

IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

FILED  
COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

TONY MICHAEL JULIEN,

MAR 22 2023

Petitioner,

JOHN D. HADDEN  
CLERK

v.

No. PC-2022-986

STATE OF OKLAHOMA,

Respondent.

**ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF**

Petitioner, pro se, appeals the denial of post-conviction relief by the District Court of Tulsa County in Case No. CF-1977-2864. 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*, 2021 OK CR 21, 497 P.3d 686, *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*, 2021 OK CR 21, ¶¶ 27-28, 40, 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*.

Petitioner has failed to demonstrate an abuse of discretion by the District Court. Therefore, the District Court's order denying post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**IT IS SO ORDERED.**

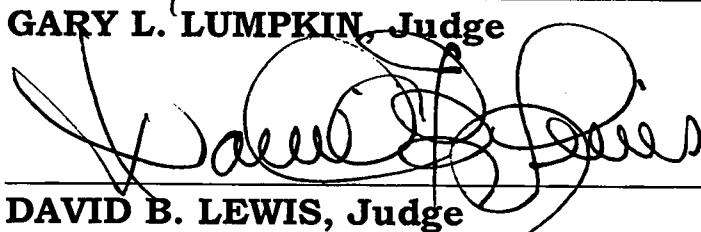
**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this

22nd day of March, 2023.

  
**SCOTT ROWLAND, Presiding Judge**

  
**ROBERT L. HUDSON, Vice Presiding Judge**

  
**GARY L. LUMPKIN, Judge**

  
**DAVID B. LEWIS, Judge**

IN THE DISTRICT COURT OF TULSA COUNTY  
STATE OF OKLAHOMA

ANTHONY MICHAEL JULIEN, )  
Petitioner, )  
v. )  
STATE OF OKLAHOMA, )  
Respondent. )

Case No. CF-1977-2864

Judge Dawn Moody

DISTRICT COURT  
FILED

OCT 12 2022

DON NEWBERRY, Court Clerk  
STATE OF OKLA. TULSA COUNTY

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**ORDER DISMISSING PETITIONER'S APPLICATION FOR POST-CONVICTION  
RELIEF**

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Petitioner's Application for Post-Conviction Relief comes before this Court for consideration under the Post-Conviction Procedure Act, 22 O.S. §§ 1080-1089. Petitioner's Application for Sentence Modification comes before this Court under 22 O.S. § 982a. This Court has reviewed the Application, and the records in rendering its decision. This Court finds that the Application fails to present any issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony; this matter can be decided on the pleadings and records reviewed. *Johnson v. State*, 1991 OK CR 124, ¶ 10, 823 P.2d 370, 373-74. Also, this Court finds it unnecessary to appoint counsel for Petitioner. See 22 O.S. § 1082.

**STATEMENT OF RELEVANT FACTS**

The State of Oklahoma filed a felony information ("Information") against Anthony Julien ("Petitioner") on September 9, 1976. The Information charged Petitioner with (Count One) Murder in the First Degree. Petitioner entered a no contest blind plea to the amended charge of

Second-Degree Murder, and he was sentenced on June 19, 1978 to life imprisonment. Petitioner attempted to withdraw his plea, and the district court denied his request. Petitioner appealed to the Oklahoma Court of Criminal Appeals, and it was affirmed. On June 7, 2022, Petitioner submitted his first Application for Post-Conviction Relief. Therein, Petitioner's single proposition alleges the State of Oklahoma lacked jurisdiction to prosecute him because the crime was on Indian land and he is Indian.

### **DISCUSSION**

Oklahoma's Post-Conviction Procedure Act, 22 O.S. § 1080-1089, provides that the District Court may dismiss an application when it is satisfied "on the basis of the application, the answer or motion of respondent, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings." 22 O.S. § 1083(B). Accordingly, dismissal on the pleadings is improper where there exists a material issue of fact. *Id.* So, as in the case at bar, where a Petitioner fails to state a meritorious claim for relief and fails to present any material fact for this Court to consider, it should dismiss the application.

#### **I. *MCGIRT* SHOULD NOT BE APPLIED RETROACTIVELY TO VOID A CONVICTION THAT WAS FINAL WHEN *MCGIRT* 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 Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, *cert denied* in *Parish v. Oklahoma*, \_\_\_ S.Ct. \_\_\_, 2022 WL 89297 (2022), the OCCA 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*.<sup>1</sup> 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 689 (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 691. Second, the *Wallace* court held that the “procedural rule announced in *McGirt* was new.” *Id.* at 691-92. 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 693. Ultimately, the OCCA held that “*McGirt* and our post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided.”<sup>2</sup> *Id.* at 689; *See Id.* at 694.

Petitioner’s conviction was final on June 19, 1978. Since Petitioner’s conviction was final over four decades prior to the July 9, 2020 decision in *McGirt*, this Court must hold that the *McGirt* decision does not apply retroactively in Petitioner’s state post-conviction proceeding to void his final conviction. *See Wallace*, 497 P.3d at 689, 694. Accordingly, the Court denies the Petitioner’s Application on this basis.

### CONCLUSION

Petitioner’s claim regarding the State of Oklahoma lacking jurisdiction because of his Indian status is meritless. He accordingly fails to advance a material issue of fact for this Court to

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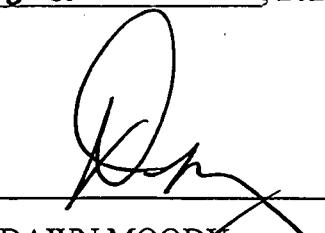
<sup>1</sup> *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020).

<sup>2</sup> *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.

consider and no purpose would be served by further proceedings. The Court dismisses the Petitioner's Application for Post-Conviction Relief.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that Petitioner's Application for Post-Conviction Relief is **DISMISSED**.

**SO ORDERED** this 7 day of Oct, 2022.

  
DAWN MOODY  
DISTRICT COURT JUDGE

**CERTIFICATE OF MAILING**

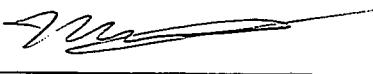
This Court certifies that on the date of filing, a true and correct copy of the above and foregoing Order was placed in the United States Mail with sufficient postage affixed thereto, addressed to:

Anthony Michael Julien  
Oklahoma State Reformatory  
1700 E 1<sup>st</sup> St.  
Granite, OK 73547

-&-

Meghan Hilborn, OBA #33908  
Assistant District Attorney  
500 South Denver, Suite 900  
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DON NEWBERRY, COURT CLERK

BY: 

Deputy Court Clerk

**Additional material  
from this filing is  
available in the  
Clerk's Office.**