FILED
United States Court of Appeals
Tenth Circuit

May 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DONALD EDWARD MCCORD,

Petitioner - Appellant,

v.

CARRIE BRIDGES, Warden,*

Respondent - Appellee.

No. 22-6169
(D.C. No. 5:21-CV-00559-PRW)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY**

Before **TYMKOVICH**, **McHUGH**, and **CARSON**, Circuit Judges.

Petitioner Donald Edward McCord is an Oklahoma state prisoner convicted of thirty-one sexual offense counts. Mr. McCord, proceeding pro se,[1] filed a 28 U.S.C.

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* In accordance with Federal Rule of Appellate Procedure 43(c)(2), Carrie Bridges is substituted for Scott Nunn as the respondent in this action. See Fed. R. App. P. 43(c)(2) ("When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party.").

** This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

§ 2254 petition, challenging the validity of his plea agreement on the ground that the prosecution did not ensure satisfaction of the terms of the agreement. A magistrate judge recommended dismissing Mr. McCord's petition as untimely. Over Mr. McCord's objections, the district court adopted the magistrate judge's report and recommendation. The district court also denied a certificate of appealability ("COA"). Mr. McCord now petitions this court for a COA and moves for leave to proceed in forma pauperis. We deny a COA because reasonable jurists could not debate the district court's conclusion that Mr. McCord's § 2254 petition was untimely. Additionally, because Mr. McCord has not raised a nonfrivolous argument, we also deny his motion for leave to proceed in forma pauperis.

I. BACKGROUND

On May 17, 2018, Mr. McCord entered a plea of nolo contendere to thirty-one sexual offense counts. On August 3, 2018, Mr. McCord, represented by counsel, filed a motion to withdraw his plea. About two weeks later, Mr. McCord withdrew his motion. Thereafter, on May 16, 2019, Mr. McCord filed an application for state post-conviction relief. On November 19, 2019, the state trial court dismissed the application for post-conviction relief as "not proper for consideration . . . because [Mr. McCord] affirmatively waived his right to appeal or otherwise seek relief from his convictions." ROA at 39. On December 9, 2019, Mr. McCord filed a second motion to withdraw his plea. The state

court denied relief, concluding that Mr. McCord had not shown "that conditions of his plea agreement . . . [were] not honored by this [c]ourt or the prosecution." Id. at 31.

Mr. McCord filed an appeal to the Oklahoma Court of Criminal Appeals ("OCCA") on January 23, 2020. On March 6, 2020, the OCCA affirmed the state trial court's ruling. Mr. McCord filed a petition for rehearing but, on April 7, 2020, the OCCA denied the motion.

On March 18, 2020, Mr. McCord filed a document in federal district court entitled "Application to Order Oklahoma County District Court to Honor Plaintiff's/Appellant's Statuatory [sic] Ten (10) Day Right to Withdraw Plea." McCord v. State of Okla., No. 5:20-cv-00249-PRW (W.D. Okla. Mar. 18, 2020), ECF No. 1 at 1. The district court construed the filing as an appeal from the state trial court's order denying Mr. McCord's motion to withdraw his plea and dismissed the action without prejudice as barred by the Rooker-Feldman Doctrine.[2] Mr. McCord did not file an appeal challenging the district court's construction of his filing or dismissal of his action.

In May 2021, more than one year after the OCCA denied rehearing on his direct appeal, Mr. McCord mailed the 28 U.S.C. § 2254 petition underlying this matter to the federal district court.[3] A federal magistrate judge screened Mr. McCord's petition and

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[2] D.C. Ct. of App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Tr. Co., 263 U.S. 413 (1923).

[3] Although the district court did not file the petition until June 1, 2021, the envelope bears a postmark of May 28, 2021, and Mr. McCord completed a form indicating that, on May 20, 2021, he provided prison officials with his § 2254 petition for

issued a report and recommendation, concluding the petition was untimely because (1) more than a year had elapsed from when his conviction became final; (2) his state court, post-conviction proceedings did not toll enough time to render his § 2254 petition timely; (3) Mr. McCord did not advance sufficient allegations for entitlement to equitable tolling; and (4) Mr. McCord did not allege actual innocence. Mr. McCord objected to the magistrate judge's report and recommendation. As to the calculation of the deadline to file his § 2254 petition, Mr. McCord argued only that his conviction never became final where he promptly sought to withdraw his plea and where the prosecutor had yet to satisfy the terms of his plea agreement. As to statutory tolling, Mr. McCord contested the date on which proceedings on his state post-conviction relief efforts concluded. Finally, as to equitable tolling, Mr. McCord contended that COVID-19 restrictions in prison impeded his ability to research his claim and that he had pursued the claim as diligently as possible. The district court overruled Mr. McCord's objections, adopted the magistrate judge's report and recommendations in full, dismissed Mr. McCord's petition as untimely, denied a COA, and denied Mr. McCord leave to proceed in forma pauperis.

Before this court, Mr. McCord seeks a COA. Relative to the timeliness of his § 2254 petition, Mr. McCord contends the district court should have granted him equitable tolling because his plea counsel failed to (1) timely file a motion to withdraw

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service on the Attorney General of Oklahoma. Under the prison mailbox rule, we "treat the petition as placed in the hands of prison authorities on the same day it was signed." Marsh v. Soares, 223 F.3d 1217, 1218 n.1 (10th Cir. 2000).

his plea agreement and (2) place all the terms of his verbal plea agreement on the record, making it difficult for Mr. McCord to support the constitutional claim he seeks to advance through his § 2254 petition. Mr. McCord has also filed a motion for leave to proceed in forma pauperis.

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 such as timeliness, 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. Standard for Leave to Proceed In Forma Pauperis

Section 1915 of Title 28 of the United States Code permits a prisoner to seek leave to proceed in forma pauperis and avoid prepayment of fees associated with docketing an

appeal. For a petitioner seeking a COA to obtain leave to proceed in forma pauperis, he must "demonstrate a financial inability to pay the required filing fees and the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." Watkins v. Leyba, 543 F.3d 624, 627 (10th Cir. 2008) (internal quotation marks omitted); see also Felvey v. Long, 800 F. App'x 642, 646 (10th Cir. 2020) (unpublished). When an appellate court dismisses a proceeding and also denies leave to proceed in forma pauperis, the litigant seeking appellate review remains responsible for paying the filing fee. Kinnell v. Graves, 265 F.3d 1125, 1129 (10th Cir. 2001); see also Knox v. Morgan, 457 F. App'x 777, 780 (10th Cir. 2012) (unpublished) (reminding § 2254 litigant of responsibility to pay filing fee after denying a COA and denying leave to proceed in forma pauperis).

C. Analysis

Section 2244 of Title 28 of the United States Code establishes the applicable limitation period for commencing a § 2254 proceeding, stating that "[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 Mr. McCord's petition, the limitation period commenced on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Furthermore, when calculating the limitation period, "[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. . . ." 28 U.S.C. § 2244(d)(2).

In his application for a COA, Mr. McCord does not contest the district court's determination that he did not file his § 2254 petition within the one-year statutory time period provided by AEDPA. Nor could he. Put simply, even if Mr. McCord's one-year limitations period did not commence until the OCCA denied rehearing on his appeal from the trial court's denial of post-conviction relief, Mr. McCord's § 2254 petition would still be untimely because he filed it on May 28, 2021, more than a year after the OCCA's last ruling on April 6, 2020. Furthermore, although Mr. McCord filed an earlier action in the district court, the district court did not construe it as a § 2254 petition, and Mr. McCord has never contested this construction. Thus, Mr. McCord is entitled to a COA only if he can demonstrate the district court's denial of equitable tolling was debatable or wrong.

"A 'petitioner' is 'entitled to equitable tolling' if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). For several independent yet sufficient reasons, Mr. McCord has not met this standard.

First, the arguments Mr. McCord raises for equitable tolling in his application for a COA in this court differ from the arguments he raised in his objection to the magistrate judge's report and recommendation. Compare Appellant's Opening Br. & COA Request at 3–4, with ROA at 48–50. Accordingly, pursuant to the firm waiver rule, the new

arguments Mr. McCord raise in his application for a COA are not properly before us. See Duffield v. Jackson, 545 F.3d 1234, 1237 (10th Cir. 2008) ("We have adopted a firm waiver rule when a party fails to object to the findings and recommendations of the magistrate. The failure to timely object to a magistrate's recommendations waives appellate review of both factual and legal questions." (internal quotation marks, citation, and brackets omitted)); see also Mathews v. Elhabte, 2022 WL 3592550, at *2 (10th Cir. Aug. 23, 2022) (unpublished) (applying firm waiver rule to deny COA in § 2254 proceeding); Morales v. Jones, 417 F. App'x 746, 748–49 (10th Cir. 2011) (unpublished) (applying firm waiver rule in context of arguments regarding timeliness of § 2254 petition and observing that "[a] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue . . . for appellate review" (quotation marks omitted)).

Second, the arguments based on COVID-19 Mr. McCord advanced while before the district court were incapable of supporting equitable tolling. This is primarily because, as pointed out by the district court, the arguments were generalized and did not provide the court with any basis to determine the number of days of equitable tolling to which Mr. McCord might be entitled due to restrictions at his institution of confinement. Moreover, Mr. McCord failed to explain what legal research he needed to conduct before filing his § 2254 petition. Meanwhile, the record strongly suggests Mr. McCord did not need any access to legal research materials following his state court proceeding because his argument for relief—that the state did not fulfill terms of his plea agreement—has

remained exactly the same since he filed his first motion to withdraw his plea agreement in August 2018 in state court.

Third, even if not barred by the firm waiver rule, the arguments Mr. McCord raises in his application for a COA before this court are incapable of satisfying the standard for equitable tolling. Specifically, Mr. McCord presents arguments about purported failings by his plea counsel—that counsel did not timely file a motion to withdraw his plea and that counsel did not place all the terms of the verbal plea agreements on the record. These purported failings, however, occurred well before the OCCA denied rehearing on his appeal from the denial of post-conviction relief. And more than one year elapsed between the OCCA's denial of rehearing and when Mr. McCord filed the § 2254 petition underlying this matter. Accordingly, these purported failings by plea counsel are not capable of tolling the one-year limitation period.

We conclude the district court's determination that Mr. McCord filed his § 2254 out of time and was not entitled to equitable tolling is therefore not debatable or wrong. Furthermore, because Mr. McCord fails to offer a nonfrivolous reason in support of issuance of a COA, he has not satisfied the standard for proceeding in forma pauperis.[4]

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[4] Mr. McCord also has more than ample funds in his prison trust account to pay the appellate filing fee, which serves as an additional ground for denying his motion for leave to proceed in forma pauperis. See Brown v. Dinwiddie, 280 F. App'x 713, 715 (10th Cir. 2008) (unpublished) (denying motion to proceed in forma pauperis because Mr. Brown's bank statements noted $850 which was sufficient to cover the $455 filing fee for his appeal).

When an appellate court dismisses a proceeding and also denies leave to proceed in forma pauperis, the litigant seeking appellate review remains responsible for paying the filing fee. Thus, Mr. McCord shall be responsible for paying the full amount of the filing fee, which is due and payable to the district court immediately.

III. CONCLUSION

We DENY Mr. McCord's application for a COA, DENY Mr. McCord's motion for leave to proceed in forma pauperis, and DISMISS this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Jane K. Castro
Chief Deputy Clerk

May 03, 2023

Donald Edward McCord #795868
James Crabtree Correctional Center
216 North Murray Street
Helena, OK 73741-1017

RE: 22-6169, McCord v. Bridges
Dist/Ag docket: 5:21-CV-00559-PRW

Dear Appellant:

Enclosed is a copy the court's final order issued today in this matter.

Prisoners are reminded that to invoke the prison mailbox rule they must file with each pleading a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit with prison officials and must also state that first-class postage has been prepaid. *See* Fed. R. App. P. 4(c) and *United States v. Ceballos-Martinez*, 358 F.3d 732, *revised and superseded*, 371 F.3d 713 (10th Cir.), *reh'g denied en banc*, 387 F.3d 1140 (10th Cir.), *cert. denied*, 125 S. Ct. 624 (2004). Prisoners should also review carefully Federal Rule of Appellate Procedure 4(c)(1), which was amended December 1, 2022.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

CMW/djd

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

DONALD EDWARD MCCORD,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. CIV-21-559-PRW**
	)	
SCOTT NUNN,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing *pro se*, brings this action pursuant to 28 U.S.C. § 2254, seeking habeas relief from a state court conviction. (ECF No. 6). United States District Judge Patrick R. Wyrick has referred this matter to the undersigned magistrate judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the petition has been promptly examined, and for the reasons set forth herein, it is recommended that the action be **DISMISSED** on filing as untimely.

I. PROCEDURAL BACKGROUND

On May 17, 2018, in Oklahoma County District Court Case No. CF-2016-6862, Plaintiff entered a negotiated plea of *nolo contendere* to 31 counts of sexual offenses, primarily based upon sexual abuse of a child. (ECF No. 6:1). The court sentenced Plaintiff to forty years imprisonment for each count, all sentences to run concurrently.

Id.[1] Petitioner did not seek to withdraw the plea, and thus failed to perfect a direct appeal. (ECF No. 6:2); *see York v. Galetka*, 314 F.3d 522, 526 (10th Cir. 2003). On May 16, 2019, Mr. McCord filed an Application for Post-Conviction Relief in Oklahoma County District Court, and on November 19, 2019, the district court dismissed the application.[2] On December 9, 2019, Plaintiff filed an application to withdraw his plea.[3] The Oklahoma County District Court denied the same on January 21, 2020. (ECF No. 6-1:1). Plaintiff appealed the denial to the Oklahoma Court of Criminal Appeals ("OCCA"), who affirmed the district court's ruling on March 6, 2020.[4] Mr. McCord filed the habeas petition on June 1, 2021, and filed an amended Petition on July 6, 2021. (ECF Nos. 1 & 6).

II. SCREENING REQUIREMENT

District courts must review habeas petitions promptly and summarily dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." Rule 4, Rules Governing Section 2254 Cases.

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[1] *See also* https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-2016-6862&cmid=3439175; *United States v. Pursley*, 577 F.3d 1204, 1214 n.6 (10th Cir. 2009) (exercising discretion "to take judicial notice of publicly-filed records in [this] court and certain other courts concerning matters that bear directly upon the disposition of the case at hand") (citation omitted).

[2] *See* https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-2016-6862&cmid=3439175.

[3] *See* https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-2016-6862&cmid=3439175.

[4] *See* Order Affirming Denial of Application for Certiorari Appeal Out of Time, *McCord v. State of Oklahoma*, Case No. PC-2020-162 (Okla. Ct. Crim. App. Mar. 6, 2020).

Additionally, "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Day v. McDonough*, 547 U.S. 198, 209 (2006). However, "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." *Day*, 547 U.S. at 210. Petitioner has such notice by this Report and Recommendation, and he has an opportunity to present his position by filing an objection to the Report and Recommendation. Further, when raising the issue *sua sponte*, the district court must "assure itself that the petitioner is not significantly prejudiced . . . and determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred." *Day*, 547 U.S. at 210 (internal quotation marks omitted); *Thomas v. Ulibarri*, No. 06-2195, 214 F. App'x 860, 861 n.1 (10th Cir. 2007). Finally, a Court may dismiss a § 2254 habeas petition *sua sponte* only if the petition is clearly untimely on its face. *Kilgore v. Attorney General of Colorado*, 519 F.3d 1084, 1085 (10th Cir. 2008).

III. AEDPA LIMITATIONS PERIOD

The Antiterrorism and Effective Death Penalty Act (AEDPA) establishes a one-year limitations period for claims of a habeas petitioner in state custody. *Rhine v. Boone*, 182 F.3d 1153, 1154 (10th Cir. 1999). The one-year limitations period runs from the latest of;

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

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D). Unless a petitioner alleges facts implicating subsection (B), (C), or (D), the limitations period generally begins to run from the date on which the conviction becomes final. *See Preston v. Gibson*, 234 F.3d 1118, 1120 (10th Cir. 2000).

Under subsection (A), Petitioner's limitations period began to run from the date on which the conviction became final. *See Preston v. Gibson*, 234 F.3d 1118, 1120 (10th Cir. 2000). 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. *See Jones v. Patton*, 619 F. App'x 676, 678 (10th Cir. 2015). Because Mr. McCord did not appeal from his plea, his conviction became final ten days following sentencing, on May 28, 2018. *See supra.*[5] Thus, without tolling, Petitioner's one-year habeas statute of limitations to file a habeas petition expired on May 28, 2019. Petitioner filed the habeas

[5] Because the tenth day fell on Sunday, May 27, 2018, Petitioner had until the following Monday, May 28, 2018, to file a motion to withdraw. *See* 12 O.S. § 2006.

petition on June 1, 2021, approximately two years after the limitations period had expired. (ECF No. 1).

IV. STATUTORY TOLLING

The AEDPA limitations period is tolled pending adjudication of a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim. *See* 28 U.S.C. § 2244(d)(2). On May 16, 2019, with 13 days remaining on the one-year habeas clock, Mr. McCord filed an Application for Post-Conviction Relief. *See supra*. The Oklahoma County District Court dismissed the Application on November 19, 2019, and although Mr. McCord did not appeal the denial of his post-conviction application, he is entitled to a period of tolling for the time period that he could have filed an appeal. *See Gibson v. Klinger*, 232 F.3d 799, 804 (10th Cir. 2000) (holding that the tolling of a properly filed application for post-conviction relief includes the time an applicant could seek appellate review of a state court's denial of his application, whether or not he actually seeks such review). Under Oklahoma law, this would entitle Mr. McCord to an additional 20 days of tolling beginning November 20, 2019 and ending December 10, 2019. *See* Rules 2.1(E), 5.2(C), Rules of the Oklahoma Court of Criminal Appeals.

Two days before the habeas clock started again, on December 9, 2019, Petitioner filed an application to withdraw his plea in the Oklahoma County District Court. *See supra*. The district court denied relief on January 21, 2020 and the OCCA affirmed the denial on March 6, 2020. *See supra*. The 13 days remaining on the habeas

clock started the following day, March 7, 2020, and expired on March 20, 2020. On March 18, 2020, in this Court, Mr. McCord filed a document entitled, "Application to Order Oklahoma County District Court to Honor Plaintiff's/Appellant's Statuatory [sic] Ten (10) Day Right to Withdraw Plea." ECF No. 1, *McCord v. State of Oklahoma*, Case No. CIV-20-249-PRW. Noting that the only relief requested by Mr. McCord was that the Court overturn the state court's decision denying as untimely Petitioner's request to withdraw his plea, the Court dismissed the action without prejudice, for lack of jurisdiction under the Rooker-Feldman Doctrine. *See* ECF No. 13. In doing so, the Court stated:

> The Court agrees with the Magistrate Judge that Plaintiff's prayer does "not present[] a habeas claim or another recognized form of collateral relief" but instead "treat[s] the federal court as an appellate forum" insofar as it "request[s] [that] this Court essentially overturn the state court's decision denying as untimely his request to withdraw his plea."

(ECF No. 13:5-6). The limitations period to file a habeas petition expired March 20, 2020.[6] Because Mr. McCord did not file the instant case until June 1, 2021, the Petition is untimely, absent equitable tolling.

[6] If the action in Case No. CIV-20-549-PRW had been construed as one seeking habeas relief under 28 U.S.C. § 2254, the instant Petition could be considered a "second or successive" petition requiring authorization from the Tenth Circuit Court of Appeals. *See* 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive [§ 2254] application ... is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.").

V. EQUITABLE TOLLING

The AEDPA limitations period may be subject to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 634 (2010). But this form of tolling is only available when an extraordinary circumstance stood in the petitioner's way and prevented timely filing. *See Lawrence v. Florida*, 549 U.S. 327, 336 (2007). And, even when the circumstances are extraordinary, equitable tolling is only available when the petitioner has been diligent in the pursuit of his habeas claims. *See Holland,* 631 U.S. at 653. Under this standard, the petitioner bears a "'strong burden to show specific facts.'" *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (citations omitted).

In regards to timeliness, Mr. McCord states:

> Petitioner has attempting to resolve the issues presented since May 2018 through many motions and petitions, both state and federal, further complicated by petitioner's limited access to legal materials and resources dimi[nished] further by Prison lockdowns, staff shortages, Covid 19 restrictions, staff absences, lack of legal knowledge or legal counsel. State's violation of petitioner's rights is still continuing.

(ECF No. 6:13). But these allegations lack specificity regarding exactly how Petitioner was prevented from filing a timely habeas petition. *See e.g.*, *Donald v. Pruitt*, 853 F. App'x 230, 234 (10th Cir. 2021) ("The bottom line is that the COVID-19 pandemic does not automatically warrant equitable tolling for any petitioner who seeks it on that basis. The petitioner must establish that . . . the COVID-19 pandemic specifically prevented him from filing his motion.") (citation omitted). The Court should find that the lack of specificity is fatal to any claim that Mr. McCord is entitled to equitable tolling.

VI. ACTUAL INNOCENCE EXCEPTION

"[A] credible showing of actual innocence" based on newly discovered evidence "may allow a prisoner to pursue his constitutional claims" as to his conviction, under an exception to 28 U.S.C. § 2244(d)(1)—established for the purpose of preventing a miscarriage of justice. *See McQuiggin v. Perkins*, 569 U.S. 383, 386, 392 (2013). Successful actual-innocence claims are rare due to the demanding evidentiary requirements for such claims. *See id.* at 383, 392, 401; *House v. Bell*, 547 U.S. 518, 538 (2006). "[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.' " *House v. Bell*, 547 U.S. at 536-37 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *accord McQuiggin v. Perkins*, 569 U.S. at 399 (applying the same standard to petitions asserting actual innocence as a gateway to raise habeas claims that are time-barred under § 2244(d)(1)). Such claims must be based on "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998).

Here, Mr. McCord has made no allegation that he is actually innocent, nor does he indicate the presence of any "new" evidence pertaining to the same. As a result, the Court should conclude that the "actual innocence" exception does not apply.

VII. SUMMARY

Under § 2244(d)(1)(A), Petitioner's conviction became final on May 28, 2018 and, with statutory tolling, the one-year habeas limitations expired on March 20, 2020.

Mr. McCord is not entitled to any equitable tolling because he has failed to demonstrate, with specificity, why he was prevented from filing a timely petition. Finally, Petitioner is not entitled to any period of tolling under the "actual innocence" exception. Because Petitioner waited until June 1, 2021 to file his Petition, the Court should dismiss it as untimely.

VIII. RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

Based upon the foregoing analysis, it is recommended that the Petition **(ECF No. 6)** be **DISMISSED** as untimely.

Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by **November 1, 2021**, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. Petitioner is further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

IX. STATUS OF REFERRAL

This Report and Recommendation terminates the referral by the District Judge in this matter.

ENTERED on October 14, 2021.

Shon T. Erwin

SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE

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

DONALD EDWARD MCCORD,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CIV-21-559-PRW
	)	
SCOTT NUNN,	)	
	)	
Respondent.	)	

ORDER

This case comes before the Court on United States Magistrate Judge Shon T. Erwin's Report & Recommendation (Dkt. 12), recommending that Petitioner's 28 U.S.C. § 2254 petition be dismissed as untimely, and Petitioner Donald Edward McCord's Objection (Dkt. 13). Magistrate Judge Erwin concluded that Petitioner's Antiterrorism and Effective Death Penalty Act (AEDPA) one-year limitations period to file a § 2254 petition expired on March 20, 2020. And since Petitioner did not file this petition until June 1, 2021, Magistrate Judge Erwin concluded that it was untimely and must be dismissed. Petitioner's objection takes issue with Magistrate Judge Erwin's conclusion that Petitioner is not entitled to equitable tolling of his AEDPA limitations period. In support of this contention, Petitioner avers to general concerns related to prison life and the COVID-19 pandemic.

Upon review, the Court agrees with Magistrate Judge Erwin and concludes that Petitioner's petition must be dismissed as untimely. Petitioner's objection does little to dispute Magistrate Judge Erwin's conclusion that this petition was filed after the expiration

of AEDPA's one-year limitations period.[1] And the Court agrees with Magistrate Judge Erwin that Petitioner is not entitled to equitable tolling. "Equitable tolling is a rare remedy"[2] that is "to be applied sparingly."[3] "In order to receive the benefit of equitable tolling, [a habeas petitioner] *must show* . . . 'that some extraordinary circumstance stood in his way and prevented timely filing.'"[4] General concerns are not enough; a habeas petitioner has a "strong burden to show specific facts" that prevented him or her from timely filing a petition.[5]

Petitioner's objection does not demonstrate an extraordinary circumstance that entitles him to equitable tolling. To begin, "general difficulties" related to pursuing legal action from prison are insufficient to demonstrate an extraordinary circumstance justifying equitable tolling.[6] So too for general difficulties related to the COVID-19 pandemic.[7] Petitioner has failed to identify any circumstance unique or specific to his situation that prevented him from filing a timely petition. Because his general concerns related to access

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[1] To the extent that Petitioner has presented an adequate objection, the Court has reviewed Magistrate Judge Erwin's analysis de novo and agrees with Magistrate Judge Erwin's AEDPA period calculations.

[2] *Wallace v. Kato*, 594 U.S. 384, 396 (2007).

[3] *Nat'l. R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113 (2002).

[4] *Porter v. Allbaugh*, 672 F. App'x 851, 856 (10th Cir. 2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

[5] *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (quoting *Brown v. Barrow,* 512 F.3d 1304, 1307 (11th Cir. 2008)).

[6] *Porter*, 672 F. App'x at 857.

[7] *See Donald v. Pruitt*, 853 F. App'x 230, 234 (10th Cir. 2021).

to legal materials and COVID-19 are insufficient,[8] Petitioner has not demonstrated an extraordinary circumstance entitling him to equitable tolling. Absent equitable tolling, Petitioner's petition was untimely and must be dismissed.

Accordingly, the Court hereby **ADOPTS** the Report & Recommendation (Dkt. 12) and **DISMISSES** the Petition (Dkt. 1).[9]

IT IS SO ORDERED this 30th day of September 2022.

PATRICK R. WYRICK
UNITED STATES DISTRICT JUDGE

[8] Nor is it likely that Petitioner could make such a showing. It is worth noting that COVID-19 could have only impacted the very tail end of Petitioner's AEDPA period, as his period expired on March 20, 2020. Almost the entirety of Petitioner's one-year period was not impacted by COVID-19. Nor does it appear that the early days of COVID-19 inhibited him from filing a petition. As Magistrate Judge Erwin points out, Petitioner was able to file legal documents in this Court on March 18, 2020, just two days prior to the expiration of his AEDPA period. *See* R & R (Dkt. 12), at 6.

[9] Before a habeas petitioner may appeal the dismissal of a section 2254 petition, he must obtain a Certificate of Appealability (COA). *See Vreeland v. Zupan*, 906 F.3d 866, 875 (10th Cir. 2018) (citing 28 U.S.C. § 2253(c)(1)(A)). A COA may issue only upon "a substantial showing of the denial of a constitutional right." § 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). Upon consideration, the Court finds the requisite showing is not met in this case. Therefore, a COA is **DENIED**.