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

ROBERT V. WONSCH,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CIV-21-00826-PRW
	)	
SCOTT CROW,[1]	)	
	)	
Respondent.	)	

ORDER

Petitioner Robert V. Wonsch, a state inmate appearing *pro se*, seeks habeas relief under 28 U.S.C. § 2254. The matter was referred to Magistrate Judge Suzanne Mitchell for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B) and (C). Respondent filed a Motion to Dismiss the habeas petition as time-barred (Dkt. 21). On July 30, 2021, the Magistrate Judge issued a Report & Recommendation (Dkt. 28) also recommending that the petition be dismissed as time-barred. Petitioner timely filed Objections (Dkt. 29).

For the reasons discussed below, the Court overrules Petitioner's objections, **ADOPTS** the Magistrate Judge's Report & Recommendation, and **DISMISSES** the petition for habeas relief.

[1] Although Petitioner named the State of Oklahoma as the respondent in this case, the correct respondent is Scott Crow, Director of the Oklahoma Department of Corrections, because Petitioner is housed in a private correctional facility.

Discussion

The Antiterrorism & Effective Death Penalty Act of 1996 establishes a one-year limitations period for state prisoners to seek federal habeas relief.[2] This clock begins running at the latest of several alternative dates—as relevant here, either the date that the judgment became final or the date on which an illegal impediment preventing the filing of a habeas petition was removed.[3] Magistrate Judge Mitchell concluded that Petitioner had not identified an impediment within the meaning of 28 U.S.C. § 2244(d)(1)(b), so his one-year clock began to run on July 23, 2020—after the Oklahoma Court of Criminal Appeals affirmed his conviction and the ninety-day window to seek Supreme Court review expired—and his habeas petition was thus out of time when filed on August 19, 2021.

Petitioner now files two objections to this conclusion. First, Petitioner argues that the State of Oklahoma engaged in *Brady* violations by concealing and destroying material evidence. Second, Petitioner argues that the State of Oklahoma, by discriminating against him due to his poverty, created an illegal impediment that prevented Petitioner's filing of a habeas petition. The Court addresses each objection in turn.

First, Petitioner's objection on allegedly concealed and destroyed evidence in violation of *Brady v. Maryland* fails to provide the Court with any reason to overlook the untimeliness of his petition or equitably toll the statutory requirements.

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[2] 28 U.S.C. § 2244(d)(1); *see also Holland v. Florida*, 560 U.S. 631, 635 (2010).

[3] *See* 28 U.S.C. §§ 2244(d)(1)(A)–(B).

It is not clear from the face of the objection to what end Petitioner presents this argument. To the extent that Petitioner seeks a determination on the merits, the Court declines to do so. The Magistrate Judge's Report & Recommendation correctly declined to reach the merits on any of Petitioner's claims since the habeas petition was filed out of time, and the Court will not ignore the clear untimeliness of a petition and consider merits simply because Petitioner alleged a cognizable *Brady* claim.[4]

To the extent that Petitioner believes any concealment or destruction qualifies as an "impediment" that would delay the start of the one-year clock pursuant to § 2244(d)(1)(B), he mistakes the function of the impediment provision. The impediment provision expressly allows tolling for state-created impediments that prevented or block a prisoner from filing a petition. But here, both the concealment and destruction allegations pertain to claims that were known by Petitioner by the conclusion of his trial. And at no point did the State prevent or block Petitioner from filing a habeas petition.

And to the extent that Petitioner believes the alleged concealment or destruction qualifies as a fundamental miscarriage of justice such that he might bypass § 2244's one-year limitation period, he is mistaken. Equitable tolling is appropriate "when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control," such as "when a prisoner is actually

[4] *See, e.g., Gonzales v. Beck*, 118 F. App'x 444, 444–47 (10th Cir. 2004). Unpublished Tenth Circuit opinions are cited for their persuasive value, pursuant to Tenth Circuit Rule 32.1(A).

innocent."[5] Yet equitable tolling is not available simply because a prisoner claims that he is actually innocent. Rather, he must present a "*colorable claim* of actual innocence" and "support his allegations . . . with new reliable evidence . . . that was not presented at trial."[6] Petitioner here offers no new evidence indicating he is actually innocent,[7] relying exclusively on the trial testimony of a law enforcement witness who testified that she "destroyed evidence vital to the defense."[8] Yet this very testimony was presented at Petitioner's trial, so—as Magistrate Judge Mitchell correctly observed—it fails the *Schlup* threshold requirement of "new" evidence. Furthermore, the Supreme Court has established that proof of "actual innocence means factual innocence, not mere legal insufficiency,"[9] and Petitioner's *Brady* claims present no affirmative evidence that demonstrates Petitioner is factually innocent.

In sum, regardless of what purpose the objection is presented for, Petitioner's objection pertaining to the alleged concealment or destruction of relevant evidence fails to undermine the Magistrate Judge's conclusion that Petitioner's claims are time-barred and not subject to equitable tolling.

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[5] *Sandoval v. Jones*, 447 F. App'x 1, 5 (10th Cir. 2011) (citing *Lopez v. Trani*, 628 F.3d 1228, 1231 (10th Cir. 2010)). Unpublished Tenth Circuit opinions are cited for their persuasive value, pursuant to Tenth Circuit Rule 32.1(A).

[6] *Schlup v. Delo*, 513 U.S. 298, 322, 324 (1995) (emphasis in original).

[7] *See, e.g.*, *Gonzales*, 118 F. App'x at 447 (affirming dismissal of an untimely habeas petition where the prisoner presented no new evidence for his actual innocence claim). Unpublished Tenth Circuit opinions are cited for their persuasive value, pursuant to Tenth Circuit Rule 32.1(A).

[8] *See* Objections (Dkt. 29), at 3; *see also* Report & Recommendation (Dkt. 28), at 23–24.

[9] *Bousley v. United States*, 523 U.S. 614, 623 (1998).

Second, the objection that the State discriminated against Petitioner on the basis of his poverty, even if true, does not result in a state-created "illegal impediment" that delays the beginning of the one-year clock for habeas petitions.

Petitioner argues that the state court judge presiding over his case denied him the transcripts and files needed for this habeas petition, while simultaneously accusing the state court judge of ethical impropriety.[10] However, as the Magistrate Judge correctly noted, "[c]ourts have unanimously rejected the proposition that the absence of transcripts automatically triggers statutory tolling under § 2244(d)(1)(B),"[11] particularly where the prisoner "failed to explain why the documents held by the state were necessary to pursue his federal claim."[12] Petitioner did not need the transcripts or files in hand in order to seek post-conviction review of any alleged errors, as clearly demonstrated by both his initial attempt at state-level habeas review and the federal petition now before this Court. At no point did the State's denial of transcripts and files physically prevent Petitioner from filing his petition in the way that a § 2244(d)(1)(B) impediment must prevent or block the filing of a petition.

Thus, even if the state court erred in denying the transcripts and files and even if such a denial was improperly predicated on Petitioner's inability to pay, Petitioner did not

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[10] *See* Objections (Dkt. 29), at 13 ("Had the Petitioner been wealthy this same judge would have SOLD him every document and file in that courthouse. Even if they had NO merit to his case or appeal.").

[11] *Heinemann v. Murphy*, 401 F. App'x 304, 309 (10th Cir. 2010). Unpublished Tenth Circuit opinions are cited for their persuasive value, pursuant to Tenth Circuit Rule 32.1(A).

[12] *Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006).

suffer from a state-created impediment to seeking habeas relief such that the one-year clock imposed by § 2244 should be delayed past the point when his conviction became final.

Conclusion

Both of Petitioner's objections fail to identify any error in the Magistrate Judge's conclusions or any reason to consider Petitioner's time-barred habeas petition. After reviewing the remainder of Report & Recommendation de novo, the Court agrees that the Petitioner's Petition for a Writ of Habeas Corpus (Dkt. 1) should be dismissed as untimely for the reasons set forth by Magistrate Judge Mitchell.

On the same day he filed his habeas petition, Petitioner filed six other motions—four motions requesting evidentiary hearings on various issues and two motions seeking production of various records. But a habeas petitioner has no absolute right to either evidentiary hearing or discovery during habeas proceedings. Before holding an evidentiary hearing in habeas proceedings, "applicant must allege facts which, if proved, would entitle him to relief."[13] Similarly, a habeas petitioner may conduct discovery after showing "good cause," requiring demonstration that "if the facts are fully developed, [the petitioner is] entitled to relief."[14] Here, even if Petitioner proved all facts he alleges, he would still not be entitled to relief due to the untimeliness of his petition. Thus, since § 2244's limitation period bars Petitioner's habeas petition as a matter of law, he has no right to either the evidentiary hearings or discovery.

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[13] *Church v. Sullivan*, 942 F.2d 1501, 1510 (10th Cir. 1991) (cleaned up).

[14] *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).

Accordingly, the Court:

(1) **ADOPTS** in full the Report & Recommendation (Dkt. 28) issued by Magistrate Judge Mitchell on January 21, 2022;

(2) **GRANTS** Respondent's Motion to Dismiss Petition as Time-Barred (Dkt. 21);

(3) **DISMISSES** Petitioner's Petition for Writ of Habeas Corpus (Dkt. 1);

(4) **DENIES AS MOOT** Petitioner's motions for evidentiary hearings and discovery (Dkts. 3–7, 10);

(5) **DENIES AS MOOT** Respondent's alternative Motion to Dismiss Petition for Failure to Exhaust State Remedies (Dkt. 23); and

(6) **DENIES** a certificate of appealability.[15]

IT IS SO ORDERED this 17th day of February 2022.

PATRICK R. WYRICK
UNITED STATES DISTRICT JUDGE

[15] Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court must issue or deny a certificate of appealability when it enters a final order adverse to a habeas petitioner. A certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner "satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Upon consideration, the Court finds the requisite standard is not met in this case.

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

ROBERT V. WONSCH,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. CIV-21-826-PRW**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner, a pro se Oklahoma prisoner, seeks habeas relief under 28 U.S.C. § 2254 from his convictions rendered in the District Court of Cleveland County, Oklahoma, Case No. CF-2016-10, for five counts of sexual battery, one count of attempted procuring of lewd exhibition of a person, one count of kidnapping, one count of forcible sodomy, one count of pattern of criminal offenses, and two counts of engaging in lewdness. Doc. 1, Part 1, at 13-14 (the Clerk of Court had to separate Petitioner's over 300-page-petition into three parts); Doc. 22, Ex. 1, at 1-2.[1] United States District Judge Patrick R. Wyrick referred the matter to the undersigned for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). Doc. 8. Respondent has moved to dismiss the

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[1] Citations to a court document are to its electronic case filing designation and pagination. Apart from adjusted capitalizations, unless otherwise indicated, quotations are verbatim.

petition as time-barred and filed a brief in support of the motion. Docs. 21-22.[2] Petitioner has responded, Docs. 25-26, and the matter is at issue.

For the reasons discussed, the undersigned recommends the Court grant Respondent's motion to dismiss the untimely petition.

I. Procedural history.

A Cleveland County jury, in Case No. CF-2016-10, found Petitioner guilty of sexual battery in counts one, three, four, nine, and twelve, attempted procuring of lewd exhibition of a person in count two, kidnapping in count ten, forcible sodomy in count eleven, pattern of criminal offenses in count thirteen, and engaging in lewdness in counts fourteen and fifteen. Doc. 22, Ex. 1, at 1. The state district court sentenced Petitioner to consecutive sentences of seven years' imprisonment on count one, two years' on count two, five years' each on counts three, four, and nine, fifteen years' on count ten, eighteen years' on count eleven, nine years' on count twelve, two years' on count thirteen, and one year each on counts fourteen and fifteen. *Id.* at 1-2. The court also fined Petitioner a total of $7,000.00. *Id.* at 2. Petitioner directly appealed his convictions and sentences to the Oklahoma Court of Criminal Appeals (OCCA). Doc. 1, Part 1, at 14-15; Doc. 22, Ex. 1. The OCCA affirmed them in a Summary

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[2] In a separate motion, Respondent alternatively moves to dismiss the petition based on Petitioner's failure to exhaust necessary state remedies. Docs. 23-24. Petitioner has not responded to this motion.

Opinion issued April 23, 2020. Doc. 22, Ex. 1. Petitioner does not state whether he sought certiorari in the United States Supreme Court. *See* Doc. 1, Part 1, at 15.

On May 15, 2020, Petitioner filed in the state district court a notice of his intent to file a writ of mandamus in the OCCA. Doc. 22, Ex. 2. Petitioner referenced the "local court rules" which he said required "a ten (10) day notice prior to filling." *Id.* at 2. He also stated he was "filling the writ pursuant to the Oklahoma Post-Conviction Procedure Act, Oklahoma Title 22, Ch. 18 § 1080 (2001)." *Id.*

On May 22, 2020, Petitioner filed in the state district court an "Affidavit In Forma Pauperis" and attached a copy of his fifty-six page writ of mandamus, captioned in the OCCA, and its eighty-five pages of exhibits. Doc. 22, Ex. 3, at 1. He explained to the district court clerk that he had sent the "original" to the "State Supreme Court for their ruling" and that "[p]ursuant to court rules this Court must be provided 1 copy 10 days after my intent was filed." *Id.*

On that same date, Petitioner filed his "Extraordinary Writ of Mandamus" in the OCCA. *Id.* Ex. 4. That court declined jurisdiction on July 16, 2020. *Id.* Ex. 5, at 1. The court explained to Petitioner that it would "only entertain applications for post-conviction relief if Petitioner had sought and been denied relief in the District Court." *Id.* The court found "Petitioner's pleading requesting post-conviction relief d[id] not contain a copy of a trial

court order or records sufficient to prove he was denied relief in the District Court." *Id.*

On July 23, 2020, Petitioner filed a motion in the state district court with the OCCA's order attached asking the district court to "[a]ddress" his extraordinary writ of mandamus and "assume jurisdiction of said writ pursuant to OCCA's order filed July 16, 20[20]." *Id.* Ex. 6. Petitioner did not attach a copy of his voluminous writ of mandamus to his motion, stating he could not "afford to print out the document(s) at $0.25 per page." *Id.* Ex. 6, at 2. He also filed an "affidavit in support of his extraordinary writ of mandamus" in which he told the district court that the OCCA had "reverted" jurisdiction back to it and moved the court to consider the other claims he was raising in his affidavit along with the claims he had raised in his original writ. *Id.* Ex. 7, at 1-2. Petitioner did not file a separate application for post-conviction relief at that time.

On August 2, 2020, Petitioner filed in the state district court a notice that the state was time-barred under the local court rules from responding to his writ of mandamus. *Id.* Ex. 8, at 3-4. On September 11, 2020, Petitioner filed his "[Fist and Final], Pro-Se Motion to Compel the Court to Make a Ruling of his 'Extraordinary Writ of Mandamus' that was filed on May 22, 2020 [over 100 days ago]." *Id.* Ex. 9. Petitioner complained that the state district court had discriminated against him since his arrest and had ignored almost all his

pro se pleadings. *Id.* at 2. He did not attach a copy of his writ of mandamus to his motion or file a separate post-conviction application.

On October 8, 2020, Petitioner filed a notice of intent to appeal to the OCCA. *Id.* Ex. 10.[3] On December 7, 2020, Petitioner filed a "[Third], Pro-Se Notice of Intention to Appeal this Court's imposed Mootness Doctrine of his Extraordinary Writ of Mandamus pursuant to Title 22 OS § 1089.1 to 1089.7." *Id.* Ex. 13.

On April 15, 2021, Petitioner filed a twenty-page "Pro-Se Motion to Post-Conviction Relief Pursuant to [Oklahoma Title 22, Ch. 18 § 1080 §§ A-F]." *Id.* Ex. 14, at 5-24. The state responded on June 28, 2021, asking the court to dismiss the application for a lack of jurisdiction because Petitioner had not verified it as the court rules required. *Id.* Ex. 18, at 2. The state district court dismissed Petitioner's post-conviction application on July 21, 2021, because it was "not verified in any manner" and the court had "no authority" to grant an unverified application. *Id.* Ex. 20, at 3.[4] The records do not show that Petitioner

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[3] The records do not show Petitioner ever sought an appeal in the OCCA.

[4] Petitioner filed three separate documents with the state district court. The first was a one-page "Praecipe" informing the court clerk he was invoking his first amendment right to free speech and was sending his documents to the court and media. Doc. 22, Ex. 14, at 1. The second was a three-page "affidavit and verification of mailing" stating that he had mailed a true and correct copy of his enclosed pleading to the court and several other institutions with his sworn verification that "the foregoing" was true and correct. *Id.* at 2-4. And the third was "The Petitioner's, Pro-Se, Motion to Post-Conviction Relief pursuant

appealed the district court's order dismissing his application for post-conviction relief to the OCCA.

Petitioner's habeas corpus petition was post-marked August 19, 2021. Doc. 1. This Court received and file-stamped it on August 20, 2021. Doc. 1.[5]

II. Petitioner's habeas claims.

Petitioner raises twenty-three grounds for relief in his habeas petition. In Ground One, Petitioner asserts the State of Oklahoma and his trial counsel obstructed his constitutional right to file a timely and well-pleaded habeas corpus petition. Doc. 1, Part 1, at 2. In Ground Two, Petitioner asserts the Antiterrorism and Effective Death Penalty Act of 1996 is repugnant and unconstitutional. *Id.* In Ground Three, Petitioner alleges that certain Oklahoma statutes governing his right to a speedy trial are vague and unconstitutional. *Id.* at 3. In Ground Four, Petitioner claims the State of Oklahoma and his counsel denied him of his right to a speedy trial. *Id.* In

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to [Oklahoma Title 22, CH. 18 § 1080 §§ A-F]," which was signed by Petitioner but not notarized or sworn. *Id.* at 5-24.

[5] The Court generally deems the petition filed on the day Petitioner gave it to prison authorities for mailing. *Fleming v. Evans*, 481 F.3d 1249, 1255 n.2 (10th Cir. 2007); *Hoggro v. Boone*, 150 F.3d 1223, 1226 n.3 (10th Cir. 1998) (citing *Houston v. Lack*, 487 U.S. 266, 270 (1988)). Petitioner, however, does not specify when he placed his petition in the prison mailing system. *See* Doc. 1, Part 3, at 97. So the undersigned applies the date it was post-marked. *See Price v. Philpot*, 420 F.3d 1158, 1164-65 (10th Cir. 2005) (holding that to benefit from the prison mailbox rule, the prisoner "must attest that a timely filing was made" and bears "the burden of proof on this issue").

Ground Five, Petitioner asserts ineffective assistance of trial counsel. *Id.* In Ground Six, Petitioner alleges the State and his court-appointed counsel denied him all transcripts. *Id.* at 4. Petitioner asserts in Ground Seven that his trial counsel had concealed the entire defense file from him "since the date of his arrest." *Id.* In Ground Eight, Petitioner alleges the State and his counsel denied him access to the State's evidence and discovery. *Id.* Petitioner claims in Ground Nine that "O.S.B.I. Special Agent Meghan Bowman" violated his constitutional rights through "'shyster' and 'illegal' means[] to obtain her first conviction." *Id.* In Ground Ten, Petitioner asserts the prosecutor committed misconduct in her closing arguments which denied him a fair trial. *Id.* at 5. Petitioner alleges in Ground Eleven that the prosecutor knowingly called witnesses at his trial who perjured themselves. *Id.* In Ground Twelve, Petitioner asserts that the State violated the Oklahoma Open Records Act by concealing all the district and appellate court rules from Petitioner. *Id.* In Ground Thirteen, Petitioner argues certain Oklahoma court rules are unconstitutional in violation of the Fourteenth Amendment. *Id.* at 6. Petitioner claims in Ground Fourteen that the admission of other crimes evidence denied him a fair trial. *Id.* In Ground Fifteen, Petitioner asserts the trial court abused its discretion by admitting other crimes evidence. *Id.* Petitioner alleges in Ground Sixteen that the trial court erred by overruling his demurrer to count two. *Id.* at 7. In Grounds Seventeen and Eighteen, Petitioner argues his

conviction for attempting to procure the lewd exhibition of a person either does not "exist" or is based on an unconstitutional state statute. *Id.* In Ground Nineteen, Petitioner asserts the trial court erred by overruling his demurrer to counts fourteen and fifteen. *Id.* Petitioner asserts in Ground Twenty that the trial court erred in instructing the jury. *Id.* at 8. In Ground Twenty-one, Petitioner argues there was insufficient evidence to convict him on counts one, three, four, nine, and twelve. *Id.* Petitioner claims in Ground Twenty-two that he was denied access to a law library before and after his trial. *Id.* And in Ground Twenty-three, Petitioner argues his counsel was ineffective for failing to invoke and preserve his constitutional and statutory rights. *Id.* at 9.

The Court will not reach the merits of these claims because Petitioner has not shown his petition is timely. *See Faircloth v. Raemisch*, 692 F. App'x 513, 521 (10th Cir. 2017) ("[In order to reach the merits of [petitioner's] § 2254 motion, [petitioner] must first demonstrate that it was timely filed—a requirement he has not and cannot meet here.").

III. Analysis.

A. Limitations period established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

AEDPA established a one-year limitation period during which an inmate in state custody can file a federal habeas petition challenging a state conviction:

> 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.

28 U.S.C. § 2244(d)(1). The act provides four alternative starting dates for the limitation period:

> 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.

Id. The statute includes a tolling provision for properly filed post-conviction actions:

> 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.

Id. § (d)(2). To meet the "properly filed" requirement, an inmate must comply with state procedural requirements. *Habteselassie v. Novak*, 209 F.3d 1208, 1210-11 (10th Cir. 2000) (defining a "properly filed" application as "one filed according to the filing requirements for a motion for state post-conviction relief' and giving examples of such requirements); *see also, Frierson v. Farris*, No. CIV-21-245-R, 2021 WL 5932980, at *3 (W.D. Okla. Dec. 15, 2021) (finding that, even if a state district court does not formally strike a pleading, "such a ruling is unnecessary in determining whether an application is properly filed" because "[i]n the Tenth Circuit, courts 'look only at state procedural filing requirements and not at whether a state court ultimately determined the application to be procedurally barred'" (quoting *Gibson v. Klinger*, 232 F.3d 799, 805 (10th Cir. 2000))).

1. Starting date under 28 U.S.C. § 2244(d)(1)(A).

Respondent contends that § 2244(d)(1)(A) applies here. Doc. 22, at 17-18. Respondent asserts Petitioner's conviction became final on July 22, 2020, after the ninety-day period for seeking certiorari in the United States Supreme

Court expired. *Id.* at 9. Petitioner's statutory one-year limitation period began to run the next day, and Petitioner's statutory year expired on July 23, 2021. *Id.* at 9, 12.

Unless a petitioner shows otherwise, the limitation period generally runs from the date the judgment becomes "final," as provided by § 2244(d)(1)(A). *See Preston v. Gibson*, 234 F.3d 1118, 1120 (10th Cir. 2000). Petitioner claims in his petition that the statute of limitations "clock" did not start at the conclusion of his direct appeal because he never received a final order of exhaustion of state remedies as required by "Title 22, Ch. 18 § 1086."[6] Doc. 1, Part 1, at 18. But in Oklahoma a criminal conviction is final when the OCCA issues its decision affirming the conviction and sentence and the ninety-day-period to seek further review in the United States Supreme Court expires. *See Lolar v. Crow*, 822 F. App'x 747, 749 (10th Cir. 2020) ("[T]he [OCCA] affirmed

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[6] Section 1086 states:

> All grounds for relief available to an applicant under this [Uniform Post-Conviction Procedure 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.

Okla. Stat. tit. 22 § 1086 (footnote omitted).

Petitioner's conviction and sentence on April 21, 2015; he never sought any further direct review from the Supreme Court of the United States; so his conviction became final ninety days later—again, July 20, 2015—when his time for seeking that further review expired."). Petitioner's reference to Oklahoma's post-conviction procedures, which occur outside the direct review process, *see* 22 Okla. Stat. tit. 22 § 1080, *et seq.*, does not alter the finality date of his convictions and sentences.

Petitioner's convictions and sentences became final on July 22, 2020, ninety days after the OCCA affirmed them. *Lolar*, 822 F. App'x at 749. The one-year period of limitation begins to run the day after a conviction is final. *See Harris v. Dinwiddie*, 642 F.3d 902, 906-07 n.6 (10th Cir. 2011); *see also United States v. Hurst*, 322 F.3d 1256, 1260-61 (10th Cir. 2003) (adopting the "anniversary method" in which "'the day of the act . . . from which the designated period of time begins to run shall not be included'" (quoting Fed. R. Civ. P. 6(a))). So, Petitioner's one-year limitation period began on July 23, 2020, and, absent tolling, expired one year later, on July 23, 2021.

2. Starting date under 28 U.S.C. § 2244(d)(1)(B).

In his petition and response to the motion to dismiss, Petitioner generally asserts an impediment to filing because both his court-appointed counsel and the state denied him access to his defense file, the evidence, and transcripts, the state courts refused to send him any court rules, and he was

confused about the state court rules because the state designed them to "obstruct" pro se prisoners from properly appealing. Doc. 1, Part 1, at 27-39, 47; Doc. 25, at 3-5, 7. Petitioner does not assert a date these alleged impediments were lifted but, assuming he is invoking section 2244(d)(1)(B), the undersigned finds no new starting date.

Petitioner misunderstands section 2244(d)(1)(B)'s application. This section applies when the state has prevented the filing of a habeas action, not the discovery of a legal basis for a claim. *See, e.g.*, *Garcia v. Hatch*, 343 F. App'x 316, 318 (10th Cir. 2009) (rejecting petitioner's argument that the state had impeded him from timely filing a federal habeas petition "by failing to provide him with access to a law library" or "'adequate research' in preparing his state and federal petitions"). While Petitioner alleges a non-specific "Brady" violation because the state allegedly failed to turn over the case-evidence and transcripts *to him personally*, he does not allege that the state withheld evidence or information from his counsel about his case. *See Sigala v. Bravo*, 656 F.3d 1125, 1127 (10th Cir. 2011) ("State courts do not violate the Constitution or the laws of the United States by communicating with defendants through counsel . . . ."); *cf. Heinemann v. Murphy*, 401 F. App'x. 304, 309 (10th Cir. 2010) ("Courts have unanimously rejected the proposition that the absence of transcripts automatically triggers statutory tolling under § 2244(d)(1)(B)"); *Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006)

(holding that the petitioner had "failed to explain why the documents held by the state were necessary to pursue his federal claim"). And even if Petitioner's counsel failed "to turn over notes and discovery" to him, that "does not constitute state action" under this section. *Bhutto v. Wilson*, 669 F. App'x 501, 502-03 (10th Cir. 2016); *see also Sigala*, 656 F.3d at 1127-28 (holding that actions by a defendant's counsel "cannot properly be 'state action' attributable" to the state for purposes of § 2244(d)(1)(B)).

Finally, Petitioner's numerous pleadings belie his allegation that the state courts denied him access to court rules. These pleadings show he had access to both court rules and state statutes relevant to his case. He began filing pleadings in the state district court referencing those rules and statutes even before his convictions and sentences were final. *See* Doc. 22, Exs. 2-4. This undercuts his lack of access argument. *See, e.g.*, *Sherratt v. Friel*, 275 F. App'x 763, 765 (10th Cir. 2008) ("Where a petitioner's claims 'are similar to those raised in his direct appeal and motion for state post-conviction relief, this undercuts his argument that lack of access caused his delay.'" (quoting *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998)) (internal alterations omitted)); *see also Mayes v. Province*, 376 F. App'x 815, 817 (10th Cir. 2010) (noting that the petitioner had "filed many other post-conviction motions in the Oklahoma state courts during the period he was allegedly deprived of the resources necessary to access the judicial system," and holding there was "no basis in the record . . .

to believe that [the petitioner] was incapable of filing a timely habeas petition," even if additional resources could have been of greater assistance to him (internal quotation marks omitted)). And, while Petitioner may have been confused about the application of those rules to his case, his confusion does not morph into a state-created impediment which prevented him from timely filing his habeas corpus action. *See Sherratt*, 275 F. App'x at 766 ("The fact that a petitioner simply did not know about the limitation in the AEDPA until it was too late, while regrettable, is not a basis for tolling.").

Because the exception in § 2244(d)(1)(B) does not apply, the Court should apply the general rule in § 2244(d)(1)(A) and conclude that statute of limitations expired on July 23, 2021, absent tolling.[7]

B. Availability and effect of tolling on the limitation period.

1. Statutory tolling.

The AEDPA allows for tolling of the limitation period while a properly filed state post-conviction action is pending before the state courts. *See* 28 U.S.C. § 2244(d)(2). Petitioner does not address statutory tolling. Respondent argues that Petitioner is not entitled to statutory tolling because none of his

[7] Petitioner argues the state's actions also denied him the ability to prove his innocence. Doc. 1, Part 1, at 50. The undersigned addresses Petitioner's actual innocence argument below.

state court pleadings were properly filed. Doc. 22, at 14-30. The undersigned agrees no statutory tolling applies to the petition.

a. Petitioner filed pleadings before his convictions and sentences became final on July 22, 2020.

On May 15, 2020, Petitioner filed in the state district court a notice of his intent to file a writ of mandamus in the OCCA. Doc. 22, Ex. 2. On May 22, 2020, Petitioner filed in the state district court an "Affidavit In Forma Pauperis" and attached a copy of his fifty-six page writ of mandamus, captioned in the OCCA, and its eighty-five pages of exhibits. Doc. 22, Ex. 3, at 1. On that same date, Petitioner filed his "Extraordinary Writ of Mandamus" in the OCCA. *Id.* Ex. 4. That court declined jurisdiction on July 16, 2020. *Id.* Ex. 5, at 1. The court explained to Petitioner that it would "only entertain applications for post-conviction relief if Petitioner had sought and been denied relief in the District Court." *Id.* The court found "Petitioner's pleading requesting post-conviction relief [did] not contain a copy of a trial court order or records sufficient to prove he was denied relief in the District Court." *Id.*

These pleadings and the OCCA order provide no tolling as they were resolved before Petitioner's one-year statute of limitations commenced. *See* 28 U.S.C. § 2244(d)(1)(A); *see also Waldrip v. Hall*, 548 F.3d 729, 735 (9th Cir. 2008) (holding that the petitioner's state habeas petition, which had been filed and decided before his conviction became final, "would otherwise have tolled

the running of the federal limitations period," but because it was denied before limitations period "had started to run, it had no effect on the timeliness of the ultimate federal filing"); *Long v. Crow*, No. CIV-19-737-D, 2019 WL 5295554, at *2 (W.D. Okla. Sept. 19, 2019) ("[B]ecause the [post-conviction] application was filed before Petitioner's conviction was final, the filing date had no effect on tolling . . . ."), *adopted by* 2019 WL 5295529 (W.D. Okla. Oct. 18, 2019).

b. Petitioner's subsequent pleadings in the state district court attempting to "revert[] jurisdiction" of his improperly filed writ of mandamus did not toll the limitations period.

On July 23, 2020, Petitioner filed a motion in the state district court asking it to "[a]ddress" his extraordinary writ of mandamus filed May 22, 2020, and "assume jurisdiction" of the writ. Doc. 22, Ex. 6.[8] But the OCCA had not remanded the matter to the district court. Instead, that court found Petitioner had improperly filed the writ and dismissed it. *Id.* Ex. 5. That pleading was thus no longer pending in the state courts. *Cf. Lolar*, 822 F. App'x at 750 n.4

[8] As explained above, Petitioner never actually filed his writ of mandamus in the state district court. But, even if he had, this Court could not find it was properly filed for tolling purposes because it exceeded the state district court's twenty-five-page limit on motions and Petitioner never requested leave of court to exceed that limit. *See* Rule 16(C), Official Ct. Rules of the Twenty-First Judicial District, Comprised of Cleveland, McClain, and Garvin Counties; *see also Frierson*, 2021 WL 5932980, at *3 (referencing a state district court rule and concluding that, even though the state district court did not strike petitioner's application for post-conviction relief, the application, which exceeded the twenty-page limit, was not properly filed and "did not statutorily toll the one-year AEDPA limitations period").

(holding that a pleading that the state court had "adjudicated" "in some way" was "no longer pending in Oklahoma state court as of that date" and the court needed "no other details about the state courts' decision-making process to calculate tolling under § 2244(d)(2)). Petitioner's subsequent filings in the district court, requesting the court address his claims which the OCCA had dismissed as improperly filed, were not a proper use of state court procedures and, thus, they did not toll the limitations period. *See, e.g.*, *Gibson*, 232 F.3d at 806-07 (explaining that an application for postconviction relief is "pending" through "all of the time during which a state prisoner is attempting, through *proper* use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application" (emphasis added)); *cf. Levering v. Dowling*, 721 F. App'x 783, 786 (10th Cir. 2018) (holding the petitioner's "motion for transcripts and exhibits [was] not a motion for collateral state review" and did not trigger the AEDPA's tolling provision (citing 28 U.S.C. § 2244(d)(2) and *Wall v. Kholi*, 562 U.S. 545, 553 (2011))).

c. Petitioner's only post-conviction application filed during the one-year limitations period was improperly filed and did not toll it.

On April 15, 2021, Petitioner filed a motion for post-conviction relief. Doc. 22, Ex. 14, at 5-24. The state filed a response on June 28, 2021, asking the court to dismiss the application for a lack of jurisdiction because Petitioner had not verified it as the court rules required. *Id.* Ex. 18, at 2. The state district

court dismissed Petitioner's post-conviction application on July 21, 2021, because it was "not verified in any manner" and the court had no authority to grant an unverified application. *Id.* Ex. 20, at 3. Petitioner did not appeal that dismissal order.

To toll the limitations period with his post-conviction application, Petitioner must have properly filed it. *See* 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."). This Court looks to the state's procedural filing requirements to determine whether an application is properly filed. *Levering*, 721 F. App'x at 787. And "a state court's interpretation of its own law is binding on a federal court conducting habeas review." *Id.* (quoting *Loftis v. Chrisman*, 812 F.3d 1268, 1272 (10th Cir. 2016)).

In Oklahoma, to commence a post-conviction proceeding, Petitioner needed to file "a verified 'application for post-conviction relief' with the clerk of the court imposing judgment." Okla. Stat. tit. 22 § 1081; *see Tarkington v. Martin*, No. CIV-18-632-SLP, 2019 WL 1875526, at *2 (W.D. Okla. Jan. 24, 2019) ("Post-conviction 'proceedings in Oklahoma district courts are considered commenced, and thus filed for purposes of Oklahoma's post-conviction statute, when a properly verified application for post-conviction relief is delivered to

the proper district court for the purpose of filing.'" (quoting *Burger v. Scott*, 317 F.3d 1133, 1140 (10th Cir. 2013)), *adopted by* 2019 WL 927735 (W.D. Okla. Feb. 26, 2019). A verified application is one in which the applicant swears that the facts within his or her personal knowledge and "the authenticity of all documents and exhibits included in or attached to the application" are true and correct. Okla. Stat. tit. 22 § 1081.

Here, the state moved to dismiss petitioner's application for post-conviction relief for non-compliance with the rules and the state district court granted the motion. Doc. 22, Exs. 18, 20. "Thus, [Petitioner's] first application for post-conviction relief was not a 'properly filed application' and did not trigger statutory tolling." *Levering*, 721 F. App'x at 787.

2. Equitable tolling.

Petitioner's statute of limitations expired on July 23, 2021. Petitioner filed his federal habeas corpus petition in this Court on August 19, 2021—almost a month after the statutory deadline. So unless equitable tolling applies to save Petitioner's petition, it is untimely and the Court must dismiss it.

"[A habeas] petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks omitted). Even assuming a diligent pursuit of rights, the one-year period of

limitation "is subject to equitable tolling . . . only in rare and exceptional circumstances." *Gibson*, 232 F.3d at 808. Petitioner must "demonstrate[] that the failure to timely file was caused by extraordinary circumstances beyond his control." *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000). Petitioner has the burden of proving that equitable tolling applies. *Sigala*, 656 F.3d at 1128. "Simple excusable neglect is not sufficient." *Gibson*, 232 F.3d at 808.

Petitioner argues he should be granted equitable tolling because he was not granted sufficient time in the law library,[9] he was confused by the rules, and his counsel and the state did assist him in obtaining legal materials or transcripts. Doc. 1, Part 1, at 25-26, Part 3, at 55-56; Doc. 25, at 7-9. But none of these are considered extraordinary circumstances which justify equitable tolling. *See Kenneth v. Martinez*, 771 F. App'x 862, 865 (10th Cir. 2019) ("[T]his court has repeatedly rejected the argument that difficulty in obtaining trial records constitutes 'extraordinary circumstances' justifying equitable tolling."); *United States v. Titties*, No. CIV-19-594-R, 2019 WL 3806632, at *2 (W.D. Okla. Aug. 13, 2019) (finding that "the lack of access to transcripts and

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[9] Petitioner asserts his prison facility is rarely not on "lockdown." Doc. 1, Part 3, at 56. But he admits that when it is not, prisoners are allowed access to the law library one day a week and can access computers for legal research for fifteen minutes a day, every day. *Id.* Petitioner's lack of access claim does not establish an extraordinary circumstance to justify equitable tolling. *See Winston v. Allbaugh*, 743 F. App'x 257, 258 (10th Cir. 2018) ("While prison lockdowns are uncontrollable, they merely impede access to the relevant law, which we have continuously ruled insufficient to warrant equitable tolling.").

other filings does not provide a basis for equitable tolling"); *see also Levering*, 721 F. App'x at 788 ("[N]either the difficulty in obtaining trial court transcripts nor [a petitioner's] limited time in the law library are 'extraordinary circumstances' that would justify the use of equitable tolling."). And Petitioner's purported confusion about the law does not give the Court a reason to apply equitable tolling. *See, e.g.*, *Marsh*, 223 F.3d at 1220 ("[I]t is well established that ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing." (internal quotation marks omitted)).

Petitioner claims he diligently pursued his rights by filing a direct appeal and "several post-conviction pleadings." Doc. 1, Part 1, at 26, 48. But, save for his direct appeal, none of Petitioner's pleadings were properly filed. And, given the OCCA's notice to Petitioner of the proper way to file a post-conviction application, which the court gave before the limitations period even commenced, the Court cannot conclude that Petitioner acted with the requisite diligence required for equitable tolling. *See, e.g.*, *Ramirez v. Allbaugh*, 771 F. App'x 458, 464-65 (10th Cir. 2019) (holding the district court did not abuse its discretion in determining the petitioner had not acted with the requisite diligence where the state district court struck a defective pleading and, although it delayed in ruling on the petitioner's motion to file an overlength motion, it never led the petitioner to believe that he had done all that was

required to "begin" a "review" of his claims). And even if the Court assumed Petitioner had diligently pursued his rights, because "he has failed to show any extraordinary circumstance for his failure to comply with AEDPA's one year statute of limitations," the Court finds Petitioner is not entitled to equitable tolling. *Marsh*, 223 F.3d at 1220.

3. Fundamental miscarriage of justice.

Having found Petitioner's statute of limitations has expired, the final issue is whether to allow Petitioner to bypass the limitation period because he has presented "a 'credible showing of actual innocence.'" *Doe v. Jones*, 762 F.3d 1174, 1182 (10th Cir. 2014) (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013)). But "[t]o be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). And Petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin*, 569 U.S. at 399 (quoting *Schlup*, 513 U.S. at 327).

Petitioner asserts he is innocent because a law enforcement witness testified at trial that she "destroyed evidence vital to the defense" and because the state presented insufficient evidence of his guilt on Counts 1, 3, 4, 9, and 12. Doc. 25, at 10-11. But "actual innocence means factual innocence, not mere

legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks omitted). Even a successful insufficiency of the evidence claim "would only show legal innocence, not [] factual innocence." *Lowery v. Bryant*, 760 F. App'x 617, 619 (10th Cir. 2019). So, it does not "excuse the untimeliness of [the] petition." *Id.* And trial testimony does not meet the *Schlup* test for "new reliable evidence." 513 U.S. at 324. There is thus no basis for bypassing the statute of limitations bar in this case.

IV. Recommendation and notice of right to object.

Petitioner filed his habeas corpus petition past the expiration of the statute of limitations. No tolling, either statutory or equitable, may be applied to save the petition. The undersigned therefore recommends granting Respondent's motion to dismiss Petitioner's petition as untimely filed. Docs. 21-22. The undersigned further recommends the Court deny as moot Petitioner's pending motions. Docs. 3-7, 10. And, if the Court adopts this Report and Recommendation, the undersigned further recommends the Court deny as moot Respondent's motion to dismiss for failure to exhaust state court remedies. Docs. 23-24.

The undersigned advises the parties of the right to file an objection to this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). Any objection must be filed with the Clerk of Court **on or before February 11, 2022**. The undersigned further advises the parties that the

failure to file a timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation disposes of all the issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 21st day of January, 2022.

SUZANNE MITCHELL
UNITED STATES MAGISTRATE JUDGE

EXHIBIT(S)

- **EXHIBIT** 1 Oklahoma Constitution Article I § 3
- **EXHIBIT** 2 Oklahoma Constitution Article II § 20
- **EXHIBIT** 3 Oklahoma Statute: 22 O.S. § 13
- **EXHIBIT** 4 Oklahoma Statute: 22 O.S. § 13 (with Historical notes)
- **EXHIBIT** 5 Oklahoma Statute: 22 O.S. § 812.2 (Court's review process)
- **EXHIBIT** 6 Oklahoma Statute: 22 O.S. § 812.1 (Time limits to trial)
- **EXHIBIT** 7 Oklahoma Country District Attorney's response to speedy trial claim(s) – indicating Oklahoma does not have a speedy trial right.
- **EXHIBIT** 8 Declaration(s) of inmate(s) who demanded a speedy trial
- **EXHIBIT** 9 Petitioner's combined opening brief and application for COA - arguing his ***ACTUAL-FACTUAL INNOCECE.***
- **EXHIBIT** 10 Marquette Law Review:

"REVENGE OF THE SIXTH: THE CONSTITITONAL RECKONING OF PANDEMIC JUSTICE"

- AND NOT MORE -

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