ORIGINAL

No. PR-2021-366

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex.rel. MARK A. MATLOFF, District Attorney
Petitioner

vs.

THE HONORABLE JANA WALLACE, Associate District Judge
Respondent

An Appeal Taken from the District Court of the Seventeenth Judicial District
Antlers, Pushmataha County, Oklahoma

Honorable Jana Wallace, Presiding

District Court Case #CF-2010-26

PETITIONER'S BRIEF IN CHIEF

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APPELLANT'S BRIEF-IN-CHIEF

I.
SUMMARY OF THE FACTS AND OF THE CASE

The real party in interest in this case is Clifton Merrill Parish. Because of the procedural posture of the case at this time, the facts underlying the crime for which Parish was convicted are essentially irrelevant. Accordingly, Petitioner has taken the liberty of combining the Summaries of the Facts and of the Case.

On April 5, 2010, Robert Edward Strickland was killed in Pushmataha County, Oklahoma. Four people were initially charged as being principals in his murder, one of those being Parish. The only other relevant facts of the crime are that, at the time of the murder, Parish was an enrolled member of the Choctaw Nation of Oklahoma (hereinafter referred to as the Choctaw Nation), and that the crime occurred on land which was part of the historical reservation of the Choctaw Nation of Oklahoma.

Parish was convicted by jury on March 6, 2012, of Murder In the Second Degree – Felony Murder (21 O.S. §701.8) (OR 1). Thereafter, on March 12, 2012, Respondent sentenced Parish, pursuant to the jury's recommendation to 25-years in the custody of the Oklahoma Department

of Corrections (OR 3). Parish then filed a direct appeal to this Court, which affirmed his conviction on March 6, 2014 (*Parish v. State*, #F-2012-335; OR 5).

No further court proceedings occurred regarding this case until after the United States Supreme Court issued its decision in *McGirt v. Oklahoma*, 591 U.S. _____, 140 S.Ct. 2452 (2020). Thereafter, on August 17, 2020, Parish filed his Application for Post-Conviction Relief and Request to Vacate and Set Aside the Judgment and Sentence Because the Court Lacked Subject Matter Jurisdiction. In it, for the first time, Parish raised the claim that he is, and was at the time of the Strickland murder, a member of the Choctaw Nation, and that the crime occurred on land which qualified as an Indian reservation pursuant to the federal Major Crimes Act, 18 U.S.C. §1153.

Subsequently, on April 7, 2021 (filed April 13, 2021), Respondent granted Parish's Application, finding:

> Pursuant to an order by the Supreme Court of the United States of America, the state of Oklahoma has no jurisdiction in this matter, the jurisdiction lies solely with the federal or tribal governments, the Application for Post Conviction relief is granted and the case is dismissed without cost. (OR 13)

Respondent stayed the effective date for her Order until April 21, 2021, based on the date this Court had set for the issuance of its Mandate in *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867.

On April 20, 2021, Petitioner filed his request for a further stay of the District Court's Order (OR 15). Respondent issued a temporary stay of her Order the same day (OR 23). Prior to a final ruling regarding that requested stay, and in order to not run afoul of jurisdictional appellate timetables (Rule 10.1, Rules of the Oklahoma Court of Criminal Appeals, Ch. 18, App., of Title 22), on April 27, 2021, Petitioner filed his Petition for Write of Prohibition and Request for

Continued Stay Pending Decision with this honorable Court. Said Writ is being requested to prohibit the enforcement of Respondent's April 7 Order overturning and dismissing Parish's State conviction.

II.
STATEMENT OF THE LAW

PROPOSITION I – THE STANDARD OF REVIEW

In order to prevail herein,

> Petitioner has the burden of establishing (1) a court . . .has or is about to exercise judicial . . . power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. (Citation omitted.) The adequacy of a remedy is to be determined upon the facts of each particular case. (Citation omitted).

In regards to the second prong of mentioned above, this Court has found that the issuance of a Writ of Prohibition is proper even when, as in the case at bar, a judge has proper jurisdiction but "is exercising an unauthorized application of judicial force," *State ex.rel. Wise v. Clanton*, 1977 OK CR 45 ¶15, 560 P.2d 588, 591.

PROPOSITION II – THE REAL PARTY IN INTEREST HAS WAIVED THE RIGHT TO PRESENT THE ISSUES RAISED IN HIS APPLICATION FOR POST-CONVICTION RELIEF

The right of a criminal defendant to raise certain issues on appeal by way of an Application for Post-Conviction Relief are strictly circumscribed by statute and case law.

In this case, Parish claims that he is entitled to post-conviction relief pursuant to 22 O.S.2011 §1080(b): "the court was without jurisdiction to impose sentence" because of the decisions in *McGirt, supra,* and *Sizemore, supra*, along with the Majors Crimes Act. The issue of whether *McGirt* actually applies will be addressed in the next Proposition. In addition to the argument which will be presented there, Petitioner also asserts that Parish does not qualify for post-

conviction relief because he has waived the right to present at this time the issues raised in his Application.

It is well established in this State that

> The post-conviction procedure is not intended to be a second direct appeal. (citation omitted) This Court does not consider an issue which was raised on direct appeal . . . or **an issue which could have been raised on direct appeal but which was not (and is therefore waived)** (citations omitted). *Mayes v. State*, 1996 OK CR 28 ¶4, 921 P.2d 367, 370 (emphasis added).

See also *Woodruff v. State*, 1996 OK CR 5 ¶2, 910 P.2d 348, 349.

Admittedly, an exception exists to this rule "when the court finds a ground for relief asserted which 'for sufficient reason was not asserted or was raised inadequately in the prior application for post-conviction relief' or 'when an intervening change in constitutional law impacts the judgment and sentence,'" citing *Bryson v. State*, 1995 OK CR 57 ¶2, 903 P.2d 333, *Rojem v. State*, 1992 OK CR 20 ¶3, 829 P.2d 683, and 22 O.S. §1086. However, Petitioner respectfully submits that neither of these condition are satisfied herein:

1. *McGirt, supra*, was **not** decided on constitutional grounds. Rather, the decision was based strictly upon a historical review of the federal government's relationship with, in that case, the Muscogee/Creek Nation of Oklahoma pursuant to various treaties and laws over the years and the federal Major Crimes Act , 18 U.S.C. §1151, et.seq.

2. Albeit in dicta, the Supreme Court recognized in *McGirt* that "defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings."

3. Some form of 18 U.S.C. §1153, that portion of the Major Crimes Act which gives exclusive jurisdiction to the federal government over any Native American who commits certain enumerated crimes within "Indian country," has been "on the books" since June 25, 1948. Accordingly, the possibility of raising in opposition to State prosecutions the jurisdictional issues address in *McGirt* and *Sizemore* have existed since June 25, 1948. In fact, essentially the very same issue was raised between 1985 and 1992 in *Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277. Perhaps even more importantly, this Court ruled in *Cravatt* that the State was without jurisdiction to try Cravatt for Murder I, vacated his conviction, and remanded the case to the District Court with an order to dismiss that portion of the case.[1] The same issues were already being argued before this Court in *Murphy v. State* (Oklahoma Court of Criminal Appeals case #PCD-2004-321) in 2004, six years before the Strickland murder had even occurred.

It is Petitioner's contention that every defendant in this State was on notice since the issuance of the *Cravatt* decision in 1992, and certainly since the start of the *Murphy* saga, that, if he/she were an enrolled member of a Native American tribe and the crime with which he/she was charged occurred in "Indian country," the issue of lack of State jurisdiction could have been raised.

Parish has given no reason as to why such a claim was not raised during his direct appeal. Petitioner therefore further submits that Parish has not and cannot present any reason as to why his case should fall within either of the *Woodruff* exceptions. He could have raised his current jurisdictional argument on direct appeal; by not doing so, he has waived the same.

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1 Cravatt had also been convicted of Larceny of an Automobile during the same trial. That part of the conviction was not overturned because, as this Court noted, Cravat had chosen not to raise any allegations of error in that regard as part of his appeal. *Cravatt, Id.* At ¶21.

PROPOSITION III – *McGIRT v. OKLAHOMA* IS NOT RETROACTIVE IN ITS APPLICATION

The Supreme Court gave no guidance in its *McGirt* decision as to whether the application of its ruling should be retroactive. The Court must therefore look to other cases in order to determine the answer to this question.

In that regard, Petitioner would point to the case of *In Re Morgan*, a decision by a three judge panel of the Tenth Circuit (10th Circuit case #20-6123)[2]. Morgan's case arose out of State District Court in Oklahoma County (Oklahoma County case #CF-2010-7695). He had pleaded guilty to the charges against him in 2011 and was sentenced to life in prison. Thereafter, he files a series of appeal, including a request with the 10th Circuit to file a second or subsequent habeas corpus application, pursuant to 28 U.S.C. §2254. It was that request which led to the aforementioned decision.

The Circuit's decision went into great detail as to why *McGirt* should not be applied retroactively, and Petitioner submits that this Court should adopt and follow the 10th Circuit's lead. Most importantly, the Court recognized that there is a major distinction between the retroactive applicability of rulings based on constitutional grounds and those which are not. It then went on to note, as Petitioner has already alluded to herein, that *McGirt* **was not** decided on constitutional grounds. Rather, it was simply an interpretation and consequent application of the aforementioned Major Crimes Act. (OR 21).

The Court then went on to hold:

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2 A copy of the entire opinion/order is attached to Petitioner's Motion to Stay filed in the District Court (OR 15). As the opinion is unpublished to the best of Petitioner's knowledge and is not marked with paragraph numbers, references to it will reference the pages of the Record filed with this Court.

> Even if *McGirt* did present a new ruled of constitutional law, the (Supreme) Court did not explicitly make its decision retroactive. '[T]he only way]the Supreme Court] could make a rule retroactively applicable is through a holding to that effect.' *Cannon v. Mullin*, 297 F.3d 989, 993 (10th Cir. 2002) (internal quotations marks omitted). It is not sufficient that lower courts have found the rule retroactive or that the rule might be retroactive based on 'the general parameters of overarching retroactivity principles.' *Id.*

Accordingly, it ruled that *McGirt* is not retroactive.

Previously, the 10th Circuit had considered the case of *U.S. v. Cutch*, 79 F.3d 987 (10th Cir. 1996). Under circumstances almost identical to the one now facing this State, *Cutch* involved a defendant's seeking retroactive application of the Supreme Court ruling in *Hagen v. Utah*, 510 U.S. 399, 114 S. Ct. 958 (1994), the latter involving a ruling regarding state court criminal jurisdiction on the Ute Indian Reservation. In Cutch, the 10th Circuit found that it "may properly examine a district court's subject matter jurisdiction on collateral review;" however, it then went on to recognize: **"The Supreme Court can and does limit the retroactive application of subject matter jurisdiction rulings**. . . . The argument that a jurisdictional ruling such as *Hagen* should not be applied retroactively to cases on collateral review is based on principles of finality and fundamental fairness." (Emphasis added.) Ultimately, it found that Defendant Cutch was not entitled to retroactive relief.

Before discussing *Ferrell v. State*, 1995 OK CR 54, 902 P.2d. 1113 and *Edwards v. Vannoy*, 593 U.S. ------- (#19-5807, May 17, 2021), Petitioner must again respectfully point out what he has already mentioned – McGirt was **not decided** on constitutional grounds. However, borrowing from the 10th Circuit in Morgan, Petitioner would also submit that, even if this Court believes *McGirt* to have been decided on constitutional grounds, *Ferrell* and *Edwards* indicate that its reach should not be retroactive.

Part of the 10th Circuit's holding in *Cutch* was based on *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), the same case which formed the basis of this Court's decision in *Ferrell*. At ¶7 in *Ferrell*, this Court found:

> As a general rule, the United States Supreme Court does not apply a new rule retroactively to defendants on collateral review. Two exceptions to this general rule allow retroactive application of a new rule on collateral review if (i) it places certain kinds of primary conduct beyond the power of the criminal law-making authority to proscribe, or (ii) if it requires the observance of those procedures that are implicit in the concept of ordered liberty. The general rule in *Teague* and the limited exceptions are based upon the purposes for collateral review and the concept of finality. Application of new constitutional rules to final cases, whose trials and appeals conformed to then-existing constitutional standards, would seriously undermine the principle of finality, without which the criminal law is deprived of much of its deterrent effect. Moreover, the purposes of collateral review would not be served, and no one affected by the criminal justice system would be benefited, if a final criminal conviction were subjected to fresh litigation tomorrow and every day thereafter. (Citations omitted).

It also held that, "It is a general rule of law in Oklahoma that decisions of the highest court are prospective in application unless specifically declared to have retroactive effect," *Id.* at ¶6.

Although *Edwards* had nothing to do with Indian land jurisdiction, it had everything to do with the issue of retroactivity. In its previous term, the Supreme Court had ruled that state jury verdicts for serious offenses have to be unanimous.[3] The issue the Court faced in *Edwards* was whether the *Ramos* decision should be applied retroactively.

Petitioner recognizes that some would argue the criminal procedural issue with which *Edwards* dealt is not the same as the jurisdictional issue before this Court. Nonetheless, Petitioner submits the Supreme Court's rationale and holding should still apply,

3 *Ramos v. Louisiana*, 590 U.S. _____, 140 S.Ct. 1390.

especially as *Cutch, Ferell*, and *Edwards* were all based, to a large extent, on the Supreme Court's *Teague* decision.

In *Edwards*, the Court recognized that "a new rule of criminal procedure applies to cases on direct review, even if the defendant's trial has already concluded." That, however, was not the issue with which it was faced (nor is it the situation with the case at bar). It then addressed whether *Ramos* was a decision which should be considered a "watershed" decision as that had been the test for the retroactive application of new criminal procedural rules at least since *Teague*.

In its analysis, the Court recognized that its previous

> Decisions in *Duncan* [*v. Louisiana*, 391 U. S. 145, 88 S.Ct. 1444 (1968)], *Crawford* [*v. Washington*, 541 U. S. 36, 124 S.Ct. 1354 (2004)], and *Batson* [*v. Kentucky*, 476 U. S. 79, 106 S.Ct. 1712 (1986)] were momentous and consequential. All three decisions fundamentally reshaped criminal procedure throughout the United States and significantly expanded the constitutional rights of criminal defendants. . . . Yet the Court did not apply any of those decisions retroactively on federal collateral review.

It then went on to ask:

> If landmark and historic criminal procedure decisions — including *Mapp* [*v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961)], *Miranda* [*v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966)], *Duncan, Crawford, Batson*, and now *Ramos* — do not apply retroactively on federal collateral review, how can any additional new rules of criminal procedure apply retroactively on federal collateral review?

It's answer to the question was an unequivocal "no:"

> We think the only candid answer is that none can — that is, no new rules of criminal procedure can satisfy the watershed exception. We cannot responsibly continue to suggest otherwise to litigants and courts. . . .

Before leaving *Edwards*, it is also important to note that the Supreme Court's opinion finally gave approbation to the type of argument which this State has long made before any of the appellate courts, including the Supreme Court – arguing that the fallout from *McGirt*-type jurisdictional issues should also be considered in the courts' decisions:

> Here, for example, applying *Ramos* retroactively would potentially overturn decades of convictions obtained in reliance on *Apodaca* [*v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628 (1972)]. Moreover, conducting scores of retrials years after the crimes occurred would require significant state resources. See *Teague*, 489 U. S., at 310 (plurality opinion). And a State may not be able to retry some defendants at all because of "lost evidence, faulty memory, and missing witnesses." *Allen v. Hardy*, 478 U. S. 255, 260, [106 S.Ct. 2878] (1986) (per curiam). When previously convicted perpetrators of violent crimes go free merely because the evidence needed to conduct a retrial has become stale or is no longer available, the public suffers, as do the victims. See *United States v. Mechanik*, 475 U. S. 66, 72 (1986). Even when the evidence can be reassembled, conducting retrials years later inflicts substantial pain on crime victims who must testify again and endure new trials. . . .
>
> Put simply, the 'costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application.' *Sawyer v. Smith*, 497 U.S. 227, 242 (1990).

Given all of the above, Petitioner respectfully submits that there is no rationale or law which should stand in the way of this honorable Court's adopting a rule stating that the application of *McGirt* is not retroactive to cases which had become final judgments, past their initial appeals, as of July 9, 2020, the date on which *McGirt* was issued.

PROPOSITION IV – PETITIONER IS ENTITLED TO THE ISSUANCE OF THIS COURT'S WRIT OF PROHIBITION

Having presented his arguments, Petitioner now turns to the question of has he met the requirements set forth in Proposition I above for the issuance of this Court's Writ of Prohibition:

1. There is no question that Respondent exercised her judicial power in granting Parish's Application and ordering that his conviction be vacated.

2. Petitioner has never maintained that Respondent was acting *ultra vires* in considering Parish's Application. There is a well established procedure in this State regarding the presentation of an Application for Post-Conviction Relief to the District Court out of which a conviction arose (Post-Conviction Procedure Act, 22 O.S. 1080, *et.seq.*). Rather, it is Petitioner's position that Respondent, by improperly applying *McGirt* retroactively to Parish's Application exercised "an unauthorized application of judicial force," as set forth in *State ex.rel. Wise*, supra.

3. Finally, Petitioner submits that there can be no argument regarding the third prong of the test for the issuance of the sought for Writ. Petitioner, hence, the State of Oklahoma, has no other remedy available to it to avoid the injury which Respondent's Order imposes.

Petitioner submits that, based on the arguments and authorities herein presented, he has shown and met the requirements for the issuance of this Court's Writ of Prohibition and is entitled to the issuance of the same.

III.
CONCLUSION

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Appellant respectfully prays that this honorable Court issue its Writ of Prohibition herein, prohibiting Respondent's Order of April 13, 2021, from taking effective, prohibiting the vacation of Parish's conviction, and for such other and further relief which the Court deems to be just and appropriate.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF DELIVERY

I hereby certify that, on the 25th day of June, 2021, I mailed a true and correct copy of the above and foregoing Brief to the following, to-wit:

DEBRA HAMPTON, attorney for Real Party in Interest, Clifton Parish, via US Mail, postage prepaid, to Hampton Law Office, PLLC, 3126 S. Blvd., Edmond, Oklahoma 73013;

HONORABLE JANA WALLACE, Respondent herein, by personal deliver;

ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, 313 NE 21st, via US Mail, postage prepaid, to 313 NE 21st, Oklahoma City, OK 73105;

JACOB KEYES, Choctaw Nation of Oklahoma, via US Mail, postage prepaid, P.O. Box 1210, Durant, Oklahoma 74702.

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