IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

WILLIAM SHIRLEY, IV,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. CIV-22-1049-J
	)	
STEVEN HARPE,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing *pro se,* filed this action challenging his state criminal conviction for First-Degree Manslaughter in Okmulgee County District Court, Case No. CF-2016-487. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). The undersigned has undertaken a review of the sufficiency of the Petition pursuant to Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. For the following reasons, it is recommended the Petition be dismissed with prejudice as untimely.

I. Background

On September 25, 2018, following entry of a guilty plea, Petitioner was convicted of First-Degree Manslaughter. Doc. No. 1 at 1; *see also* Oklahoma State Courts Network, *State v. Shirley*, Okmulgee County District Court, Case No. CF-2016-487.[1] Petitioner did not move to withdraw his guilty plea, nor did he file a direct appeal. Doc. No. 1 at 2.

On December 23, 2020, Petitioner filed an application for post-conviction relief in the state district court. Doc. No. 1 at 3; *see also* Oklahoma State Courts Network, *State v. Shirley*, Okmulgee County District Court, Case No. CF-2016-487, *supra*. Therein, he challenged the state court's jurisdiction over his criminal proceedings. *Id.* The state district court denied his application on January 11, 2022. *Id.* Following an untimely appeal and the state court's subsequent permission to file an appeal out of time, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed the state district court's denial of post-conviction relief on October 10, 2022. Doc. No. 1 at 3-4; Oklahoma State Courts Network, *Shirley v. State*, Oklahoma Court of Criminal Appeals, PC-2022-593.[2] In affirming the lower court's decision, the OCCA explained,

[1] https://www.oscn.net/dockets/GetCaseInformation.aspx?db=okmulgee&number=CF-2016-487

[2] https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=PC-2022-593&cmid=133254

> Before the District Court, Petitioner asserted that the District Court lacked jurisdiction to convict and punish him. *See McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In *State ex rel. Matloff v. Wallace*, [], 497 P.3d 686 [(2022)], *cert. denied*, 142 S.Ct. 757 (2022), this Court determined that the United States Supreme Court decision in *McGirt,* because it is a new procedural rule, is not retroactive and does not void final state convictions. *See Matloff*, [], 497 P.3d at 691-92, 694.
>
> The conviction in this matter was final before the July 9, 2020[] decision in *McGirt,* and the United States Supreme Court's holding in *McGirt* does not apply. We decline Petitioner's invitation to revisit our holding in *Matloff.*

Doc. No. 1-1 at 1-2.

Petitioner filed the instant matter on December 12, 2022, asserting the state court lacked jurisdiction over his criminal proceedings. Doc. No. 1 at 5. Petitioner explains that he is a member of the Creek Nation, a federally recognized Indian tribe. *Id.* He states that his underlying crime was committed on Indian land, and therefore, the State of Oklahoma did not have jurisdiction over the resulting criminal proceedings. *Id.*

II. Screening Requirement

Under Rule 4 of the Rules Governing Section 2254 Cases, the Court is required to examine a habeas petition and to summarily dismiss it "[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). Petitioner has such notice by this Report and Recommendation, and he has an opportunity to present his position by filing an objection to the Report and Recommendation. Further, when raising a dispositive issue *sua sponte*, the district court must "assure itself that the petitioner is not significantly prejudiced . . . and determine whether the interests of justice would be better served by addressing the merits . . . ." *Id.* (quotations omitted); *Smith v. Dorsey*, No. 93-2229, 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).

III. Statute of Limitations

A. Applicable Limitations Period

The Antiterrorism and Effective Death Penalty Act ("AEDPA") establishes a one-year limitations period for claims of a habeas petitioner in state custody. *Rhine v. Boone*, 182 F.3d 1153, 1154 (10th Cir. 1999). The one-year 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;
>
> (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.

28 U.S.C. § 2244(d)(1)(A)-(D). Unless a petitioner alleges facts implicating subsection (B), (C), or (D), the limitations period generally begins to run from the date on which the conviction becomes final. *Preston v. Gibson*, 234 F.3d 1118, 1120 (10th Cir. 2000). Petitioner has suggested facts that would implicate subsection (C), indicating *McGirt* revealed the State of Oklahoma did not have jurisdiction over his criminal proceedings. However, as explained below, the *McGirt* decision does not trigger § 2244(d)(1)(C) to extend his conviction's finality date.

1. 28 U.S.C. § 2244(d)(1)(A)

Under 28 U.S.C. § 2244(d)(1)(A), a petitioner must seek habeas relief within one-year and said limitations period generally begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]" After pleading guilty, Petitioner was sentenced on September 25, 2018. Petitioner did not move to withdraw his guilty plea, nor did he file a direct appeal. Petitioner's conviction became final, therefore, on October 5,

2018, upon expiration of the ten-day period during which Petitioner could have filed a timely application to withdraw his guilty plea. Rule 4.2(A), Rules of the Oklahoma Court of Criminal Appeals, Okla. Stat. tit. 18, Ch. 18, App.; *Fisher v. Gibson*, 262 F.3d 1135, 1142 (10th Cir. 2001) (noting the petitioner's Oklahoma convictions following guilty pleas became "final ten days after entry of Judgment and Sentence[.]").

Application of the one-year limitation period under § 2244(d)(1)(A) means that, absent statutory or equitable tolling, Petitioner's one-year limitation period for filing a federal habeas petition expired on Monday, October 7, 2019. Petitioner did not file this action until December 12, 2022.

2. 28 U.S.C. § 2244(d)(1)(C)

Petitioner implies that his basis for seeking habeas relief did not ripen until July 2020 when the Supreme Court issued the *McGirt* decision. Such an argument inherently relies on the premise that *McGirt* recognized 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[.]" However, because *McGirt* did not recognize a new constitutional right, the provision does not apply.

McGirt revolved around a longstanding rule that "[s]tate courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country.'" *McGirt*, 140 S.Ct. at 2459 (citing *Negonsott v. Samuels*, 507 U.S. 99, 102-03 (1993)). This is so because the Major Crimes Act "provides that, within 'the Indian country,' '[a]ny Indian who commits' certain enumerated offenses 'against the person or property of another Indian or any other person' 'shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.'" *Id.* (quoting 18 U.S.C. § 1153(a)). "Indian Country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government[.]" 18 U.S.C. § 1151(a). Thus, the relevant question for the Supreme Court was "whether the land [that] treaties promised [the Creek Nation] remain[ed] an Indian reservation for purposes of federal criminal law." *McGirt*, 140 S.Ct. at 2459.

To answer that question, the Court examined various treaties between the United States government and the Muscogee (Creek) Nation and statutes governing the Muscogee (Creek) Nation and its territory. *Id.* at 2460-68. Indeed, the Court only looked to Acts of Congress to answer that question based on the Court's previous holding that "[o]nly Congress can divest a reservation of its land and diminish its boundaries." *Id.* at 2462 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). The Court determined that the Muscogee (Creek) Nation's reservation continued to exist

despite federal allotment policy in the early twentieth century because the "Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *Id.* at 2464 (citing *Nebraska v. Parker*, 577 U.S. 481, 489 (2016); *Mattz v. Arnett*, 412 U.S. 481, 497 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356-58 (1962)). The Court determined that while the federal government engaged in other policy decisions negatively impacting the sovereignty of the Muscogee (Creek) Nation, "there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation." *Id.* at 2468.

Although Petitioner suggests otherwise, *McGirt* 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, the Court addressed whether the Muscogee (Creek) Nation "remain[ed] an Indian reservation for purposes of federal criminal law," a non-constitutional issue. *Id.* at 2459.[3] Indeed, the Tenth Circuit has stated: "*McGirt* announced no new constitutional right." *Pacheco v. El Habti*, 48

[3] To be sure, a prisoner has a due process right to be convicted in a court which has jurisdiction over the matter. *See Yellowbear v. Wyoming Atty. 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."). However, this due process right was recognized prior to *McGirt*. *See Frank v. Mangum*, 237 U.S. 309, 326 (1915) (recognizing that a state criminal prosecution must proceed in a court of competent jurisdiction in order to accord with constitutional due process).

F.4th 1179, 1191 (10th Cir. 2022). *See also Jones v. Pettigrew*, No. CIV-18-633-G, 2021 WL 3854755, at *3 (W.D. Okla. Aug. 27, 2021) (citing *Littlejohn v. Crow*, No. 18-CV-477-CVE-JFJ, 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*); *Sanders v. Pettigrew*, No. CIV-20-350-RAW-KEW, 2021 WL 3291792, at *5 (E.D. Okla. Aug. 2, 2021) (concluding that *McGirt* "did not break any new ground" or "recognize a new constitutional right, much less a retroactive one"); *accord with Berry v. Braggs*, No. 19-CV-706-GKF-FHM, 2020 WL 6205849, at *7 (N.D. Okla. Oct. 22, 2020) ("Because the *McGirt* ruling did not recognize any new constitutional right relevant to petitioner's jurisdictional claim, § 2244(d)(1)(C) does not apply to that claim.")).

Additionally, the Supreme Court denied Petitions for Writ of Certiorari in three cases in which the petitioners were challenging state court rulings that *McGirt* was not retroactive. *State ex. rel. Matloff v. Wallace*, 497 P.3d 686 (Okla. Crim. App. 2021), *cert. denied*, *Parish v. Oklahoma*, 142 S.Ct. 757, 2022 WL 89297 (Jan. 10, 2022); *Davis v. Oklahoma*, 142 S.Ct. 793, 2022 WL 89459 (Jan. 10, 2022); *Compelleebee v. Oklahoma*, 142 S.Ct. 792, 2022 WL 89454 (Jan. 10, 2022). Therefore, the Court should find that § 2244(d)(1)(C) does not apply in this case and thus, Petitioner's action is untimely. *See Pacheco,* 48 F.4th at 1191 (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).

B. Statutory Tolling

The AEDPA limitations period is tolled pending adjudication of a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim. 28 U.S.C. § 2244(d)(2). Petitioner's first application for post-conviction relief was not filed until December 23, 2020. Because the one-year limitations period had already expired at that time, the application did not provide 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, the Court should conclude the Petition is not rendered timely through application of 28 U.S.C. § 2244(d)(2).

C. Equitable Tolling

28 U.S.C. "§ 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling." *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (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). Generally, equitable tolling is warranted only in situations where the petitioner was actively misled or is prevented in some extraordinary way from asserting his rights. *Id.* at 418-19. Here, Petitioner makes no assertion that he is entitled to equitable tolling.

The Supreme Court has also held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . [or] expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). "It is important to note in this regard that actual innocence means factual innocence, not mere legal insufficiency." *Pacheco*, 48 F.4th at 1186 (quotations omitted). Thus, such tolling of the limitations period for actual innocence is appropriate only in rare instances in which the petitioner shows that "in light of the new evidence [presented by the petitioner], no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin,* 569 U.S. at 386 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

Petitioner has made no allegation that he is actually innocent, nor does he indicate the presence of any "new" evidence pertaining to the same. Additionally, Petitioner's claim that the state court lacked jurisdiction, unaccompanied by any new evidence, is insufficient to credibly show actual innocence. *See Pacheco,* 48 F.4th at

1183, 1190 (holding that the petitioner's jurisdictional argument does not show actual innocence). As a result, the Court should conclude the "actual innocence" exception does not apply.

RECOMMENDATION

Based on the foregoing findings, it is recommended this action be dismissed with prejudice based on the statute of limitations.[4] Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by January 25th, 2023, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Report and Recommendation would waive appellate review of the recommended ruling. *Moore v. United States*, 950 F.2d 656 (10th Cir. 1991); *see, cf. Marshall v. Chater,* 75 F.3d 1421, 1426 (10th Cir. 1996) ("Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.").

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not

[4] "Where a claim is time-barred, a dismissal without prejudice provides no relief to the claimant because an action dismissed as untimely cannot be refiled. Thus, even if dismissal based on the expiration of the limitations period is without prejudice, it has the practical effect of a dismissal with prejudice." *Long v. Crow*, No. CIV-19-737-D, 2019 WL 5295529, at *1 n.2 (W.D. Okla. Oct. 18, 2019) (citing *AdvantEdge Bus. Grp. v. Thomas E. Mestmaker & Assocs., Inc.,* 552 F.3d 1233, 1236 (10th Cir. 2009); *accord Satterfield v. Franklin*, No. CIV-08-733-D, 2009 WL 523181, at *1 (W.D. Okla. Mar. 2, 2009)).

specifically addressed herein is denied.

ENTERED this 5th day of January, 2023.

GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE