APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-11893-J

CARLOTTA SUSANN KUTSCHENREUTER,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before: JORDAN and NEWSOM, Circuit Judges.

BY THE COURT:

Carlotta Kutschenreuter has filed a motion for reconsideration, of this Court's order dated November 17 , 2022, denying her motions for a certificate of appealability and *in forma pauperis* status in her appeal from the district court's orders dismissing her *pro se* 28 U.S.C. § 2254 petition and denying reconsideration. Because she has not alleged any points of law or fact that this Court overlooked or misapprehended in denying her prior motions, her motion for reconsideration is DENIED.

3/24/2023 ORIGINAL COURT DOCUMENT

Appendix 2

CARLOTTA SUSANN KUTSCHENREUTER, Petitioner-Appellant, versus WARDEN, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2022 U.S. App. LEXIS 31826
No. 22-11893-J
November 17, 2022, Filed

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1}Appeal from the United States District Court for the Northern District of Alabama.Kutschenreuter v. McClain, 2022 U.S. Dist. LEXIS 43432, 2022 WL 1284307 (N.D. Ala., Jan. 12, 2022)

Counsel CARLOTTA SUSANN KUTSCHENREUTER, Petitioner - Appellant, Pro se, WETUMPKA, AL.

Judges: Kevin C. Newsom, UNITED STATES CIRCUIT JUDGE.

Opinion

Opinion by: Kevin C. Newsom

Opinion

ORDER:

Carlotta Kutschenreuter is an Alabama prisoner serving a 35-year sentence for murder. On January 15, 2021, she filed a *pro se* 28 U.S.C. § 2254 petition, which the district court dismissed as time barred. She now moves for a certificate of appealability ("COA") and *in forma pauperis* ("IFP") status.

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court denied a habeas petition on procedural grounds, the petitioner must show that jurists of reason would find debatable (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

For purposes of the statute of limitations, the direct review process concludes when the time for seeking review in the state court of last resort expires. *Gonzalez v. Thaler*, 565 U.S. 134, 149-50, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012). A petitioner is not entitled to the 90-day period for petitioning for *certiorari* with the U.S. Supreme Court when she**{2022 U.S. App. LEXIS 2}** did not seek review from the highest state court. *Pugh v. Smith*, 465 F.3d 1295, 1299-1300 (11th Cir. 2006). The limitation period is statutorily tolled during the pendency of "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim." 28 U.S.C. § 2244(d)(2). A state post-conviction motion that is filed following the expiration of the limitation period cannot toll that period, however, because there was no period remaining to be tolled. *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001).

The limitation period also may be equitably tolled where the petitioner shows that (1) she has been

pursuing her rights diligently, and (2) some extraordinary circumstance stood in her way to prevent timely filing. *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). Under the miscarriage-of-justice exception, a petitioner may overcome the expiration of the limitation period if she shows her actual innocence. *McQuiggin v. Perkins*, 569 U.S. 383, 386, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013).

Here, reasonable jurists would not debate the district court's conclusion that Kutschenreuter's § 2254 petition was untimely under § 2244(d)(1). Her conviction and sentence became final on July 17, 2014, when her time for petitioning the Alabama Supreme Court for *certiorari* expired. *See Gonzalez*, 565 U.S. at 149-50. She was not entitled to statutory tolling because she did not file her Ala. R. Crim. P. 32 petition within the § 2254 limitation period. *See Tinker*, 255 F.3d at 1333. Likewise, her**{2022 U.S. App. LEXIS 3}** motion for an extension of time to file her Rule 32 petition did not toll the limitation period. *See Howell v. Crosby*, 415 F.3d 1250, 1251 (11th Cir. 2005) (holding that, in the context of a Florida state habeas petition, a request for an extension of time to file motions for state post-conviction relief did not toll the AEDPA's limitation period).

Reasonable jurists also would not debate that Kutschenreuter was not entitled to equitable tolling or to the miscarriage-of-justice exception to the time-bar. Her confusion about the effect of the state trial court's grant of her motion for extension of time, the inadequate law library resources, the delay in her receiving the trial transcript, and her attorney's failure to petition for *certiorari* with the Alabama Supreme Court were not extraordinary circumstances. *See Rivers v. United States*, 416 F.3d 1319, 1323 (11th Cir. 2005) (holding that a lack of legal education and related confusion does not warrant equitable tolling); *Cadet v. Fla. Dep't of Corr.*, 742 F.3d 473, 481, 484-85 (11th Cir. 2014) (holding that gross attorney negligence was not an extraordinary circumstance). She did not qualify for the miscarriage-of-justice exception, as her evidence was not new. *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (holding that actual-innocence claims must be supported with new evidence).

Further, reasonable jurists would not debate the denial of Kutschenreuter's Fed. R. Civ. P. 59(e) motion as she**{2022 U.S. App. LEXIS 4}** did not point to any new evidence to support her Rule 59(e) motion. *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) ("The only grounds for granting a Rule 59(e) motion are newly discovered evidence or manifest errors of law or fact." (alterations adopted and quotation marks omitted)).

Accordingly, Kutschenreuter's motion for a COA is DENIED and her motion for IFP status is DENIED AS MOOT.

/s/ Kevin C. Newsom

UNITED STATES CIRCUIT JUDGE

Appendix 3

CARLOTTA SUSANN KUTSCHENREUTER, Petitioner, v. WARDEN LAGRETA MCCLAIN, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION
2022 U.S. Dist. LEXIS 43418
Case No. 4:21-cv-00115-AMM-JHE
March 11, 2022, Decided
March 11, 2022, Filed

Editorial Information: Prior History

Kutschenreuter v. McClain, 2022 U.S. Dist. LEXIS 43432 (N.D. Ala., Jan. 12, 2022)

Counsel **{2022 U.S. Dist. LEXIS 1}**Carlotta Susann Kutschenreuter, Petitioner, Pro se, Wetumpka, AL.

Judges: ANNA M. MANASCO, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: ANNA M. MANASCO

Opinion

MEMORANDUM OPINION

Petitioner Carlotta Susann Kutschenreuter filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. 1. On January 12, 2022, the magistrate judge entered a report recommending the court deny that petition as untimely. Doc. 18. Specifically, the magistrate judge determined that under 28 U.S.C. § 2244(d)(1)(A), Ms. Kutschenreuter's federal habeas limitation period began to run on July 18, 2014, and expired one year later on July 18, 2015. Doc. 18 at 4-6. Because Ms. Kutschenreuter did not file the present petition until January 15, 2021, Doc. 1-10 at 35, the magistrate judge found that Ms. Kutschenreuter's petition is untimely. Doc. 18 at 4-6. The magistrate judge further found that Ms. Kutschenreuter did not meet the standard for either statutory or equitable tolling.1 *Id.* at 6-8. On February 18, 2022, Ms. Kutschenreuter filed objections to the magistrate judge's report and recommendation. Doc. 24.

Ms. Kutschenreuter objects to the magistrate judge's determination of the date her limitation period began to run under 28 U.S.C. § 2244. *Id.* at 19-23. She further objects to the**{2022 U.S. Dist. LEXIS 2}** magistrate judge's conclusion that she is not entitled to statutory or equitable tolling of the limitation period and provides various reasons why she is entitled to tolling under one, if not both, tolling provisions. *Id.* at 23-53. Moreover, Ms. Kutschenreuter contends she meets the actual innocence exception to overcome the statute of limitations. *Id.* at 53-55.

A. Ms. Kutschenreuter's federal habeas limitation period began to run on July 18, 2014, and expired one year later on July 18, 2015.

Ms. Kutcschenreuter argues that under Alabama Rule of Criminal Procedure 32.2(c), her one-year limitation to file a Rule 32 petition began to run on July 23, 2014-when the Alabama Court of Criminal Appeals issued its Certificate of Judgment-and expired one year later on July 23, 2015. Doc. 24 at

24-27. She reasons that her federal habeas limitation period mirrors the Alabama Rule of Criminal Procedure 32.2(c) limitation period and therefore she had until July 23, 2015 to file her federal petition. Doc. 24 at 27. The court understands Ms. Kutschenreuter's argument to be that if her federal limitation period also expired on July 23, 2015, and the Etowah County Circuit Court extended her time to file her Rule 32 petition to August 23, 2015, her federal limitation period would have been tolled during**{2022 U.S. Dist. LEXIS 3}** the pendency of the Rule 32 proceedings. *Id.* at 31-32.

This court is bound by 28 U.S.C. § 2244(d)(1) and federal case law precedent. Under § 2244(d)(1)(A), Ms. Kutschenreuter's limitation period began to run on the date her conviction became final by the conclusion of direct review or the expiration of her time for seeking direct review. Because Ms. Kutschenreuter's time for seeking direct review by filing a petition for a writ of certiorari in the Alabama Supreme Court expired on July 17, 2014, *see* Ala. R. App. P. 39(c), 40(c), her federal habeas time began to run on July 18, 2014, not on July 23, 2014 when the Alabama Court of Criminal Appeals issued the Certificate of Judgment. *See Gonzalez v. Thaler*, 565 U.S. 134, 137, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012) ("We hold that, for a state prisoner who does not seek review in a State's highest court, the judgment becomes final on the date that the time for seeking such review expires.") (internal quotation marks omitted); *Green v. Sec'y, Dep't of Corrs.*, 877 F.3d 1244, 1247 n.3 (11th Cir. 2017) ("The limitation period began to run the day after the conviction and sentence became final . . . .") (citing Fed. R. Civ. P. 6(a)(1)). That limitation period expired one year later on July 18, 2015.

To the extent Ms. Kutschenreuter attempts to argue that the State "impeded her Rule 32 appeal rights" and therefore her limitation period did not begin to run until such impediment was removed**{2022 U.S. Dist. LEXIS 4}** under 28 U.S.C. § 2244(d)(1)(B), her argument is without merit. Doc. 24 at 21. There is no evidence in the record to indicate the State prevented Ms. Kutschenreuter from filing a Rule 32 petition in the Etowah County Circuit Court. Rather, Ms. Kutschenreuter contends the State did not respond to her Rule 32 petition in a timely manner. *Id.* at 42-43. Similarly, Ms. Kutschenreuter has not alleged facts suggesting § 2244(d)(1)(C) or (D) triggered the limitation period.

Ms. Kutschenreuter also contends she should have the benefit of the 90-day period within which she might have sought certiorari review in the United States Supreme Court. Doc. 24 at 32-33. Where a state prisoner appeals her conviction to the Alabama Court of Criminal Appeals and files an application for rehearing but does not petition for certiorari review in the Alabama Supreme Court, she is not entitled to the 90-day period within which she might have sought review in the U.S. Supreme Court, had she first sought review in the state's highest court. *See Pugh v. Smith*, 465 F.3d 1295, 1299-300 (11th Cir. 2006) (holding that petitioner is not entitled to benefit of 90-day period for U.S. Supreme Court certiorari review when he does not seek review in the state's highest court). Accordingly, Ms. Kutschenreuter is not entitled to the**{2022 U.S. Dist. LEXIS 5}** additional 90-day period had she appealed to the Alabama Supreme Court.

Ms. Kutschenreuter argues that her appellate counsel was ineffective for failing to petition for certiorari review in the Alabama Supreme Court and contends the loss of the 90-day period should not be counted against her. Doc. 24 at 32-33. But precedent does not support that result. Ms. Kutschenreuter did not have a right for counsel to file a petition for certiorari in the Alabama Supreme Court since such review is discretionary. *See* Ala. R. App. P. 39(a) ("Certiorari review is not a matter of right, but of judicial discretion."). Although the Constitution "requires appointment of counsel for indigent state defendants on their first appeal as of right," *Ross v. Moffitt*, 417 U.S. 600, 602, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974), the same is not true for seeking discretionary state review. *Id.* at 609-16; *see also Wainwright v. Torna*, 455 U.S. 586, 587, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982) (reiterating that "a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in this Court"). Accordingly, Ms. Kutschenreuter's assertion that her appellate attorney failed to file a petition for certiorari to the Alabama Supreme Court does not make

her petition timely.

Ms. Kutschenreuter further complains that her appellate counsel did**{2022 U.S. Dist. LEXIS 6}** not provide her a copy of her trial transcript until January 30, 2015. Doc. 24 at 8, 34. As the magistrate judge observed, Ms. Kutschenreuter still had more than five months to file a timely federal habeas petition after that date, but she offers no explanation why she failed to do so. Doc. 18 at 7-8.

Similarly, Ms. Kutschenreuter casts blame on the inadequacy of the prison law library and various prison policies for her failure to timely file a federal habeas petition. Doc. 24 at 49-51. But Ms. Kutschenreuter concedes that she "did not even begin to research the Federal § 2254 issue until she exhausted her Rule 32 on Oct 16, 2020," which was long after her limitation period expired. *Id.* at 44. Ms. Kutschenreuter's assertion that she was unaware of or misunderstood the federal limitation deadline is unavailing since she is presumed to know of the limitation period. *See Perez v. Florida*, 519 F. App'x 995, 997 (11th Cir. 2013) (finding that *pro se* litigants are deemed to know of the one-year federal habeas limitation and "confusion or ignorance about the law" does not constitute extraordinary circumstances).

Ms. Kutschenreuter also asserts that her August 2015 Rule 32 petition remained pending for nearly four years due to the Etowah County District Attorney's**{2022 U.S. Dist. LEXIS 7}** failure to timely respond to the petition, Doc. 24 at 10-18, but the federal limitation period had already expired when Ms. Kutschenreuter filed the Rule 32 petition in August 2015, and the State's delay in responding does not excuse her untimely federal habeas petition. Accordingly, Ms. Kutschenreuter's objections on the foregoing grounds are **OVERRULED**.

B. Ms. Kutschenreuter has not shown she is entitled to an actual innocence exception to overcome the statute of limitations.

Ms. Kutschenreuter also asserts that she is actually innocent of murder to overcome the untimeliness of her petition. Doc. 24 at 53-55. But Ms. Kutschenreuter cannot establish actual innocence. Actual innocence means factual innocence, not merely legal insufficiency, which is what Ms. Kutschenreuter alleges here. *See Bousley v. United States*, 523 U.S. 614, 623-24, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). Indeed, Ms. Kutschenreuter contends she is innocent of "intentional murder" because she lacked "the mental capability of intent," but acknowledges she "may have been found guilty of reckless manslaughter" or found not guilty by reason of insanity. *Id.* at 53. Because Ms. Kutschenreuter has not alleged facts sufficient to establish actual innocence, her objection on this ground is **OVERRULED**.

Having carefully**{2022 U.S. Dist. LEXIS 8}** reviewed and considered *de novo* all the materials in the court file, including the report and recommendation, and Ms. Kutschenreuter's objections, the court hereby **ADOPTS** the report of the magistrate judge and **ACCEPTS** his recommendation. The court will deny the petition and dismiss Ms. Kutschenreuter's claims with prejudice.

This court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (internal quotations omitted). The court finds Ms. Kutschenreuter's claims do not satisfy either standard.

The court will enter a separate Final Judgment.

DONE and **ORDERED** this 11th day of March, 2022.

/s/ Anna M. Manasco

ANNA M. MANASCO

UNITED STATES DISTRICT JUDGE

FINAL JUDGMENT

Consistent with the accompanying Memorandum Opinion and with Rule 58 of the Federal Rules of Civil Procedure, it is **ORDERED** that the petition is **DENIED**, and the claims are **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that a certificate**{2022 U.S. Dist. LEXIS 9}** of appealability is **DENIED**.

The parties shall bear their respective costs.

DONE and **ORDERED** this 11th day of March, 2022.

/s/ Anna M. Manasco

ANNA M. MANASCO

UNITED STATES DISTRICT JUDGE

Footnotes

1

Although the magistrate judge referenced the Certificate of Judgment from Ms. Kutschenreuter's Rule 32 post-conviction proceedings in the report and recommendation, the Certificate of Judgment was inadvertently omitted as an exhibit to the report and recommendation. Doc. 18 at 2 n.2. Therefore, the Certificate of Judgment is attached to this Memorandum Opinion as an exhibit. Because Ms. Kutschenreuter's federal habeas limitation expired before she filed her Rule 32 post-conviction petition in August 2015, as discussed herein, the Certificate of Judgment has no bearing on the timeliness of her federal habeas petition.

Appendix 4

CARLOTTA SUSANN KUTSCHENREUTER, Petitioner, v. WARDEN LAGRETA MCCLAIN, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION
2022 U.S. Dist. LEXIS 43432
Case No. 4:21-cv-00115-AMM-JHE
January 12, 2022, Decided
January 12, 2022, Filed

Editorial Information: Subsequent History

Adopted by, Writ of habeas corpus denied, Dismissed by, Certificate of appealability denied, Objection overruled by, Judgment entered by Kutschenreuter v. McClain, 2022 U.S. Dist. LEXIS 43418 (N.D. Ala., Mar. 11, 2022)

Editorial Information: Prior History

Kutschenreuter v. State, 184 So. 3d 471, 2014 Ala. Crim. App. LEXIS 907 (Ala. Crim. App., June 6, 2014)

Counsel **{2022 U.S. Dist. LEXIS 1}**Carlotta Susann Kutschenreuter, Petitioner, Pro se, Wetumpka, AL.

Judges: JOHN H. ENGLAND, III, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: JOHN H. ENGLAND, III

Opinion

REPORT AND RECOMMENDATION

Petitioner Carlotta Susann Kutschenreuter filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1). The court referred the petition to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b) for preliminary review. As explained below, the undersigned recommends the court deny the petition as untimely and dismiss the claims with prejudice.

Factual and Procedural Background

On December 20, 2010, an Etowah County grand jury indicted Kutschenreuter on one count of murder for the shooting death of her husband, Joel David Kutschenreuter. (Doc. 10-1 at 14). On September 6, 2013, a jury found Kutschenreuter guilty of murder as charged in the indictment. (Doc. 10-1 at 51-52). On October 17, 2013, the Etowah County Circuit Court sentenced Kutschenreuter to 35 years' imprisonment.1 (Doc. 10-1 at 54).

On December 20, 2013, Kutschenreuter filed a notice of appeal. (Doc. 10-1 at 67-68). On June 6, 2014, the Alabama Court of Criminal Appeals affirmed Kutschenreuter's conviction. (Doc. 10-18 at 1-13). On July 3, 2014, the Court of Criminal Appeals**{2022 U.S. Dist. LEXIS 2}** overruled Kutschenreuter's application for rehearing. (Doc. 10-19 at 1). Kutschenreuter did not file a petition for a writ of certiorari in the Alabama Supreme Court (Doc. 1 at 4), and the Court of Criminal Appeals issued a certificate of judgment on July 23, 2014. (Doc. 10-20 at 1).

On August 20, 2015, Kutschenreuter filed a petition for post-conviction relief in the Etowah County Circuit Court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. (Doc. 10-21 at 7-95; Doc. 10-22 at 1-12). On July 20, 2018, Kutschenreuter amended her Rule 32 petition. (Doc. 10-22 at 22-105; Doc. 10-23 at 1-96; Doc. 10-24 at 1-51). On May 20, 2019, the circuit court summarily dismissed Kutschenreuter's Rule 32petition. (Doc. 10-24 at 61-64).

Kutschenreuter appealed and on May 22, 2020, the Alabama Court of Criminal Appeals affirmed the circuit court's judgment. (Doc. 10-29 at 1-10). On June 19, 2020, the Court of Criminal Appeals overruled Kutschenreuter's application for rehearing. (Doc. 10-31 at 1). On October 16, 2020, the Alabama Supreme Court denied Kutschenreuter's petition for a writ of certiorari. (Doc. 10-33 at 1). On the same day, the Alabama Court of Criminal Appeals entered a certificate of judgment. Certificate of Judgment, *State v. Kent*, 31-CC-2010-001304.60,**{2022 U.S. Dist. LEXIS 3}** Doc. 69.2

On January 15, 2021,3 Kutschenreuter filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1). Kutschenreuter seeks federal habeas review on the following ten grounds:

> (1) Appellate counsel was ineffective because he filed a frivolous direct appeal on Kutschenreuter's behalf (Doc. 1-1);
>
> (2) The trial court engaged in several instances of judicial misconduct which violated Kutschenreuter's constitutional rights to due process and a fair trial (Doc. 1-2);
>
> (3) Jurors engaged in several instances of misconduct which violated Kutschenreuter's constitutional rights to due process and a fair trial (Doc. 1-3);
>
> (4) Prosecutors engaged in misconduct which violated Kutschenreuter's constitutional rights to due process and a fair trial (Doc. 1-4);
>
> (5) Trial counsel was ineffective by failing to "subject the prosecution to an adversarial process" or offer mitigating evidence and for compelling Kutschenreuter to testify (Doc. 1-5);
>
> (6) Kutschenreuter's constitutional rights against self-incrimination and to present witnesses were violated (Doc. 1-6);
>
> (7) Trial counsel was ineffective for failing to object to certain jury instructions and appellate counsel was**{2022 U.S. Dist. LEXIS 4}** ineffective for failing to raise the issue on appeal (Doc. 1-7);
>
> (8) Trial counsel was ineffective for misstating the burden of proof (Doc. 1-8);
>
> (9) The trial court violated Kutschenreuter constitutional rights to due process and a fair trial by denying her a recording of the opening statements and closing arguments and trial and appellate counsel were ineffective for failing to raise the issue (Doc. 1-9); and
>
> (10) The jury was struck in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (Doc. 1-10).

In response to the undersigned's Order to Show Cause, the respondent filed an answer supported by exhibits. (Doc. 10). The undersigned notified the parties that the petition would be considered for summary disposition and advised Kutschenreuter of the provisions and consequences of this procedure under Rule 8 of the Rules Governing Section 2254 Cases. (Doc. 12). Kutschenreuter filed a traverse and a corrected traverse. (Doc. 15; Doc. 16).

II. Analysis

The respondent argues Kutschenreuter's petition is untimely, and her claims are unexhausted and

procedurally defaulted. (Doc. 10 at 8-17). The undersigned agrees that Kutschenreuter's petition is untimely and therefore does not reach the respondent's arguments that Kutschenreuter's claims are also unexhausted and procedurally**{2022 U.S. Dist. LEXIS 5}** defaulted.

A. Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides a one-year limitation period for filing a habeas action under 28 U.S.C. § 2254. 28 U.S.C. § 2244(d)(1). This limitation period begins to run from the latest of the following dates:

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

Kutschenreuter does not allege any facts suggesting § 2244(d)(1)(B), (C), or (D) triggered the limitation period. Instead, the facts before the court establish that § 2244(d)(1)(A) is the trigger for Kutschenreuter's limitation period. For this reason, the limitation period began to run on the date**{2022 U.S. Dist. LEXIS 6}** her conviction became final by the conclusion of direct review or the expiration of her time for seeking direct review.

When a petitioner appeals her conviction to the Alabama Supreme Court but does not file an appeal to the United States Supreme Court, her conviction is final under § 2244(d)(1)(A) on the 90th day after the date of the state court order denying review. *See, e.g., Green v. Sec'y, Dep't of Corr.*, 877 F.3d 1244, 1247 (11th Cir. 2017) (citing *Nix v. Sec'y for Dep't of Corr.*, 393 F.3d 1235, 1236-37 (11th Cir. 2004)). Where, as here, a state prisoner appeals her conviction to the Alabama Court of Criminal Appeals and files an application for rehearing but does not petition for certiorari review in the Alabama Supreme Court, she is not entitled to the benefit of the 90-day period within which she might have sought certiorari review in the U.S. Supreme Court, had she first sought review in the state's highest court. *See Pugh v. Smith*, 465 F.3d 1295, 1299-300 (11th Cir. 2006) (holding that petitioner is not entitled to benefit of 90-day period for U.S. Supreme Court certiorari review when he does not seek review in the state's highest court).

Here, the Alabama Court of Criminal Appeals overruled Kutschenreuter's application for rehearing on July 3, 2014. (Doc. 10-19 at 1). Pursuant to the Alabama Rules of Appellate Procedure, Kutschenreuter had 14 days from the date the appellate court**{2022 U.S. Dist. LEXIS 7}** overruled her application for rehearing to file a petition for a writ of certiorari in the Alabama Supreme Court. *See* Ala. R. App. P. 39(c), 40(c). Because Kutschenreuter did not file a petition for certiorari review in the Alabama Supreme Court, her conviction became final for purposes of § 2244(d)(1)(A) on July 17, 2014-the expiration of the deadline for seeking certiorari review. *See Gonzalez v. Thaler*, 565 U.S. 134, 137, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012) ("We hold that, for a state prisoner who does not seek review in a State's highest court, the judgment becomes final on the date that the time for seeking such review expires.") (internal quotation marks omitted). Thus, under AEDPA, Kutschenreuter's one-year time limitation to file a § 2254 petition with this court began to run the

following day on July 18, 2014. *See Green*, 877 F.3d at 1247 n.3 ("The limitation period began to run the day after the conviction and sentence became final . . . .") (citing Fed. R. Civ. 6(a)(1)). It expired one year later, on July 18, 2015. *See Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (noting "limitations period expires on the anniversary of the date it began to run"). As noted, Kutschenreuter did not file the present federal petition until January 15, 2021. (Doc. 1-10 at 35). Because the limitation period expired before Kutschenreuter filed her federal habeas petition, the petition is untimely unless**{2022 U.S. Dist. LEXIS 8}** she can avail herself of statutory or equitable tolling.

B. Statutory Tolling

Under § 2244(d)(2), the time-period during which "a properly filed application for State post-conviction or other collateral review" of the underlying judgment or claim is pending is not counted towards any period of limitation. 28 U.S.C. § 2244(d)(2); *Cramer v. Sec'y, Dep't of Corr.*, 461 F.3d 1380, 1383 (11th Cir. 2006). One year and 32 days elapsed before Kutschenreuter filed her Rule 32 petition in the Etowah County Circuit Court on August 20, 2015. Thus, the federal one-year limitation period had already expired before Kutschenreuter filed her Rule 32 petition in the circuit court. Therefore, Kutschenreuter is not entitled to statutory tolling under § 2244(d)(2). *See Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004) ("A state court filing after the federal habeas filing deadline does not revive it."); *see also Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) (holding where a state court application for post-conviction relief is filed after the one-year statute of limitations has expired, it does not toll the statute because no time remains to be tolled).

C. Equitable Tolling

The AEDPA limitation may be equitably tolled, but a petitioner must show "(1) that [she] has been pursuing [her] rights diligently, and (2) that some extraordinary circumstance stood in [her] way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (internal quotation marks and**{2022 U.S. Dist. LEXIS 9}** citation omitted). Nevertheless, equitable tolling is typically applied sparingly, *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000), and is available "only in truly extraordinary circumstances." *Johnson v. United States*, 340 F.3d 1219, 1226 (11th Cir. 2003). The petitioner bears the burden of proving her entitlement to equitable tolling, *San Martin v. McNeil*, 633 F.3d 1257, 1268 (11th Cir. 2011), and will not prevail based upon a showing of either extraordinary circumstances or diligence alone; the petitioner must establish both. *Chavez v. Sec'y Fla. Dep't of Corr.*, 647 F.3d 1057, 1072 (11th Cir. 2011).

Kutschenreuter fails to demonstrate that she diligently pursued her federal habeas claims and that some extraordinary circumstance prevented her from timely filing her federal habeas petition. Kutschenreuter contends her appellate counsel failed to appeal to the Alabama Supreme Court, and she was not aware that she was not afforded an additional 90 days within which she might have sought certiorari review in the U.S. Supreme Court. (Doc. 15 at 27, 29, 34). "As with any litigant, *pro se* litigants are deemed to know of the one-year statute of limitations" and, therefore, "confusion or ignorance about the law" does not constitute extraordinary circumstances. *Perez v. Florida*, 519 F. App'x 995, 997 (11th Cir. 2013) (internal quotation marks and citation omitted). Thus, Kutschenreuter's ignorance of the limitation period and applicable procedural rules does not constitute an extraordinary**{2022 U.S. Dist. LEXIS 10}** circumstance that prevented the timely filing of her federal habeas petition.

Kutschenreuter also alleges appellate counsel did not provide her with a copy of her trial transcript until January 30, 2015. (Doc. 15 at 34). But Kutschenreuter still had over five months from January 30, 2015, to file a federal habeas petition. Therefore, her assertion against appellate counsel does not explain why she could not have filed a timely federal habeas petition.

Kutschenreuter complains the Etowah County District Attorney failed to timely respond to her Rule 32 petition and the circuit court did not render a decision on her petition until almost four years later. (Doc. 15 at 26-28). As explained herein, Kutschenreuter's one-year limitation period to file a federal habeas petition had already expired before she filed her Rule 32 petition. Therefore, any delay on the part of the prosecution or trial court during her Rule 32 proceedings cannot serve as an extraordinary circumstance that prevented her from filing a timely federal habeas petition. Because Kutschenreuter fails to demonstrate both diligence and an extraordinary circumstance that prevented timely filing, she is not entitled to equitable tolling.

D. Actual Innocence{2022 U.S. Dist. LEXIS 11}

The U.S. Supreme Court has held that actual innocence, if proved, serves as a gateway allowing a habeas petitioner to overcome an impediment due to the expiration of the statute of limitations. *See McQuiggin v. Perkins*, 569 U.S. 383, 386, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013). Nevertheless, "tenable actual-innocence gateway pleas are rare: 'A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 329, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (alteration adopted)). This standard is "demanding and permits review only in the 'extraordinary' case." *House v. Bell*, 547 U.S. 518, 538, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (citations omitted).

Moreover, "[t]o meet the threshold showing of innocence in order to justify a review of the merits of the constitutional claims, the new evidence must raise sufficient doubt about the petitioner's guilt to undermine confidence in the result of the trial. Actual innocence means factual innocence, not mere legal insufficiency." *Ray v. Mitchem*, 272 F. App'x 807, 810 (11th Cir. 2008) (citations and quotation marks omitted) (some alterations adopted). The Supreme Court observed in *Schlup v. Delo*:

> [A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. To be credible, such a claim requires**{2022 U.S. Dist. LEXIS 12}** 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. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (citation omitted).

Kutschenreuter contends she is not guilty of murder (Doc. 15 at 44, 51), but she points to no new reliable evidence to support a claim of actual innocence. *See Schlup* 513 U.S. at 324; *Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1017-18 (11th Cir. 2012). Because Kutschenreuter has not made a credible showing of actual innocence to warrant equitable tolling of the statute of limitations, her petition is untimely.

III. Recommendation

For the reasons stated above, the undersigned **RECOMMENDS** the court **DENY** the petition and **DISMISS** the claims **WITH PREJUDICE**.

In accordance with Rule 11 of the Rules Governing 2254 Proceedings, the undersigned **FURTHER RECOMMENDS** that a certificate of appealability be **DENIED**. This court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district**{2022 U.S. Dist. LEXIS 13}** court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146

L. Ed. 2d 542 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (internal quotation marks omitted). Based on the foregoing discussion, the undersigned concludes Kutschenreuter has failed to make the requisite showing.

IV. Notice of Right to Object

Any party may file specific written objections to this report and recommendation. A party must file any objections with the Clerk of Court within 14 calendar days from the date the report and recommendation is entered. Objections should specifically identify all findings of fact and recommendations to which objection is made and the specific basis for objecting. Objections also should specifically identify all claims contained in the complaint that the report and recommendation fails to address. Objections should not contain new allegations, present additional evidence, or repeat legal arguments. An objecting party must serve a copy of its objections on each other party to this action.

Failing to object to factual and legal conclusions contained in the magistrate judge's findings or recommendations waives the right to challenge on appeal those same**{2022 U.S. Dist. LEXIS 14}** conclusions adopted in the district court's order. In the absence of a proper objection, however, the court may review on appeal for plain error the unobjected to factual and legal conclusions if necessary in the interests of justice. 11th Cir. R. 3-1.

On receipt of objections, a United States District Judge will review *de novo* those portions of the report and recommendation to which specific objection is made and may accept, reject, or modify in whole or in part, the undersigned's findings of fact and recommendations. The district judge must conduct a hearing if required by law. Otherwise, the district judge may exercise discretion to conduct a hearing or otherwise receive additional evidence. Alternately, the district judge may consider the record developed before the magistrate judge, making an independent determination on the basis of that record. The district judge also may refer this action back to the undersigned with instructions for further proceedings.

A party may not appeal the magistrate judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. A party may only appeal from a final judgment entered by a district judge.

DONE this 12th day of**{2022 U.S. Dist. LEXIS 15}** January, 2022.

/s/ John H. England, III

JOHN H. ENGLAND, III

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

The circuit court's judgment was incorrectly dated September 17, 2013. (Doc. 10-1 at 54). On December 17, 2013, the circuit court entered a corrected judgment to reflect the October 17, 2013 entry date. (Doc. 10-1 at 65).

2

The court may take judicial notice of Kutschenreuter's state court criminal records which can be found

at www.alacourt.com. *See Grider v. Cook*, 522 F. App'x 544, 546 n.2 (11th Cir. 2013) (finding "the district court was permitted to take judicial notice of Grider's state court criminal proceedings"); *see also Keith v. DeKalb Cty., Ga.*, 749 F.3d 1034, 1041 n.18 (11th Cir. 2014) (taking judicial notice of DeKalb County Superior Court's Online Judicial System pursuant to Fed. R. Evid. 201). Consistent with the Eleventh Circuit's guidance on best practices when judicially noticing facts under these circumstances, a copy of the cited document is attached as an exhibit to this report and recommendation. *See Paez v. Sec'y, Fla. Dep't of Corr.*, 947 F.3d 649, 652-53 (11th Cir. 2020).
3

A *pro se* inmate's petition is deemed filed the date it is delivered to prison officials for mailing. *See Houston v. Lack*, 487 U.S. 266, 275-76, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988); *Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999); *Garvey v. Vaughn*, 993 F.2d 776, 780-82 (11th Cir. 1993).