

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SCHUYLER SCARBOROUGH,

JAN - 9 2023

Petitioner,

JOHN D. HADDEN
CLERK

v.

No. PC-2022-711

STATE OF OKLAHOMA,

Respondent.

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner, pro se, appeals the order of the District Court of Sequoyah County denying him post-conviction relief in Case No. CF-2003-247. A jury convicted Petitioner of first-degree murder. He was sentenced to life imprisonment without the possibility of parole.

Petitioner represented himself at trial and he refused the appointment of direct appeal counsel. Despite insisting that he represent himself on appeal, no direct appeal was perfected. Petitioner has, however, filed pro se post-conviction applications. The District Court has denied those applications and we have affirmed the denials.

See Scarborough v. State, PC-2006-360 (Okl.Cr. June 8, 2006) (not for publication); Scarborough v. State, PC-2007-98 (Okl.Cr. May 2, 2007) (not for publication); Scarborough v. State, PC-2007-905 (Okl.Cr.

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January 24, 2008) (not for publication); *Scarborough v. State*, PC-2015-1113 (Okl.Cr. April 27, 2016) (not for publication).

The instant action was filed in the District Court on July 20, 2020. The District Court denied the application on February 10, 2022. Thereafter, the District Court recommended, and we approved, Petitioner's request for an appeal out of time. *Scarborough v. State*, PC-2022-637 (Okl.Cr. August 5, 2022) (not for publication).

The District Court aptly described Petitioner's pleadings as "largely incomprehensible." Nonetheless, the District Court categorized the eleven propositions of error into two groups: those that challenged the State's jurisdiction pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), and "all other propositions."

We review the District Court's denial of post-conviction relief for an abuse of discretion. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Concerning Petitioner's jurisdictional challenge, we have recognized that an intervening change in the law which did not exist at the time of Petitioner's direct appeal or in previous post-conviction proceedings constitutes sufficient reason for not previously asserting an allegation of error. *VanWoudenberg v. State*, 1991 OK CR 104, ¶ 2, 818 P.2d 913, 915. Therefore, it was appropriate for the District Court to reach the merits of the claim.

Among the reasons the District Court denied relief on this claim was because Petitioner's conviction predated the *McGirt* decision. This was not an abuse of discretion. *See State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 27-28, 497 P.3d 686, 691-92, *cert. denied*, 142 S.Ct. 757 (2022) (holding *McGirt* is not retroactive and does not void final state convictions). We decline Appellant's invitation to revisit our holding in *Matloff*.

As to Petitioner's remaining substantive claims, we agree with the District Court that they are procedurally barred because they either were, or could have been, presented earlier. *See Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973 ("Issues that were previously raised and ruled upon by this Court are procedurally barred from further review under the doctrine of *res judicata*; and issues that were not

petitioner's 11 propositions of error into two types: those that challenge the Court's jurisdiction over him because he alleges that he is Indian² and all other propositions.

Initially, the Court notes that petitioner's motion fails to comply with 22 O.S. § 1081; Rule 5.6, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2003), in that the self-styled, *pro se* motion was not verified as mandated. Title 22 of the Oklahoma Statutes, §1081 states that a post-conviction proceeding "is commenced by filing a verified 'application for post-conviction relief' with the clerk of the court imposing the judgment" and that the OCCA may prescribe the form of the application and verification. The OCCA exercised its statutorily granted authority and created Form 13.11 – Application for Post-Conviction Relief to initiate post-conviction proceeding. Compliance with the application for post-conviction relief form helps guide petitioners as to what content should be included, and equally important what is unnecessary, and also aids the court in efficiently responding to applications, which in turn helps judges manage their criminal dockets. Petitioner's motion does not comply with the required form and is therefore dismissed.

In effort to prevent future frivolous filings by Mr. Scarborough, the Court will substantively address petitioner's jurisdictional challenges because they can be raised at any time³, even though not raised in an approved and verified form here. All other propositions for relief must be raised in the original, supplemental, or amended application unless Mr. Scarborough is able to show sufficient reason why a ground for relief was not previously

² In his motion and exhibit captions, Mr. Scarborough refers to himself as "An Indian Tribal member" and "AN INDIAN."

³ Before and after *McGirt*, the OCCA 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). *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 13, 497 P.3d 686, 689, *cert. denied sub nom. Par. v. Oklahoma*, No. 21-467, 2022 WL 89297 (U.S. Jan. 10, 2022); 22 O.S. § 1080(b).

asserted or that a ground for relief was inadequately raised in the prior application. 22 O.S. § 1086.

FINDINGS OF FACT

The Court finds that while Mr. Scarborough's motion never explicitly alleges that he is an Indian there are several references to jurisdiction and the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). The Court also finds that petitioner's exhibits offer no proof of his Indian status, although he alleges without proof that "Petitioner IS an Indian [sic], has a role Number, D.N.A. test support he IS an Indian, act took place on Indian land, McGirt fits his case to a 'T'." Based on the Oklahoma Court of Criminal Appeals (OCCA) "order affirming denial of fifth request for post-conviction relief and directive to clerk to notify court administrator of frivolous action (fifth order)" of April 27, 2016, the Court makes most of its findings of fact as to all of petitioner's propositions that do not challenge jurisdiction. The Court finds that this is Mr. Scarborough's sixth post-conviction proceeding and that all have been denied other than the OCCA granting Mr. Scarborough an appeal out of time that he did not pursue. In the fifth order, the OCCA is clear in its finding that Mr. Scarborough's judgement is now final and "any issues raised therein to become to res judicata and procedurally barred from further litigation."

From the probable cause affidavit, the Court finds that the crime charged occurred at 409 East Leftwhich, Vian, Sequoyah County, Oklahoma 74962, and that that location is well within the reservation⁴ boundary of the Cherokee Nation according to United States Department of the

⁴ In *McGirt v. Oklahoma*, 591 U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), the Supreme Court held that Muscogee (Creek) Reservation remains in existence today for purposes of the Major Crimes Act (18 U.S.C.A. § 1153) because Congress never explicitly disestablished it. The OCCA extended the *McGirt* reasoning to also apply to the Cherokee Reservation in *Hogner v. State*, 2021 OK CR 4, ¶ 18, 500 P.3d 629, 635.

Interior Bureau of Indian Affairs (BIA) and Cherokee Nation maps.⁵ All of Sequoyah County, including the location where this crime occurred, is within the Cherokee Nation Reservation and therefore Indian country as defined by 18 U.S.C.A § 1151⁶.

Further, the Court finds that, pursuant to *Matloff v. Wallace*, 2021 OK CR 21, the judgment in the above case is a final judgment. As such, the Supreme Court decision in *McGirt v. Oklahoma*, 140 S.Ct 2452 (2020) does not apply as it is not retroactive. Even if Mr. Scarborough's judgment was not final pursuant to *Matloff*, he has failed to present any evidence of his Indian status and therefore is not entitled to relief under *McGirt*, even before the decision in *Matloff*⁷, which is when his motion was filed July 20, 2020—immediately after *McGirt* was decided on July 9, 2020.

The historic cases of *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) and *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, cert. denied *Parish v. Oklahoma*, 595 U.S. ____ (2022), provide the determinative framework for the Court's analysis here. For reasons that are clear below, the Court finds that petitioner is not entitled to relief requested in his motion as the

⁵ <https://biamaps.doi.gov/indianlands>,
<https://vngis4.cherokee.org/portal/zapps/webappviewer/index.htm?l?id=d390e55c04c04c31a65830f1f9d020521>.

⁶ The term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

⁷ The OCCA opinion in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, 694, cert. denied *sub nom. Par. v. Oklahoma*, No. 21-467, 2022 WL 89297 (U.S. Jan. 10, 2022) was filed on August 12, 2021, which reversed the *Bosse v. State*, 2021 OK CR 3, that was filed on March 11, 2021, corrected on March 19, 2021, and stayed on April 15, 2021. The OCCA original opinion in *Bosse v. State*, 2021 OK CR 3, was withdrawn and superseded by *Bosse v. State*, Case No. PCD-2019-124, 2021 WL 4704316 (Okla. Crim. App. Oct. 7, 2021). So for that one to five month period between *Bosse* and *Matloff*, there may have been cases that were wrongly, but in good faith, dismissed and that issue was addressed in *Matloff* where the OCCA held 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. *State ex rel. Matloff v. Wallace*, 2021 OK CR at ¶ 40, 497 P.3d 686, 694 (emphasis added).

basis for the relief requested is not retroactive and does not void the conviction here. The Court also finds that petitioner failed to present any evidence, much less established *prima facie* evidence, that he has some Indian blood and was recognized as an Indian by tribe or the federal on the date of the offense is not entitled to the relief requested and his motion is denied as to his jurisdictional challenge.

As to Mr. Scarborough's other propositions, the Court also finds that petitioner's motion wholly fails to raise "a genuine issue of material fact" and the Court grants judgment as a matter of law obviating the need for an evidentiary hearing. 22 O.S. § 1083(b). This Court notes that petitioner's motion assert merely conclusory, unspecific claims of ineffective, new evidence and witnesses, and the like do not raise a genuine issue of material fact. Post-conviction applications must be accompanied by comprehensible argument, some citation to relevant authority or legal norms, and specific statements, which support the specific propositions being made in the application. See 22 O.S.2011, §§ 1080–83. Applications that do not meet these minimal requirements can be summarily disposed of by the district court, either with or without waiting for an answer from the State. See 22 O.S.2011, § 1081 (requirements for properly filing a verified application for post-conviction relief); 22 O.S.2011, § 1083 (requirements for summary disposition). It is not the job of the district court to comb the record or the law looking for support for the applicant's claims. *Logan v. State*, 2013 OK CR 2, ¶ 23, 293 P.3d 969, 978–79, as corrected (Feb. 28, 2013).

CONCLUSIONS OF LAW

I. *MCGIRT DOES NOT APPLY RETROACTIVELY TO VOID A CONVICTION THAT WAS FINAL AT THE TIME MCGIRT WAS DECIDED*

In *Matloff*, the OCCA found persuasive the analysis and authorities provided by the appellate court in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), when considering the

"independent state law question of collateral non-retroactivity for *McGirt*." *Id.* at ¶ 26. The OCCA also explained that new rules of criminal procedure "generally do *not* apply retroactively to convictions that are final, with a few narrow exceptions." *Id.* at ¶ 8 (emphasis in original).

Related to its analysis of the *McGirt* decision under these principles, the *Matloff* Court first determined that the holding in *McGirt* only imposed procedural changes and was "clearly a procedural ruling." *Id.* at ¶ 27. Second, the *Matloff* Court held that the "procedural rule announced in *McGirt* was new." *Id.* at ¶ 28. Third, the court explained in detail in *Matloff* that the OCCA's "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." *Id.* at ¶ 33. Ultimately, the OCCA held that "McGirt and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction,..."⁸ *Id.* at ¶¶ 6, 40.

As discussed above, petitioner was found guilty by the jury and sentenced on November 8, 2004, and the district court sentenced him in accordance with the jury's verdict. Petitioner did not appeal the judgment and sentence but importantly the OCCA found that Mr. Scarborough's judgement is now final. Since Ms. Scarborough did not file a petition for a writ of certiorari with the United States Supreme Court within the 90-day time limit, his conviction became final in July 2016. *See* 28 U.S.C.A. § 2244, Sup. Ct. R. 13.

Since petitioner's conviction was final long before the July 9, 2020, decision in *McGirt*, this Court holds that the *McGirt* decision does not apply retroactively in petitioner's state post-

⁸ *Teague v. Lane*, 489 U.S. 288, 295 (1989) defines "a final conviction as one where judgment was rendered, the availability of appeal exhausted, and the time to petition for certiorari had elapsed." *Matloff*, 2021 OK 21, at ¶ 2, n.1.

conviction proceeding to void his final conviction. Accordingly, the Court hereby denies petitioner's motion on this basis.

II. PETITIONER DOES NOT MEET THE DEFINITION OF INDIAN FOR PURPOSES OF CRIMINAL JURISDICTION

A person meets the definition of Indian for the purposes of criminal jurisdiction 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 CDIB issued by the United States 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.⁹ 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)).

Finally, the defendant must establish membership in or affiliation with a tribe as of the time of the offense. In *Parker v. State*, 2021 OK CR 17, ¶ 36, 495 P.3d 653, 666, the OCCA has indicated its adoption of the date of offense as the pertinent point in time for the determination of

⁹ 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").

Indian status. Specifically, in *Parker*, the OCCA stated the person "must still show that at the time of the offense, he or she was recognized as an Indian by a tribe or by the federal government." *Parker*, 2021 OK CR, at ¶ 36.

This evidence indicates the petitioner had no affiliation with or recognition of any tribe under any of the non-enrollment *Drewry* factors during the relevant time period. *See Drewry*, 365 F.3d at 961. Therefore, based on this evidence, Mr. Scarborough did not meet the second requirement of the definition of an Indian under *Prentiss* during the relevant time period. *Id.* *See Parker*, 2021 OK CR at ¶ 36; *Zepeda*, 792 F.3d at 1113. Accordingly, the Court also denies petitioner's motion on this basis.

III. OTHER PROPOSITIONS ARE ALSO DENIED

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 Okla. Stat. tit. 22, § 1080 (2001)). Post-conviction review is not a substitute for direct appeal, nor is it intended as a means of providing a petitioner with a second direct appeal. *See Maines v. State*, 1979 OK CR 71, ¶ 4, 597 P.2d 774, 775–76; *Fox v. State*, 1994 OK CR 52, ¶ 2, 880 P.2d 383, 384.

The Oklahoma Court of Criminal Appeals has long held that issues that were previously raised and ruled by upon by the Oklahoma Court of Criminal Appeals 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 at ¶ 3, 293 P.3d at 973 (citing Okla. Stat. tit. 22, § 1080 (2001)); *King v. State*, 2001 OK CR 22, ¶ 4, 29 P.3d 1089, 1090; *Webb v. State*, 1992 OK CR 38, ¶ 6, 835 P.2d 115, 116, *overruled on other grounds*, *Neill v. State*, 1997 OK CR 41, ¶ 7 n.2, 943 P.2d 145, 148 n.2.

Additionally, the Post-Conviction Procedure Act further precludes claims that could have been raised "...in any other proceeding the applicant has taken to secure relief," which includes his prior post-conviction collateral attacks of the Court's judgment. *See Berget v. State*, 1995 OK CR 66, ¶ 6, 907 P.2d 1078, 1081-82 (holding that claims that could have been raised in a prior post-conviction application are waived).

The Court finds that Mr. Scarborough's other propositions of error have already been raised before the Court of Criminal Appeals, and as such, they are procedurally barred by the doctrine of *res judicata*. *See Logan*, 2013 OK CR 2 at ¶ 3, 293 P.3d at 973. To the extent that the other propositions were not previously raised and ruled upon, the Court finds they are barred due to waiver, as petitioner has provided no reason external to the defense which prevented it from being raised previously. *Id*; and see 22 O.S. § 1086. The OCCA has stated that where a claim is procedurally barred, there is no need to address the merits of the issue presented. *Boyd v. State*, 1996 OK CR 12, ¶ 3, 915 P.2d 922, 924.

The propositions raised by petitioner do not present any genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony. *Johnson v. State*, 1991 OK CR 124, 823 P.2d 370. Petitioner's motion has therefore be decided based on the records the Court has stated it has reviewed.

IV. SANCTION IMPOSED

Even though Mr. Scarborough's jurisdictional proposition was substantively addressed, the Court finds that his motion lacks merit and he has abused his access to this Court by his repeated, frivolous filings. The exhibits he submitted in support of his motion have nothing to do with Mr. Scarborough's Indian status. Instead, the exhibits are a hodgepodge of articles, orders, pleadings, maps, a cooperative extension fact sheet, and copies of other things equally irrelevant,

but not a copy of a CDIB card, tribal identification, or a letter from his tribe that reflects his enrollment. Mr. Scarborough's exhibits simply asserts that "Petitioner IS an Indian [sic], has a role Number, D.N.A. test support he IS an Indian, act took place on Indian land, McGirt fits his case to a 'T'." Yet, he offers no evidence in support of his assertions. Like here, the Court in *Cotner v. Creek Cty. Dist. Ct.*, 1996 OK CR 3, ¶ 57, 911 P.2d 1215, 1221–22, found that "[t]he goal of fairly dispensing justice is compromised when courts are forced to devote their limited resources to the processing of repetitious and frivolous requests."

This Court has the inherent power to prevent "vexatious litigation and to sanction anyone who clogs the courts with frivolous filings and disrupts its proceedings." *Taylor v. State*, 2001 OK CR 23, ¶ 8, 30 P.3d 1160. This Court notes that the OCCA in its fifth order found that Mr. Scarborough was a "prisoner, who, while incarcerated, brought this appeal, and that such appeal is frivolous, malicious, or fails to present any claim for which relief might be granted...." The OCCA then placed Mr. Scarborough on the frivolous or malicious appeals registry pursuant to 57 O.S. ¶ 566.2. The Court finds that placing Mr. Scarborough on the registry did not result in changing the merit of his pleadings here. The Court also finds that imposing financial sanctions on Mr. Scarborough, who remains in prison, will be ineffective in deterring future frivolous filings because the district court does not require Mr. Scarborough to pay filing fees in this case for any pleading and certainly not for the 20 or so additional pleadings noted in the table above that he has filed since he originally filed his motion on July 20, 2020.

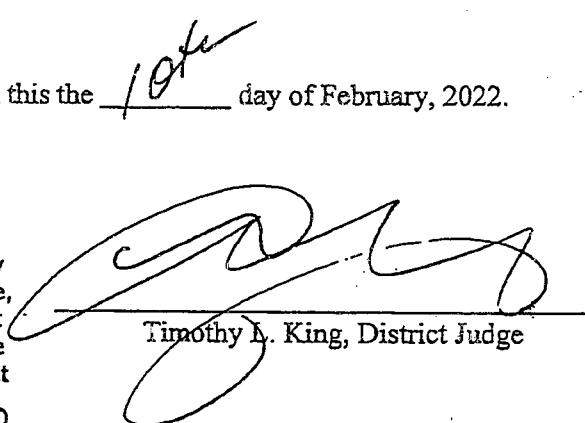
This Court concludes that Mr. Scarborough has exhausted his options to challenge the judgment and sentence and conviction in this case and that he is barred from filing additional pleadings in this case. See *Berryhill v. State*, 2002 OK CR 7, ¶ 8, 43 P.3d 410, 412 (emphasis added). As required *Taylor v. State*, 2001 OK CR 23, ¶ 9, 30 P.3d 1160, 1161, citing *Chambers*

v. *NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 2132-33, 115 L.Ed.2d 27 (1991), the Court is providing Mr. Scarborough with notice of the sanction imposed and that he is permitted 20 days from receipt of this order to respond in writing. The Court will also conduct a remote sanction hearing with Mr. Scarborough and the State on the 3rd day of April, 2022, at 3:00 p.m. and the petitioner will be provided an opportunity to respond.

CONCLUSION

Based on the *Mattoff* holding, petitioner is not now entitled to the post-conviction relief that he asserted that he was entitled to under *McGirt* and by extension *Bosse v. State*, 484 P.3d 286, (opinion subsequently withdrawn, *Bosse v. State*, 2021 OK CR 23, 495 P.3d 669). In short, the basis for the relief requested is now not retroactive and does not void his final conviction. Additionally, the petitioner has failed to sustain his burden of proof to produce evidence of his legal status as an Indian on the date of the offense. In short, petitioner again makes incomprehensible arguments, supported by no evidence and therefore meritless, that results in petitioner's motion being denied. Likewise, Mr. Scarborough's other pending pleading are equally without merit and also denied or are moot at this point. This is a final judgment in accordance with 22 O.S. § 1084 subject to appeal to the Oklahoma Court of Criminal Appeals as provided in 22 O.S. § 1087.

IT IS SO ORDERED on this 19th day of February, 2022.



Timothy L. King, District Judge

I, Gina L. Cox, Court Clerk for Sequoyah County Oklahoma, hereby certify that the foregoing is a true, correct, and full copy of the instrument herewith set out as appears of record in the Court Clerk's office of Sequoyah County, Oklahoma, and said instrument is now in full force and effect.

Dated this 1 day of August 20²²
Gina L. Cox, Court Clerk
By Taylor
Deputy

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

Schuyler Scarborough,)
Petitioner,)
vs.)
The State of Oklahoma,)
Respondent.)
Case No. _____
PC 2022 711

PETITION IN ERROR

(Post-Conviction Appeal)

Comes now the petitioner, Schuyler Scarborough, and pursuant to Rule 5.2 (C) of this Court, respectfully submit this as his "petition in error" in the above-entitled cause, and states"

I.

That petitioner was convicted by a jury of first degree malice afore-thought murder, and was sentenced on November 8, 2004 to life without parole, Sequoyah County Case No. CF-2003-247.

II.

That on July 20, 2020, petitioner filed a Sixth Application for Post-Conviction Relief in Sequoyah County Case No. CF-2003-247.

III.

That on February 10, 2022, the district court denied the application, without conducting an evidentiary hearing thereon.

IV.

That on August 5, 2022, this Court granted petitioner an appeal out of time from the Sequoyah County District Court's February 10, 2022 denial of

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post-conviction relief in Case No. PC-2022-637

v.

That petitioner intends to raise the following grounds for relief in this appeal, to-wit:

1. Petitioner's judgment of conviction is void as having been rendered without jurisdiction because petitioner did not make a knowing and voluntary decision to waive counsel for his defense;
2. This Court incorrectly classified the McGirt decision as a new procedural rule;
3. The district court abused its discretion by imposing sanctions.

Wherefore, for these reasons set forth above, and those more fully set out by citation of authorities in the accompanying brief in support, petitioner respectfully requests this Court grant him post-conviction relief, and petitioner would further pray for such other and further relief as to which he may be entitled and to which this Court may deem fit, proper, and equitable.

Respectfully Submitted,

Dated: 8-16-22

/s/ Schuyler L. daBancroft

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Schuyler Scarborough,
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The State of Oklahoma,
Respondent.

AUG 18 2022

JOHN D. HADDEN
CLERK

Case No. _____

PC 2022 711

BRIEF OF THE PETITIONER

Comes now the petitioner, Schuyler Scarborough, and pursuant to Rule 5.2(C) of this Court, respectfully submit this as his brief in support of the post-conviction appeal in the above-entitled cause. Numbers in parenthesis will refer to the Record on Appeal by page number (O.R.____).

STATEMENT OF THE CASE

Petitioner Schuyler Scarborough, appeals to this Court from the District Court of Sequoyah County Denying petitioner's application for post-conviction relief in Case No. CF-2003-247, by order filed on February 10, 2022. In that case, petitioner was convicted by a jury of first degree malice aforethought murder in the death of his father, Chester Scarborough, whom petitioner allegedly stabbed to death with a kitchen knife during an argument in their home. Petitioner represented himself at the trial and was sentenced to life without parole. From this judgment and sentence no direct appeal of the conviction was ever perfected.

Additional facts will be stated as they become necessary.

PROPOSITION I

PETITIONER'S JUDGMENT OF CONVICTION IS VOID AS HAVING BEEN RENDERED WITHOUT JURISDICTION BECAUSE PETITIONER DID NOT MAKE A KNOWING AND VOLUNTARY DECISION TO WAIVE COUNSEL FOR HIS DEFENSE.

STANDARD OF REVIEW

Jurisdictional claims are never waived and can be raised for the first time on collateral appeal. *Wackerly v. State*, 237 P.3d 795, 797 (Okl.Cr. 2010).

Moreover, a judgment of conviction of one who did not effectively waive his constitutional right to the assistance of counsel is void as having been rendered without jurisdiction. *Ex parte Meadows*, 106 P.2d 139, 146 (Okl.Cr. 1940).

DISCUSSION

At petitioner's trial, the key prosecution witness, Jonathan Choate, testified that petitioner and the victim were involved in a heated argument at the victim's residence, which also was where the defendant lived. Defendant was the victim's son. The Defendant was standing in the yard and the victim was standing at the doorway, yelling back and forth at each other, Mr. Choate was driving to the store in his truck and thought he heard the Defendant calling out to him, so he stopped his truck in the middle of the street in front of the house. Mr. Choate testified that the victim and the Defendant both went inside, still yelling at one another, so he got out of his truck to see if he could get the Defendant to come with him and calm him down. Mr. Choate ran up to the screen door and was standing halfway inside yelling the Defendant's name several times before the Defendant turned and looked at him. The victim was laying on his side on the floor and the Defendant was standing over him. Mr. Choate testified that he saw the back of the Defendant's arm move up and down more than

once, but less than 15 times, and Mr. Choate started yelling the Defendant's name louder. When the Defendant finally looked over at Mr. Choate, Mr. Choate got scared by the way the Defendant was looking at him, so Mr. Choate "got out of there" and drove to the store. (O.R. 56-64).

But the trial court never informed the petitioner of the possible defenses to the charge, neither did the trial court sua sponte instruct the jury at the close of the evidence on the crime of first degree manslaughter. (O.R. 65-66, 67).

Under Oklahoma law, a person commits first degree manslaughter when perpetrated in a heat of passion. 21 O.S. § 711. Here, the evidence at trial, unequivocally reveals that petitioner and the victim were involved in a heated argument prior to the victim being found by police stabbed to death with a kitchen knife. Thus, there was adequate provocation that aroused a sudden heat of passion within petitioner, and it was that passion that caused the act which resulted in the victim's death before there was a reasonable opportunity for the passion to cool. *Id.*

To be valid, a defendant's waiver of assistance of counsel must be informed of the possible defenses to the charge. *Brown v. State*, 422 P.3d 155 (Okl.Cr. 2018). In the case at bar, the record does not affirmatively reflect that the trial court complied with this mandate. (O.R. 65-66).

Additionally, it was fundamental reversible error for the trial court not to sua sponte instruct the jury on the lesser included crime of first degree "heat of passion" manslaughter when the evidence at the trial supported the instruction. See *Welbon v. State*, 105 P.2d 187 (Okl.Cr. 1940); *Tarter v. State*, 358 P.2d 596, 605 (Okl.Cr. 1961).

Because the trial court never informed petitioner of the possible defenses to the charge, and failed to sua sponte instruct the jury on the crime of first degree "heat of passion" manslaughter, petitioner's waiver of the assistance of counsel was not knowingly and intelligently made. *Brown v. State*, *supra*. Consequently, petitioner's judgment of conviction is void as having been rendered without jurisdiction. *Ex parte Meadows*, *supra*.

For these reasons, petitioner's conviction must be reversed and the case remanded to the trial court for a new trial.

PROPOSITION II

THIS COURT INCORRECTLY CLASSIFIED THE MCGIRT
DECISION A A NEW PROCEDURAL RULE.

STANDARD OF REVIEW

Issues of subject matter jurisdiction are never waived and can therefore be raised on collateral appeal. *Wackerly v. State*, 237 P.3d 795, 797 (OkI.Cr. 2010).

A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. See *Bousley v. United States*, 523 U.S. 614, 620-621 (1998)(rule "hold[s] that a . . . statute does not reach certain conduct" or make[s] conduct criminal"); *Saffle v. Parks*, 494 U.S. 484, 495 (1990)(rule "decriminalize[s] a class of conduct [or] prohibit[s] the imposition of . . . punishment on a particular class of persons"). In contrast, rules that regulate only the manner of determining the defendant's culpability are procedural. *Bousley*, *supra*.

DISCUSSION

The district court denied petitioner's claim that the district court lacked jurisdiction over his murder charge under the Supreme Court's decision in McGirt, in part, because this Court subsequently ruled that the McGirt decision announced a new procedural rule that did not apply retroactively to cases on collateral review that had become final before the rule was announced. (O.R. 48-50).

However, under Supreme Court precedent, McGirt announced a new "substantive rule," because the decision applied only to a certain class of people, i.e., Indians who commit crimes against Indians or non-Indians on Tribal Land. Schriro v. Summerlin, 542 U.S. 348, 351-352 (2004); see also Perry v. Lynaugh, 492 U.S. 302, 330 (1989).

As such, the McGirt decision applies retroactively on collateral review to finalized convictions. *Id.*

States may not disregard a controlling, constitutional command in their own courts. See *Martin v. Hunter's Lessee*, 1 Wheat. 304, 340-341, 344, 4 L.Ed. 97 (1816); see also *Yates v. Aiken*, 484 U.S. 211, 218 (1988)(when State has not "placed any limits on the issues that it will entertain in collateral proceedings . . . it has a duty to grant the relief that federal law requires").¹

Additionally, the district court erred by not conducting an evidentiary hearing to determine petitioner's Indian status. *Chase v. State*, 505 P.2d 1003,

¹ In fact, Oklahoma's limitation on jurisdictional claims in post-conviction proceedings does not take effect until on November 1, 2022. See 22 O.S. § 1080.1.

1004 (OkI.Cr. 1973). Petitioner's application for post-conviction relief specifically alleges that petitioner is an Indian, has a role number, and that DNA tests will prove he is an Indian by blood. (O.R. 1,2,3,10,16-29).

These factual allegations were sufficient to raise a genuine issue of material fact to warrant an evidentiary hearing on the question of petitioner's Indian status. Chase v. State, *supra*.

For these reasons, the district court's order denying petitioner's application for post-conviction relief must be reversed and the case remanded for an evidentiary hearing.

PROPOSITION III

THE DISTRICT COURT ABUSED ITS DISCRETION BY IMPOSING SANCTIONS.

STANDARD OF REVIEW

A district court's decision to impose post-conviction sanctions is reviewed on appeal for abuse of discretion. Berryhill v. State, 43 P.3d 410 (OkI. Cr. 2002).

When the court's inherent power to impose sanctions is relied upon, and the court does not rely upon statute governing frivolous actions, reasonable and appropriate sanctions would be prepayment of all fees, dismissals and/or awards of costs. Washington v. Department of Corrections, 49 P.3d 754 (OkI.Cr. 2002).

DISCUSSION

In denying petitioner post-conviction relief, the district court addressed one of petitioner's claims on the merits, concluding that it was jurisdictional and can be raised at any time. The district court stated that petitioner's various other filings were likely because the district court did not address

petitioner's original claims for relief in a timely manner. (O.R. 44).

Although the district court found that petitioner's claims were largely incomprehensible, the district court went on to categorize them into two types of errors: "those that challenge the court's jurisdiction, and all other propositions." (O.R. 44-45).

The district court then sanctioned petitioner based on "all other propositions" that did not raise challenge to the district court's jurisdiction because they were procedurally barred by the doctrines of res judicata and waiver. (O.R. 51-52).

Petitioner argues that because the claims raised above in propositions I and II were jurisdictional, and all other propositions of error had been sought solely because the district court admittedly had not addressed those claims in a timely manner, the district court abused its discretion by imposing sanctions based solely because he brought the claims. As the district court itself acknowledged, petitioner would not have brought these claims had the district court timely addressed petitioner's claims challenging the trial court's jurisdiction.²

Moreover, the district court had already found that petitioner's application was not in the form prescribed by this Court's Rule 13.11 and was not verified, and therefore is dismissed. (O.R. 45). This finding, if true, should have ended the matter.³

In the case at bar, the district court barred petitioner from filing future application in his criminal case. (O.R. 53). This was an inappropriate sanction

² The district court further erred by not entering any written findings of fact or conclusions of law with regards to the jurisdictional claim set forth in proposition I, above

³ In any event, petitioner signed his application under penalty of perjury, which took the place of a notary public's signature. See 12 O.S. § 426.

and an abuse of the trial court's discretion. Berryhill v. State, supra; Washington v. Department of Corrections, supra.

For these reasons, the district court's sanction order must be vacated.

CONCLUSION

Wherefore, for these reasons and authorities set forth above, petitioner respectfully requests this Court to grant him a new trial, and petitioner would further pray for such other and further relief as to which he may be entitled and to which this Court may deem fit, proper, and equitable.

Respectfully Submitted

Dated: 8-16-22

/s/ DeWayne Scarborough