FILED
United States Court of Appeals
Tenth Circuit

June 29, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WILLIAM SHIRLEY, IV,

Petitioner - Appellant,

v.

STEVEN HARPE,

Respondent - Appellee.

No. 23-6044
(D.C. No. 5:22-CV-01049-J)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BACHARACH**, **KELLY**, and **MORITZ**, Circuit Judges.

Petitioner-Appellant William Shirley, IV, a state inmate appearing pro se, seeks to appeal the district court's denial of his habeas corpus petition, 28 U.S.C. § 2254, as time barred. 28 U.S.C. § 2244(d)(1)(A). The district court concluded that there was no basis for statutory or equitable tolling of the Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year limitation period and dismissed the petition as untimely. As no reasonable jurist could conclude otherwise, we deny a COA and dismiss this appeal.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Background

Mr. Shirley pled guilty in Oklahoma state court to first-degree manslaughter in 2018 and was sentenced to 25 years' imprisonment. After unsuccessful attempts at obtaining state post-conviction relief, Mr. Shirley filed his federal petition. He alleged his conviction was devoid of due process because he is Indian, the offense was committed on Indian land, and based on the Supreme Court's ruling in McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), Oklahoma lacked jurisdiction to prosecute him under the Major Crimes Act, 18 U.S.C. § 1153(a). R. 5, 7.

The magistrate judge recommended the petition be dismissed as untimely under the one-year limitation period as he had not shown a basis for statutory or equitable tolling. Upon consideration of Mr. Shirley's objections and applying de novo review, the district court adopted the recommendation and dismissed the petition. Shirley v. Harpe, No. CIV-22-1049, 2023 WL 2496720 (W.D. Okla. Mar. 14, 2023).

Discussion

Mr. Shirley asks this court to consider his "[j]urisdictional [c]laim" de novo. Aplt. Br. at 5. But a COA is a prerequisite to our appellate review. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). To obtain a COA, where, as here, a district court has dismissed a filing on procedural grounds, Mr. Shirley must show both "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). No

reasonable jurist could conclude that the district court's dismissal of Mr. Shirley's petition was procedurally incorrect.

A state inmate seeking habeas relief must file in federal court within one year "from the latest 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" or "the date on which the constitutional right asserted . . . has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(A), (C). The one-year limitations period may be tolled pending the disposition of "a properly filed application for State post-conviction or other collateral review." Id. § 2244(d)(2).

Following entry of his guilty plea, Mr. Shirley was sentenced on September 25, 2018. Shirley, 2023 WL 2496720, at *1. Mr. Shirley did not move to withdraw his plea or pursue a direct appeal. Thus, his conviction became final when the time to pursue a direct appeal expired on December 24, 2018. Okla. Stat. tit. 22, § 1051(A). Given Mr. Shirley did not file his federal habeas petition until December 2022, four years after his conviction became final, his petition was untimely. R. 3; 28 U.S.C. § 2244(d)(1)(A). Although Mr. Shirley pursued state post-conviction relief, it was two years after his state conviction became final, so statutory tolling did not apply. 28 U.S.C. § 2244(d)(2); Shirley, 2023 WL 2496720, at *1; Okla. Stat. tit. 22, § 1080.1 ("A one-year period of limitation shall apply to the filing of any application for post-conviction relief . . . .").

Mr. Shirley asserts the limitations period should proceed from the date the Supreme Court decided McGirt v. Oklahoma. Aplt. Br. at 6; see 28 U.S.C. § 2244(d)(1)(C). In his view, the Supreme Court implicitly indicated McGirt's

jurisdictional ruling had retroactive effect, because "otherwise Mcgirt (sic) would not have received relief." Aplt. Br. at 6. "But there is at least one fatal flaw to this argument: McGirt announced no new constitutional right." Pacheco v. El Habti, 62 F.4th 1233, 1246 (10th Cir. 2023). Thus, § 2244(d)(1)(C) does not apply.

As the district court unassailably found, Mr. Shirley's petition was time-barred and lacked basis for statutory tolling or application of § 2244(d)(1)(C). Although Mr. Shirley argued that equitable tolling applied in his objections to the magistrate judge's report and recommendation, he does not raise it on appeal. Thus, the argument is waived. United States v. Springfield, 337 F.3d 1175, 1178 (10th Cir. 2003).

We DENY a COA and DISMISS this appeal. Seeing no "reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal[,]" DeBardeleben v. Quinlan, 937 F.2d 502, 505 (10th Cir. 1991), we deny Mr. Shirley's motion for leave to proceed without the prepayment of costs or fees.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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June 29, 2023

William Shirley IV
Lawton Correctional Facility
8607 SE Flower Mound Road
Lawton, OK 73501-9700
#828193

RE: 23-6044, Shirley v. Harpe
Dist/Ag docket: 5:22-CV-01049-J

Dear Appellant:

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

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

CMW/jjh

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

WILLIAM SHIRLEY, IV,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. CIV-22-1049-J
	)	
STEVEN HARPE,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing pro se, filed this action challenging his state criminal conviction for First-Degree Manslaughter in Okmulgee County District Court, Case No. CF-2016-487. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). The undersigned has undertaken a review of the sufficiency of the Petition pursuant to Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. For the following reasons, it is recommended the Petition be dismissed with prejudice as untimely.

I. Background

On September 25, 2018, following entry of a guilty plea, Petitioner was convicted of First-Degree Manslaughter. Doc. No. 1 at 1; see also Oklahoma State Courts Network, State v. Shirley, Okmulgee County District Court, Case No. CF-2016-487.[1] Petitioner did not move to withdraw his guilty plea, nor did he file a direct appeal. Doc. No. 1 at 2.

On December 23, 2020, Petitioner filed an application for post-conviction relief in the state district court. Doc. No. 1 at 3; see also Oklahoma State Courts Network, State v. Shirley, Okmulgee County District Court, Case No. CF-2016-487, supra. Therein, he challenged the state court's jurisdiction over his criminal proceedings. Id. The state district court denied his application on January 11, 2022. Id. Following an untimely appeal and the state court's subsequent permission to file an appeal out of time, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed the state district court's denial of post-conviction relief on October 10, 2022. Doc. No. 1 at 3-4; Oklahoma State Courts Network, Shirley v. State, Oklahoma Court of Criminal Appeals, PC-2022-593.[2] In affirming the lower court's decision, the OCCA explained,

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[1]https://www.oscn.net/dockets/GetCaseInformation.aspx?db=okmulgee&number=CF-2016-487

[2]https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=PC-2022-593&cmid=133254

> Before the District Court, Petitioner asserted that the District Court lacked jurisdiction to convict and punish him. See McGirt v. Oklahoma, 140 S.Ct. 2452 (2020). In State ex rel. Matloff v. Wallace, [], 497 P.3d 686 [(2022)], cert. denied, 142 S.Ct. 757 (2022), this Court determined that the United States Supreme Court decision in McGirt, because it is a new procedural rule, is not retroactive and does not void final state convictions. See Matloff, [], 497 P.3d at 691-92, 694.
>
> The conviction in this matter was final before the July 9, 2020[] decision in McGirt, and the United States Supreme Court's holding in McGirt does not apply. We decline Petitioner's invitation to revisit our holding in Matloff.

Doc. No. 1-1 at 1-2.

Petitioner filed the instant matter on December 12, 2022, asserting the state court lacked jurisdiction over his criminal proceedings. Doc. No. 1 at 5. Petitioner explains that he is a member of the Creek Nation, a federally recognized Indian tribe. Id. He states that his underlying crime was committed on Indian land, and therefore, the State of Oklahoma did not have jurisdiction over the resulting criminal proceedings. Id.

II. Screening Requirement

Under Rule 4 of the Rules Governing Section 2254 Cases, the Court is required to examine a habeas petition and to summarily dismiss it "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief . . . ." Rule 4, Rules Governing § 2254 Cases. "[B]efore acting on its own

initiative, a court must accord the parties fair notice and an opportunity to present their positions." Day v. McDonough, 547 U.S. 198, 210 (2006). 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 a dispositive 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 . . . ." Id. (quotations omitted); Smith v. Dorsey, No. 93-2229, 1994 WL 396069, at *3 (10th Cir. July 29, 1994) (noting no due process concerns with the magistrate judge raising an issue sua sponte where the petitioner could "address the matter by objecting" to the report and recommendation).

III. Statute of Limitations

A. Applicable 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. Preston v. Gibson, 234 F.3d 1118, 1120 (10th Cir. 2000). Petitioner has suggested facts that would implicate subsection (C), indicating McGirt revealed the State of Oklahoma did not have jurisdiction over his criminal proceedings. However, as explained below, the McGirt decision does not trigger § 2244(d)(1)(C) to extend his conviction's finality date.

1. 28 U.S.C. § 2244(d)(1)(A)

Under 28 U.S.C. § 2244(d)(1)(A), a petitioner must seek habeas relief within one-year and said limitations period generally begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]" After pleading guilty, Petitioner was sentenced on September 25, 2018. Petitioner did not move to withdraw his guilty plea, nor did he file a direct appeal. Petitioner's conviction became final, therefore, on October 5,

2018, upon expiration of the ten-day period during which Petitioner could have filed a timely application to withdraw his guilty plea. Rule 4.2(A), Rules of the Oklahoma Court of Criminal Appeals, Okla. Stat. tit. 18, Ch. 18, App.; Fisher v. Gibson, 262 F.3d 1135, 1142 (10th Cir. 2001) (noting the petitioner's Oklahoma convictions following guilty pleas became "final ten days after entry of Judgment and Sentence[.]").

Application of the one-year limitation period under § 2244(d)(1)(A) means that, absent statutory or equitable tolling, Petitioner's one-year limitation period for filing a federal habeas petition expired on Monday, October 7, 2019. Petitioner did not file this action until December 12, 2022.

2. 28 U.S.C. § 2244(d)(1)(C)

Petitioner implies that his basis for seeking habeas relief did not ripen until July 2020 when the Supreme Court issued the McGirt decision. Such an argument inherently relies on the premise that McGirt recognized a new constitutional right. Section 2244(d)(1)(C) allows the statute of limitations to run from "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[.]" However, because McGirt did not recognize a new constitutional right, the provision does not apply.

McGirt revolved around a longstanding rule that "[s]tate courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country.'" McGirt, 140 S.Ct. at 2459 (citing Negonsott v. Samuels, 507 U.S. 99, 102-03 (1993)). This is so because the Major Crimes Act "provides that, within 'the Indian country,' '[a]ny Indian who commits' certain enumerated offenses 'against the person or property of another Indian or any other person' 'shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.'" Id. (quoting 18 U.S.C. § 1153(a)). "Indian Country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government[.]" 18 U.S.C. § 1151(a). Thus, the relevant question for the Supreme Court was "whether the land [that] treaties promised [the Creek Nation] remain[ed] an Indian reservation for purposes of federal criminal law." McGirt, 140 S.Ct. at 2459.

To answer that question, the Court examined various treaties between the United States government and the Muscogee (Creek) Nation and statutes governing the Muscogee (Creek) Nation and its territory. Id. at 2460-68. Indeed, the Court only looked to Acts of Congress to answer that question based on the Court's previous holding that "[o]nly Congress can divest a reservation of its land and diminish its boundaries." Id. at 2462 (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984)). The Court determined that the Muscogee (Creek) Nation's reservation continued to exist

despite federal allotment policy in the early twentieth century because the "Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." Id. at 2464 (citing Nebraska v. Parker, 577 U.S. 481, 489 (2016); Mattz v. Arnett, 412 U.S. 481, 497 (1973); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 356-58 (1962)). The Court determined that while the federal government engaged in other policy decisions negatively impacting the sovereignty of the Muscogee (Creek) Nation, "there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation." Id. at 2468.

Although Petitioner suggests otherwise, McGirt does not allow Petitioner additional time to file his habeas petition under § 2244(d)(1)(C) because it did not recognize a new constitutional right. Rather, the Court addressed whether the Muscogee (Creek) Nation "remain[ed] an Indian reservation for purposes of federal criminal law," a non-constitutional issue. Id. at 2459.[3] Indeed, the Tenth Circuit has stated: "McGirt announced no new constitutional right." Pacheco v. El Habti, 48

[3] To be sure, a prisoner has a due process right to be convicted in a court which has jurisdiction over the matter. See Yellowbear v. Wyoming Atty. Gen., 525 F.3d 921, 924 (10th Cir. 2008) ("Absence of jurisdiction in the convicting court is indeed a basis for federal habeas corpus relief cognizable under the due process clause."). However, this due process right was recognized prior to McGirt. See Frank v. Mangum, 237 U.S. 309, 326 (1915) (recognizing that a state criminal prosecution must proceed in a court of competent jurisdiction in order to accord with constitutional due process).

F.4th 1179, 1191 (10th Cir. 2022). See also Jones v. Pettigrew, No. CIV-18-633-G, 2021 WL 3854755, at *3 (W.D. Okla. Aug. 27, 2021) (citing Littlejohn v. Crow, No. 18-CV-477-CVE-JFJ, 2021 WL 3074171, at *5 (N.D. Okla. July 20, 2021) ("But [28 U.S.C. § 2244(d)(1)(C)] does not apply because the Supreme Court did not recognize any constitutional rights in McGirt); Sanders v. Pettigrew, No. CIV-20-350-RAW-KEW, 2021 WL 3291792, at *5 (E.D. Okla. Aug. 2, 2021) (concluding that McGirt "did not break any new ground" or "recognize a new constitutional right, much less a retroactive one"); accord with Berry v. Braggs, No. 19-CV-706-GKF-FHM, 2020 WL 6205849, at *7 (N.D. Okla. Oct. 22, 2020) ("Because the McGirt ruling did not recognize any new constitutional right relevant to petitioner's jurisdictional claim, § 2244(d)(1)(C) does not apply to that claim.")).

Additionally, the Supreme Court denied Petitions for Writ of Certiorari in three cases in which the petitioners were challenging state court rulings that McGirt was not retroactive. State ex. rel. Matloff v. Wallace, 497 P.3d 686 (Okla. Crim. App. 2021), cert. denied, Parish v. Oklahoma, 142 S.Ct. 757, 2022 WL 89297 (Jan. 10, 2022); Davis v. Oklahoma, 142 S.Ct. 793, 2022 WL 89459 (Jan. 10, 2022); Compelleebee v. Oklahoma, 142 S.Ct. 792, 2022 WL 89454 (Jan. 10, 2022). Therefore, the Court should find that § 2244(d)(1)(C) does not apply in this case and thus, Petitioner's action is untimely. See Pacheco, 48 F.4th at 1191 (concluding that

in a McGirt challenge, § 2244(d)(1)(C) would not apply to extend conviction finality date because McGirt did not recognize a new constitutional right).

B. Statutory Tolling

The AEDPA limitations period is tolled pending adjudication of a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim. 28 U.S.C. § 2244(d)(2). Petitioner's first application for post-conviction relief was not filed until December 23, 2020. Because the one-year limitations period had already expired at that time, the application did not provide tolling under § 2244(d)(2). See Clark v. Oklahoma, 468 F.3d 711, 714 (10th Cir. 2006) ("Only state petitions for post-conviction relief filed within the one year allowed by AEDPA will toll the statute of limitations."); Green v. Booher, 42 F. App'x 104, 106 (10th Cir. 2002) ("[Petitioner's] state application [for postconviction relief] could not toll the federal limitation period, because he did not file it until after the one-year period had expired."). Thus, the Court should conclude the Petition is not rendered timely through application of 28 U.S.C. § 2244(d)(2).

C. Equitable Tolling

28 U.S.C. "§ 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling." Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1)

that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). Generally, equitable tolling is warranted only in situations where the petitioner was actively misled or is prevented in some extraordinary way from asserting his rights. Id. at 418-19. Here, Petitioner makes no assertion that he is entitled to equitable tolling.

The Supreme Court has also held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . [or] expiration of the statute of limitations." McQuiggin v. Perkins, 569 U.S. 383, 386 (2013). "It is important to note in this regard that actual innocence means factual innocence, not mere legal insufficiency." Pacheco, 48 F.4th at 1186 (quotations omitted). Thus, such tolling of the limitations period for actual innocence is appropriate only in rare instances in which the petitioner shows that "in light of the new evidence [presented by the petitioner], no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." McQuiggin, 569 U.S. at 386 (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)).

Petitioner has made no allegation that he is actually innocent, nor does he indicate the presence of any "new" evidence pertaining to the same. Additionally, Petitioner's claim that the state court lacked jurisdiction, unaccompanied by any new evidence, is insufficient to credibly show actual innocence. See Pacheco, 48 F.4th at

1183, 1190 (holding that the petitioner's jurisdictional argument does not show actual innocence). As a result, the Court should conclude the "actual innocence" exception does not apply.

RECOMMENDATION

Based on the foregoing findings, it is recommended this action be dismissed with prejudice based on the statute of limitations.[4] Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by January 25th, 2023, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Report and Recommendation would waive appellate review of the recommended ruling. Moore v. United States, 950 F.2d 656 (10th Cir. 1991); see, cf. Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996) ("Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.").

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not

[4] "Where a claim is time-barred, a dismissal without prejudice provides no relief to the claimant because an action dismissed as untimely cannot be refiled. Thus, even if dismissal based on the expiration of the limitations period is without prejudice, it has the practical effect of a dismissal with prejudice." Long v. Crow, No. CIV-19-737-D, 2019 WL 5295529, at *1 n.2 (W.D. Okla. Oct. 18, 2019) (citing AdvantEdge Bus. Grp. v. Thomas E. Mestmaker & Assocs., Inc., 552 F.3d 1233, 1236 (10th Cir. 2009); accord Satterfield v. Franklin, No. CIV-08-733-D, 2009 WL 523181, at *1 (W.D. Okla. Mar. 2, 2009)).

specifically addressed herein is denied.

ENTERED this 5th day of January, 2023.

GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

WILLIAM SHIRLEY, IV,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CIV-22-1049-J
	)	
STEVEN HARPE,	)	
	)	
Respondent.	)	

ORDER

Petitioner, a state prisoner appearing pro se, filed a Petition seeking habeas relief from a state court conviction pursuant to 28 U.S.C. § 2254 (Pet.) [Doc. No. 1]. The matter was referred for initial proceedings to United States Magistrate Judge Gary M. Purcell, consistent with 28 U.S.C. § 626(b)(1)(B), (C). Judge Purcell examined the Petition under Rule 4 of the Rules Governing Section 2254 Cases and issued a Report and Recommendation recommending that the Petition be dismissed as untimely (Rep. & Rec.) [Doc. No. 6]. Petitioner has objected (Petr.'s Objs.) [Doc. Nos. 8, 10],[1] triggering de novo review.

I. Background

On September 25, 2018, Petitioner was sentenced to 25 years after pleading guilty to first degree manslaughter in state court. *See* Pet. at 1. More than two years later, in December 2020, Petitioner filed an application for post-conviction relief, arguing that the State of Oklahoma lacked jurisdiction to prosecute him under *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). *See* Pet. at 3. The state district court denied the application, and the Oklahoma Court of Criminal Appeals affirmed the denial on October 10, 2022. *See id.*, Ex. 1 at 1. On December 12, 2022, Petitioner

[1] Because Petitioner filed two objections that are identical in substance, the Court's reference to a particular page number applies synonymously to both filings.

filed the instant action seeking habeas relief, wherein he repeats his jurisdictional allegations. *See id.* at 5.

II. Report and Recommendation Findings

On review, in recognizing that § 2254 petitions are governed by a one-year statute of limitations period under the Antiterrorism and Effective Death Penalty Act (AEDPA), Judge Purcell found that Petitioner's claims were untimely under either 28 U.S.C. § 2244(d)(1)(A) or (C). *See* Rep. & Rec. at 5–10. In relevant part, the statute provides that the limitations period begins to 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;
>
> . . .
>
> [or]
>
> (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[.]

28 U.S.C. § 2244(d)(1)(A), (C).

Beginning with § 2244(d)(1)(A), Judge Purcell concluded that Petitioner's one-year limitations period started on October 5, 2018—given that Petitioner was sentenced on September 25, 2018, and made no attempt to withdraw his plea during the statutorily authorized period. *See* Rep. & Rec. at 5–6. Thus, absent statutory or equitable tolling, Petitioner's one-year filing period expired on October 7, 2019. *See id.* at 6. Judge Purcell then found that (1) the one-year limitations period was not statutorily tolled because Petitioner's application for post-conviction relief was not filed within the one-year period; and (2) Petitioner had not articulated any grounds for equitable tolling. *See id.* at 10–12.

As to § 2244(d)(1)(C), Judge Purcell reasoned that the *McGirt* decision failed to recognize a new constitutional right retroactively applicable to cases on collateral review; thus, he concluded

that § 2244(d)(1)(C) was inapplicable and did not extend the one-year limitations period. *See id.* at 6–10.

III. Petitioner's Objections

Petitioner objects to the Report and Recommendation on several grounds. First, Petitioner maintains that he did not receive fair notice of the Report and Recommendation because it was received after objections were due. *See* Petr.'s Objs. at 1. Secondly, he asserts that the AEDPA one-year limitations period was both statutorily and equitably tolled. *See id.* at 1–2.

A. Timeliness

Petitioner first objects generally to the Report and Recommendation on the basis that it was received "[f]ive (5) days after Petitioner's objection was already due." *Id.* at 1. While it is not entirely clear from the record when Petitioner received the Report and Recommendation, the Court construes his objections as timely filed, thus triggering de novo review. In any event, the standard of review applied to the Report and Recommendation does not impact the Court's conclusion as to the Petition's untimeliness.

B. Statutory Tolling

Petitioner next maintains that the limitations period was statutorily tolled. *See id.* at 1–2. Upon the Court's review, however, it is evident that Petitioner confuses Judge Purcell's findings on statutory tolling with those regarding § 2244(d)(1)(C)'s inapplicability. To that end, Petitioner asserts that Judge Purcell's consideration and discussion of § 2244(d)(1)(C) "alone is evidence of Statutory Tolling." *Id.* at 1. Petitioner goes on to add that "since June 25, 1948, the Major Crimes Act, 18 U.S.C. § 1153(a), has been in effect and was made retroactively applicable for cases on collateral review." *Id.* (cleaned up).

But as noted by Judge Purcell, a case may only be applied retroactively if the Supreme Court expressly holds so. *See* 28 U.S.C. § 2244(d)(1)(C) (holding that the one-year limitations period begins on "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"). And because the Supreme Court has not done so, Petitioner's objection is without merit. *See Mathews v. Elhabte*, No. CIV-21-1023-R, 2022 WL 363357, at *1 (W.D. Okla. Feb. 7, 2022) ("[T]he Supreme Court has not held that *McGirt* is retroactive, and the only way the Supreme Court could make a rule retroactively applicable is through a holding to that effect." (internal quotation marks omitted)); *Sanders v. Pettigrew*, No. CIV 20-350-RAW-KEW, 2021 WL 3291792, at *5 (E.D. Okla. Aug. 2, 2021) ("*McGirt* did not recognize a new constitutional right, much less a retroactive one.").

C. Equitable Tolling

Petitioner lastly contends that the limitations period was equitably tolled. *See* Petr.'s Objs. at 2. Although the one-year limitations period may be subject to equitable tolling, such tolling is appropriate only in "rare and exceptional circumstances." *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003) (internal quotation marks omitted). A petitioner "seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Sigala v. Bravo*, 656 F.3d 1125, 1128 (10th Cir. 2011) (internal quotation marks omitted). Equitable tolling is also "appropriate, for example, when a prisoner is actually innocent." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000).

Petitioner first provides that the COVID-19 pandemic supports equitable tolling. However, the COVID-19 pandemic, and its associated shutdowns, began in March 2020—more than six

months after the expiration of Petitioner's one-year filing period. In any event, "the COVID-19 pandemic does not automatically warrant equitable tolling for any movant who seeks it on that basis," *United States v. Tinsman*, No. 21-7024, 2022 WL 3208346, at *3 (10th Cir. Aug. 9, 2022) (internal quotation marks omitted), and Petitioner has failed to "establish that he was pursuing his rights diligently and that the COVID-19 pandemic specifically prevented him from filing his motion." *Id.* Accordingly, the Court finds this objection is without merit.

Petitioner next asserts, in conclusory fashion, that "he was actively misled and coerced by [state court] counsel into signing a guilty plea, preventing [him] from asserting his self-defense and defense of another right at trial." Petr.'s Objs. at 2. Although attorney misconduct can be an extraordinary circumstance allowing for equitable tolling, it must be an external factor that accounts for a petitioner's failure to file a timely petition. *See Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005). And such misconduct must be "[p]articularly egregious, . . . such as repeated, deceitful assurances that a habeas petition would soon be filed." *Trujillo v. Tapia*, 359 F. App'x 952, 955 (10th Cir. 2010) (citing *Fleming v. Evans*, 481 F.3d 1249, 1255–56 (10th Cir. 2007)).

Even assuming, generously, that Petitioner's state court counsel engaged in misconduct, Petitioner provides no explanation for the lengthy four-year delay in seeking habeas relief. *See Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) ("In the final analysis, however, [petitioner] has provided no specificity regarding the alleged lack of access and the steps he took to diligently pursue his federal claims."). And conclusory allegations of an involuntary plea do not constitute evidence which would support a claim of actual innocence for purposes of equitable tolling. *See Laurson v. Leyba*, 507 F.3d 1230, 1233 (10th Cir. 2007) ("Actual innocence means factual innocence. A claim that [petitioner's] guilty plea was involuntary does not assert that he did not commit the crime to which he pleaded guilty." (internal quotation marks and citations omitted));

see also Herrera v. Collins, 506 U.S. 390, 417–18 (1993) (finding affidavits fell short of threshold for actual innocence showing based in part on affiants' failure to provide satisfactory explanation as to why they "waited until the 11th hour" to offer their statements).

IV. Conclusion

Having carefully reviewed the Petition, Report and Recommendation, and Petitioner's objections de novo, the Court agrees with Judge Purcell's thorough and well-reasoned analysis. Accordingly, the Court ADOPTS the Report and Recommendation [Doc. No. 6] and DISMISSES Petitioner's Petition as untimely. Petitioner's motion to proceed in forma pauperis [Doc. No. 9] is DENIED as moot.

IT IS SO ORDERED this 14th day of March, 2023.

BERNARD M. JONES
UNITED STATES DISTRICT JUDGE

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