

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

November 3, 2022

Christopher M. Wolpert
Clerk of Court

ANTHONY H. WARNICK,

Petitioner - Appellant,

v.

STEVEN HARPE, *

Respondent - Appellee.

No. 22-5042
(D.C. No. 4:21-CV-00478-GKF-SH)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY**

Before **HARTZ**, **BALDOCK**, and **McHUGH**, Circuit Judges.

Petitioner Anthony H. Warnick, an Oklahoma state prisoner proceeding pro se,¹ seeks a certificate of appealability (“COA”) to challenge the district court’s dismissal of his 28 U.S.C. § 2254 petition for a writ of habeas corpus as untimely under 28 U.S.C.

* Pursuant to Fed. R. App. P. 43(c)(2), Scott Crow is replaced by Steven Harpe as the Director of the Oklahoma Department of Corrections, effective October 13, 2022.

** This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

¹ Because Mr. Warnick is proceeding pro se, “we liberally construe his filings, but we will not act as his advocate.” *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

APPENDIX - A

§ 2244(d)(1). Because the district court’s procedural ruling is not debatable, we deny a COA and dismiss this matter.

I. BACKGROUND

On August 9, 2017, an Oklahoma state court convicted Mr. Warnick of one count of possessing child pornography and sentenced him to thirty-five years in prison. The Oklahoma Court of Criminal Appeals (“OCCA”) affirmed the judgment and sentence on November 8, 2018. Mr. Warnick did not file a petition for writ of certiorari in the United States Supreme Court. On July 27, 2020, Mr. Warnick filed an application for post-conviction relief in state court arguing the Oklahoma state court lacked jurisdiction to convict him.² The state court denied his application and the OCCA affirmed.

On November 1, 2021, Mr. Warnick filed a 28 U.S.C. § 2254 petition in the United States District Court for the Northern District of Oklahoma, arguing the Oklahoma state court lacked subject matter jurisdiction to convict him based on *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The Director of the Oklahoma Department of Corrections filed a motion to dismiss the petition as untimely under the Antiterrorism and Effective Death Penalty Act’s (“AEDPA”) one-year statute of limitations. Mr. Warnick opposed the motion and argued his § 2254 petition was timely because “issues of jurisdiction can be raised at any time, AEDPA notwithstanding.” *Id.* at 117. Mr. Warnick then filed a motion for leave to file a supplemental response to the motion to dismiss,

² Oklahoma does not follow a “prisoner mailbox rule” for applications for post-conviction relief. *Moore v. Gibson*, 27 P.3d 483, 487 (Okla. 2001). Instead, these applications are considered “filed” under the Post-Conviction Procedure Act, Section 1080 et seq. of Title 22, “when a proper petition is delivered to the proper court.” *Id.*

stating he planned to “file information pertinent to his Application and Response which should greatly assist th[e] [c]ourt in the matter.” ROA at 129. Without waiting for the district court to rule on his motion, Mr. Warnick filed a supplemental response, which included as an exhibit a letter from his state appellate counsel advising that he could raise a jurisdictional issue at any time during his state proceedings.

The district court granted the Director’s motion and dismissed Mr. Warnick’s § 2254 petition as untimely because it was not filed within one year of his conviction becoming final. Because Mr. Warnick filed the supplemental response without leave and could have advanced the supplemental arguments in his response to the motion to dismiss, the district court ordered it to be stricken from the record. Finally, the district court declined to issue a COA. Mr. Warnick now seeks a COA in this court.

II. DISCUSSION

Mr. Warnick must “seek a COA to obtain appellate review of the dismissal of his habeas petition.” *Slack v. McDaniel*, 529 U.S. 473, 482 (10th Cir. 2000). Because the district court denied his petition on procedural grounds, Mr. Warnick must show “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling” to receive a COA. *Id.* at 484. “Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed

further.” *Id.* Because the district court was correct to dismiss Mr. Warnick’s petition as untimely, “no appeal [is] warranted.” *Id.*

AEDPA establishes a one-year limitations period for a person in state custody to file a writ of habeas corpus. 28 U.S.C. § 2244(d)(1). This limitations period begins to run from the latest of four possible accrual dates. *Id.* Here, the relevant one-year limitations period began on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]” *Id.* § 2244(d)(1)(A). Because Mr. Warnick did not file a certiorari petition with the United States Supreme Court, his conviction became final on February 6, 2019. *See Harris v. Dinwiddie*, 642 F.3d 902, 906 n.6 (10th Cir. 2011) (noting state prisoners have ninety days to file a petition for a writ of certiorari). AEDPA’s limitations period began to run the next day and expired one year later, on February 7, 2020. *See id.* Mr. Warnick did not file his § 2254 petition until November 1, 2021.³

³ In his COA request, Mr. Warnick briefly argues the one-year limitations period should have been tolled pursuant to 28 U.S.C. § 2244(b)(2)(B)(i). Because this section applies only in “second or successive habeas corpus application[s],” we construe his argument to be seeking equitable tolling of 28 U.S.C. § 2244(d)(1)(A). “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Sigala v. Bravo*, 656 F.3d 1125, 1128 (10th Cir. 2011) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Mr. Warnick maintains that by “striking from the record the [s]upplemental brief, the [d]istrict [c]ourt could evade” his tolling argument. COA Request at 6. In Mr. Warnick’s stricken supplemental brief, he argued he had diligently pursued his federal habeas claim because his state appellate counsel advised him that in the context of his direct appeal he could raise a jurisdictional issue at any time. ROA at 156. Even if the district court had considered this information, it would not have advanced Mr. Warnick’s due diligence argument where his state appellate counsel was providing advice only as to state court proceedings and not in the context of a federal habeas petition. Accordingly, even considering the letter in Mr. Warnick’s

In his COA request, Mr. Warnick raises two arguments to demonstrate the district court's timeliness determination was debatable or wrong. First, Mr. Warnick argues AEDPA's one-year limitations period does not apply to jurisdictional challenges. He contends that because subject matter jurisdiction challenges can be raised at any time, his § 2254 petition based on the state trial court's lack of jurisdiction under *McGirt* is not time barred by AEDPA's statute of limitations. We have rejected this argument in several unpublished orders, concluding that a challenge to the convicting court's jurisdiction is a due process claim and, "as with any other habeas claim, . . . is subject to dismissal for untimeliness." *Morales v. Jones*, 417 F. App'x 746, 749 (10th Cir. 2011) (unpublished); *see also Lamarr v. Nunn*, No. 22-6063, 2022 WL 2678602, at *2 (10th Cir. July 12, 2022) (unpublished) (rejecting a state prisoner's argument that AEDPA time limitations do not apply to his habeas petition because the state court lacked jurisdiction to convict him); *Murrell v. Crow*, 793 F. App'x 675, 679 (10th Cir. 2019) (unpublished) (denying a COA challenging the district court's dismissal of an untimely habeas petition challenging the convicting court's jurisdiction).⁴ We have explained that a petitioner's challenge to the convicting court's jurisdiction is considered a due process challenge and is subject to AEDPA's one-year limitations period. *See Yellowbear v. Wyo. Att'y Gen.*, 525 F.3d 921, 924 (10th Cir. 2008) (explaining "[a]bsence of jurisdiction in the convicting court is . . . a

supplemental response, he has not demonstrated reasonable jurists could debate whether he was entitled to tolling on his § 2254 petition.

⁴ We cite these unpublished decisions herein as persuasive authority. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

basis for federal habeas corpus relief cognizable under the due process clause”); *Gibson v. Klinger*, 232 F.3d 799, 803, 808 (10th Cir. 2000) (affirming dismissal of due process habeas claim as time barred under AEDPA). The district court’s conclusion that AEDPA’s one-year statute of limitations applied to Mr. Warnick’s habeas petition challenging the state court’s subject matter jurisdiction was neither “debatable [n]or wrong.” *Slack*, 529 U.S. at 484.

Second, Mr. Warnick argues his state judgment could not be “final” because it was “void” where the state court lacked the jurisdiction to convict him. We disagree. A judgment becomes final “by the conclusion of direct review or the expiration of the time for seeking such review[.]” 28 U.S.C. § 2244(d)(1)(A); *see also Woodward v. Cline*, 693 F.3d 1289, 1292 (10th Cir. 2012) (“[A] judgment becomes final when the defendant has exhausted all direct appeals in state court and the time to petition for a writ of certiorari from the United States Supreme Court has expired.”). Whether or not the state court had subject matter jurisdiction, its judgment became final on February 7, 2019. Mr. Warnick did not file his § 2254 petition until over a year later, on November 1, 2021. Thus, the district court was correct to dismiss it as time barred.⁵ Reasonable jurists “could not

⁵ While Mr. Warnick does not argue AEDPA’s limitations period should be statutorily tolled, it is worth noting that his state court application for post-conviction relief did not toll the limitations period because he filed it after the one-year limitations period had expired. *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.”). Nor did *McGirt* establish a new constitutional right that would trigger a new date for the limitations period. *Pacheco v. El Habti*, 48 F.4th 1179, 1191 (10th Cir. 2022) (“*McGirt* announced no new constitutional right.”).

conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Slack*, 529 U.S. at 484.

III. CONCLUSION

For these reasons, we DENY Mr. Warnick's application for a COA and DISMISS this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

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

ANTHONY H. WARNICK,)
Petitioner,)
v.) Case No. 21-CV-0478-GKF-SH
SCOTT CROW,)
Respondent.)

OPINION AND ORDER

This matter is before the Court on two motions: Respondent Scott Crow's motion (Dkt. 9) to dismiss Petitioner Anthony Warnick's 28 U.S.C. § 2254 petition for writ of habeas corpus (Dkt. 1) as barred by 28 U.S.C. § 2244(d)(1)'s one-year statute of limitations and Warnick's motion (Dkt. 12) for leave to file a supplemental response to Crow's motion to dismiss. For the following reasons, the Court DENIES Warnick's motion, orders the supplemental response (Dkt. 17) he filed on May 2, 2022, STRICKEN from the record, GRANTS Crow's motion and DISMISSES the petition.

I. Background

Warnick, a state inmate appearing *pro se*,¹ brings this action to collaterally attack the judgment entered against him in the District Court of Washington County, Case No. CF-2016-395. Dkt. 1, Pet. 1.² In that case, Warnick is serving the 35-year prison sentence the trial court imposed against him on August 9, 2017, following his conviction as to one count of possessing child pornography. Dkt. 1, Pet. 1; Dkt. 10-2, J. and Sentence 1. In an unpublished opinion filed

¹ Because Warnick appears without counsel, the Court liberally construes his filings. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

² For consistency, the Court's citations refer to the CM/ECF header pagination.

APPEND X - R

November 8, 2018, in Case No. F-2017-851, the Oklahoma Court of Criminal Appeals (OCCA) affirmed Warnick's judgment and sentence. Dkt. 1, Pet. 2; Dkt. 10-3, OCCA Op. 1, 13. Warnick did not file a petition for writ of certiorari in the United States Supreme Court. Dkt. 1, Pet. 3.

Warnick did, however, seek postconviction relief in state court. He filed an application for postconviction relief in Washington County District Court on July 27, 2020, alleging that, in light of the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the State of Oklahoma lacked jurisdiction to prosecute him because he is a member of the Choctaw Tribe, Choctaw Nation of Oklahoma and he committed his crime within the boundaries of the Cherokee Nation Reservation (hereafter, "McGirt claim"). Dkt. 2, Pet'r's Br. 2; Dkt. 10-4, Appl. 1-3, 5-7, 9. In *McGirt*, the Supreme Court held that Congress did not disestablish the Muscogee (Creek) Nation Reservation, the land within the historical boundaries of that reservation is "Indian country," as defined in 18 U.S.C. § 1151(a), and, as a result, the federal government has exclusive jurisdiction to prosecute certain crimes committed within those boundaries if those crimes are committed by or against Native Americans. *McGirt*, 140 S. Ct. at 2468, 2479-80.

The state district court denied Warnick's application on September 14, 2020, concluding that the *McGirt* decision was not "applicable to other tribal lands beyond Muscogee/Creek Nation." Dkt. 2, Pet'r's Br. 2; Dkt. 10-5, Dist. Ct. Order (Sept. 14, 2020) 1. Warnick filed a postconviction appeal. Dkt. 2, Pet'r's Br. 2. On May 10, 2021, citing its post-*McGirt* decision that recognized the continued existence of the Cherokee Nation Reservation, the OCCA reversed the state district court's order and remanded the case for an evidentiary hearing. Dkt. 2, Pet'r's Br. 3; Dkt. 10-7, OCCA Order (May 10, 2021) 2-3. The OCCA subsequently granted the State's motion to stay postconviction proceedings. Dkt. 2, Pet'r's Br. 3; Dkt. 10-8, OCCA Order (July 29, 2021) 1-2. Ultimately, in an order filed September 29, 2021, the OCCA affirmed the denial of

postconviction relief, citing its decision in *State ex rel. Matloff v. Wallace*, 497 P.3d 686, 689 (Okla. Crim. App. 2021), *cert. denied sub nom. Parish v. Oklahoma*, 142 S. Ct. 757 (Jan. 10, 2022). Dkt. 2, Pet'r's Br. 2-3; Dkt. 10-11, OCCA Order (Sept. 29, 2021) 1-2. In *Wallace*, the OCCA held “that *McGirt* and [the OCCA’s] post-*McGirt* decisions recognizing [other] reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided.” Dkt. 2, Pet'r's Br. 2-3.³

Warnick filed the instant federal habeas petition (Dkt. 1), and a supporting brief (Dkt. 2) on November 1, 2021.⁴ He seeks federal habeas relief based on the *McGirt* claim he raised in state postconviction proceedings. Dkt. 1, Pet. 5; Dkt. 2, Pet'r's Br. 3-11. In response to the allegations in the petition, Crow filed a motion to dismiss (Dkt. 9) and a supporting brief (Dkt. 10), asserting that the petition is barred by 28 U.S.C. § 2244(d)(1)’s one-year statute of limitations. Warnick timely filed a response (Dkt. 11) in opposition to the dismissal motion. Nearly three months later, Warnick filed a motion (Dkt. 12) requesting leave to file a supplemental response to the dismissal motion. Crow filed a response (Dkt. 13) in opposition to the motion to supplement, and Warnick filed a reply (Dkt. 16). Without leave of Court, Warnick filed a supplemental response (Dkt. 17) to the dismissal motion on May 2, 2022.

³ On November 1, 2021, the Washington County District Court issued an order indicating that it held an evidentiary hearing on Warnick’s application on October 29, 2021, that it found that Warnick is a member of a federally-recognized Native American tribe and that his crime occurred within the Cherokee Nation Reservation, and that *Wallace* barred postconviction relief. Dkt. 10-12, Dist. Ct. Order (Nov. 1, 2021). The legal effect, if any, of this state district court order is unclear given that the OCCA had already affirmed the state district court’s previous order denying Warnick’s application for postconviction relief.

⁴ The Clerk of Court received the petition on November 5, 2021. Dkt. 1, Pet. 1. But evidence in the record shows that the petition should be deemed filed on November 1, 2021, the date Warnick placed the petition in the prison’s legal mailing system. Dkt. 1, Pet. 15, 19; *see* Rule 3(d), *Rules Governing Section 2254 Cases in the United States District Courts* (providing rule for inmate filings).

II. Motion for leave to file supplemental response (Dkt. 12)

As just discussed, on April 8, 2022, Warnick moved for leave to file a supplemental response to Crow's dismissal motion and, without obtaining a ruling on his motion, Warnick filed a supplemental response to the dismissal motion on May 2, 2022. Under this Court's local civil rules, "[s]upplemental briefs are not encouraged and may be filed only upon motion and leave of Court." LCvR 7-1(f). Warnick's motion requesting leave to file a supplemental response brief identified no good reason to grant his request and, having reviewed the supplemental response that Warnick filed without leave of Court, it is evident that Warnick merely wanted an additional opportunity to make arguments he could have made in his original response brief. For these reasons, the Court DENIES Warnick's motion (Dkt. 12) for leave to file a supplemental response and orders the supplemental response (Dkt. 17) he filed on May 2, 2022, STRICKEN from the record.

III. Motion to dismiss the petition (Dkt. 9)

Crow moves to dismiss Warnick's habeas petition as barred by 28 U.S.C. § 2244(d)(1)'s one-year statute of limitations. Dkts. 9, 10. On consideration of the record of state court proceedings and the parties' arguments, the Court agrees that the petition is untimely and should be dismissed.

A. The petition is untimely under § 2244(d)(1)(A).

The Antiterrorism and Effective Death Penalty Act (AEDPA) establishes a one-year statute of limitations for state prisoners seeking federal collateral review of a state-court judgment under 28 U.S.C. § 2254. The limitation period "run[s] from the latest of" one of four dates:

(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;
- (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 due diligence.

28 U.S.C. § 2244(d)(1).

Regardless of which provision governs the commencement date, the limitation period is tolled for “[t]he 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.” 28 U.S.C. § 2244(d)(2). An application for postconviction relief or other collateral review is “properly filed,” for purposes of statutory tolling, “when its delivery and acceptance are in compliance with the applicable [state] laws and rules governing filings.” *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). But a properly filed application for postconviction relief or other collateral review tolls the limitation period only if the applicant files it before the one-year limitation period expires. *Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006).

For most prisoners, § 2244(d)(1)(A) provides the commencement date for the one-year limitation period. Even with the benefit of liberal construction, the Court does not read the petition or response as presenting any argument that Warnick’s limitation period commenced at a later date under any other provision of § 2244(d)(1). Applying § 2244(d)(1)(A) to the facts of this case, the petition is clearly untimely. As Crow argues, Warnick’s conviction became final on February 6, 2019, when the time expired for him to seek further direct review by filing a petition for writ of certiorari in the United States Supreme Court. *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012); Sup. Ct. R. 13.1. His one-year limitation period commenced the next day, February 7, 2019, and, absent

any tolling events, expired on February 7, 2020. *Harris v. Dinwiddie*, 642 F.3d 902, 906 n.6 (10th Cir. 2011). Warnick filed an application for postconviction relief in July 2020, after his limitation period expired. As a result, that application did not toll the one-year limitation period. *Clark*, 468 F.3d at 714. Because Warnick filed the instant petition on November 1, 2021, more than one year after his one-year limitation period expired, the AEDPA's statute of limitations bars relief and the record supports Crow's request to dismiss the petition.⁵

B. Warnick's arguments against dismissal are not persuasive.

Warnick makes only two discernible arguments against dismissal. Neither is persuasive. First, he contends that the one-year statute of limitations does not apply because challenges to a trial court's lack of subject-matter jurisdiction cannot be waived and can be raised at any time. Dkt. 1, Pet. 13-14; Dkt. 11, Resp. 2, 4. A claim alleging an absence of jurisdiction in the convicting court presents a cognizable habeas claim because the lack of jurisdiction implicates the defendant's constitutional right to due process. *Yellowbear v. Wyo. Att'y Gen.*, 525 F.3d 921, 924 (10th Cir. 2008). But federal courts have repeatedly rejected the notion that due-process claims alleging a lack of subject-matter jurisdiction are exempt from the AEDPA's statute of limitations. *See Murrell v. Crow*, 793 F. App'x 675, 678-79 (10th Cir. 2019) (unpublished)⁶ (characterizing habeas petitioner's claim that the trial court lacked jurisdiction to accept his plea as a "due-process claim"

⁵ Because the AEDPA's one-year limitation period is not jurisdictional, federal courts may, in some circumstances, toll the limitation period for equitable reasons. *Holland v. Florida*, 560 U.S. 631, 645 (2010). Federal courts also may excuse noncompliance with the statute of limitations if the petitioner makes "a credible showing of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). But here, the Court agrees with Crow that even a liberal reading of the petition and response shows that Warnick does not attempt to demonstrate that equitable tolling is warranted and does not assert an actual-innocence claim.

⁶ The Court cites this unpublished decision, and other unpublished decisions herein, as persuasive authority. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

and affirming district court's determination that the due-process claim could be dismissed as untimely under § 2244(d)(1)); *Morales v. Jones*, 417 F. App'x 746, 749 (10th Cir. 2011) (unpublished) (finding no legal support for habeas petitioner's assertion that "subject matter jurisdiction can never be waived and therefore [the petitioner] can never be barred from raising" a claim that the trial court lacked subject-matter jurisdiction and stating, "[a]s with any other habeas claim, [a claim that the trial court lacked subject-matter jurisdiction] is subject to dismissal for untimeliness"); *Donahue v. Harding*, No. CIV-21-183-PRW, 2021 WL 4714662, at *6 & n.9 (W.D. Okla. Sept. 15, 2021) (unpublished) (rejecting habeas petitioner's claim that the "AEDPA's statute of limitations does not apply because the state trial court lacked jurisdiction" over his criminal prosecution and reasoning that, on habeas review, a claim challenging the state court's subject-matter jurisdiction is properly considered a due-process claim), *report and recommendation adopted* by 2021 WL 4711680 (W.D. Okla. Oct. 8, 2021); *Cole v. Pettigrew*, Case No. 20-CV-0459-JED-CDL, 2021 WL 1535364, at *2 n.4 (N.D. Okla. Apr. 19, 2021) (unpublished) (explaining that "the plain language of § 2244(d)(1)'s one-year statute of limitations makes no exception for claims challenging subject-matter jurisdiction"). Thus, contrary to Warnick's argument, the statute of limitations applies and, in this case, bars relief.

Second, Warnick appears to argue that his conviction is "void" and thus cannot be "final." Dkt. 2, Pet'r's Br. 10. This argument is not well-developed, but it too fails. To be fair, there is support for the proposition that a judgment entered by a court that lacked jurisdiction is void. *See, e.g., Ex parte Reed*, 100 U.S. 13, 23 (1879) ("Every act of a court beyond its jurisdiction is void."); *Wallace*, 497 P.3d 686, 695 (Lumpkin, J., specially concurring) ("When the federal government pre-empts a field of law, the legal effect is to deprive states of their jurisdiction in that area of the law. If a court lacks jurisdiction to act than any rulings and judgments would appear to be void

when rendered.”). But even if Warnick could establish that the trial court lacked jurisdiction over his criminal prosecution and that his conviction is therefore “void,” it would not follow that his conviction could not be “final” as that term is used in § 2244(d)(1)(A). Rather, the plain text of § 2244(d)(1)(A) provides that, for purposes of triggering the one-year limitation period, a state-court judgment is “final” when the petitioner can no longer seek direct review of that judgment. *See Gonzalez*, 565 U.S. at 150 (“For petitioners who pursue direct review all the way to [the Supreme] Court, the judgment becomes final at the ‘conclusion of direct review’—when [the Supreme] Court affirms a conviction on the merits or denies a petition for certiorari. For all other petitioners, the judgment becomes final at the ‘expiration of the time for seeking such review’—when the time for pursuing direct review in [the Supreme] Court, or in state court, expires.” (quoting 28 U.S.C. § 2244(d)(1)(A))). The end of direct review does not foreclose a collateral attack on an allegedly “void” judgment, either through state postconviction proceedings or federal habeas proceedings, but it does trigger the one-year limitation period under § 2244(d)(1)(A) for filing a federal habeas petition to challenge the allegedly “void” judgment. Thus, to the extent Warnick attempts to argue that the statute of limitations does not bar relief because his conviction is allegedly “void” and not “final,” the Court rejects that argument.

III. Conclusion

Based on the foregoing, the Court concludes that the petition for writ of habeas corpus is untimely under 28 U.S.C. § 2244(d)(1)(A), that Warnick has not shown that his one-year limitation period commenced at a later date under any other provision of § 2244(d)(1), and that Warnick has not shown that his one-year limitation period should be tolled for equitable reasons. The Court therefore GRANTS Crow’s motion and DISMISSES the petition, with prejudice, as barred by 28 U.S.C. § 2244(d)(1)’s one-year statute of limitations. The Court further concludes that reasonable

jurists would not debate the correctness of the procedural dismissal of the petition and thus declines to issue a certificate of appealability. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Warnick's motion for leave to file a supplemental response (Dkt. 12) is **denied**.
2. Warnick's supplemental response (Dkt. 17) is **stricken** from the record.
3. Crow's motion to dismiss (Dkt. 9) is **granted**.
4. Warnick's petition for writ of habeas corpus (Dkt. 1) is **dismissed** with prejudice as barred by the statute of limitations.
5. A certificate of appealability is **denied**.
6. A separate judgment shall be entered in this matter.

DATED this 23rd day of May 2022.


GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

ANTHONY WARNICK,

SEP 29 2021

Petitioner,

JOHN D. HADDEN
CLERK

-vs-

No. PC-2020-656

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 Washington County in Case No. CF-2016-395 denying his application for post-conviction relief. Petitioner's application asserted the same issues addressed in *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, the trial court's denial of post-

APPENDIX X-C

WESTLAW

State ex rel. Matloff v. Wallace

Court of Criminal Appeals of Oklahoma. | August 12, 2021 | 497 P.3d 686 | 2021 OK CR 21 (Approx. 15 pages)

Declined to Extend by Roth v. State, | Okla.Crim.App., | September 16, 2021

497 P.3d 686

Court of Criminal Appeals of Oklahoma.

STATE EX REL. Mark MATLOFF, District Attorney, Petitioner

v.

The Honorable Jana WALLACE, Associate District Judge, Respondent.

Case No. PR-2021-366

FILED AUGUST 12, 2021

Synopsis

Background: State petitioned for a writ of prohibition, seeking to vacate a post-conviction order by the District Court, Pushmataha County, Jana Kay Wallace, J., that vacated and dismissed defendant's second degree murder conviction, which was committed in the Choctaw Reservation, in light of Supreme Court's decision in *McGirt v. Oklahoma*, U.S. 140 S.Ct. 2452.

Holdings: The Court of Criminal Appeals, Lewis, J., held that:

- 1 rule in *McGirt v. Oklahoma* did not apply retroactively to convictions that were final at the time it was decided, overruling *Bosse v. State*, 484 P.3d 286, *Cole v. State*, 492 P.3d 11, *Ryder v. State*, 489 P.3d 528, and *Bench v. State*, 492 P.3d 19;
- 2 rule announced in *McGirt* was procedural;
- 3 rule announced in *McGirt* was new; and
- 4 trial court judge could not apply rule in *McGirt* retroactively.

Petition granted; order granting postconviction relief reversed.

Hudson, J., filed a specially concurring opinion.

Lumpkin, J., filed a specially concurring opinion.

Appellate ReviewPost-Conviction ReviewPetition for Writ of Prohibition

West Headnotes (7)

Change View

1 Criminal Law

Effect of change in law or facts

New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law.

1 Case that cites this headnote

2 Courts

In general; retroactive or prospective operation

New rules of criminal procedure generally do not apply retroactively to convictions that are final, with a few narrow exceptions.

26 Cases that cite this headnote

3 Courts

In general; retroactive or prospective operation

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, did not apply retroactively to void a conviction that was final when *McGirt* was decided; overruling *Bosse v. State*, 484 P.3d 286, *Cole v. State*, 492 P.3d 11, *Ryder v. State*, 489 P.3d 528, and *Bench v. State*, 492 P.3d 19. 18 U.S.C.A. § 1153.

APPENDIX
- D -

21 Cases that cite this headnote

4 Criminal Law  Change in the law

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, was only a procedural change in the law, and thus, did not constitute a substantive or watershed rule that would permit retroactive collateral attacks. 18 U.S.C.A. § 1153.

3 Cases that cite this headnote

5 Courts  In general; retroactive or prospective operation

For purposes of retroactivity analysis, a case announces a "new rule" when it breaks new ground, imposes new obligation on the state or federal government, or in other words, result was not dictated by precedent when defendant's conviction became final.

5 Cases that cite this headnote

6 Courts  In general; retroactive or prospective operation

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, was new, and thus, did not apply retroactively to convictions that were final at the time it was decided, since the rule imposed new and different obligations on the state and federal government, and rule also broke new legal ground in the sense that it was not dictated by Supreme Court precedent. 18 U.S.C.A. § 1153.

26 Cases that cite this headnote

7 Criminal Law  Change in the law**Prohibition**  Criminal prosecutions

Trial court judge could not retroactively apply rule in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, to defendant's petition for post-conviction relief, and thus, issuance of a writ of prohibition to vacate trial court's order vacating and dismissing defendant's final second degree murder conviction was warranted, since trial court judge was unauthorized take such action under state law. 18 U.S.C.A. § 1153.

17 Cases that cite this headnote

***687 OPINION**

LEWIS, JUDGE:

¶1 The State of Oklahoma, by Mark Matloff, District Attorney of Pushmataha County, petitions this Court for the writ of prohibition to vacate the Respondent Judge Jana Wallace's April 12, 2021 order granting post-conviction relief. Judge Wallace's order vacated and dismissed the second degree murder conviction of Clifton Merrill Parish in Pushmataha County Case No. CF-2010-26. Because the Respondent's order is unauthorized by law and prohibition is a proper remedy, the writ is **GRANTED**.

FACTS

¶2 Clifton Parish was tried by jury and found guilty of second degree felony murder in March, 2012. The jury sentenced him to twenty-five years imprisonment. This Court affirmed the conviction on direct appeal in *Parish v. State*, No. F-2012-335 (Okl.Cr., March 6, 2014) (unpublished). Mr. Parish did not petition for rehearing, and did not petition the U.S. Supreme Court for *certiorari* within the allowed ninety-day time period. On or about June 4, 2014, Mr. Parish's conviction became final.¹

¶3 On August 17, 2020, Mr. Parish filed an application for post-conviction relief alleging that the State of Oklahoma lacked subject matter jurisdiction to try and sentence him for murder under the Supreme Court's decision in *McGirt v. Oklahoma*, — U.S. —, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). Judge Wallace held a hearing and found that Mr. Parish was an Indian and committed his crime within the Choctaw Reservation, the continued existence of which was recently recognized by this Court, following *McGirt*, in *Sizemore v. State*, 2021 OK CR 6, ¶ 16, 485 P.3d 867, 871.

¶4 Because the Choctaw Reservation is Indian Country, Judge Wallace found that the State lacked subject matter jurisdiction to try Parish for murder under the Major Crimes Act. 18 U.S.C. § 1153. Applying the familiar rule that defects in subject matter jurisdiction can never be waived, and can be raised at any time, Judge Wallace found Mr. Parish's conviction for second degree murder was void and ordered the charge dismissed.

¶5 Judge Wallace initially stayed enforcement of the order. The State then filed in this Court a verified request for a stay and petitioned for a writ of prohibition against enforcement of the order granting post-conviction relief. In *State ex rel. Matloff v. Wallace*, 2021 OK CR 15, — P.3d —, this Court stayed all proceedings and directed counsel for the interested parties to submit briefs on the following question:

In light of *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *Edwards v. Vannoy* (No. 19-5807), 593 U.S. — [141 S.Ct. 1547, 209 L.Ed.2d 651] (May 17, 2021), cases cited therein, and related authorities, should the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* be applied retroactively to void a state conviction that was *688 final when *McGirt* and *Sizemore* were announced?

¶6 The parties and *amici curiae*² subsequently filed briefs on the question presented. For reasons more fully stated below, we hold today that *McGirt v. Oklahoma* announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction. The writ of prohibition is therefore **GRANTED** and the order granting post-conviction relief is **REVERSED**.

ANALYSIS

¶7 In state post-conviction proceedings, this Court has previously applied its own non-retroactivity doctrine—often drawing on, but independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus—to bar the application *689 of new procedural rules to convictions that were final when the rule was announced. See *Ferrell v. State*, 1995 OK CR 54, ¶¶ 5-9, 902 P.2d 1113, 1114-15 (citing *Teague, supra*) (finding new rule governing admissibility of recorded interview was not retroactive on collateral review); *Baxter v. State*, 2010 OK CR 20, ¶ 11, 238 P.3d 934, 937 (noting our adoption of *Teague* non-retroactivity analysis for new rules in state post-conviction review); and *Burleson v. Saffle*, 278 F.3d 1136, 1141 n.5 (10th Cir. 2002) (noting incorporation “into state law the Supreme Court's *Teague* approach to analyzing whether a new rule of law should have retroactive effect,” citing *Ferrell, supra*).

1 2 ¶8 New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law. See *Carter v. State*, 2006 OK CR 42, ¶ 4, 147 P.3d 243, 244 (citing *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)) (applying new instructional rule of *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 to case tried before the rule was announced, but pending on direct review). But new rules generally do *not* apply retroactively to convictions that are final, with a few narrow exceptions. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1114-15; *Thomas v. State*, 1994 OK CR 85, ¶ 13, 888 P.2d 522, 527 (decision requiring that prosecution file bill of particulars no later than arraignment did not apply to convictions already final).

¶9 Following *Teague* and its progeny, we would apply a new *substantive* rule to final convictions if it placed certain primary (private) conduct beyond the power of the Legislature to punish, or categorically barred certain punishments for classes of persons because of their status (capital punishment of persons with insanity or intellectual disability, or juveniles, for example). See, e.g., *Pickens v. State*, 2003 OK CR 16, ¶¶ 8-9, 74 P.3d

601, 603 (retroactively applying *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) because *Atkins* barred capital punishment for persons with intellectual disability).

¶10 Under *Ferrell*, we also would retroactively apply a new “watershed” procedural rule that was essential to the accuracy of trial proceedings, but such a rule is unlikely ever to be announced. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1115; see *Beard v. Banks*, 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (identifying *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) as the paradigmatic watershed rule, and likely the only one ever announced by the Supreme Court); *Edwards v. Vannoy*, — U.S. —, 141 S.Ct. 1547, 1561, 209 L.Ed.2d 651 (2021) (acknowledging the “watershed” rule concept was moribund and would no longer be incorporated in *Teague* retroactivity analysis).

¶11 Like the Supreme Court, we have long adhered to the principle that the narrow purposes of collateral review, and the reliance, finality, and public safety interests in factually accurate convictions and just punishments, weigh strongly against the application of new procedural rules to convictions already final when the rule is announced. Applying new procedural rules to final convictions, after a trial or guilty plea and appellate review according to then-existing procedures, invites burdensome litigation and potential reversals unrelated to accurate verdicts, undermining the deterrent effect of the criminal law. *Ferrell*, 1995 OK CR 54, ¶¶ 6-7, 902 P.2d at 1114-15.

¶12 Just as *Teague*’s doctrine of non-retroactivity “was an exercise of [the Supreme Court’s] power to interpret the federal habeas statute,” *Danforth v. Minnesota*, 552 U.S. 264, 278, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008), we have barred state post-conviction relief on new procedural rules as part of our independent authority to interpret the remedial scope of state post-conviction statutes. *Smith v. State*, 1994 OK CR 46, ¶ 3, 878 P.2d 375, 377-78 (declining to apply rule on flight instruction to conviction that was final six years earlier); *Thomas*, 1994 OK CR 85, ¶ 13, 888 P.2d at 527 (declining to apply rule on filing bill of particulars at arraignment to conviction that was final when rule was announced).

¶13 Before and after *McGirt*, this Court has treated Indian Country claims as presenting non-waivable challenges to criminal subject matter jurisdiction. *Bosse v. State*, 2021 OK CR 3, ¶¶ 20-21, 484 P.3d 286, 293-94; *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (both characterizing claim as subject matter jurisdictional challenge that may be raised at any time). After *McGirt* was decided, relying on this theory of non-waivability, this Court initially granted post-conviction relief and vacated several capital murder convictions, and at least one non-capital conviction (Jimcy McGirt’s), that were final when *McGirt* was announced.³

¶14 We acted in those post-conviction cases without our attention ever having been drawn to the potential non-retroactivity of *McGirt* in light of the Court of Appeals’ opinion in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), cert. denied, 519 U.S. 963, 117 S.Ct. 384, 136 L.Ed.2d 301 (1996) and cases discussed therein, which we find very persuasive in our analysis of the state law question today. See also, e.g., *Schlomann v. Moseley*, 457 F.2d 1223, 1227, 1230 (10th Cir. 1972) (finding Supreme Court’s “newly announced jurisdictional rule” restricting courts-martial in *O’Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969) had made a “clear break with the past;” retroactive application to void final convictions was not compelled by jurisdictional nature of *O’Callahan*; and *O’Callahan* would not be applied retroactively to void court-martial conviction that was final when *O’Callahan* was decided).

3 ¶15 After careful examination of the reasoning in *Cuch*, as well as the arguments of counsel and *amici curiae*, we reaffirm our recognition of the Cherokee, Choctaw, and Chickasaw Reservations⁴ in those earlier cases. However, exercising our independent state law authority to interpret the remedial scope of the state post-conviction statutes, we now hold that *McGirt* and our post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided. Any statements, holdings, or suggestions to the contrary in our previous cases are hereby overruled.

¶16 In *United States v. Cuch*, *supra*, the Tenth Circuit Court of Appeals held that the Supreme Court’s Indian Country jurisdictional ruling in *Hagen v. Utah*, 510 U.S. 399, 114

S.Ct. 958, 127 L.Ed.2d 252 (1994) was not retroactive to convictions already final when *Hagen* was announced. In *Hagen*, the Supreme Court held that certain lands recognized *690 as Indian Country by *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir.1985) (en banc) were not part of the Uintah Reservation; and that Utah, rather than the federal government, had subject matter jurisdiction over crimes committed in the area. *Cuch*, 79 F.3d at 988.

¶17 *Cuch* and *Appawoo*, defendants who pled guilty and were convicted of major crimes (sexual abuse and second degree murder respectively) in the federal courts of Utah, challenged their convictions in collateral motions to vacate pursuant to 28 U.S.C. § 2255. They argued the subject matter jurisdiction defect recognized in *Hagen* voided their federal convictions. *Cuch*, 79 F.3d at 989-90. The federal district court found *Hagen* was not retroactive to collateral attacks on final convictions under section 2255. *Id.* at 990. The Tenth Circuit affirmed.

¶18 The Court of Appeals noted that the Supreme Court had applied non-retroactivity principles to new rules that alter subject matter jurisdiction. *Id.* at 990 (citing *Gosa v. Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973)) (refusing to apply new jurisdictional limitation on military courts-martial retroactively to void final convictions). The policy of non-retroactivity was grounded in principles of finality of judgments and fundamental fairness: *Hagen* had been decided after the petitioners' convictions were final; it was not dictated by precedent; and the accuracy of the underlying convictions weighed against the disruption and costs of retroactivity. *Id.* at 991-92.

¶19 The Court of Appeals found non-retroactivity of the *Hagen* ruling upheld the principle of finality and foreclosed the harmful effects of retroactive application, including

the prospect that the invalidation of a final conviction could well mean that the guilty will go unpunished due to the impracticability of charging and retrying the defendant after a long interval of time. Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Furthermore, retroactive application would surely visit substantial injustice and hardship upon those litigants who relied upon jurisdiction in the federal courts, particularly victims and witnesses who have relied on the judgments and the finality flowing therefrom. Retroactivity would also be unfair to law enforcement officials and prosecutors, not to mention the members of the public they represent, who relied in good faith on binding federal pronouncements to govern their prosecutorial decisions. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered.

79 F.3d at 991-92 (citing and quoting from *Gosa*, 413 U.S. at 685, 93 S.Ct. 2926, and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (internal citations, quotation marks, brackets, and ellipses omitted)).

¶20 The Court of Appeals found that no questions of innocence arose from the jurisdictional flaw in the petitioners' convictions. Their conduct was criminal under both state and federal law. The question resolved in *Hagen* was simply "where these Indian defendants should have been tried for committing major crimes." 79 F.3d at 992 (emphasis in original). The petitioners did not allege unfairness in the processes by which they were found guilty. *Id.*

¶21 The Court of Appeals reasoned that a jurisdictional ruling like *Hagen* raised no fundamental questions about the basic truth-finding functions of the courts that tried and sentenced the defendants. *Id.* The legal processes resulting in those convictions had "produced an accurate picture of the conduct underlying the movants' criminal charges and provided adequate procedural safeguards for the accused." *Id.*

¶22 The Court of Appeals also noted that the chances of successful state prosecution were slim after so many years. "The evidence is stale and the witnesses are probably unavailable or their memories have dimmed." *Id.* at 993. The Court also considered the "violent and abusive nature" of the underlying *691 convictions, and the burdens that immediate release of these prisoners would have on victims, many of whom were child victims of sexual abuse. *Id.*

¶23 The Court of Appeals distinguished two lines of Supreme Court holdings that retroactively invalidated final convictions. The first involved the conclusion that a court lacked authority to convict or punish a defendant in the first place. But in those cases, the bar to prosecution arose from a constitutional immunity against punishment for the conduct in *any* court, or prohibited a trial altogether. The defendants in *Cuch* could hardly claim immunity for acts of sexual abuse and murder. The only issue touched by *Hagen* was the federal court's exercise of jurisdiction. *Id.* at 993.

¶24 The second line of Supreme Court cases retroactively invalidating final convictions involved holdings that narrowed the scope of a penal statute defining elements of an offense, and thus invalidated convictions for acts that Congress had never criminalized. *Hagen*, on the other hand, had not narrowed the scope of *liability* for conduct under a statute, it had modified the extent of Indian Country jurisdiction, and thus altered the *forum* where crimes would be prosecuted. *Id.* at 994.

¶25 Finding neither of the exceptional circumstances that might warrant retroactive application of *Hagen*'s jurisdictional ruling to final convictions, the Court of Appeals found "the circumstances surrounding these cases make prospective application of *Hagen* unquestionably appropriate in the present context." *Id.* Prior federal jurisdiction was well-established before *Hagen*; the convictions were factually accurate; the procedural safeguards and truth-finding functions of the courts were not impaired; and retroactive application would compromise both reliance and public safety interests that legitimately attached to prior proceedings.

4 ¶26 We find *Cuch*'s analysis and authorities persuasive as we consider the independent state law question of collateral non-retroactivity for *McGirt*. First, we conclude that *McGirt* announced a rule of criminal *procedure*, using prior case law, treaties, Acts of Congress, and the Major Crimes Act to recognize a long dormant (or many thought, non-existent) federal jurisdiction over major crimes committed by or against Indians in the Muscogee (Creek) Reservation. And like *Hagen* before it, "the [*McGirt*] decision effectively overruled the contrary conclusion reached in [the *Murphy*] case,⁵ redefined the [Muscogee (Creek)] Reservation boundaries ... and conclusively settled the question." *Cuch*, 79 F.3d at 989.

¶27 *McGirt* did not "alter[] the range of conduct or the class of persons that the law punishes" for committing crimes. *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). *McGirt* did not determine whether specific conduct is criminal, or whether a punishment for a class of persons is forbidden by their status. *McGirt*'s recognition of an existing Muscogee (Creek) Reservation effectively decided *which sovereign* must prosecute major crimes committed by or against Indians within its boundaries, crimes which previously had been prosecuted in Oklahoma courts for more than a century. But this significant change to the extent of state and federal criminal jurisdiction affected "only the *manner of determining* the defendant's culpability." *Schriro*, 542 U.S. at 353, 124 S.Ct. 2519 (emphasis in original). For purposes of our state law retroactivity analysis, *McGirt*'s holding therefore imposed only *procedural* changes, and is clearly a procedural ruling.

5 6 ¶28 Second, the procedural rule announced in *McGirt* was new.⁶ For purposes *692 of retroactivity analysis, a case announces a new rule when it breaks new ground, imposes a new obligation on the state or federal government, or in other words, the result was not dictated by precedent when the defendant's conviction became final. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1114 (finding rule of inadmissibility of certain evidence broke new ground and was not dictated by precedent when defendant's conviction became final).

¶29 *McGirt* imposed new and different obligations on the state and federal governments. Oklahoma's new obligations included the reversal on direct appeal of at least some major

crimes convictions prosecuted (without jurisdictional objections at the time, and apparently lawfully) in these newly recognized parts of Indian Country; and to abstain from some future arrests, investigations, and prosecutions for major crimes there. The federal government, in turn, was newly obligated under *McGirt* to accept its jurisdiction over the apprehension and prosecution of major crimes by or against Indians in a vastly expanded Indian Country.

¶30 *McGirt*'s procedural rule also broke new legal ground in the sense that it was not dictated by, and indeed, arguably involved controversial innovations upon, Supreme Court precedent. For today's purposes, the holding in *McGirt* was dictated by precedent only if its essential conclusion, i.e., the continued existence of the Muscogee (Creek) Reservation, was "apparent to all reasonable jurists" when Mr. Parish's conviction became final in 2014. *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997).

¶31 In 2005, this Court had declined to recognize the claimed Muscogee (Creek) Reservation, and thus denied the essential premise of the claim on its merits, in *Murphy v. State*, 2005 OK CR 25, ¶¶ 50-52, 124 P.3d at 1207-08. From then until the Tenth Circuit Court of Appeals' 2017 decision in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), no court that had addressed the issue, including the federal district court that initially denied Murphy's habeas claim, had embraced the possibility that the old boundaries of the Muscogee (Creek) Nation remained a reservation.⁷

¶32 With no disrespect to the views that later commanded a Supreme Court majority in *McGirt*, the dissenting opinion of Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Thomas, whom we take to be "reasonable jurists" in the required sense, certainly did *not* view the holding in *McGirt* as dictated by precedent even in 2020, much less in 2014.⁸ Chief Justice Roberts's dissent raised a host of reasonable doubts about the majority's adherence to precedent,⁹ arguing *693 at length that it had divined the existence of a reservation only by departing from the governing standards for proof of Congress's intent to disestablish one, *McGirt*, 140 S.Ct. at 2489; and in many other ways besides,¹⁰ "disregarding the 'well settled' approach required by our precedents." *Id.* at 2482 (Roberts, C.J., dissenting). The *McGirt* majority, of course, remains just that, but the Chief Justice's reasoned, precedent-based objections are additional proof that *McGirt*'s holding was not "apparent to all reasonable jurists" when Mr. Parish's conviction became final in 2014.

¶33 Third, our independent exercise of authority to impose remedial constraints under state law on the collateral impact of *McGirt* and post-*McGirt* litigation is consistent with both the text of the opinion and the Supreme Court's apparent intent. As already demonstrated, *McGirt* is neither a substantive rule nor a watershed rule of criminal procedure. The Supreme Court itself has not declared that *McGirt* is retroactive to convictions already final when the ruling was announced.

¶34 *McGirt* was never intended to annul decades of final convictions for crimes that might never be prosecuted in federal court; to free scores of convicted prisoners before their sentences were served; or to allow major crimes committed by, or against, Indians to go unpunished. The Supreme Court's intent, as we understand it, was to fairly and conclusively determine the claimed existence and geographic extent of the reservation.

¶35 The Supreme Court predicted that *McGirt*'s disruptive potential to unsettle convictions ultimately would be limited by "other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few," designed to "protect those who have reasonably labored under a mistaken understanding of the law." *McGirt*, 140 S.Ct. at 2481. The Court also well understood that collateral attacks on final state convictions based on *McGirt* would encounter "well-known state and federal limitations on post-conviction review in criminal proceedings." *Id.* at 2479. "[P]recisely because those doctrines exist," the Court said, it felt "free" to announce a momentous holding effectively recognizing a new jurisdiction and supplanting a longstanding previous one, "leaving questions about reliance interests for later proceedings crafted to account for them." *Id.* at 2481 (brackets and ellipses omitted).

¶36 Those questions are now properly before us and urgently demand our attention. Because *McGirt*'s new jurisdictional holding was a clear break with the past, we have applied *McGirt* to reverse several convictions for major crimes pending on direct review,

and not yet final, when *McGirt* was announced. The balance of competing interests is very different in a final conviction, and the reasons for non-retroactivity of a new *jurisdictional* rule apply with particular force. Non-retroactivity of *McGirt* in state post-conviction proceedings can mitigate some of the negative consequences so aptly described in *Coch*, striking a proper balance between the public safety, finality, and reliance interests in settled convictions against the competing interests of those tried and sentenced under the prior jurisdictional rule.

¶37 The State's reliance and public safety interests in the results of a guilty plea or trial on the merits, and appellate review according to then-existing rules, are always substantial. Though Oklahoma's jurisdiction over major crimes in the newly recognized reservations was limited in *McGirt* and our post-*McGirt* reservation rulings, the State's jurisdiction was hardly open to doubt for over a century and often went wholly unchallenged, as it did at Mr. Parish's trial in 2012.

¶38 We cannot and will not ignore the disruptive and costly consequences that retroactive application of *McGirt* would now have: the shattered expectations of so many crime victims that the ordeal of prosecution would assure punishment of the offender; the trauma, expense, and uncertainty awaiting victims and witnesses in federal re-trials; the outright release of many major crime offenders due to the impracticability of new prosecutions; and the incalculable loss to agencies and officers who have reasonably labored for decades to apprehend, prosecute, defend, and punish those convicted of major crimes; all *694 owing to a longstanding and widespread, but ultimately mistaken, understanding of law.

¶39 By comparison, Mr. Parish's legitimate interests in post-conviction relief for this jurisdictional error are minimal or non-existent. *McGirt* raises no serious questions about the truth-finding function of the state courts that tried Mr. Parish and so many others in latent contravention of the Major Crimes Act. The state court's faulty jurisdiction (unnoticed until many years later) did not affect the procedural protections Mr. Parish was afforded at trial. The trial produced an accurate picture of his criminal conduct; the conviction was affirmed on direct review; and the proceedings did not result in the wrongful conviction or punishment of an innocent person. A reversal of Mr. Parish's final conviction now undoubtedly would be a monumental victory for him, but it would not be justice.

7 ¶40 Because we hold that *McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction, the order vacating Mr. Parish's murder conviction was unauthorized by state law. The State ordinarily may file a regular appeal from an adverse post-conviction order, but here, it promptly petitioned this Court for extraordinary relief and obtained a stay of proceedings. The time for filing a regular post-conviction appeal (twenty days from the challenged order) has since expired. Rule 5.2(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

¶41 The petitioner for a writ of prohibition must establish that a judicial officer has, or is about to, exercise unauthorized judicial power, causing injury for which there is no adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). There being no adequate remedy by appeal, the injury caused by the unauthorized dismissal of this final conviction justifies the exercise of extraordinary jurisdiction. The writ of prohibition is **GRANTED**. The order granting post-conviction relief is **REVERSED**.

ROWLAND, P.J.: CONCURS

HUDSON, V.P.J.: SPECIALLY CONCURS

LUMPKIN, J.: SPECIALLY CONCURS

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCUR:

¶1 I commend Judge Lewis for his thorough discussion of the retroactivity principles governing this case. I write separately to summarize my understanding of today's holding. Today's ruling holds that *McGirt v. Oklahoma*, — U.S. —, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020) does not apply retroactively on collateral review to convictions that were final before *McGirt*. We apply on state law grounds the retroactivity principles from *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) in reaching this conclusion because the United States Supreme Court has not previously ruled on the retroactivity of *McGirt*. We hold that *McGirt* is a new rule of criminal procedure not dictated by precedent,

that represents a clear break with past law and that imposes a new obligation on the State. The Supreme Court recently acknowledged there is no longer an exception in its *Teague* jurisprudence for watershed procedural rules to be applied retroactively and we incorporate this ruling in today's decision. See *Edwards v. Vannoy*, — U.S. —, 141 S. Ct. 1547, 1561, 209 L.Ed.2d 651 (2021). Today's decision is also based on *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996) which addressed a similar situation. We overrule our previous decisions in which we have applied *McGirt* on post-conviction review. Today's decision, however, reaffirms our previous recognition of the existence of the various reservations in those cases.

¶2 Based on this understanding of our holding, I fully concur in today's decision. While this decision resolves one aspect of the post-*McGirt* jurisdictional puzzle, many challenges remain for which there are no easy answers. So far, Congress has missed the opportunity to implement a practical solution which, at this point, seems unlikely. It is now up to the leaders of the State of Oklahoma, the Tribes and the federal government to address the jurisdictional fallout from the *McGirt* decision. Only in this way, with all of these parties working together, can public *695 safety be ensured across jurisdictional boundaries in the historic reservation lands of eastern Oklahoma. It will require this type of cooperation in the post-*McGirt* world to ensure that stability is restored to Oklahoma's criminal justice system.

LUMPKIN, JUDGE, SPECIALLY CONCURRING:

¶1 I compliment my colleague on a well-researched opinion which accurately sets out the decisions of the U.S. Supreme Court and the Tenth Circuit Court of Appeals regarding giving retroactive effect to Supreme Court decisions. I especially compliment him for recognizing the scholarly analysis of Chief Justice Roberts in the *McGirt* dissent which shows by established precedent that the *McGirt* majority was not fully analyzing and applying past precedent of the Court in its decision.

¶2 I join this opinion based on the precedent set by the United States Supreme Court and the Tenth Circuit Court of Appeals. In doing so I cannot divert from basic principles of stating the obvious. In recognizing that the federal precedents set forth in the opinion and this writing are binding on this Court, I cannot overlook the legal fact that each of them applied a policy relating to collateral attacks on judgments rendered by courts lacking jurisdiction to render those judgments. When those courts found the lower courts rendering the subject judgments had no jurisdiction to render them, the result of this finding should have been to render the judgments void. Rather than declaring those judgments void, the courts instead formulated a policy limiting the retroactive application of their decisions, thereby preserving from collateral attack final judgments preceding them.

¶3 Keeping the policy decisions reflected in those opinions in mind, I do diverge from the court in labeling the *McGirt* ruling as procedural. When the federal government pre-empts a field of law, the legal effect is to deprive states of their jurisdiction in that area of the law. If a court lacks jurisdiction to act then any rulings and judgments would appear to be void when rendered.¹ As the opinion notes, this Court since statehood has recognized and honored federal jurisdiction as to Indian allotments and dependent Indian communities. Those areas are subject to federal jurisdiction and that jurisdiction is recognized by the federal government, the tribes and the State of Oklahoma. There was no question Oklahoma had jurisdiction over the rest of the state and this Court, as the court with exclusive jurisdiction in criminal cases, faithfully honored those jurisdictional claims.

¶4 Regardless, a 5-4 majority of the Supreme Court disregarded the precedent set out by Chief Justice Roberts in his dissent to *McGirt*, and for the first time in legal history determined the existence of a reservation in Oklahoma based on "magic words" rather than historical context.² In doing so, the majority *696 in *McGirt* declared this reservation has always been in existence, even after Oklahoma became a state. This operative wording in the opinion creates a legal conundrum in that *McGirt* states that legally Oklahoma never had jurisdiction on this newly identified Indian reservation. This holding creates a question as to every criminal judgment entered by a state court regarding its validity. If all courts involved in this issue held themselves to the legal effect of this holding then those judgments would be void.

¶5 However both the Supreme Court and the Tenth Circuit have shown us by their precedents that courts have an option other than the legal one in cases of this type and that is the application of legal policy. As set out in the opinion, each of those courts has

applied policy regarding retroactive application of cases based on the chaos, confusion, harm to victims, etc., if retroactive application occurred. The *McGirt* decision is the *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), decision in reverse. In upholding the state court conviction, the Court held in *Hagen* that Congress had disestablished the Uintah reservation; therefore, the federal district court did not have jurisdiction to decide the subject case. In a later case involving the same land area, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), the Tenth Circuit found that although the federal district court lacked jurisdiction to try the subject cases, there was no need to vacate the judgments for lack of jurisdiction because of the harm it would cause and because those defendants were given a fair trial and made no complaints regarding the fairness. Thus the court applied policy rather than the law which would have rendered the judgments void due to lack of subject matter jurisdiction.

¶6 The legal effect of the *McGirt* decision, finding Oklahoma lacked jurisdiction to try cases by or against Indians in Indian Country due to federal preemption through the Major Crimes Act, would be to declare the associated judgments void. However, we now adopt the federal policy and established precedent of selective retroactive application in these type of cases due to the ramifications retroactive application would have on the criminal justice system and victims. This is hard to explain in an objective legal context but provides a just and pragmatic resolution to the *McGirt* dilemma.

All Citations

497 P.3d 686, 2021 OK CR 21

Footnotes

- 1 *Teague v. Lane*, 489 U.S. 288, 295, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (defining a final conviction as one where judgment was rendered, the availability of appeal exhausted, and the time to petition for certiorari had elapsed).
- 2 The Cherokee, Chickasaw, Choctaw, and Muscogee (Creek) Nations filed a joint brief as *amici curiae* in response to our invitation. The Acting Attorney General of Oklahoma, counsel from the Capital Habeas Unit of the Federal Public Defender's Office for the Western District of Oklahoma, and the Oklahoma Criminal Defense Lawyer's Association also submitted briefs as *amicus curiae*. We thank counsel for their scholarship and vigorous advocacy.
- 3 *Bosse, supra*; *Cole v. State*, 2021 OK CR 10, 492 P.3d 11; *Ryder v. State*, 2021 OK CR 11, 489 P.3d 528, *Bench v. State*, 2021 OK CR 12, 492 P.3d 19. We later stayed the mandate in these capital post-conviction cases pending the State's petition for certiorari to the Supreme Court. We have also granted *McGirt*-based relief and vacated many convictions in appeals pending on direct review. *E.g., Hogner v. State*, 2021 OK CR 4, — P.3d —, 2021 WL 958412; *Spears v. State*, 2021 OK CR 7, 485 P.3d 873; *Sizemore v. State*, *supra*.
- 4 We first recognized the Seminole Reservation in the post-*McGirt* direct appeal of *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250, and have no occasion to revisit that decision today.
- 5 *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198 (denying post-conviction relief on claim that Muscogee (Creek) Reservation was Indian Country and jurisdiction of murder was federal under the Major Crimes Act).
- 6 *McGirt*'s recognition of the entire historic expanse of the Muscogee (Creek) Nation as a reservation was undoubtedly new in the *temporal* sense. We take it as now well-established that "Oklahoma exercised jurisdiction over all of the lands of the former Five [] Tribes based on longstanding caselaw from statehood until the Tenth Circuit in *Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) found a small tract of tribally-owned treaty land existed along the Arkansas River in Tulsa County, Oklahoma." *Murphy v. Simrons*, 497 F. Supp.2d 1257, 1288-89 (E.D. Okla. 2007). Until

McGirt, this Court, and Oklahoma law enforcement officials generally, declined to recognize the historic boundaries of any Five Tribes reservation, as such, as Indian Country. See, e.g., 11 Okla. Op. Att'y. Gen. 345 (1979), available at 1979 WL 37653, at *8-9 (stating the Attorney General's opinion that "there is no 'Indian country' in said former 'Indian Territory' over which tribal and thus federal jurisdiction exists").

7 *McGirt*, 140 S.Ct. at 2497 (Roberts, C.J., dissenting). In *Murphy v. Simrons*, 497 F.Supp.2d 1257, 1289-90 (E.D. Okla. 2007), the federal habeas court held thus:

While the historical boundaries of once tribally owned land within Oklahoma may still be determinable today, there is no question, based on the history of the Creek Nation, that Indian reservations do not exist in Oklahoma. State laws have applied over the lands within the historical boundaries of the Creek nation for over a hundred years.

The federal district court found "no doubt the historic territory of the Creek Nation was disestablished as a part of the allotment process." *Id.*, at 1290. The court concluded that our 2005 decision "refusing to find the crime occurred on an Indian 'reservation' [was] not 'contrary to nor an unreasonable application of Federal law as determined by the United States Supreme Court.'" *Id.*

8 The mere existence of a dissent does not establish that a rule is new, but a 5-4 split among Justices on whether precedent dictated a holding is strong evidence of a novel departure from precedent. *Beard*, 542 U.S. at 414-15, 124 S.Ct. 2504 (finding that the four dissents in *Mills v. Maryland* [486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)] strongly indicated that the rule announced was not dictated by *Lockett v. Ohio* [438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)]).

9 Principally *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), and *Nebraska v. Parker*, 577 U.S. 481, 136 S.Ct. 1072, 194 L.Ed.2d 152 (2016).

10 See generally, *McGirt*, 140 S.Ct. at 2485-2489 (Roberts, C.J., dissenting).

1 I realize courts in the past have engaged in legal gymnastics to keep from voiding judgments rendered by a court without jurisdiction by finding that a court's judgment must be void on its face before it can be held void. *Springer v. Townsend*, 336 F.2d 397, 401 (10th Cir. 1964) (in deciding whether a probate decree was void, the Court stated "our scope of review is limited to determining whether a lack of jurisdiction in the approval proceeding affirmatively appears from the record."); "[a] judgment will not be held to be void on its face unless an inspection will affirmatively disclose that the court had no jurisdiction of the person, no jurisdiction of the subject matter, or had no judicial power to render the particular judgment." *Clay v. Sun River Mining Co.*, 302 F.2d 599, 601 (10th Cir. 1962); "[a]s long as the supporting record does not reflect the district court's lack of authority, the district court order cannot be declared "void." Such an order is instead only "voidable." *Bumpus v. State*, 1996 OK CR 52, ¶ 7, 925 P.2d 1208, 1210; "[t]his Court has held in numerous cases that in order for a judgment to be void as provided in the Statute just quoted, it must be void on the face of the record, and that extrinsic evidence is not admissible to show judgment is void on the face of the record." *Scoufos v. Fuller*, 1954 OK 363, 280 P.2d 720, 723. However, logic and common sense dictate that if a court had no authority to act then any actions would be a nullity. Regardless, I apply the precedent cited in the opinion and specially concur.

2 In *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), the Court enunciated several factors which must be considered in determining whether a reservation has been disestablished. Those factors are: the explicit language of Congress evincing intent to change boundaries;

events surrounding the passage of surplus land acts which "reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation ..."; Congress's subsequent treatment of the subject areas; identity of who moved onto the affected land; and the subsequent demographic history of those lands. *Id.* at 470-72, 104 S.Ct. 1161.

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