APPENDIX

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MARK E. LEWIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PC-2021-505**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner, pro se, appealed to this Court from an order of the District Court of Tulsa County in Case No. CRF-1981-1315 denying his application for post-conviction relief. Lewis was convicted of First Degree Murder in Tulsa County Case No. CRF-1981-1315 and was sentenced to life imprisonment. His conviction was reversed on appeal and the matter remanded for a new trial. *Lewis v. State,* 1984 OK CR 93, 695 P.2d 528. The State amended the charges and Lewis, on re-trial, entered a guilty plea to Accessory After the Fact to Murder. In July 1985, he was sentenced to five (5) years for the offense.[1] Lewis did not seek to timely withdraw his plea or otherwise appeal his convictions.

[1] Lewis has completed service of his sentence in Tulsa County Case No. CRF-1981-1315.

The record in this case indicates this is Petitioner's fifth application for post-conviction relief in the trial court and fourth post-conviction appeal filed with this Court in this matter. *See Lewis v. State,* No. PC-2018-496 (Okl.Cr. June 6, 2018)(unpublished); *Lewis v. State,* No. PC-2019-203 (Okl.Cr. August 2, 2019)(unpublished).

Petitioner Proposition I argues he is entitle to post-conviction relief pursuant to *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020). In *State ex rel. Matloff v. Wallace,* 2021 OK CR 21, ___ P.3d ___, this Court determined that the United States Supreme Court decision in *McGirt,* because it is a new procedural rule, is not retroactive and does not void final state convictions. *See Matloff,* 2021 OK CR 21, ¶¶ 27-28, 40.

The conviction in this matter was final before the July 9, 2020 decision in *McGirt,* and the United States Supreme Court's holding in *McGirt* does not apply. Therefore, Proposition I is denied.

With regard to Petitioner's Propositions II-V, Petitioner was fully afforded the opportunity for post-conviction relief in his previous applications. Petitioner has failed to establish entitlement to any relief in this subsequent post-conviction proceeding. "In the interests of efficiency and finality, our judicial system employs various doctrines to ensure that issues are not endlessly re-litigated." *Smith v. State,*

2013 OK CR 14, ¶ 14, 306 P.3d 557, 564. All issues that were previously raised and ruled upon in direct appeal proceedings or previous post-conviction proceedings are barred as *res judicata*, and all issues that could have been raised in those previous proceedings but were not are waived, and may not be the basis of a subsequent post-conviction application. 22 O.S.2011, § 1086; *Fowler v. State*, 1995 OK CR 29, ¶ 2, 896 P.2d 566, 569. Post-conviction review is not an opportunity for a second chance to argue claims of error in hopes that doing so in a different proceeding may change the outcome. *Turrentine v. State*, 1998 OK CR 44, ¶ 12, 965 P.2d 985, 989. "Simply envisioning a new method of presenting an argument previously raised does not avoid the procedural bar." *McCarty v. State*, 1999 OK CR 24, ¶ 9, 989 P.2d 990, 995. "Appellate jurisprudence was not created or designed to allow a person convicted of a crime to continually challenge a conviction with new assertions of error." *Mayes v. State*, 1996 OK CR 28, ¶ 14, n.3, 921 P.2d 367, 372, n.3.

Petitioner's Propositions II-V either were or could have been raised in his previous application for post-conviction relief, and are thus barred by res judicata or waived. 22 O.S.2011, § 1086; *Fowler*, 1995 OK CR 29, ¶ 2, 896 P.2d at 569. He has not established any

sufficient reason for not asserting or inadequately raising his current grounds for relief in his previous application for post-conviction relief. *Id.* Petitioner's Propositions II-V are denied as procedurally barred.

The trial court's denial of post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 1 day of October, 2021.

Scott Rowland

SCOTT ROWLAND, Presiding Judge

Robert L. Hudson

ROBERT L. HUDSON, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

ATTEST:

John D. Hadden

Clerk

PA

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

MARK E. LEWIS, Petitioner, vs. STATE OF OKLAHOMA, Respondent.	)	Case No. CF-1989-3106 Judge Moody

ORDER DENYING PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF FOR APPOINTMENT OF COUNSEL AND FOR EVIDENTIARY HEARING

This matter came on for hearing on April 19, 2021 pursuant to Mark E. Lewis' ("Petitioner") "Application for Post-Conviction Relief for Appointment of Counsel, And for Evidentiary Hearing" ("Application") filed February 1, 2021. On April 15, 2021 the State of Oklahoma filed its' Response to Petitioner's Application ("State's Response").

PROCEDURAL HISTORY

Mark Eugene Lewis ("Petitioner"), represented by counsel, was tried by jury and convicted of First Degree Rape (Counts 1, 3, 4, and 5), Larceny from a House (Count 2), and Forcible Sodomy (Count 6), after former conviction of two (2) or more felonies. On February 23, 1990, the Honorable B.R. Beasley, District Judge, sentenced Petitioner in accordance with the jury's verdict to one hundred five (105) years imprisonment for Counts 1, 3, 4, 5, and 6, and three (3) years imprisonment for Count 2. The District Court ordered each sentence to run consecutively with the other. Petitioner was advised of his appeal rights.

Petitioner, by and through counsel, perfected a timely direct appeal to the Court of Criminal Appeals. In support of his direct appeal, Petitioner raised the following propositions of error:

I. The conviction of both Counts 3 and 4 violated his right against double jeopardy
II. The denial of his motion to sever deprived him of a fair trial
III. The State failed to give adequate notice of intent to offer evidence of escape
IV. The inculpatory statements made by him were not predicated by an knowing and voluntary waiver of his right to remain silent
V. Demonstrative evidence was improperly admitted without chain of custody being established
VI. Third party identification testimony was improperly admitted into evidence
VII. The escape instruction given by the trial court prejudiced the fairness of the proceedings
VIII. The prosecutor made statements that prejudiced the jury and deprive him of a fair trial

The Court of Criminal Appeals affirmed Petitioner's judgment and sentence by unpublished summary opinion. *See Lewis v. State,* No. F-1990-918 (Okl.Cr. March 25, 1993) (unpublished).

On April 29, 1997, Petitioner, *pro se,* filed his first application for post-conviction relief. Petitioner raised the following propositions of error in support of his application:

I. Petitioner received multiple sentences for a single transaction in violation of 22 O.S. § 404.
II. Trial counsel was ineffective for allegedly failing to "object and adversarily (sic) test the prosecution's case" for failing to raise the alleged violation of 22 O.S. § 404, advising Petitioner not to take the stand in his own defense, test the second stage evidence, failing to object to the jury instructions, and by ineffectively examining female witnesses because trial counsel is female.
III. Petitioner was in effect tried in restraints because of the number of sheriff's deputies who were in the courtroom during trial.
IV. The accumulation of the above errors denied Petitioner a fair trial.

Judge Beasley denied Petitioner's application by order filed October 20, 1997. Petitioner attempted to perfect a post-conviction appeal, but it was dismissed by the Oklahoma Court of Criminal Appeals ("OCCA"). *See Lewis v. State,* No. PC-1997-1640 (Okl.Cr. Jan. 28, 1998) (unpublished). On February 11, 2016, Petitioner, *pro se,* filed a "Motion to Correct Clerical Error in Judgment Nunc Pro Tune." Petitioner essentially claimed that because of a scrivener's error in

the judgment and sentences, court costs were wrongfully being assessed. Petitioner raised the following propositions of error in support of his Motion:

I. Fees and costs imposed in criminal cases are part of penalty.
II. The imposition of court costs is exclusively an adjudicative function of a judge and not the court clerk.

On September 7, 2017 the Court by Order filed September 11, 2017 denied Petitioner's "Motion to Correct Clerical Error in Judgment Nunc Pro Tunc."

The Petitioner filed another Application for Post-Conviction Relief requesting a recommendation from the Court for an appeal out-of-time. Petitioner claims he was denied the right to appeal this Court's order denying his "Motion to Correct Clerical Error in Judgment Nunc Pro Tunc" through no fault of his own as the Court's order was delivered to him by prison staff until September 21, 2017. Based on this delay in delivery Petitioner claims he was unable to timely file his "Notice of Intent to Appeal." The District Court granted Petitioner an appeal out of time. Petitioner filed a "Writ of Prohibition" which the Court denied, finding that the issue Petitioner raised was moot because it had already been resolved in the Court's earlier Order dated September 11, 2017. On November 30, 2018, Petitioner filed another Petition for Writ of Mandamus, regarding his allegations of clerical error in his Judgment which was denied by the OCCA.

Petitioner has now filed his subsequent Application, wherein he alleges the following propositions of error:

I. The State did not have jurisdiction to prosecute him, pursuant to *McGirt v. Oklahoma,* 140 S.Ct. 2452, 2482-2483, 207 L.Ed.2d 985 (2020), because he was an "enrolled citizen of the Muscogee Creek Nation" and the offense occurred in "Indian Country."
II. Petitioner's right to due process was violated, as the State instructed the jury to sentence him to 105 years on each count, thereby violating 22 O.S. § 926.1

III. Petitioner's Fifth Amendment right against Double Jeopardy was violated when he was charged and conviction twice for the same criminal act

IV. Petitioner was denied his Fourteenth Amendment right to due process and equal protection when the state introduced an unlawfully obtained conviction to enhance his sentence

V. Petitioner's right to due process under the Fourteenth Amendment to the United States Constitution and the Oklahoma Constitution, Article II, § 7, was violated when he was assessed court costs by the court clerk.

FINDINGS OF FACTS

1. A representative of the Muscogee Creek Nation Enrollment Office would testify that Petitioner was not a registered citizen of the Muscogee Creek Nation on July 26, 1989, the date of the offense in the above listed case. This representative would testify Petitioner has been a citizen of the Muscogee Creek Nation since July 22, 1993.
2. A representative of the Muscogee Creek Nation Enrollment Office would testify that Petitioner possesses 1/64 degree of Creek blood.
3. The Muscogee Creek Nation is a federally recognized tribe.
4. A representative of the Tulsa Police Department would testify that Petitioner committed the offenses he was convicted of within Tulsa County.
5. A representative of the Muscogee Creek Nation or a representative of the Cherokee Nation, or an expert witness testifying on Petitioner's behalf, would testify that the location of the offense Petitioner was convicted of in the above case –occurred within the Muscogee Creek Nation and/or the Cherokee Nation.

CONCLUSIONS OF LAW

I. Petitioner is not entitled to relief on Proposition I

A. Petitioner is not an "Indian" as defined by federal law

For the purposes of federal criminal jurisdiction a person is defined as an "Indian" if that person "(1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government." *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001); *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). The first part of the test can be shown by a Certificate of Degree of Indian Blood issued by the U.S. Bureau of Indian Affairs. *See Davis v. U.S.*, 192 F.3d 951, 956 (10th Cir. 1999).

In order to satisfy the second requirement of this definition, the defendant or victim must be affiliated with a Tribe that is recognized by the federal government.[1] The second prong of "whether an individual is recognized by an Indian tribe or the federal government" is considered under the following four factors:

> (1) tribal enrollment; (2) government recognition formally and informally through receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal affiliation; and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life.

United States v. Drewry, 365 F.3d 957, 961 (10th Cir. 2004) (quoting *United States v. Lawrence*, 51 F.3d 150 (8th Cir. 1995).

Further, related to the second *Prentiss* factor, the Petitioner must establish membership in or affiliation with a Tribe as of the time of the offense. *See United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015); *State v. Perank*, 858 P.2d 927, 932 (Utah 1992). Otherwise, a Petitioner could choose which sovereign has jurisdiction by simply obtaining (or renouncing) tribal

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[1] *See United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977) ("members of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act"); *State v. Daniels*, 16 P.3d 650, 654 (Wash. Ct. App. 2001); *see also State v. Sebastian*, 701 A.2d 13, 24 n. 28 (Conn. 1997) ("most recent federal cases consider whether the tribe to which a defendant or victim claims membership or affiliation has been acknowledged by the federal government").

membership. *Goforth v. State of Oklahoma*, 1982 OK CR 48, 644 P.2d 114, 116 ("Absent such recognition, we cannot hold that the appellant is an Indian under federal law, since such a determination at this point would allow the appellant to assert Indian heritage only when necessary to evade a state criminal action.").

> In a prosecution under the [Indian Major Crimes Act], the government must prove that the Petitioner was an Indian at the time of the offense with which the Petitioner is charged. If the relevant time for determining Indian status were earlier or later, a Petitioner could not "predict with certainty" the consequences of his crime at the time he commits it. *Apprendi v. New Jersey*, 530 U.S. 466, 478, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). Moreover, the government could never be sure that its jurisdiction, although proper at the time of the crime, would not later vanish because an astute Petitioner managed to disassociate himself from his tribe. This would, for both the Petitioner and the government, undermine the "notice function" we expect criminal laws to serve. *United States v. Francisco*, 536 F.2d 1293, 1296 (9th Cir.1976).

Zepeda, 792 F.3d at 1113.

The State confirmed that Petitioner is currently an enrolled citizen of the Muscogee Creek Nation. *See Exhibit 1*. However, Petitioner's tribal documentation reveals he was not enrolled until July 22, 1993 which was long after the offense date of July 26, 1989 in the above case. Although tribal enrollment is not the only way a person can establish tribal affiliation under the four factor analysis set forth in *Drewry*, 365 F.3d at 960-61, Petitioner has failed to provide any other evidence related to these factors, indicating that he had any affiliation with or involvement with the Muscogee Creek Nation at the time of the offense.

As discussed above, the relevant analysis for who is an Indian under the second *Prentiss* factor pertains specifically to the date of the offense. To hold otherwise would subject all the parties to uncertainty—a Petitioner would never know the consequences of her crime, no sovereign nation could be certain of jurisdiction, and a Petitioner could choose which sovereign has

jurisdiction by simply obtaining (or renouncing) tribal membership. *See Zepeda*, 792 F.3d at 1113; *Goforth*, 644 P.2d at 116. Wherefore, since Petitioner was not a tribal citizen at the time of the offense, the Court denies Petitioner's Application on this basis.

B. Petitioner's jurisdictional claim is barred by 22 O.S. § 1086

Oklahoma law limits the grounds for relief that may be raised in a post-conviction application to those that were not, and could not have been, raised on direct appeal. 22 O.S.2011, § 1086; *see, e.g., Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973; *Woodruff v. State*, 1996 OK CR 5, ¶ 2, 910 P.2d 348, 350; *Berget v. State*, 1995 OK CR 66, ¶ 3, 907 P.2d 1078, 1080-81. Section 1086 of Title 22 states:

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceedings the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court founds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

Since Petitioner did not raise his present jurisdictional challenge in an appeal, this Court finds the claim to be barred by § 1086. The Oklahoma Court of Criminal Appeals has held that it will not review claims "that could have or should have been brought at some previous point in time without proof of adequate grounds to excuse the delay." *Johnson v. State*, 1991 OK CR 124, ¶ 8, 823 P.2d at 373; *see also Carter v. State*, 1997 OK CR 22, ¶ 2, 936 P.2d 342, 344 ("The application of the act is limited to only those claims which, for whatever reason, could not have been raised on direct appeal.").

Petitioner claims he could not have raised his jurisdictional claim earlier because the "[p]rior to the Supreme Court's decision in *McGirt*, the State of Oklahoma did not recognize this

jurisdictional flow and the underlying attitude was that Indian reservations did not exist in Oklahoma." Application at p. 6. An intervening change in constitutional law is a sufficient reason for failing to raise a claim. *Stevens v. State*, 2018 OK CR 11, ¶ 18, 422 P.3d 741, 746-47; *Hale v. State*, 1997 OK CR 16, ¶ 5, 934 P.2d 1100, 1102. However, the question is whether a new constitutional right has been created. *Compare Stevens*, 2018 OK CR 11, ¶ 18, 422 P.3d at 746-47 (reviewing successive post-conviction application based on *Miller v. Alabama*, 567 U.S. 460 (2012), which created a new constitutional right against mandatory life without parole sentences for juveniles) *with Hale*, 1997 OK CR 16, ¶ 5, 934 P.2d at 1102 (refusing to consider a claim based on a decision of the Oklahoma Court of Criminal Appeals which "was an interpretation and application of state law and did not create any new constitutional right").

This Court finds that *McGirt* did not affect a change in constitutional law nor is it a "new rule of Constitutional law." In fact, the Supreme Court said as much: "In saying [allotment did not affect disestablishment] we say nothing new." *Id.*, 140 S. Ct. at 2464; *see also Murphy v. Royal*, 875 F.3d 896, 921-922 (10th Cir. 2017) (holding that the Supreme Court's reservation disestablishment framework was well established), *aff'd sub nom Sharp v. Murphy*, 140 U.S. 2412 (2020). In *McGirt*, the Supreme Court explained that its decision was dictated by precedent and was simply an application of that precedent to the Creek Reservation. *McGirt*, 140 S. Ct. at 2462-64, 2468-69; *see also Valdez v. State*, 2002 OK CR 20, ¶¶ 21-22, 46 P.3d 703, 709-10 (finding a claim not previously unavailable where other Petitioners in Oklahoma and across the county had raised similar claims); *Hatch v. State*, 1996 OK CR 37, ¶ 41, 924 P.2d 284, 293 (holding that claim based on a case decided in 1982 was clearly available "at any time since 1982" and did not satisfy the exceptions in § 1089(D)(8)); *accord Dopp v. Martin*, 750 F. App'x 754, 757 (10th Cir. 2018) (unpublished) ("Nothing prevented Dopp from asserting in his first § 2254 application a claim that

the Oklahoma state court lacked jurisdiction because the crime he committed occurred in Indian Country. The fact that he, unlike the prisoner in *Murphy*, did not identify that argument does not establish that he could not have done so."); *In re David Brian Morgan,* No. 20-6123(10th Cir. Sept. 18, 2020), *unpublished,* (noting that in *McGirt,* "...the Court cited well-established precedent and reviewed Congressional action to determine whether a federal statute applied. That hardly speaks of a 'new rule of constitutional law,"...)

Contrary to Petitioner's argument that this jurisdictional claim could not have been raised earlier, his claim under the Major Crimes Act could have reasonably been formulated before either *Murphy* or *McGirt* were decided, and should have been raised on appeal. The Major Crimes Act was enacted in 1885.[2] In 1962, the Supreme Court reversed the judgment of the Washington Supreme Court affirming the conviction of an Indian on a reservation which the Washington Supreme Court had erroneously determined to be disestablished. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). This is just one of a number of cases in which the Supreme Court has considered such claims in the decades preceding *McGirt. See e.g., Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 466 U.S. 463 (1984); *see also Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (although not a criminal case, applying prior Supreme Court cases on reservation diminishment to the facts of a particular reservation).

The Oklahoma Court of Criminal Appeals has also been called upon to determine whether a crime took place in Indian country many times in the history of the state. *See, e.g., Eaves v. State*, 1990 OK CR 42, ¶ 2, 795 P.2d 1060, 1061 (determining whether the crime took place within a dependent Indian community because the parties agreed there was no question as to a restricted

[2]https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153.

allotment or reservation); *C.M.G. v State*, 1979 OK CR 39, ¶ 9, 594 P.2d 798, 801 (agreeing with the State that the land in question was not a reservation and thus, proceeding to determine whether it was a dependent Indian community). In 1963, an inmate sought a writ of habeas corpus, alleging the crime was committed on an Indian reservation. *Ellis v. State*, 1963 OK CR 88, 386 P.2d 326. The OCCA held that the reservation was disestablished. *Id.*; 1963 OK CR 88, ¶¶ 18-24, 386 P.2d at 330-31.[3] In 2005, the Oklahoma Court of Criminal Appeals declined to hold that the Creek Reservation—the subject of the Supreme Court's decisions in *McGirt* and *Murphy*—was intact because the federal courts had not addressed the question. *Murphy v. State*, 2005 OK CR 25, ¶¶ 47-52, 124 P.3d 1198, 1207-08.

The right to challenge a state court conviction based on an allegation that the crime occurred within the limits of an undiminished Indian reservation has been recognized for *decades* and Oklahoma inmates have invoked that right. Therefore, the legal basis for a post-conviction applicant's challenge to jurisdiction based on an argument that a crime occurred on an Indian reservation could have been formulated as early as 1885 and was recognized by the Supreme Court as early as 1962, and by the Oklahoma Court of Criminal Appeals in 1963.

The Oklahoma Court of Criminal Appeals has stated on numerous occasions that challenges to subject matter jurisdiction can never be waived. *See Wackerly v. State*, 2010 OK CR 16, ¶ 4, 237 P.3d 795, 797; *see also Murphy*, 2005 OK CR 25, ¶¶ 2, 6, 124 P.3d at 1199-1200 (reviewing jurisdictional challenge raised in second post-conviction application on the merits).

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[3] *Ellis* was decided prior to the 1970 enactment of the Post-Conviction Procedure Act, and thus, at the time, jurisdictional challenges were brought via a state habeas proceeding and not pursuant to the provisions of that Act. *See Paxton v. State*, 1995 OK CR 46, ¶ 6, 903 P.2d 325, 327.

However, this is not a requirement of constitutional law.[4] *See In re Wackerly*, No. 10-7062, 2010 WL 9531121, at *2 (10th Cir. Sept. 3, 2010) (unpublished) (emphasis added) (holding challenges to subject matter jurisdiction may be procedurally barred); *see also Hatch v. State of Okl.*, 92 F.3d 1012, 1014-15 (10th Cir. 1996) (*per curiam*), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180 (10th Cir. 2001) ("lack of jurisdiction is not an authorized ground upon which a second or successive habeas petition may be filed").

In a subsequent published case, the Tenth Circuit reaffirmed its reasoning in *In re Wackerly*, finding itself bound by legislative intent:

> [T]hough the writ of habeas corpus in its earliest form was largely a remedy against confinement imposed by a court lacking jurisdiction, *see McCleskey [v. Zant]*, 499 U.S. [467,] 478, 111 S.Ct. 1454 [1991], this court has barred a state prisoner convicted of murder and sentenced to death by the wrong sovereign from bringing a successive collateral attack to contest his conviction on this basis. *See In re Wackerly*, No. 10–7062, at 5 (10th Cir. Sept. 3, 2010). This is because, like a statutory claim of innocence, lack of jurisdiction is not one of the two authorized grounds upon which a successive § 2254 motion may be filed. *Id.*

Prost v. Anderson, 636 F.3d 578, 592 (10th Cir. 2011).

Further, this Court is required to give effect to the intent of the legislature. *King v. State*, 2008 OK CR 13, ¶ 8, 182 P.3d 842, 844. The legislature said "all" claims "must be raised" at the first opportunity—and said so in spite of its explicit recognition that challenges to the trial court's

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[4] Indeed, at least six of the Supreme Court Justices endorsed, either explicitly or implicitly, the idea that courts may refuse to consider jurisdictional claims on procedural grounds. *See McGirt*, 140 S. Ct. at 2479 ("Other Petitioners who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings."); *id.* at 2481 (stating the Court was free to reach its decision because doctrines such a procedural bars and laches exist to protect reliance interests); *id.* at 2502-04 (Thomas, J., dissenting) (arguing the Supreme Court lacked jurisdiction because this Court procedurally barred McGirt's claim). The Chief Justice's dissent recognized that this Court might not bar such claims, but did not suggest it would be unconstitutional for this Court to do so. *Id.* at 2501 n.9 (Roberts, C.J., dissenting).

jurisdiction may be raised. *Compare* 22 O.S.2011, § 1080 ("Any person who has been convicted of, or sentenced for, a crime and who claims: . . . (b) that the court was without jurisdiction to impose sentence . . . may institute a proceeding under this act . . . .") *with* 22 O.S.2011, § 1086 ("All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. . . . or in any other proceeding the applicant has taken to secure relief [such as direct appeal]"). This Court it is bound by the plain language of the statute. *See State v. Silas*, 2020 OK CR 10, ¶ 6, ___ P.3d ___, ___ ("A fundamental principle of statutory construction is to ascertain and give effect to the intention of the Legislature. . . . Legislative intent is first determined by the plain and ordinary language of the statute."); *State v. Farthing*, 2014 OK CR 4, ¶ 7, 328 P.3d 1208, 1210 (where there is ambiguity in the language of a statute, "we are bound by the Legislative intent as expressed through the plain language of the statute"); *cf. Minie v. Hudson*, 1997 OK 26, ¶ 8, 934 P.2d 1082, 1086 ("The use of 'shall' by the Legislature is normally considered as a legislative mandate equivalent to the term 'must', requiring interpretation as a command.").

Furthermore, in deciding *McGirt*, supra, the United States Supreme Court expressly invited Oklahoma courts to apply procedural bars to the jurisdictional challenges that would proliferate in the wake of its decision:

> Other Petitioners [aside from those who choose not to seek relief] who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.[1]
>
> [1] For example, Oklahoma appears to apply a general rule that "issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Logan v. State*, 2013 OKCR 2, ¶ 1, 293 P.3d 969, 973. . . .

McGirt, 140 S. Ct. at 2479.

Based on the foregoing, this Court finds Petitioner's claim that this court lacked subject matter jurisdiction with respect to the crimes committed by the Petitioner to be waived, and therefore barred by 22 O.S. § 1086.

C. Petitioner's claim that this Court lacks subject matter jurisdiction is barred by the doctrine of laches

The Oklahoma Court of Criminal Appeals has long held that, pursuant to the laches doctrine, "one cannot sit by and wait until lapse of time handicaps or makes impossible the determination of the truth of a matter, before asserting his rights." *Thomas v. State*, 1995 OK CR 47, ¶ 11, 903 P.2d 328, 331 (quotation marks omitted, alteration adopted) (collecting cases); *see also Berry v. Anderson*, 1972 OK CR 192, ¶ 4, 499 P.2d 959, 960 (barring claim based on laches even where it was "apparent" that the petitioner "would have been entitled to release" had he earlier brought his challenge); *Application of Smith*, 1959 OK CR 59, ¶ 10, 339 P.2d 796, 797-98 ("The right to relief . . . may be lost by laches, when the petition for habeas corpus is delayed for a period of time so long that the minds of the trial judge and court attendants become clouded by time and uncertainty as to what happened, or due to dislocation of witnesses, the grim hand of death and the loss of records the rights sought to be asserted have become mere matters of speculation, based upon faulty recollections, or figments of imagination, if not outright falsifications.").

The laches doctrine applies to collateral attacks upon convictions, including by means of an application for post-conviction relief. *Thomas*, 1995 OK CR 47, ¶ 15, 903 P.2d at 332; *see also Paxton v. State*, 1995 OK CR 46, ¶ 8 903 P.2d 325, 327 ("We hold, therefore, that the doctrine of

laches has been and continues to be applicable, in appropriate cases, to collateral attacks upon convictions, whether by means of an extraordinary writ, as in former times, or by means of an application for post-conviction relief."). "Thus, the doctrine of laches may prohibit the consideration of an application for post-conviction relief where a petitioner has forfeited that right through his own inaction." *Paxton*, 1995 OK CR 46, ¶ 8, 903 P.2d at 327.

The OCCA has "emphasize[d] that the applicability of the doctrine of laches necessarily turns on the facts of each particular case." *Id.* The question is whether the post-conviction applicant has provided "sufficient reason" for the delay in seeking post-conviction relief. *See id.*, 1995 OK CR 47, ¶ 16, 903 P.2d at 332 (holding that "Petitioner's contention that depression caused by incarceration for subsequent convictions have prevented him from seeking relief . . . for fifteen years is not sufficient reason to overcome the doctrine of laches"). Finally, the OCCA has refused to place a threshold burden upon the State to demonstrate actual prejudice before laches applies. *Id.*, 1995 OK CR 47, ¶ 14, 903 P.2d at 332.

Moreover, the *McGirt* Court, tacitly recognizing that its decision would open the floodgates to jurisdictional challenges, encouraged Oklahoma courts to consider applying laches to such challenges:

> Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are "fre[e] to say what we know to be true . . . today, while leaving questions about . . . reliance interest[s] for later proceedings crafted to account for them." *Ramos*, 590 U. S., at ——, 140 S.Ct., at 1047 (plurality opinion).

McGirt, 140 S. Ct. at 2481.

Here, Petitioner committed these crimes in 1989. Yet, all of the facts underlying his jurisdictional claim—that is, his evidence that he is Indian and the offense was purportedly committed in Indian Country-were available to him at every prior stage of his criminal case, including at the time of the crimes, at trial, at the time for appeal, and in his earlier applications for post-conviction relief. Indeed, the OCCA has on multiple occasions applied laches to jurisdictional claims. In *Ex parte Wallace*, 81 Okla. Crim. 176, 178-79, 162 P.2d 205, 207 (1945), the Petitioner filed a state habeas petition three years after his guilty plea alleging that the federal court had exclusive jurisdiction over his crime because he and his rape victims were Comanche Indians and the crime occurred on a restricted allotment. Although the OCCA did not invoke the word "laches," it ultimately concluded that "at this late date" it would not consider the Petitioner's jurisdictional attack, noting in particular that the statute of limitations for any federal action against the Petitioner had lapsed.[5] *Ex parte Wallace*, 81 Okla. Crim. at 179, 188, 162 P.2d at 207, 211.

Similarly, in *Allen v. Raines*, 1961 OK CR 41, ¶¶ 6-8, 360 P.2d 949, 951, the OCCA applied laches to a state habeas petitioner's claim that he was not furnished counsel at the time of his guilty plea sixteen years prior. Importantly, at the time, the OCCA treated the denial of counsel as a jurisdictional issue. *See Allen*, 1961 OK CR 41, ¶ 6, 360 P.2d at 951 ("We have held that a trial court may lose jurisdiction to pronounce judgment by failure to complete the court by appointing counsel to represent the accused whose the accused has not effectively waived his constitutional right to the assistance of counsel."); *see also Application of Smith*, 1959 OK CR 59, ¶ ¶ 1, 10-14, 339 P.2d 796, 798-99 (barring based on laches jurisdictional claim of denial of counsel); *Ex parte*

[5] Laches does not require that there be no possibility of a retrial. In this case, it is patently unfair that Petitioner sat on a potentially meritorious jurisdictional challenge for *thirty-one* years.

Paul, 93 Okla. Crim. 300, 301, 227 P.2d 422, 423 (1951) (same).[6] Petitioner has provided no reason whatsoever for his inaction, let alone "sufficient" reason. *Paxton*, 1995 OK CR 47, ¶ 16, 903 P.2d at 332. Again, this Court should accept the *McGirt* court's invitation to apply laches to belated jurisdictional claims.

Further, the State is not required to show prejudice from Petitioner's inaction for laches to apply. *Paxton*, 1995 OK CR 47, ¶ 14, 903 P.2d at 332. Given the State's legitimate reliance on the inaction of the Tribes and Petitioner himself (and that of the hundreds—if not thousands—of others inmates who will seek relief after *McGirt*), this Court should refuse to consider this belated jurisdictional challenge. *See City of Sherrill*, 544 U.S. at 216-17; *cf. also McGirt*, 140 S. Ct. at 2500 (Roberts, C.J., dissenting) ("[T]he Court's decision draws into question thousands of convictions obtained by the State for crimes involving Indian Petitioners or Indian victims across several decades.").

At bottom, laches is an equitable doctrine. *See Sullivan v. Buckhorn Ranch P'ship*, 2005 OK 41, ¶ 32, 119 P.3d 192, 202 ("Laches is an equitable defense to stale claims. . . . Application of the doctrine is discretionary depending on the facts and circumstances of each case as justice requires."). Under these circumstances, the Court finds it is grossly inequitable and unjust to reward Petitioner with consideration of his belated jurisdictional claim.

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[6] This Court has on occasion not applied laches to delayed jurisdictional claims. *See, e.g., Ex parte Ray*, 87 Okla. Crim. 436, 441-44, 198 P.2d 756, 759-60 (1948) (considering on the merits claim of deprivation of counsel before denying based on laches delayed habeas petition); *Ex parte Motley*, 86 Okla. Crim. 401, 404-09, 193 P.2d 613, 615-17 (1948) (same). But this is not surprising, as laches is applied on a case-by-case basis. *See Paxton*, 1995 OK CR 46, ¶ 8, 903 P.2d at 327. The facts of this case warrant application of laches.

For the foregoing reasons, this Court finds Petitioner's jurisdictional claim to be barred by laches.

II. Petitioner's claims in Propositions II through V are procedurally barred

Petitioner's claims in Propositions II through V are procedurally barred, as they either were previously raised and ruled upon, or could have been raised, but were not. Post-conviction review provides petitioners with *very limited* grounds upon which to base a collateral attack on their judgments. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973 (citing 22 O.S.2001, § 1086). The Post-Conviction Procedure Act is neither a substitute for a direct appeal, nor a means for a second appeal. *Fox v. State*, 1994 OK CR 52, ¶ 2, 880 P.2d 383, 384; *Maines v. State*, 1979 OK CR 71, ¶ 4, 597 P.2d 774, 775–76. The scope of this remedial measure is *strictly limited* and does not allow for litigation of issues available for review at the time of direct appeal. *Castro v. State*, 1994 OK CR 53, ¶ 2, 880 P.2d 387, 388; *Johnson v. State*, 1991 OK CR 124, ¶¶ 3–4, 823 P.2d 370, 372. "Issues that were previously raised and ruled by upon by are *procedurally barred* from further review under the doctrine of *res judicata*; and issues that were not raised previously on direct appeal, but which could have been raised, are *waived* for further review." *Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973 (emphasis added).

Section 1086 of the Post-Conviction Procedures Act governs subsequent applications for post-conviction relief and sets forth the constraints and limitations imposed upon petitioners. *Rojem v. State*, 1995 OK CR 1, ¶ 7, 888 P.2d 528, 529–30. The statute provides:

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated and not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure

> relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

22 O.S.2011, § 1086. Sufficient reason for failing to previously raise or adequately assert an issue requires a showing that some impediment external to the defense prevented the petitioner and counsel from properly raising the claim. *Johnson v. State*, 1991 OK CR 124, ¶ 7, 823 P.2d 370, 373. "Petitioner has the burden of establishing that his alleged claim could not have been previously raised and thus is not procedurally barred." *Robinson v. State*, 1997 OK CR 24, ¶ 17, 937 P.2d 101, 108.

Propositions II through V in Petitioner's application for post-conviction relief deal with issues that were raised and ruled upon in his direct appeal or issues that could have, but were not, raised in his direct appeal or in his first application for post-conviction relief. In Proposition II of his application, Petitioner claims his jury was improperly instructed regarding punishment as the State, through the prosecutor, asked the jury for a sentence of one hundred and five (105) years. This, in Petitioner's mind, violated his right have his punishment fixed by a jury pursuant to 22 O.S. § 926.1. To the extent he has already raised this claim, as it touches on issues raised in Proposition VIII of his direct appeal, it is barred by the doctrine of *res judicata*. *See Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973. To the extent he asserts a new claim in Proposition II, it is barred by the doctrine of waiver, as it could have been, but was not, raised in his direct appeal or in his first application for post-conviction relief. *Id.* Petitioner has failed to meet his burden of showing that some impediment, external to the defense, prevented him from raising this claim on direct appeal or in his first application for post-conviction relief. *See Rojem*, 1995 OK CR 1, ¶ 7, 888 P.2d at 529–30; 22 O.S.2011, § 1086. The Court of Criminal Appeals has stated that where a claim

is procedurally barred, there is no need to address the merits of the issues presented. *Boyd v. State*, 1996 OK CR 12, ¶ 3, 915 P.2d 922, 924. Accordingly, Petitioner's claims in Proposition II must be denied.

In Proposition III of his application, Petitioner claims his right to double jeopardy was violated by his convictions in Counts Three and Four, contending that each conviction arose from the same, single incident. However, Petitioner has raised this exact claim in Proposition I of direct appeal and in Proposition I of his first application for post-conviction relief. As such, his claim in this Proposition is barred by the doctrine of *res judicata*. *See Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973. Petitioner has failed to meet his burden of showing that some impediment, external to the defense, prevented him from raising this claim on direct appeal or in his first application for post-conviction relief. *See Rojem*, 1995 OK CR 1, ¶ 7, 888 P.2d at 529–30; 22 O.S.2011, § 1086. He merely states that it was not. This is inadequate to sustain his burden on his application for post-conviction relief. *See Russell v. Cherokee County Dist. Ct.*, 1968 OK CR 45, ¶ 5, 438 P.2d 293, 294. The Court of Criminal Appeals has stated that where a claim is procedurally barred, there is no need to address the merits of the issues presented. *Boyd v. State*, 1996 OK CR 12, ¶ 3, 915 P.2d 922, 924. Accordingly, Petitioner's claims in Proposition III are denied.

In Proposition IV of his application, Petitioner claims the State introduced an unlawfully obtained conviction to enhance his punishment, violating his rights to due process and equal protection. However, Petitioner has raised claims in his first application for post-conviction relief regarding the use of his prior convictions and his counsel's failure to object to them in Proposition II of his first application for post-conviction relief. To the extent he again urges this claim, it is barred by the doctrine of *res judicata*. *See Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973. To the extent he asserts a new claim in Proposition IV, it is barred by the doctrine of waiver, as it could

have been, but was not, raised in his direct appeal or in his first application for post-conviction relief. *Id.* Petitioner has failed to meet his burden of showing that some impediment, external to the defense, prevented him from raising this claim on direct appeal or in his first application for post-conviction relief. *See Rojem*, 1995 OK CR 1, ¶ 7, 888 P.2d at 529–30; 22 O.S.2011, § 1086. The Court of Criminal Appeals has stated that where a claim is procedurally barred, there is no need to address the merits of the issues presented. *Boyd v. State*, 1996 OK CR 12, ¶ 3, 915 P.2d 922, 924. Accordingly, Petitioner's claims in Proposition IV are denied.

In Proposition V, Petitioner claims he has been unlawfully assessed court costs in this case. However, Petitioner has raised this exact claim in his "Motion to Correct Clerical Error in Judgment Nunc Pro Tunc," filed on February 11, 2016, which was denied by the district court. To the extent he again urges this claim, barred by the doctrine of *res judicata*. *See Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973. Petitioner has failed to meet his burden of showing that some impediment, external to the defense, prevented him from raising this claim on direct appeal or in his first application for post-conviction relief. *See Rojem*, 1995 OK CR 1, ¶ 7, 888 P.2d at 529–30; 22 O.S.2011, § 1086. This is particularly true in this case, where Petitioner has raised this exact claim in a previously filing, only to have it rejected outright. The Court of Criminal Appeals has stated that where a claim is procedurally barred, there is no need to address the merits of the issues presented. *Boyd v. State*, 1996 OK CR 12, ¶ 3, 915 P.2d 922, 924. Accordingly, Petitioner's claims in Proposition V is denied.

III. Petitioner is not entitled to counsel

Section 1084 of the Post-Conviction Procedure Act states, "Counsel necessary in representation shall be made available to the applicant after filing the application on a finding by

the court that such assistance is necessary to provide a fair determination of meritorious claims. *See* 22 O.S.2011, §1082. Petitioner's claims are without merit, and as such, the Court declines to appoint counsel. *See id.*

IV. An evidentiary hearing is not necessary

Section 1084 of the Post-Conviction Procedure Act provides that an evidentiary hearing may be had where the application cannot be disposed of on the pleadings or where there is a material issue of disputed fact. 22 O.S.2011, § 1084. "[A petitioner] has no constitutional or statutory right to an evidentiary hearing on post-conviction review unless his application cannot be disposed of on the pleadings and the record or a material issue of fact exists." *Fowler v. State*, 1995 OK CR 29, ¶ 8, 896 P.2d 566, 566; *see also Logan*, 2013 OK CR 2, ¶¶ 20–22, 293 P.3d at 978. Here, a request for a hearing contains no material dispute for which an evidentiary hearing is necessary to resolve because, as discussed herein, consideration of Petitioner's claims may be disposed on the record and as a matter of law. *See* 22 O.S.2011, § 1083(C). Therefore, this Court declines to conduct an evidentiary hearing.

CONCLUSION

Since Petitioner did not meet the requirements to be defined as an Indian under the second prong factors set forth in *Drewry,* 365 F.3d at 961, the Court hereby denies Petitioner's Application for Post-Conviction Relief. Further, the lengthy delay in raising his jurisdictional challenge is inexcusable. Therefore, Petitioner's claims are also deemed waived, and procedurally barred. Additionally, the remainder of Petitioner's claims raised in his application for post-conviction relief are procedurally barred by the doctrines of waiver and *res judicata.*

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Petitioner's application for post-conviction relief is hereby **DENIED.**

SO ORDERED this 19 day of April, 2021.

DAWN MOODY
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING/DELIVERY

I certify that on the date of filing, a file stamped certified copy of the above and foregoing Order was mailed to:

Mark E. Lewis, DOC # 126478
Lawton Correctional Facility
8607 S. E. Flower Mound Road
Lawton, OK 73501
Petitioner

And I further certify that on the date of filing, a file stamped certified copy of the above and foregoing Order was hand delivered to:

Marianna E. McKnight, Esq.
Assistant District Attorney
Tulsa County District Attorney's Office
800 County Courthouse
500 S. Denver Ave.
Tulsa, OK 74103

DON NEWBERRY
TULSA COUNTY COURT CLERK

BY: _____
DEPUTY COURT CLERK

FILED
United States Court of Appeal
Tenth Circuit

June 16, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

In re: MARK EUGENE LEWIS,

Movant.

No. 22-5038
(D.C. No. 4:98-CV-000715-TCK)
(N.D. Okla.)

ORDER

Before **BACHARACH**, **McHUGH**, and **ROSSMAN**, Circuit Judges.

Mark Eugene Lewis, an Oklahoma prisoner proceeding pro se,[1] seeks authorization to file a second or successive habeas application under 28 U.S.C. § 2254. Because he has not met the requisite conditions under 28 U.S.C. § 2244(b), we deny authorization.

In 1990, Mr. Lewis was convicted in Oklahoma state court of rape, sodomy, and larceny. He was sentenced to life in prison, and the Oklahoma Court of Criminal Appeals affirmed his conviction. Mr. Lewis filed his first § 2254 application in 1998, which the district court dismissed as untimely under § 2244(d). We declined to issue a certificate of appealability.

[1] We liberally construe pro se pleadings, but we do not make arguments for pro se litigants or otherwise advocate on their behalf. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

Appendix C

claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court. 28 U.S.C. § 2244(b)(2)(A).[2]

In *McGirt*, the Supreme Court held that the territory in Oklahoma reserved for the Creek Nation since the 19th century remains "'Indian country'" for purposes of exclusive federal jurisdiction over "certain enumerated offenses" committed "within 'the Indian country'" by an "'Indian.'" 140 S. Ct. at 2459 (quoting 18 U.S.C. § 1153(a)); *see id.* at 2459-60, 2482. In light of this holding, the Court reversed a decision by the OCCA upholding the state-court conviction of an enrolled member of an Indian tribe for crimes committed on the Creek Reservation. *See id.* at 2482. Even assuming without deciding that *McGirt* announced a new rule of constitutional law, Mr. Lewis has not shown that the Supreme Court has made *McGirt* retroactive to cases on collateral review.[3] *See In re Jones*, 847 F.3d 1293, 1295 (10th Cir. 2017) ("The only way the Supreme Court could make a rule retroactively applicable is through a holding to that effect." (brackets and internal quotation marks omitted)).

Second, Mr. Lewis appears to seek authorization to assert a claim that the state court used a prior accessory-after-the-fact conviction to increase his sentence, but that he

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[2] Mr. Lewis also argues this claim is based on newly discovered evidence, but the Supreme Court's decision in *McGirt* is not a newly discovered "factual predicate" underlying his proposed claim, as required by § 2244(b)(2)(B)(i), and he points to no newly discovered facts establishing his innocence, *see id.* § 2244(b)(2)(B)(ii).

[3] Mr. Lewis cites *Yellowbear v. Wyoming Att'y Gen.*, 525 F.3d 921 (10th Cir. 2008), for the general proposition that absence of jurisdiction in the convicting court is a basis for habeas corpus relief under the due process clause. *Id.* at 924. To the extent this argument is distinct from his *McGirt* argument, we also reject it based on his failure to satisfy § 2244(b)(2)(A).

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