# APPENDIX

# A.

**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**October 6, 2021**

**Christopher M. Wolpert**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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DARNEAU VERSILL PEPPER,

Petitioner - Appellant,

v.

DEAN WILLIAMS; LARRY SCHULTZ; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 21-1210
(D.C. No. 1:21-CV-00313-LTB-GPG)
(D. Colo.)

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**ORDER DENYING CERTIFICATE OF APPEALABILITY***

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Before **HARTZ**, **KELLY**, and **McHUGH**, Circuit Judges.

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Petitioner-Appellant Darneau Pepper, a state inmate appearing pro se, seeks a Certificate of Appealability (COA) to appeal from the district court's dismissal of his habeas petition under 28 U.S.C. § 2254 as time barred. See Pepper v. Williams, No. 21-cv-00313 (D. Colo. May 6, 2021). Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss the appeal.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

The district court's resolution of the procedural issue is not reasonably debatable. The one-year limitation period begins running on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). For Mr. Pepper, that date was June 10, 2013 — that is, 90 days after the Colorado Supreme Court denied review of his direct appeal on March 11, 2013, when his period for seeking certiorari in the United States Supreme Court expired. See Sup. Ct. R. 13.1; see also Gonzalez v. Thaler, 565 U.S. 134, 150 (2012); 1 R. 194. Thus, on June 10, 2014, § 2244(d)'s limitations period closed Mr. Pepper's window for federal habeas relief. See 1 R. 194–95.

Mr. Pepper argues that the magistrate judge and district court failed to account for 15 days of tolling. Aplt. Br. at A-5 to A-8. He submits that state court proceedings from April 9 to April 24, 2013, should toll his 90-day clock for appeal to the United States Supreme Court, and thus delay by 15 days the dates when § 2244(d)'s time bar began running and eventually barred further habeas petition. Id. This argument was not raised below and is waived, see Morales-Fernandez v. I.N.S., 418 F.3d 1119, 1119 (10th Cir. 2005), but in any event appears incorrect. The state court "reopened" Mr. Pepper's case on April 9, 2013, and then issued a writ of habeas corpus on April 18 to transfer him for a hearing set for April 25 to unseal the record. 1 R. 85–86. It "closed" the case on April 24 and unsealed the record on April 25 after Mr. Pepper had withdrawn his objection. 1 R. 85–86. These activities have nothing to do with an entry of final judgment, and thus have no effect on the 90-day period. Compare Sup. Ct. R. 13.1, 13.3, with 1 R. 85–86.

citation omitted). Where evidence offered "merely corroborates defense evidence that the jury rejected," it does not constitute the "showing of factual innocence" required. Park v. Reynolds, 958 F.2d 989, 996 (10th Cir. 1992).

We DENY a COA, DENY IFP, and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Gordon P. Gallagher, United States Magistrate Judge

Civil Action No. 21-cv-00313-LTB-GPG

DARNEAU VERSILL PEPPER,

Petitioner,

v.

DEAN WILLIAMS,
LARRY SCHULTZ, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

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## RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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This matter comes before the Court on the *Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254* filed *pro se* by Petitioner Darneau Versill Pepper on February 1, 2021. (ECF No. 1). Because Petitioner is *pro se*, the Court liberally construes his filings, but will not act as an advocate. *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013). The matter has been referred to this Court for recommendation (ECF No. 13).[1]

[1] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

The Court has reviewed the filings to date, considered the entire case file, the applicable law, and is advised of the premises. For the reasons that follow, this Court respectfully recommends dismissing Petitioner's § 2254 application as untimely.

## I. BACKGROUND

Petitioner is in the custody of the Colorado Department of Corrections, currently serving his sentence at a federal prison in Texas. Petitioner brings this § 2254 action to challenge a criminal conviction entered against him by the El Paso County District Court in case number 08CR636. (ECF No. 1 at 2). In 2009, a jury found Petitioner guilty of two counts of first-degree murder, eight counts of attempted murder, two counts of first-degree assault, seven crime-of-violence counts, and one count of possessing a weapon as a previous offender. (*See* ECF No. 10-5).

On February 10, 2021, the Court ordered Respondents to file a pre-answer response limited to addressing the procedural defenses of timeliness and exhaustion of state remedies. (ECF No. 5). Respondents have filed a *Pre-Answer Response*, contending the application should be dismissed as untimely under the one-year statute of limitations found in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[2] (ECF No. 10). Petitioner filed a response to the motion, countering that the application should be considered timely. (ECF No. 11). The Court now addresses whether the § 2254 application is timely.

[2] Because the Court finds the application untimely, it does not address whether Petitioner's claims are cognizable or exhausted.

## II. DISCUSSION

Respondents argue the application is barred by AEDPA's one-year limitation period, 28 U.S.C. § 2244(d). That statute provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (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.
>
> (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 shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Petitioner does not allege he was prevented by unconstitutional state action from filing this action sooner, he is not asserting any constitutional rights newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, and there are no allegations to show the factual predicate for his claims could not have been discovered through the exercise of due diligence before the state proceedings concluded. *See* 28 U.S.C. § 2244(d)(1)(B) - (D). As a result, the one-

year limitation period began to run on the date Petitioner's judgment of conviction became final. *See* 28 U.S.C. § 2244(d)(1)(A).

Finality occurs on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]" 28 U.S.C. § 2244(d)(1)(A). Here, the Colorado Supreme Court denied certiorari review of Petitioner's direct appeal on March 11, 2013. (ECF No. 10-3). Because Petitioner did not file a petition for certiorari in the United States Supreme Court, his direct appeal concluded when the time for filing a certiorari petition in the United States Supreme Court expired. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (if a defendant directly appeals to the state's highest court, the conviction is final on the expiration of the 90-day period for seeking certiorari in the United States Supreme Court); *see also* S. Ct. R. 13.1. Therefore, Petitioner had until June 10, 2013 to seek certiorari in the United States Supreme Court—90 days after the Colorado Supreme Court's March 11, 2013 denial of certiorari. Since he did not seek such review, his state judgment of conviction became final, and the AEDPA statute began to run, on June 10, 2013. *See Holland v. Florida*, 560 U.S. 631, 635 (2010); *Al-Yousif v. Trani*, 779 F.3d 1173, 1178 (10th Cir. 2015).

From the date his conviction became final on June 10, 2013, the one-year AEDPA statute of limitations required Petitioner to seek relief under § 2254 by June 10, 2014. Petitioner did file a § 2254 application in this Court on August 9, 2013. *See Pepper v. Archuleta*, Civil Action No. 13-cv-02145-LTB (D. Colo. Aug. 9, 2013). Yet after realizing that he hadn't exhausted all claims in state court, Petitioner voluntarily dismissed that action without prejudice on December 4, 2013. *Id.* at ECF No. 16. An earlier-filed federal habeas application, however, does not toll the AEDPA statute of limitations. *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (holding that "an application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2)" and "therefore did not toll the limitation period during the pendency of [a petitioner's] first federal habeas petition").

Petitioner also filed a motion for postconviction relief in state court on June 17, 2014. (ECF No. 10-1 at 45). But the motion did not toll the statute of limitations because it was filed after the AEDPA statute expired on June 10, 2014. *See Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006) (stating that postconviction motions toll the one-year limitation period under § 2244(d)(2) only if they are filed within the one-year limitation period). Because Petitioner did not initiate this habeas action until February 1, 2021, it is time-barred unless Petitioner establishes a basis for excusing the delay.

In his reply, Petitioner contends this § 2254 application should be considered timely. (ECF No. 11). First, Petitioner explains that, in reliance on legal advice from his then-attorney, he filed the federal habeas corpus application in 2013. (*Id.* at 4-6). But Petitioner had to voluntarily dismiss the action without prejudice because he was not advised that before filing a habeas application under § 2254 he had to exhaust state remedies. (*See id.* at 5-6). Second, Petitioner maintains he worked diligently to exhaust state remedies after dismissing his first federal habeas action. (*Id.* at 6 (explaining that he "had to obtain transcripts, which took a few months"; "had to review all transcripts for any ineffective assistance issues"; and then he diligently submitted his postconviction motion in state court).

Equitable tolling is available to Petitioner "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649 (quotations and citation omitted). "An inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence." *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (brackets and quotations omitted).

To start, Petitioner's suggestion that he received inaccurate legal advice (regarding either the AEDPA statute of limitations or exhaustion requirement) does not toll the statute of limitations. "[I]t is well established that ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing." *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (cleaned up). The Tenth Circuit has also "rejected attorney miscalculation or mistake as to the limitations period as an 'extraordinary circumstance' justifying equitable tolling." *Davidson v. McKune*, 191 F. App'x 746 (10th Cir. 2006) (unpublished). Petitioner's first argument is therefore unavailing.

Petitioner's second argument—that he diligently pursued postconviction relief in state court—also does not excuse the untimely filing. Petitioner makes no showing of specific facts to establish he pursued his rights diligently and that some extraordinary circumstance prevented timely filing of *this § 2254 action*. Petitioner cites no authority, and the Court is aware of none, for the proposition that requesting and reviewing state-court transcripts qualifies as an extraordinary circumstance standing in the way of timely filing.

Petitioner's claim of diligence in pursuing state postconviction remedies really seems to be an argument for the application of statutory tolling. 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 shall not be counted toward any period of limitation under this subsection."). But according to the state-court register of actions, Petitioner's 35(c) motion was filed on June 17, 2014, which was after the AEDPA statute had expired. (ECF No. 10-1 at 45). This Court may not disregard that fact. *See* 28 U.S.C. § 2254(e)(1)("a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). And insofar as Petitioner contends his 35(c) motion should be deemed filed as of the date he signed it (June 12, 2014), that does not help him because the AEDPA statute expired two days earlier, on June 10, 2014. As such, equitable tolling does not save this untimely application.

## III. RECOMMENDATION

For these reasons, this Court respectfully recommends **denying** the *Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254* (ECF No. 1) and **dismissing this action with prejudice as untimely**.

DATED April 13, 2021.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-00313-LTB-GPG

DARNEAU VERSILL PEPPER,

Petitioner,

v.

DEAN WILLIAMS,
LARRY SCHULTZ, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

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**ORDER**

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This matter is before the Court on the Recommendation of United States Magistrate Judge filed April 13, 2021. (ECF No. 14). Petitioner has filed timely written objections to the Recommendation. (ECF No. 15). The Court has therefore reviewed the Recommendation *de novo* in light of the file and record in this case. On *de novo* review the Court concludes that the Recommendation is correct for the reasons stated therein.

To the extent Petitioner's objections argue that the COVID-19 pandemic should equitably toll the time for filing this § 2254 action, the argument is rejected. For the reasons stated in the Recommendation, the one-year AEDPA statute of limitations expired on June 10, 2014. Thus, the month-long COVID-related lockdown ending in April of 2021 that Petitioner references in his objections (ECF No. 15 at 1-2), occurred well after the statute of limitations expired in this case. *Donald v. Pruitt*, 2021 WL 1526421, at *2 (10th Cir. 2021) (unpublished) (affirming that equitable tolling not warranted where the petitioner "had failed to allege with any specificity what steps he had taken to pursue his claim diligently *before* the COVID-19 restrictions went into place[.]"). Such an objection is therefore unavailing.

Accordingly, it is

ORDERED that Petitioner's written objections (ECF No. 15) are OVERRULED. It is

FURTHER ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 14) is ACCEPTED AND ADOPTED. It is

FURTHER ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is DISMISSED WITH PREJUDICE as untimely for the reasons stated in the Recommendation. It is

FURTHER ORDERED that no certificate of appealability will issue because Petitioner has not made a substantial showing of the denial of a constitutional right. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is DENIED WITHOUT PREJUDICE to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal would not be taken in good faith.

DATED at Denver, Colorado, this 6th day of May, 2021.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court