

APPENDIX

A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 19 2021

JOHN D. HADDEN
CLERK

JIMMY DALE STONE,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

No. PC-2021-1226

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner appealed to this Court from an order of the District Court of Garvin County in Case No. CF-2016-370 denying his request for post-conviction relief pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___, 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.

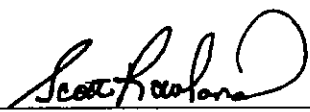
The conviction in this matter was final before the July 9, 2020 decision in *McGirt*, and the United States Supreme Court's holding in *McGirt* does not apply. Therefore, the trial court's denial of post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the*

Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

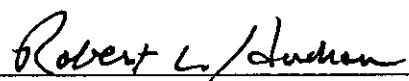
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this


19th day of November, 2021.



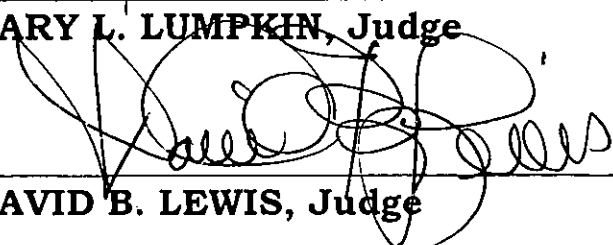
SCOTT ROWLAND, Presiding Judge



ROBERT L. HUDSON, Vice Presiding Judge

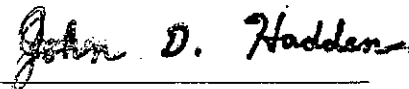


GARY L. LUMPKIN, Judge



DAVID B. LEWIS, Judge

ATTEST:



Clerk
PA

APPENDIX

B

IN THE DISTRICT COURT OF Garvin
STATE OF OKLAHOMA

STATE OF OKLAHOMA } SS.
GARVIN COUNTY }
COUNTY FILED

SEP 20 2021

AT 10:10 O'CLOCK A M.
LAURA LEE, Court Clerk
BY _____ DEPUTY

Jimmy Dale Stone,)
Petitioner,)
v.)
STATE OF OKLAHOMA,)
Respondent.)

Case No. CF-16-370

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: DEFENDANT'S APPLICATION FOR POST-CONVICTION RELIEF

This matter comes before the Court this 17 day of Sept 28th day of June, 2021 +

2021 on Petitioner's Application for Post-Conviction Relief. After review of the pleadings, the Court hereby denies Petitioner's Application. In support thereof, the Court finds as follows:

Findings of Fact

1. Petitioner was found guilty on in the above-entitled matter as a result of plea trial.
2. Petitioner did not appeal his her conviction. Therefore, Petitioner's conviction became final.
3. Petitioner filed the instant Application for Post-Conviction relief on 9/2/2020.

Conclusions of Law

The United State Supreme Court decided *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), on July 9, 2020. On that date it held that if defendant or defendant's victim(s) are Indian and the alleged crime was committed in Indian County, the federal government or tribal government, not the State of Oklahoma, has jurisdiction to prosecute. Subsequently, the Oklahoma Court of

Criminal Appeals recognized the continued existence of the Chickasaw Reservations in *Bosse v. State*, 2021 OK CR 3.¹

However, the Oklahoma Court of Criminal Appeals recently held in *State ex. rel. Matloff v. Wallace*, 2021 OK CR 21, that “*McGirt* [...] shall not apply retroactively to void a conviction that was final when *McGirt* was decided.” Id. at 15. Because Petitioner’s conviction was final at the time *McGirt* was decided, Petitioner is not entitled to relief, and Petitioner’s Application for Post-Conviction Relief is hereby denied.

Conclusion

WHEREFORE, Petitioner’s Application for Post-Conviction Relief is hereby denied.

IT IS HEREBY ORDERED!



LEAH EDWARDS,
Judge of the District Court

NOTICE OF RIGHT TO APPEAL: A final judgment under the Post-Conviction Procedure Act, 22 O.S. 1080, et. sec., may be appealed to the Oklahoma Court of Criminal Appeals on Petitioner in Error filed either by the Petitioner or the State within thirty (30) days from entry of the judgment. Upon motion of either party on filing of Notice of Intent to Appeal, within ten (10) days of entering the judgment, the District Court may stay the execution of the judgment pending disposition on appeal; provided the Court of Criminal Appeals may direct the vacation of the order staying the execution prior to the final disposition of the appeal 22 O.S., 1087. The party desiring to appeal from the final order must file Notice of Post-Conviction Appeal with the Clerk of the District Court within twenty (20) days from the date the final order is filed in the District Court. Rules 2.1(E) & 5.2(C)(1), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18 App. (2018).

¹ While the Order Granting Post-Conviction Relief in *Bosse* has been vacated, the Oklahoma Court of Criminal Appeals reaffirmed the continued existence of the Chickasaw Reservation in *Matloff v. Wallace*, 2021 OK CR 21, 15.

CERTIFICATE OF MAILING

I, Beth Jaraman, bailiff for the District Court, do certify that a true and correct copy of the foregoing Order was mailed, postage prepaid, on 9/24/2021 to the following:

Jimmy Dale Stone, Pro Se

Petitioner

and

The Flavin District Attorney's Office

(by hand-delivery)

Respondent

Beth Jaraman
District Court Bailiff

APPENDIX

C

IN THE DISTRICT COURT OF GARVIN COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,)
)
 Plaintiff,)
)
 v.)
)
 JIMMY DALE STONE,)
)
 Defendant.)

Case No. CF-2016-370

STATE OF OKLAHOMA }
GARVIN COUNTY } SS.
FILED
AUG 26 2021
AT _____ O'CLOCK _____ M.
LAURA LEE, Court Clerk
BY _____ DEPUTY,

AMENDED MOTION TO VACATE ORDER STAYING POST-CONVICTION RELIEF

COMES NOW the State of Oklahoma, by and through Assistant District Attorney, Laura A. McClain, and respectfully moves this Court to vacate its order staying proceedings on Defendant's Application For Post-conviction Relief, which was based on *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). On June 28, 2021, this Court stayed the defendant's post-conviction application pursuant to the Matloff decision, reference herein. At the time of this Court's decision, the Oklahoma Court of Criminal Appeals ("OCCA") had granted *McGirt* relief on post-conviction review. *Bosse v. State*, 2021 OK CR 3, ¶ 21, 484 P.3d 286, 293-94. However, on August 12, 2021, the OCCA repudiated its prior cases, which had assumed that *McGirt* applied retroactively on collateral review, and held that "*McGirt* and [its] post-*McGirt* decisions recognizing [the other Five Tribes'] reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided." *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 15, ___ P.3d ___, ___.

In light of this intervening decision, this Court should vacate its order staying proceedings on Defendant's Application For Post-conviction Relief and deny said Application based thereon.

In support thereof, the State shows as follows.

I. *Wallace* Prohibits the Retroactive Application of *McGirt* to the Defendant

Prior to *Wallace*, the OCCA had held that *McGirt* claims “can never be waived or forfeited” and that “the limitations of post-conviction or subsequent post-conviction statutes do not apply to [*McGirt* claims].” *Bosse*, 2021 OK CR 3, ¶ 21, 484 P.3d at 293-94. *Bosse*—the OCCA’s first published case to address a post-conviction *McGirt* claim—rejected the “variety of procedural” defenses raised by the State and applied *McGirt* to the defendant’s already final convictions. See *Bosse*, 2021 OK CR 3, ¶¶ 20-22 & nn. 8-9, 484 P.3d at 294. The OCCA further concluded that *McGirt* provided a new legal basis for the filing of a successive postconviction application, apparently on the implicit assumption that *McGirt* had retroactive effect in cases on collateral review. The OCCA subsequently applied *McGirt* to long-final convictions in *Cole v. State*, 2021 OK CR 10, ¶ 16, ___ P.3d ___, ___; *Ryder v. State*, 2021 OK CR 11, ¶ 5, 489 P.3d 528, 530; and *Bench v. State*, 2021 OK CR 12, ¶¶ 15, 18, ___ P.3d ___, ___, apparently on the same assumption.

In a change from its earlier applications of *McGirt* to convictions that were final when *McGirt* was decided, *Wallace* held that, as a matter of state law, post-conviction claims based on *McGirt* are not permitted in cases in which the conviction became final on direct review before July 9, 2020—the day *McGirt* was decided. *Wallace*, 2021 OK CR 21, ¶ 15. The OCCA spoke in mandatory terms: “[E]xercising our independent state law authority to interpret the remedial scope of the state post-conviction statutes, we now hold that *McGirt* and our post-*McGirt* decisions recognizing [the additional] reservations **shall not** apply retroactively to void a conviction that was final when *McGirt* was decided.” *Id.* (emphasis added). Indeed, the court held that the district court’s reversal in *Wallace* was an “unauthorized dismissal” which “justifie[d] the exercise of

extraordinary jurisdiction.” *Id.*, 2021 OK CR 21, ¶ 41. The OCCA further repudiated its earlier cases to the extent they assumed that *McGirt* had retroactive effect. *Id.*¹

Here, the defendant’s conviction(s) became final in 2019 when his conviction(s) were affirmed on direct appeal and he failed to petition for certiorari review to the Supreme Court. *See id.*, 2021 OK CR 21, ¶ 2 n. 1 (a conviction is final “where judgment was rendered, the availability of appeal exhausted, and the time to petition for certiorari had elapsed”). Pursuant to *Wallace*, *McGirt* does not apply retroactively to defendant’s post-conviction claim. *Id.*, 2021 OK CR 21, ¶ 40 (“Because we hold that *McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction, the order vacating Mr. Parish’s murder conviction was unauthorized by state law.”).

II. In Light of the Intervening Change of Law in *Wallace*, this Court Should Exercise Its Authority to Vacate Its Order Granting Post-Conviction Relief and Reinstate the Defendant’s Conviction(s)

“Deeply rooted in the common law is the concept that trial courts retain for a limited period plenary control over their terminal decisions.” *Schepp v. Hess*, 1989 OK 28, ¶ 7, 770 P.2d 34, 37. The OCCA has recognized this inherent power of a district court to reconsider, modify, or vacate its judgments. For instance, in *Harris v. Oklahoma Cty. Dist. Ct.*, 1988 OK CR 26, ¶ 4, 750 P.2d 1129, 1130-31, the OCCA held that the district court “was within its authority to vacate its previous order . . . releas[ing]” the defendant from incarceration. In *Harris*, on appeal, the defendant challenged the district court’s vacatur of its prior order erroneously releasing him from custody, following a “not guilty by reason of insanity” verdict, without adhering to the proper procedures

¹ The OCCA “acted in those post-conviction cases without [their] attention ever having been drawn to the potential non-retroactivity of *McGirt*,” but it nonetheless repudiated its prior holdings in cases involving final convictions to the extent inconsistent with *Wallace*. *Wallace*, 2021 OK CR 21, ¶¶ 14-15.

in 22 O.S.1981, § 1161. *Harris*, 1988 OK CR 26, ¶¶ 1-2, 750 P.2d at 1130. Rejecting the defendant's argument that "the district court [was] without jurisdiction to issue a warrant [for his reincarceration] because jurisdiction was relinquished at the time the release was signed," the OCCA pointed to the general power of a district court to modify its judgments:

Clearly, the district court erred by releasing petitioner without performing its statutory duty. The only question left to be answered is whether the district court may now correct its mistake.

Title 12 O.S.1981, § 1031 provides for the correction of irregularities which occur during court proceedings. If an order issued by the district court is clearly erroneous under a current statute, the court can modify or vacate its judgment. *See, e.g., Hays v. L.C.I., Inc.*, 604 P.2d 861, 862 (Okla. 1979). Similar to the present situation, the court in *Knell v. Burnes*, 645 P.2d 471, 473 (Okla. 1982), was allowed to vacate its judgment. In that case, the court took a matter under advisement, allowing the defendant time to brief the issues. When the defendant timely filed his brief, he discovered that judgment had been entered. The court set aside its judgment when the defendant pointed out that the judgment had been entered prematurely. In the present case, an order requiring petitioner's release was entered prematurely without giving consideration to the dictates of Section 1161. Within one week, the district court vacated its previous order so that required statutory procedures could be followed. It is inconceivable to this Court why Assistant District Attorney Lou Keel, the prosecuting attorney, failed to bring this statute to the attention of the district court. However, in spite of this neglect, the district court was within its authority to vacate its previous order of release. The mandatory language of Section 1161 requires that the district court have jurisdiction until it is determined that the acquittee is not a threat to himself or others. Accordingly, we believe that the district court acted within its jurisdiction.

Id., 1988 OK CR 26, ¶ 4, 750 P.2d at 1130-31. Although *Harris* based its analysis in part on the specific context of § 1161, it also clearly indicated that district courts possess an inherent power to correct erroneous judgments. *See also, e.g., Morgan v. Dist. Ct. of Woodward Cty.*, 1992 OK CR 29, ¶ 9, 831 P.2d 1001, 1005 ("The District Court has inherent and statutory powers to do many things when the judicial process is thwarted."); *Ussery v. State*, 1988 OK CR 122, ¶¶ 10-15, 758 P.2d 319, 320-21 (holding a trial court has the authority to reconsider and vacate its order granting a new trial and reinstate the judgment and sentence even though Oklahoma statutory law,

while “contain[ing] specific provisions for granting a new trial,” “has no provision whereby a trial court is granted the authority to vacate its own order granting a new trial”).

The OCCA has also not hesitated to overturn the erroneous grant of post-conviction relief and reinstate improperly vacated criminal convictions and sentences. *See, e.g., Wallace*, 2021 OK CR 21, ¶¶ 6, 40-41; *Powell v. Dist. Ct. of Seventh Jud. Dist.*, 1970 OK CR 67, ¶ 9, 473 P.2d 254, 257; *cf. also Ute Indian Tribe of the Uintah & Ouray Rsrv. v. State of Utah*, 114 F.3d 1513, 1521-22, 1527 (10th Cir. 1997) (recalling the mandate and modifying the Tenth Circuit’s earlier decision holding that the Uintah Valley Reservation had not been disestablished based on the Supreme Court’s contrary decision in *Hagen v. Utah*, 510 U.S. 399, 421-22 (1994), finding the reservation had been diminished, “in light of the extraordinary circumstances presented,” the incongruity of the two opinions, and “the effect of the incongruity on the interests of uniformity and the integrity of our system of judicial decisionmaking”). In *Application of Anderson*, 1990 OK CR 82, ¶ 5, 803 P.2d 1160, 1163, the OCCA, after finding the district court improperly modified the defendant’s sentence based on the erroneous conclusion that indeterminate sentences are impermissible, “reinstate[d] said sentence and direct[ed] the District Court to recommit [the defendant] thereon.” In general, the reinstatement of an improperly vacated conviction and sentence does not offend any rights of the defendant. *See United States v. Silvers*, 90 F.3d 95, 99 (4th Cir. 1996) (generally, reinstating a vacated conviction does not violate double jeopardy, as “reinstatement [does] not subject the defendant to a new trial or multiple punishments”); *Dye v. Kansas State Supreme Ct.*, 48 F.3d 487, 488-91 (10th Cir. 1995) (rejecting habeas petitioner’s procedural due process challenge based on state court’s recall of mandate reversing petitioner’s convictions and subsequent decision reinstating his convictions).

Based on the foregoing, it is clear that this Court has the power and authority to now consider, rule upon and deny Defendant's Application for Post-conviction Relief and also, in appropriate cases, reconsider and vacate its grant of post-conviction relief to defendants, reinstate conviction(s) and sentence(s), and order defendants recommitted on those sentence(s). While this Court's order granting post-conviction relief in cases may have conformed with *Bosse*, *Wallace* makes clear that post-conviction relief is not available based on *McGirt*. *Wallace*, 2021 OK CR 21, ¶ 41. Where a prior order is "clearly erroneous" under "current" law, this Court has the power to "modify or vacate its judgment." *Harris*, 1988 OK CR 26, ¶ 4, 750 P.2d at 1130-31; *see also*, *e.g.*, *Morgan*, 1992 OK CR 29, ¶ 9, 831 P.2d at 1005; *Ussery*, 1988 OK CR 122, ¶¶ 10-15, 758 P.2d at 320-21.

This Court should exercise that authority here. As the OCCA explained in *Wallace*, declining retroactive application of *McGirt* "can mitigate some of the negative consequences" of that unexpected "jurisdictional"² rule and further "public safety, finality, and reliance interests in settled convictions," *Wallace*, 2021 OK CR 21, ¶ 36:

The State's reliance and public safety interests in the results of a guilty plea or trial on the merits, and appellate review according to then-existing rules, are always substantial. Though Oklahoma's jurisdiction over major crimes in the newly recognized reservations was limited in *McGirt* and our post-*McGirt* reservation rulings, the State's jurisdiction was hardly open to doubt for over a century and often went wholly unchallenged

We cannot and will not ignore the disruptive and costly consequences that retroactive application of *McGirt* would now have: the shattered expectations of so many crime victims that the ordeal of prosecution would assure punishment of the

² As argued in the *Bosse* litigation, the State does not agree that where the State lacks prosecutorial authority by virtue of the Major Crimes Act or General Crimes Act, the state court is thereby deprived of subject matter jurisdiction. *See, e.g., United States v. Tony*, 637 F.3d 1153, 1157-60 (10th Cir. 2011) (defendant waived claim that government failed to plead and prove that crime occurred in Indian Country because "[t]he Indian Country nexus . . . is not jurisdictional in the sense that it affects a court's subject matter jurisdiction"). In any event, regardless of whether the rule in *McGirt* is "jurisdictional," it is clear under *Wallace* that it does not apply retroactively under state law.

offender; the trauma, expense, and uncertainty awaiting victims and witnesses in federal re-trials; the outright release of many major crime offenders due to the impracticability of new prosecutions; and the incalculable loss to agencies and officers who have reasonably labored for decades to apprehend, prosecute, defend, and punish those convicted of major crimes; all owing to a longstanding and widespread, but ultimately mistaken, understanding of law.

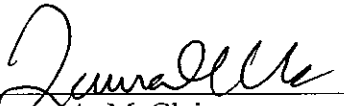
Id., 2021 OK CR 21, ¶¶ 38-39. “By comparison,” the OCCA reasoned, a defendant’s “legitimate interests in post-conviction relief for . . . jurisdictional error [under *McGirt*] are minimal or non-existent.” *Id.*, 2021 OK CR 21, ¶ 40. A “state court’s faulty jurisdiction (unnoticed until many years later),” did not affect “the truth-finding function of the state court[]” or “the procedural protections [a defendant was] afforded at trial.” *Id.*

Here, too, the State has suffered “disruptive and costly consequences” in the overturning of the defendant’s final conviction(s) based on an erroneous retroactive application of *McGirt*. Meanwhile, the defendant can claim no legitimate interest in the retroactive application of *McGirt*. Like the defendant in *Wallace*, Clifton Parish, the criminal conduct of the defendant here was accurately established by his trial, “the conviction was affirmed on direct review,” and “the proceedings did not result in the wrongful conviction or punishment of an innocent person.” *Id.*, 2021 OK CR 21, ¶ 40. As the OCCA poignantly observed, “A reversal of Mr. Parish’s final conviction now undoubtedly would be a monumental victory for him, but *it would not be justice.*” *Id.* (emphasis added). In this case, allowing the erroneous vacatur of the defendant’s final conviction(s) to stand would be unjust and provide him an entirely unfair windfall based merely on the fact that the vacatur was entered prior to the OCCA’s decision on retroactivity in *Wallace*. *Cf. Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993) (refusing to find prejudice from “counsel’s failure to make an objection in a state criminal sentencing proceeding—an objection that would have been supported by a decision which subsequently was overruled— . . . [because] [t]o hold

CERTIFICATE OF MAILING

On this 26 day of August, 2021, the undersigned mailed a true and correct copy of the foregoing to:

Jimmy Dale Stone
DOC # 245269
LCC-5-H-2-A
P.O. Box 260
Lexington, OK 73051



Laura A. McClain