

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 21, 2017

Elisabeth A. Shumaker
Clerk of Court

ONG VUE,

Petitioner - Appellant,

v.

JANET DOWLING, Warden, Dick Conner
Correctional Center,

Respondent - Appellee.

No. 17-6213
(D.C. No. 5:17-CV-00857-HE)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **KELLY, MURPHY**, and **MATHESON**, Circuit Judges.

Ong Vue, a state prisoner proceeding pro se,¹ seeks a certificate of appealability (“COA”) to challenge the district court’s dismissal of his 28 U.S.C. § 2254 application for a writ of habeas corpus. He also seeks leave to file a “Motion to Certify Question of Law to Oklahoma Supreme Court” and a “Motion to Confer Standing as a Member of a Peculiar Suspect Class.” Exercising jurisdiction under 28

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

¹ Because Mr. Vue is proceeding pro se, we construe his filings liberally. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); see also *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) (“[W]e must construe [a pro se litigant’s] arguments liberally; this rule of liberal construction stops, however, at the point at which we begin to serve as his advocate.”).

U.S.C. § 1291, we deny the COA and dismiss this matter. We also dismiss as moot his request to file the motions.

I. BACKGROUND

In 1998, Mr. Vue pled no contest in Oklahoma state court to one count of murder in the first degree and two counts of shooting with intent to kill. On June 1, 1998, he was sentenced to life in prison for the murder conviction and two 20-year terms for the shooting with intent to kill convictions. Mr. Vue did not appeal these convictions in state court. Instead, his trial counsel filed a motion to modify his original sentence, which the Oklahoma state trial court granted in September of 1998.² In July 2016, Mr. Vue sought post-conviction relief in state court. That request was denied, and the Oklahoma Court of Criminal Appeals (“OCCA”) affirmed.

On August 12, 2016, Mr. Vue filed a 28 U.S.C. § 2241 petition in the United States District Court for the Western District of Oklahoma seeking relief from an immigration removal order and raising claims of ineffective assistance of counsel. *See Ong Vue v. Allbaugh*, 682 F. App’x 636, 638-39 (10th Cir. 2017). The district court construed Mr. Vue’s petition as a request for relief under § 2254 and dismissed

² Under Mr. Vue’s original sentence, the 20-year terms were to run concurrently with each other but consecutively to the life sentence. The Oklahoma state trial court granted Mr. Vue’s request to modify the sentence, ordering that one of the 20-year terms would run concurrently with the life sentence. *See Ong Vue v. Allbaugh*, 682 F. App’x 636, 638 (10th Cir. 2017).

it as unexhausted and time-barred. On review, this court denied a COA and dismissed the appeal. *Id.* at 639.

Mr. Vue later filed two applications to bring a successive § 2254 claim based on ineffective assistance of counsel. This court denied his first request, holding that Mr. Vue had not shown he was relying on “a new rule of constitutional law” or “newly discovered evidence.” *See* Order dated June 1, 2017 at 2 (17-6124).

Regarding his second request, we found that Mr. Vue was not required to obtain circuit authorization to challenge his state convictions under § 2254 because the district court had failed to provide him adequate notification before construing his § 2241 petition as, in part, a first § 2254 application. *See* Order dated July 31, 2017 at 2 (17-6161). This court thus denied his request for authorization as unnecessary and permitted him to file a § 2254 application in district court to challenge his convictions. *See id.* at 1.

A magistrate judge issued a report and recommendation (“R & R”) concluding that Mr. Vue’s habeas application was untimely under the one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and that neither statutory nor equitable tolling was warranted. The district court adopted the R & R and dismissed Mr. Vue’s habeas application as untimely. It issued separate orders denying Mr. Vue leave to proceed *in forma pauperis* (“*ifp*”) on appeal and declining to grant a COA. After the district court denied *ifp*, Mr. Vue paid the filing fee in full.

II. DISCUSSION

Mr. Vue contends he is entitled to equitable tolling because his attorney failed to pursue a direct appeal of his 1998 Oklahoma state convictions. We conclude under the alleged facts that he is not entitled to equitable tolling for 17 years—the time that elapsed between when his conviction became final and when he first sought federal habeas relief. The district court did not abuse its discretion in denying equitable tolling, reasonable jurists would not disagree, and a COA is unwarranted.

A. *Legal Background*

1. Certificate of Appealability

Mr. Vue may not appeal the district court's denial of his § 2254 application without a COA. *See* 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). To receive a COA, an applicant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Because the district court denied Mr. Vue's habeas application on procedural grounds “without reaching the prisoner's underlying constitutional claim,” a COA cannot issue unless Mr. Vue shows both (1) “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right,” and (2) “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); *accord Dulworth v. Jones*, 496 F.3d 1133, 1137 (10th Cir. 2007). Because we may “resolve the issue whose answer is more apparent from the record and arguments,” *Slack*, 529 U.S. at 485, we

start and end our discussion with the second ground concerning the district court's procedural ruling.

2. Statute of Limitations

Mr. Vue challenges the district court's conclusion that his claim was procedurally barred and that equitable tolling was unwarranted. "[W]e review the district court's decision on equitable tolling of the limitation period for an abuse of discretion." *Burger v. Scott*, 317 F.3d 1133, 1138 (10th Cir. 2003).

Under AEDPA, state prisoners have one year from the day their state court conviction becomes final to seek habeas relief. 28 U.S.C. § 2244(d)(1). As relevant here, a state conviction is final either when direct review has concluded or when the period during which direct review can be sought has expired. *Id.* To qualify for equitable tolling, an applicant must show "(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) (quotations omitted).

Attorney negligence can warrant equitable tolling in "extraordinary instance[s]" when the conduct constitutes "far more than 'garden variety' or 'excusable neglect.'" *Id.* at 652. The petitioner bears the burden of demonstrating that equitable tolling is appropriate. *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

B. *Analysis*

Mr. Vue's conviction became final in June 1998—ten days after his conviction was entered and the date on which his opportunity to seek direct review ended. *See* ROA at 148; *see also* Okla. Stat. tit. 22, § 1051; Rules of Oklahoma Court of Criminal Appeals 4.2. The one-year period for filing a habeas application ended in June 1999. He filed his habeas application 17 years later—long after AEDPA's one-year statute of limitations had expired. Thus, the district court was correct to conclude that Mr. Vue's application is time-barred unless he can show he is entitled to tolling of the limitations period.

Mr. Vue contends equitable tolling is warranted based on his attorney's failure to (1) file a motion to withdraw his plea or (2) file a timely appeal. But he fails to provide sufficient evidence that his lawyer's purported negligence prevented him from filing a habeas application within the one-year limitations period.

Mr. Vue offers no corroboration—other than his own affidavit—of his claim that a May 29, 1998 conversation with his attorney led him to believe that she would pursue an appeal. He claims he believed the attorney had perfected his appeal, but he provides no explanation for his failure to follow up on the matter for the 17 years that passed between the time his conviction became final and the time he sought habeas relief in federal court. Even if Mr. Vue's version of the events is correct, he has failed to demonstrate the diligence necessary for equitable tolling to apply or that the district court abused its discretion in denying equitable tolling. Accordingly, he

cannot show that reasonable jurists would differ over whether the district court properly dismissed his habeas application.

III. CONCLUSION

Mr. Vue filed his § 2254 application long after AEDPA's one-year statute of limitations expired, and he has not demonstrated that equitable tolling is warranted or that reasonable jurists would debate whether the district court abused its discretion. We therefore deny his request for a COA and dismiss his appeal. We also dismiss as moot his "Motion to Certify Question of Law to Oklahoma Supreme Court" and the "Motion to Confer Standing as a Member of a Peculiar Suspect Class."

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

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

ONG VUE,	)	
	)	
Petitioner,	)	
vs.	)	NO. CIV-17-0857-HE
	)	
JANET DOWLING, Warden,	)	
Dick Conner Correctional Center	)	
	)	
Defendant.	)	

ORDER

Petitioner is a state prisoner seeking habeas relief pursuant to 28 U.S.C. § 2254. His petition was referred to Magistrate Judge Shon Erwin for initial proceedings. Judge Erwin has submitted a Report and Recommendation recommending that the petition be dismissed as untimely. Petitioner has objected, therefore the court reviews the petition *de novo*.

Background

On May 5, 1998, petitioner entered a *nolo contendere* plea in the District Court of Cleveland County, Oklahoma. He pled to one count of first degree murder and two counts of shooting with intent to kill. On May 29, 1998¹, he was sentenced to life in prison on the murder conviction and to twenty year sentences on each of the shooting convictions, with the two twenty year sentences to run concurrent to each other, but consecutive to the life sentence. Petitioner later filed a motion to modify the sentence, which the court granted.

¹ The record is not clear on this point. Some documents say that petitioner was sentenced on May 29, 1998, while others say he was sentenced on June 1, 1998. However, this discrepancy does not affect the outcome here.

The modified judgment directed that one of the 20-year sentences run concurrently with the life sentence.

Petitioner claims he expressed his desire to file a direct appeal, but his attorney did not file one. Petitioner took no other action regarding his conviction and sentence until July 1, 2016, when he filed an application for post-conviction relief in state district court. That court denied relief, after which petitioner appealed to the Oklahoma Court of Criminal Appeals (“OCCA”). On December 14, 2016, the OCCA affirmed the denial of relief.

During the pendency of the state post-conviction proceeding, petitioner filed a petition in this court under 28 U.S.C. § 2241, which this court construed as raising at least some claims under § 2254. The court dismissed the action as untimely. Prior to filing the current petition, petitioner sought authorization from the Tenth Circuit to file a second or successive habeas action. However, that Court concluded a further challenge to the conviction pursuant to § 2254 would not be second or successive, as this court had not followed the appropriate procedures to re-characterize petitioner’s prior motion as a habeas petition. Therefore, the current petition is properly before this court.²

Analysis

The Report recommends that the petition be dismissed because it is untimely. Petitioner has objected to dismissal, arguing that he is entitled to tolling of the limitations period applicable to his ineffective assistance of counsel claim.

² Petitioner also sought state habeas relief in Osage County District Court, which denied his petition in April of 2017. The OCCA affirmed the denial, stating that petitioner could not challenge his judgment and sentence through an application for writ of habeas corpus.

Applications for a writ of habeas corpus by a person in state custody must be filed within a one year period. That period generally runs from the date on which the judgment of conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). In some circumstances, other dates may be applicable, such as where unconstitutional state action has impeded the filing of a habeas application, where a new constitutional right has been recognized by the Supreme Court, or where the basis for the claim is discovered later. *Id.* § 2244(d)(1)(B)-(D). In calculating the one year period, the “time during which a properly filed application for State post-conviction . . . with respect to the pertinent judgment or claim is pending” is excluded. *Id.* § 244(d)(2). The one year limitation is also subject to equitable tolling where the prisoner can show that he pursued his rights diligently, and that his failure to timely file the action was “caused by extraordinary circumstances beyond his control.” Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000). Here, petitioner appears to argue for an alternate date from which to compute the one year period. He also asserts that he is entitled to statutory and equitable tolling of the limitations period.

Petitioner asserts that the limitation should run either from the date of the Supreme Court’s decision in Buck v. Davis, 137 S. Ct. 759 (2017), or from the date of the OCCA’s denial of his post-conviction appeal in December 2016. But Buck does not constitute some sort of general waiver of the limitations period as plaintiff appears to view it. Buck was a fact-specific examination of the procedural default rule in light of Martinez v. Ryan, 566 U.S. 1 (2012) and Trevino v. Thaler, 133 S. Ct. 1911 (2013), turning primarily on the application of Fed.R.Civ.P. 60(b). None of those authorities are relevant in this case. Buck

did not involve concerns of timeliness nor does it involve any new right helpful to the petitioner.

Petitioner also cannot rely on the OCCA's recent dismissal of his post-conviction appeal as a basis for tolling. The judgment of conviction became final ten days after the judgment and sentence are imposed. *See Clark v. Oklahoma*, 468 F.3d 711, 713 (10th Cir. 2006); Okla. Crim. App. R. 2.5(A) & 4.2(A). It was therefore final in May or June of 1998³, and the period for filing a habeas petition ended in June of 1999 at the latest.⁴ An application for post-conviction relief filed after the expiration of the deadline does not serve to extend the deadline or avoid its application. *See Fisher v. Gibson*, 262 F.3d 1135, 1142-43 (10th Cir. 2001) (no statutory tolling for state post-conviction proceedings initiated after expiration of the limitation period). Petitioner has not shown a basis for statutory tolling.

He has also not stated a basis for equitable tolling. His equitable tolling argument appears to suffer from the same misunderstanding as his statutory tolling argument, in that it confuses procedural default with issues of timeliness. But, in any event, petitioner is not entitled to equitable tolling for at least two reasons. First, petitioner did not diligently pursue his rights. Petitioner argues that he did not know that his attorney had not filed a direct appeal until the OCCA's opinion in December of 2016. That suggestion does not, however, explain or excuse a 17-year delay. Prisoners, although incarcerated, "must

³ *The Report calculated the finality date from May 5, 1998, when petitioner pled guilty. However, petitioner was not sentenced until either May 29 or June 1, 1998.*

⁴ *As the Report points out, even including the time during which petitioner's motion to modify his sentence was pending, the limitation period still ended in June of 1999.*

‘vigilantly oversee,’ and ultimately bear responsibility for, their attorneys’ actions or failures.” Broadus v. Hartley, 345 F. App’x 345, 348 (10th Cir. 2009) (quoting Fleming v. Evans, 481 F.3d 1249, 1255-56 (10th Cir. 2007)).

Second, petitioner has not shown the “egregious misconduct” of counsel necessary to justify equitable tolling. Simple negligence on counsel’s part is not sufficient. Fleming, 481 F.3d at 1255. Substantially for the reasons stated in the Report, the court concludes any failure to file a direct appeal is at most simple negligence.⁵

Conclusion

The petition is untimely. There is no basis for statutory or equitable tolling. Therefore, the Report and Recommendation [Doc. #10] is **ADOPTED**. The petition is **DISMISSED**.

IT IS SO ORDERED.

Dated this 29th day of September, 2017.



JOE HEATON
CHIEF U.S. DISTRICT JUDGE

⁵ *Petitioner claims it was his “understanding” that counsel would “take care of it” based on a discussion with counsel the day of his sentencing. However, he does not suggest he gave any sort of explicit instructions to commence a direct appeal as opposed to the effort at sentence modification, which the attorney did pursue.*

but on September 10, 1998, he filed a Motion for Judicial Review to modify his sentence. (ECF No. 1:2).² On September 22, 1998, the Cleveland County District Court granted the Motion and modified Petitioner's sentence. (ECF No. 1:2).³ On July 1, 2016, Petitioner filed an Application for Post-Conviction Relief in the Cleveland County District Court. (ECF No. 1:2).⁴ On September 14, 2016, the District Court denied the application and on December 14, 2016, the Oklahoma Court of Criminal Appeals (OCCA) affirmed the denial. (ECF No. 1:2-3).⁵

II. PRIOR HABEAS ACTION

On August 12, 2016, Mr. Vue filed a petition for habeas relief in this Court, challenging an immigration removal order and his 1997 Cleveland County conviction. ECF No. 1, *Vue v. Immigrations and Customs Enforcement Agency*, Case No. CIV-16-926-HE (Aug. 12, 2016). Although Mr. Vue filed the petition under 28 U.S.C. § 2241, the District Court found that to the extent Mr. Vue challenged the validity of his state

² <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=cleveland&number=CF-1997-628&cmid=15101>

³ <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=cleveland&number=CF-1997-628&cmid=15101>

⁴ <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=cleveland&number=CF-1997-628&cmid=15101>

⁵ <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=cleveland&number=CF-1997-628&cmid=15101>;
<http://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=PC-2016-905&cmid=120065>

court conviction and sentence, the petition should be construed as one seeking relief under 28 U.S.C. § 2254. ECF No. 8, *Vue v. Immigrations and Customs Enforcement Agency*, Case No. CIV-16-926-HE (Sept. 3, 2016). The District Court dismissed the § 2254 challenge to Mr. Vue's state court conviction as untimely. *Id.* On August 10, 2017, Mr. Vue filed the instant habeas petition under 28 U.S.C. § 2254. (ECF No. 1).

III. THE CURRENT PETITION IS NOT SECOND OR SUCCESSIVE

In *Case v. Hatch*, 731 F.3d 1015 (10th Cir. 2013), the Tenth Circuit examined the federal district court's role in applying the second or successive gatekeeping provision, and noted that its authorization to file a second or successive habeas petition in the district court is the first in a two-step "gatekeeping" process:

The filing of a second or successive § 2254 application is tightly constrained by the provisions of AEDPA. Congress expressly established a two-step "gate-keeping" mechanism for the consideration of second or successive habeas corpus applications in federal courts. Before a court can consider a second claim, an applicant must first "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). The court of appeals then has 30 days to decide whether to grant the authorization to file. *Id.* § 2244(b)(3)(D).

If the court of appeals finds the applicant "makes a prima facie showing that the application satisfies the requirements of [§ 2244(b)]," *id.* § 2244(b)(3)(C), the applicant may pursue a claim in district court. The district court must then review the proffered evidence, and "shall dismiss any claim ... that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of [§ 2244(b)]." *Id.* § 2244(b)(4).

Case v. Hatch, 731 F.3d 1015, 1026-27 (10th Cir. 2013) *cert. denied*, 134 S. Ct. 269 (2013). These gate-keeping requirements are jurisdictional and must be considered

prior to the merits of a § 2254 petition. *Id.* “If the inmate does not obtain prior authorization, the federal district court has no jurisdiction to consider his § 2254 petition[.]” *Stanko v. Davis*, 617 F.3d 1262, 1265 -1266 (10th Cir. 2010) (*citing In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008)).

The instant petition and the previous petition in Case No. CIV-16-926 both challenge the same Cleveland County conviction and sentence in Case No. CF-1997-628. Ordinarily, the District Court’s dismissal of the first petition as untimely, would require authorization in the Circuit Court of Appeals prior to proceeding with a second petition. *See In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) (“The dismissal of Mr. Rains’s first habeas petition as time-barred was a decision on the merits, and any later habeas petition challenging the same conviction is second or successive and is subject to the AEDPA requirements.”).

Mr. Vue sought authorization to proceed with the current petition in the Tenth Circuit Court of Appeals, but the Circuit Court denied authorization as “unnecessary.” (ECF No. 1-1). The Circuit Court recognized that ordinarily, the prior dismissal in Case No. CIV-16-926 would qualify as a “merits” disposition rendering a subsequent application second or successive under § 2244(b). (ECF No. 1-1). However, the Tenth Circuit also concluded that the District Court had failed to follow the proper procedure in recharacterizing a portion of the claims in CIV-16-926 under § 2254. (ECF No. 1-1). As a result, the Circuit Court concluded that CIV-16-926 “cannot be considered as a prior habeas action subjecting Mr. Vue to the second-or-successive constraints in §

2244(b) [and] [a]s he has no other prior habeas applications, he is not required to obtain circuit authorization to challenge his state convictions under § 2254.” (ECF No. 1-1:2). Based on the Tenth Circuit’s Order, this Court has jurisdiction over the current petition.

IV. PETITIONER’S HABEAS CLAIMS

Mr. Vue asserts four grounds for habeas relief. First, Mr. Vue alleges his trial attorney was ineffective for:

- Failing to perfect Petitioner’s direct appeal;
- Coercing Petitioner to enter a plea;
- Failing to properly complete the Plea of Guilty/Summary of Facts form; and
- Failing to inform Petitioner of the “direct consequences” of the plea.

(ECF No. 1:6-19; 25-28).

Second, Mr. Vue argues that the plea was constitutionally invalid based on the trial court’s failure to:

- Determine Petitioner’s competence,
- Admonish Petitioner regarding the “direct consequences” of the plea,
- Inquire whether the plea was being entered into voluntarily;
- Consider a declaration from Gayle Morrison regarding the fact that Mr. Vue was not born in the United States;
- Inform Petitioner that if convicted, he could be subject to removal from the United States based on his lack of citizenship;

- Determine a factual basis for the plea; and
- Explain to Mr. Vue that a *nolo contendere* plea was not legally different from a guilty plea.

(ECF No. 1:19-24).

Third, Mr. Vue alleges prosecutorial misconduct because the District Attorney had made a statement that the State would seek the death penalty in Mr. Vue's case without investigating exculpatory evidence. (ECF No. 1:28-31).

Finally, Mr. Vue alleges cumulative error based on: (1) trial counsel's ineffectiveness, (2) the trial court's errors in conducting the plea, and (3) prosecutorial misconduct. (ECF No. 1:25-31).

V. DISMISSAL OF THE PETITION AS UNTIMELY

The Court should dismiss the habeas petition as untimely, as it was filed over 17 years after the statute of limitations had expired.

A. 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). In the absence of allegations of facts implicating subsection (B), (C), or (D),⁶ 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).

Because Petitioner did not appeal from the May 5, 1998 plea, his conviction became final ten days later on May 15, 1998. *See Clark v. Oklahoma*, 468 F.3d 711, 713 (10th Cir. 2006). Thus, without tolling, Petitioner's statute of limitations expired

⁶ Mr. Vue argues that under *Buck v. Davis*, 137 S.Ct. 759 (2017), he has satisfied the criteria for "cause and prejudice" sufficient to bypass a procedural default on his claim that his attorney had failed to perfect his direct appeal. (ECF No. 1:5-6). According to Petitioner, *Buck* sets forth a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." (ECF No. 1:5-6) (internal quotation marks omitted). The language used by Petitioner is similar to that in 28 U.S.C. § 2244(d)(1)(C) which allows the limitations period to begin "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." But the undersigned does not interpret Mr. Vue's argument to invoke subsection (C), as he has failed to cite the statute or argue that *Buck* somehow relates to the statute of limitations issue.

on May 17, 1999.⁷ Petitioner filed the habeas petition on August 10, 2017, over 17 years after the limitations period had expired. (ECF No. 1:1). Thus, under § 2244(d)(1)(A) the petition would be considered untimely absent statutory or equitable tolling.

B. Statutory Tolling

The AEDPA limitations period is tolled while a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. *See* 28 U.S.C. § 2244(d)(2). In *Wall v. Kholi*, 131 S. Ct. 1278 (2011), the United States Supreme Court defined “collateral review” as “judicial review of a judgment in a proceeding that is not part of direct review.” *Wall v. Kholi*, 131 S. Ct. at 1281–82. On September 10, 1998, Mr. Vue filed a Motion for Judicial Review to modify his sentence. (ECF No. 1:2).⁸ On September 22, 1998, the District Court granted the Motion and modified Petitioner’s sentence. (ECF No. 1:2).⁹ Under *Wall*, The Court may assume that the State Petition is considered a type of “collateral review” subject to tolling under 28 U.S.C. § 2244(d)(2). *See Doby v. Dowling*, 632 F. App’x 485, 488

⁷ Because the one-year anniversary date fell on Saturday, May 15, 1999, he had until the following Monday, May 17, 1999, to file a habeas petition. *See* Fed. R. Civ. P. 6(a).

⁸ <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=cleveland&number=CF-1997-628&cmid=15101>

⁹ <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=cleveland&number=CF-1997-628&cmid=15101>

(10th Cir. 2015) (assuming § 982a motion tolls limitations period). Thus, Mr. Vue would be entitled to an additional 13 days of tolling, extending his habeas limitations period until May 31, 1999.¹⁰

As stated, a properly filed application for post-conviction relief can also toll the AEDPA's limitations period. *See* 28 U.S.C. § 2244(d)(2). Here, Mr. Vue filed an application for post-conviction relief on July 1, 2016. (ECF No. 1:2).¹¹ But Petitioner is not entitled to any period of tolling for the application because it was filed after the AEDPA limitations period had already expired. *See Fisher v. Gibson*, 262 F.3d 1135, 1142-43 (10th Cir. 2001); *Hubler v. Ortiz*, 190 F. App'x 727, 729 (10th Cir. 2006) ("[A] petition for post-conviction relief filed in state court after the limitations period has expired no longer serves to toll it."). Accordingly, unless equitable tolling is applicable, the instant petition would be untimely under 28 U.S.C. § 2244(d)(1)(A)-(D).

C. Equitable Tolling

The AEDPA limitations period may be equitably tolled in the event of "extraordinary circumstances," *i.e.*, "a constitutional violation [that] has resulted in the conviction of one who is actually innocent or incompetent," *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). Equitable tolling is appropriate, for instance, "when a

¹⁰ The thirteenth day fell on Sunday, May 30, 1999. Accordingly, Mr. Vue had until the following Monday, May 31, 1999, to file a habeas petition. *See* Fed.R.Civ.P. 6(a).

¹¹ <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=cleveland&number=CF-1997-628&cmid=15101>

prisoner is actually innocent” or “when an adversary’s conduct-or other uncontrollable circumstances-prevents a prisoner from timely filing, or when a prisoner actively pursues judicial remedies but files a defective pleading during the statutory period” but is not appropriate in circumstances amounting to “excusable neglect.” *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000). Moreover, a petitioner must diligently pursue his federal habeas claims. *Id.* The petitioner bears the burden to demonstrate the equitable tolling applies. *Miller v. Marr*, 141 F.3d at 978.

Petitioner has alleged four grounds for habeas relief: (1) ineffective assistance of counsel, (2) invalidity of the plea due to errors by the trial court, (3) prosecutorial misconduct, and (4) cumulative error. *See supra* p. 5. The only ground for which Mr. Vue argues he is entitled to equitable tolling is the ineffective assistance of counsel claim. *See* ECF No. 1:11, 33. As stated, Mr. Vue alleges his trial attorney was ineffective for: (1) failing to perfect his direct appeal, (2) coercing Petitioner to enter a plea, (3) failing to properly complete the Plea of Guilty/Summary of Facts form, and (4) failing to inform Petitioner of the “direct consequences” of the plea. (ECF No. 1:6-19; 25-28). Mr. Vue only argues that he is entitled to equitable tolling on the issue of whether his attorney had failed to file his direct appeal. The Court should reject Petitioner’s argument.

Mr. Vue asserts that following a discussion with his attorney on May 29, 1998, he believed: (1) the attorney would file a motion to withdraw the plea and (2) the appeal had been perfected. (ECF No. 1:9, 34). The record is clear, however, that Mr.

Vue's attorney never filed a motion to withdraw the plea.¹² According to Petitioner, he did not discover trial counsel's failure to perfect the direct appeal until the OCCA affirmed the denial of Petitioner's Application for Post-Conviction relief on December 14, 2016. (ECF No. 1:11, 33). Even assuming Petitioner's allegations to be true, the Court should conclude that the attorney's actions do not warrant equitable tolling.

In *Holland v. Florida*, 560 U.S. 631 (2010), the United States Supreme Court considered whether a habeas petitioner was entitled to equitable tolling because his court-appointed attorney had failed to timely file a habeas petition. The District Court rejected the argument for equitable tolling, noting that: (1) the attorney's conduct was, at worst, merely "negligent" and (2) the petitioner had not diligently pursued the matter. *Id.* at 643. The Eleventh Circuit Court of Appeals agreed, even assuming that the attorney's conduct had been *grossly* negligent. *Id.* at 644. The Supreme Court reversed, holding that the Eleventh Circuit's standard was "too rigid." *Id.* at 649. In doing so, the Court reiterated its holding that a "garden variety claim" of attorney negligence would not warrant equitable tolling, but the facts of the instant case plausibly presented "extraordinary circumstances" because the petitioner had presented evidence that he had written many letters to the attorney regarding the proper filing date, even identifying the applicable rules. *Id.* at 652. The attorney failed

¹² <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=cleveland&number=CF-1997-628&cmid=15101>

to respond to the petitioner or communicate with his client over a period of years, despite the petitioner's many requests. *Id.* Ultimately, the Court held that the District Court had wrongfully relied on a lack of diligence by the petitioner and the Eleventh Circuit had erroneously applied an "overly rigid *per se* approach." *Id.* at 653. Accordingly, the remanded to the District Court for further findings. *Id.* at 654.

Here, however, even assuming Mr. Vue's allegations to be true, the Court should conclude: (1) his attorney's conduct would not amount to the type of "extraordinary circumstance" warranting equitable tolling and (2) Mr. Vue had not diligently pursued the issue in state court.

In *Johnson v. Jones*, the Tenth Circuit Court of Appeals reached a similar conclusion. In *Johnson*, the habeas petitioner had been convicted in state court following the entry of a guilty plea. *Johnson v. Jones*, 502 F. App'x 807, 808 (10th Cir. 2012). The petitioner did not file a direct appeal, and filed a habeas petition in federal court over one-year following the finality of the conviction. *Id.* The State sought dismissal, arguing that the petition was untimely. *Id.* The district court agreed, rejected the petitioner's argument for equitable tolling, and dismissed the petition. *Id.*

The petitioner appealed, arguing that he was entitled to equitable tolling because his attorney had failed to file his direct appeal in state court. *Id.* at 809. For purposes of the limitations period, the conviction had become final 10 days following the guilty plea, because no direct appeal had been filed. *Id.* Mr. Johnson then filed the habeas petition more than one year after the conviction had become final, arguing that

he was entitled to equitable tolling because he had instructed his attorney to file a direct appeal, but the attorney had negligently failed to do so. *Id.*

The Tenth Circuit rejected the petitioner's argument, noting that outside of the one alleged conversation where Mr. Johnson had told his attorney to file a direct appeal, the petitioner did not claim that he ever followed up with the attorney or otherwise inquired into the status of the direct appeal. *Id.* at 810. Accordingly, the petitioner had no reason to believe that the attorney was diligently pursuing the appeal. *Id.* Ultimately, even assuming the allegations to be true, the Court concluded that the attorney's conduct was "closer to a garden variety claim of excusable neglect, rather than an extraordinary circumstance warranting equitable tolling." *Id.* (internal citations and quotation marks omitted).

In the instant case, the Court should conclude that even assuming Mr. Vue's allegations to be true, the circumstances present a "garden variety claim of excusable neglect" rather than "extraordinary circumstances" warranting equitable tolling. According to Petitioner, "it was [his] understanding [that] counsel would 'take care of it' . . . 'it' being [his] first appeal as of right after briefly conferring with [him] after the May 29, 1998 proceeding, [he] truly believed counsel would timely file [his] motion to withdraw his nolo contendere plea." (ECF No. 1:8-9). Mr. Vue states that his attorney "is available to testify as to why she failed to [file the direct appeal]," but Petitioner does not give any insight into the attorney's purported reasons. Mr. Vue states that

his counsel never contacted him again after the court modified his sentence, so he "concluded that his case was legally over." (ECF No. 1:11).

Mr. Vue has not presented any argument as to why his attorney failed to file his direct appeal. At most, he has alleged facts which would amount to nothing more than excusable neglect. Furthermore, even though Petitioner states that he had believed the appeal had been perfected,¹³ he obviously never received a ruling on the appeal because it had never been filed. Even so, Petitioner never pursued a ruling in state court on the supposed direct appeal or attempted to further contact his attorney. The lack of evidence regarding egregious conduct by the attorney and Petitioner's lack of diligence in pursuing the matter preclude equitable tolling.

Petitioner has neither proven that any "extraordinary circumstances" existed nor has he satisfied his burden to prove that he is actually innocent. Accordingly, the Court should conclude that Petitioner is not entitled to equitable tolling. With the 13 days of statutory tolling and in the absence of any equitable tolling, Mr. Vue's deadline for filing his habeas petition expired May 31, 1999. Because he waited until August 10, 2017 to file the petition, dismissal is appropriate.

VI. RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

Based upon the foregoing analysis, the Court should **DISMISS** the habeas petition as untimely. Adoption of this report would moot Petitioner's pending

¹³ (ECF No. 1:34).

Application (Motion) for Leave to Proceed *in forma pauperis* (**ECF No. 2**), Motion for Appointment Counsel (**ECF No. 3**) and Motion to Certify Question of Law to the Oklahoma Supreme Court (**ECF No. 4**).

The parties are advised of their right to file an objection to this Report and Recommendation with the Clerk of this Court by **September 11, 2017**, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The parties are 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).

VII. STATUS OF REFERRAL

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

ENTERED on August 24, 2017.

A handwritten signature in black ink, reading "Shon T. Erwin". The signature is fluid and cursive, with the first name "Shon" and last name "Erwin" clearly distinguishable.

SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

December 11, 2017

Elisabeth A. Shumaker
Clerk of Court

ONG VUE,

Petitioner - Appellant,

v.

JANET DOWLING, Warden, Dick Conner
Correctional Center,

Respondent - Appellee.

No. 17-6213
(D.C. No. 5:17-CV-00857-HE)
(W.D. Okla.)

ORDER

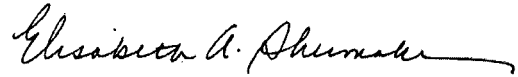
Before **KELLY, MURPHY**, and **MATHESON**, Circuit Judges.

This matter is before the court on the appellant's *Request in Petition for Rehearing and Request for En Banc Consideration; Request for Oral Argument*, his *Motion for Appointment of Appellate Counsel* with brief in support, and his motion for *Merits Adjudication of Appellant's Motions*.

Upon consideration, the request for appointment of appellate counsel is denied. We also deny as moot the request for merits adjudication of Mr. Vue's *Motion To Certify Questions of State Law* and his *Motion to Confer Standing as a Member of a Peculiar Suspect Class*. Both those motions were dismissed in the court's order denying a certificate of appealability.

Finally, the petition for rehearing is denied by the original panel members. The petition was also circulated to all the judges of the court who are in regular active service. As no judge on the original panel or the en banc court called for a poll, the request for en banc reconsideration is likewise denied.

Entered for the Court

A handwritten signature in black ink, appearing to read "Elisabeth A. Shumaker", with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER, Clerk

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