UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WARREN MONROE STEWART,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. CIV-16-837-HE**
	)	
CARL BEAR, Warden,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner Warren Monroe Stewart, a state prisoner appearing pro se, brings this action pursuant to 28 U.S.C. § 2254 seeking a writ of habeas corpus. Chief United States District Judge Joe Heaton has referred this matter to the undersigned Magistrate Judge for initial proceedings in accordance with 28 U.S.C. § 636. Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Section 2254 Rules"), the undersigned has examined the Petition (Doc. No. 1) and recommends dismissal.

BACKGROUND

In this action, Petitioner challenges his conviction upon guilty plea in the District Court of Caddo County, Oklahoma, on a felony charge of committing lewd or indecent acts on a child under twelve years of age. *See* Pet. at 1;[1] *State v. Stewart*, No. CF-2010-

[1] References to filings in this Court use the page numbers assigned by the Court's CM/ECF system.

140 (Caddo Cnty. Dist. Ct.).[2] On April 21, 2011, Petitioner was convicted and sentenced to a term of fifty years, with all but twenty years suspended. *See* Pet. at 1; *State v. Stewart*, No. CF-2010-140 (docket entries for Apr. 21, 2011).

Petitioner did not initially move to withdraw his plea or appeal, seek postconviction relief, or otherwise challenge his conviction or sentence. Pet. at 2-3; *State v. Stewart*, No. CF-2010-140 (docket entries from Apr. 21, 2011, to Jan. 3, 2014). Nearly three years later, on January 3, 2014, Petitioner filed an Application for Postconviction Relief in the state trial court. Pet. at 2, 16-21. The trial court initially failed to rule upon this Application, and on April 6, 2016, Petitioner submitted a Supplemental Application for Postconviction Relief, as well as some additional motions. Pet. at 3-4, 22-27, 28-35.

The trial court denied both Applications on April 15, 2016, and Petitioner appealed that disposition to the Oklahoma Court of Criminal Appeals ("OCCA"). Pet. at 2, 3-4, 36; *Stewart v. State*, No. PC-2016-347 (Okla. Crim. App.). The OCCA affirmed the denial of postconviction relief on June 16, 2016. *Stewart v. State*, No. PC-2016-347 (Order of June 16, 2016). Petitioner then filed the instant § 2254 Petition in this Court, along with supporting exhibits, on July 11, 2016. *See* Pet. at 15; *Fleming v. Evans*, 481 F.3d 1249, 1255 n.2 (10th Cir. 2007).

Liberally construed, Petitioner asserts that he is entitled to a hearing and to habeas relief because: (1) he received ineffective assistance from trial counsel; (2) the trial court lacked jurisdiction because the alleged crime took place on federal Indian land and

[2] The undersigned takes judicial notice of the dockets and selected filings for Petitioner's state-court proceedings, which are publicly available through http://www.oscn.net.

federal laws preempt state laws; (3) evidence exists that proves that changes in state parole law result in a violation of the federal Constitution's prohibition against ex post facto laws; (4) the trial court sentenced Petitioner under a repealed sentencing range; and (5) a transfer to a private prison and the prosecutor's failure to do his duty "void[ed Petitioner's] plea agreement." *See* Pet. at 6, 7-8, 9, 10-11, 18-21, 22-27.

ANALYSIS

A. Screening Requirement and Jurisdiction

The Court is required to review habeas petitions promptly and to dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Section 2254 R. 4. The Rule allows the district court to sua sponte dismiss a petition for writ of habeas corpus if its untimeliness is "clear from the face of the petition itself." *Kilgore v. Att'y Gen. of Colo.*, 519 F.3d 1084, 1089 (10th Cir. 2008); *accord Day v. McDonough*, 547 U.S. 198, 209 (2006) ("[D]istrict courts are permitted . . . to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition.").

B. The Applicable Limitations Period

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") sets forth a one-year statute of limitation for habeas petitioners challenging the validity of their conviction or sentence:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

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

The one-year limitations period generally runs from the date the judgment became "final" under § 2244(d)(1)(A), unless a petitioner alleges facts that implicate § 2244(d)(1)(B), (C), or (D). *See Preston v. Gibson*, 234 F.3d 1118, 1120 (10th Cir. 2000). Recognizing the ostensible tardiness of his Petition, Petitioner attempts to argue that the latter subsections are applicable by annotating the preprinted text of § 2244(d) that appears in his Petition form. *See* Pet. at 14-15. For the reasons outlined below, Petitioner's effort is unavailing, and his one-year limitations period should be assessed pursuant to § 2244(d)(1)(A).

First, regarding § 2244(d)(1)(B), Petitioner has circled "the impediment of" statutory language and written in "2016." Pet. at 15. Similarly to the remainder of his Petition, these vague, overly general allegations fail to reasonably apprise the Court of any actual and unconstitutional impediment that was "created by State action" and prevented Petitioner from timely filing his habeas suit. To the extent Petitioner is

attempting to rely upon impediments he encountered merely by virtue of his incarceration, such difficulties could possibly be relevant to whether Petitioner is entitled to equitable tolling (as discussed below), but Petitioner fails to plausibly allege that his incarcerated status "prevented" him from seeking habeas relief or explain how such an impediment was removed in "2016," as required for application of § 2244(d)(1)(B).

Next, regarding § 2244(d)(1)(C), Petitioner has underlined "initially recognized by" and appears to allude to either the Supreme Court's decision in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), or the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). *See* Pet. at 4, 5, 15, 22-23, 24-25.

Petitioner cites *DIRECTV* to support his argument that the state court lacked jurisdiction over his criminal case because: the alleged crime occurred on federal Indian land, and federal rules mandate that a court can "gain jurisdiction of a felony" only by a grand jury indictment and not by a written information (as was used to charge Petitioner here), and *DIRECTV* held that "*state* courts must comply with and enforce all federal rules, regulations, laws and the Constitution in *all* state courts." Pet. at 4, 22-23.[3] The

[3] Petitioner asserts that his claim that the trial court lacked jurisdiction over Petitioner's case is nonwaivable and "can be raised at any time." *See* Pet. at 4, 9, 22-23. "Absence of jurisdiction in the convicting court is indeed a basis for federal habeas corpus relief cognizable under the due process clause." *Yellowbear v. Wyo. Att'y Gen.*, 525 F.3d 921, 924 (10th Cir. 2008). However, the Tenth Circuit has held in unpublished opinions that similar due process claims were subject to dismissal for untimeliness on habeas review. *See, e.g.*, *Morales v. Jones*, 417 F. App'x 746, 749 (10th Cir. 2011); *United States v. Patrick*, 264 F. App'x 693, 694-95 (10th Cir. 2008). And in *Hall v. Falk*, the Tenth Circuit denied a certificate of appealability when the district court dismissed as unauthorized and second-or-successive a habeas petition alleging that the state trial court had lacked subject-matter jurisdiction to enter the underlying criminal conviction because

Supreme Court in *DIRECTV* did state, in the course of explaining that state courts are required to follow the Supreme Court's interpretation of the Federal Arbitration Act, "[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *DIRECTV*, 136 S. Ct. at 468 (internal quotation marks omitted). But Petitioner himself recognizes that this supremacy principle "has always been the 'law-of-the-land.'" Pet. at 22 (citing cases). And there is nothing in the remainder of the *DIRECTV* decision recognizing a relevant constitutional right now asserted by Petitioner or making any such right "retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C).

Petitioner cites *Kingsley* for the proposition that the trial court lacked jurisdiction to accept his guilty plea "*until* it *first* determined the 'legally-requisite-state-of-mind' of the Defendant *at* the time of the al[leg]ed criminal act, *from* the Defendant's p[er]spective, *and* whether Defendant[']s interpretation *of* the physical act is subjective, *or* objective." Pet. at 24. *Kingsley*, however, is a decision addressing the standard to be used for an excessive-force civil rights claim brought by a pretrial detainee under 42 U.S.C. § 1983—i.e., whether a pretrial detainee must show that the state official's use of force was objectively unreasonable or that the official was subjectively aware that his or her use of force was unreasonable. *See Kingsley*, 135 S. Ct. at 2470-77. In adopting the objective standard, the Supreme Court addressed requirements for proof of civil liability

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the petitioner had not been indicted by a grand jury. *See Hall*, 535 F. App'x 762, 762-63 (10th Cir. 2013).

and did not purport to reach the requisite state-of-mind requirements for any type of federal or state criminal liability—much less establish a new right or determine what is required for a state court to accept a criminal defendant's guilty plea on a state-law charge. *See id.* Petitioner's citations to *DIRECTV* and *Kingsley* therefore fail to show that § 2244(d)(1)(C) applies in this habeas proceeding.

Finally, Petitioner underlines "factual predicate" in § 2244(d)(1)(D) and writes: "3-29-16 New St.App.Ct. Ruling." Pet. at 15; *see also* Pet. at 6 (referencing "[n]ewly discovered evidence"). This date does not appear to reference any court ruling in Petitioner's own state-court proceedings, and the undersigned discerns no further explanation of this unclear notation in the pleading. In any event, Petitioner offers no support for the proposition that the issuance of a court's order or opinion would provide a new *factual* (rather than *legal*) predicate for any of his habeas claims. *See* 28 U.S.C. § 2244(d)(1)(D); Pet. at 14-15.

Therefore, because Petitioner fails to allege facts that plausibly implicate § 2244(d)(1)(B), (C), or (D), the undersigned considers the timeliness of the Petition under § 2244(d)(1)(A).

C. Section 2244(d)(1)(A)

The date of the judgment and sentence in the conviction under attack was April 21, 2011. *See State v. Stewart*, No. CF-2010-14 (docket entries for Apr. 21, 2011). Oklahoma law provides a specific course of procedure for the appeal of a conviction based upon a guilty plea. *See Clayton v. Jones*, 700 F.3d 435, 441 (10th Cir. 2012). "First, . . . the defendant must file an application in the trial court to withdraw his plea

within ten days of the judgment and sentence, with a request for an evidentiary hearing." *Id.* (citing Okla. Stat. tit. 22, ch. 18 app., R. 4.2(A)). "If the trial court denies the motion to withdraw, the defendant may then appeal by way of a petition for writ of certiorari" to the OCCA. *Id.* (citing Okla. Stat. tit. 22, § 1051(a); *id.* ch. 18 app., R. 4.2(D)). If, however, the defendant fails to file an application to withdraw his or her guilty plea within the ten-day period, the defendant's conviction is considered final upon the conclusion of that period. *See Clark v. Oklahoma*, 468 F.3d 711, 713 (10th Cir. 2006).

Petitioner did not seek to withdraw his plea or otherwise challenge his conviction within ten days. *See* Pet. at 2, 36; *State v. Stewart*, No. CF-2010-140. As a result, Petitioner's conviction became final on May 2, 2011.[4] *See Clark*, 468 F.3d at 713. Assuming the limitation period under § 2244(d)(1)(A) began to run the next day, Petitioner had until May 3, 2012, to file a federal habeas action. *See* 28 U.S.C. § 2244(d)(1)(A); *Harris v. Dinwiddie*, 642 F.3d 902, 906 n.6 (10th Cir. 2011) (citing *United States v. Hurst*, 322 F.3d 1256, 1261 (10th Cir. 2003)). Because Petitioner did not file his Petition until more than four years later, on July 11, 2016, this habeas action—absent tolling or an exception—is untimely under 28 U.S.C. § 2244(d)(1)(A).

i. Statutory Tolling

For petitions brought under 28 U.S.C. § 2254, the § 2244(d)(1) one-year limitations period is tolled while "a properly filed application for State post-conviction or

[4] The final day of the ten-day period was May 1, 2011, a Sunday. In accordance with state procedural rules, Petitioner's deadline to file an application to withdraw his guilty plea was extended to Monday, May 2, 2011. *See* Okla. Stat. tit. 12, § 2006(A)(1); *id.* tit. 22, ch. 18 app., R. 1.5.

other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); *Clark*, 468 F.3d at 714 (explaining that "properly filed" means "filed within the one year allowed by AEDPA"). Here, Petitioner's state-court postconviction attempts were not filed until January 2014 and April 2016, as described above, and so were filed long after Petitioner's one-year deadline expired on May 3, 2012. Petitioner's applications for postconviction relief therefore did not statutorily toll his AEDPA limitations period. *See* 28 U.S.C. § 2244(d)(2); *Clark*, 468 F.3d at 714.

ii. Equitable Tolling

The AEDPA filing deadline may be equitably tolled in "extraordinary circumstances." *Clark*, 468 F.3d at 714 (internal quotation marks omitted). To be entitled to equitable tolling, Petitioner must "show both extraordinary circumstances preventing timeliness and diligent pursuit of his claim." *See id.*; *accord Holland v. Florida*, 560 U.S. 631, 649 (2010); *see also Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000). Circumstances appropriate for equitable tolling include "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." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000).

Petitioner presents no extraordinary circumstance that prevented his timely pursuit of federal habeas corpus relief. He argues that he has lacked proper access to the prison's law library and mailing system, and was unaware of the legal basis for some of his claims until recently, but a lack of knowledge of the law, incarcerated status, or a lack of legal assistance generally are insufficient to warrant equitable tolling. *See Marsh*, 223 F.3d at

1220; *Johnson v. Jones*, 502 F. App'x 807, 810 (10th Cir. 2012). Petitioner argues that his state trial counsel failed to properly advise Petitioner with respect to his plea and to seeking an appeal, but Petitioner has set forth no facts connecting his state trial counsel to his federal habeas efforts and has offered "no explanation" "for the lengthy time period that elapsed between the date his state conviction became final" (May 2, 2011) "and the date he attempted to pursue any type of post-conviction relief" (January 3, 2014). *Brown v. Poppel*, 98 F. App'x 785, 788 (10th Cir. 2004). Further, although Petitioner conclusorily asserts that he "has been diligent, and did all he could to be within the timelines," his own submissions and the relevant dockets reflect a lack of *any* pursuit of federal or state judicial remedies until well after his statutory deadline expired. *See* Pet. at 2-4, 14-15; *State v. Stewart*, No. CF-2010-140; *Stewart v. State*, No. PC-2016-347.

The lack of "extraordinary circumstances preventing timeliness" and lack of "diligent pursuit" of Petitioner's federal claims are clear on the face of the Petition. Petitioner has not shown that he is entitled to equitable tolling. *See Clark*, 468 F.3d at 714; *Brown*, 98 F. App'x at 788.

iii. 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 procedural and limitations-based bars—including 28 U.S.C. § 2244(d)(1)—established for the purpose of preventing a miscarriage of justice. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928, 1931-32 (2013). Successful actual innocence claims are rare due to the demanding evidentiary requirements for such claims. *See id.* at 1928,

1931, 1936; *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*, 547 U.S. at 536-37 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *accord McQuiggin*, 133 S. Ct. at 1935 (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, Petitioner's pleading contains naked references to "actual innocence," but his factual allegations concern his trial counsel's effectiveness (including failures regarding a possible legal defense of "emotional disturbance" and suppression of unfavorable evidence), the trial court's jurisdiction, the applicable sentencing range, "parole law," and whether post-plea events "void[ed] his plea agreement." *See* Pet. at 4-5, 6, 7-8, 9, 18-21, 22-27. Petitioner does not allege facts that would support the proposition that he is factually innocent of the felony crime for which he was convicted. Petitioner's claimed improprieties in his conviction and sentence do not amount to a contention that he is actually (rather than legally) innocent of the crimes for which he is currently incarcerated. *See Schlup*, 513 U.S. at 327-29; Pet. at 4-5, 6, 7-8, 9, 18-21, 22-27. Petitioner's claims, even liberally construed, do not invoke the actual innocence equitable exception and do not permit continued consideration of his Petition by this Court. *See McQuiggin*, 133 S. Ct. at 1928; *Bousley*, 523 U.S. at 623.

D. Summary

Petitioner's statute of limitations to file this habeas action expired on May 3, 2012, and he is not entitled to statutory or equitable tolling or to an exception based upon actual innocence. Because Petitioner did not file his Petition until July 11, 2016, the Court should dismiss the Petition as untimely under 28 U.S.C. § 2244(d)(1)(A).

RECOMMENDATION

For the foregoing reasons, it is recommended that the Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2254 (Doc. No. 1) be dismissed as untimely.

NOTICE OF RIGHT TO OBJECT

Petitioner is advised of his right to file an objection to the Report and Recommendation with the Clerk of this Court by November 21, 2016, in accordance with 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72. Petitioner is further advised that failure to timely object to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the present case. The Clerk of Court is directed to serve copies of the Petition and this Report and Recommendation on Respondent and on the Attorney General of the State of Oklahoma through electronic mail sent to fhc.docket@oag.state.ok.us.

ENTERED this 31st day of October, 2016.

Charles B. Goodwin

CHARLES B. GOODWIN
UNITED STATES MAGISTRATE JUDGE