FILED
United States Court of Appeals
Tenth Circuit
February 6, 2025
Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DANIEL DEL BRUMIT, Petitioner-Appellant, v. DAVID ROGERS, Respondent-Appellee.	 No. 24-6202 (D.C. No. 5:23-CV-00155-SLP) (W.D. Okla.)

ORDER

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

This action arises out of a challenge to a criminal conviction for lewd acts with a child under 16. The defendant, Mr. Brumit, unsuccessfully appealed in state court and sought habeas relief in federal court roughly fourteen years later. The federal district court summarily dismissed the habeas action based on timeliness, and Mr. Brumit wants to appeal. To do so, he needs a certificate of appealability. 28 U.S.C. §2253 (c)(1)(A). We decline to issue a certificate. [1]

[1] Mr. Brumit requests leave to amend the petition. We grant this request.

To address Mr. Brumit's request, we consider whether the appellate arguments are reasonably debatable. See *Laurson v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007)(holding that when the district court denies habeas relief based on timeliness, the court of appeals can issue a certificate of appealability only if the district court's ruling on timeliness is at least reasonably debatable). In our view, Mr. Brumit's appellate arguments are not reasonably debatable.

Mr. Brumit doesn't appear to deny that his habeas action was untimely. Federal law provides a one-year period of limitations for federal habeas actions. 28 U.S.C. § 2244(d)(1). And when Mr. Brumit's direct appeal ended, he waited roughly fourteen years to seek habeas relief. Rather than defend this delay, Mr. Brumit addresses the district court's sua sponte consideration of timeliness, the existence of jurisdiction in state court, the right to relief under a treaty, and the failure to defer to a finding in state court.

These challenges include the district court's decision to address timeliness sua sponte (on the court's motion). Mr. Brumit challenge is understandable, but federal law requires the district court to screen the habeas petition.

This screening process is outlined in Rules Governing Section 2254 Cases in the United States District Courts. Rule 4 provides a mechanism for the district court to screen the petition before the petition is submitted to the state. Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. If the claim appears meritless, the district court must dismiss the petition without any

involvement by the state. *Id.* If the petition isn't dismissed at this stage, the court must order the state to respond. *Id.*

The district court followed this process by screening the petition for timeliness. In screening for timeliness, the court didn't err. See *Day v. McDonough*, 547 U.S. 198, 209 (2006) ("In sum, we hold that district courts are permitted, but not obligated, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition."). Because the petition was untimely, the court dismissed the action rather than order the state attorney general to respond.

Mr. Brumit argues that the state attorney general

- committed a default and
- waived its defenses.

But the court never ordered a response. As a result, the state attorney general neither defaulted nor waived a defense of timeliness.

Mr. Brumit also argues that (1) the state court lacked jurisdiction and (2) he was entitled to declaratory relief under a treaty. But even if Mr. Brumit were right on both arguments, he couldn't prevail because he waited too long to file the habeas petition.

Finally, Mr. Brumit contends that the federal district court should have deferred to a state court's finding that he was "similarly situated" to the claimant in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). But the state courts didn't compare Mr.

Brumit to the McGirt claimant. So Mr. Brumit can't base habeas relief on a state court's finding of similarity to the *McGirt* claimant.

Because Mr. Brumit's appellate arguments aren't reasonably debatable, we deny his request for a certificate of appealability. And in the absence of a certificate of appealability, we dismiss the matter.[2]

Entered for the Court

(absent s/)

Robert E. Bacharach

Circuit Judge

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[2] Mr. Brumit also requests leave to proceed in forma pauperis. But in the absence of a reasonably debatable argument, we deny leave to proceed in forma pauperis. See *Rolland v. Primesource Staffing, L.L.C.*, 497 F.3d 1077, 1079 (10th Cir. 2007)

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DANIEL DEL BRUMIT, Petitioner-Appellant, v. DAVID ROGERS, Respondent-Appellee.	No. 24-6202 (D.C. No. 5:23-CV-00155-SLP) (W.D. Okla.)

ORDER

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

This matter is before the court on appellant's motion for clarification and his petition for rehearing. Appellant's motion and the petition are denied.

Entered for the Court

s/

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

DANIEL DEL BRUMIT,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CIV-23-155-SLP
	)	
DAVID ROGERS,[1]	)	
	)	
Respondent.	)	

ORDER

Petitioner, proceeding pro se, filed this habeas corpus action pursuant to 28 U.S.C. § 2254, challenging his Oklahoma state-court conviction in Case No. CF-2006-115, District Court of Grady County. Petitioner alleges the State lacked jurisdiction over him because he "is a Choctaw Indian" and his "alleged criminal conduct occurred within the Choctaw/Chickasaw reservation." Pet. [Doc. No. 1] at 5. Accordingly, Petitioner argues his conviction violates his rights under the Constitution and the Treaty of Dancing Rabbit Creek. See id.

Pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), this matter was referred for

[1] The appropriate respondent in a habeas action is the inmate's custodian. See Rumsfeld v. Padilla, 542 U.S. 426, 443 (2004). Pursuant to Rule 2(a) of the Rules Governing Section 2254 Cases and Federal Rules of Civil Procedures 25(d) and 81(a)(4), David Rogers, current warden at Petitioner's location of incarceration, is substituted as Respondent. Petitioner filed a Memorandum [Doc. No. 9] regarding this matter.

initial proceedings to United States Magistrate Judge Gary Purcell entered a Report and Recommendation [Doc. No. 6], in which he recommended dismissing the Petition on timeliness grounds. In his R. § R., Judge Purcell concluded the Petition is untimely under the Antiterrorism and Effective Death Penalty Act ("AEDPA") because Petitioner's conviction became final on October 17, 2007, over 15 years before he filed his Petition. *See id.* At 5-6 (citing 28 U.S.C. § 2244(d)(1)(A). Additionally, Judge Purcell found that 28 U.S.C. § 2244(d)(1)(C) did not apply because *McGirt v. Oklahoma*, 591 U.S. 894 (2020), did not recognize a new constitutional right. *See* [Doc. No. 6] at 6-9. Finally, Judge Purcell recommended dismissal because Petitioner provided no basis for either statutory or equitable tolling, nor did he allege that the actual innocence exception applies. *See id.* At 9-12.

In addition to his Objection [Doc. No. 13], Petitioner filed a Motion for Declaratory Judgment [Doc. No. 10], Motion to Stay and Compel Declaratory Judgment [Doc. No. 11], and Motion for the Appointment of Counsel [Doc. No. 1]

I. Objection to the R. & R.

Petitioner filed a timely objection to the R. & R. See [Doc. No. 13] The Court, therefore, must make a de novo determination of the portions of the R. & R. to which specific objections have been made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). Review of all other issues addressed by the Magistrate Judge are waived. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991); see *also United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996).

First, Petitioner claims the Court should disregard the timeliness issue because the State "deliberately and intelligently chose to waive [its] procedural defenses" in the state post-conviction proceedings. [Doc. No. 13] at 4. But the State did not have opportunity to challenge timeliness under AEDPA during the state post-conviction proceedings. Similarly, the State has not appeared in this federal habeas action, so it has not had an opportunity to raise (or waive) any of the procedural defenses available to it under AEDPA. *See Woods v. Milyard*, 566 U.S. 463, 474 (2012) (Waiver is the intentional relinquishment or abandonment of a known right." (quotations omitted) (alteration in original)).

Similarly, Petitioner claims the Court should disregard the timeliness issue in light of "the [d]octrines of res judicata/ collateral estoppel," reasoning the Supreme Court did not analyze timeliness when it decided *McGirt*. {Doc. No. 13} at 5. But the doctrines of collateral estoppel requires, inter alia, that "the issues previously decided is *identical* with the one presented in the action in question." *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1255, 1257 (10th Cir. 1997). The doctrine of res judicata requires "a full and fair opportunity to litigate the claim in the prior suit." *Nwosun v. Gen. Mills Restaurants, Inc.* 124 F.3d 1255, 1257 (10th Cir. 1997). Petitioner did not seek habeas relief until February 13, 2023—about two and a half years after the Supreme Court decided McGirt. Thus, McGirt did not provide the State with a full and fair opportunity to litigate the issue of whether Petitioner timely sought federal habeas relief under §2254. Likewise, that precise issue was not decided in McGirt or any other case. Thus, neither preclusion doctrine applies here.

Petitioner next argues "the treaty grants this Court broad and compulsive jurisdiction to secure immunity for those protected by Congressional promises." [Doc. No. 13] at 6. To be sure, AEDPA expressly permits a state prisoner to seek habeas relief "on grounds that he is in custody in violations of... treaties of the United States." 28 U.S.C. §2254(a). But Judge Purcell did not reach the merits of Petitioner's argument under the treaty because he accurately concluded that such a challenge was procedurally barred on timeliness grounds. The Court finds no error with Judge Purcell's analysis and, similarly, does not reach the substantive merits of Petitioner's claim under the treaty. *Cf. Breard v. Greene, 523 U.S. 371, 376 (1998)* (concluding state prisoner's "ability to obtain relief based on violations of [a treaty] is subject to " AEDPA's ; subsequent enacted" procedural requirements, "just as any claim arising under the United States Constitution would be").[2]

Finally, Petitioner argues Judge Purcell erred by failing to consider Petitioner's other arguments after recommending dismissal on timeliness grounds. See [Doc. No. 13] at 8-9. But all of Petitioner's claims challenge the State's ability to exercise jurisdiction over him, and none of those challenges are timely. *See Davis v. Bridges,* No. 22-6107, 2024 WL 140026, at *8 (10th Cir. Jan. 12, 2024) (Courts have repeatedly rejected attempts to carve out a jurisdictional exception to AEDPA's plain

[2]Despite his arguments to the contrary, Petitioner appears to recognize this requirement. See [Doc. No. 13] at 7 (AEDPA was post-Choctaw treaty and may have controlling effect so as to abrogate the Choctaw treaty to the extent of the inconsistency.") Nevertheless, Petitioner argues "this Court need not limit its habeas review to [his] conviction and sentence since fraud against the Choctaw treaty exists in Oklahoma's Post-Conviction proceedings." [Doc. No. 13] at 7. But a § 2254 petition can be used to attack only the state judgment resulting in Petitioner's confinement, not the state post-conviction proceedings. *See Jackson v. Ray* 292 F. App'x 737, 740 (10th Cir. 2008).

language.") Upon de novo review and for all reasons stated herein, the Court concurs with the analysis set forth in the R. & R. and ADOPTS the same.

II. Declaratory Judgment

The same day he filed his Objection, Petitioner also filed his Motion for Declaratory Judgment [Doc. No. 10] and Motion to Stay and Compel Declaratory Judgment [Doc. No. 11]. The Court liberally construes the former motion as a request to amend the Petition, pursuant to Federal Rule of Civil Procedure 15(a), to assert a claim for declaratory relief. *See* [Doc. No. 10] at 1 (citing 28 U.S.C. § 2201). But "Rule 15(a) allows the judge to deny a motion to amend because of, among other things, the futility of the amendment." *Wolf v. Bryant*, 678 F. App'x 631, 636 (10th Cir. 2017)(quotations omitted)(addressing motion to amend in § 2254 context).

Here, Petition aims to recast this action as one for declaratory judgment instead of one seeking habeas relief. See [Doc. No. 10] at 10 (Although habeas relief is more desirable and immediate in re conviction, declaratory relief is an avenue within the discretion of this Court." In doing so, Petitioner attempts to avoid AEDPA's time bar to obtain a ruling on the merits of his claim. But Petitioner seek the same end result: invalidating his conviction based on the state's purported lack of jurisdiction over him. A § 2254 habeas petition is the only avenue by which he may seek relief. See *Weldon v. Pacheco*, 715 F. App'x 837, 844 (10th Cir. 2017); *see also Leonor v. Heavican*, No. 8:21CV76, 2021 WL 2555654, at *5 (D. Neb. June 22, 2021)(citing case), aff'd, 2021 WL6689168 (8th Cir. Aug. 16, 2021). Because

amendment on this ground would be futile, the Motion for Declaratory Judgment [Doc. No. 10] is DENIED. In light of the denial, the Motion to Stay and Compel Declaratory Judgment [Doc. No. 11] is DENIED as moot.

III. Appointment of Counsel

Finally, Petitioner filed a Motion for the Appointment of Counsel [Doc. No. 12]. "[G]enerally appointment of counsel in a § 2254 proceeding is left to the court's discretion." *Watson v. McCollum*, 772 F.App'x 675, 679 (10th Cir. 2019)(quoting *Swazo v. Wyo. Dep't of Corr. State Penitentiary Warden*, 23 F.3d 332, 333 (10th Cir. 1994); *see also* 18 U.S.C. § 3006A(a)(2)(B). In exercising this discretion, the Court considers "the merits of the litigant's claims, the nature of the factual issues raised in the claims, the litigant's ability to present his claims, and the complexity of the legal issues raised by the claims." *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995).

Upon consideration of these factors, the Court finds appointment of counsel is not warranted. First, as explained above, Petitioner's claim are timed barred. Further, Petitioner's claims, which are not of unusual complexity, require no further factual or legal development. Finally, Petitioner contends his incarceration has impeded his ability "to represent himself and to do a proper investigation into the merits of his claims." [Doc. No. 12] at 4 But Petitioner has articulated his claims clearly, and it is apparent he had access to the appropriate resources to develop those claims. Accordingly, this Motion is DENIED.

IV. Conclusion

IT IS THEREFORE ORDERED that the Report and Recommendation [Doc. No. 6] is Adopted and the Petition [Doc. No. 1] is DISMISSED WITH PREJUDICE.[3]

IT IS FURTHER ORDERED that the Motion to Stay and Compel Declaratory Judgment [Doc. No. 10] is DENIED.

IT IS FURTHER ORDERED that the Motion for the Appointment of Counsel [Doc. No. 12] is DENIED.

IT IS FURTHER ORDERED that pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court must issue or deny a certificate of appealability (COA) when it enters a final order adverse to a petitioner. A COA may issue only upon "a substantial showing of a denial of a constitutional right." See 28 U.S.C. § 2253(c)(2). When the district court dismisses a habeas petition on procedural grounds, the petitioner must make this showing by demonstrating both "[1] that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that a jurist of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Court finds that reasonable jurists would not debate the correctness of the Court's determination regarding the timeliness of the Petition. The Court therefore, denies a COA.

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[3]A dismissal on grounds the Petition is untimely should be with prejudice. *Taylor v. Martin*, 757 F.3d 1122, 1123 (10th Cir. 2014) (denying COA and dismissing appeal of § 2254 habeas petition dismissed with prejudice as untimely under §2244(d); see also *Brown v. Roberts*, 177 F. App'x 774, 778 (10th cir. 2006) ("Dismissal of a [§ 2254 habeas] petition as time barred operates as a dismissal with prejudice....").

IT IS SO ORDERED this 12th day of September, 2024.

s/

SCOTT L. PALK

UNITED STATES DISTRICT JUDGE

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

DANIEL DEL BRUMIT,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. CIV-23-155-SLP
	)	
LUKE PETTIGREW,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing *pro se,* filed this action challenging his state criminal convictions on five counts of Lewd Acts with a Child Under the Age of 16 in Grady County District Court, Case No. CF-2006-115. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). The undersigned has undertaken a review of the sufficiency of the Petition pursuant to Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. For the following reasons, it is recommended the Petition be dismissed with prejudice as untimely.

I. Background

On January 16, 2007, following Petitioner's entry of a plea of *nolo contendere*, he was convicted on five counts of Lewd Acts with a Child Under the Age of 16. Doc. No. 1 at 1; *see also* Oklahoma State Courts Network, *State v. Brumit*,

Grady County District Court, Case No. CF-2006-115.[1] On January 25, 2007, Petitioner filed an application to withdraw his plea. Doc. No. 1 at 2; *see also* Oklahoma State Courts Network, *State v. Brumit*, Grady County District Court, Case No. CF-2006-115, *supra*. The district court denied Plaintiff's application on February 8, 2007. *Id.*

Petitioner filed an appeal with the Oklahoma Court of Criminal Appeals ("OCCA") on February 9, 2007. *See* Oklahoma State Courts Network, *Brumit v. State*, Oklahoma Court of Criminal Appeals, Case No. C-2007-123.[2] The OCCA affirmed Petitioner's convictions on July 19, 2007. *Id.*

On February 25, 2021, Petitioner filed an application for post-conviction relief in the state district court. Doc. No. 1 at 6, 7, 9; *see also* Oklahoma State Courts Network, *State v. Brumit*, Grady County District Court, Case No. CF-2006-115, *supra*. Therein, he challenged the state court's jurisdiction over his criminal proceedings. *Id.*[3] The state district court denied his application on September 21,

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[1] https://www.oscn.net/dockets/GetCaseInformation.aspx?db=grady&number=CF-2006-00115&cmid=11623

[2] https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=C-2007-123&cmid=96026

[3] In asserting this argument, Petitioner relied upon the United States Supreme Court decision in *McGirt v. Oklahoma*, __ U.S. __, 140 S.Ct. 2452 (2020), in which the Court held that pursuant to the Major Crimes Act, Oklahoma does not have subject matter jurisdiction over criminal proceedings wherein the defendant is a member of a federally recognized Indian tribe and the alleged crime occurred on Indian land. *Id.* at 2480-82.

2021. Doc. No. 1 at 35-37. Plaintiff filed an appeal with the OCCA and the OCCA affirmed the state district court's decision on April 1, 2022. Doc. No. 1-1 at 33-34.

Petitioner filed the instant matter on February 13, 2023, asserting the state court lacked jurisdiction over his criminal proceedings. Doc. No. 1 at 5, 7, 8. Petitioner explains that he is a member of the Choctaw Nation, a federally recognized Indian tribe. *Id.* He asserts that his underlying crime was committed on Indian land, and therefore, the State of Oklahoma did not have jurisdiction over the resulting criminal proceedings. *Id.*

II. Screening Requirement

Under Rule 4 of the Rules Governing Section 2254 Cases, the Court is required to examine a habeas petition and to summarily dismiss it "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief . . . ." Rule 4, Rules Governing § 2254 Cases. "[B]efore acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." *Day v. McDonough*, 547 U.S. 198, 210 (2006). Petitioner has such notice by this Report and Recommendation, and he has an opportunity to present his position by filing an objection to the Report and Recommendation. Further, when raising a dispositive issue *sua sponte*, the district court must "assure itself that the petitioner is not significantly prejudiced . . . and determine whether the interests of justice would be better served by addressing the merits . . . ." *Id.* (quotations

omitted); *Smith v. Dorsey*, No. 93-2229, 1994 WL 396069, at *3 (10th Cir. July 29, 1994) (noting no due process concerns with the magistrate judge raising an issue *sua sponte* where the petitioner could "address the matter by objecting" to the report and recommendation).

III. Statute of Limitations

A. Applicable Limitations Period

The Antiterrorism and Effective Death Penalty Act ("AEDPA") establishes a one-year limitations period for claims of a habeas petitioner in state custody. *Rhine v. Boone*, 182 F.3d 1153, 1154 (10th Cir. 1999). The one-year limitations period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (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)(A)-(D). Unless a petitioner alleges facts implicating

subsection (B), (C), or (D), the limitations period generally begins to run from the date on which the conviction becomes final. *Preston v. Gibson*, 234 F.3d 1118, 1120 (10th Cir. 2000). Petitioner has suggested facts that would implicate subsection (C), indicating *McGirt* revealed the State of Oklahoma did not have jurisdiction over his criminal proceedings. However, as explained below, the *McGirt* decision does not trigger § 2244(d)(1)(C) to extend his conviction's finality date.

1. 28 U.S.C. § 2244(d)(1)(A)

Under 28 U.S.C. § 2244(d)(1)(A), a petitioner must seek habeas relief within one-year and said limitations period generally begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]" After entering a plea of *nolo contendere*, Petitioner was sentenced on January 16, 2007. *See, supra*. Petitioner timely moved to withdraw his plea, and the state district court denied this request on February 8, 2007. *Id.* Petitioner appealed and the OCCA affirmed the lower court's decision on July 19, 2007. *Id.* Petitioner's convictions therefore became "final" under 28 U.S.C. § 2244(d)(1)(A) on October 17, 2007, when the time for Petitioner to seek certiorari review, which he did not do, with the United States Supreme Court expired.[4] *See Locke v. Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001) ("Under the statute, a

[4] *See* Sup. Ct. R. Rule 13(1) (providing that applicant for certiorari has 90 days from date of judgment to file petition for writ of certiorari); 28 U.S.C. § 2101(d).

petitioner's conviction is not final and the one-year limitation period for filing a federal habeas petition does not begin to run until . . . 'after the United States Supreme Court has denied review, or, if no petition for certiorari is filed, after the time for filing a petition for certiorari with the Supreme Court has passed.'") (quoting *Rhine*, 182 F.3d at 1155).

Application of the one-year limitation period under § 2244(d)(1)(A) means that, absent statutory or equitable tolling, Petitioner's one-year limitation period for filing a federal habeas petition expired on Monday, October 20, 2008. Petitioner did not file this action until February 13, 2023.

2. 28 U.S.C. § 2244(d)(1)(C)

Petitioner implies that his basis for seeking habeas relief did not ripen until July 2020 when the Supreme Court issued the *McGirt* decision. Such an argument inherently relies on the premise that *McGirt* recognized a new constitutional right. Section 2244(d)(1)(C) allows the statute of limitations to run from "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[.]" However, because *McGirt* did not recognize a new constitutional right, the provision does not apply.

McGirt revolved around a longstanding rule that "[s]tate courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country.'" *McGirt*, 140 S.Ct. at 2459 (citing *Negonsott v. Samuels*, 507 U.S. 99, 102-03 (1993)). This is so because the Major Crimes Act "provides that, within 'the Indian country,' '[a]ny Indian who commits' certain enumerated offenses 'against the person or property of another Indian or any other person' 'shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.'" *Id.* (quoting 18 U.S.C. § 1153(a)). "Indian Country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government[.]" 18 U.S.C. § 1151(a). Thus, the relevant question for the Supreme Court was "whether the land [that] treaties promised [the Creek Nation] remain[ed] an Indian reservation for purposes of federal criminal law." *McGirt*, 140 S.Ct. at 2459.

To answer that question, the Court examined various treaties between the United States government and the Muscogee (Creek) Nation and statutes governing the Muscogee (Creek) Nation and its territory. *Id.* at 2460-68. Indeed, the Court only looked to Acts of Congress to answer that question based on the Court's previous holding that "[o]nly Congress can divest a reservation of its land and diminish its boundaries." *Id.* at 2462 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). The Court determined that the Muscogee (Creek) Nation's reservation continued to exist

despite federal allotment policy in the early twentieth century because the "Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *Id.* at 2464 (citing *Nebraska v. Parker*, 577 U.S. 481, 489 (2016); *Mattz v. Arnett*, 412 U.S. 481, 497 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356-58 (1962)). The Court determined that while the federal government engaged in other policy decisions negatively impacting the sovereignty of the Muscogee (Creek) Nation, "there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation." *Id.* at 2468.

Although Petitioner suggests otherwise, *McGirt* does not allow Petitioner additional time to file his habeas petition under § 2244(d)(1)(C) because it did not recognize a new constitutional right. Rather, the Court addressed whether the Muscogee (Creek) Nation "remain[ed] an Indian reservation for purposes of federal criminal law," a non-constitutional issue. *Id.* at 2459.[5] Indeed, the Tenth Circuit has stated: "*McGirt* announced no new constitutional right." *Pacheco v. El Habti*, 48

[5] To be sure, a prisoner has a due process right to be convicted in a court which has jurisdiction over the matter. *See Yellowbear v. Wyoming Atty. Gen.*, 525 F.3d 921, 924 (10th Cir. 2008) ("Absence of jurisdiction in the convicting court is indeed a basis for federal habeas corpus relief cognizable under the due process clause."). However, this due process right was recognized prior to *McGirt*. *See Frank v. Mangum*, 237 U.S. 309, 326 (1915) (recognizing that a state criminal prosecution must proceed in a court of competent jurisdiction in order to accord with constitutional due process).

F.4th 1179, 1191 (10th Cir. 2022). *See also Jones v. Pettigrew*, No. CIV-18-633-G, 2021 WL 3854755, at *3 (W.D. Okla. Aug. 27, 2021) (citing *Littlejohn v. Crow*, No. 18-CV-477-CVE-JFJ, 2021 WL 3074171, at *5 (N.D. Okla. July 20, 2021) ("But [28 U.S.C. § 2244(d)(1)(C)] does not apply because the Supreme Court did not recognize any constitutional rights in *McGirt*); *Sanders v. Pettigrew*, No. CIV-20-350-RAW-KEW, 2021 WL 3291792, at *5 (E.D. Okla. Aug. 2, 2021) (concluding that *McGirt* "did not break any new ground" or "recognize a new constitutional right, much less a retroactive one"); *accord with Berry v. Braggs*, No. 19-CV-706-GKF-FHM, 2020 WL 6205849, at *7 (N.D. Okla. Oct. 22, 2020) ("Because the *McGirt* ruling did not recognize any new constitutional right relevant to petitioner's jurisdictional claim, § 2244(d)(1)(C) does not apply to that claim.")).

Additionally, the Supreme Court denied Petitions for Writ of Certiorari in three cases in which the petitioners were challenging state court rulings that *McGirt* was not retroactive. *State ex. rel. Matloff v. Wallace*, 497 P.3d 686 (Okla. Crim. App. 2021), *cert. denied*, *Parish v. Oklahoma*, 142 S.Ct. 757, 2022 WL 89297 (Jan. 10, 2022); *Davis v. Oklahoma*, 142 S.Ct. 793, 2022 WL 89459 (Jan. 10, 2022); *Compelleebee v. Oklahoma*, 142 S.Ct. 792, 2022 WL 89454 (Jan. 10, 2022). Therefore, the Court should find that § 2244(d)(1)(C) does not apply in this case and thus, Petitioner's action is untimely. *See Pacheco,* 48 F.4th at 1191 (concluding that

in a *McGirt* challenge, § 2244(d)(1)(C) would not apply to extend conviction finality date because *McGirt* did not recognize a new constitutional right).

B. Statutory Tolling

The AEDPA limitations period is tolled pending adjudication of a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim. 28 U.S.C. § 2244(d)(2). Petitioner's application for post-conviction relief was not filed until February 25, 2021. Because the one-year limitations period had already expired at that time, the application did not provide tolling under § 2244(d)(2). *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."); *Green v. Booher*, 42 F. App'x 104, 106 (10th Cir. 2002) ("[Petitioner's] state application [for postconviction relief] could not toll the federal limitation period, because he did not file it until after the one-year period had expired."). Thus, the Court should conclude the Petition is not rendered timely through application of 28 U.S.C. § 2244(d)(2).

C. Equitable Tolling

28 U.S.C. "§ 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling." *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). "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." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Generally, equitable tolling is warranted only in situations where the petitioner was actively misled or is prevented in some extraordinary way from asserting his rights. *Id.* at 418-19. Here, Petitioner makes no assertion that he is entitled to equitable tolling.

The Supreme Court has also held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . [or] expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). "It is important to note in this regard that actual innocence means factual innocence, not mere legal insufficiency." *Pacheco*, 48 F.4th at 1186 (quotations omitted). Thus, such tolling of the limitations period for actual innocence is appropriate only in rare instances in which the petitioner shows that "in light of the new evidence [presented by the petitioner], no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin,* 569 U.S. at 386 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

Petitioner has made no allegation that he is actually innocent, nor does he indicate the presence of any "new" evidence pertaining to the same. Additionally, Petitioner's claim that the state court lacked jurisdiction, unaccompanied by any new evidence, is insufficient to credibly show actual innocence. *See Pacheco,* 48 F.4th at 1183, 1190 (holding the petitioner's jurisdictional argument does not show actual

innocence). As a result, the Court should conclude the "actual innocence" exception does not apply.

RECOMMENDATION

Based on the foregoing findings, it is recommended this action be dismissed with prejudice based on the statute of limitations.[6] Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by March 28th, 2023, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Report and Recommendation would waive appellate review of the recommended ruling. *Moore v. United States*, 950 F.2d 656 (10th Cir. 1991); *see, cf. Marshall v. Chater,* 75 F.3d 1421, 1426 (10th Cir. 1996) ("Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.").

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not

[6] "Where a claim is time-barred, a dismissal without prejudice provides no relief to the claimant because an action dismissed as untimely cannot be refiled. Thus, even if dismissal based on the expiration of the limitations period is without prejudice, it has the practical effect of a dismissal with prejudice." *Long v. Crow*, No. CIV-19-737-D, 2019 WL 5295529, at *1 n.2 (W.D. Okla. Oct. 18, 2019) (citing *AdvantEdge Bus. Grp. v. Thomas E. Mestmaker & Assocs., Inc.,* 552 F.3d 1233, 1236 (10th Cir. 2009); *accord Satterfield v. Franklin*, No. CIV-08-733-D, 2009 WL 523181, at *1 (W.D. Okla. Mar. 2, 2009)).

specifically addressed herein is denied.

ENTERED this 8th day of March, 2023.

GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE

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