# Akre v. Allbaugh et al

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DANIEL ROBERT AKRE, ) Petitioner, ) v. ) Case No. CIV-16-665-R JOE M. ALLBAUGH, ) Respondent. )

REPORT AND RECOMMENDATION Petitioner, an individual serving five suspended sentences, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Petition was originally filed in the United States District Court for the Eastern District of Oklahoma on June 8, 2016 (the date on which Petitioner placed the Petition in the prison mailing system) [Doc. No. 1]. The case was transferred to this Court on June 16, 2016 [Doc. No. 4]. The matter has been referred by United States District Judge David L. Russell for proposed findings and recommendations consistent with 28 U.S.C. § 636(b)(1)(B) and (C).

Pending before the [Doc. No. 13] and Brief in Support [Doc. No. 14] to which Petitioner filed a response [Doc. No. 15]. Petitioner also filed a Motion for Injunctive Relief and Declaratory Judgment [Doc. No. 12]. ef and Declaratory Judgment [Doc. No. 16] to which Petitioner filed a response [Doc. No. 17]. It is recommended that the Petition be dismissed with prejudice and Motion for Injunctive Relief and Declaratory Judgment be denied.

I. Factual Background

The State of Oklahoma (State) charged Petitioner with four counts of lewd molestation and one count of indecent proposal stemming from alleged conduct with an eight-to-eleven year old victim between 2003 and 2006. See 1

at 2, 5. 2

On February 1, 2008, Petitioner entered into an Alford Plea on all five charges. Id. at 5. Petitioner was sentenced to twenty years in prison on each count, to be served concurrently, with all but the first ten years suspended. 3

Id. at Ex. 5. Petitioner first challenged his conviction in an Application for Post-Conviction Relief with the trial court on June 6, 2014. Id. at Ex. 8, at 17. application on February 24, 2016. Id. at Ex. 9. Petitioner filed a Petition in Error on March 24, Id. at Exs. 10, 11. The Oklahoma Court of Criminal Id. at Ex. 12. II.

filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and a brief in support [Doc. Nos. 1, 2]. Petitioner brought nine grounds for relief (Grounds). Ground One contends Petitioner hearing, -7, despite a history of psychological trauma and treatment between 1986 and

2007. Opening Br. Supp. Pet. 5. Further, according to Petitioner, the trial court erred in its standard of review on this issue when adjudicating his application for post-conviction relief. Id. at 4. 1 The Court takes judicial notice of state court records 2 Page references to court filings are to the CM/ECF page number. 3 Because the initial sentence erroneously reflected five counts of lewd molestation, the sentence was later amended in order to reflect that Petitioner was sentenced to four counts of lewd molestation. Id. at Ex. 6.

Ground Two essentially amounts to four distinct constitutional claims due process, double jeopardy, ex post facto, and bill of attainder and all revolve around the application of the Oklahoma Sex Offender Registration Act (OSORA). With regard to his due process claim, Petitioner contends he was not advised that he was sentenced to a total of 120 years and must register as a sex offender for life pursuant to OSORA. Opening Br. Supp. Pet. 5-6. 4

Petitioner asserts he did not have knowledge of the OSORA provisions at the time his plea was accepted and he first knew about OSORA when he was subjected to signing Special Supervision Conditions for Sex Offenders just minutes before being sentenced. Id. at 6. The double- jeopardy aspect of his claim contends that the OSORA provisions amount to double punishment. Id. The ex-post-facto claim argues that the OSORA provisions improperly apply to Petitioner retroactively from the date of his conviction rather than the date of his criminal offense. Id. at 6- 7. He also claims he is unaware of which OSORA provisions actually apply to him, but Id. at 7. The bill-of-attainder claim alleges that Petitioner was not granted a separate trial to determine whether OSORA-related aggravating factors apply to his case or whether a separate and distinct punishment could be added to his sentence after his plea and sentencing. Id. at 7-8.

Ground Three asserts counsel was ineffective by: (a) not demanding a competency hearing; 5

(b) not informing Petitioner of OSORA, its provisions, or his true range of

4 Petitioner also contends he was not informed of other provisions of OSORA law, [] that his freedom of religion would be violated by requiring specific written permission

all of which he asserts are more restrictive than probation or parole. Opening Br. Supp. Pet. 6.

5 In his brief, Petitioner clarifies that his counsel raised the competency issue at sentencing, but did not object when the district court proceeded without a hearing. Opening Br. Supp. Pet. 8.

punishment (the duty to register for life); (c) not instructing Petitioner of the 85% Rule; (d) not

coerced, incriminating statements; (f) failing to demand or object to the withholding

of a tape recorded interview; (g) failing to ensure that Petitioner was not subjected to multiple

and (i) failing to raise the issues on direct appeal. Pet. 9; Opening Br. Supp. Pet. 8-10.

Ground Four alleges Petitioner was not informed of the 85% Rule by his attorney, the State, or the district court in violation of his right to due process. 6

Pet. 11. Ground Five alleges Petitioner was not properly warned of his Miranda rights and was coerced into signing a waiver of his Miranda rights against his will. Id. at 12. Ground Six contends counsel failed to suppress involuntary statements and the district court failed to investigate coercive police tactics that were used to gain involuntary statements. Id. at 13-14. In the Seventh Ground, Petitioner asserts he objected to the withholding of exculpatory evidence, but his counsel did not object to the lack of production or otherwise demand the interview. Id. at 15.

Ground Eight asserts Petitioner was originally charged with two crimes, but a new prosecutor added three additional counts despite no new circumstances warranting them. Id. at 16-17. Further, Petitioner asserted he was originally sentenced to a sixth count for which he was not charged. 7

Id. Finally, Petitioner contends the alleged crimes occurred over a four-year Id. Ground

6 contends he did not Br. 12. 7 -15.

Nine alleges the State used evidence of other crimes in violation of James v. State, 152 P.3d 255 (Okla. Crim. App. 2007). Pet. 19. According to Petitioner, his attorney objected or raised issues related to the other-crimes evidence at the preliminary hearing, but failed to do so on appeal. See Opening Br. Supp. Pet. 13-14.

Petitioner also filed a motion for injunctive relief and declaratory judgment [Doc. No. 12] asking the Court to prohibit the State from enforcing a policy of the Oklahoma Department of Corrections (DOC) because it violates his rights under the Fifth Amendment to the United States Constitution. Specifically, Petitioner contends his probation officer required Petitioner to answer incriminating questions and, pursuant to DOC policy authorities there be evidence of other crimes. Id. at 2. Petitioner asks the Court to order the State to not

require Petitioner to answer questions which are incriminating or which he believes to be a possible link in the chain of evidence to future criminal proceedings, those which would be a disadvantage to him in the instant case, and those which are prejudicial. Id. at 5. Finally, the motion asks counsel to be appointed on his behalf. Id. at 7. III. Analysis

A. Timeliness of the Petition 8

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year statute of limitations for Section 2254 habeas petitions brought by state prisoners. See 28 U.S.C. §

(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;

8 With the exception of Ground Two, Respondent argues all avenues for relief are untimely. The reasons for the dismissal of Ground Two and the denial of the motion for injunctive relief are discussed infra.

(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 could have been discovered through the exercise of due diligence. Id. Unless a petitioner alleges facts implicating the provisions set forth in § 2244(d)(1)(B), (C) or (D), the limitations period generally begins to run from the date on which the conviction became final. See Preston v. Gibson, 234 F.3d 1118, 1120 (10th Cir. 2000). Petitioner entered an Alford Plea on February 1, 2008. 9

judgment and sentence were announced on March 26, 2008. Id. at Ex. 5. Under Oklahoma law,

in order to appeal from any conviction on a plea of guilty or nolo contendere, a defendant must file an application to withdraw the plea within ten days of the pronouncement of the judgment and sentence. See Rule 4.2(A), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18; see also Gordon v. Franklin Oklahom -day deadline to Alford Pleas). Petitioner had ten days to file an appeal or until

April 7, 2008 10

otherwise his conviction is considered final. See Clark v. Oklahoma, 468 F.3d w his guilty

9 An Alford P United States v. Buonocore, 416 F.3d 1124, 1128 n. 2 (10th Cir.2005); see also North Carolina v. Alford, 400 U.S. 25 (1970). 10 April 5, 2008 was a Saturday.

Because Petitioner did not file an appeal within such time period, his conviction became final on April 7, 2008.

Pursuant to § 2244(d)(1)(A), Pe -year limitations period commenced on April 8, 2008, and he had until

April 8, 2009 to file his federal habeas petition. See United States v. Hurst, 322 F.3d 1256, 1261 (10th Cir. 2003) (adopting anniversary method for calculating deadline under AEDPA). This action is considered to be filed June 8, 2016 11

over seven years after the expiration of the deadline established by Subsection A. Therefore, absent a later start date of the limitations period pursuant to Subsections B, C, or D, any tolling events, or the application of the actual-innocence exception, the Petition is untimely filed.

Petitioner is not entitled to a later filing deadline pursuant to Subsections B, C, or D. Subsection B does not apply because Petitioner has not identified any unconstitutional state action which impeded his ability to file his Petition. Petitioner asserts Subsection C applies due to the Oklahoma Supreme Court Starkey v. Okla. Dept. of Corrections, 305 P.3d 1004 (Okla. 2013). However, Subsection C is inapplicable because Starkey is a state-court decision applying state law. See Preston, 234 F.3d at 1120 (holding 28 U.S.C. § 2244(d)(1)(C) did not apply when the petitioner relied on decisions by a state court applying state law); Blevins v. Farris, No. 16-CV-436-GKF-PJC, 2017 WL 1037142, at *5 (N.D. Okla. Mar. 17, 2017) (holding Starkey cannot trigger a new one-year limitations period because it was decided by the Oklahoma Supreme Court).

11 Because Petitioner placed the Petition in the prison mailing system on June 8, 2016, it is the filing date for timeliness purposes. Rule 3(d), Rules Governing Section 2254 Cases in the United States District Courts.

Petitioner has not identified any newly discovered evidence which would trigger a later filing deadline under Subsection D. Specifically, the Oklahoma Supreme Court decision in Starkey 12

does not constitute a factual predicate. Blevins, 2017 WL 1037142, at *6; see also Lo v. Endicott, 506 F.3d 572, 576 (7th Cir. 2007) e do not find that a state court decision new one-year limitations period E.J.R.E. v. United States, 453 F.3d 1094, 1098 (8th Cir.

2006) decision taken from a federal court of appeals does not provide an independent basis to trigger the one-year statute of limitations provided under § 2255. Shannon v. Newland, 410 F.3d 1083, 1088 (9th Cir. 2005) If a change in (or clarification of) state law, by a state court, in a case in which Shannon was n factual would be meaningless. a later start to the one-year limitations period pursuant to Subsections B, C, or D is inapplicable in this matter.

1. Statutory Tolling Petitioner does not demonstrate that grounds for statutory tolling exist. See 28 U.S.C. § 2244(d)(2) (providing for tolling if during the one-year limitations period a petitioner properly files an application for post- attempt at post-conviction relief occurred on June 6, 2014, after the expiration of the one-year

period under § r. Ex. 8, at 17. Because Petitioner made his post- conviction application after the filing

deadline passed, the statute of limitations was not tolled pursuant to 28 U.S.C. § 2244(d)(2). See Clark, 468 F.3d at 714 - conviction relief filed within the one year allowed by AEDPA will toll the statute of

12 Petitioner asserts that Starkey allows him additional time to file his habeas petition under an Supp. Pet. 5 [Doc. No. 2].

2. Equitable Tolling The limitations period set forth in § 2254(d) is subject to equitable tolling. Holland v. Florida his rights diligently, and (2) that some extraordinary circumstance stood in his way and

Id. (internal quotations and citation omitted). In the Tenth Circuit, Al-Yousif v. Trani, 779 F.3d 1173, 1179 (10th Cir. 2015), cert. denied, 136 S. Ct. 199 (2015) (internal quotation omitted) concerning issues contained in a letter sent to him from an attorney dated November 25, 2013. 13

Opening Br. Supp. Pet. 5.

ions fail to demonstrate that he has been diligent in pursuing his rights. Courts consider how frequently the petitioner alleges he took action to advance his case in light of an asserted extraordinary circumstance. A four-year wait to take action the amount of time between the expiration of his limitations period and the November 2013 letter does not amount to diligence. See Diaz v. Milyard, 314 F. App x 146, 148 (10th Cir. 2009) (unpublished) (finding the petitioner failed to show due diligence because he had not filed a request for court records and transcripts until . . . four years after the one-year limitation of legal assistance or access to legal materials are generally insufficient grounds upon which to

grant equitable tolling. See Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000); see also Johnson v. Jones Petitioner does not present evidence

13 The letter provides an analysis of how the Starkey case. Opening Br. Supp. Pet. 16. Further, the letter discusses the ramifications of not being advised of the 85% rule, addresses the consequences of withdrawing a plea of guilty, and the difficulty of succeeding on an application for post-conviction relief. Id.

that he did anything to pursue his rights other than solicit an opinion from one attorney. Thus, he cannot rely on equitable tolling to save his Petition. 14

3. Actual-Innocence Exception

overcome the statute of limitations bar. McQuiggin v. Perkins, -- U.S. --, 133 S.Ct. 1924, 1928 (2013). 15

w that it is more Id at 1935. In this matter, Petitioner asserts that this exception applies to all Grounds except

Ground Two. 16

-innocence gateway pleas McQuiggin, 133 S.Ct. at 1928. The petitioner must support his claim of constitutional -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- Schlup v. Delo 14

The Okla Starkey does not affect this analysis. As a state court decision modifying substantive law, Starkey does not constitute an extraordinary circumstance sufficient to equitably toll the statute of limitations. See Lo, 506 F.3d at 576 o succeed on this . . . argument would usurp the congressionally mandated limits on habeas petitions 15 To the extent that Petitioner asserts a standalone claim of actual innocence, the viability of such a claim for purposes of habeas review is an issue that has not been resolved by the Supreme Court of the United States. McQuiggin, 133 S. Ct. at 1931. Because Petitioner ties his actual innocence claim to his constitutional claims, the Court need not consider whether a standalone claim exists. 16 Grounds 1, 3, 5, 6, 7, 8, and 9. Pet. 4-19. Petitioner Id. at 4-15. The fundamental-miscarriage-of-justice exception applies when the petitioner makes a credible showing of actual innocence. McQuiggin v. Perkins, -- U.S. --, 133 S.Ct. 1924, 1932 (2013). Therefore, the Court construes the Petition as seeking an actual-innocence exception as to all Grounds except for Ground Two.

evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable Id. at 329. An appellate court interpreted the decision in Schlup to create a three-stage (1) new evidence (2) that is reliable and (3) so probative of innocence that no reasonable juror would have convicted the petitioner. Sistrunk v. Rozum, 674 F.3d 181, 191 (3d Cir. 2012) (citing Schlup, 513 U.S. at 324; House v.

Bell, 547 U.S. 518, 536 537 (2006)). The petitioner, according to the court in Sistrunk, must establish all three factors in order to show actual innocence. Id. Petitioner cannot establish the first prong.

Although it is less-than-clear from the face of the pleadings, it appears Petitioner asserts the actual innocence exception to his involuntary confession which he contends was given under improper circumstances and a withheld tape-recorded interview between himself and a detective. Pet. 12-13, 15; Opening Br. Supp. Pet. 9. When a defendant knows about evidence at the time of trial, it is not considered to be new for purposes of establishing actual innocence. See Johnson v. Medina x 880, 885 (10th Cir. 2013) (unpublished) (evidence petitioner was aware of at the time of trial does not constitute new evidence); Price v. Friel x 855, 856-57 (10th Cir. 2007) (unpublished) ( psychological report not new evidence when petitioner knew of its existence before trial).

Petitioner asserts he asked his counsel to make a direct appeal regarding the withheld interview. Pet. 15. Therefore neither the involuntary confession nor the withheld interview constitutes new evidence

because he was aware of them before his Alford Plea. It follows, then, that the actual-

innocenc -barred as to all claims except Ground Two. 17

B. Two

Ground Two take issue with the application of OSORA. Section McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 811 (10th Cir. 1997). OSORA

for sex offenders are not part of the conviction or sentence, but instead are collateral consequences thereof. Therefore, the Court is without jurisdiction to determine the Ground Two claims on the merits. 18

A petitioner asserting relief under Section 2254 may only do so if in custody pursuant to the judgment of a State court [and] only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States (emphasis added).

to be considered in custody. Kirby v. Janecka (unpublished). A petitioner meets the status requirement if he raises his claim while in custody.

Id. at 783. In order to meet the substance requirement, the claim must assert a right to be released from custody on federal law grounds. Id. If a petitioner brings multiple claims, some claims may be justiciable while others are not. See id. (finding that one of the 17

so probative of innocence that no reasonable Petitioner asserts the withheld The introduction of incriminating statements is not probative of innocence.

18 Peti did not see the Special Supervision Conditions for Sex Offenders until he signed them a few minutes before his sentence. To the extent Petitioner takes issue with the terms and conditions of his probation, as opposed to the provisions of OSORA, those claims fail because they were not timely made, as addressed supra.

did not satisfy the substance requirement); see also Virsnieks v. Smith, 521 F.3d 707 (7th Cir. 2008) (finding the petitioner was not in custody with regard to one of his claims). The custodial requirement is jurisdictional. See Mays v. Dinwiddie, 580 F.3d 1136, 1139 (10th Cir. 2009).

By virtue of having been incarcerated at the time he filed his petition, Petitioner satisfies the status requirement. 19

For purposes his Ground Two claims, however, Petitioner does not satisfy the substance requirement. [T]he collateral consequences of a conviction, those consequences with negligible

effects on a petitioner's physical liberty of movement, are insufficient to satisfy the custody requirement Calhoun v. Attorney Gen. of Colo., 745 F.3d 1070, 1073 (10th Cir. 2014) (quoting Virsnieks, 521 F.3d at 718). Specifically, the requirement to register under state sex-offender registration statutes, including OSORA, does not satisfy the See Dickey v. Allbaugh, 664 Fed. 690, 693-94 (10th Cir. 2016) (unpublished) petition for cert. filed; see also Calhoun, 745 F.3d at 1074 (reaching same conclusion analyzing Colorado sex-offender-registration law). The court in Dickey found that although OSORA is more restrictive than the Colorado sex-offender-registration law, 20

it also did main[ed] free to live, work, travel,

Dickey, 664 Fed.

19 Petitioner has since been released from incarceration and is now serving a suspended sentence. Serving a suspended sentence satisfies the in-custody requirement. Powell v. Arapahoe Cty. Dist. Court x 571, 572 n. 1 (unpublished) (10th Cir. 2015). Further, the in-custody requirement is determined from the time of filing. See Mays v. Dinwiddie, 580 F.3d 1136, 1139 (10th Cir. 2 . 20 The court in Dickey specifically addressed that the petitioner was prohibited from working with children or on school premises, living within a 2,000-foot radius of a school, or living in a dwelling with another sex offender. Dickey, 2016 WL 6211801, at * 1.

at 693. Therefore, the court in Dickey recognized that conditions are collateral consequences of a conviction and not a continuation of punishment. Id. at 694.

Because OSORA on Petitioner are merely collateral consequences to his conviction, he is not considered to be in custody with regard to such claims. As such, the Court does not have jurisdiction to review these claims in this action brought under 28 U.S.C. § 2254.

C. Motion for Injunctive Relief

Petitioner filed a motion for injunctive relief and declaratory judgment [Doc. No. 12]. The motion requests that Petitioner be prohibited from responding to questions which would incriminate him. Mot. for Injunctive Relief [Doc. No. 12], 1-2. Petitioner contends that his probation officer has required him to answer incriminating questions in violation of the Fifth Amendment of the Constitution. Id. at 2. 21

A party seeking a preliminary injunction must ask for intermediate relief of the same character as that which may be granted at the conclusion of the underlying case. See De Beers Consol. Mines v. United States, 325 U.S. 212, 220 (1945). Further, serted in the

Little v. Jones, 607 F.3d 1245, 1251 (10th Cir. 2010); see also Dopp v. Jones, No. CIV-12-0703-HE, 2013 WL 672928, at *1 (W.D. Okla. Feb. 25, 2013) (utilizing the reasoning in Little to deny a requested

injunction in a habeas action).

confinement, which is what he necessarily sought by filing his Section 2254 habeas action. See

Palma-Salazar v. Davis, 677 F.3d 1031, 1035 (10th Cir. 2012) prisoner who challenges the fact or duration of his confinement and seeks immediate release or a shortened period of

21 Petitioner also contends, however, that he has refused to answer any incriminating questions. Id. at 3.

confinement, must do so through an application for habeas corpus s relief from the requirement that he respond to questions posed by his probation officer. Because the motion seeks relief separate from the relief sought in the Petition, the motion should be denied.

RECOMMENDATION It is recommended that 3] should be should be dismissed with prejudice. Grounds 1, 3, 4, 5, 6, 7, 8, and 9 are time-barred, and the Court is without jurisdiction to entertain Ground 2.

Pro Se Motion for Injunctive Relief and Declaratory Judgment [Doc. No. 12] be denied because the motion seeks relief of a different character than the relief sought in the Petition.

NOTICE OF RIGHT TO OBJECT The parties are advised of their right to object to this Report and Recommendation. See 28 U.S.C. § 636. Any objection must be filed with the Clerk of the District Court by April 21, 2017. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Failure to make timely objection to this Report and Recommendation waives the right to appellate review of the factual and legal issues addressed herein. Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

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

ENTERED this 31 th

day of March, 2017.