FILED
United States Court of Appeals
Tenth Circuit

August 14, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARIO WILLIAMS,

Petitioner - Appellant,

v.

STEVEN HARPE, DOC Director,

Respondent - Appellee.

No. 23-7015
(D.C. No. 6:22-CV-00032-RAW-KEW)
(E.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, Chief Judge, **HARTZ**, and **PHILLIPS**, Circuit Judges.

Oklahoma prisoner Mario Williams is serving a life sentence without parole for first-degree murder. Proceeding pro se,[1] he requests a certificate of appealability (COA) to appeal from the district court's dismissal of his 28 U.S.C. § 2254 application as untimely. *See* 28 U.S.C. § 2253(c)(1)(A). We deny a COA and dismiss this matter.

To obtain a COA, Mr. Williams must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). Because the district court ruled on procedural grounds, he must show both "that jurists of reason would find it debatable [1] whether the

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[1] We liberally construe Mr. Williams's pro se filings, but we do not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

petition states a valid claim of the denial of a constitutional right and . . . [2] whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). He has not shown, however, that reasonable jurists would debate whether the district court correctly dismissed the application as untimely.

Mr. Williams does not dispute the district court's finding that his conviction became final on February 15, 1996. After the Supreme Court held Congress had never disestablished the Creek reservation in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462, 2468 (2020), Mr. Williams filed a state post-conviction petition arguing Oklahoma lacked jurisdiction to prosecute him. The state district court denied the petition, and the Oklahoma Court of Criminal Appeals affirmed. Mr. Williams then brought his federal § 2254 application.

There is a one-year limitations period for filing a § 2254 application. 28 U.S.C. § 2244(d)(1). The limitations period starts running 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;
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> (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;
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> (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. Mr. Williams relies upon subsections (B) and (D).[2]

Regarding subsection (B), Mr. Williams argues *McGirt* removed an impediment to filing his § 2254 application (namely, that for more than 100 years Oklahoma and the United States had allowed Oklahoma to exercise jurisdiction over crimes committed against Indians in Indian country). And under subsection (D), he asserts he could not have earlier discovered the facts underlying his claims. Before *McGirt*, he states, he did not know, and could not have known, his crime took place in Indian country and his victim "was not a African American-(Black), but a Freedman of the Choctaw Indian Tribe." Aplt. Opening Br./Appl. for COA at 3 (bolding omitted).

But no reasonable jurist would debate the propriety of the district court's order, based on these contentions. Mr. Williams's principal factual predicate—that Congress had not disestablished an Indian reservation where his crime was committed—could have been discovered at any time through due diligence by consulting "the Acts of Congress," which is the "only one place [to] look." *McGirt*, 140 S. Ct. at 2462. In fact, even before *McGirt*, this court recognized that Congress had not disestablished the Creek reservation. *See Murphy v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017). Thus, Mr. Williams could have made the same argument as the petitioner in *McGirt*. *Cf. Prost v. Anderson*,

[2] Mr. Williams asserts that the district court erred in analyzing his *McGirt* argument under § 2244(d)(1)(C) and disclaims any intention of relying on that subsection. In any event, reasonable jurists would not debate the district court's determination that an argument based on *McGirt* does not satisfy the requirements of § 2244(d)(1)(C). *See Pacheco v. El Habti*, 62 F.4th 1233, 1246 (10th Cir.) ("*McGirt* announced no new constitutional right."), *cert. denied*, 2023 WL 4163309 (U.S. June 26, 2023) (No. 22-7376).

636 F.3d 578, 580 (10th Cir. 2011) (recognizing nothing prevented a prisoner from raising a question of statutory interpretation before the Supreme Court resolved the issue in a different case). Similarly, Mr. Williams's other factual predicate—that his victim qualified as an Indian—could have been discovered at any time through due diligence.

Mr. Williams further contends that because the Oklahoma courts never had jurisdiction, the § 2244(d)(1) limitations period does not apply. Again, no reasonable jurist would debate the propriety of the district court's order, in light of this contention. Although "[a]bsence of jurisdiction in the convicting court is indeed a basis for federal habeas corpus relief cognizable under the due process clause," *Yellowbear v. Wyo. Att'y Gen.*, 525 F.3d 921, 924 (10th Cir. 2008), due process claims are subject to the limitations period set forth in § 2244(d), *see Gibson v. Klinger*, 232 F.3d 799, 803, 808 (10th Cir. 2000).

Finally, Mr. Williams objects that if the district court thought his § 2254 application was untimely, it should have dismissed the application during the initial screening process. But because "the timeliness of a § 2254 petition is an affirmative defense," *Kilgore v. Att'y Gen. of Colo.*, 519 F.3d 1084, 1086 (10th Cir. 2008), no reasonable jurist would debate the district court's decision to wait and allow the state to raise the issue.

We deny a COA and dismiss this matter.

Entered for the Court

Jerome A. Holmes
Chief Judge