

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 26, 2023

Christopher M. Wolpert  
Clerk of Court

DAVID DOUGLAS SOI,

Petitioner - Appellant,

v.

STEVEN HARPE, Director of Oklahoma  
Department of Corrections,

Respondent - Appellee.

No. 23-5021  
(D.C. No. 4:22-CV-00224-CVE-JFJ)  
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY\*

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

David Douglas Soi, a pro se Oklahoma prisoner,<sup>1</sup> seeks a certificate of appealability (COA) to appeal the district court's denial of his application for relief under 28 U.S.C. § 2254. We deny a COA and dismiss this matter.

**BACKGROUND**

In 2018, a jury convicted Mr. Soi of Use of a Vehicle in Discharge of a Weapon and Felonious Possession of a Firearm. He was sentenced to twenty years' imprisonment

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\* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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> Because Mr. Soi proceeds pro se, we construe his filing liberally but do not serve as his advocate. See *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

on the first count and five years on the second count, with the sentences to run consecutively. The Oklahoma Court of Criminal Appeals (OCCA) affirmed the convictions on direct appeal.

Mr. Soi filed an application for post-conviction relief in state court. He later filed two motions to supplement the application, raising new claims in each filing. The state district court denied the application in an order that addressed all the claims raised in Mr. Soi's various filings. On appeal, the OCCA affirmed the district court's denial of Mr. Soi's application for post-conviction relief.

Next, Mr. Soi filed a habeas application under § 2254 in which he raised three claims. For his first claim, he alleged that Oklahoma violated his right to due process because it had no authority to prosecute him under 18 U.S.C. § 1153(a)—the Major Crimes Act—on the grounds that: (1) he is a Native American; (2) one or more of his victims may have been Native Americans; and (3) the crimes were committed on a tribal reservation. He later conceded, however, that he is not Native American, so his jurisdictional claim hinged on the second and third grounds.

Mr. Soi's second claim alleged that his trial and appellate counsel provided ineffective assistance in violation of the Sixth Amendment. Specifically, he alleged that trial counsel failed to challenge the alleged absence of jurisdiction and appellate counsel failed to raise trial counsel's error on appeal. For his third claim, Mr. Soi alleged that he was "actually innocent" because Oklahoma had no authority to prosecute him. *See, e.g.*, R. at 30.

Respondent moved to dismiss the application based on Mr. Soi's failure to exhaust available state court remedies as required under § 2254(b)(1)(A). The district court determined that all but one of Mr. Soi's claims—the jurisdictional claim—were unexhausted and procedurally defaulted, and that he could not obtain federal habeas relief on the jurisdictional claim. Accordingly, the court denied the application, dismissed Respondent's motion to dismiss as moot, and denied a COA.

### LEGAL FRAMEWORK

No appeal may be taken from a final order denying a § 2254 application without a COA. *See* 28 U.S.C. § 2253(c)(1)(A). We will issue a COA “only if the applicant has made a substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2). To make that showing, a petitioner must demonstrate “that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

“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 . . . the applicant has exhausted the remedies available in the court of the State.” 28 U.S.C. § 2254(b)(1)(A). “Exhaustion requires that the claim be fairly presented to the state court, which means that the petitioner has raised the substance of the federal claim in state court.” *Grant v. Royal*, 886 F.3d 874, 890 (10th Cir. 2018) (internal quotation marks omitted); *see also Fairchild v. Workman*, 579 F.3d 1134, 1151 (10th Cir. 2009) (holding that to satisfy the

exhaustion requirement, a state prisoner must fairly present his claims in state court before asserting them in federal court).

“Generally, a federal court should dismiss unexhausted claims without prejudice so that the petitioner can pursue available state-court remedies.” *Grant*, 886 F.3d at 891-92 (internal quotation marks omitted). “However, if the court to which [the] Petitioner must present his claims in order to meet the exhaustion requirement would now find those claims procedurally barred, there is a procedural default for the purposes of federal habeas review.” *Bland v. Sirmons*, 459 F.3d 999, 1012 (10th Cir. 2006) (internal quotation marks omitted); *see also Frost v. Pryor*, 749 F.3d 1212, 1231 (10th Cir. 2014) (“Anticipatory procedural bar occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it.”) (internal quotation marks omitted)).

“A petitioner may overcome the procedural bar only if he can ‘demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate the failure to consider the claims will result in a fundamental miscarriage of justice.’” *Bland*, 459 F.3d at 1012 (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

When the district court dismisses claims on procedural grounds, such as the failure to exhaust state-court remedies or procedural default, we will grant a COA only if the applicant can demonstrate both “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

“For federal habeas claims not adjudicated on the merits in state-court proceedings, we exercise our independent judgment and review the federal district court’s conclusion of law de novo. The district court’s factual determinations are reviewed for clear error.” *Littlejohn v. Trammell*, 704 F.3d 817, 825 (10th Cir. 2013) (citations and internal quotation marks omitted).

## ANALYSIS

### Claim One

Mr. Soi never argued on direct appeal or in state post-conviction proceedings that he could not be prosecuted by Oklahoma because *he was an Indian* who committed a crime in Indian country; instead, he argued that the state lacked jurisdiction because one or more of his victims was Native American and the crime was committed in Indian country. In the district court, however, Mr. Soi conceded that although “he was raised to believe and had been taught all of his life that he was of Native American de[s]cent,” recent DNA testing revealed “that he is not Native American.” R. at 189.

Under a de novo review standard, we agree with the district court that claim one failed on the merits because Mr. Soi is not Native American. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2478 (2020) (holding that for purposes of the Major Crimes Act, 18 U.S.C. § 1153(a), “[o]nly the federal government, not the State, may prosecute *Indians* for major crimes committed in Indian country”) (emphasis added)).

### Claim Two

For his second claim, Mr. Soi alleged that trial counsel was ineffective for failing to challenge the trial court’s alleged lack of jurisdiction and that appellate counsel was

ineffective for failing to argue that trial counsel was ineffective for this reason. The district court determined that the claims of ineffective assistance in Mr. Soi's habeas application were not the same claims of ineffective assistance that he raised in the state court post-conviction proceedings and were therefore unexhausted. Reasonable jurists would not debate the correctness of this procedural ruling.

Nor would reasonable jurists debate the correctness of the district court's determination that these unexhausted claims were procedurally barred under Oklahoma's Uniform Post-Procedure Act, and thus defaulted for purposes of habeas relief. *See* Okla. Stat. tit. 22, § 1086 (2022) ("All grounds for relief available to an applicant under the Post-Conviction Procedure Act, including claims challenging the jurisdiction of the trial court, must be raised in his or her original, supplemental or amended application. Any ground . . . not so raised . . . may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.").

Likewise, reasonable jurists would not debate the correctness of the district court's procedural ruling that there was no cause and prejudice to excuse the procedural default. The court noted that while counsel's ineffectiveness can establish cause for a procedural default in some cases, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." R. at 198 (quoting *Murray v. Carrier*, 477 U.S. 478, 486 (1986)). In any event, the court concluded that could be no prejudice because Mr. Soi's jurisdictional claim lacks merit. *See McGirt*, 140 S. Ct. at 2478; *see also*

*Pacheco v. El Habti*, 62 F.4th 1233, 1241-45 (10th Cir.) (holding that the actual innocence exception does not apply where the assertion of actual innocence is based solely on the allegation that the petitioner allegedly was convicted by the wrong jurisdiction), *cert denied*, 143 S. Ct. 2672 (2023).

### **Claim Three**

In his third claim, Mr. Soi alleged that he is actually innocent until he is convicted by a court with jurisdiction. The district court determined that this claim of actual innocence was substantially different than the actual innocence claim asserted in the state post-conviction proceedings, and therefore unexhausted. Reasonable jurists would not debate the correctness of this decision.

The district court then considered whether the claim would be procedurally barred under Okla. Stat. tit. 22, § 1086, and explained that “[i]t is not entirely clear whether [the] state court[] would apply a procedural bar if [Mr.] Soi were to return to state court and attempt to exhaust his new actual innocence claim.” R. at 199. Nonetheless, the court decided that dismissing the claim as unexhausted would serve no purpose because the claim was based on *where* Mr. Soi committed the crime, which cannot serve as the basis of an actual innocence claim. *See Pacheco*, 62 F.4th at 1241-45. Reasonable jurists would not disagree with the court’s resolution of this claim.

### **CONCLUSION**

We deny Mr. Soi's application for a COA and dismiss this matter. We grant Mr. Soi's motion to proceed on appeal without prepayment of costs or fees.

Entered for the Court

Gregory A. Phillips  
Circuit Judge