FILED
United States Court of Appeals
Tenth Circuit

October 25, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT D. CARTER,

Petitioner - Appellant,

v.

DEON CLAYTON, Warden,

Respondent - Appellee.

No. 22-7031
(D.C. No. 6:19-CV-00243-RAW-KEW)
(E.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Robert Carter, a state prisoner proceeding pro se,[1] seeks a certificate of appealability (COA) to appeal an order denying his motion under Federal Rule of Civil Procedure 60(b)(1) to set aside a judgment dismissing his 28 U.S.C. § 2254 petition as untimely. For the reasons below, we deny Carter's request and dismiss this matter.

Background

Carter filed his § 2254 petition in July 2019, asserting various constitutional challenges to his Oklahoma convictions for possessing child pornography. The State

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

[1] "Because [Carter] is pro se, we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

APPENDIX 1

moved to dismiss the petition as untimely, arguing that Carter filed it more than one year after his convictions became final in February 2016. *See* 28 U.S.C. § 2241(d)(1). The district court agreed. So in late November 2020, it dismissed the petition, declined to issue a COA, and entered judgment for the State. Carter then moved for reconsideration under Federal Rule of Civil Procedure 59(e); the district court denied that motion in August 2021.

Carter then made his first trip to this court, seeking a COA to challenge the district court's ruling that the one-year statute of limitations barred his petition. *See* 28 U.S.C. § 2253(c)(1)(A). Earlier this year, we denied Carter's COA request and dismissed the case. *Carter v. Clayton*, No. 21-7049, 2022 WL 484033, at *1 (10th Cir. Feb. 17, 2022). In doing so, we rejected Carter's argument—renewed from the district court—that his petition was timely under § 2241(d)(1)(B) and (D) because he filed it within one year of a state prosecutor belatedly disclosing police reports that revealed the factual basis for a Fourth Amendment claim asserted in his petition. *See id.* at *1, *3–4.

In June 2022, Carter reasserted that argument in a Rule 60(b)(1) motion asking the district court to set aside its November 2020 dismissal order. The district court denied Carter's motion as untimely after determining that he did not file it within "a year after the entry of the judgment," as required by Rule 60(c)(1). Carter appeals.

Analysis

In his second trip to this court, Carter requests a COA to appeal the order denying his Rule 60(b)(1) motion.[2] We may grant that request only if Carter shows that reasonable jurists could debate both (1) the validity of the underlying constitutional claims asserted in his habeas petition and (2) the district court's procedural ruling denying his Rule 60(b)(1) motion to set aside the judgment dismissing his petition. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Buck v. Davis*, 137 S. Ct. 759, 775 (2017) (applying *Slack* standard to habeas petitioner's Rule 60(b) motion). We need not address the constitutional question if we conclude that reasonable jurists would not debate the district court's procedural ruling. *Slack*, 529 U.S. at 485.

Carter argues that reasonable jurists could disagree with the district court's procedural ruling because the district court based it on a mistaken view that the Rule 60(b)(1) motion was untimely. *See* Fed. R. Civ. P. 60(c)(1) (requiring parties to file Rule 60(b)(1) motions "no more than a year after the entry of the judgment or order or the date of the proceeding"). Specifically, he contends that the one-year deadline for filing such a motion began not when the district court first entered judgment in November 2020 (as the district court concluded), but when it denied his Rule 59(e) reconsideration motion in

[2] Our precedents require a COA to appeal an order denying a Rule 60(b) motion in a habeas case. *Spitnas v. Boone*, 464 F.3d 1213, 1217–18 (10th Cir. 2006). Initially, the district court did not consider whether to grant a COA, so when Carter appealed, we abated the appeal and remanded for consideration of that issue. The district court ultimately declined to issue a COA, and we have since lifted the abatement.

August 2021. As a result, Carter says, his Rule 60(b)(1) motion was timely because he filed it in June 2022—more than two months before the August 2022 deadline.

But even if the district court's Rule 60(b) timeliness analysis is debatable, as Carter suggests, its ultimate decision to deny his Rule 60(b)(1) motion is not. *See Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005) (noting our discretion to deny COA on any ground supported by the record). In the motion, Carter mentioned no "mistake, inadvertence, or excusable neglect" that would support setting aside the district court's decision to dismiss his § 2254 petition on statute-of-limitations grounds. Fed. R. Civ. P. 60(b)(1). Instead, he simply reasserted an argument the district court rejected in its dismissal order—that he timely filed the petition within one year of receiving the police reports that revealed the factual basis for his Fourth Amendment claim.[3] Because "Rule 60(b) relief is not available to allow a party merely to reargue issues previously addressed [by] the court," the district court here could not have granted Carter's motion even if he filed it on time. *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1242 (10th Cir. 2006); *see also Van Skiver v. United States*, 952 F.2d 1241, 1244 (10th Cir. 1991) (explaining that Rule 60(b) relief is inappropriate when motion "reiterate[s] the original issues" or "argu[es] that the district court misapplied the law or misunderstood [a party's] position"). For this reason, no reasonable jurist could debate the district court's decision to deny Carter's Rule 60(b)(1) motion, whether or not Carter timely filed it.

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[3] The motion also repeated a related argument, which the district court likewise rejected in its earlier dismissal order, that the statute of limitations should be equitably tolled based on the state prosecutor's purported failure to timely disclose the police reports.

Conclusion

Because Carter fails to show that reasonable jurists could debate the district court's procedural ruling, we deny his COA request and dismiss this appeal. *See Slack*, 529 U.S. at 484.

Entered for the Court

Nancy L. Moritz
Circuit Judge

MIME-Version:1.0 From:CM-ECFRetMail_OKED@oked.uscourts.gov
To:CM-ECFLive_OKED@oked.uscourts.gov Bcc:
Message-Id:<1348207@oked.uscourts.gov>Subject:Activity in Case 6:19-cv-00243-RAW-KEW
Carter v. Clayton Ruling on Motion for Relief Content-Type: text/html

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U.S. District Court

Eastern District of Oklahoma

Notice of Electronic Filing
The following transaction was entered on 6/13/2022 at 1:45 PM CDT and filed on 6/13/2022

Case Name:	Carter v. Clayton
Case Number:	6:19-cv-00243-RAW-KEW
Filer:	
WARNING: CASE CLOSED on 11/24/2020	
Document Number:	44(No document attached)

Docket Text:
MINUTE ORDER by District Judge Ronald A. White: Denying Petitioner's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(1), which was filed on June 10, 2022 [43]. Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 was denied as time barred on November 24, 2020 [24], and judgment was entered on that same date [25]. On February 17, 2022, the Tenth Circuit Court of Appeals dismissed Petitioners appeal and denied a certificate of appealability in Case No. 21-7049 (10th Cir. Feb. 17, 2022) [42]. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after entry of the judgment or order or the date of proceeding. Fed. R. Civ. P. 60(c)(1). Because Petitioner's Rule 60(b)(1) motion was filed more than one year after judgment was entered, the motion is untimely. (acg, Deputy Clerk)

6:19-cv-00243-RAW-KEW Notice has been electronically mailed to:
Tessa L. Henry tessa.henry@oag.ok.gov, fhc.docket@oag.ok.gov
6:19-cv-00243-RAW-KEW Notice will not be electronically mailed to:
Robert D. Carter
735513
Howard McLeod Correctional Center
1970 E Whippoorwill Ln
Atoka, OK 74525-8415

APPENDIX 2

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

ROBERT D. CARTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. CIV 19-243-RAW-KEW**
	)	
DEON CLAYTON, Warden,	)	
	)	
Respondent.	)	

OPINION AND ORDER

On November 24, 2020, Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 was dismissed as time-barred, and a certificate of appealability was denied (Dkt. 24). Judgment was entered on that same date (Dkt. 25). On December 30, 2020, Petitioner filed a "motion for reconsideration [under Fed. R. Civ. P. 59(e)], motion for evidentiary hearing, motion to expedite" (Dkt. 26). This Court denied the motion and denied a certificate of appealability on August 25, 2021 (Dkt. 30). Petitioner filed an appeal to the Tenth Circuit on September 7, 2021 (Dkt. 31). On February 17, 2022, the Tenth Circuit Court of Appeals denied Petitioner a certificate of appealability and dismissed his appeal in Case No. 21-7049 (Dkt. 42).

On June 10, 2022, Petitioner filed a "motion for relief from a judgment or order pursuant to Rule 60(b)(1)," challenging the dismissal of his habeas petition as time-barred (Dkt. 43). On June 13, 2022, the Court denied the motion as untimely, pursuant to Fed. R. Civ. P. 60(c)(1) (Dkt. 44). On June 27, 2022, Petitioner filed a notice of appeal to the Tenth Circuit Court (Dkt. 45). The next day, the Tenth Circuit entered an Order remanding the case back to this Court for a determination of whether a certificate of appealability should be issued for the denial of Petitioner's motion for relief from judgment pursuant to Rule 60(b)(1). *Carter v. Clayton*, No. 22-7031 (10th Cir. June 28,

2022) (Dkt. 49).

After careful review, the Court finds Petitioner has failed to make a "substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2). He also has not shown "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether [this] court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, a certificate of appealability cannot be issued.

ACCORDINGLY,

1. Petitioner is DENIED a certificate of appealability.

2. The Court Clerk is directed to transmit a copy of this Opinion and Order to the Tenth Circuit Court of Appeals, pursuant to the June 28, 2022, Order in Case No. 22-7031.

IT IS SO ORDERED this 17th day of August, 2022.

Ronald A. White
United States District Judge
Eastern District of Oklahoma

FILED
United States Court of Appeals
Tenth Circuit

February 17, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT D. CARTER,

Petitioner - Appellant,

v.

DEON CLAYTON, Warden,

Respondent - Appellee.

No. 21-7049
(D.C. No. 6:19-CV-00243-RAW-KEW)
(E.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

In 2019, Robert D. Carter, an Oklahoma prisoner proceeding pro se,[1] filed a 28 U.S.C. § 2254 petition challenging his convictions stemming from his possession of child pornography. Mr. Carter sustained the convictions after pleading guilty to the charges in 2016. The district court dismissed Mr. Carter's petition and denied a certificate of appealability ("COA") because it held the petition was untimely where Mr. Carter filed the petition more than one year after his convictions became final and no other provision or doctrine governing timeliness applied. Mr. Carter asks us to issue a COA, arguing his

* 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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Because Mr. Carter proceeds pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

APPENDIX 3

petition relies on information withheld by the prosecutor such that his petition is timely under 28 U.S.C. § 2244(d)(1)(D). Concluding reasonable jurists could not debate the district court's dismissal of Mr. Carter's § 2254 petition, we deny a COA and dismiss this matter.

I. BACKGROUND

Pursuant to a warrant, authorities searched Mr. Carter's home and located a computer containing images of child pornography. Mr. Carter admitted to authorities that he used a peer-to-peer computer program to obtain child pornography and that there were images of child pornography on his computer. On January 22, 2016, in an Oklahoma district court, Mr. Carter pleaded guilty to charges of distribution of child pornography, aggravated possession of child pornography, and violation of Oklahoma statutes via a computer. On January 8, 2018, Mr. Carter filed for post-conviction relief and an out-of-time appeal, which the state district court denied the next day. On January 22, 2018, Mr. Carter filed a second motion for post-conviction relief, seeking again to pursue an out-of-time appeal. The state district court denied the motion on August 13, 2018. Mr. Carter appealed the denial of his second motion for post-conviction relief; but the Oklahoma Court of Criminal Appeals ("OCCA") denied the appeal.

Mr. Carter contends that, in December 2018, he obtained Oklahoma State Bureau of Investigation reports about the execution of the search of his home. In support of this proposition, Mr. Carter directed the federal district court to a photocopy of the envelope in which he contends his attorney mailed the reports to him. *See* ROA at 314 ("The date on which the factual predicate of my claims could have been discovered is December

17th, 2018. Ex. 7 is a copy of the envelope that the Oklahoma State Bureau of Investigation (OSBI) report was sent to me in."). However, the exhibit to which Mr. Carter points bears a postmark of December 11, *2017*, not 2018. *Id.* at 335.

The two reports on which Mr. Carter relies were prepared by Special Agents Rachell Savory and Adam Whitney. The special agents described the entry into Mr. Carter's home, indicating authorities "opened the glass storm door and knocked and announced" their presence before executing the search warrant by breaching the primary door to Mr. Carter's home.[2] ROA at 340; *see also id.* at 341 (stating that Special Agent Savory "knocked loudly on the front door, after opening the glass storm door"). On April 8, 2019, Mr. Carter filed a motion to withdraw his guilty plea in the state district court, arguing (1) his plea was not knowing, intelligent, and voluntary; (2) plea counsel provided ineffective assistance by not investigating his case; (3) authorities did not properly execute the search warrant and illegally entered his home by failing to knock and announce before breaching his door such that evidence seized during the search should have been suppressed; and (4) the state district court, when taking his plea, did not permit him to allocute to his crime. The state district court denied the motion as untimely and without merit. Mr. Carter appealed the district court's denial. On June 5, 2019, the OCCA dismissed Mr. Carter's appeal, concluding Mr. Carter had not demonstrated that the delay in seeking to withdraw his plea was through no fault of his own. This completed state court proceedings in Mr. Carter's case.

[2] In his § 2254 petition, Mr. Carter disputes the accuracy of the reports, contending the officers entered his home without first knocking and announcing their presence.

On July 31, 2019, Mr. Carter submitted his § 2254 petition. In his petition, Mr. Carter broadly contended (1) plea counsel provided ineffective assistance of counsel, (2) authorities improperly executed the search warrant by failing to knock and announce their presence before entering his home and by seizing items not authorized by the search warrant, (3) the district attorney committed prosecutorial misconduct by pursuing the case despite knowing about the knock and announce violation, (4) the state district court did not permit him an opportunity to allocute, and (5) he did not enter a knowing and voluntary guilty plea because he was not advised of the sentencing and sex offender registry consequences of pleading guilty. The State[3] moved to dismiss Mr. Carter's § 2254 petition as untimely. In response, Mr. Carter argued his § 2254 petition was timely where it was filed within one year of (1) the OCCA's dismissal of his appeal from the state district court's denial of his motion to withdraw his plea, making his petition timely under 28 U.S.C. § 2244(d)(1)(A); and (2) when he obtained Special Agents Savory's and Whitney's reports describing the search of his home and learned the factual predicate for his claims, making his petition timely under 28 U.S.C. § 2244(d)(1)(D). Related to the second argument, Mr. Carter contended the State created an impediment to challenging his conviction by not disclosing the reports prior to December 2018.

The district court granted the State's motion to dismiss as untimely and denied a COA. The district court reasoned Mr. Carter's § 2254 petition was not timely under 28 U.S.C. § 2244(d)(1)(A) where his conviction became final ten days after entry of his

[3] As the warden at Mr. Carter's institution of confinement has changed several times during the course of this action, we refer to the Respondent as the State.

guilty plea and more than a year elapsed between that date and his first post-conviction filing in state court. The district court also rejected Mr. Carter's argument for applying § 2244(d)(1)(B) and (D), concluding that where Mr. Carter was at home at the time of the search, he knew prior to receiving Special Agents Savory's and Whitney's reports whether authorities knocked and announced their presence before entering his home. Furthermore, the district court concluded Mr. Carter was not diligent in discovering facts underlying his claims and pursuing those claims. Mr. Carter moved for reconsideration, which the district court denied. Mr. Carter now asks this court to grant him a COA.

II. DISCUSSION

A. Standard for a COA

Without a COA, we do not possess jurisdiction to review the denial of a petition for a writ of habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Where a district court denies relief and denies a COA, we will issue a COA only "if the applicant has made a substantial showing of the denial of a constitutional right." *Charlton v. Franklin*, 503 F.3d 1112, 1114 (10th Cir. 2007) (quoting 28 U.S.C. § 2253(c)(2)). "This standard requires 'a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Further, where a district court denies relief on procedural grounds, the petitioner must also show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 478.

B. Analysis

Section 2244 of Title 28 of the United States Code establishes the applicable limitation period for commencing a § 2254 proceeding, stating, "[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). Relevant to the arguments raised by Mr. Carter, the one-year statute of limitations runs from the latest of events described in § 2244(d)(1)(A), (B), or (D).

A § 2254 petition is timely under § 2244(d)(1)(A) if it is filed within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." "In Oklahoma, if a defendant's conviction is based on a guilty plea," to obtain a direct appeal he "must file an application in the trial court to withdraw his plea within ten days of the judgment and sentence." *Clayton v. Jones*, 700 F.3d 435, 441 (10th Cir. 2012) (citing Okla. R. Crim. App. 4.2(A)). If a defendant who pleaded guilty does not seek to withdraw his guilty plea within ten days of the judgment and sentence, his conviction becomes final upon expiration of the ten-day period to so move. *Clark v. Oklahoma*, 468 F.3d 711, 713 (10th Cir. 2006) (citing Okla. Stat. tit. 22, § 1501; Okla. Crim. App. R. 2.5(A), 4.2(A)).

Mr. Carter appeared before the state district court for judgment and sentence on January 22, 2016.[4] Thus, Mr. Carter had until February 1, 2016, to move to withdraw his

[4] The judgment and sentence was not filed by the court clerk for the state district court until February 18, 2016. Mr. Carter, however, does not argue that February 18, 2016, is the pertinent date from which he had ten days to seek to withdraw his guilty plea.

plea. But Mr. Carter did not move to withdraw his plea until April 8, 2019, well outside of the ten-day period to do so. Accordingly, Mr. Carter's convictions became final on February 1, 2016. It follows that, for his § 2254 petition to be timely under § 2244(d)(1)(A), Mr. Carter needed to submit his petition to the federal district court by February 2, 2017. *See United States v. Hurst*, 322 F.3d 1256, 1261–62 (10th Cir. 2003) (in the context of 28 U.S.C. § 2255 proceeding, adopting "anniversary date" approach to counting statute of limitations where limitations period begins day after finality and runs to anniversary of that date, even in a leap year); *see also Brooks-Gage v. Martin*, No. 21-7008, 2021 WL 3745199, at *2 (10th Cir. Aug. 25, 2021) (unpublished) (applying *Hurst* in § 2254 context). Therefore, where Mr. Carter did not submit his § 2254 petition until July 31, 2019, the district court's conclusion that the petition was not timely under § 2244(d)(1)(A) is not debatable or wrong.[5]

Alternatively, a § 2254 petition is timely under § 2244(d)(1)(D) if it is filed within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Mr. Carter contends the one-year period did not commence running under this subsection until he received

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Nor could such an argument help Mr. Carter where he did not move to withdraw his guilty plea until April 2019.

[5] Under 28 U.S.C. § 2244(d)(2), "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under [§ 2244(d)(1)]." This tolling provision, however, does not help Mr. Carter where he did not pursue any relief in state court until September 2017, after the statute of limitations under § 2244(d)(1)(A) had fully run.

Special Agents Savory's and Whitney's reports regarding execution of the search warrant on his home.[6]

As an initial matter, whether authorities knocked and announced, the only item for which Mr. Carter relies on the reports by Special Agents Savory and Whitney, does not serve as a factual predicate for Mr. Carter's claims that the state district court did not permit him an opportunity to allocute or that he did not enter a knowing and voluntary guilty plea because he was not advised of the sentencing and sex offender registry consequences of pleading guilty. Accordingly, even if Mr. Carter's allegedly delayed receipt of the reports were sufficient to invoke § 2244(d)(1)(D), it does not relate to these two claims or support their timeliness.

Moreover, for two reasons, Mr. Carter cannot rely on § 2244(d)(1)(B) and (D) to demonstrate the timeliness of his remaining three claims stemming from the search of his home—(1) authorities improperly executed the search, supporting exclusion of evidence recovered during the search; (2) the prosecutor engaged in misconduct by pursuing the case despite the alleged knock and announce violation; and (3) counsel rendered ineffective assistance by not investigating the execution of the search and seeking

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[6] In a parallel argument, Mr. Carter contends he may rely on 28 U.S.C. § 2244(d)(1)(B) to establish he timely filed his § 2254 petition. A petition is timely under § 2244(d)(1)(B) if it is filed within one year of "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." For the same reasons discussed in this section explaining why Mr. Carter is unable to demonstrate the reports by Special Agents Savory and Whitney provide a factual predicate supporting the violation of a constitutional right, Mr. Carter is unable to rely upon any delayed disclosure of the reports and § 2244(d)(1)(B) to demonstrate that the district court's dismissal of his § 2254 petition is debatable or wrong.

exclusion of evidence. First, to the extent he argues authorities never knocked and announced their presence, Mr. Carter would have been aware of this factual premise from the time of the search given that he was home when authorities executed the warrant and entered his home. And the reports by Special Agents Savory and Whitney do not suggest authorities failed to knock and announce. Rather, the reports indicate the authorities opened an exterior glass storm door before knocking on the primary door to Mr. Carter's residence. Second, to the extent Mr. Carter advances the narrower argument that authorities needed to knock and announce before opening his outer glass storm door, we have held that authorities opening a storm door prior to knocking and announcing does not amount to a constitutional violation. *See United States v. Walker*, 474 F.3d 1249, 1253 (10th Cir. 2007) ("In our view, opening the storm door to knock on the inner door, even though the inner door was partially open, was not a Fourth Amendment intrusion because such action does not violate an occupant's reasonable expectation of privacy.").[7] Thus, even if Mr. Carter could rely upon his alleged delayed receipt of the reports to demonstrate his claims are timely, he has not shown that it is debatable that this narrower argument can support the denial of a constitutional right. Accordingly, Mr. Carter has not satisfied the standard for obtaining a COA.

[7] In his request for a COA, Mr. Carter does not identify any contrary Oklahoma case law requiring authorities to knock and announce before opening an exterior storm door capable of supporting his ineffective assistance of counsel and prosecutorial misconduct claims.

III. CONCLUSION

We DENY a COA and DISMISS this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

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

ROBERT D. CARTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. CIV 19-243-RAW-KEW**
	)	
DEON CLAYTON, Warden,	)	
	)	
Respondent.	)	

OPINION AND ORDER

Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 was dismissed as barred by the statute of limitations on November 24, 2020, and judgment was entered on that date (Dkts. 24, 25). On December 21, 2020, Petitioner filed a motion for reconsideration of the dismissal pursuant to Fed. R. Civ. P. 59(e), a motion for evidentiary hearing, and a motion to expedite (Dkt. 26).[1, 2]

"[A] motion will be considered under Rule 59(e), when it involves reconsideration of matters properly encompassed in a decision on the merits." *Phelps v. Hamilton*, 122 F.3d 1309, 1323-24 (10th Cir. 1997) (citations and internal quotations omitted). The Court may

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[1] Under the prisoner "mailbox rule" of *Houston v. Lack*, 487 U.S. 266, 270, 276 (1988), a pro se prisoner's notice of appeal is deemed to have been "filed" when the prisoner delivers the pleading to prison officials for mailing. The mailbox rule also has been applied to Rule 59(e) motions. *United States v. Nunez*, Nos. 09-40039-01, 11-4118-RDR, 2012 WL 2685199, at *1 (D. Kan July 6, 2012) (unpublished). Petitioner certified that his motion was deposited with postage prepaid in the prison legal mail system on December 21, 2020 (Dkt. 26 at 19.)

[2] Petitioner is advised that any future filings in this Court must comply with Local Civil Rule 7.1(b), which requires that "[e]ach motion, application, or objection filed shall be a *separate* pleading . . . ." (emphasis added).

APPENDIX 4

reconsider a final decision if the moving party shows "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citation omitted). Rule 59(e), however, does not permit a losing party to rehash arguments previously addressed or to present new legal theories or facts that could have been raised earlier. *Servants of the Paraclete*, 204 F.3d at 1012. "A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider." *Cline v. S. Star Cent. Gas Pipeline, Inc.*, 370 F. Supp. 2d 1130, 1132 (D. Kan. 2005) (citation omitted), *aff'd*, 191 F. App'x 822 (10th Cir. 2006). "[T]he district court is vested with considerable discretion" in determining whether to grant or deny such a motion. *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996).

In its Opinion and Order dismissing this action, the Court found that Petitioner's conviction became final on February 1, 2016, and his statutory deadline for filing a habeas petition was February 2, 2017 (Dkt. 24 at 7-8). This habeas corpus petition, filed on August 1, 2019, was untimely under the AEDPA. Petitioner was not subject to statutory tolling, because he did not file an application for state post-conviction or other collateral review during the statutory year pursuant to 28 U.S.C. § 2244(d)(2) (Dkt. 24 at 8).

The Court further found Petitioner was not entitled to equitable tolling, because he did not demonstrate diligence in pursuing his claims. *Id.* at 12. Petitioner alleges in his motion

for reconsideration that the Court did not "consider in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief" (Dkt. 26 at 1) (quoting *Holland v. Florida*, 560 U.S. 653-54 (2010)). He asserts that "[t]he extraordinary circumstances in this case revolve around prosecutorial misconduct (where the state failed to provide evidence in support of the defendant in violation of *Brady v. Maryland*, 373 U.S. 85 (1963)), and ineffective assistance of counsel" (Dkt. 26 at 1).

Petitioner argues that the Court's reference to *Miller v. Rios*, No. CIV-13-1048-R, 2014 WL 773477, at *3 (W.D. Okla. Feb. 24, 2014), in its previous Opinion and Order (Dkt. 24 at 12-13) was inappropriate, because the *Miller* petitioner waited eight months after the denial of judicial review before seeking post-conviction relief. Petitioner alleges the time between his denial of judicial review on September 22, 2017, and the date he filed for an out-of-time appeal in state district court on January 8, 2018 was less than four months (Dkt. 26 at 1). He claims that during that period, he diligently pursued his claims by contacting his attorney to request copies of reports from his case. *Id.*

Regarding Petitioner's claim about the *Miller* case, the Court finds the length of time between the denial of judicial review and his post-conviction application is not relevant. The Court has not stated that the eight-month length of time in *Miller* is the standard for assessing equitable tolling. The limitation period expired prior to Petitioner's commencement of any post-conviction proceedings. His assertion that he diligently pursued his claims during the

almost four-month period does not excuse his failure to pursue his claims prior to expiration of the one-year limitation period.

Petitioner contends he did not know of a possible claim until he spoke with a jailhouse lawyer in prison. He also maintains that until he received the OSBI report, he did not have specific knowledge of what transpired outside his home before the OSBI agents breached his front door while he was sleeping. He contends he did not have "the sophistication needed to go against the system until [he] heard a jailhouse lawyer speaking to another inmate." The jailhouse lawyer then answered Petitioner's questions concerning the denial of his judicial review, and the jailhouse lawyer advised Petitioner that Petitioner's counsel may have been deficient in his representation (Dkt. 26 at 2-3).

Petitioner claims he was asleep when the OSBI entered his house, and he quickly awakened and met the officers in the hallway of the home (Dkt. 1 at 6-8). He, therefore, was aware that the OSBI had entered his home, and he had the opportunity to ascertain the facts and commence his research about the breach of the door within the limitation period. As stated in the Court's earlier Opinion and Order, Petitioner's lack of understanding of the legal significance of these facts makes no difference. *See Klein v. Franklin*, 437 F. App'x 681, 684 (10th Cir. 2011). His assertion that he could not have learned the vital facts surrounding his claim about the agents' alleged actions is unpersuasive, when he could have requested the OSBI report before receiving advice from the jailhouse lawyer. The fact that he was incarcerated did not excuse him from exercising due diligence in pursuing his claim.

Petitioner also alleges his case involves a fundamental miscarriage of justice (Dkt. 26 at 9-10). "To invoke the miscarriage of justice exception to the AEDPA's statute of limitations, . . . a 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 v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Here, as discussed in the previous order, "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623-24 (1998) (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)).

As previously stated by the Court, Petitioner has not argued that he is factually innocent or that he did not commit these crimes. In addition, any claim of actual innocence would be undermined by Petitioner's guilty pleas. Therefore, he is not entitled to relief under the miscarriage of justice exception.

Motion for Evidentiary Hearing

Petitioner has requested an evidentiary hearing based on his attorney's delay in responding to letters requesting information about the OSBI report and a destroyed DVD containing OSBI reports (Dkt. 26 at 7). Petitioner also wants to explore counsel's actions prior to the guilty plea. *Id.* The Court, however, finds Petitioner is not entitled to an evidentiary hearing on his time-barred claims. *See Cleveland v. Sharp*, 672 F. App'x 824, 826 (10th Cir. 2016) ("Petitioner is not entitled to an evidentiary hearing on meritless claims.").

Certificate of Appealability

A petitioner is entitled to a certificate of appealability (COA) only upon making a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The failure to satisfy either prong requires the denial of a COA. *Id.* at 485. The Court finds nothing in the record that suggests its ruling is debatable or an incorrect application of the law and therefore declines to issue a certificate of appealability.

ACCORDINGLY, Petitioner's motion for reconsideration of the dismissal pursuant to Fed. R. Civ. P. 59(e) and his a motion for evidentiary hearing (Dkt. 26) are DENIED. Petitioner's motion for expedited consideration (Dkt. 26) is DENIED AS MOOT, and Petitioner is DENIED a certificate of appealability.

IT IS SO ORDERED this 25th day of August 2021.

Ronald A. White

HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA

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

ROBERT D. CARTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. CIV 19-243-RAW-KEW**
	)	
DEON CLAYTON, Warden,	)	
	)	
Respondent.	)	

OPINION AND ORDER

This action is before the Court on Respondent's motion to dismiss Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 as barred by the statute of limitations. (Dkt. 10). Petitioner is a pro se prisoner in the custody of the Oklahoma Department of Corrections who is incarcerated at Howard McLeod Correctional Center in Atoka, Oklahoma. He is attacking his conviction in Carter County District Court Case No. CF-2015-268 for Distribution of Child Pornography (Count I), Aggravated Possession of Child Pornography (Count II), and Violation of Statute via Computer (Count III).

I. Petitioner's Motion for Emergency Release and for Expedited Consideration

As an initial matter, Petitioner has filed a Motion for Emergency Release and for Expedited Consideration (Dkt. 22) and an "update" to the motion (Dkt. 23). Because of the ongoing COVID-19 pandemic, Petitioner requests to be released immediately on his own recognizance, to home confinement, to the custody of his parents, or to any solution determined by the Court. He alleges the Oklahoma Department of Corrections has a policy of moving inmates between facilities without testing all the inmates for the coronavirus, thus contributing to the spread of the disease. He asserts his facility is unable to socially distance the inmates because two units are open dormitories with only three-feet-tall walls separating the bed. Also, one unit has bunk beds with two-person cells. While his facility has masks

APPENDIX 5

for inmates and staff, this personal protective equipment is not used regularly. Petitioner contends he is in the moderate risk category for COVID-19, because he is 50 years old, obese, and has hypertension.

Petitioner filed this habeas corpus petition under 28 U.S.C. § 2254, which is the process for attacking the validity of a conviction or sentence. *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000). An attack on the execution of a sentence, however, should be presented in a habeas petition under 28 U.S.C. § 2241. *See id.* Further, a § 2241 petitioner "is generally required to exhaust state remedies." *Id.* at 866. For these reasons, Petitioner's request for early release cannot be brought in this § 2254 action, and his Motion for Emergency Release and for Expedited Consideration (Dkt. 22) must be DENIED WITHOUT PREJUDICE.

II. Petitioner's Grounds for Relief under Section 2254

Petitioner raises the following grounds for habeas relief:

Ground I: Petitioner did not have effective assistance of counsel and due process. Counsel failed to investigate Petitioner's defense and failed to discover that the search warrant was improperly executed, the search warrant return was incorrect, and the officers/agents failed to identify themselves prior to forcing entry into Petitioner's residence. Counsel also failed to file a motion to suppress and incorrectly advised Petitioner of his right to file a direct appeal or of all the consequences of the plea agreement. (Dkt. 1 at 5).

Ground II: OSBI agents acted improperly and illegally entered the home after knocking by breaking down a door to effect an illegal search and arrest. Petitioner did not refuse entry to the agents, and the agents' reports do not show exigent factors existed to warrant breaching the front door when it appeared that no one was at home. (Dkt. 1 at 6).

Ground III: OSBI agents improperly executed a search warrant by failing to properly

identify themselves before entering the residence and as they invaded the residence after breaking down the door. Petitioner was awakened by banging on the front door, and while walking to the door, an unknown number of armed persons burst in and screamed for him to get down on the floor. At no time did the armed persons state they were law enforcement officers or why they had entered the house. (Dkt. 1 at 7-8).

Ground IV: The OSBI agent improperly made a return of the search warrant, which was falsely sworn. The agent failed to list two guns that were removed from Petitioner's house. It did list a television that was removed, however, the court did not authorize the removal of the above-mentioned items. (Dkt. 1 at 9).

Ground V: Because the initial search was unlawful, the products of the search were fruit of the poisonous tree and thus inadmissible in court. (Dkt. 1 at 10).

Ground VI: The Carter County District Attorney's office committed prosecutorial misconduct when it continued to prosecute this case after ignoring the errors and illegal actions of the OAG/OSBI agents. The District Attorney and his assistants chose to ignore the inaccuracies of the agents' reports and obvious violations of the law committed by the OAG/OSBI agents. Instead, the District Attorney chose to cover up the illegal activity and continue the prosecution. (Dkt. 1 at 11).

Ground VII: Petitioner had no opportunity or direction by the court to allocute to the crimes. (Dkt. 1 at 12).

Ground VIII: The prosecutor, the court, and Petitioner's counsel failed to advise Petitioner of all the (unspecified) consequences of his plea agreement, resulting in an uninformed decision to enter the plea. (Dkt. 1 at 13).

Ground IX: "Inefficient" counsel resulted in the ill-advised plea. Petitioner's attorney colluded with the prosecutor "and sold [him] down the river to obtain a better deal

for a client with more resources." (Dkt. 1 at 14).

III. Statute of Limitations

Respondent alleges the petition was filed beyond the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996, codified at 28 U.S.C. § 2244(d) (AEDPA). The following dates are pertinent to the motion to dismiss:

01/22/2016	Petitioner, represented by counsel, entered pleas of guilty to three Counts in Case No. CF-2015-268 and was sentenced. He was notified of his appellate rights regarding his pleas. Petitioner's Judgment and Sentence also was entered on this date. (Dkts. 11-2, 11-3, 11-4).
09/13/2017	Petitioner filed in the Carter County District Court a petition for judicial review/modification of sentence. (Dkt. 11-5).
09/22/2017	Petitioner's petition for judicial review/modification of sentence was denied. (Dkt. 11-6).
01/04/2018-06/10/2019	Petitioner filed numerous motions in the Carter County District Court, mainly requests for filings, records, or transcripts. (Dkt. 11-30). He also filed four state habeas corpus actions in the Oklahoma Court of Criminal Appeals (OCCA) and five mandamus actions in the OCCA.[1]
01/08/2018	Petitioner filed in the Carter County District Court an application for post-conviction relief, requesting an appeal out of time. (Dkt. 11-7).
01/09/2018	The state district court denied Petitioner's application for post-conviction relief, because all claims for relief could have been addressed in an appeal. (Dkt. 11-8).
01/22/2018	Petitioner filed in the Carter County District Court a notice of intent to appeal the denial of his post-conviction application. (Dkt. 11-9).
01/22/2018	Petitioner filed in the Carter County District Court an appeal out

[1] *See* Case Nos. HC-2018-235 (Mar. 28, 2018) (Dkt. 11-21), HC-2018-354 (Apr. 30, 2018) (Dkt. 11-22), MA-2018-466 (May 21, 2018) (Dkt. 11-23), HC-2018-494 (June 6, 2018) (Dkt. 11-24), MA-2018-706 (July 25, 2018) (Dkt. 11-25), MA-2018-825 (Aug. 29, 2018) (Dkt. 11-26), MA-2018-976 (Oct. 2, 2018) (Dkt. 11-27), MA-2018-1085 (Dec. 14, 2018) (Dkt. 11-28), and HC-2019-193 (Mar, 26, 2019) (Dkt. 11-29).

of time by application for post-conviction relief. (Dkt. 11-10).

08/13/2018 The state district court denied Petitioner's second request for appeal out of time through post-conviction relief and did not recommend that Petitioner be allowed to file an appeal out of time. (Dkt. 11-11).

08/20/2018 Petitioner filed in the Carter County District Court a notice of appeal of the August 13, 2018 denial of post-conviction relief. (Dkt. 11-12).

11/30/2018 The Certificate of Appeal in Case No. PC-2018-1182 was filed in the Carter County District Court. (Dkt. 11-13).

02/27/2019 The OCCA denied Petitioner's application for post-conviction relief for his failure to show he was denied an appeal through no fault of his own in Case No. PC-2018-1182. (Dkt. 11-14 at 1-4).

03/04/2019 The OCCA issued its Mandate in the denial of Case No. PC-2018-1182. (Dkt. 11-14 at 5).

04/08/2019 Petitioner filed an application to withdraw his guilty plea/motión for extension of time to file the application. (Dkt. 11-15).

04/29/2019 The state district court denied Petitioner's application to withdraw guilty plea/motion for extension of time as untimely. (Dkt. 11-16).

05/06/2019 Petitioner filed in the Carter County District Court a notice of intent to appeal all convictions, designation of record; order determining indigency, appellate counsel, preparation of appeal record, and granting trial counsel's motion to withdraw; court reporter's acknowledgment; and notification of appropriate appellate counsel, if appointed. (Dkt. 11-17).

05/10/2019 Petitioner initiated an appeal to the OCCA in Case No. C-2019-323. (Dkt. 11-18).

05/15/2019 The OCCA entered an order directing Petitioner to show cause with respect to his notice of intent to appeal and designation of record in Case No. C 2019-0323. (Dkt. 11-19).

06/05/2019 The OCCA dismissed Petitioner's appeal of the denial of his attempt to withdraw his guilty plea in Case No. C 2019-0323. (Dkt. 11-20).

07/31/2019 Petitioner filed this habeas corpus petition. (Dkt. 1 at 18).

Section 2244(d) provides that:

> (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;
>
> (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).

The record shows that on January 22, 2016, Petitioner, represented by counsel, entered guilty pleas to three counts in Case No. CF-2015-268 (Dkt. 11-2). On that same date, the Carter County District Court entered a formal Judgment and Sentence reflecting Petitioner's pleas and sentences. (Dkt. 11-4).

"In Oklahoma, if a defendant's conviction is based on a guilty plea, he may pursue an appeal to the OCCA only by a petition for a writ of certiorari." *Clayton v. Jones*, 700 F.3d 435, 441 (10th Cir. 2012) (citing *Hickman v. Spears*, 160 F.3d 1269, 1271 (10th Cir. 1998)). "First, however, the defendant must file an application in the trial court to withdraw his plea within ten days of the judgment and sentence, with a request for an evidentiary hearing." *Clayton*, 700 F.3d at 441 (citing Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App.)). "The court [then] must hold an evidentiary

hearing and rule on the application to withdraw the plea within thirty days from the date the application was filed." *Id.* (citing Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App.)). "'The application to withdraw guilty plea and the evidentiary hearing are both necessary and critical steps in securing this appeal . . . .'" *Id.* (quoting *Randall v. State*, 861 P.2d 314, 316 (Okla. Crim. App. 1993)). "If the trial court denies the motion to withdraw, the defendant then may appeal by way of a petition for writ of certiorari." *Id.* (citing Okla. Stat. tit. 22, § 1051(a); Rule 4.2(D), *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App.)).

If a defendant fails to "move to withdraw his guilty pleas, file a direct appeal, or seek a writ of certiorari from the United States Supreme Court," the judgments on the convictions become final ten days after the pleas. *See Clark v. Oklahoma*, 468 F.3d 711, 713 (10th Cir. 2006). *See also Jones v. Patton*, 619 F. App'x 676, 678 (10th Cir. July 15, 2015) ("If a defendant does not timely move to withdraw a guilty plea or file a direct appeal, Oklahoma criminal convictions become final ten days after sentencing." (citing Okla. Stat. tit. 22 § 1051; Rule 4.2, *Rules of the Oklahoma Court of Criminal Appeals*; Okla. Stat. tit. 22, Ch.18, App.; *Clayton*, 700 F.3d at 441; *Clark*, 468 F.3d at 713)).

Because Petitioner did not seek to timely withdraw his guilty plea or seek a direct appeal to the OCCA, his conviction became final on February 1, 2016, ten days after entry of the Judgment and Sentence. *See* Rule 4.2, *Rules of the Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch.18, App.; Okla. Stat. tit. 22, § 1051.[2] Therefore, his statutory year began the following day on February 2, 2016. *See United States v. Hurst*, 322 F.3d 1256, 1261 (10th

[2] The year 2016 was a leap year, however, "when a statute of limitations is measured in years, the last day for instituting the action is the anniversary date of the relevant act. The anniversary date is the 'last day to file even when the intervening period includes the extra leap year day.'" *United States v. Hurst*, 322 F.3d 1256, 1260 (10th Cir. 2003) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000)).

Cir. 2003). Petitioner thus had until February 2, 2017, to file his petition for a writ of habeas corpus. His petition, filed on July 31, 2019, was untimely.

A. Statutory Tolling

Pursuant to 28 U.S.C. § 2244(d)(2), the statute of limitations is tolled while a properly-filed application for post-conviction relief or other collateral review of the judgment at issue is pending. State procedural law determines whether an application for state post-conviction relief is "properly filed." *Garcia v. Shanks*, 351 F.3d 468, 471 (10th Cir. 2003). Here, Petitioner did not initiate any post-conviction proceedings until after expiration of the limitation period, so there is no statutory tolling. *See May v. Workman*, 339 F.3d 1236, 1237 (10th Cir. 2003) (citing 28 U.S.C. § 2244(d)(2)).

B. Tolling Under 28 U.S.C. § 2244(d)(1)(D)

Petitioner appears to reference 28 U.S.C. § 2244(d)(1)(D) in claiming his petition is timely. (Dkt. 1 at 16-17). Petitioner apparently is attempting to argue that the "factual predicate" for his claims was not discovered until he received an OSBI report from his attorney in mid-December 2017 and discovered his attorney's alleged ineffectiveness. (Dkt. 1 at 16). Petitioner apparently is arguing this "discovery" of new evidence led him to file for post-conviction relief out of time and caused the one-year statute of limitations to run from the date of "discovery." Respondent alleges this argument is completely unpersuasive, because "Petitioner has not shown how the factual predicate of the claims presented *could not have* been discovered *through the exercise of due diligence prior* to December 2017," pursuant to 28 U.S.C. § 2244(d)(1)(D). (Dkt. 11 at 16) (emphasis in original).

The relevant inquiry for triggering the one-year limitation period under Section 2244(d)(1)(D) is whether the petitioner had knowledge of the predicate facts underlying his claim, not whether he understood the legal significance of such facts. *See Preston v. Gibson*,

234 F.3d 1118, 1120 (10th Cir. 2000) (finding the petitioner's one-year limitation period did not start under Section 2244(d)(1)(D) when he first understood the legal significance of the factual basis, but instead the one-year period began when petitioner "was clearly aware" of the factual basis for his claim "years before" he filed his habeas petition). *See also Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2001) ("[T]he trigger in § 2244(d)(1)(D) is (actual or imputed) discovery of the claim's 'factual predicate,' not recognition of the facts' legal significance.").

> The determination of the date on which the factual predicate for a habeas claim is first discoverable is a "fact-specific" inquiry which requires a district court to analyze the factual bases of each claim and to determine when the facts underlying the claim were known, or could with due diligence have been discovered. . . . Accordingly, if new information is discovered that merely supports of strengthens a claim that could have been properly stated without the discovery, that information is not a 'factual predicate' for purposes of triggering the statute of limitations under 2244(d)(1)(D).

Rivas v. Fischer, 687 F.3d 514, 534-35 (2d Cir. 2012) (citations omitted).

Regarding Petitioner's claims about the OSBI's breach of his front door, the OSBI's "knock and announce" technique, and the ineffective assistance claims concerning the announcing and breaching of the door, Petitioner was present when the OSBI entered and searched his house. He thus was aware of the vital facts underlying these claims. (Dkt. 1 at 6-8). Petitioner's lack of understanding of the legal significance of these facts makes no difference. *See Klein v. Franklin*, 437 F. App'x 681, 684 (10th Cir. 2011).

With respect to Petitioner's claims that he did not allocute to the crime, that he was not advised of each particular consequence of his pleas, and his related ineffectiveness of counsel claims that counsel improperly advised him to plea and misinformed him of his appellate rights and consequences of the pleas, the factual predicate of these claims was known to him when he entered his pleas on January 22, 2016. *See id.* (holding that petitioner's presence at his own hearing put him "on notice that neither the court nor his

attorney advised him of his right to appeal"). *See also Rivas*, 687 F.3d at 535. Concerning Petitioner's claims regarding prosecutorial misconduct, the search warrant return, the "fruit of the poisonous tree," and ineffective assistance of counsel, the Court finds he could have exercised due diligence and sought the records and materials from counsel much earlier than December 2017, which was almost two years after his pleas.

Petitioner admits he did not write to his attorney until after the state district court denied his petition for judicial review in September 2017 and after he talked to a "jailhouse lawyer." (Dkt. 2 at 6-7). Therefore, despite having all the information and facts from his pleas, he apparently never sought any information from his attorney until his request to modify his sentence was denied. This did not constitute due diligence. *Cf. Brown v. Parker*, 348 F. App'x 405, 409 (10th Cir. Oct. 9, 2009) (rejecting petitioner's argument he did not learn the factual predicate of his claims until he received the district attorney's case file, because petitioner waited almost a year to request the file after he learned he had been misinformed about his sentence).

I did not wait a year from the time I learned of error until I requested F. le

Here, the Court finds that Petitioner's argument pursuant to 28 U.S.C. § 2244(d)(1)(D) fails, because he was aware of the factual predicate for his claims and did not exercise due diligence in seeking the OSBI report from his defense attorney. The Court further finds he has not supported his claim or shown that a date, other than the date of final judgment, should serve to trigger the statute of limitations. *See Chavez v. Workman*, No. 05-CV-554-HDC-PJC, 2006 WL 2251718, at *3 (N.D. Okla. Aug. 4, 2006) (finding that petitioner should bear some burden in proving applicable trigger date).

I did give date Post mark

C. Tolling Under 28 U.S.C. § 2244(d)(2)

The Court further finds Petitioner's limitation period was not tolled under 28 U.S.C. § 2244(d)(2), which provides for tolling of the statute of limitations while a properly-filed

application for post-conviction relief or other collateral review of the judgment at issue is pending. The Supreme Court of the United States defines "collateral review" as "a form of review that is not part of the direct appeal process." *Wall v. Kholi*, 562 U.S. 545, 552 (2011). Further, "[a] state post-conviction application is 'properly filed' if it satisfies the State's requirements for filing such a pleading." *Robinson v. Golder*, 443 F.3d 718, 720 (10th Cir. 2006).

In this case, Petitioner did not file any requests for relief in the state district court until his statutory year under AEDPA had expired. Therefore, he is not entitled to tolling under § 2244(d)(2). *See May v. Workman*, 339 F.3d 1236, 1237 (10th Cir. 2003) (noting that AEDPA's one-year period "is tolled or suspended during the pendency of a state application for post-conviction relief properly filed *during* the limitations period" (emphasis added) (citing 28 U.S.C. § 2244(d)(2)).

D. Equitable Tolling

The Court further finds that Petitioner has not shown that he is entitled to equitable tolling. Equitable tolling of § 2244(d)(1)'s one-year statute of limitations is available "only in rare and exceptional circumstances." *York v. Galetka*, 314 F.3d 522, 527 (10th Cir. 2003). Further, "it 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) (quoting *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999)), *cert. denied*, 531 U.S. 1194 (2001). Generally, equitable tolling requires a litigant to establish two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (citation and internal quotation marks omitted).

> Equitable tolling would be appropriate, for example, when a prisoner is actually innocent, when an adversary's conduct--or other uncontrollable

> circumstances--prevents a prisoner from timely filing, or when a prisoner actively pursues judicial remedies but files a defective pleading during the statutory period. Simple excusable neglect is not sufficient. Moreover, a petitioner must diligently pursue his federal habeas claims . . . .

Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000) (internal citations omitted).

After careful review, the Court finds Petitioner has not demonstrated any unique, exceptional, or rare circumstances or due diligence deserving of equitable tolling. Instead, he offers, along with an argument under § 2244(d)(1)(D), a conclusory declaration that he is entitled to equitable tolling because he has "shown a reasonable diligence in seeking relief after discovering a basis for [his] application" and a claim that he received ineffective assistance of counsel. (Dkt. 1 at 17; Dkt. 2 at 1). Further he has failed to set forth specific facts to support his claim of due diligence. Such conclusory statements are insufficient to suffice for the requirement of specific facts. *See Yang v. Archuleta*, 525 F.3d 925, 930 10th Cir. 2008) ("His conclusory statement that he diligently pursued his rights and remedies will not suffice.") (internal quotation marks omitted).

Further, based on the procedural history set forth above, it is apparent that Petitioner cannot demonstrate diligence in pursuing his claims. The Tenth Circuit "has generally declined to apply equitable tolling when it is facially clear from the timing of the state and federal petitions that the petitioner did not diligently pursue his federal claims." *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003). "[S]ince 1996 Oklahoma inmates have been aware that they have one year in which to file their claims in state court in order to benefit from tolling pursuant to § 2244(d)(2)." *Id.* at 1142. Although Petitioner filed numerous state court pleadings challenging his pleas, convictions, and sentences, he failed to do so diligently, and he did so only after being denied sentence modification by the state district court. *Cf. Miller v. Rios*, No. CIV-13-1048-R, 2014 WL 773477, at *3 (W.D. Okla. Feb. 24, 2014) (finding the petitioner did not diligently pursue his state collateral and federal habeas

I did not wait 9 months after my judicial mediation was denied to start to investigate and file pro

claims, and thus was not entitled to equitable tolling, because he waited eight months after his motion for sentence modification was denied to seek further state post-conviction relief and then another month before he brought his federal habeas actions). Petitioner clearly has not shown the requisite due diligence for equitable tolling.

Moreover, Petitioner has not shown the existence of extraordinary circumstances through improper conduct by an adversary, an active and timely pursuit of remedies defeated by the filing of defective pleadings, uncontrollable circumstances that prevented him from seeking relief, or any other exceptional situation. *See Gibson*, 232 F.3d at 808. Petitioner's claim and his self-serving affidavit that he was not allowed to appeal because of his pleas (Dkt. 1 at 5; Dkt. 2 at 6; Dkt. 2-1) are inconsistent with the record. The state court documents clearly show that Petitioner was notified of his appellate rights with respect to his pleas, and he was aware he had ten days to move to withdraw his pleas (Dkt. 11-2 at 11; Dkt. 11-3). In fact, Petitioner acknowledges that he was advised of his appellate rights as follows: "During the proceedings the District Judge did advise that I had 10 days to withdraw the plea but did not say that it would be the start of my direct appeal (or that I could have an appeal) under Title 22 Ch. 18 App. Rule 4." (Dkt. 2 at 1) (emphasis omitted).

The record shows that Petitioner's Plea of Guilty Summary of Facts advised that:

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

(Dkt. 11-2 at 11).

Both Petitioner and his attorney signed the above statement and acknowledged that Petitioner "[understood] each of these rights to appeal. *Id.* The Minutes of Proceeding in Court further noted that Petitioner was advised of his right to appeal. (Dkt. 11-3). Based on this record, the Court finds Petitioner knew he had a limited time to initiate an appeal of his guilty pleas, however, he chose not to do so until he asked the state district court to modify his sentence more than a year later. Even if Petitioner's attorney misinformed him of his appellate rights, he clearly was notified in writing and by the district court of his appellate rights and how to initiate an appeal.

"[A]ttorney negligence is not extraordinary and clients, even if incarcerated, must 'vigilantly oversee,' and ultimately bear responsibility for, their attorneys' actions or failures." *Fleming v. Evans*, 481 F.3d 1249, 1255-1256 (10th Cir. 2007) (quoting *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003)). Here, Petitioner was made aware of the proper way to challenge his pleas and sentences, yet he failed to do so in a timely and proper manner. Blaming his failures on his attorney is not an extraordinary circumstance in light of his knowledge. *See Garrett v. Howard*, 205 F. App'x 682, 684 (Nov. 9, 2006) (finding petitioner's general assertions that his attorney failed to inform him of his right to appeal from his state-court guilty plea was insufficient to demonstrate due diligence required for equitable tolling under § 2244(d)). *See also Benshoof v. Tavanello*, No. CIV-10-381-M, 2010 WL 3489404 (W.D. Okla. Aug. 20, 2010) (finding petitioner's unsupported, vague, and conclusory allegation that counsel advised him not to appeal after his nolo contendere blind plea was insufficient to establish equitable tolling).

Finally, courts may excuse noncompliance with the statute of limitations if the prisoner makes "a credible showing of actual innocence." *McQuiggin v. Perkins*, 569 U.S.

383, 392 (2013). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623-24 (1998) (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). Actual innocence is not a constitutional claim; it instead serves as a gateway through which a habeas petitioner may pass to gain federal court review of constitutional claims that are otherwise barred by the statute of limitations. *Schlup v. Delo*, 513 U.S. 298, 315 (1995); *McQuiggin*, 569 U.S. at 392.

Here, Petitioner has not argued that he is factually innocent or did not commit these crimes. In addition, any claim of actual innocence would be undermined by Petitioner's guilty pleas. *See Johnson v. Medina*, 547 F. App'x 880, 885 (10th Cir. 2013) ("While [the petitioner] claims that his guilty plea was involuntary and coerced, the state courts rejected that argument, and his plea of guilty simply undermines his claim that another individual committed the crime to which he pled guilty."). Moreover, Petitioner admitted in his September 2017 Petition for Judicial Review that he was "genuinely remorseful and recognize[d] the seriousness of his crimes," and he acknowledged his "detrimental behavior." (Dkt. 11-5 at 2). For these reasons, it is clear that equitable tolling for actual innocence cannot be applied, and this habeas petition is barred by the statute of limitations.

IV. Certificate of Appealability

The Court further finds Petitioner has not shown "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether [this] Court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). *See also* 28 U.S.C. § 2253(c). Therefore, Petitioner is DENIED a certificate of appealability. *See* Rule 11(a) of the Rules Governing Section 2254 Cases.

ACCORDINGLY,

1. Petitioner's Motion for Emergency Release and for Expedited Consideration (Dkt. 22) is DENIED WITHOUT PREJUDICE.
2. Respondent's motion to dismiss time-barred § 2254 petition (Dkt. 10) is GRANTED.
3. Petitioner is DENIED a certificate of appealability.

IT IS SO ORDERED this 24th day of November 2020.

Ronald A. White
United States District Judge
Eastern District of Oklahoma

No.:

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT DEE CARTER - PETITIONER

v.

DEON CLAYTON, (Warden) - RESPONDENT

PROOF OF SERVICE

I, Robert Dee Carter, do swear or declare that on this date, January 24th, 2023, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents into the institutional legal mailing system at Howard McLeod Correctional Center addressed to each of them and with first-class postage prepaid.

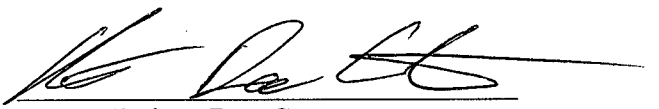
The names and addresses of those served are as follows:

Tessa L. Henry
Assistant Attorney General
313 N.E. 21st Street
Oklahoma City, Ok 73105

Clerk
Supreme Court of the United States
Washington, D.C. 20543

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 24th, January 2023



Robert Dee Carter