

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**April 13, 2023**

**Christopher M. Wolpert**  
**Clerk of Court**

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CAMERON LEE SCHEMMER,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 22-6139  
(D.C. No. 5:22-CV-00309-R)  
(W.D. Okla.)

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**ORDER DENYING CERTIFICATE OF APPEALABILITY\***

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Before **HARTZ, KELLY**, and **BACHARACH**, Circuit Judges.

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Cameron Lee Schemmer, a pro se Oklahoma prisoner, seeks a certificate of appealability (COA) to appeal the dismissal as untimely of his application for relief under 28 U.S.C. § 2254.<sup>1</sup> *See* 28 U.S.C. § 2253(c)(1)(A). We deny a COA and dismiss this matter.

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\* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

<sup>1</sup> We afford Mr. Schemmer's pro se materials a liberal construction, but we do not serve as an advocate for him. *See Childers v. Crow*, 1 F.4th 792, 798 n.3 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2718 (2022).

I

In 2018 an Oklahoma court convicted Mr. Schemmer on one count of forcible sodomy and three counts of lewd molestation.<sup>2</sup> The Oklahoma Court of Criminal Appeals (OCCA) affirmed his convictions on January 23, 2020, and Mr. Schemmer did not seek rehearing or certiorari review with the Supreme Court.

On July 9, 2020, the Supreme Court held in *McGirt v. Oklahoma* that Congress did not disestablish tribal lands in Oklahoma reserved for the Creek Nation, and those lands remain Indian country for purposes of exclusive federal jurisdiction under the federal Major Crimes Act, 18 U.S.C. § 1153(a). *See* 140 S. Ct. 2452, 2459-60, 2482 (2020). More than a year after *McGirt*, Mr. Schemmer sought postconviction relief in state court on July 29, 2021, arguing that Oklahoma lacked jurisdiction to convict him because his crimes occurred on Indian lands. The state district court denied relief, and the OCCA affirmed. Both courts relied on the OCCA's decision in *State ex rel. Matloff v. Wallace*, which held that *McGirt* announced a new procedural rule that does not apply retroactively to invalidate state convictions that were final before *McGirt*, *see* 497 P.3d 686, 688 (Okla. Crim. App. 2021), *cert. denied sub nom. Parish v. Oklahoma*, 142 S. Ct. 757 (2022).

Mr. Schemmer then turned to the federal courts for relief. On April 11, 2022, he filed a § 2254 application, claiming under *McGirt* that Oklahoma lacked jurisdiction to convict him for crimes committed on tribal lands. He also disputed the state courts'

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<sup>2</sup> We take judicial notice of documents from Mr. Schemmer's state postconviction proceedings. *See Pacheco v. El Habti*, 62 F.4th 1233, 1238 n.2 (10th Cir. 2023).

reliance on *Matloff* to deny postconviction relief, arguing that *Matloff* could not cure or overcome the jurisdictional defect recognized in *McGirt*.

The district court directed Mr. Schemmer to show cause why his § 2254 application should not be dismissed as untimely under the one-year statute of limitations in 28 U.S.C. § 2244(d)(1). The court noted that the OCCA affirmed his convictions on January 23, 2020, and that judgment became final 90 days later, on April 22, 2020, when the time for him to seek certiorari review expired, *see* Sup. Ct. R. 13.1. It said that the statute of limitations under § 2244(d)(1)(A) expired one year later, on April 22, 2021, but Mr. Schemmer did not file his § 2254 application until April 11, 2022. It also determined he was not entitled to tolling under § 2244(d)(2) during the pendency of his state postconviction proceedings because he initiated those proceedings more than one year after his convictions became final. *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.”). The court further explained that Mr. Schemmer could not rely on *McGirt* to extend the limitations period under § 2244(d)(1)(C) because he did not file his state postconviction application within a year of *McGirt*’s issuance and, in any event, he acknowledged it did not announce a new law. Nonetheless, the court allowed him to argue in favor of equitable tolling or actual innocence, if applicable.<sup>3</sup>

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<sup>3</sup> Mr. Schemmer requested additional time to respond to the show-cause order, which the district court granted. In his request he briefly suggested equitable tolling was warranted because his counsel and the state judges involved with his criminal proceedings failed to inform him of the jurisdictional issue. He also asserted actual

In response, Mr. Schemmer maintained that, under *McGirt*, Oklahoma lacked jurisdiction to prosecute him, and that the jurisdictional defect was a fundamental trial error that was not subject to waiver or the statute of limitations. He also insisted the state courts improperly relied on *Matloff* to deny postconviction relief, which he argued restarted the statute of limitations.<sup>4</sup> The district court rejected his arguments, concluding that jurisdictional claims are subject to the statute of limitations in § 2244(d) and that Mr. Schemmer failed to establish he was entitled to statutory or equitable tolling. The court therefore dismissed the application as untimely and denied a COA. After entry of judgment, Mr. Schemmer filed a motion for reconsideration, which the court construed as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) and denied.

## II

To obtain a COA, Mr. Schemmer must “show[], at least, 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

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innocence based on his jurisdictional claim. Although he now suggests the district court ignored these issues, he ignores the record. The court ruled that he failed to establish he was “entitled to statutory [or] equitable tolling,” R. at 105. And he has abandoned his jurisdiction-based innocence argument in favor of a new evidence-based innocence theory. We do not consider new issues on appeal or issues abandoned after being presented in the district court. *See Childers*, 1 F.4th at 798-99.

<sup>4</sup> Relying on the same allegations (and some new ones), Mr. Schemmer also asserted several restyled claims or theories that were not presented in his § 2254 application. Mr. Schemmer contends the district court failed to consider these issues, but none were presented as independent claims in his § 2254 application, so we do not consider them. *See Stouffer v. Trammell*, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013) (declining to consider restyled claims not raised in the district court as part of the habeas petition).

court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If reasonable jurists could not debate the district court’s procedural ruling, there is no need to consider the constitutional question. *See id.* at 485. We consider only those issues that Mr. Schemmer preserved in the district court, *see Childers*, 1 F.4th at 798, and adequately presents in his COA application, *see Fairchild v. Trammell*, 784 F.3d 702, 723-24 (10th Cir. 2015).

Under 28 U.S.C. § 2244(d)(1), Mr. Schemmer had one year to file his § 2254 application, “run[ning] from the latest of” four dates:

- (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.

*Id.* § 2244(d)(1)(A)-(D).

Mr. Schemmer does not dispute his application was untimely under § 2244(d)(1)(A). Instead, he raises a new argument that the statute of limitations should be extended under § 2244(d)(1)(B) because the state courts impeded his ability to file his

state postconviction application. We do not consider this argument, however, because he did not raise it in district court. *See Childers*, 1 F.4th at 798.

Mr. Schemmer also suggests the limitations period should run from the date of the *McGirt* decision. *See* 28 U.S.C. § 2244(d)(1)(C). But this argument backtracks from his position in the district court, where he acknowledged “*McGirt* did not create a new law.” R. at 40. In any event, “*McGirt* announced no new constitutional right. It self-professedly resolved a question of statutory interpretation.” *Pacheco*, 62 F.4th at 1246 (internal quotation marks omitted). Consequently, reasonable jurists would not debate that Mr. Schemmer could not rely on § 2244(d)(1)(C).

Mr. Schemmer maintains that the jurisdictional defect is a nonwaivable, fundamental error that is not subject to the limitations period. He therefore insists the state courts erred in applying *Matloff* to deny postconviction relief. This challenge to the convicting court’s subject-matter jurisdiction is properly characterized as a due-process claim. *See Yellowbear v. Wyo. Att’y 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.”). Yet Mr. Schemmer has not offered any authority to suggest this type of due-process claim should be treated differently from any other due-process claim subject to dismissal for untimeliness under the § 2244(d) statute of limitations. *Cf. Gibson v. Klinger*, 232 F.3d 799, 803, 808 (10th Cir. 2000) (affirming dismissal of due-process habeas claim as untimely). And to the extent he contends the denial of state postconviction relief based on *Matloff* started the statute of limitations, that

event is not among those listed in § 2244(d)(1). Thus, the district court’s rejection of Mr. Schemmer’s jurisdictional argument is not reasonably debatable.

Finally, Mr. Schemmer suggests he is entitled to equitable tolling. Equitable tolling requires a litigant to show “(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). Mr. Schemmer seems to argue that the district court could have found his state counsel’s failure to investigate, or perhaps the lack of counsel during these federal proceedings, is an extraordinary circumstance, but he does not explain how he was diligent in pursuing his rights. Again, reasonable jurors could not debate the district court’s conclusion that Mr. Schemmer failed to establish he is entitled to equitable tolling.

### III

Because reasonable jurists could not debate that Mr. Schemmer’s § 2254 application was untimely, we deny a COA and dismiss this matter. Mr. Schemmer’s motion to proceed on appeal without prepayment of costs and fees is granted.

Entered for the Court

Harris L Hartz  
Circuit Judge