

**Capital Case**

**Case No. 21-6680**

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**In the  
Supreme Court of the United States**

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JEMAINÉ MONTEIL CANNON,  
*Petitioner,*  
v.  
THE STATE OF OKLAHOMA,  
*Respondent*

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On Petition for a Writ of Certiorari to the  
Oklahoma Court of Criminal Appeals

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**PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR A WRIT OF CERTIORARI**

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**PETITIONER’S REPLY TO BRIEF IN OPPOSITION**

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**PETITIONER’S REPLY**

In Reply to Respondent’s Brief in Opposition, Petitioner will further present a unique, but exceptional case that presents a compelling reason for this Court to grant a Writ of Certiorari. Petitioner will detail and demonstrate below unfathomable and unconscionable Sixth and Fourteenth Amendments rights violations Oklahoma committed against Petitioner in order to maintain an unconstitutional conviction. Constitutional vindication and judicial continuity warrants this Court’s review.

Respondent misstates Petitioner’s “questions presented” by rewording them. This is significant as Respondent’s recasting created new questions that are materially

different than the original questions presented by Petitioner. Respondent is the “Respondent” and not the “Petitioner,” which requires the Respondent to respond to the specific questions presented by the Petitioner. Instead, Respondent opts to simultaneously fill the position of the Petitioner and the Respondent by attempting to dictate the questions presented and the response. Respondent’s brief in opposition is non-responsive to Petitioner’s petition.

Respondent misstates that “Petitioner’s first question presented relies entirely upon the arguments advanced in the petition in *Parish v. Oklahoma*, No. 21-467, as a basis for certiorari in this case.” BIO at 1. Petitioner shares some arguments advanced in *Parish*, but Petitioner also proffers additional arguments, facts, and evidence that specifically bolster, distinguish, and differentiate Petitioner’s exceptional case from *Parish*, as Petitioner will demonstrate below.

Respondent misstates that “Petitioner's second question presented is inadequately developed, was not pressed or passed upon below, and presents no compelling question.” BIO at 1. Petitioner will demonstrate the second question was adequately developed in accordance with the facts and circumstances; it was pressed, passed upon and/or prevented below; and it does present a compelling question.

Oklahoma provided trial and direct appeal counsel to Petitioner, neither of whom raised a claim challenging the State’s improper assertion of jurisdiction over

Petitioner. But as Petitioner explained in his Petition for Writ of Certiorari, the United States District Court for the Northern District of Oklahoma found Petitioner was provided trial and appellate counsel who were not “separate.” *See* Pet. App. at 22 (Appendix D, Order, Pet. App. at 18-27). In other words, Oklahoma provided Petitioner with conflicted counsel. On remand from the Tenth Circuit, the Northern District made an appointment of counsel limited to the issues remanded by the Tenth Circuit. This limitation prevented appointed counsel from amending Petitioner’s habeas petition to include any jurisdictional issue.

When this Court decided *McGirt*, Chief Justice Roberts noted that under Oklahoma law, jurisdictional objections are never waived and can therefore be raised on collateral appeal. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2501 n.9 (2020) (Roberts, CJ, dissenting). At the time Petitioner filed his second post-conviction application, Oklahoma’s longstanding rule that subject-matter jurisdiction can never be waived or forfeited was the law. *See Wackerly v. State*, 237 P.3d 795, 797 (Okla. Crim. App. 2010). There were no exceptions. This Court should take Oklahoma at its word. Due to this, there was no procedural bar to challenge or defend against, so there was no need or foreseeable reason to anticipate a *Matloff v. Wallace* issue or include the conflicted-counsel issue initially when Petitioner filed his second post- conviction application.

The Oklahoma Court of Criminal Appeals (OCCA) accepted Petitioner's second application for post-conviction relief, ruled it was reviewable under Oklahoma law, and remanded it for an evidentiary hearing to Tulsa County District Court. *See* Pet. App. at 4-9 (Appendix B Order Remanding). Again, there was no foreseeable reason to amend the application to include the conflicted-counsel issue. The OCCA specifically ordered that the only issues to be addressed were the appointment of counsel, Petitioner's Indian status, and whether the crime occurred within the boundaries of the Creek Reservation. Again, due to this order, there was no need or foreseeable reason to amend the application to include the conflicted-counsel issue.

While the evidentiary hearing was pending and after the Tulsa County District Court appointed counsel, the OCCA stayed Petitioner's hearing until it determined whether *McGirt* would be applied retroactively to void a state conviction that was final when *McGirt* was decided. Even though the outcome of that decision would dictate the disposition of Petitioner's Application, the Court only invited representatives of the Attorney General of Oklahoma and the Choctaw Nation to enter appearances and file briefs. Petitioner was denied any opportunity to present a defense to the overall question or present a defense that was specific to his case. When the OCCA stayed the hearing, Petitioner immediately requested that the counsel Oklahoma provided amend his application to include the conflicted-counsel

issue because, had Oklahoma not provided conflicted counsel, the jurisdictional issue had a place before the court before Petitioner's state conviction was final and Petitioner would not be in the current position.

Tulsa County District Judge Tracy Priddy explicitly prevented counsel Oklahoma provided to Petitioner from presenting the conflicted-counsel issue. *See* Att. 1 (letter from appointed counsel Brian Boenheim). Then, the OCCA denied Petitioner's second application for post-conviction relief based on *State ex rel. Matloff v. Wallace*, 497 P.3d 686 (Okla. Crim. App. 2021), which was not the law or foreseeable at the time Petitioner's second application was filed. In *Matloff*, the OCCA ruled it would not apply *McGirt* retroactively to void a state conviction that was final when *McGirt* was decided. In an ironic twist, the OCCA then retroactively applied its new decision to Petitioner's pending application. The OCCA issued its mandate at the same time it denied Petitioner's second application for post-conviction relief, which again prevented Petitioner an opportunity to present his conflicted-counsel issue to the court. Oklahoma provided no procedural mechanism to bring the conflicted-counsel issue in this action. *See generally Wilkinson v. Austin*, 545 U.S. 209, 211 (2005) (holding opportunity to respond is among one of the most important procedural mechanisms for purpose of avoiding erroneous deprivations to satisfy procedural due process).

Respondent materially misstates and misrepresents *Matloff's* holding as if it were a preexisting state law. Respondent states “[b]efore [Petitioner’s] hearing was held, the Court of Criminal Appeals in another case held as a matter of state law that *McGirt* was not retroactively applicable to void state convictions on state postconviction review.” BIO at 1. This incorrectly makes it appear as if the OCCA’s concern is with a jurisdictional issue being raised on state post-conviction review. The OCCA actually held that the purported new rule of criminal procedure concerning Indian Country jurisdiction announced in *McGirt* would not be applied retroactively to void a state conviction that was final when *McGirt* was decided. *See Matloff*, 497 P.3d at 694. This is different from Respondent’s portrayal. But either way, the OCCA is changing the rules in the middle of the game and making up the law as it goes along because neither one of those positions reconcile with Oklahoma’s long-standing rule that subject matter jurisdiction can never be waived or forfeited and therefore can be raised at any time. This rule had no exceptions and was the current applicable law at the time Petitioner filed his second application for post-conviction relief.

Respondent also misstates this Court’s holding in *McGirt* itself. It manufactures and cuts and pastes language and incorrectly attributes it to this Court. Respondent states “[a]s more fully explained in *Parish*, when this Court decided

*McGirt*, it recognized that many state inmates who attempt to seek release under its decision would nonetheless remain in state custody ‘thanks to well-known state and federal limitations on postconviction review in criminal proceedings.’ BIO at 1 (quoting *McGirt*, 140 S. Ct. at 2479). This is not what this Court stated. Respondent further states “[t]he [OCCA] took *McGirt* at its word, applying one such well-known limitation: claims seeking to apply new decisions retroactively are, as a general rule, not redressable when raised for the first time on postconviction review.” BIO at 1-2. As previously stated, and as recognized by Chief Justice Roberts, this was not Oklahoma’s longstanding rule of law at the time Petitioner filed his application. Nevertheless, this would not be applicable to a case like Petitioner’s where Oklahoma provided conflicted counsel to Petitioner and/or passed upon or prevented Petitioner from presenting the conflicted-counsel issue.

Petitioner’s case is rare and exceptional. And it presents a uniquely compelling reason for this Court to grant certiorari review. Not only does Petitioner have a Sixth Amendment right to counsel, Petitioner has a right to conflict-free counsel. *See generally Strickland v. Washington*, 466 U.S. 668, 692 (1984) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 350, 348 (1980)) (finding prejudice presumed when an actual conflict of interest adversely affected his lawyer’s performance). Petitioner further

has a Fourteenth Amendment right to due process. Oklahoma provided neither to Petitioner.

Respondent attempts to illogically confine Petitioner's conflicted-counsel issue to the federal court proceedings and characterizes the issue as being only applicable to analyzing a procedural bar to an ineffective assistance of counsel claim. Counsel cannot be situationally or partially conflicted. Counsel is or is not conflicted overall. Respondent ignores Oklahoma's role, responsibility, and consequences of providing conflicted counsel to Petitioner.

As a matter of law, conflicted counsel cannot be deemed to be effective. Respondent nonsensically asserts "whether appellate counsel challenged the State's exercise of prosecutorial authority is irrelevant." BIO at 3. If Oklahoma had not provided conflicted counsel, Petitioner would not be in this current position. The *McGirt* decision is the proof of that. The OCCA denied Petitioner's post-conviction application because he did not raise a jurisdictional issue before his state conviction was final.

## **CONCLUSION**

As demonstrated above, Petitioner's case is exceptional as it presents a uniquely compelling reason for this Court to grant this Petition for a Writ of Certiorari. Below, Oklahoma, who seeks to impose the death penalty upon Petitioner,

provided Petitioner with conflicted trial and appellate counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Oklahoma's actions denied and prevented Petitioner the opportunity to present a jurisdictional issue to the Oklahoma courts. The United States District Court for the Northern District of Oklahoma placed specific limitations on the counsel it appointed to represent Petitioner. These court-ordered limitations prevented counsel from amending Petitioner's petition to include a jurisdictional issue when the court found Oklahoma provided conflicted counsel to Petitioner. In compliance with existing Oklahoma law that did not contain any procedural bars, Petitioner filed his second post-conviction application, so there was no need to couple the conflicted-counsel issue with the jurisdictional issue and no foreseeable reason to anticipate a *Matloff v. Wallace* issue. This is bolstered by the actions of the OCCA in accepting the application, ruling it was reviewable under Oklahoma law, and remanding it for an evidentiary hearing without any *Matloff v. Wallace* issue. Oklahoma appointed counsel to represent Petitioner for the evidentiary hearing. OCCA stayed Petitioner's hearing to decide *Matloff v. Wallace*, which was not state law when Petitioner filed his application. The OCCA only invited representatives of the Attorney General of Oklahoma and the Choctaw Nation to enter appearances and file briefs, even though its decision would dictate the disposition of Petitioner's application.

Oklahoma prevented Petitioner from presenting a defense to the overall question or a defense specific to his case. Oklahoma explicitly prevented the counsel it provided to Petitioner to amend the application to include the conflicted-counsel issue. The OCCA declined to apply *McGirt* retroactively to Petitioner, but ironically opted to apply *Matloff v. Wallace* retroactively to Petitioner. At every judicial level through no fault of his own, Petitioner was prevented from presenting either his jurisdictional issue or his conflicted-counsel issue. This fact pattern warrants this Court's intervention to vindicate Petitioner's Sixth Amendment right to conflict-free counsel and Fourteenth Amendment right to due process that Oklahoma denied Petitioner. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

*s/ Emma V. Rolls*

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Dated this 28th day of January, 2022

**BOEHEIM | FREEMAN, P.L.L.P.**  
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September 14, 2021

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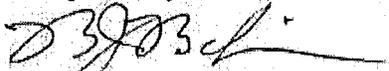
Mr. Cannon,

I am writing to you in response to your letters and phone calls regarding your appeal. As we discussed on the phone, the State of Oklahoma has informed us they are filing a Motion to Dismiss your appeal based on McGirt, and that Motion is due September 30<sup>th</sup>. Once received, I will file the Defense Response by October 19<sup>th</sup>, which will be followed by a Motion Hearing on November 10<sup>th</sup>.

I know from your letters and our discussion that there are numerous other aspects of your case you would like me to explore further, but the Judge has explicitly instructed me that the only aspect I can address is the appeal based on McGirt. I know that this is not what you want to hear, but it is the Court's instruction and I must follow it.

Once I receive the State's Motion, I will send that along to you for your review.

Respectfully,



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