

No. 21-7173

FILED
FEB 08 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

Herman Snell, II — PETITIONER
(Your Name)

vs.

STATE OF OKLAHOMA — 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

Herman Snell II
(Your Name)

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(Address)

Hominy OK 74035
(City, State, Zip Code)

918-524-1300
(Phone Number)

QUESTIONS PRESENTED

1. McGIRT V. OKLAHOMA, 140 S.Ct. 2452 (2020) WAS A COLLATERAL PROCEEDING: DID THE UNITED STATES SUPREME COURT ENACT A NEW PROCEDURAL RULE OF LAW IN OKLAHOMA — THAT OVERRULES SUBJECT MATTER JURISDICTION — IN ITS DECISION IN McGIRT.
2. IS THE STATE OF OKLAHOMA IN VIOLATION OF THE FUNDAMENTAL MISCARRIAGE OF JUSTICE CLAUSE FOR FAILING TO VOID, VACATE, AND DISMISS PETITIONER'S STATE CONVICTION WHEN THE STATE IS FULLY AWARE THAT IT NEVER HAD SUBJECT MATTER JURISDICTION OVER PETITIONER.

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:

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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 N/A to the petition and is

☐ reported at N/A; 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☐ is unpublished.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 N/A to the petition and is

☐ reported at N/A; 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☐ is unpublished.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 PC-2021-1076; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Mayes County District court appears at Appendix B to the petition and is

☐ reported at CF-1994-257; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was N/A.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was November 12, 2021.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN

All Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall ~~abridge~~ the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws.

UNITED STATES CONSTITUTION ART. II § 6, SUPREMACY CLAUSE

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all ~~Treaties~~ made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the ~~United~~

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (CONT'D)

~~STATES~~ LAND; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding

OKLAHOMA CONSTITUTION ART. I § 3

The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, Tribe, or Nation, and that until the title to any such public land shall have been ~~an~~ extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States....

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (CONT'D)

FEDERAL MAJOR CRIMES ACT 18 U.S.C 1153(a)

Any Indian who commits against the person or property of another Indian or ~~person~~ other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under Chapter 109A, incest, a felony assault under Section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under Section 661 of this Title within Indian Country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States

STATEMENT OF THE CASE

Petitioner is Native American and a Certified Member of the Cherokee Nation. Petitioner was charged with a major offense within the boundaries of Indian Country.

On Saturday May 1, 1994 (Petitioner was 14 years old at that time), Petitioner met up with a few friends at a party. Everyone, including Petitioner, was drinking alcohol, and was drunk.

Later in the evening, Petitioner and a friend went to a neighbors house to hang out. While at my neighbor's house a fight began between my friend my neighbor and ~~me~~ Petitioner. The fight stopped for a few minutes, but then up again. The fight ended in a ditch across the road from my neighbor's house. Petitioner and his friend left and returned to the party and continued to drink through the night. When it began to get light in the morning, Petitioner and his friend walked to Petitioner's home.

Later that day, Sunday May 2, 1994

STATEMENT OF THE CASE (Cont'd)

(at approximately 4:00 p.m.), the Mayes County Oklahoma Sheriff's Department, the Oklahoma State Bureau of Investigation (OSBI), and the City of Salina, Oklahoma Police Department arrested Petitioner and his friend for the death of my neighbor, Mr. Robert Ballard.

Petitioner and his friend were unaware that Mr. Ballard was dead at the time of their arrest.

In or about October 1994, (Petitioner was 14 years old) the State Certified Petitioner as an adult.

On September 12, 1994, Petitioner entered a Nolo Contendere plea for first-degree murder and received a sentence of life without parole.

REASONS FOR GRANTING THE PETITION

I.

THE UNITED STATES SUPREME COURT (COURT) DID NOT ENACT A NEW PROCEDURAL RULE OF LAW IN OKLAHOMA - THAT OVERRULES SUBJECT MATTER JURISDICTION - IN ITS DECISION IN McGIRT V. OKLAHOMA, 140 S. CT. 2452 (2020)

In McGirt (a collateral proceeding), the Court verified to the State of Oklahoma that Congress had never disestablished the Moscogee Creek Nation's (Creek Nation) treaty with the United States.

The Court further verified that the Creek Nation was (at this time) and had been "Indian Country" before Oklahoma's statehood, and the State of Oklahoma Never had subject matter jurisdiction over Native Americans who commit major offenses within the boundaries

Of Indian Country. see U.S.C.
18 § 1153 (a).

The Court's verification that the treaty was not disestablished required the State of Oklahoma to vacate and dismiss McGirt's state conviction because Oklahoma courts lacked subject matter jurisdiction.

Shortly after the McGirt decision the Oklahoma Court of Criminal Appeals (OCCA) verified that the treaty between the Cherokee Nation and the United States had not been disestablished, and the Cherokee Reservation was Indian Country.

After the McGirt decision, the State of Oklahoma attempted to avoid applying federal Indian law (18 U.S.C. 1153 (a)) to vacate and dismiss Native's Unconstitutional state convictions.

After multiple failed attempts to circumvent McGirt, and get the Court to reverse McGirt, the State of Oklahoma determined McGirt had enacted a "new procedural rule of law" in Oklahoma.

According to the OCCA, this "new procedural rule" enacted by the Court prevents Oklahoma from applying McGirt retroactively. Therefore, Oklahoma cannot vacate and dismiss Petitioner's unconstitutional conviction. See State ex rel. Matloff v. Wallace, 2021 OK CR 21, ____ P.3d ____.

The retroactivity of McGirt has absolutely nothing to do with the State vacating and dismissing Petitioner's unconstitutional conviction. McGirt verified that the State of Oklahoma never had subject matter jurisdiction to begin Petitioner's legal proceedings because he is Native and was charged with a major offense in Indian Country.

However, after the OCCA's decision in Wallace, it is clear that the State of Oklahoma has determined this "Phantom Law" overrules subject matter jurisdiction and refuses to acknowledge that it never had the authority to begin Petitioner's legal proceedings.

The Court's verification that a treaty (which as existed since 1820) was not disestablished cannot, in any manner, be construed as a new procedural rule of law for the State of Oklahoma. In fact, the Court explained in McGirt that it was not telling the State anything new. See McGirt Supra.

Moreover, it is a fundamental principal of our jurisprudence that a defendant be tried in a court that has jurisdiction over his case. See United States Constitution Amendment 14, the Supremacy Clause Art II § 6, and the Oklahoma Constitution Art. II § 3. Clearly no non-existing law fabricated by the State of Oklahoma can or will overrule jurisdiction.

In addition, Oklahoma is fully aware that the Cherokee Nation, by and through treaty, is a "domestic dependant" of the United States Government. See Exhibit A, The Oklahoma Legal Directory 2017, pg. 105

Therefore, for the Court (in McGirt) to have enacted a new procedural rule in Oklahoma, the Court would have had to amend the treaty between the United States and the Creek Nation.

The Court does not have the authority/power to amend any treaty; Only Congress has the power to make and amend treaties.

The sole reason that the State of Oklahoma will not vacate and dismiss Petitioner's illegal state conviction is because the State has unconstitutionally determined that the Court enacted a new procedural rule of law in Oklahoma in its decision in McGirt, and this new law overrides subject matter jurisdiction.

The Court did not enact a new rule of law in Oklahoma and No law can override subject matter jurisdiction.

II

THE STATE OF OKLAHOMA IS IN VIOLATION OF THE FUNDAMENTAL MISCARriage OF JUSTICE CLAUSE FOR FAILING TO VACATE AND DISMISS PETITIONER'S UNCONSTITUTIONAL STATE CONVICTION BECAUSE THE STATE WAS FULLY AWARE THAT IT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER PETITIONER BEFORE HIS LEGAL PROCEEDINGS BEGAN.

Fundamental Miscarriage of Justice is defined in Habeas Statute 2241 (d)(C).

Thirty-one (31) years before the Court heard McGirt, the State of Oklahoma was fully aware it did not have subject matter jurisdiction over Petitioner.

In 1989 (5 years before Petitioner entered his plea with the State), the OCCA ruled that the State of Oklahoma did not have jurisdiction on crimes committed by Indians or against Indians within Indian Country. Klondt v. Oklahoma, 782 P.2d 401

(Okla. Cr. App. 1989)

Clearly, Klondt pre-empted the State from accepting Petitioner's plea deal under Oklahoma law. See also Oklahoma Constitution Art I § 3.

Moreover, federal law as set forth in 18 U.S.C § 1153(a) (the Major Crimes Act), holds that Natives who commit major offenses within the boundaries of Indian Country are under the sole jurisdiction of the United States Government.

"The general rule is that States may apply their own neutral procedural rules to federal claims, Unless those rules are pre-empted by federal law." STATE ex. rel MATLOFF v. Wallace — P.3d. —, 2021 WL 3578089, Case No. PR 2021-366 (Okla. Crim. App. Aug. 12, 2021) Petition for Cert. filed, denied sub. nom., Parish v. Oklahoma (U.S. Sept. 29, 2021) (No. 21-467); citing Howlett v. Rose, 496 U.S. 356, 372 (1990); see Parish v. Oklahoma, O.P.P. 9.

In Petitioner's Case, it is clear that the State was fully aware that it lacked subject matter jurisdiction under both federal and State law.

However, now, the State asserts that subject matter jurisdiction has been overruled by a non-existing procedural rule enacted by the Court in McGirt.

Petitioner's conviction is void. In Ex Parte Wilson, 114 U.S. 417, 5 S.Ct. 935, 29 L. Ed 89 (1885), the Court held the defendant was entitled to a writ of habeas corpus because the trial Court had exceeded its jurisdiction in trying, convicting, and sentencing defendant. The Court further held that when a court lacks "jurisdiction," the court must "discharge the prisoner from confinement."

Moreover, the Court held, "[A]bsent a showing through" clear and convincing evidence that but for a constitutional error, no

reasonable jury would have found [defendant] guilty. Sawyer v. Whitley, 505 U.S. 333 (1992), Ante, at 1.

Petitioner asserts that no Oklahoma court had the authority to convene any jury in his case.

In re Mayfield, 141 U.S. 107 (1891), the Court granted a writ of habeas Corpus on an original jurisdiction claim where a Cherokee citizen had been unlawfully arrested, tried, and imprisoned by Oklahoma, "It is needless to say that the fact, if it be a fact, that the laws of Cherokees make no provision for the punishment of the crime of adultery would not extend to the courts of the United States a power to punish this crime that did not ~~exist~~ otherwise exist. As Mayfield was a member of the Cherokee Nation by adoption, if not by nativity, and was the sole party to these proceedings, we think it is clear that under the treaties and Acts of Congress, he is amenable only to the courts

Of the Nation, and that his petition should be granted. Id. at 141.

Clearly, the State of Oklahoma is in violation of the Fundamental Mischance of Justice Clause for failing to void, vacate, and dismiss Petitioner's unconstitutional State conviction when the State is fully aware that it Never had subject Matter jurisdiction to begin Petitioner's legal proceedings. See Kontreck, v. Ryan, 124 S.Ct 906 (2004) (When the Court lacks subject matter jurisdiction, the Court shall dismiss the action)

Petitioner has provided the Court a copy of his C D I B Card to prove he is Native. [See EXHIBIT B]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Herman Snell II

Date: 2/08/22