

No. 21-6889

**ORIGINAL**

IN THE  
SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

Michael D. Lowery — PETITIONER  
(Your Name)

John O'Connor vs.  
Oklahoma Attorney General RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Oklahoma Court of Criminal Appeals  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael D. Lowery #197216  
(Your Name)

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(Address)

Helena, Oklahoma 73741  
(City, State, Zip Code)

(572) 568-6000  
(Phone Number)

QUESTION(S) PRESENTED

- (1) Whether Article 6 of the 1830 Treaty of Dancing Rabbit Creek, 7 Stat 333 reserves criminal jurisdiction to the United States for crimes committed by a Choctaw freedman or his descendants against a citizen of the United States when said crimes occurred without the boundaries of the reservation?
- (2) Whether Congress has authorized the State of Oklahoma to exercise jurisdiction over crimes committed by Choctaw Indians, their descendants, Choctaw freedmen, their descendants or spouses of Choctaw Indian tribal members wherever committed?
- (3) Whether Oklahoma may refuse to apply this Court's holdings in McGirt v. Oklahoma, 140 S.Ct. 2452 to a final conviction in light of this Court's holding Montgomery v. Louisiana,

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_, or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the Oklahoma County District court appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

STATEMENT OF THE CASE

Petitioner, a descendant of a Choctaw freedman, was charged and convicted of crimes that occurred outside the boundaries of any reservation by the State of Oklahoma's Oklahoma County District Court. Treaty provisions specify that Choctaws must be prosecuted by United States authorities rather than Oklahoma authorities.

Petitioner raised a jurisdictional claim through state collateral review but was denied relief.

## REASON TO GRANT CERTIORARI

### GROUND ONE

The Trial Counsel lacked jurisdiction because provisions of treaties between the Choctaw nation and United States limits jurisdiction to the Federal Government.

#### Supporting Facts:

Petitioner, a descendant of a Choctaw Freedman, was prosecuted and convicted of committing a crime of violence against the person of a citizen of the United States, the alleged crime is Manslaughter.

### GROUND TWO

The Trial Court lacked jurisdiction because Congress has never granted the State of Oklahoma criminal jurisdiction over Choctaw tribal members or their descendants.

#### Supporting Facts:

Petitioner, a descendant of a Choctaw Freedman, was prosecuted and convicted of committing a crime of violence against the person of a citizen of the United States, the alleged crime is Manslaughter.

### GROUND THREE

The Oklahoma Court of Criminal Appeals (OCCA) ruling in *Matloff v. Wallace* is contrary to clearly established law.

#### Supporting Facts:

The OCCA held in *Matloff* that Petitioner could not receive relief because *McGirt v. Oklahoma* is not retroactive. Therefore, Petitioner was denied relief without ruling on the merits of his claim.

According to the United States Constitution, Congress has exclusive and plenary power to confer jurisdiction to a government over an Indian reservation. (US Const., art. I § 8) (*Ex parte Wilson*, 140 US 575, 577 (1891)) (Only Congress has “power... to provide for the punishment of all offenses committed [on Indian reservations], by whomsoever committed.”) Congress exercises this power through treaty ratification or enactment of federal statute.

### **A. Treaties**

The United States Constitution declares that a federal treaty, including an Indian treaty, and just like a federal statute, is “the supreme law of the land.” (US Const., art. VI § 2) Treaties, therefore are superior to state constitutions and state statute. (*Id*) If a state law conflicts with the provisions of a treaty, the treaty prevails.

Additionally, ambiguities in treaties must be resolved in favor of the Indians. (*Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 392 (1976)) Treaties must be interpreted as the Indians would have understood them at the time the treaty was signed. (*Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970)). Finally, treaties must be construed liberally in favor of the Indians. (*Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985))

With these legal standards in mind, the Treaties with the Choctaw/Chickasaw Nation states in relevant part:

“The Government and people of the United States are hereby obligated to secure to the said Choctaw Nation of Red People the jurisdiction of government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws of the government of the Choctaw Nation of Red People and their descendants....” [Article 4, Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830))]

“Should a Choctaw or any party of Choctaws commit acts of violence upon the person or property of a citizen of the United States...such person so offending shall be delivered up to an officer of the United States...” [Article 4, Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830))]

In the 1866 Treaty of Washington, which affirmed the 1830 treaty provisions, provided for tribal membership for former Choctaw/Chickasaw Nation slaves and others of African descent living in Choctaw/Chickasaw Nation (Article 3, Treaty of Washington, 14 Stat 769) and provides for the authority of a general council of the so-called Five Civilized Tribes for “the

administration of justice" among tribal members, members from other tribes and "person other than Indian."

Both Treaties were signed long before Oklahoma statehood. So, the only understanding the Choctaw/Chickasaw Indians could have had with respect to the meaning of these treaties at the time of their signing is that jurisdiction, whether in civil or criminal cases, regardless of the victim or perpetrator, that arise within the boundaries of Choctaw/Chickasaw Nation reservation, rests exclusively with the Tribe, with some oversight from the United States. Clearly, the treaties make no provision for Oklahoma or any other State to exercise jurisdiction over crimes committed within Choctaw/Chickasaw Nation boundaries.

## **B. Federal Statutes**

As stated above, the Supremacy Clause of the Constitution (US Const., art. VI § 2) states that federal treaties and federal statutes are the supreme law of the land. Acts of Congress may prescribe or limit a government's jurisdiction over crimes committed on an Indian reservation. With respect to jurisdiction over the Choctaw/Chickasaw Nation reservation, Congress has acted a number of times. First, Congress declared that major crimes committed by or any crime committed against Indians on the reservation must be tried by the federal government exclusively. (See 18 USC § 1152-1153) Second, non-major crimes committed and domestic violence crimes occurring on the reservation may be tried by either the Tribe or the United States, but exclusive of state jurisdiction. (25 USC § 1301, 1304) Third, in the Oklahoma Enabling Act, 34 stat 267, Congress reserved jurisdiction over Indian reservations to the United States. Fourth, Congress passed the Oklahoma Indian Welfare Act which provides for the full restoration of tribal government for tribes in Oklahoma. Fifth, in 1953, Congress passed Public Law 280 which authorizes a pathway for States to acquire jurisdiction over Indian reservations within the State's borders. However, Oklahoma never avails itself of this opportunity.

Neither the State, the Supreme Court held in *Worcester v. Georgia*, 31 US 515 (1832), nor federal government, the Court held in *Ex parte Crow Dog*, 109 US 556 (1883), may exercise criminal jurisdiction over crimes committed on the reservation unless Congress has expressly conferred that power. Nothing in these acts confers jurisdiction to Oklahoma over any Indian reservation or crimes committed therein, as in the instant case.

However, a State may exercise criminal jurisdiction over non-Indians who commit crimes against other non-Indians on the reservation, provided no treaty stipulation or federal statute declares otherwise. (US v. McBratney, 104 US 621 (1881)) Oklahoma could not have acquired jurisdiction over non-Indian-against-non-Indian crimes on the Choctaw/Chickasaw Nation reservation because the Oklahoma Enabling Act reserved such jurisdiction to the United States (McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) and the treaties between the United States and Choctaw/Chickasaw Nation reserve jurisdiction to the Tribe and/or the United States. Oklahoma's constitution itself cedes such jurisdiction to the United States. (OK Const, art I § 3)

Therefore, the only conclusion is that Oklahoma and her courts are without jurisdiction to prosecute criminal cases regarding alleged crimes occurring on an Indian reservation. As the Tenth Circuit said in US v. Magnan, 622 Fed Appx 719 (2015), "accordingly, when a court 'assume[s] a jurisdiction which in fact it could not take...all the proceedings in that court must go for naught' Riverdale Cotton Mills v. Ala & Ga Mfg Co, 198 US 188, 195 (1905)." In other words, any conviction pronounced by an Oklahoma court regarding a crime alleged to have occurred at a location within the boundaries of the Choctaw/Chickasaw Nation are *void ab initio* as a matter of law and are of no legal effect. (Johnson v. Zerbst, 304 US 458, 468 (1938) ("The judgment of conviction pronounced by a court without jurisdiction is void"))

### The Effect of Matloff

The Oklahoma Court of Criminal Appeals held in Matloff v. Wallace, 2021 OK CR 23, that McGirt may not be applied through a post-conviction proceeding to void a conviction that is final, i.e. exhausted the direct appeal process. However, Matloff should not be applied to post-conviction proceedings involving a claim of lack of jurisdiction due to treaty provision or federal statutes for three primary reasons: (1) such a conviction is not final within the meaning of the law, (2) Matloff contradicts US Supreme Court precedent and, (3) Matloff must operate prospectively only.

First, as described above, the state district court is without jurisdiction in cases that occur within the boundaries of the Choctaw/Chickasaw Nation reservation; a fact that would clearly appear on the face of the record of the case. Accordingly, any conviction pronounced by a state court regarding such a criminal case would be void ab initio and therefore not a conviction under

law. Such “conviction” then could never be final under Matloff since the conviction doesn’t actually exists.

Additionally, in cases where a defendant pled guilty and took no appeal, Matloff would not be a barrier to that defendant seeking post-conviction relief. (See Samantha Perales v. State, Delaware County District Court, according to media reports of the case)

Second, the US Supreme Court held in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), “where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.” No constitutional right is more substantive and fundamental than the right to be tried in a court of competent jurisdiction. As early as 1816, the High Court said “States may not disregard a controlling constitutional command in their own courts.” Martin v. Hunter’s Lessee, 1 Wheat 304, 340-41; *See also Yates v. Aiken*, 484 US 211, 218 (1988)

McGirt asked and answered only one substantive fact question: Does the Choctaw/Chickasaw (Creek) Nation reservation continue to exist? Using a procedural rule established in Solem v. Bartlett, 465 US 463 (1984), the US Supreme Court determined, yes, the reservation continues to exist and had not be disestablished by Congress. The OCCA made to same determination using the same 1984 procedural rule with respect to the Choctaw/Chickasaw Nation reservation. (Sizemore v. State), 2021 OK CR 6) No law changed. How the law is to be applied was not changed. The only thing that McGirt and Sizemore changed was a substantive fact: the reservation continues to exist. This leads to a different outcome when clearly established law is applied to it.

Third, Matloff itself should only be applied, if at all, prospectively to post-conviction proceedings filed after the OCCA decision was handed down and the mandate issued. Matloff applied retroactively would be tantamount to an ex post facto law constitutional violation. (US Const., art.I § 10)

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Lavery

Date: Jan 3rd 2022