

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

SHAWN MICHAEL BARBRE,)	
)	
Petitioner,)	
)	
vs.)	CIV-18-259-RAW-KEW
)	
JASON BRYANT, Warden,)	
)	
Respondent.)	

**BRIEF IN SUPPORT OF
MOTION TO DISMISS TIME BARRED PETITION**

Comes Now Respondent and moves this Court to dismiss the instant Petition for Writ of Habeas Corpus as time-barred. In support of his Motion to Dismiss, Respondent files the following brief in support. For the reasons stated herein, Respondent respectfully asks this Court to dismiss the instant Petition pursuant to 28 U.S.C. § 2244(d).

ARGUMENT AND AUTHORITY

Pursuant to the one year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act, “AEDPA”, 28 U.S.C. §2244(d)(1), Petitioner’s request for habeas corpus relief is barred. The following dates are relevant for purposes of the disposition of this Motion:

- January 7, 2016:** Petitioner entered his plea of guilty (Exhibit 1, p. 4, OSCN Docket Sheet for Muskogee County Case No. CF-2015-644).
- January 19, 2016:** Petitioner’s judgment and sentence became final ten days after entry of his plea since he did not move to withdraw his plea (Exhibit 1, p. 5).¹
- January 19, 2016:** The date upon which Petitioner’s conviction became final for purposes of the AEDPA.

¹ Although ten days from January 7, 2016, was January 17, 2016, that day was a Sunday and the next day, January 18, 2016, was a holiday. Therefore, Petitioner received an additional two days in which to file a motion to withdraw guilty plea. *Harris v. Dinwiddie*, 642 F.3d 902, 906 n. 6 (10th Cir. 2011).

- January 20, 2017:** Petitioner's statutory one year period in which to file a habeas petition ended pursuant to the AEDPA.
- February 28, 2018:** Petitioner filed Application for Post-Conviction Relief in State Court (Exhibit 1, p. 6).
- May 31, 2018:** State trial court denied Petitioner's Post Conviction Application pending further litigation in *Murphy v. Royal*, 875 F. 3d 896 (10th Cir. 2017) (Exhibit 2, ORDER, dated May 31, 2018).
- July 13, 2018:** The OCCA affirmed the trial court's denial of Petitioner's Application for Post-Conviction relief (Exhibit 3, Order Affirming Denial of Application for Post-Conviction Relief).
- August 7, 2018:** Petitioner filed the instant habeas Petition.

Because his judgment and sentence was final after the Antiterrorism and Effective Death Penalty Act, 28 U.S.C § 2244(d) became law, the Petitioner had one year from January 19, 2016, the date his conviction became final, until January 20, 2017, in which to file a petition for habeas relief. The Petitioner had ten days from January 7, 2016, the date he entered his guilty plea, in which to file an application to withdraw his guilty plea; his application to withdraw guilty plea must have been filed by January 19, 2016. Rule 4.2(A), *Rules of the Court of Criminal Appeals*, Okla. Stat. Tit. 22, Ch. 18, App. (2018); *Clark v. Oklahoma*, 468 F.3d 711, 713 (10th Cir. 2006) (where a defendant does not file a motion to withdraw plea within the ten day period, the conviction becomes final upon the conclusion of that period). The Petitioner filed no application to withdraw his guilty plea within the statutory time allowed; therefore, his conviction became final on January 19, 2016. Accordingly, pursuant to *Clark*, Petitioner had to file his habeas petition on or before January 20, 2017.

While the Petitioner did file an application for post-conviction relief regarding his guilty plea, he filed it on February 28, 2018, over one year after the statutory time in which to file his

habeas petition expired. Therefore, no tolling of the statutory limitation period occurred since the limitation period had expired prior to the filing of the application for post-conviction relief. *See* 28 U.S.C. § 2244(d)(2); *Clark*, 468 F.3d at 714 (“Only state petitions for post-conviction relief filed within the one year allowed by AEDPA will toll the statute of limitations.”). The trial court denied his application on May 31, 2018; on July 18, 2018, the OCCA affirmed the trial court’s denial of Petitioner’s application for post-conviction relief.

The Petitioner’s conviction became final for the purposes of the AEDPA on January 19, 2016; and he had to file his habeas petition on or before January 20, 2017. The Petitioner filed his habeas petition on August 7, 2018, over eighteen months after his statutory year ended. The Petitioner’s petition is untimely and must be dismissed pursuant to § 2244(d)(1)(A).

Respondent believes the Petitioner is attempting to avail himself of a later starting date for his habeas year by asserting that § 2244 (d)(1)(C) applies to him. That section provides that the one year limitation period begins on “the date on which the constitutional right asserted was initially recognized by the Supreme Court, if [1] the right has been newly recognized by the Supreme Court and [2] made retroactively applicable to cases on collateral review.” The Petitioner asserts in his petition that he is a member of the Tunica-Biloxi Tribe and that his crime occurred in Muskogee on land lying entirely within the Cherokee Nation. Therefore, he alleges that the District Court of Muskogee County lacked jurisdiction over him. In support of this allegation he cites to numerous federal statutes, two Tenth Circuit cases and three OCCA cases (Doc. 1, p. 5). The Tenth Circuit cases he relies upon are *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2016 (2018) and *United States v. Sands*, 968 F.2d 1058 (10th Cir. 1992). Because neither *Murphy* nor *Sands* is a Supreme Court decision, they cannot support application of § 2244(d)(1)(C) to provide the Petitioner with an alternate commencement date for his habeas year. *See Pettit v. Bryant*, No.

18-CV-0387-CVE-JFJ, 2018 WL 4224448, at *4, (N.D. Okla. Sept. 5, 2018) (unpublished)² (rejecting the petitioner's claim that application of *Murphy* allowed the petitioner's habeas year to start pursuant to § 2244(d)(1)(C) rather than § 2244(d)(1)(A)).

Moreover, to the extent the Petitioner may be arguing that his habeas year commenced pursuant to § 2244(d)(1)(D), *i.e.*, that he could not discover the factual predicate of his claim until the *Murphy* decision came down, his argument must fail. As clearly stated in his petition, the Petitioner asserts his tribal membership and that he committed his crime on land within the Cherokee Nation (Doc. 1, p. 5). Thus, he knew of his status as a Native American and that his crime allegedly occurred on Indian land at the time he entered his guilty plea. Nothing contained in *Murphy* adds anything to the **factual** basis of the Petitioner's claim. At best, *Murphy* explained the potential legal significance of those facts. Accordingly, § 2244(d)(1)(D) does not apply. *Cf. Preston v. Gibson*, 234 F. 3d 1118, 1120 (10th Cir. 2000) (petitioner was aware of the factual basis of his claim "years before he filed his" petition thus nothing in the new cases he relied upon "alerted [him] to any factual basis for his claim" such that § 2244(d)(1)(D) applied); *Dopp v. Martin*, No. 18-CV-0152-CVE-FHM, 2018 WL 2750228 at *2 (N.D. Okla. June 7, 2018) (unpublished)³ (in the context of a second or successive habeas petition, § 2244(d)(1)(D) was not applicable based upon *Murphy* because the petitioner knew his house was located within the Seneca-Cuyoga tribal lands and his claims stemmed from the results of a search warrant executed at that house and his cited case law existed at the time of his trial and may have supported his claims; his lack of understanding of the

² Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. 21.1 and 10th Cir. R. 32.1.

³ Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. 21.1 and 10th Cir. R. 32.1.

legal significance of the cited authority to his facts did not negate that he was aware of the factual predicate of his claims).

The Petitioner's conviction became final for the purposes of the AEDPA on January 19, 2016; and he had to file his habeas petition on or before January 19, 2017. The Petitioner filed his habeas petition on August 7, 2018, over eighteen months after his statutory year ended. The Petitioner is not entitled to the application of § 2244(d)(1)(C) or (D) to provide alternate commencement dates for his habeas year. The Petitioner's petition is untimely and must be dismissed pursuant to § 2244(d)(1)(A).

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL

s/ JAY SCHNIEDERJAN
JAY SCHNIEDERJAN, OBA #11986
ASSISTANT ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 (FAX)
Service email: fhc.docket@oag.ok.gov
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

X I hereby certify that on the 26th day of September, 2018, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing.

X I hereby certify that on the 26th day of September, 2018, I served the attached document by mail on the following, who is not a registered participant of the ECF System:

Shawn Michael Barbre, #757178
JCCC
216 N. Murray St.
Helena, OK 73741-9606

s/ JAY SCHNIEDERJAN