

APPENDIX

A

FILED
United States Court of Appeal
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 2, 2024

Christopher M. Wolpert
Clerk of Court

JIMMY DALE STONE,

Petitioner - Appellant,

v.

KAMERON HARVONEK,

Respondent - Appellee.

No. 23-6069
(D.C. No. 5:22-CV-00661-J)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Petitioner Jimmy Dale Stone, proceeding pro se, seeks a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition as untimely.¹ We deny a COA.

I.

Mr. Stone was convicted in Garvin County, Oklahoma, on January 25, 2018, for three counts of lewd or indecent acts to a child under 16. His conviction was affirmed on February 28, 2019, and he did not seek review by the United States Supreme Court. His

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Because Mr. Stone proceeds 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).

conviction therefore became final on May 29, 2019, and the one-year period for him to bring a federal habeas corpus petition under § 2254 expired on May 30, 2020. *See* 28 U.S.C. § 2244(d)(1)(A); *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012).

On July 9, 2020, the Supreme Court decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). “*McGirt* . . . held that the Creek Reservation had never been disestablished and that the land it encompassed remained Indian country for purposes of the Major Crimes Act.” *Pacheco v. El Habti*, 62 F.4th 1233, 1239 (10th Cir. 2023), *cert. denied*, 143 S. Ct. 2672 (2023). The consequence of *McGirt* is that Oklahoma lacks jurisdiction to convict Indians of crimes covered by the Major Crimes Act, 18 U.S.C. § 1153(a), in many parts of Oklahoma which are “Indian country” within the meaning of § 1153(a). *See McGirt*, 140 S. Ct. at 2459; *Pacheco*, 62 F.4th at 1237.

Mr. Stone did not initially file a § 2254 petition seeking relief based on *McGirt*. But he did file an application for post-conviction relief in the Oklahoma courts, on September 2, 2020. That application was denied, and Mr. Stone first appealed to the Oklahoma Court of Criminal Appeals, then sought review by the United States Supreme Court, which denied certiorari on May 2, 2022.

Mr. Stone then filed his § 2254 petition in the federal district court, on July 29, 2022. His petition argues, consistent with *McGirt*, that Oklahoma lacked jurisdiction to convict him because he is an Indian and the crime for which he was convicted occurred in Indian country. A magistrate judge recommended his petition be dismissed as untimely because it was filed more than two years after the time period to bring a § 2254 petition had ended, on May 30, 2020. The magistrate judge noted Mr. Stone’s application for

state post-conviction relief was filed after that deadline and therefore did not extend the time for Mr. Stone to bring a § 2254 petition. *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 [§ 2244(d)(1)] will toll the statute of limitations.”).

Mr. Stone filed objections to the recommendation. He did not dispute that his § 2254 petition was untimely, but he asked for equitable tolling based on prison lockdowns. He filed a letter from an acting warden stating the prison had been on lockdowns, first for security from September to October 2019, then for the COVID-19 pandemic from approximately April 2020 through June 2021. The letter corroborated his claim of extremely limited access to the law library and legal resources in those periods.

The district court adopted the recommendation and dismissed Mr. Stone’s petition as untimely. It denied his request for equitable tolling, ruling that “[e]ven if the statute of limitations is equitably tolled for the . . . lockdown[s] . . . Petitioner filed his Petition . . . over a year after the COVID-19 lockdown was lifted.” R. at 85. It also observed “the first lockdown occurred approximately three months after Petitioner’s conviction became final and the second lockdown occurred approximately five months after the first lockdown had lifted.” *Id.* at 85 n.3. The district court concluded the “extremely long period of time cannot support any finding of diligence by Petitioner.” *Id.* at 85.

Mr. Stone appealed. On limited remand, the district court denied a COA, and Mr. Stone now requests one from this court.

II.

To appeal, Mr. Stone must obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(A).

Because the district court dismissed his petition on procedural grounds, he must show both “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.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We need not address the constitutional question if reasonable jurists would not debate the resolution of the procedural one. *See id.* at 485.

Mr. Stone’s COA application argues the district court “misinterpreted the filing due date” for his petition. *Aplt. Br.* at 2. But he does not dispute either that the one-year limitations period expired on May 30, 2020, or that his petition was filed more than two years later, on July 29, 2022. He argues that because he filed an application for post-conviction relief *in the state court* on September 2, 2020, we should treat that as the relevant filing date, making his petition late by only “approximately 3 months.” *Id.*

But the one-year limitations period set the date by which Mr. Stone was required to file his § 2254 petition *in federal court*. *See* § 2244(d)(1). Under § 2244(d)(2), the time when a properly filed application for state post-conviction relief is pending does not count against the one-year period. But, as the magistrate judge pointed out, Mr. Stone’s application for post-conviction relief in state court did not extend the time for his § 2254 petition, because his state court application was filed after the § 2254 deadline had already passed. *See Clark*, 468 F.3d at 714. Reasonable jurists would not debate the determination that Mr. Stone’s § 2254 petition was filed more than two years late.

Mr. Stone also objects to the district court's finding that he did not establish the diligence required for equitable tolling. His argument is unavailing. Equitable tolling is "a rare remedy," and a petitioner "bears a strong burden to show specific facts to support his claim." *Al-Yousif v. Trani*, 779 F.3d 1173, 1179 (10th Cir. 2015) (internal quotation marks omitted). Mr. Stone must show both (1) "that he has been pursuing his rights diligently," and (2) "that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks omitted). The district court's denial of equitable tolling is reviewed for abuse of discretion. *Al-Yousif*, 779 F.3d at 1177.

The district court found Mr. Stone did not establish diligence because he filed his § 2254 petition more than a year after the prison lockdown lifted. The diligence showing requires a petitioner to "allege with specificity the steps he took to diligently pursue his federal claims." *Yang v. Archuleta*, 525 F.3d 925, 930 (10th Cir. 2008) (emphasis added; internal quotation marks omitted). Mr. Stone has not identified any steps he took to bring his federal § 2254 petition, either before or after he filed his state court application. He argues he showed diligence by filing his state court application as soon as he was able, given the lockdowns, then pursuing appellate review through the U.S. Supreme Court before filing his § 2254 petition. However, his claim of diligence in the state court proceedings does not satisfy the showing required for equitable tolling of the federal limitations period. *See Yang*, 525 F.3d at 930.

Given the record and timing of his filings, we understand Mr. Stone's argument to be not so much that he was unable to file his § 2254 petition earlier, but instead that he

waited to do so until his state court proceedings were concluded (i.e., after the Supreme Court denied review). This is effectively a claim that his delay was based on a mistaken belief about the law. To the extent Mr. Stone believed his state court proceedings tolled the statute of limitations, he was mistaken for the reason explained above. *See Clark*, 468 F.3d at 714. Likewise, to the extent he believed he was precluded from filing a § 2254 petition before exhausting his claim based on *McGirt* in the state courts, that belief was also mistaken. *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005) (noting a prisoner can file a “protective petition in federal court . . . asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted”). However, “it is well established that ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing.” *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (internal quotation marks omitted)).

Accordingly, neither Mr. Stone’s pursuit of state court relief, nor a mistaken belief that his state court proceedings had tolled the time to bring a § 2254 petition compelled the district court to grant equitable tolling. Reasonable jurists therefore would not debate whether the district court abused its discretion by denying equitable tolling.

III.

For the foregoing reasons, we deny a certificate of appealability and dismiss this matter. Mr. Stone's motion to proceed without prepayment of costs or fees is granted.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

APPENDIX

B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

JIMMY DALE STONE,

Petitioner,

V.

KAMERON HARVONEK,

Respondent.

Case No. CIV-22-661-J

ORDER

On April 26, 2023, this Court issued an Order adopting the Report and Recommendation of United States Magistrate Judge Amanda Maxfield Green and dismissing Petitioner's habeas action as untimely. *See* [Doc. No. 20]. Petitioner seeks to appeal the Court's Order, but he cannot proceed on appeal without a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1). Because the Court did not address whether a COA should issue and Petitioner did not request a COA from the Court, the Tenth Circuit, in light of *United States v. Higley*, No. 17-1111 (10th Cir. Sep. 29, 2017), directed a limited remand for the Court "to consider whether to issue a COA for this appeal." *Stone v. Harvonek*, No. 23-6069 (10th Cir. May 11, 2023).

Under 28 U.S.C. § 2253(c)(2), the Court is instructed to issue a COA “only if the [petitioner] has made a substantial showing of the denial of a constitutional right.” To that end, the Court must consider whether “reasonable jurists could debate . . . (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks omitted).

With this standard in mind, the Court finds Petitioner has not made a substantial showing that he was denied a constitutional right. No reasonable jurist could debate whether Petitioner's

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habeas petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. A COA is therefore DENIED.

IT IS SO ORDERED this 12th day of May, 2023.

A handwritten signature in black ink, appearing to read "B.M.J.", is written over a horizontal line.

BERNARD M. JONES
UNITED STATES DISTRICT JUDGE

APPENDIX

C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

JIMMY DALE STONE,)	
)	
Petitioner,)	
)	
v.)	Case No. CIV-22-661-J
)	
KAMERON HARVONEK,)	
)	
Respondent.)	

ORDER

Petitioner, Jimmy Dale Stone, a state prisoner appearing pro se, brings this action pursuant to 28 U.S.C. § 2254, seeking habeas relief from a state court conviction. The matter was referred to United States Magistrate Judge Amanda Maxfield Green for initial proceedings consistent with 28 U.S.C. § 636. [Doc. No. 5]. On February 16, 2023, Judge Green issued a Report and Recommendation recommending that the Petition for a Writ of Habeas Corpus (Petition) be dismissed, with prejudice, as untimely. [Doc. No. 13]. Petitioner has filed an Objection to the Report and Recommendation which triggers de novo review. [Doc. No. 19].

In the Report and Recommendation, Judge Green concludes that Petitioner did not timely file his Petition. Specifically, Judge Green finds that the statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to Petitioner's claim that the state court lacked jurisdiction, that the Petition is untimely under 28 U.S.C. § 2244(d)(1)(A), and that 28 U.S.C. § 2244(d)(1)(C) is not applicable. Petitioner does not dispute that his Petition was not filed within the AEDPA's one year limitation period¹ but asserts that he should be allowed over two years of equitably tolled time based upon a statewide lockdown of his correctional facility

¹ Petitioner does not dispute that he had until May 30, 2020 to file his habeas petition, absent any tolling.


APPX: C

from approximately September 2019 until October 2019 due to security and from April 2020 until June 2021 due to COVID-19.²

Having reviewed the Report and Recommendation and Petitioner's objection to the Report and Recommendation, the Court concludes that the Petition should be dismissed as untimely. Even if the statute of limitations is equitably tolled for the time period during which Petitioner's correctional facility was on lockdown due to security issues and COVID-19, Petitioner filed his Petition on July 29, 2022, over a year after the COVID-19 lockdown was lifted.³ This extremely long period of time cannot support any finding of diligence by Petitioner.

Accordingly, the Court ADOPTS the Report and Recommendation [Doc. No. 13] and DISMISSES the Petition, with prejudice, as untimely.

IT IS SO ORDERED this 26th day of April, 2023.


BERNARD M. JONES
UNITED STATES DISTRICT JUDGE

² Due to these lockdowns, inmates' access to legal material was extremely limited, and inmates were unable to utilize the law library resources. See April 7, 2023 letter from Mike Rogers, Acting Warden, Lexington Assessment and Reception Center [Doc. No. 19-1].

³ The Court would also note that the first lockdown occurred approximately three months after Petitioner's conviction became final and the second lockdown occurred approximately five months after the first lockdown had been lifted.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

JIMMY DALE STONE,

Petitioner,

v.

KAMERON HARVONEK,

Respondent.

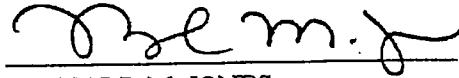
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Case No. CIV-22-661-J

JUDGMENT

In accordance with the Court's order entered on this date, Petitioner's Petition for Writ of Habeas Corpus is dismissed, with prejudice, as untimely.

IT IS SO ORDERED this 26th day of April, 2023.



BERNARD M. JONES
UNITED STATES DISTRICT JUDGE

APPENDIX

D

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

JIMMY DALE STONE,)	
)	
Petitioner,)	
)	
v.)	Case No. CIV-22-661-J
)	
KAMERON HARVONEK,)	
)	
Respondent.)	

REPORT AND RECOMMENDATION

Petitioner Jimmy Dale Stone ("Petitioner"), a state prisoner proceeding *pro se*, seeks a Writ of Habeas Corpus under 28 U.S.C. § 2254.¹ (Doc. 1).² United States District Judge Bernard M. Jones referred the matter to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). (Doc. 5). As the undersigned has considered the entirety of the Petition (Doc. 1), Petitioner's Motion for Leave to File Excess Pages is **GRANTED**. (Doc. 3). For the reasons set forth below, the undersigned recommends that Petitioner's application for habeas relief be **DISMISSED** with prejudice.

¹ Petitioner states that he is bringing this Petition under 28 U.S.C. § 2254 and 28 U.S.C. § 2241. (Doc. 1, at 7). As Petitioner is challenging the jurisdiction of the court in his conviction, the Petition is properly brought under § 2254. *Yellowbear v. Wyo. Atty. Gen.*, 525 F.3d 921, 924 (10th Cir. 2008) (recognizing that § 2241 is not the proper vehicle to challenge state court jurisdiction over the petitioner for a crime allegedly committed in Indian country).

² Citations to the parties' filings and attached exhibits will refer to this Court's CM/ECF pagination.

APPX. D

I. Screening

The Court must review habeas petitions and summarily dismiss a petition “[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). This Report and Recommendation provides Petitioner with notice, and he can present his position by objecting to the recommendation. *See Smith v. Dorsey*, 30 F.3d 142, 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).

II. Procedural History

A. Petitioner’s Garvin County Sentence.

On January 25, 2018, Petitioner was convicted after a non-jury trial in Garvin County District Court of three counts of Lewd or Indecent Acts to a Child Under 16, After Former Conviction of Two Felonies. Garvin County District Court, Case No. CF-2016-370.³ On March 15, 2018, the court sentenced Petitioner to life on each count to run concurrently. (*Id.*)

³ <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=garvin&number=CF-2016-00370&cmid=8904> (*Docket Sheet*) (last visited February 14, 2023). The undersigned takes judicial notice of the docket sheets and related documents in Petitioner’s state criminal proceedings. *See United States v. Pursley*, 577 F.3d 1204, 1214 n.6 (10th Cir. 2009) (exercising discretion “to take judicial notice of publicly-filed records in [this] court and

On March 26, 2018, Petitioner filed an appeal in the Oklahoma Court of Criminal Appeals (OCCA), arguing that there was insufficient evidence to support his conviction and that his punishment constituted double jeopardy in violation of his due process rights under the Fifth and Fourteenth Amendments. OCCA, Case No. F-2018-297.⁴ On February 28, 2019, the OCCA affirmed Petitioner's conviction and sentence. (*Id.*)

B. Petitioner's Efforts to Obtain Post-Conviction Relief in State Court

On March 27, 2019, Petitioner filed a Motion for Suspended Sentence pursuant to 22 Okla. Stat. § 994, which was denied by the district court on April 11, 2019. Garvin County District Court, Case No. CF-2016-370 (*see* footnote 3).

On September 2, 2020, Petitioner filed an Application for Post-Conviction Relief in the Garvin County District Court asserting that the court lacked subject matter jurisdiction under *McGirt v. Oklahoma*, 140 S.Ct 2452 (2020), as Petitioner is an Indian and the crime occurred in Indian Country. Garvin County District Court, Case No. CF-2016-370 (*see* footnote 3). On September 17, 2021, the Garvin County District Court denied Petitioner's Application under *State ex rel. Matloff v. Wallace*, 497 P.3d 686 (Okla. Crim. App. 2021), as Petitioner's conviction was final when *McGirt* was decided. (*Id.*; Doc. 1, at 8).

certain other courts concerning matters that bear directly upon the disposition of the case at hand") (citation omitted).

⁴<https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=F-2018-297&cmid=123630> (*Docket Sheet*) (last visited February 14, 2023).

On November 5, 2021, Petitioner filed a Petition in Error in the OCCA. OCCA, Case No. PC-2021-1226.⁵ The OCCA affirmed the denial of Petitioner's Application for Post-Conviction Relief on November 19, 2021. (*Id.*)

On February 8, 2022, Petitioner filed a Petition for Writ of Certiorari to the United States Supreme Court that was subsequently denied on May 2, 2022. *Stone v. Oklahoma*, Case No. 21-7257, 142 S.Ct. 2683 (2022).

C. The Petition

On July 29, 2022,⁶ Petitioner filed the instant Petition, challenging his Garvin County sentence. (Doc. 1, at 51). Petitioner asserts he is an enrolled member of the Choctaw Tribe and that the crime occurred in Indian Country. (*Id.* at 12). Based on these facts, Petitioner asserts Oklahoma did not have jurisdiction to prosecute him pursuant to *McGirt*. (*Id.* at 9). Thus, he contends his conviction is void *ab initio*. (*Id.*)

III. Analysis

A. Petitioner Did Not Timely File His Petition.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one-year limitations period for federal habeas claims by petitioners in state custody. 28 U.S.C. § 2244(d)(1). The 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;

⁵<https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=PC-2021-1226&cmid=131636> (*Docket Sheet*) (last visited February 14, 2023).

⁶ See *Marsh v. Soares*, 223 F.3d 1217, 1218 n.1 (10th Cir. 2000) (applying the prison mailbox rule to habeas petition) (citing *Houston v. Lack*, 487 U.S. 266, 270 (1988)).

- (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.

Id. AEDPA includes a tolling provision for properly filed post-conviction actions:

The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Id. at § 2244(d)(2).

1. The Petition is Untimely Under § 2244(d)(1)(A).

Unless a petitioner alleges facts implicating §§ 2244(d)(1)(B), (C), or (D), “[t]he limitations period generally runs from the date on which the state judgment became final[,] . . . but is tolled during the time state post-conviction review is pending.” *Preston v. Gibson*, 234 F.3d 1118, 1120 (10th Cir. 2000) (citing §§ 2244(d)(1)(A), 2244(d)(2)). A prisoner has 90 days from the entry of the court of appeals judgment to file a writ of certiorari to the Supreme Court. *Habteselassie v. Novak*, 209 F.3d 1208, 1209 (10th Cir. 2000). The OCCA affirmed Petitioner’s conviction and sentence on February 28, 2019, and Petitioner did not file a writ. OCCA, Case No. F-2018-297 (*see* footnote 4). Thus, Petitioner’s conviction became final on May 29, 2019. The one-year statute of limitations

began the day after Petitioner's conviction became final. *Harris v. Dinwiddie*, 642 F.3d 902, 906 n.6 (10th Cir. 2011). Accordingly, Petitioner had until May 30, 2020, to file his habeas petition, absent any tolling. *See id.* (noting the limitations period began the day after the judgment became final and ended one year later on the same day).

On March 27, 2019, which was 27 days after his conviction and sentence was affirmed, Petitioner filed a Motion for Suspended Sentence pursuant to 22 Okla. Stat. § 994, which was denied by the district court on April 11, 2019. Garvin County District Court, Case No. CF-2016-370 (*see* footnote 3). A motion filed under § 994 “constitutes ‘collateral review’” for the purposes of tolling under § 2244(d)(2)). *See Estes v. Crow*, 2022 WL 301598, at *3 (E.D. Okla. Feb. 1, 2022); *Clements v. Franklin*, No. CIV-12-247-W, 2012 WL 2344430, at *3 (W.D. Okla. May 8, 2012) (“Petitioner’s] state court motion seeking a reduction of his sentence under Okla. Stat. tit. 22, § 994, tolled the running of the limitations period under 28 U.S.C. § 2244(d)(2).” (citing *Najera v. Murphy*, 462 Fed. App’x. 827, 2012 WL 453649 (10th Cir. Feb. 14, 2012)), *report and recommendation adopted*, No. CIV-12-247-W, 2012 WL 2358564 (W.D. Okla. June 20, 2012). However, because Petitioner’s motion was filed and decided entirely within the time period before his conviction became final on May 29, 2019, he is not entitled to any tolling. *See Long v. Crow*, No. CV-19-737-D, 2019 WL 5295554, at *2 (W.D. Okla. Sept. 19, 2019), *report and recommendation adopted*, 2019 WL 5295529 (W.D. Okla. Oct. 18, 2019) (holding that when applications for collateral review are filed prior to a conviction becoming final, such applications have no tolling effect until the conviction becomes final).

Because Petitioner did not attempt to file any other form of state post-conviction relief until September 2, 2020 – after the limitations period had already expired on May 30, 2020 – those efforts likewise did not result in 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, Petitioner’s habeas action, filed on July 29, 2022, more than three years after his conviction became final, is untimely under § 2244(d)(1)(A).

2. Section 2244(d)(1)(C) Is Not Applicable Because *McGirt* Did Not Recognize 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.”

The *McGirt* decision, however, 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, in *McGirt* the Court addressed whether the Muscogee (Creek) Nation “remain[ed] an Indian reservation for purposes of federal criminal law,” 140 S.Ct. at 2459, a non-constitutional issue. Indeed, “[c]ourts in this Circuit . . . have rejected the proposition that the date of the *McGirt* decision should be used as the commencement date

under § 2244(d)(1)(C) for habeas challenges to state-court jurisdiction.” *Jones v. Pettigrew*, Case No. CIV-18-633-G, 2021 WL 3854755, at *3 (W.D. Okla. Aug. 27, 2021) (citing *Littlejohn v. Crow*, 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*.”)), *see further Jones v. Pettigrew*, 2022 WL 176139, at *1 (10th Cir. Jan. 20, 2022) (denying certificate of appealability and holding that “upon review of the district court’s thorough and well-reasoned order, we conclude that reasonable jurists wouldn’t debate the correctness of the district court’s decision that Jones’s petition was untimely”); *Voyles v. Crow*, Case No. CIV-22-71-F, 2022 WL 954993, at *3 (W.D. Okla. Mar. 14, 2022) (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”), *report and recommendation adopted*, 2022 WL 949979 (W.D. Okla. Mar. 29, 2022); *Donahue v. Harding*, Case No. CIV-21-183-PRW, 2021 WL 4714662, at *1 (W.D. Okla. Sept. 15, 2021) (same), *report and recommendation adopted*, 2021 WL 4711680 (W.D. Okla. Oct. 8, 2021). Therefore, § 2244(d)(1)(C) does not apply in this case, and Petitioner’s action is untimely.

3. AEDPA’s Statute of Limitations Applies to Petitioner’s Claim That the State Court Lacked Jurisdiction.

Petitioner further argues that because the State of Oklahoma lacked jurisdiction over his crime, his conviction is “void *ab initio*” and therefore cannot become “final” for purposes of applying AEDPA’s statute of limitations. (Doc. 1, at 14, 23). He asserts that a federal habeas challenge to subject matter jurisdiction can be raised at any time. (*Id.* at

10). The Tenth Circuit has held that “[t]his argument is meritless. We need not address whether the state trial court actually lacked jurisdiction to convict [Petitioner] because a habeas claim predicated on a convicting court’s lack of subject matter jurisdiction ‘is subject to dismissal for untimeliness.’” *Lamarr v. Nunn*, 2022 WL 2678602, at *2 (10th Cir. July 12, 2022) (unpublished) (quoting *Morales v. Jones*, 417 F. App’x 746, 749 (10th Cir. 2011) (unpublished)). Indeed, the Tenth Circuit “has clearly explained that challenges to the convicting court’s jurisdiction are considered due process challenges, subject to AEDPA’s limitations period.” *Lamarr*, 2022 WL 2678602 at *2 (citing *Yellowbear v. Wyo. Attorney Gen.*, 525 F.3d 921, 924 (10th Cir. 2008) (explaining “[a]bsence of jurisdiction in the convicting court is . . . 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)). Because AEDPA’s statute of limitations provides no exception for jurisdictional claims, Petitioner’s argument fails.

IV. Recommended Ruling and Notice of Right to Object

For the reasons discussed above, the undersigned recommends that the Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2254 (Doc. 1) be **DISMISSED** with prejudice.

The undersigned advises Petitioner of his right to object to this Report and Recommendation by March 9, 2023, under 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). The undersigned further advises the Petitioner that failure to make timely objection to this report and recommendation waives his right to appellate review of both

factual and legal issues contained herein. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation disposes of all issues and terminates the referral to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 16th day of February, 2023.


AMANDA MAXFIELD GREEN
UNITED STATES MAGISTRATE JUDGE

APPENDIX

E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

April 24, 2024

Christopher M. Wolpert
Clerk of Court

JEMMY DALE STONE,

Petitioner - Appellant,

v.

KAMERON HARVONEK,

Respondent - Appellee.

No. 23-6069
(D.C. No. 5:22-CV-00661-J)
(W.D. Okla.)

ORDER

Before HARTZ, PHILLIPS, and McHUGH, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

APPX. E