

MAILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 20 2022

JOHN D. HADDEN
CLERK

No. PC-2021-1408

Respondent.

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 request to reexamine this

Court's holding in *Matloff*. Therefore, the trial court's denial of post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

20th day of January, 2022.



SCOTT ROWLAND, Presiding Judge



ROBERT L. HUDSON, Vice Presiding Judge

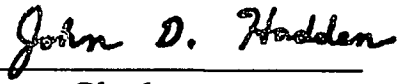


GARY L. LUMPKIN, Judge



DAVID B. LEWIS, Judge

ATTEST:



Clerk

PA

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

VITALY BURLEOVITSH KOLOSHA,)

Petitioner,)

vs.)

STATE OF OKLAHOMA,)

Respondent.)

Case No. CF-2007-3180

Judge Priddy

DISTRICT COURT
FILED

OCT 28 2021

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

ORDER DENYING PETITIONER'S APPLICATION
FOR POST-CONVICTION RELIEF

This matter came on for consideration on Sept. 16, 2021 pursuant to the Application for Post-Conviction Relief styled as a "Motion to Dismiss or Vacate Sentences for Lack of Jurisdiction" ("Application") filed by Petitioner Vitaly Burleovitch Kolosha ("Petitioner") on July 7, 2021.

STATEMENT OF THE CASE

Petitioner was found guilty by a jury of Lewd Molestation (Counts 1-4) in the District Court of Tulsa County, Case No. CF-2007-3180. On October 5, 2009, the District Court also found Petitioner guilty and sentenced him to twenty years in the custody of the Department of Corrections ("DOC") on each of Counts 1, 2, and 4 with these sentences to run concurrently. The District Court also sentenced Petitioner to seven years in the custody of DOC in Count 3 with the sentence in this Count to run consecutive to the other Counts. Petitioner appealed this judgment and sentence to the Oklahoma Court of Criminal Appeals ("OCCA") and raised the following propositions of error:

I. The State was allowed to put on a key witness to testify about events which were admitted lies, and recanted by the witness prior to her testimony. This testimony was irrelevant and extremely prejudicial, and resulted in a jury verdict of guilty in an otherwise close case.

II. The other crimes evidence was not established by the "clear and convincing evidence" standard; therefore its admission was error; and since the error was not harmless, Appellant is entitled to a new trial.

III. The admission of this other crimes evidence likely had a significant effect upon the sentences received by Appellant, and the way these sentences were ordered to be carried out.

Kolosha v. State, F-2009-915, slip op. (Okla. Crim. App. Oct. 28, 2010 (Summary Opinion –Not Published)). The OCCA affirmed the judgment and sentence of the District Court. *See id.*

Petitioner filed his first "Application for Post-Conviction Relief" on October 31, 2011

wherein he raised the following propositions of error as grounds for relief:

1. Mr. Kolosha was denied effective assistance of counsel during trial and pretrial proceedings.
2. Further deficient performance is evidence where Ms. Perkins failed to call Mr. Kolosha to the stand after telling the jury that he would testify and therefore amounts to ineffective assistance of counsel.
3. Mr. Kolosha was denied his right to testify.
4. The trial court failed to provide/state for the record the required particular facts and circumstances supporting its findings that the hearsay statements presented in this case are reliable.
5. The trial court failed to provide any statement what-so-ever, or even state any findings regarding the reliability or any particular facts or circumstances to support a finding that the videotape presented in this case is reliable.
6. The trial court committed fundamental reversible error by allowing the videotape of the forensic interview of the alleged victim to be sent back into the deliberation room with the jury for additional viewing, requiring a new trial.

On December 29, 2011 the District Courts' Order denying Petitioner application for post-conviction relief was filed of record and mailed to the Petitioner. The Petitioner appealed the district courts' order denying his application to the OCCA. On May 7, 2012 the OCCA's mandate

affirming the District Courts' order denying Petitioner's application was filed with the District Court.

On May 14, 2015 the Petitioner filed his second application seeking post-conviction relief in this matter which he styled "Supplemental Amended Post-Conviction Application." This was the first of a plethora of pleadings filed with this Court, which are styled as follows:

- 1) "Application to Disqualify Attorney," filed May 14, 2015.
- 2) "Next Friend Amicus Curiae Brief," filed May 14, 2015.
- 3) "Motion for New Trial and Vacate Sentence," filed May 14, 2015.
- 4) "Notice of New Evidence," filed May 21, 2015
- 5) "Motion to Vacate Conviction and Sentence for Counts 2, 3, and 4 and Brief in Support," filed May 26, 2015.
- 6) "Motion for Declaratory Judgment," filed May 26, 2015.
- 7) "Motion to Compel Brady Materials withheld by Prosecutor or Dismiss Charges, Vacate Conviction," filed May 26, 2015.
- 8) "Motion to Allow New Evidence," filed June 5, 2015.
- 9) "Application- Writ of Habeas Corpus ad Prosequendum," filed June 5, 2015.
- 10) "Motion to Strike or Suppress any and all Statements or Confessions," June 26, 2015.
- 11) "Motion for Summary Judgment," filed July 6, 2015.
- 12) "Notice to Court of New Case Law That Applies To This Case," filed July 31, 2015.
- 13) "Motion and Brief for Hearing on Ineffective Assistance of Counsel 6th Amendment Claim," filed September 2, 2015.
- 14) "Motion to Certify Question to Oklahoma Supreme Court," filed September 4, 2015.
- 15) "Petition for Writ of Mandamus," filed September 9, 2015.

16) "Motion and Brief for Hearing on Ineffective Assistance of Counsel, 6th Amendment Claim," filed September 22, 2015.

On October 7, 2015 the District Court's order denying Petitioner's second application for post-conviction relief was filed and mailed to the Petitioner. The Petitioner again appealed the district courts' order denying his application for post-conviction relief to the OCCA. On November 25, 2015 the Petitioner filed a "Petition for Writ of Replevin or \$2,500.00 Reimbursement." On January 25, 2016 the OCCA's mandate affirming the District Courts' order denying Petitioner's second application for post-conviction relief was filed with the District Court.

After the District Court denied Petitioner's second post-conviction application, the Petitioner began his second profusion of pleadings to this Court, which are titled as follows:

- 1) "Motion for Summary Judgment," filed May 27, 2016.
- 2) "Notice to Court," filed July 19, 2016.
- 3) "Motion for New Trial and Vacate Sentence," filed July 19, 2016.
- 4) "Motion to Vacate Conviction and Sentence for Counts 2, 3, and 4 and Brief in Support," filed July 19, 2016.
- 5) "Motion for Declaratory Judgment," filed July 19, 2016.
- 6) "Motion for Hearing," filed July 19, 2016.
- 7) "Motion to Strike or Suppress Any and All Statements or Confessions Because of the Manner in Which They Were Extracted, Being Totally Unconstitutional," filed July 19, 2016.
- 8) "Next Friend Amicus Curiae Brief," filed July 19, 2016.
- 9) "Amended Corrected Supplemental Post-Conviction Application," filed July 19, 2016.
- 10) "Motion for Hearing," filed July 19, 2016.

- 11) "Motion to Suppress Evidence," filed July 19, 2016.
- 12) "Motion and Brief to Disqualify Judge Caputo or Vacate Conviction and Seal Record,"
filed July 19, 2016.
- 13) "Motion to Produce Records and Subpoena District Attorney," filed July 19, 2016.
- 14) "Motion for Hearing on Brady Materials Discovered and New Evidence of Innocence,"
filed July 19, 2016.
- 15) "Motion for Declaratory Judgment or Amended Post-Conviction," filed July 19, 2016.
- 16) "Nunc Pro Tunc to Correct Sentences Requiring Revocation," filed July 19, 2016.
- 17) "Motion for Funding for Evidence and Experts for Hearing and to Set Aside," filed
July 19, 2016.
- 18) "Affidavit," filed July 19, 2016.
- 19) "Motion to Strike and Dismiss Cost Fees and Fine or Conduct a Trial," filed July 19,
2016.

On August 8, 2016 the District Court's Order denying Petitioner's "Petition for Writ of Replevin or \$2,500.00" was filed in this case. On August 17, 2016 the Petitioner filed his "Notice of Intent to Appeal and Designation of Record." On September 12, 2016, the OCCA declined to assume jurisdiction and dismissed Petitioner's Motion for Declaratory Judgment and to Certify Question of Law.

On August 26, 2016, the Petitioner once again began to deluge the Court with pleadings to this Court, which are titled as follows:

- 1) "Motion for New Trial Based Upon Judge Caputo's August 8, 2016 Order Finding Prosecutor Committed Perjury in Trial," filed August 26, 2016.

- 2) "Defendant's Motion for New Trial Based Upon Judge Caputo's August 8, 2016 Order Finding Prosecutor Committed Perjury in Trial," filed August 29, 2016.
- 3) "Motion for Writ of Mandamus," filed September 13, 2016.
- 4) "Motion for Summary Judgment," filed September 13, 2016.
- 5) "Notice of Discovery of Perjury to Judge Clancy Smith," filed September 15, 2016.
- 6) "Motion to Dismiss," filed February 23, 2017.
- 7) "Motion to Suppress Evidence from Digital Storage Device," filed April 10, 2018.
- 8) "Brief in Support of Claims of Uncontested Post-Conviction of 2016," filed April 10, 2017.
- 9) "Request for Investigation and Judicial Notice," filed April 10, 2017.
- 10) "Motion to Enter Default and Grant Summary Judgment," filed April 24, 2017.
- 11) "Petition for Writ of Mandamus," filed May 25, 2017.

On June 2, 2017 the Court's Order denying Petitioner's third application for post-conviction relief was filed with the Court. On July 6, 2017, the Petitioner's appeal of the Court's order denying his third application for post-conviction relief was assigned appellate case number PC-2017-644. On September 25, 2017 the Oklahoma Court of Criminal Appeals order dismissing Petitioner's appeal of this court's order denying his third application for post-conviction relief was filed with the Court.

On December 12, 2017 the Petitioner filed what is his fourth application for post-conviction relief, titled "Amended-Supplemented Post-Conviction Application." On January 16, 2018, Petitioner also filed a pleading styled "Motion to Reopen First Petition for Post-Conviction." On March 19, 2018, Petitioner filed a "Motion to enter Default and Grant Summary Judgement.

The District Court issued an Order denying these applications on July 23, 2018. Petitioner also appealed this denial to the OCCA and the OCCA affirmed the decision of the District Court.

In his current Application, Petitioner relies on *McGirt v. Oklahoma*, 140 S.Ct 2452 (2020) to argue that the State lacks subject matter jurisdiction to prosecute him under Article I, § 3 of the Oklahoma Constitution because his offenses occurred within the "boundaries of the Muskogee (Creek) Nation's reservation." Application at pp. 1-4.

FINDINGS OF FACTS

1. A representative of the Tulsa Police Department would testify that Petitioner committed the offenses he was convicted of within Tulsa County.
2. A representative of the Muscogee Creek Nation or a representative of the Cherokee Nation, or an expert witness testifying on Petitioner's behalf, would testify that the location of the offense Petitioner was convicted of in the above case—occurred within the Muscogee Creek Nation and/or the Cherokee Nation.

CONCLUSIONS OF LAW

I. THE STATE OF OKLAHOMA HAS AUTHORITY TO PROSECUTE NON-INDIANS FOR CRIMES AGAINST NON-INDIANS WITHIN INDIAN COUNTRY.

In his Application, Petitioner never claims that he is "Indian." Instead, Petitioner claims, pursuant to Article 1, § 3 of the Oklahoma Constitution, the State did not have jurisdiction to prosecute him "regardless of race" because his crimes occurred within "Indian Territory." Application at pp. 1-4. However, this argument contradicts well-established authority from the Supreme Court of the United States ("Supreme Court") on this topic. In *Draper v. U.S.* 164 U.S. 240, 243-47 (1896), the Supreme Court considered language from the Enabling Act and

Constitution of Montana which is nearly identical to the language contained in the Enabling Act of Oklahoma, Fifty-ninth Congress, Sess. 1, Ch. 3335, p. 279-80, and Article 1 § 3 of the Oklahoma Constitution. *See* 11 Okl. Op. Att. Gen 345, *2 (1979). Following a review of this language, the *Draper* court concluded:

As equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise treated. The mere reservation of jurisdiction and control by the United States of 'Indian lands' does not of necessity signify a retention of jurisdiction in the United States to punish all offenses committed on such lands by others than Indians or against Indians.

Draper, 164 U.S. at 244-45. The *Draper* court further clarified that the language at issue, reserving jurisdiction and control over Indian lands to the United States, "was not intended to deprive that state of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians . . ." By analogy, the nearly identical language contained in the Oklahoma Enabling Act, and Article 1 § 3 of the Oklahoma Constitution likewise does not deprive the State of Oklahoma of its authority to try non-Indians for crimes against non-Indians within Indian Country. *See id.*

Petitioner's argument, regarding Oklahoma Constitution Article 1 § 3, also contradicts precedent, related to this topic, from the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *United States v. Langford*, 641 F.3d 1195, 1199 (10th Cir. 2011).¹ The

¹ Petitioner's argument also contradicts authority from the Supreme Court of Oklahoma which interprets the disclaimer provision of O.S. Const. Art. 1 §. 3. Specifically, in *Currey v. Corp. Comm'n of Okla.* 1979 OK 89, 617 P.2d 177, 179, the Supreme Court of Oklahoma explained:

Oklahoma's disclaimer of right and title to Indian lands is a disclaimer of proprietary rather than governmental interests. 'The State may well waive its claim to any right or title to the lands and still have all of its political or police power with respect to the actions of the people on those lands, as long as that does not affect the title to the land.'

Langford court directly quoted from the disclaimer language of Article I, Section 3 of the Oklahoma Constitution and noted that despite the plain text of this language, "the Oklahoma courts have construed this provision 'to disclaim jurisdiction over Indian lands only to the extent that the federal government claimed jurisdiction.'" (quoting *Goforth v. State*, 1982 OK. CR 48, 644 P.2d 114, 116). The Tenth Circuit noted the *Goforth* court's explanation that "Oklahoma courts have asserted jurisdiction over crimes by non-Indians in Indian country" because otherwise construing Article I, Section 3 of the Oklahoma Constitution "would result in a jurisdictional vacuum in which neither the federal government (due to *McBratney*) nor Oklahoma could punish crimes committed by non-Indians against non-Indians in Indian country." *Id.* at 1199. Ultimately, the *Langford* court held that the State of Oklahoma had jurisdiction to prosecute a victimless crime committed by a non-Indian in Indian country. *See id.* at 1200.

Petitioner's claims that Oklahoma Constitution, Article 1 § 3 deprives the State of all jurisdiction within Indian Country are contrary to law and completely without merit. Accordingly, this Court rejects Petitioner's arguments and determines that the State has jurisdiction in his case.

Id., (quoting from *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 567 (1962)). The *Currey* court ultimately held that the Oklahoma Corporation Commission could regulate oil and gas activity on Indian lands because Art. 1 § 3 does not envision exclusive federal jurisdiction. *See Currey*, 617 P.2d at 180-81

II. MCGIRT SHOULD NOT BE APPLIED RETROACTIVELY TO VOID A CONVICTION THAT WAS FINAL WHEN THAT CONVICTION WAS DECIDED.

A. Application of Retroactivity Principles to Indian Country Claims

United States v. Cuch, 79 F.3d 987 (10th Cir. 1996) is the most relevant decision to the specific issue, presented by this case, of the proper forum for prosecution after the issuance of a new decision, regarding disestablishment or diminishment of an Indian reservation. In *Cuch*, the Tenth Circuit considered the question of whether it should retroactively apply the Supreme Court's decision in *Hagen v. Utah*, 510 U.S. 399 (1994), that a reservation's boundaries had been diminished, to vacate convictions that were made final prior to that decision. See *Cuch*, 79 F.3d at 989-90. The Tenth Circuit started by noting "[t]he Supreme Court can and does limit the retroactive application of subject matter jurisdiction rulings," citing the Court's decision in *Gosa v. Mayden*, 413 U.S. 665 (1973). *Cuch* 79 F.3d. at 990. The *Cuch* court recounted the principles that underlie retroactivity analysis: "finality and fundamental fairness." *Cuch*, 79 F.3d at 991. "A subset of the principle of finality is the prospect that the invalidation of a final conviction could well mean that the guilty will go unpunished due to the impracticability of charging and retrying the defendant after a long interval of time." *Id.*

The *Cuch* court also considered that the issue of fairness to petitioners did not support retroactivity: "There is no question of guilt or innocence here" and these cases "involved conduct made criminal by both state and federal law." *Id.* at 992. The petitioners do not "assert any unfairness in the procedures by which they were charged, convicted, and

sentenced" and the Supreme Court's recent reservation boundaries decision does not "bring[] into question the truth finding functions of the ... courts that prosecuted Indians for acts committed within the historic boundaries of the ... Reservation." *Id.* Similarly, *Cuch* distinguished cases where courts retroactively applied decisions holding the crime at issue could not be constitutionally punished by any court or where the acts committed were not actually criminalized by the statute of conviction. *Id.* at 993-94. There is not "complete miscarriage of justice to these movants that would mandate or counsel retroactive application of *Hagen* to invalidate these convictions." *Id.* at 994 (internal marks omitted). Rather, the question solely "focuses on *where* these Indian defendants should have been tried for committing major crimes." *Id.* at 992. As a result, the court found "the circumstances surrounding these cases make prospective application of *Hagen* unquestionably appropriate in the present context." *Id.* at 994.

Cuch also rejected the argument that a decision on reservation boundaries "did not effect a 'change' in federal law, but merely clarified what had been the law all along." *Id.* The *Cuch* court dismissed "the Blackstonian common law view that courts do no more than discover the law," noting that in *Linkletter v. Walker*, 381 U.S. 618 (1965), the Supreme Court recognized under American law "such a rule was out of tune with actuality." *Id.* at 994-95. In other words, "the Supreme Court admitted that '[t]he past cannot always be erased by a new judicial declaration.'" *Id.* at 995 (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940)). "While the jurisdictional nature of a holding makes the retroactivity question more critical, the nature of the case alone does not dispense with the duty to decide whether the Court may in the

interest of justice make the rule prospective where the exigencies of the situation require such application.” *Cuch*, 79 F.3d at 995. (citations and internal marks omitted). Instead, “the rule of law is strengthened when courts, in their search for fairness, giving proper consideration to the facts and applicable precedent, allow the law to be an instrument in obtaining a result that promotes order, justice and equity.” *Id.* (citation and internal marks omitted).

B. *McGirt* Shall Not Apply Retroactively to Void a Final State Conviction

In *State ex rel, District Attorney v. Wallace*, 2021 OK CR 21, __P.3d__, 2021 WL 3578089, the Oklahoma Court of Criminal Appeals (“OCCA”) recently stated that it found persuasive the analysis and authorities provided by the United States Court of Appeals for the Tenth Circuit in *Cuch*, in considering the “independent state law question of collateral non-retroactivity for *McGirt*.”² *Id.* at ¶ 26. The OCCA also explained that new rules of criminal procedure “generally do not apply retroactively to convictions that are final, with a few narrow exceptions.” *Id.* at ¶ 8 (emphasis in original).

Related to its analysis of the *McGirt* decision under these principles, the *Wallace* court first determined that the holding in *McGirt* only imposed procedural changes and was “clearly a procedural ruling.” *Id.* at ¶ 27. Second, the *Wallace* court held that the “procedural rule announced in *McGirt* was new.” *Id.* at ¶ 28. Third, the court explained in detail in *Wallace* that the OCCA’s “independent exercise of authority to impose remedial constraints under state law on the collateral impact of *McGirt* and post-*McGirt* litigation is consistent with both the text of the opinion and the Supreme Court’s apparent intent.” *Id.* at ¶ 33. Ultimately, the OCCA held that “*McGirt* and our

² *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020).

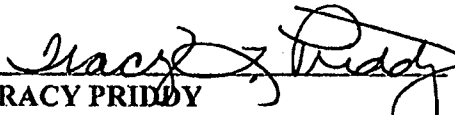
post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction, . . .³
Id. at ¶¶ 6, 40.

As discussed above, the Tulsa County District Court found Petitioner guilty on October 5, 2009 and sentenced him accordingly. As discussed above, Petitioner appealed this judgment and sentence to the OCCA. The OCCA affirmed the District Court's judgment and sentence on October 28, 2010. Since Respondent did not file a petition for a writ of certiorari with the United States Supreme Court within the ninety-day time limit following this decision, his conviction became final on January 26, 2011. *See* U.S. Sup. Ct. Rule 13, 28 U.S.C.A.

Since Petitioner's conviction was final long prior to the July 9, 2020 decision in *McGirt*, this Court holds that the *McGirt* decision does not apply retroactively in Petitioner's state post-conviction proceeding to void his final conviction. *See Wallace*, 2021 OK CR 21, at ¶¶ 6, 40. Accordingly, the Court hereby denies Petitioner's Application for this reason.

Based on the foregoing, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Petitioner's application for post-conviction relief, is hereby **DENIED**.

SO ORDERED this 16 day of September, 2021.


TRACY PRIDDY
JUDGE OF THE DISTRICT COURT

³ *Teague v. Lane*, 489 U.S. 288, 295 (1989) defines "a final conviction as one where judgment was rendered, the availability of appeal exhausted, and the time to petition for certiorari had elapsed)." *Wallace*, 2021 OK 21, at ¶ 2, n.1.