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NOVEMBER 10, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2022 ND 190

Elijah Addai, Petitioner and Appellant

v.

State of North Dakota, Respondent and Appellee

No. 20220044

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Wade L. Webb, Judge.

AFFIRMED.

Opinion of the Court by Jensen, Chief Justice.

Kiara C. Kraus-Parr, Grand Forks, ND, for petitioner and appellant.

Joshua J. Traiser (argued) and Nicholas S. Samuelson (appeared), Assistant State's Attorneys, Fargo, ND, for respondent and appellee.

Addai v. State
No. 20220044

Jensen, Chief Justice.

[¶1] Elijah Addai appeals from the district court's dismissal of his request for post-conviction relief. Addai asserts our discussion of public trials in *State v. Martinez*, 2021 ND 42, ¶ 13, 956 N.W.2d 772, created a new rule that must be applied retroactively, is applicable to his case, and precludes the dismissal of his petition for post-conviction relief. We affirm.

I

[¶2] On February 17, 2009, Addai was convicted of murder, a class AA felony, after a jury found him guilty of fatally stabbing David Delonais. *State v. Addai*, 2010 ND 29, ¶ 13, 778 N.W.2d 555. Addai appealed his conviction arguing that, among other issues, the district court's closure of the courtroom at the request of defense counsel violated his right to a public trial. *Id.* at ¶ 48. This Court found, "Addai failed to object to the court's decision to close the courtroom, and he has failed to prove the court's decision was plain error affecting his substantial rights." *Id.* at ¶ 50. His conviction was affirmed on February 17, 2010. *Id.* at ¶ 58. Addai did not appeal his conviction to the United States Supreme Court.

[¶3] Addai filed his first application for post-conviction relief in 2010. *Addai v. State*, 2012 ND 50, 809 N.W.2d 833. He argued his trial counsel was ineffective for failing to object to the courtroom's closure. *Id.* at ¶ 1. This Court summarily affirmed the district court's denial of his application. *Id.* He applied again for post-conviction relief in 2015 asserting newly discovered evidence, was denied relief by the district court, and the denial was affirmed by this Court. *Addai v. State*, 2017 ND 98, ¶¶ 1, 16, 893 N.W.2d 480. Addai filed a third application for post-conviction relief in 2017 that was summarily denied by the district court. He did not appeal the denial of his third application.

[¶4] Addai has also initiated federal habeas corpus proceedings arguing his right to a public trial was violated. *Addai v. Schmalenberger*, 776 F.3d 528, 532 (8th Cir. 2015). The federal district court denied relief finding "no plain error

and Addai waived the argument by agreeing to the courtroom closure." *Id*. The Eighth Circuit affirmed the denial of his request for relief concluding the "consensual courtroom closure" did not violate Addai's right to a public trial. *Id*.

[¶5] This case is Addai's fourth application for post-conviction relief. The State argues Addai's claim is barred by res judicata. The district court granted summary disposition in favor of the State and dismissed Addai's application finding the issue of the courtroom closure to be fully and finally adjudicated, and the *Martinez* ruling does not apply retroactively.

II

[¶6] "Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure." *Parshall v. State*, 2018 ND 69, ¶ 5, 908 N.W.2d 434 (quoting *Burke v. State*, 2012 ND 169, ¶ 10, 820 N.W.2d 349). "Our review of a summary denial of post-conviction relief is like the review of an appeal from a summary judgment." *Greybull v. State*, 2004 ND 116, ¶ 2, 680 N.W.2d 254. "For summary disposition, the movant bears the burden of showing that there is no dispute to either the material facts or the inferences to be drawn from undisputed facts, and that the movant is entitled to judgment as a matter of law." *Id*.

[¶7] Post-conviction relief may be granted if a "conviction was obtained or the sentence was imposed in violation of the laws or the Constitution of the United States or of the laws or Constitution of North Dakota" or "[a] significant change in substantive or procedural law has occurred which, in the interest of justice, should be applied retrospectively[.]" N.D.C.C. § 29-32.1-01(1)(a), (f). An application must be filed within two years of a final conviction unless "[t]he petitioner asserts a new interpretation of federal or state constitutional or statutory law by either the United States supreme court or a North Dakota appellate court and the petitioner establishes that the interpretation is retroactively applicable to the petitioner's case." N.D.C.C. § 29-32.1-01(3)(a)(3). The application must be filed within two years of the effective date of the retroactive application of law. *Id*. at § 29-32.1-01(3)(b).

[¶8] North Dakota has adopted the following three prong test for determining if a right applies retroactively as articulated by the United States Supreme Court in *Beard v. Banks*, 542 U.S. 406, 411 (2004):

> *First*, the court must determine when the defendant's conviction became final. *Second*, it must ascertain the "legal landscape as it then existed," and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually "new." *Finally*, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Morel v. State, 2018 ND 141, ¶ 9, 912 N.W.2d 299 (emphasis added). The two exceptions under the third prong of *Morel* include that "(1) the rule is substantive or places a class of private conduct beyond the power of the State, or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Morel*, at ¶ 9 (quoting *Parshall*, 2018 ND 69, ¶ 21).

[¶9] It is unnecessary to discuss the first two prongs of the test we adopted in *Morel*. As discussed below, we conclude the ruling in *Martinez* does not apply retroactively because it is not substantive and did not place a class of private conduct beyond the power of the State, and it is not a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

III

[¶10] The first exception to applying a new rule retroactively requires the rule to be substantive or place a class of private conduct beyond the power of the State. Addai does not argue *Martinez* represents a substantive law change or that the ruling in *Martinez* places a class of private conduct beyond the power of the State. We conclude *Martinez* was not a substantive law change and does not place a class of private conduct beyond the power of the State.

IV

[¶11] "[Procedural] rules regulate only the manner of determining a defendant's culpability" and "generally do not apply retroactively because they merely provide a 'speculative connection to innocence.'" *Morel*, 2018 ND 141, ¶ 13 (citing *Schriro v. Summerlin*, 542 U.S. 348, 352-53 (2004)). "[T]o qualify as watershed, a . . . rule must be necessary to prevent an impermissibly large risk of an inaccurate outcome and must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Walker v. U.S.*, 810 F.3d 568, 574 (8th Cir. 2016) (quoting *Whorton v. Bockting*, 549 U.S. 406, 418 (2007)). The exception is "extremely narrow" and "it is unlikely that any . . . 'ha[s] yet to emerge.'" *Schriro*, at 352 (quoting *Tyler v. Cain*, 533 U.S. 656, 667, n. 7 (2001)).

[¶12] This Court did not label as watershed a case recognizing a defendant's right to be informed of immigration consequences (*Giwa v. State*, 2017 ND 250, ¶ 10, 902 N.W.2d 734), and has chosen not to decide retroactive application to the requirement that a fact increasing the penalty for a crime beyond a statutory maximum be submitted to a jury. *Greybull*, 2004 ND 116, ¶ 10; *Clark v. State*, 2001 ND 9, ¶ 9, 621 N.W.2d 576. Additionally, the *Clark* decision emphasized the finality of convictions that should not be undermined by post-conviction effort:

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. . . .
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> . . . .
>
> . . . In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States to marshal resources in order to keep prison defendants whose trials and appeals conformed to then-existing constitutional standards. (Citations omitted.)

Id. at ¶ 8 (quoting *Teague v. Lane*, 489 U.S. 288, 309-10 (1989)).

[¶13] Addai continues to file post-conviction applications in an effort to re-litigate the courtroom closure issue. The State has been forced to marshal resources responding to each petition. This Court will not undermine the finality of our decision in accordance with *Clark* and *Teague*.

[¶14] Like the criminal procedure rules discussed in *Giwa*, *Greybull*, and *Clark*, which were either not given retroactive application or such status was not decided, we conclude the ruling in *Martinez* regarding waiver does not implicate the fundamental fairness and accuracy of criminal proceedings, nor does it alter the bedrock procedural elements essential to the fairness of such proceedings. Furthermore, because the question of whether the district court committed obvious error has already been finally determined, Addai's case is barred by res judicata as the court concluded.

V

[¶15] The district court's findings that the *Martinez* ruling should not apply retroactively, and that Addai's case is barred by res judicata are supported by our law. The court's conclusion that the State was entitled to summary disposition and that Addai's post-conviction application should be dismissed is not incorrect. We affirm the district court's order.

[¶16] Jon J. Jensen, C.J.
Gerald W. VandeWalle
Daniel J. Crothers
Lisa Fair McEvers
Jerod E. Tufte