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

STACEY D. BERRY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 19-CV-0706-GKF-FHM
	)	
JEORLD BRAGGS, JR., WARDEN,	)	
	)	
Respondent.	)	

REPLY TO PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AS TIME-BARRED BY THE STATUTE OF LIMITATIONS AND REQUEST TO FILE OUT OF TIME

Comes now Respondent, by and through the Attorney General of the State of Oklahoma, pursuant to LCvR 7.2(h) and gives this Reply to Petitioner's Brief in Response to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus as Time-Barred by the Statue [sic] of Limitations and Request to File Out of Time (Doc. 14).

Petitioner's Response Brief fluctuates between recognizing the untimeliness of his habeas corpus petition and requesting equitable tolling on the one hand and continuing to argue that his statute of limitations "began to run February 14, 2019" (Doc. 14 at 9). Respondent will not belabor the point. For the reasons stated in Respondent's Brief in Support of Motion to Dismiss, Petitioner's statute of limitations began to run the day after his conviction became final, *i.e.* January 22, 2016, and not following the denial of post-conviction relief in 2019.

While Petitioner devotes a considerable amount of his Response to the merits of his underlying federal habeas corpus petition which he claims supports equitable tolling, Respondent has previously addressed why Petitioner cannot show actual innocence or equitable tolling. Even if Petitioner did not personally learn about certain DHS reports until 2017, Petitioner has still failed

to show that he could not have learned of those reports earlier if he had acted with diligence or that he acted diligently once he obtained that information. In particular, Petitioner has failed to account for the nearly one year swath of time in 2019 when nothing was pending in state court before filing his petition on December 24, 2019. The Tenth Circuit Court of Appeals has held that equitable tolling is appropriate only "when an inmate diligently pursues his claims *and* demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control." *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (emphasis added). "'[A]n inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence.'" *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (quoting *Brown v. Barrow*, 512 F.3d 1304, 1307 (11th Cir. 2008)). *See Law v. Jones*, No. 11-5040, 433 Fed. Appx. 651, 652 (10th Cir. Aug. 5, 2011) (unpublished) (finding that the petitioner was not sufficiently diligent in pursuing his claim to merit equitable tolling where he discovered that his attorney lied about filing a post-conviction application in 2008 and yet the petitioner did not file one himself until nearly two years later). Notably, there is no constitutional right to counsel in state collateral proceedings or federal habeas corpus proceedings. *See Coronado v. Ward*, 517 F.3d 1212, 1218 (10th Cir. 2008); *Parkhurst v. Shillinger*, 128 F.3d 1366 (10th Cir. 1997) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). Therefore, the fact that Petitioner has not been *pro se* during his state collateral proceedings weighs heavily against the application of equitable tolling in this case.

While much of Petitioner's Response is geared towards the merits of his claim under *Strickland v. Washington*, 466 U.S. 668 (1984), Respondent writes primarily to address the following portion of Petitioner's Response:

The unsettled issue on Jurisdiction is still before the Supreme Court

> of the United States. The Murphy case, speaks to jurisdictional bounds and whether a [N]ative American who is charged with a crime on Indian land, should be heard in Federal Court. **This is a long establish [sic] law from United States Code Major Crimes Act.** The vey [sic] issue that also applies to Mr. Berry, a member of the Cherokee Tribe and who has been charged with certain crimes that alleges [sic] took place on property that is under the jurisdiction of the Cherokee tribe. This alone, should toll any statutes of limitation until the United States Supreme Court renders its decision.

(Doc. 14, at 9-10) (emphasis added).

As Respondent previously noted in his Brief in Support of Motion to Dismiss, Oklahoma federal courts have applied the AEDPA to bar petitions similar to Petitioner's. For instance, in *Martin v. Bear*, No. CIV-18-134-JHP-KEW, 2019 WL 1437603 (E.D. Okla. Mar. 29, 2019) (unpublished), the United States District Court for the Eastern District of Oklahoma reasoned:

> Respondent points out that Petitioner raised a claim concerning the facts that he is an Indian and that his crime occurred in Indian Country in the pleading filed on June 2, 2017, more than two months before the Tenth Circuit's initial decision in *Murphy* [*v. Royal*, 866 F.3d 1164 (10th Cir. 2017)].[1] Respondent further argues that Petitioner's repeated reliance in state court on the February 18, 1992, *Cravatt* decision alters the analysis for the statute of limitations. Therefore, Petitioner's claim concerning Indian Country was available to him when the *Cravatt* decision was issued, and this habeas claim could have been discovered more than 27 years ago. Therefore, the Indian Country claim also is time barred.

Martin, 2019 WL 1437603, *4.

The United States District Court for the Western District of Oklahoma reached a similar conclusion in *Hayes v. Bear*, No. CIV-18-391-D, 2018 WL 2943459 (W.D. Okla. Jun. 12, 2018) (unpublished). The Court found that although Petitioner attempted to raise an Indian Country claim,

[1] That case was later renamed *Sharp v. Murphy* to reflect the current Interim Warden of the Oklahoma State Penitentiary, Tommy Sharp.

"[n]one of Petitioner's claims are based on newly-discovered facts." *Hayes*, 2018 WL 2943459, *2. The Court went on to explain:

> Petitioner identifies the date of discovery as August 8, 2017, which is the date that the court of appeals issued its initial decision *Murphy v. Royal*, 866 F.3d 1164, 1189-90 (10th Cir.), *modified on denial of reh'g en banc*, 875 F.3d 896 (10th Cir. 2017), *cert. granted,* No. 17-1107, 2018 WL 74674 (May 21, 2018). *Murphy* provides the legal, not factual, predicate of one of Petitioner's claims.

Hayes, 2018 WL 2943459, *2 n.2. Therefore, under *Martin* and *Hayes*, Petitioner's jurisdictional claim concerning Indian Country is subject to the same time bars and procedural bars as any other type of claim. Petitioner has surely been aware of the factual predicate of his claim, that he and his victims are members of the Cherokee Nation, all along. Moreover, like the petitioner in *Martin*, Petitioner has relied on case law which is decades old. *See, e.g.,* Doc. 1, at 15 (citing *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) and *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962)). *See also Solem v. Bartlett*, 465 U.S. 463 (1984). Simply put, in the words of Petitioner's own recent Response, "This is a long establish [sic] law from United States Code Major Crimes Act." (Doc. 14, at 9).

On July 9, 2020, the United States Supreme Court issued its opinion in *McGirt v. Oklahoma*, Case No. 18-9526, 591 U.S. _ (2020), in which it held that the Creek Reservation in Oklahoma had not been disestablished by Congress and that Mr. McGirt should have been prosecuted in federal court under the Major Crimes Act. However, in so holding, the Court made it clear that state and federal procedural bars are still applicable to claims regarding Indian Country. *See McGirt*, 591 U.S. _, slip op., at 38 ("Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on post-

conviction review in criminal proceedings."); *id.*, at 41 ("Many other legal doctrines–procedural bars, res judicata, statutes of repose, and laches, to name a few–are designed to protect those who have reasonably labored under a mistaken understanding of the law."). One such "well-known . . . federal limitation[]" and "statute[] of repose" is the statute of limitations under the AEDPA which Respondent has asserted as a bar in this case pursuant to 28 U.S.C. § 2244(d)(1). Respondent reasserts that time bar on the basis that the facts underlying this claim have always been available to Petitioner, and by his own admission, Petitioner has relied on case law which has been long established.[2]

Therefore, the instant habeas corpus petition should be dismissed as time-barred under the AEDPA, as Petitioner has not shown his entitlement to equitable tolling of the statute of limitations.

CONCLUSION

In *McGirt,* the Supreme Court has made it clear that state and federal procedural bars are still applicable to claims regarding Indian Country. *See McGirt*, 591 U.S. _, slip op., at 38 ("Other defendants who do try to challenge their state convictions may face significant procedural obstacles,

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[2] To the extent that Petitioner might now seek to rely on *McGirt* or *Sharp v. Murphy*, Case No. 17-1107, 591 U.S. _ (2020) as authority for the State's lack of jurisdiction, Respondent affirmatively does not waive the requirement of total exhaustion as to that claim. Under 28 U.S.C. § 2254(b)(1):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-(A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Furthermore, 28 U.S.C. § 2254(b)(3) provides, "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."

thanks to well-known state and federal limitations on post-conviction review in criminal proceedings."); *id.*, at 41 ("Many other legal doctrines–procedural bars, res judicata, statutes of repose, and laches, to name a few–are designed to protect those who have reasonably labored under a mistaken understanding of the law."). Petitioner, already nearing the end of his statute of limitations under the AEDPA, waited for nearly another whole year after the Oklahoma Court of Criminal Appeals denied post-conviction relief on his Indian Country claim before taking it to federal court. Therefore, he is time-barred by the AEDPA, and he has not demonstrated his entitlement to equitable tolling of his petition where he was represented by counsel throughout the proceedings.

Moreover, Respondent does not waive the requirement of total exhaustion with respect to any attempted reliance which Petitioner may now attempt to place on *McGirt* or *Murphy*.

Moreover, for the reasons set out in Respondent's separate Response to Petitioner's Motion for Hearing, Respondent respectfully requests that Petitioner's request for a hearing be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2020, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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