Second Degree | Fifteen (15) years imprisonment |
| 7. Robbery with Firearms | Life imprisonment |

In accordance with the plea agreement, the Court ordered all counts in CRF-1986-5788 to be served concurrently with each other and ordered the three cases to be served consecutively to each other.

3. Petitioner was advised of and acknowledged his right to appeal and the manner in which to invoke that right. However, he did not seek an appeal.
4. On January 10, 1989, Petitioner, *pro se*, filed his original Application for Post-Conviction Relief. Therein, he raised no legal challenge to his convictions or sentences but merely stated he would amend the application to present such claims upon receipt of unspecified court documents. Finding that Petitioner had presented no grounds upon which post-conviction relief could be granted, the Honorable Thomas C. Smith denied the application on February 28, 1989. Petitioner did not seek a post-conviction appeal.
5. On May 7, 1997, Petitioner, *pro se*, filed a Petitioner for Appeal Out of Time in the Court of Criminal Appeals. On May 16, 1997, he filed a Motion for Leave to File Supplemental Petition for Appeal Out of Time. Because he had not first sought and been denied relief in the District Court, the appellate court declined jurisdiction. *Lee v. State*, No. PC-97-638 (Okl.Cr. May 27, 1997).
6. On June 10, 1997, Petitioner, *pro se*, filed his second Application for Post-Conviction Relief under the guise of his juvenile case numbers. Therein, he raised the following propositions of error:

Proposition I Petitioner's Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel were violated when the trial court based its findings and rulings upon psychiatric evaluations and testimony that was given by a court ordered psychiatrist who examined and evaluated Petitioner with Petitioner ever having been advised of Fifth Amendment privilege and Sixth Amendment right, and where the record is silent as to a waiver of these basic fundamental rights;

Proposition II The trial court abused its discretion when, in certifying Petitioner to stand trial as an adult, it rejected overwhelming

evidence that Petitioner was amenable to rehabilitation within the juvenile system and based its decision on personal opinion and evidence outside of the record and not before the court; and

Proposition III Petitioner was deprived of his rights to due process, an appeal, and effective assistance of counsel on appeal from the Court of Criminal Appeals dismissal of his juvenile certification appeal.

7. On June 30, 1997, the Honorable Daniel L. Owens denied the application. Petitioner was advised of his right to appeal from that decision. But he again failed to seek a post-conviction appeal.
8. On October 7, 1997, Petitioner, *pro se*, filed a Petition for Nunc Pro Tunc Order wherein he essentially reasserted the same claims of error raised in his second post-conviction application and requested the trial court to withdraw its order denying the same. On October 21, 1997, Judge Owens denied the petition.
9. On November 4, 1997, Petitioner, *pro se*, filed a motion requesting the trial court hold his time for collateral appeal in abeyance and reconsider its order denying his second Application for Post-Conviction Relief. Judge Owens denied that motion on November 7, 1997.
10. Petitioner subsequently attempted to appeal the order denying his second Application for Post-Conviction Relief to the Court of Criminal Appeals. The Court declined jurisdiction over the untimely appeal. *Lee v. State*, No. PC-97-1620 (Okl.Cr. December 18, 1997).
11. On February 13, 2018, Petitioner, *pro se*, filed the instant Application for Post-Conviction Relief raising the following propositions of error:

Proposition I Petitioner's sentences are in violation of the Eighth Amendment as in the U.S. Supreme Court cases of *Miller v. Alabama* and *Montgomery v. Louisiana*;

Proposition II Lack of sentencing guidelines violates Petitioner's right to due process and the declared policy of the State of Oklahoma;

Proposition III The trial court violated the separation of powers by failing to prescribe the standards of rehabilitation that Petitioner must meet as part of his sentence and thereby impermissibly delegated its authority to the Executive Branch; and

Proposition IV There is evidence of material facts, not previously presented and heard, that requires modification of the sentence in the

interests of justice.

12. On March 23, 2018, Petitioner, *pro se*, filed a Supplement to Application for Post-Conviction Relief raising the following additional proposition of error:

Proposition V Petitioner was subjected to a reverse certification process as a juvenile in violation of the Eighth Amendment as in the U.S. Supreme Court cases of *Miller v. Alabama* and *Montgomery v. Louisiana*.

FINDINGS OF FACT & CONCLUSIONS OF LAW

The Court of Criminal Appeals has made clear the Post-Conviction Procedure Act, Title 22 O.S. §1080, *et seq.*, is neither a substitute for a direct appeal nor a means for a second appeal. *Maines v. State*, 1979 OK CR 71, ¶ 4, 597 P.2d 774, 775-76; *Fox v. State*, 1994 OK CR 52, ¶ 2, 880 P.2d 383, 384. The scope of this remedial measure is strictly limited and does not allow for litigation of issues available for review at the time of direct appeal. *Johnson v. State*, 1991 OK CR 124, ¶¶ 3-4, 823 P.2d 370, 372; *Castro v. State*, 1994 OK CR 53, ¶ 2, 880 P.2d 387, 388. "Issues that were previously raised and ruled upon are procedurally barred from further review under the doctrine of res judicata; and issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973.

In regards to subsequent Applications for Post-Conviction Relief, the Act specifically provides:

All grounds for relief available to an applicant under the act must be raised in his original, supplemental or amended application. 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 a 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.

22 O.S. § 1086 (emphasis added).

Sufficient reason for failing to previously raise or adequately assert an issue requires a showing that some impediment external to the defense prevented the petitioner and counsel from properly raising the claim. *Johnson v. State*, 1991 OK CR 124, ¶ 7, 823 P.2d 370, 373. "Petitioner has the burden of establishing that his alleged claim could not have been previously raised and thus is not procedurally barred." *Robinson v. State*, 1997 OK CR 24, ¶ 17, 937 P.2d 101, 108.

In this matter, the issues asserted in Propositions II and III could have been raised in a timely certiorari appeal, which Petitioner effectively forfeited, or in either of his two previous post-conviction applications. He offers no sufficient reason for this Court to consider those claims. Propositions II and III are procedurally barred by waiver.

~~In Proposition IV, Petitioner alleges there exists evidence of material facts, not previously presented and heard, that requires modification of his sentence in the interests of justice. See 22 O.S. § 1080(d). While post-conviction relief may be based on newly discovered evidence, Petitioner presents no such evidence here. Rather, he offers only his own bare statement regarding proactive steps he has taken towards rehabilitation while incarcerated. Petitioner's post-conviction conduct in prison is not material to the validity of his convictions or the sentences imposed. Proposition IV is meritless.~~

Propositions I and V are both predicated on intervening changes in constitutional law announced by the Supreme Court in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *Montgomery v. Louisiana*, 136 S.Ct. 718, 734, 193 L.Ed.2d 599 (2016). Because these cases were decided after Petitioner filed his last post-conviction application, these issues are viable for review in a subsequent post-conviction proceeding. *Stevens v. State*, 2018 OK CR 11, ¶ 18, 422 P.3d 741, 746-47; *see also Bryson v. State*, 1995 OK CR 57, ¶ 2, 903 P.2d 333, 334.

In *Miller*, the Supreme Court declared that any statutory sentencing scheme that mandates a sentence of life without parole for a juvenile convicted of a homicide offense is unconstitutional. *Miller*, 567 U.S. at 479, 132 S.Ct. at 2469. In *Montgomery*, the Court held that *Miller* announced a new, substantive rule of constitutional law that applies retroactively in state post-conviction proceedings. *Montgomery*, 136 S.Ct. 718, 734. The Oklahoma Court of Criminal Appeals has held the principles in *Miller* and *Montgomery* apply to Oklahoma's discretionary sentencing scheme. *Luna v. State*, 2016 OK CR 27, ¶ 14, 387 P.3d 956, 961.

As to Proposition I, Petitioner fails to establish that *Miller* and *Montgomery* are applicable to him. Petitioner has not been sentenced to life without parole. *See Stevens*, 2018 OK CR 11, ¶ 26, 422 P.3d at 748 (“To establish a claim under *Miller* and *Montgomery* on post-conviction review, *the petitioner must establish that he is serving a sentence of life without parole* for a homicide committed while he or she was under 18 years of age . . .”) (Emphasis added). Rather he was sentenced to life with the possibility of parole for murder in CRF-1986-5774, twenty (20) years imprisonment for a non-homicide offense in CRF-1986-5783, and a total of life imprisonment with the possibility of parole for several non-homicide offenses in CRF-1986-5788. As such, this matter is distinguishable.

Moreover, even were this Court to consider Petitioner's sentences in these three separate and distinct cases in aggregate, Petitioner fails to demonstrate denial of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *See Graham v. Florida*, 560 U.S. 48, 75, 130 S.Ct. 2011, 2030, 176 L.Ed.2d 825 (2010); *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017).

Under 57 O.S. § 332.7, Petitioner is eligible for parole after serving one-third of his sentences. Pursuant to the long-standing policy of the Oklahoma Pardon and Parole Board, a sentence of life imprisonment is calculated as 45 years for purposes of calculating parole eligibility.² *See Anderson v. State*, 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282; *Runnels v. State*, 2018 OK CR 27, ¶

² Thus, Petitioner reaches parole eligibility from his life sentences after, at most, 15 years each and from his 20-year sentence after approximately 6 years and 8 months.

28, n.8, 426 P.3d 614, 621, n.8. Indeed, the State has submitted documentation supporting that the Board has regularly reviewed Petitioner for parole from his life sentence for murder on at least five separate occasions, beginning in 2001,³ which Petitioner does not refute.

The structure of the sentences imposed in these cases did not constitute a judgment at the outset that Petitioner would never be fit to reenter society. Petitioner's sentences are subject to Oklahoma's pardon and parole system. "A State is not required to guarantee eventual freedom to a juvenile offender," nor does the Eighth Amendment "require the State to release that offender during his natural lifetime." *Graham*, 560 U.S. at 75, 130 S.Ct. at 2030; *accord Miller*, 567 U.S. at 479, 132 S. Ct. at 2469; *Luna*, 2016 OK CR 27, ¶ 7, 387 P.2d at 959. Petitioner fails to show that his sentences amount to a sentence the Supreme Court has deemed forbidden by the Eighth Amendment. Proposition I is without merit.

Finally, Petitioner argues in Proposition V that the process by which he was certified to stand trial as an adult is also violative of *Miller*. However, *Miller* did not invalidate Oklahoma's adult certification process for juvenile offenders. Indeed, the Supreme Court in *Miller* recognized the distinction between the discretion available to a judge at a transfer stage and the discretion available to the judge at a post-trial sentencing in adult court. *Miller*, 567 U.S. at 488-89, 132 S.Ct. at 2474-75. Proposition V is meritless.

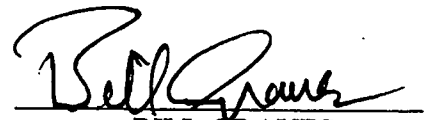
This Court has disposed of the Petitioner's application as a matter of law based upon the pleadings. There is no issue of material fact for which an evidentiary hearing is necessary to resolve. 22 O.S. § 1084.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petitioner's third Application for Post-Conviction Relief is **DENIED** in its entirety.

DATED THIS 10th DAY OF JANUARY, 2019, A.D.

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

JAN 11 2019


BILL GRAVES
DISTRICT JUDGE

RICK WARREN COURT CLERK
Oklahoma County



NOTICE OF RIGHT TO APPEAL

A final judgment under this act [Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq.*] may be appealed to the Court of Criminal Appeals on petition in error filed either by the applicant or the State within thirty (30) days from entry of the judgment. Upon motion of either party on filing of notice of intent to appeal, within ten (10) days of entering the judgment, the district court may stay the execution of the judgment pending disposition on appeal; provided the Court of Criminal Appeals may direct the vacation of the order staying the execution prior to final disposition of the appeal. 22 O.S. § 1087. The party desiring to appeal from the final order must file a Notice of Post-Conviction Appeal with the Clerk of the District Court within twenty

³ See State's Exh. 12, Parole Ballots.

(20) days from the date the order is filed in the District Court. Rule 5.2(C)(1), *Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18 App. (2018)*.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of January, 2019, I mailed a certified copy of the above and foregoing order, with postage thereon fully prepaid, to:

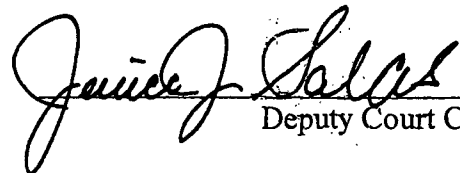
Eddie D. Lee, DOC #160684
Lawton Correctional Facility
8607 S.E. Flower Mound Rd.
Lawton, OK 73501

PETITIONER, PRO SE

and that a true and correct copy of the above and foregoing order was hand-delivered to:

Jennifer M. Hinsperger, Assistant District Attorney
Oklahoma County District Attorney's Office

COUNSEL FOR RESPONDENT


Deputy Court Clerk