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

STACEY D. BERRY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 19-CV-0706-GKF-FHM
	)	
JEORLD BRAGGS, JR., WARDEN,	)	
	)	
Respondent.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AS TIME-BARRED BY THE STATUTE OF LIMITATIONS

Comes now the Respondent and in support of his Motion to Dismiss Petition for Writ of Habeas Corpus as Time Barred, files the following brief in support. For the reasons stated herein, Respondent respectfully asks this Court to dismiss the instant Petition pursuant to 28 U.S.C. § 2244(d)(1).

ARGUMENT AND AUTHORITY

Stacey D. Berry, hereinafter referred to as Petitioner, has failed to file his petition within the one-year statute of limitations contained within the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d)(1), and therefore his petition is barred. The following dates are relevant to the disposition of this Motion:

> **November 16, 2015:** Petitioner pled guilty to four counts of Child Sexual Abuse (Counts 1-4) and one count of Sexual Battery (Count 5), in Craig County District Court Case No. CF-2014-36 (Exhibit 1, Docket Sheet, Craig County Case No. CF-2014-36, at 12; Exhibit 2, Order on Post-Conviction Relief, at 4).
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> **January 11, 2016:** Petitioner was sentenced to twenty (20) years each on Counts 1 and 2 to run concurrently plus a $250 fine, and twenty (20) years each on Counts 3 and 4, and a $250 fine, to run concurrently with each other but consecutively to Counts 1 and 2.

Petitioner was sentenced to five (5) years on Count 5, plus a $250 fine, consecutive to the other counts (Exhibit 1, at 13-15; Exhibit 2, at 2).

January 21, 2016: This was the last day of the ten (10) day period during which Petitioner could have moved to withdraw his plea and file a direct appeal. Because no direct appeal could be taken after this date, Petitioner's conviction became final. *See* Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2004). The AEDPA limitations period began to run the following day, January 22, 2016.

August 19, 2016: Petitioner filed a motion for judicial review of sentence (Exhibit 1, at 15). The District Court held on March 6, 2017, that it was without jurisdiction to hear the motion absent agreement by the State (Exhibit 1, at 18; Exhibit 2, at 2).

January 22, 2017: Petitioner's one year to file his federal habeas corpus petition expired, absent statutory tolling.

October 2, 2017: Following a remand from the Oklahoma Court of Criminal Appeals, which granted extraordinary relief in Case No. MA-2017-503, the District Court held a hearing on Petitioner's motion for judicial review and denied sentence modification (Exhibit 1, at 21-22; Exhibit 2, at 2; Exhibit 3, Order Granting Extraordinary Relief and Remanding Matter to District Court for Further Proceedings).

December 27, 2017: Petitioner filed an Application for Post-Conviction Relief (Exhibit 1, at 22; Exhibit 2, at 2).

April 10, 2018: The District Court entered an Order on Post-Conviction Relief (Exhibit 1, at 24; Exhibit 2, at 1). Petitioner's first attempted appeal of this order was declined by the Oklahoma Court of Criminal Appeals on June 29, 2018 (Exhibit 4, Order Declining Jurisdiction, Case No. PC-2018-618). As explained more fully below, Petitioner is entitled to statutory tolling only for the thirty (30) days in which he could have properly perfected his post-conviction appeal.

June 15, 2018: Petitioner filed an Application for Post-Conviction Relief Out of Time, seeking to appeal the denial of post-conviction relief out of time. Pursuant to the recommendation of the District

> Court, the Oklahoma Court of Criminal Appeals granted Petitioner's post-conviction appeal out of time on August 1, 2018 (Exhibit 5, Order Granting Post-Conviction Appeal Out of Time, PC-2018-756).
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> **January 30, 2019:** The Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief (Exhibit 6, Order Affirming Denial of Application for Post-Conviction Relief, Case No. PC-2018-863).
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> **March 5, 2019:** Petitioner's one year to file his federal habeas corpus petition expired, with all possible statutory tolling considered.
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> **December 24, 2019:** The instant petition for writ of habeas corpus was filed. Because Petitioner was represented by counsel, the prisoner mailbox rule is not applicable to this case.

The AEDPA granted Petitioner one year to file a petition for a writ of habeas corpus. 28 U.S.C. § 2244(d)(1). Pursuant to 28 U.S.C. § 2244(d)(1)(A) and *Harris v. Dinwiddie*, 642 F.3d 902, 906 n.6 (10th Cir. 2011), that year started to run on January 22, 2016, the day after Petitioner's judgment and sentence became final, and would have expired on January 22, 2017. The tolling statute, 28 U.S.C. § 2244(d)(2) provides: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." Only a state petition filed within the one year allowed by the AEDPA can toll the statute of limitations. *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."); *Burger v. Scott*, 317 F.3d 1133, 1136-1137 (10th Cir. 2003) (finding that where the petitioner had until February 17, 2000, to file his federal habeas petition and his post-conviction application was not filed until May 12, 2000, the petitioner was not entitled to statutory tolling).

In this case, Petitioner filed a motion for judicial review under Okla. Stat. tit. 22, § 982a (2011) which was pending from August 19, 2016 to October 2, 2017. It is debatable whether this motion for judicial review constitutes "other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2). In *Nicholson v. Higgins*, No. 05-7032, 147 Fed. Appx. 7 (10th Cir. Aug. 2, 2005)[1] (unpublished), the Tenth Circuit Court of Appeals held motions for sentence modification, pursuant to Section 982a, do not toll the AEDPA statute of limitations. The *Nicholson* Court reasoned that motions for judicial review "seek discretionary review, their denial is not appealable, and they therefore do not constitute post-conviction proceedings for purposes of tolling the AEDPA limitations period." *Nicholson*, 147 Fed. Appx. at 8 n.2. *See also Bohon v. Oklahoma*, No. 07-5169, 313 Fed. Appx. 82, 84 n.1 (10th Cir. Apr. 3, 2008)[2] (unpublished) (same, motions for sentence modification under Section 982a do not toll the limitations period as relief under that section is discretionary and a denial of relief is not appealable). However, Respondent acknowledges the United States Supreme Court's opinion in the case of *Wall v. Kholi*, 562 U.S. 545, 547 (2011), in which the Court held that a motion to reduce sentence under Rhode Island's Rule 35 was a form of collateral review within the meaning of 28 U.S.C. § 2244(d)(1)(A).

Assuming *arguendo* that the request for judicial review constitutes "collateral review" within the meaning of § 2244(d)(2),[3] the motion was pending for 409 days. The motion was originally filed

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[1] Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[2] Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[3] In light of the decision of the Oklahoma Court of Criminal Appeals in Case No. MA-2017-503, holding that Petitioner was entitled to judicial review, and was not required to obtain the permission (continued...)

on August 19, 2016. At that point, there were 156 days remaining in Petitioner's statutory year. When the motion was denied on October 2, 2017, Petitioner's new due date under the AEDPA was 156 days later, or March 7, 2018. After the passage of eighty-six (86) more days, Petitioner filed his first application for post-conviction relief on December 27, 2017. The District Court denied relief 104 days later on April 10, 2018; however, Petitioner initially failed to perfect his appeal to the Oklahoma Court of Criminal Appeals and it was dismissed (Exhibit 4). May 10, 2018, was the last day of the thirty day period during which Petitioner could have perfected his appeal. After that, Petitioner had nothing pending in state court for the next thirty-six (36) days. *See Gibson v. Klinger*, 232 F.3d 799, 806-807 (10th Cir. 2000) (reasoning that after Gibson's thirty days to appeal expired, the limitations period was not tolled until he filed his second application for leave to appeal out of time in the state district court). Then, Petitioner began seeking a post-conviction appeal out of time on June 15, 2018, which was ultimately granted (Exhibit 5). The post-conviction appeal was resolved when the OCCA affirmed the denial of post-conviction relief on January 30, 2019 (Exhibit 6). Thus, Petitioner's post-conviction appeal was pending for another 229 days.

All told, Petitioner may be entitled to statutory tolling for the 409 days his motion for judicial review was pending, the 134 days his post-conviction application was pending in the District Court (which includes the time in which he could have initially perfected his appeal from the denial of post-conviction relief), and the 229 days his post-conviction appeal was pending from the time that Petitioner sought post-conviction relief out of time until the Oklahoma Court of Criminal Appeals finally denied his post-conviction appeal. This amounts to 772 days of statutory tolling. Therefore,

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[3](...continued)
of the District Attorney to file the motion given his blind plea, Respondent acknowledges that the motion was "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2) (Exhibit 3).

with all statutory tolling considered, Petitioner's habeas corpus petition was due to be filed on March 5, 2019, or 772 days after Petitioner's statutory year expired on January 22, 2017.

Under Question No. 18 on the habeas corpus form, Petitioner avers, "Oklahoma Court of Criminal Appeals decision handed down on the [sic] January 30, 2019. This Petition for Habeas Corpus is timely filed consistent with AEDPA 28 U.S.C. § 2244(1)(A)." Thus, Petitioner has not made any claim for equitable tolling because he believes his petition is timely. The Tenth Circuit Court of Appeals has held that equitable tolling is appropriate only "when an inmate diligently pursues his claims *and* demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control." *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (emphasis added). "'[A]n inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence.'" *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (quoting *Brown v. Barrow*, 512 F.3d 1304, 1307 (11th Cir. 2008)). Given the fact that nearly a year passed between the time the Oklahoma Court of Criminal Appeals denied Petitioner's post-conviction appeal and the filing of this habeas petition, Petitioner is at a loss to show that he diligently pursued his claims and that the failure to timely file was caused by extraordinary circumstances beyond his control. *Marsh*, 223 F.3d at 1220.

Likewise, Petitioner has not made any claim, under Question No. 18, that a different starting date pursuant to 28 U.S.C. § 2244(d)(1)(B-D) governs his federal habeas corpus petition. Section 2244(d) of Title 22 of the United States Code provides:

> (1) A 1-year period of limitations 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;
>
> (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 reasonable diligence.

28 U.S.C. § 2244(d)(1).

Although Petitioner does not directly argue that § 2244(d)(1)(B), (C), or (D) are applicable, Petitioner does suggest within his petition that the jurisdictional claim raised in his first ground of error cannot be time-barred. However, other Oklahoma federal courts have applied the AEDPA to bar similar petitions. For instance, in *Martin v. Bear*, No. CIV-18-134-JHP-KEW, 2019 WL 1437603 (E.D. Okla. Mar. 29, 2019)[4] (unpublished), the United States District Court for the Eastern District of Oklahoma reasoned:

> Respondent points out that Petitioner raised a claim concerning the facts that he is an Indian and that his crime occurred in Indian Country in the pleading filed on June 2, 2017, more than two months before the Tenth Circuit's initial decision in *Murphy* [*v. Royal*, 866 F.3d 1164 (10th Cir. 2017)].[5] Respondent further argues that Petitioner's repeated reliance in state court on the February 18, 1992,

[4] Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[5] That case was later renamed *Sharp v. Murphy* to reflect the current Interim Warden of the Oklahoma State Penitentiary, Tommy Sharp.

> *Cravatt* decision alters the analysis for the statute of limitations. Therefore, Petitioner's claim concerning Indian Country was available to him when the *Cravatt* decision was issued, and this habeas claim could have been discovered more than 27 years ago. Therefore, the Indian Country claim also is time barred.

Martin, 2019 WL 1437603, *4.

The United States District Court for the Western District of Oklahoma reached a similar conclusion in *Hayes v. Bear*, No. CIV-18-391-D, 2018 WL 2943459 (W.D. Okla. Jun. 12, 2018)[6] (unpublished). The Court found that although Petitioner attempted to raise an Indian Country claim, "[n]one of Petitioner's claims are based on newly-discovered facts." *Hayes*, 2018 WL 2943459, *2. The Court went on to explain:

> Petitioner identifies the date of discovery as August 8, 2017, which is the date that the court of appeals issued its initial decision *Murphy v. Royal*, 866 F.3d 1164, 1189-90 (10th Cir.), *modified on denial of reh'g en banc*, 875 F.3d 896 (10th Cir. 2017), *cert. granted,* No. 17-1107, 2018 WL 74674 (May 21, 2018). *Murphy* provides the legal, not factual, predicate of one of Petitioner's claims. New legal developments are covered by subsection 2244(d)(1)(C), which does not apply here. *See* R&R at 6.

Hayes, 2018 WL 2943459, *2 n.2. Therefore, under *Martin* and *Hayes*, Petitioner's jurisdictional claim concerning Indian Country is subject to the same procedural bars as any other type of claim. Just like the petitioners in those cases, Petitioner has been aware of the factual predicate of his claim, that he and his victims are members of the Cherokee Nation, all along. Moreover, like the petitioner in *Martin*, Petitioner also relies on case law which is decades old. *See, e.g.,* Doc. 1, at 15 (citing *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) and *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962)).

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[6] Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Petitioner also appears to vaguely allege that he did not learn of the DHS materials at the heart of his second ground of error until July of 2017. Arguably, Petitioner could be making out a claim for a later starting date pursuant to § 2244(d)(1)(C) ("the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence"). However, as Petitioner concedes, his mother was aware of the material as early as May 18, 2017 (Doc. 1, at 18). In its Order on Post-Conviction Relief, the District Court explained why any such claim must fail:

> The DHS report (attached to the Application for Post-Conviction Relief) shows that the Defendant/Petitioner participated in the investigation and certainly was aware back in 2010, that the report had been generated and that no wrongdoing had been found and no action was taken. The Defendant/Petitioner certainly knew of any impeachment evidence in the form of previous denials by his daughters prior to charges even being filed in this case.
>
> It was actually 3 years later in 2013, when the Defendant/Petitioner confessed to sexual abuse of his offspring. The Defendant's wife, Sandra Berry, contacted the Craig County Sheriff's Office on May 8, 2013 to report the abuse that resulted in the charges herein. The charges were not filed until April 11, 2014, over 2 months after the DHS report was given to Defense counsel. The existence of some impeachment evidence in light of the overwhelming evidence of guilt resulted in a calculated decision to take a chance with the Court rather than the jury. There is no question that the 2010 DHS report was turned over to the Defense nearly two years before the pleas by the Defendant, and the Defendant would have personally known of the evidentiary contents of the report regardless of its being turned over.
>
> The Defendant received a new opportunity to argue his Motion for Sentence Modification in July, 2017, the same month he claims to have first found out about the 2010 DHS report. It is revealing that he did not attempt to withdraw his pleas of Guilty and No Contest nor seek an appeal out of time but proceeded to urge his sentence modification and *elected* to stand on his pleas. The Defendant/Petitioner was given a hearing on his Motion for Sentence Modification in October, 2017. Apparently the Defendant didn't

> believe his plea to have been involuntary because of the DHS report until after Judge Wyatt declined to modify his sentence.

(Exhibit 2, at 3-4) (emphasis in the original).

Importantly, § 2244(d)(1)(C) is not concerned with the date a defendant personally learned of the factual predicate for the claim but rather "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence[.]" As Petitioner participated in the investigation at issue, and would have been personally aware that the DHS took no action regarding his children in 2010, he surely must have known that no wrongdoing was found by the DHS at that time. Moreover, Petitioner concedes that both his attorney and his mother knew of the reports prior to July 2017. These reports were not hidden from the defense; they were known to the defense all along and could have been discovered through the exercise of reasonable diligence. *Compare Law v. Jones*, No. 11-5040, 433 Fed. Appx. 651, 652 (10th Cir. Aug. 5, 2011)[7] (unpublished) (finding that the petitioner was not sufficiently diligent in pursuing his claim to merit equitable tolling where he discovered that his attorney lied about filing a post-conviction application in 2008 and yet the petitioner did not file one himself until nearly two years later). As Petitioner has failed to explain why the DHS reports could not have been discovered earlier through the exercise of reasonable diligence, the DHS reports do not provide a later starting date under the AEDPA.

Finally, Petitioner's habeas corpus petition stops short of alleging his actual innocence. At most, Petitioner alleges that some DHS reports of a 2010 investigation could have been used as impeachment for crimes which he committed years later. The Tenth Circuit Court of Appeals has

[7] Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

held, "A claim of actual innocence may toll the statute of limitations." *Larson v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007). However, for the reasons set forth below, Petitioner's claim does not amount to a "colorable" showing of actual, factual innocence. *Demarest v. Price*, 130 F.3d 922, 941-942 (10th Cir. 1997). The *Demarest* Court explained this "very narrow exception":

> The petitioner must supplement his habeas claim with a colorable showing of factual innocence. Such a showing does not in itself entitle the petitioner to relief but instead serves as a "gateway" that then entitles the petitioner to consideration of the merits of his claims. In this context, factual innocence means that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."

Demarest, 130 F.3d at 941-42.

Actual innocence, if proved, serves as a gateway through which a habeas petitioner may pass to gain federal court review of constitutional claims that are otherwise barred by the statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). However, as the Supreme Court has made clear, the threshold for showing actual innocence is "extraordinarily high." *Herrera v. Collins*, 506 U.S. 390, 392 (1993); *see also Frost v. Pryor*, 749 F.3d 1212, 1232 (10th Cir. 2014) (the standard to establish actual innocence is "demanding and permits review only in the extraordinary case"). Likewise, in *Schlup v. Delo*, 513 U.S. 298 (1995), the United States Supreme Court held that "[t]o be credible [a claim of actual innocence requires] new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup*, 513 U.S. at 324. "Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Id.* *See House v. Bell*, 547 U.S. 518, 538 (2006) (reasoning, "[t]he *Schlup* standard is demanding and permits review only in the 'extraordinary case'"); *Lopez v. Trani*, 628 F.3d 1228, 1230-1231 (10th Cir. 2010) (reasoning the

"actual innocence exception [to § 2244 equitable tolling] is rare and will 'only be applied in the extraordinary case'").

In this case, Petitioner pled guilty to committing the crimes at issue after confessing the crimes to his wife, who contacted the Sheriff's Office (Exhibit 2, at 1) ("The Defendant, his wife . . . and their daughters had a family meeting on May 20, 2013, lasting into May 21, 2013, during which Defendant confessed his sexual abuse of his daughter JNB. The Defendant/Petitioner's wife reported this to the Craig County Sheriff's office on May 28, 2013."). Under these facts and circumstances, Petitioner would have a difficult time attempting to make a claim of actual innocence. As the United States District Court for the Eastern District of Oklahoma recently reasoned in *Resinger v. Bolt*, No. CIV-19-161-JHP-KEW, 2020 WL 618822 (E.D. Okla. Feb. 10, 2020)[8] (unpublished):

> [S]elf-serving assertions of innocence do not constitute credible, reliable evidence sufficient to show actual innocence. *See Pfeil v. Everett*, 9 F. App'x. 973, 979 (10th Cir. 2001) ("two self-serving assertions of innocence" are "insufficient to make a colorable showing of innocence"). Petitioner's claim of actual innocence is further undermined by his guilty pleas and his admission that he shot one victim and aided and abetted the shooting of the other. *See Johnson v. Medina*, 547 F. App'x. 880, 885 (10th Cir. 2013) ("While [the petitioner] claims that his guilty plea was involuntary and coerced, the state courts rejected that argument, and his plea of guilty simply undermines his claim that another individual committed the crime to which he pled guilty.").

Resinger, 2020 WL 618822, at *2.

Likewise, the fact that Petitioner has presented evidence which he alleges could have been used for impeachment does not meet the demanding standard to show actual innocence. *See Frost*,

[8] Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

749 F.3d at 1232 ("Simply maintaining one's innocence, or even casting some doubt on witness credibility, does not necessarily satisfy this standard."); *Stafford v. Saffle*, 34 F.3d 1557, 1562 (10th Cir. 1994) (reasoning that the new evidence was "only impeachment evidence, rather than evidence of actual innocence").

Thus, although Petitioner appears to be entitled to 772 days of statutory tolling, he was still required to file his habeas corpus petition no later than March 5, 2019. Petitioner actually filed his habeas petition on December 24, 2019, over nine months past his deadline under the AEDPA, even with all statutory tolling considered. Moreover, because Petitioner was represented by counsel when he filed his habeas petition, he is not entitled to the inmate "mailbox rule" and thus, December 24, 2019 represents the actual date his petition was filed.[9] Therefore, Petitioner's habeas corpus petition must be dismissed as it is time-barred.

CONCLUSION

Petitioner has failed to file the instant habeas petition within the one-year period of limitations pursuant to 28 U.S.C. § 2244(d)(1). For the foregoing reasons Respondent respectfully asks this Court to dismiss the instant Petition for Writ of Habeas Corpus.

[9] *Compare Garcia v. Shanks*, 351 F.3d 468, 471 (10th Cir. 2003) ("Under the federal mailbox rule, a *pro se* prisoner's cause of action is considered filed when the prisoner delivers the pleading to prison officials for mailing.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of March, 2020, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Wesley E. Johnson
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624 S. Denver Ave.
Tulsa, OK 74119-1075

s/ THEODORE M. PEEPER