

Appendix A

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

DAVID PAUL WORTHINGTON,

Petitioner,

v.

RICK WHITTEN,

Respondent.

Case No. 19-CV-0369-GKF-FHM

ORDER

Petitioner David Paul Worthington, a state inmate appearing *pro se*,¹ commenced this action on July 8, 2019, by filing a 28 U.S.C. § 2254 petition for writ of habeas corpus (Dkt. 1) and a motion to proceed *in forma pauperis* (Dkt. 2). For the reasons that follow, the Court denies Petitioner's motion to proceed *in forma pauperis* and directs Petitioner to show cause why his petition should not be dismissed for lack of jurisdiction or, in the alternative, as time-barred.

A. Motion to proceed *in forma pauperis* shall be denied.

Based on Petitioner's representations in his motion, the Court finds Petitioner is able to pay the requisite filing fee. *See* Dkt. 2, at 1-2. For that reason, the Court denies his motion. Within 30 days of the entry of this order, Petitioner shall either pay the \$5 filing fee or show cause in writing for his failure to do so. *See* 28 U.S.C. § 1914(a); LCvR 3.5(b).

¹ Because Petitioner appears *pro se*, the Court liberally construes his pleadings. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*).

In August 1978, the State moved to revoke Petitioner's suspended sentence, the trial court granted the State's motion, and Petitioner did not appeal from the revocation of his suspended sentence. *Id.* at 18.

Nearly 40 years later, on February 16, 2018, Petitioner filed an application for post-conviction relief in state district court, challenging his conviction in Tulsa County District Court Case No. CF-1977-2704. Dkt. 1, at 3. He asserted one proposition of error: "The [trial court] was without jurisdiction to impose sentence because Petitioner is 'Indian' and the crime happened in 'Indian Country.'" *Id.* The state district court denied relief on June 8, 2018, and Petitioner filed a post-conviction appeal. *Id.* at 7. In an unpublished order filed February 1, 2019, in Case No. PC-2018-734, the Oklahoma Court of Criminal Appeals (OCCA) affirmed the denial of Petitioner's application for post-conviction relief. *Id.* at 7, 17-20.

Petitioner filed the instant federal habeas petition on July 1, 2019.² He seeks federal habeas relief on one ground: "The State Court was without jurisdiction to impose sentence on [Petitioner] because he is a[n] 'Indian' and the crime happened in 'Indian Country.'" Dkt. 1, at 5. In support of this claim, Petitioner alleges he is a registered member of the Cherokee Nation and he committed his crime of conviction "inside the Boundaries of the Creek Nation." *Id.* He alleges the OCCA's ruling denying his application for post-

² The Clerk of Court received the habeas petition on July 8, 2019. Dkt. 1, at 1. However, Petitioner states, under penalty of perjury that he placed the petition in the prison mailing system on July 1, 2019. *Id.* at 16. Applying the prison mailbox rule, the Court deems the petition filed on July 1, 2019. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (holding pro se prisoner pleadings are "filed" when delivered to prison authorities for forwarding to court clerk).

pursuant to [the] challenged conviction when the petition is filed.” *Garey v. Ulibarri*, 332 F. App’x 445, 446 (10th Cir. 2009) (unpublished)³ (citing *Erlandson v. Northglenn Mun. Court*, 528 F.3d 785, 788 (10th Cir. 2008)).

Here, Petitioner challenges the judgment and sentence entered against him in Tulsa County District Court Case No. CF-1977-2704 and acknowledges that he is no longer serving the sentence in that case. Ordinarily, once a state prisoner has discharged his sentence, he is no longer in custody for purposes of challenging his judgment and sentence through a federal habeas petition. *See Maleng v. Cook*, 490 U.S. 488, 492 (1989) (holding that a habeas petitioner does not “remain[] ‘in custody’ under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted”). This is true even when “the possibility of a sentence upon a subsequent conviction being enhanced because of a prior conviction actually materialize[s]” because “[w]hen the second sentence is imposed, it is pursuant to the second conviction that the petitioner is incarcerated and is therefore ‘in custody.’” *Id.* at 492-93.

Nevertheless, “in very limited circumstances, the ‘in custody’ requirement may be satisfied where a petitioner challenges a ‘conviction [that] was used to enhance the sentence he is now serving.’” *Neiberger v. Rudek*, 450 F. App’x 719, 724 (10th Cir. 2011) (unpublished) (alteration in original) (quoting *Anderson-Bey v. Zavaras*, 641 F.3d 445, 453

³ The Court cites this unpublished decision, and other unpublished decisions herein, as persuasive authority. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

Based on the foregoing, the Court finds that Petitioner has not shown that he is “in-custody” as to the challenged judgment and sentence. As a result, the habeas petition is subject to being dismissed without prejudice for lack of jurisdiction.⁴

3. The petition is subject to being dismissed as time-barred.

Even assuming Petitioner can demonstrate that this Court has jurisdiction over his habeas petition, the petition is subject to being dismissed as time-barred. As previously stated, Petitioner’s sole habeas claim alleges that the trial court lacked jurisdiction over his criminal prosecution, in Tulsa County District Court Case No. CF-1977-2704, because Petitioner is an Indian and committed his crime of conviction in Indian Country. Dkt. 1, at 5-6.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), state prisoners have one year from the latest of the following four dates to file a federal habeas petition:

(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;

⁴ Petitioner also asserts that he brings his petition “under Coram Nobis and the All Writs Act 28 U.S.C. § 1651 and title 28 U.S.C. § 1361.” Dkt. 1, at 1. These additional citations do not assist Petitioner in establishing jurisdiction. First, federal courts “have no power to examine a state-court judgment under the writ of coram nobis.” *Rawlins v. Kansas*, 714 F.3d 1189, 1191 (10th Cir. 2013). And, as the Tenth Circuit Court of Appeals explained in *Rawlins*, “[t]his outcome is required by the All Writs Act.” *Id.* at 1196. Second, 28 U.S.C. § 1361 provides federal district courts with jurisdiction “of any action in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to the plaintiff.” But § 1361 does not provide federal courts with jurisdiction to compel state officials to do anything, much less to “dismiss” a conviction arising from a state criminal prosecution.

of date judgment and sentence is pronounced). Thus, Petitioner's conviction became final on May 22, 1978, when the time to seek direct review expired. 28 U.S.C. § 2244(d)(1)(A).

Because Petitioner's conviction was final before Congress enacted the AEDPA, Petitioner had until April 24, 1997, to file a timely federal habeas petition challenging his 1978 conviction. *Gibson v. Klinger*, 232 F.3d 799, 803 (10th Cir. 2000) (noting that for state prisoners with convictions that became final before the AEDPA's enactment, the one-year limitation period did not begin to run until the AEDPA's effective date, April 24, 1996); *Hoggro v. Boone*, 150 F.3d 1223, 1225-26 (10th Cir. 1998) (recognizing judicially created grace period). Petitioner filed the instant habeas petition on July 1, 2019, more than 20 years after his one-year limitation period expired. And his first application for state post-conviction relief, filed February 16, 2018, had no tolling effect because it too was filed more than 20 years after his one-year limitation period expired. *See* 28 U.S.C. § 2244(d)(2); *Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2014) ("Only state petitions for post-conviction relief filed within the one year allowed by AEDPA will toll the statute of limitations"). The petition is clearly untimely under § 2244(d)(1)(A).

b. No later commencement date appears to apply.

Further, it does not appear any later commencement date would apply. First, under § 2244(d)(1)(B), Petitioner must show that (1) the State's unconstitutional action (2) prevented him from filing a federal habeas petition. Even assuming as true Petitioner's allegation that the State unlawfully prosecuted him without jurisdiction, nothing in the petition suggests that unconstitutional state action, in and of itself, prevented Petitioner from filing a federal habeas petition before April 24, 1997. Instead, it appears Petitioner

Supreme Court has not issued a final decision. *See Parris v. Whitten*, No. 18-CV-0443-TCK-FHM, 2019 WL 2928754, at *2 n.3 (N.D. Okla. July 8, 2019) (unpublished) (noting that the Supreme Court heard oral argument in *Carpenter v. Murphy*, No. 17-1107, on November 17, 2018, and, on June 27, 2019, the Supreme Court restored the case to its calendar for reargument).³ Thus, to the extent Petitioner relies on *Murphy* to support the timeliness of his petition under § 2244(d)(1)(C), that reliance is misplaced.

Third, to the extent Petitioner may rely on *Murphy* to seek application of § 2244(d)(1)(D), that provision also does not apply. Petitioner claims he is an Indian and that he committed the crime underlying his 1978 conviction in Indian Country. Dkt. 1, at 5-6. Presumably, Petitioner knew the factual predicate for his jurisdictional claim—namely, his status as member of the Cherokee Nation and the physical location where he committed his crime—when he entered his guilty plea in February 1978, even if he did not understand the legal significance of those facts until he read the 2017 *Murphy* decision. Under these circumstances, § 2244(d)(1)(D) is inapplicable. *See Preston v. Gibson*, 234 F.3d 1118, 1120 (10th Cir. 2000) (declining to apply § 2244(d)(1)(D) when state prisoner filed his petition within a year of two state-court decisions he believed supported his claim; reasoning that petitioner was aware of the factual basis of his claim “years before he filed his” petition and nothing in either state-court decision “alerted [him] to any factual basis for his claim”); *Dopp v. Martin*, No. 18-CV-0152-CVE-FHM, 2018 WL 2750228, at *2 (N.D. Okla. 2018) (unpublished) (declining to apply § 2244(d)(1)(D) when record demonstrated petitioner knew relevant facts underlying his claim at time of his trial but did not grasp legal significance of those facts until *Murphy* decision was issued).

his plea proceeding, in and of itself, constitutes an extraordinary circumstance that prevented him from filing a habeas petition on or before April 24, 1997. Nor does he identify any other extraordinary circumstances that prevented him from filing a timely federal habeas petition. For these reasons, the Court finds nothing in the present record that would warrant equitable tolling.

The Supreme Court has also held that “a credible showing of actual innocence,” operates as a “gateway through which a petitioner may pass” to excuse his failure to comply with the AEDPA’s statute of limitations and permit review of untimely habeas claims. *McQuiggin v. Perkins*, 569 U.S. 383, 386, 392 (2013). Nevertheless, the Supreme Court cautioned, “tenable actual-innocence gateway pleas are rare: ‘[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.’” *Id.* at 386 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). Petitioner does not suggest, in any part of his petition, that he is actually innocent of the crime he pleaded guilty to in 1978. Dkt. 1, generally. Rather he asserts his conviction is “void” on jurisdictional grounds. Thus, he cannot rely on *Perkins* to excuse his untimely petition.

4. Opportunity to respond

For the foregoing reasons, the Court finds that the habeas petition is subject to being dismissed because (1) Petitioner cannot satisfy the “in-custody” requirement as to the challenged judgment and sentence and (2) even if he could, the petition is time-barred. However, before dismissing the petition, the Court will provide Petitioner 30 days to file a

Appendix B

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

Inmate Copy
6S-23T

David Paul Worthington,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent,

Case Number: PC-2018-1275

TCC Number(s): CF-1986-53

MANDATE

To the Honorable Judge of the District Court in and for the County of WASHINGTON,
State of Oklahoma, Greetings:

Whereas, the Court of Criminal Appeals of the State of Oklahoma has rendered its
decision in the above styled and numbered case on the 26th day of March, 2019, resolving
the appeal from the District Court in Case Number CF-1986-53.

AFFIRMED

Now, therefore, you are hereby commanded to cause such Decision to be filed and
spread of record in your court and to issue such process (see 22 O.S. 2001, §§ 978 & 979,
and 22 O.S. 2004 §980) and to take such other action as may be required by said Order (see
22 O.S. 2001 §§ 1066 and 1072). You shall then make due and prompt return to this court
showing ultimate disposition of the above case.

Witness, the Honorable David B. Lewis, Presiding Judge of the Court of Criminal
Appeals of the State of Oklahoma, State Capitol Building, Oklahoma City, this 26th day of
March, 2019 .

JOHN D. HADDEN
Clerk

(seal)

By: Glenda Burris
Deputy



ORIGINAL

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 26 2019

JOHN D. HADDEN
CLERK

DAVID PAUL WORTHINGTON,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

No. PC-2018-1275

ORDER AFFIRMING DENIAL OF
APPLICATION FOR POST-CONVICTION RELIEF

The Petitioner has appealed to this Court from an order of the District Court of Washington County denying his application for post-conviction relief in District Court Case No. CRF-1986-53. The record reflects Petitioner was found guilty by a jury in this case and convicted of three counts of Kidnapping (Counts I-III), First Degree Rape (Count IV), and Assault with a Dangerous Weapon (Count VI), all after conviction of two or more felonies. He was sentenced to seventy years imprisonment for each count. The sentences were ordered to be served consecutively. This Court affirmed Petitioner's Judgment and Sentence. *Worthington v. State*, F-1995-87 (September 29, 1995) (Not

For Publication).

Petitioner has failed to establish entitlement to any relief in this post-conviction proceeding. *Russell v. Cherokee County District Court*, 1968 OK CR 45, ¶ 5, 438 P.2d 293, 294 (it is fundamental that where a post-conviction appeal is filed, the burden is upon the petitioner to sustain the allegations of his petition). Post-conviction review provides petitioners with very limited grounds upon which to base a collateral attack on their judgments and sentences. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. All issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review. *Id.*; 22 O.S.2011, § 1086. Petitioner has not established any sufficient reason why his current grounds for relief were not previously raised. *Id.*

Petitioner tries to claim that his crime was committed in portions of Oklahoma located in Indian Country, prohibiting Oklahoma courts from exercising jurisdiction over his crime in Case No. CRF-1986-53. However, the prosecution of Petitioner's crime in that case was a justiciable matter, and thus he has not established that the District Court lacked jurisdiction. Okla. Const. Art. VII, § 7

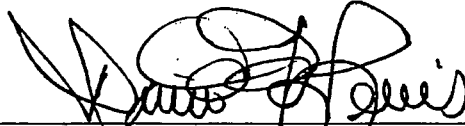
(District Courts shall have unlimited original jurisdiction of all justiciable matters in Oklahoma). The issues raised in Petitioner's application are addressed in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017) and as a result are currently pending before the United States Supreme Court. *Murphy* is stayed pending the United States Supreme Court's final disposition of the petition for writ of certiorari. *Murphy v. Royal*, Nos. 07-7068 & 15-7041 (10th Cir. November 16, 2017). The United States Supreme Court has granted the petition for writ of certiorari. *Royal v. Murphy*, __ U.S. __, __ S.Ct. __, 2018 WL 747674 (Mem) (May 21, 2018). Therefore, *Murphy* is not a final decision and Petitioner has cited no other authority that refutes the jurisdictional provisions of the Oklahoma Constitution.

Therefore, the order of the District Court of Washington County denying Petitioner's application for post-conviction relief in Case No. CRF-1986-53 should be, and is hereby, **AFFIRMED**. Pursuant to Rule 3.15, *Rules, supra*, the MANDATE is ORDERED issued forthwith upon the filing of this decision with the Clerk of this Court.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

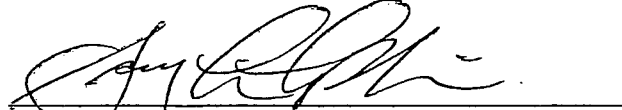
26th day of March, 2019.




DAVID B. LEWIS, Presiding Judge

NOT PARTICIPATING

DANA KUEHN, Vice Presiding Judge



GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden
Clerk
PA/F

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 10 2019

JOHN D. HADDEN
CLERK

DAVID PAUL WORTHINGTON,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

No. PC-2019-222

ORDER AFFIRMING DENIAL OF
APPLICATION FOR POST-CONVICTION RELIEF

The Petitioner has appealed to this Court from an order of the District Court of Washington County denying his application for post-conviction relief in District Court Case No. CRF-1986-52. The record reflects Petitioner was found guilty by a jury in this case and convicted of Kidnapping (Count I), First Degree Rape (Count II), and First Degree Robbery (Count III), all after conviction of two or more felonies. He was sentenced to forty years imprisonment for Count I, seventy years imprisonment for Count II, and twenty years imprisonment for Count III. The sentences were ordered to be served consecutively. This Court affirmed Petitioner's Judgment and Sentence. *Worthington v. State*, F-

1994-511 (September 29, 1995) (Not For Publication).

Petitioner has failed to establish entitlement to any relief in this post-conviction proceeding. *Russell v. Cherokee County District Court*, 1968 OK CR 45, ¶ 5, 438 P.2d 293, 294 (it is fundamental that where a post-conviction appeal is filed, the burden is upon the petitioner to sustain the allegations of his petition). Post-conviction review provides petitioners with very limited grounds upon which to base a collateral attack on their judgments and sentences. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. All issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review. *Id.*; 22 O.S.2011, § 1086. Petitioner has not established any sufficient reason why his current grounds for relief were not previously raised. *Id.*

Petitioner tries to claim that his crime was committed in portions of Oklahoma located in Indian Country, prohibiting Oklahoma courts from exercising jurisdiction over his crime in Case No. CRF-1986-52. However, the prosecution of Petitioner's crime in that case was a justiciable matter, and thus he has not established that the District Court lacked jurisdiction. Okla. Const. Art. VII, § 7

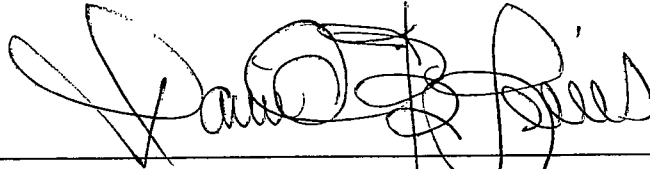
(District Courts shall have unlimited original jurisdiction of all justiciable matters in Oklahoma). The issues raised in Petitioner's application are addressed in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017) and as a result are currently pending before the United States Supreme Court. *Murphy* is stayed pending the United States Supreme Court's final disposition of the petition for writ of certiorari. *Murphy v. Royal*, Nos. 07-7068 & 15-7041 (10th Cir. November 16, 2017). The United States Supreme Court has granted the petition for writ of certiorari. *Royal v. Murphy*, __ U.S. __, 138 S.Ct. 2026, 201 L.Ed. 277, 2018 WL 747674 (Mem) (May 21, 2018). Therefore, *Murphy* is not a final decision and Petitioner has cited no other authority that refutes the jurisdictional provisions of the Oklahoma Constitution.

Therefore, the order of the District Court of Washington County denying Petitioner's application for post-conviction relief in Case No. CRF-1986-52 should be, and is hereby, **AFFIRMED**. Pursuant to Rule 3.15, *Rules, supra*, the MANDATE is ORDERED issued forthwith upon the filing of this decision with the Clerk of this Court.

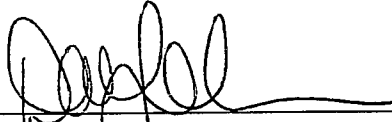
IT IS SO ORDERED.

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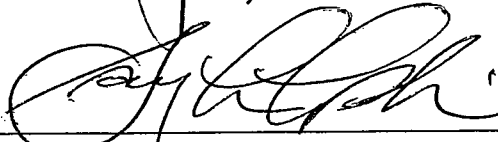
10th day of May, 2019.



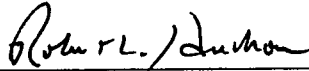
DAVID B. LEWIS, Presiding Judge



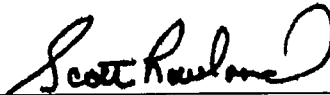
DANA KUEHN, Vice Presiding Judge



GARY L. LUMPKIN, Judge



ROBERT L. HUDSON, Judge



SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden

Clerk

PA/F

Appendix C

IN THE DISTRICT COURT OF WASHINGTON COUNTY
STATE OF OKLAHOMA

DAVID PAUL WORTHINGTON)
)
 Petitioner/Appellant,)
)
vs.) Case No. CRF-1986-53
)
STATE OF OKLAHOMA,)
)
 Respondent/Appellee.)

DISTRICT COURT
WASHINGTON COUNTY, OK
FILED
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JULIE L. SARTER
COURT CLERK
BY _____ DEPUTY

ORDER DENYING APPLICATION FOR POST CONVICTION RELIEF

NOW on this 14th day of November, 2018, this matter comes before the Court upon the Petitioner/Appellant's Application For Post Conviction Relief, pursuant to Title 22 O.S. §1080 et. seq. The Court FINDS AND ORDERS as follows:

Appellant's Application is based on the well-known case now pending before the United States Supreme Court, Murphy v. Royal, 875 F3d 896 (10th Cir. 2017).

The Court takes judicial notice of the case file herein.

The Court accepts as true that the Appellant is a member of the Cherokee Nation, and he has attached to his pleadings his tribal card showing him to be a 125/512 member of the Cherokee Nation of Oklahoma.

Appellant alleges that the crime for which he was convicted occurred within the boundaries of the Cherokee Nation, pursuant to an 1866 treaty with the federal government.

The Murphy case only address the Muscogee Creek Nation tribe and does not further elaborate on the application to the other Oklahoma tribes. No guidance is given

to lower courts on how said ruling is to be applied in cases like the one at bar that involves a different tribe, or for determining the current boundaries for a certain tribe.

The Murphy case is presently pending before the United States Supreme Court. Until such time as the matter is decided by the Supreme Court and further direction is given to lower courts, this Court will not take action which could have irreversible effects.

For the reasons stated herein, the Application For Post-Conviction Relief is denied.

A handwritten signature in black ink, appearing to be "R. J. Hall", is written over a horizontal line. Below the line, the text "Judge of the District Court" is printed.

Judge of the District Court

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