IN THE UNITED STATES DISTRICT COURT OF EASTERN DISTRICT OF OKLAHOMA

SHAWN MICHAEL BARBRE

Petitioner,

vs.

Case # **6:18-CV-259-RAW-KEW**

JASON BRYANT, Warden
Respondent.

RESPONSE TO MOTION TO DISMISS

Comes Now, Petitioner, in response to Respondent's Motion to Dismiss, alleges and states:

"[A] pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." ***Haines v. Kerner***, 404 US 519, 5201-521 (1972)

A. The structure and function of 28 U.S.C. § 2254(d).

While it is not uncommon for litigants, even courts, to use terms like "deference" and "standard of review" as shorthand when describing § 2254(d), these terms are actually both incorrect and harmful to a habeas petitioner's right to full substantive review of the constitutional issues he presents.[1] Such shorthand terms often employed by respondents' counsel, and

[1] "[I]t is significant that the word "deference" does not appear in the text of the statute itself . . . Whatever "deference" congress had in mind . . . , it surely is not a requirement that federal courts actually defer to a sate-court application of the federal law that is, in the interdependent judgment of the federal court, in error. " (Terry) *Williams v. Taylor, 529 U.S. 362, 386-87 (2000): see also Lindh v. Murphy, 96 F.3d 856,868 (C.A.7 1996)*(en banc)

sometimes by federal courts, can suggest a mode of review that is less than thorough or exacting. While using the "reasonableness" components of § 2254(d)(1) or (2) in such a manner might promote the state's interests in minimizing the scrutiny with which a habeas petitioner's constitutional claims are examined by a federal habeas court, doing so would be consistent with neither the plain language of the statue, nor its application by the Supreme Court. Rather, as discussed below, § 2254(d) not only permits but requires a more exacting inquiry into the constitutional merit's of a petitioner's claims.

Section 2254(d) provides as follows:

> An application of a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a Sate court shall not be granted with respect to any claim that was adjudicated on the merits in Sate court proceedings unless the adjudication of the claim -
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United states; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the Sate curt proceedings.

Under the plain language of the statute's opening sentence, the threshold question is whether the particular claim under federal habeas review "was adjudicated on the merits in the State court proceedings." If the state court to which the claim was previously presented failed to resolve the merits of a claim entirely, or failed to reach any of the standard prescribed for the

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(Easterbrook, J.), *rev'd on other grounds, 521 U.S. 320 (1997)* ("[§ 2254] does no tell us to "defer" to state decisions, as if the constitution means one thing in Wisconsin and another in Indiana. Nor dos it tell us to treat state courts the way we treat federal administrative agencies. Deference after the fashion of *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984)*, depends on delegation. Congress did not delegate either interpretative or executive power to the state courts. They exercise powers under their in domestic law, constrained by the Constitution of the Untied State. 'Deference' to the jurisdictions bound by those constraints is not sensible." (Internal citations omitted)).

claims by federal law, then § 2254 (d) is inapplicable to the federal court's analysis. See *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("[O]ur review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* [v. Washington, 466 U.S. 668 (1984),] analysis"); Rompilla v. Beard, 545 U.S. 374, 390 (2005) (citing Wiggins) ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo*.") (internal citations omitted): *Romano .v Gibson*, 278 F.3d 1145, 1150 (10th Cir, 2002) ("If the state court did not address a claim's merit, however, this court then reviews the district court's legal determinations *de novo* and its factual findings, if any, for clear error."); *Ellis v. Mullin*, 326 F.3d 1122, 1128 (10th Cir. 2002).

For those claims or portions of claims that the state court did adjudicate on the merits, the first step in correctly applying § 2254(d) is to recognize that it is concerned with limiting a federal habeas court's authority to grant relief once a federal constitutional violation has been found to exist, not with attempting to influence the federal court's discharge of it's Article III mandate to determine the existence *vel non* of constitutional errors. [2] That § 2254(d) speaks to the availability of a remedy, rather than to the existence of an error for which a remedy might be warranted, is clear for at least two reasons. *First,* the opening clause of the statute - "An application for a writ of habeas corpus . . . *shall not be granted*" (emphasis added) – is an express direction to withhold the writ unless certain conditions are met. It says nothing, however,

[2] See, e.g. (Terry) *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (§ 2254 (d) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court")(emphasis added): *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("the requirements for habeas *relief* established by 28 U.S.C. § 2254 (d) are thus satisfied") (emphasis added).

that purports to modify the ways in which federal courts analyze or resolve the constitutional questions, which are necessarily anterior to any consideration of a possible remedy.

Second, when Congress created the limitation on relief in § 2254(d) as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), it made no changes to § 2254(a), which confers federal habeas jurisdictions only for the circumscribed purpose of determining whether a habeas petitioner "is in custody in the violation of the Constitution or laws or treaties of the United States." Taken together, §§ 2254 (a) and (d) thus form a framework in which federal courts remain both authorized and obligate to determine the existence of constitutional violations in the first instance, but may no longer remedy such violations by issuing the writ of habeas corpus unless they further find one or more of the conditions enumerated in § 2254(d)(1) or (2) to be satisfied. See *Gonzales v. Crosby*, 545 U.S. 524, 532 n.4 (2005) (defining a "merits" decision in a habeas case as "a determination that there exists or does not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254 (a) and (d)"); see also *Danforth v. Minnesota,* 128 S. Ct. 1029, 1035 & n.5 (2008) (discussing the distinction between violations of constitutional rights and redressibility of such violations in habeas cases).

With this framework in view, the function of subdivisions (1) and (2) if § 2254 (d) is straightforward. Whereas the opening lines of § 2254 (d) establish the general proposition that habeas relief "shall not be granted . . . unless" certain conditions are met, subdivisions (1) and (2) enumerate in broad terms what those conditions are. Subdivision (1) authorized a federal court to remedy a constitutional violation where the sate court's "adjudication of the claim . . . resulted in a decision that was contrary to . . . clearly established federal law," or "involved an

unreasonable application [of] clearly established Federal law." And subdivision (2) further authorizes a grant of relief where the sate court's "adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts n light of the evidence presented in the State court proceeding."

B. Petitioner's Petition is subject to equitable principles

Under the Antiterrorism and Effective Death Penalty ACT (AEDPA, state prisoners have a one-year limitation period in which to file a federal habeas petition. 28 USC § 2244(d)(1). Generally, the limitation period begins to run from the date on which a prisoner's conviction becomes final. It may also commence at a later date under the terms of §2244(d)(1)(B), (C), and (D). Regardless of which date the one0year limitation period commences, the period is statutorily tolled for the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. Because the AEDPA's one-year limitation period is not jurisdictional, the untimeliness of a habeas petition also may be excused for equitable reasons, ***Holland v. Florida***, 560 US 631, 645 (2010), or upon "a credible showing of actual innocence," ***McQuiggins v. Perkins***, 569 US 383, 392 (2013).

To obtain equitable tolling, a petitioner must show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing of his federal habeas petition. ***Holland***, 560 US at 649.

Additionally, under § 2244(d)(1)(B), a petitioner must show (1) the State's unconstitutional action (2) prevented petitioner from filing a federal habeas petition.

Finally, the statutory tolling due under § 2244(d)(1)(C) and (D) require a showing that a new US Supreme Court has caused a substantive change in law that impacts a prisoner's case or

the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

C. State's Unconstitutional Action[3]

When Oklahoma became a state, Proclamation of Nov. 16, 1907, 35 Stat. 2160-61, it was already well settled that the authority of the United States to prosecute crimes not committed by or against Indians on reservations ended at statehood. *United States v. McBratney*, 104 U.S. 621, 624 (1881); *Draper v. United States*, 164 U.S. 240 (1896). Despite having no legal basis, federal and state officials acted as if statehood also marked the end of federal authority over prosecutions of all crimes by or against Indians in "Indian country" under GCA and on "reservations" under MCA. This viewpoint was contrary to an early Oklahoma Supreme Court decision, *Higgins v. Brown*, 94 P. 703, 730 (Okla. 1908). Although *Higgins* did not involve claims that the crime occurred on a reservation, it provided guidance regarding any future cases involving Indian country jurisdiction. The Court found that § 16, 28 of the Enabling Act was "intended to vest in the federal courts the continued prosecution of criminal cases of a federal character and to continue in the state courts the prosecutions of a local or municipal character." *Id.* at 725. It accordingly found that prosecutions under "a general law relating to crime against the United States of which a federal court would have had jurisdiction even had the crime been committed within a state" (such as MCA and GCA) were to be transferred to the federal courts. *Id.* at 725. *See also Ex parte Buchanen*, 94 P. 943, 944-45 (Okla. Crim. App. 1908); *Ex parte Curlee*, 95 P. 414 (Okla. Crim. App. 1908) ("Of course, non-pending actions of a federal character would necessarily vest in the United States courts in the state erected out of said [Oklahoma and Indian] territories just as they do in United States courts in the other

[3] This historical record is derived from the *Brief of Amici Curiae Historians, Legal Scholars, and Cherokee nation in Support of Respondent* in ***Mike Carpenter v. Patrick Murphy***, No. 17-1107

states."). A few years after these Oklahoma decisions, this Court ruled that Oklahoma statehood did not change the Indian country status of lands in Indian Territory or the applicability of federal criminal laws on those lands. *United States v. Wright*, 229 U.S. 226 (1913).10 In *Wright*, the United States charged the defendant in federal court in Oklahoma for violation of Rev. Stat. § 2139, which prohibited introduction of liquor into "Indian country." *Id.* at 226-27. This Court concluded 10 An earlier decision of this Court, *Hendrix v. United States*, 219 U.S. 79, 90 (1911), offers no guidance. It did not address or reference GCA, MCA, the reservation status of the crime site, or the United States' argument that the Enabling Act withdrew Indian Territory from federal jurisdiction that § 2139 was applicable to "Indian country" throughout the states and territories generally, and that the Enabling Act did not repeal its applicability in Oklahoma. *Id.* at 238; *see also United States Exp. Co. v. Friedman*, 191 Fed. 673, 678-79 (8th Cir. 1911) (rejecting broad contention "Indian Territory ceased to be Indian country upon the admission of Oklahoma as a state"); and *Southern Surety Company v. State of Oklahoma*, 241 U.S. 582, 585-86 (1916) ("[T]he test of the jurisdiction of the state courts was to be the same that would have applied had the Indian Territory been a state when the offenses were omitted."). In sum, any claim that state prosecutions of all crimes in Creek Nation constituted "universal acknowledgement" of reservation disestablishment cannot withstand the principles set forth in early state and federal judicial interpretations of the Enabling Act.

Less than two years after statehood, state and federal prosecutors were put on notice that trust allotments are Indian country for purposes of prosecutions under GCA. In *United States v. Pelican*, the Court held that Colville trust allotments "remained Indian lands set apart for Indians under governmental care" and were Indian country for purposes of a federal murder prosecution

under GCA, Rev. Stat. § 2145. *Pelican*, 232, 30 U.S. at 449. The Court declared that the United States' territorial jurisdiction did not "depend upon the size of the particular areas which are held for Federal purposes." *Id.* at 449-50. If there was any question that a restricted allotment in Oklahoma is Indian country for purposes of prosecutions under GCA, this Court resolved that question in *Ramsey*, 271 U.S. at 471-72.11 Citing the *Pelican* case, the Court ruled that a restricted Osage allotment crime site was Indian country for purposes of the GCA prosecution of two non-Indians for the murder of an Osage. *Id.* This decision put state and federal officials on notice that the federal courts had jurisdiction under the GCA over offenses on trust and restricted allotments, regardless of reservation status, including prosecutions of non-Indians for crimes against Indians. Yet the state continued its unlawful prosecutions. This exercise of jurisdiction did not impact the Indian country status of Creek reservation lands. *See United States v. John*, 437 U.S. at 652-54. 11 Federal investigation of the *Ramsey* case, which involved one of the numerous murders motivated by greed for the huge wealth of Osage mineral headright owners, was prompted by J. Edgar Hoover's desire to avoid scandal and protect his 1924 appointment as the director of the "Bureau of Investigation." DAVID GRANN, KILLERS OF THE FLOWER MOON – THE OSAGE MURDERS AND THE BIRTH OF THE FBI 116, 120 (2017). Because it was believed that it was "not only useless but positively dangerous" to try the case in the state legal system, federal attorneys filed the case in federal court, after which an appeal of dismissal on jurisdictional grounds reached this Court. *Id.* at 214.

D. Extraordinary Circumstances stood in Petitioner's Way that Prevented timely filing.

As discussed above, the State of Oklahoma, all its district attorneys, all of its trial and appellate judges, and even all of its appointed counsels have engaged in a concerted effort *since statehood* to subvert both the US Constitution Supremacy Clause, Oklahoma Constitution's

Article I, and federal law to illegally prosecute Indians whose alleged crimes occurred in Indian country. In the instant matter, the trial judge did not examine his own jurisdiction, the district attorney did not advise the trial court that its jurisdiction was at least suspect, nor did the assigned counsel challenge the trial court's jurisdiction even though he knew Petitioner was member of the Cherokee Nation.

Petitioner assumed the regularity of the proceedings because, as a layperson, he relied on his counsel and the other trial officer's integrity. It was only when the decision in the Tenth Circuit's ***Murphy*** case on November 9, 2017 that Petitioner became aware that he had a lack jurisdiction claim.

E. Petitioner Pursued His Rights Diligently

Once the Tenth Circuit announced its decision in the ***Murphy*** case, Petitioner quickly moved to file an application for post-conviction relief and diligently pursued relief until the instant habeas petition.

Additionally, the petition contains a claim that the state court did not have subject matter jurisdiction of the case because Petitioner is an Indian and the crime is alleged to have occurred on land which is deemed Indian country and Petitioner is a Cherokee Indian whose treaty with the United States does not provide for any State to have criminal jurisdiction over him. According to §2244(d)(1)(B), Petitioner showed that the State of Oklahoma by prosecuting him violated both the Supremacy Clause of the United Constitution and federal law (18 USC § 1153). Additionally, Petitioner showed that because all three trial officers (the district attorney, the judge and appointed defense counsel) were complicit in violating Petitioner's constitutional rights while pretending the proceedings were regular and constitutional, Petitioner was led to believe he had no possible appeal issues. It was only with the publication of the Tenth Circuit

decision in ***Murphy v. Royal***, 875 F3d 896 that Petitioner knew the State of Oklahoma had acted in violation of the Constitution. Upon this notice, Petitioner acted immediately to seek relief from the state court through both state habeas corpus and application for post-conviction relief.

Petitioner encourages this Court to look at his claim as a fundamental miscarriage of justice. What could be more fundamental than being tried in a court that does not have jurisdiction? While the United States Supreme has not stated recently that a fundamental miscarriage of justice includes a jurisdictional question, the High Court has not foreclosed this possibility either. Given the broad equitable powers of this Court, deeming Ground 5 as an issue of fundamental miscarriage of justice is within this Court's authority.

Moreover, this Court has broad powers to bestow equitable relief. As discussed further below, our nation's history and notions of rule of law and conceptions of ordered liberty impose on the Court a duty to allow equitable redress of Petitioner's issues, particularly Ground 5.

F. Dismissal of Petitioner's Habeas Petition is Tantamount to Suspension of the Writ

The US Supreme Court has stated, "We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' ***Bowen v. Johnston***, 1939, 306 US 19, 26, 59 SCt 442, 446, 83 Led 455, and unsuspended, save only in the cases specified in our Constitution." Since, as stated previously, AEDPA is not jurisdictional, Petitioner should be allowed to present a state criminal jurisdiction issue, especially when without such jurisdiction any conviction would be *void ab initio* as here. Leaving such a conviction in place would violate the rule of law, conceptions of order liberty and other foundational notions of our democracy.

In a land where the rule of law is supreme, would it make any sense to leave in place a conviction in a court that did not have jurisdiction? Wouldn't such a conviction be suspect, especially when the court acted outside the law in order to secure the conviction?

DECLARATION

I affirm under penalty of perjury that the foregoing is true and correct. I also affirm under the penalty of perjury that I placed the foregoing with first-class postage prepaid in the prison mailing system on this 4 day of October, 20 18.

Shawn Batt

Signature

CERTIFICATE OF MAILING

I affirm under the penalty for perjury that, in compliance with Title 28 U.S.C. 1746, I placed the foregoing with first-class postage prepaid in the prison mail system in the United States Mail, addressed to the Clerk of the U.S. District Court, United States Courthouse, 101 N. 5th Street, Rm 208, Muskogee, Oklahoma 74401-6203. In addition, I hereby certify that a copy of the foregoing was placed with first-class postage prepaid in the prison mail system in the United States Mail, addressed to the Jay Schniederjan, Asst. Attorney General, 313 N.E. 21st, Oklahoma City, Oklahoma 73105, on the following date:

October 4, 2018

Shawn Batt

Signature