

No. 21-467

In The
Supreme Court of the United States

—◆—
CLIFTON MERRILL PARISH,

Petitioner,

v.

OKLAHOMA, ET AL.,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
Of Oklahoma**

—◆—
**BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONER**

—◆—
ANDREA DIGILIO MILLER
Counsel of Record
800 North Harvey Ave., Suite 317
Oklahoma City, OK 73102
(405) 208-6161-telephone
admiller@okcu.edu

NICOLE DAWN HERRON
KATRINA CONRAD-LEGLER
OKLAHOMA CRIMINAL DEFENSE LAWYER'S ASSOCIATION
P.O. Box 2272
Oklahoma City, OK 73101

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
1. The Oklahoma Court of Criminal Appeals’ outcome determinative analysis in <i>State ex rel. Matloff v. Wallace</i> is contrary to long-standing United States Supreme Court precedent and will bar state in- mates serving under void judgments and sentences from relief	4
2. Oklahoma’s repeated assertions that <i>McGirt v. Oklahoma</i> has thrown the criminal justice system into chaos are overstated and any uncertainty that exists is the direct result of the State of Oklahoma’s repeated attempts to undermine the Court’s holding	10
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
CASES	
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	7
<i>Bench v. State</i> , 2021 OK CR 12, ___ P.3d ___	4, 7
<i>Bosse v. State</i> , 2021 OK CR 3, 484 P.2d 286.....	4
<i>Cravatt v. State</i> , 1992 OK CR 6, 825 P.2d 277.....	7
<i>Edwards v. Vannoy</i> , ___ U.S. ___, 141 S.Ct. 1547 (2021)	8
<i>Ferrell v. State</i> , 1995 OK CR 54, 902 P.2d 1113	7
<i>Hogner v. State</i> , 2021 OK CR 4, ___ P.3d ___	4
<i>Johnson v. United States</i> , 576 U.S. 591 (2015).....	8
<i>McGirt v. Oklahoma</i> , 140 S.Ct. 2452 (2020)	<i>passim</i>
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983).....	5
<i>Saffle v. Parks</i> , 494 U.S. 484 (1990)	7
<i>Schriro v. Summerlin</i> , 542 U.S. 348 (2004)	7, 8
<i>Spears v. State</i> , 2021 OK CR 7, 485 P.3d 873	4
<i>State v. Lawhorn</i> , 2021 OK CR 37, ___ P.3d ___	5
<i>State ex rel. Matloff v. Wallace</i> , 2021 OK CR 21, ___ P.3d ___	<i>passim</i>
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	8
<i>United States v. Cotton</i> , 535 U.S. 625 (2002).....	6
<i>United States v. Cuch</i> , 79 F.3d 987 (10th Cir. 1996)	4, 5
<i>Welch v. United States</i> , 578 U.S. 120 (2016).....	8

TABLE OF AUTHORITIES—Continued

	Page
CONSTITUTIONAL PROVISIONS	
Okla. Const. art. 1, § 3	6
Okla. Const. art. 7, § 1	6
Okla. Const. art. 7, § 7	6
U.S. Const. art. VI, cl. 2.....	5
STATUTES	
Okla. Stat. tit. 22, § 1080(b)	2, 7
18 U.S.C. § 1153(a).....	5
ARTICLES	
Curtis Killman, <i>Tusla U.S. Attorney’s Office adds 24 prosecutors to help with surge in cases due to McGirt ruling</i> , <i>Tulsa World</i> , (September 29, 2021)	11
Amelia Mugavero, <i>Federal prosecutors busy with cases even after new jurisdiction ruling</i> , <i>News9.com</i> (September 4, 2021).....	11
<i>Tribal court’s response to expanded criminal authority</i> , <i>American Bar Association Journal</i> , https://www.americanbar.org/news/abanews/aba-news-archives/2021/10/mcgirt-v-oklahoma-program/	11

TABLE OF AUTHORITIES—Continued

	Page
<i>Cherokee Nation files 1000th case in Tribal Court following McGirt ruling</i> , Anadisgoi, https://anadisgoi.com/index.php/government-stories/601-cherokee-nation-files-1000th-case-in-tribal-court-following-mcgirt-ruling (June 7, 2021)	11
<i>Judiciary Supplements Judgeship Request, Prioritizes Courthouse Projects</i> , https://www.uscourts.gov/news/2021/09/28/judiciary-supplements-judgeship-request-prioritizes-courthouse-projects?utm_campaign=usc-news&utm_medium=email&utm_source=govdelivery (September 28, 2021)	12

INTEREST OF AMICUS CURIAE¹

The Oklahoma Criminal Defense Lawyer's Association ("OCDLA"), established in 1976, is Oklahoma's only statewide criminal defense organization. OCDLA counts among its 400 members private practitioners, public defenders, law professors, and agency attorneys who defend criminal cases in the state, tribal, and federal trial and appellate courts in the State of Oklahoma. OCDLA's stated mission is to protect and ensure by rule of law those individual rights guaranteed by the Oklahoma and federal constitutions in criminal cases; to resist any effort to curtail those rights; to encourage cooperation between lawyers engaged in the furtherance of these objectives through educational programs and other assistance; and through this cooperation, education, and assistance to promote justice and common good.

To those ends, OCDLA has a strong interest in any matter relating to the subject matter jurisdiction, or lack of subject matter jurisdiction, of the state in prosecuting criminal cases and the timing with which challenges to jurisdiction may be brought. Additionally, OCDLA has an interest in the fair, equitable, and regular application of the law. The holding in *State ex rel.*

¹ No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties were timely notified and have consented to its filing.

*Matloff v. Wallace*² that *McGirt v. Oklahoma*³ does not apply retroactively conflicts with this Court’s long-standing jurisprudence on the retroactivity of substantive rules.⁴ That fundamental error of federal law warrants this Court’s review because it deprives scores of Oklahoma post-conviction petitioners the ability to challenge the prosecuting court’s subject matter jurisdiction—even though that issue generally cannot be waived and may be raised at any time. The holding in *Matloff* also contravenes the Oklahoma Uniform Post-Conviction Act, which specifically allows anyone convicted and sentenced in state court to collaterally attack his or her conviction based on the court’s lack of jurisdiction. *See* Okla. Stat. tit. 22, § 1080(b).

Further, OCDLA has an interest in ensuring that information presented to this Court is accurate. The State of Oklahoma continues to submit in filings to this Court that tribal courts and federal courts in Oklahoma are ill equipped to handle cases in the aftermath of *McGirt*, and therefore, *McGirt* should be overruled. It is likely that in this case the State will argue in its brief in opposition that if the Court reverses the underlying opinion in *Parish v. Oklahoma* even more chaos will ensue. The reality is that tribal

² 2021 OK CR 21 (August 12, 2021).

³ 140 S.Ct. 2452 (2020).

⁴ The Oklahoma Criminal Defense Lawyers Association presented these arguments to the OCCA in an amicus brief filed in *State ex rel. Matloff v. Wallace*. *See* Oklahoma Criminal Defense Lawyer’s Association Amicus Br. 4-6, *State ex rel. Matloff v. Hon. Jana Wallace*, No. PR-2021-366 (Okla. Crim. App. July 15, 2021).

courts and federal courts in Oklahoma have already adjusted to the consequences of *McGirt*, including handling cases vacated on post-conviction appeal.

◆

SUMMARY OF ARGUMENT

The Petition should be granted because this Court is the only Court that can review the Oklahoma Court of Criminal Appeals ruling in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___, in which the court of last resort for criminal cases in Oklahoma disregarded applicable United States Supreme Court precedent to achieve the result desired by the State and the court. In *Matloff*, the OCCA ruled that *McGirt v. Oklahoma*⁵ was a new rule of procedure that does not apply retroactively. That decision leaves many Oklahoma inmates without a mechanism to challenge convictions and sentences that are *void ab initio* because they were tried in state courts that did not have subject matter jurisdiction. By so holding, the Court relied on inapplicable United States Supreme Court precedent and ignored applicable precedent that dictates the opposite result.

The State of Oklahoma has argued in other cases, and will continue to argue, that if *McGirt* stands, the criminal justice system in Oklahoma will collapse. By extension, the State will likely urge here that the system cannot handle all the cases that would result if *McGirt* applies retroactively. That is simply not the case. Tribal and federal courts in Oklahoma have

⁵ 140 S.Ct. 2452.

adjusted and continue to adjust to the realities of post-*McGirt* litigation. Moreover, the number of inmates released to the street is fewer than predicted. *McGirt* simply has not caused irreparable disruption in Oklahoma.

◆

ARGUMENT

- 1. The Oklahoma Court of Criminal Appeals' outcome determinative analysis in *State ex rel. Matloff v. Wallace* is contrary to longstanding United States Supreme Court precedent and will bar state inmates serving under void judgments and sentences from relief.**

One inevitable question left open in the wake of the *McGirt* holding was what impact, if any, it would have on judgments that were final before the opinion was issued. Initially, the Oklahoma Court of Criminal Appeals ruled that because *McGirt* presented a non-waivable challenge to criminal subject matter jurisdiction, it was cognizable under the Uniform Post-Conviction Act. See *Bosse v. State*, 2021 OK CR 3, 484 P.2d 286; *Bench v. State*, 2021 OK CR 12, ___ P.3d ___; *Spears v. State*, 2021 OK CR 7, 485 P.3d 873; *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___. Relying in part on the Tenth Circuit Court of Appeals opinion in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), the Court in *Matloff* reversed course finding that *McGirt* created a new rule of procedure that does not apply retroactively. *Matloff*, at ¶¶ 14-15.

In *Matloff*, the Court explained that the backtracking was because *United States v. Cuch* had not been previously brought to its attention. *Id.* at ¶ 14. The Court found the reasoning in *Cuch* “very persuasive in our analysis of the state law question today.” *Id.* at ¶ 15. Despite the OCCA’s effort to frame its holding in *Matloff* as an exercise of its “independent state law authority to interpret the remedial scope of the state post-conviction statutes,” even a perfunctory reading of the opinion reveals that the court’s holding on the jurisdictional issue is, in fact, based on federal constitutional law.⁶ In applying federal constitutional law, the OCCA’s analysis and conclusions are deeply flawed and violate long-standing notions of both subject matter jurisdiction and substantive law.

The central issue of *McGirt* was what court has jurisdiction to try cases involving crimes committed by Native Americans on tribal land. The Major Crimes Act specifically divests states of jurisdiction to prosecute any “Indian” who commits an enumerated offense while in “Indian Country.” *See* 18 U.S.C. § 1153(a). This constitutes the supreme law of the land under U.S. Const. art. VI, cl. 2. The issue clearly relates to a court’s subject matter jurisdiction over the case. That was most recently recognized by the OCCA in the October 21, 2021 opinion in *State v. Lawhorn*, 2021 OK CR 37, ¶ 3, ___ P.3d ___ (“That ruling meant that Oklahoma lacked jurisdiction to prosecute McGirt, an Indian, because he committed his crimes on the Creek Reservation, i.e. in Indian Country, and the federal government has

⁶ Accordingly, it is reviewable by this Court. *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983).

jurisdiction of such criminal matters under the MCA.”) The modern-day understanding of subject matter jurisdiction relates to a court’s statutory or constitutional power to adjudicate a case. *United States v. Cotton*, 535 U.S. 625, 630 (2002). Multiple state constitutional provisions inform the scope of jurisdiction that state, federal, and tribal land courts have over crimes committed by Native Americans on tribal land. Okla. Const. art. 1, § 3 states in pertinent part:

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 extinguished by the United States, **the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.** (emphasis added)

Article 7, § 1 confers judicial powers to the Oklahoma Supreme Court, the Oklahoma Court of Criminal Appeals and the district courts, among other entities. Okla. Const. art. 7, § 7 states “The District Court shall have unlimited original jurisdiction of all justiciable matters, . . .” Taken together, these provisions confer general subject matter jurisdiction to the courts in the State of Oklahoma unless such jurisdiction has been “extinguished” by the United States. Here, federal law has extinguished such jurisdiction. Because *McGirt* has recognized that federal and tribal courts, not state courts, have jurisdiction in these cases where Congress has not extinguished or disestablished tribal land, the

state lacks jurisdiction over those cases. Consistent with this principle is the OCCA's previous recognition in *Cravatt v. State*, 1992 OK CR 6, ¶ 19, 825 P.2d 277, 280, that:

[T]here is a strong presumption that the sovereignty of Indian tribes and their people are to be afforded a high degree of protection from infringement by state governments. There is an equally compelling presumption, arising from the United States Constitution, that the power to regulate and control Indians and their related properties resides with the federal government.

Subject matter jurisdiction has traditionally been recognized by this Court, as well as the OCCA, as a requirement that cannot be waived and can be challenged at any time and should be considered when fairly in doubt. *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009); *Bench v. State*, 2021 OK CR 12, ¶ 15, ___ P.3d ___. Accordingly, the Oklahoma Uniform Post-Conviction Act, Okla. Stat. tit. 22, § 1080(b), provides a mechanism for those convicted of an offense in Oklahoma to challenge the jurisdiction of the court that sentenced them.

A rule is substantive if, among other factors, it involves a determination that places certain conduct or persons covered by the statute beyond the state's power to punish. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) citing *Saffle v. Parks*, 494 U.S. 484, 494-495 (1990). See also *Ferrell v. State*, 1995 OK CR 54, ¶ 7, 902 P.2d 1113, 1115. In fact, the *Summerlin* Court observed that such rules are not subject to the

retroactivity bar at all. *Id.* at 352, n.4. Anything that impacts a court’s “constitutional or statutory authority to adjudicate a case” must necessarily be categorized as substantive.

In *Edwards v. Vannoy*, ___ U.S. ___, 141 S.Ct. 1547, 1560, this Court abandoned the “moribund” rule of retroactivity established in *Teague v. Lane*, 489 U.S. 288 (1989). The *Teague* rule only required retroactive application of a new constitutional rule of criminal procedure if the new rule was a “watershed rule” that could not have been anticipated based on prior precedent of the Court. *Id.* at 301. However, as explicitly recognized by the *Edwards* Court, the *Teague* retroactivity rule did not apply to substantive rules. *Edwards*, 141 S.Ct. at 1555, n.3.

In so observing, the *Edwards* Court cited *Welch v. United States*, 578 U.S. 120 (2016). *Welch* considered whether *Johnson v. United States*, 576 U.S. 591 (2015), which declared the residual clause of the federal Armed Career Criminal Act void for vagueness, was a substantive rule that applied retroactively. *Welch*, 136 S.Ct. at 1261. Ultimately, the *Welch* Court concluded that the rule articulated in *Johnson* was substantive because it changed the substantive reach of the Armed Career Criminal Act and thereby altered the “range of conduct or the class of persons that the [A]ct punishes.” *Id.* at 1265.

Applying that criteria, it is clear that *McGirt*’s recognition that the tribal boundaries of the Muscogee (Creek) Nation (now extended to other tribes) were

never disestablished altered the “range of conduct or the class of persons” that could be prosecuted in state court. As such, the rule is clearly substantive. The general rule of retroactivity should apply to this substantive change in the law, if indeed the Court determines *McGirt* constitutes a change in the law at all.⁷ OCDLA presented this argument in an amicus brief when the case was pending before the OCCA. *See* Oklahoma Criminal Defense Lawyer’s Association Amicus Br. 4-6, *State ex rel. Matloff v. Hon. Jana Wallace*, No. PR-2021-366 (Okla. Crim. App. July 15, 2021).

Despite being squarely presented with this issue, the *Matloff* Court did not address the issue of whether the rule in *McGirt* is substantive. By ignoring the line of cases from this Court extending retroactive application to substantive rules, the Court achieved its desired result of foreclosing post-conviction relief for dozens of *McGirt* petitioners. However, achieving the desired result by ignoring applicable law and long-standing principles of the law is abhorrent to the rule of law. The Oklahoma Court of Criminal Appeals is the only appellate court in Oklahoma that has the power to review criminal cases. If this Court does not grant the petition currently before it and decide the critical question of retroactivity, dozens of Oklahoma inmates

⁷ Of course, this Court may determine there is actually nothing new about *McGirt* as it was largely dictated by decades-old treaties between the federal government and the tribes that failed to disestablish their reservations. If *McGirt* isn’t new, there is no question that under the Oklahoma Uniform Post-Conviction Act, an inmate has a mechanism to challenge the jurisdiction of the state court that sentenced him.

with final judgments, most of whom don't have counsel, will be unable to challenge their convictions despite the fact that the court that convicted and sentenced them did not have the jurisdiction to do so leaving incarcerated people to serve prison sentences that are *void ab initio*.

2. Oklahoma's repeated assertions that *McGirt v. Oklahoma* has thrown the criminal justice system into chaos are overstated and any uncertainty that exists is the direct result of the State of Oklahoma's repeated attempts to undermine the Court's holding.

Beginning with the State's Brief of Respondent in *McGirt* and throughout the numerous petitions currently pending before the Court asking for *McGirt*'s reversal, the State has repeatedly argued that *McGirt* will cause irreparable harm to Oklahoma's social, economic, and justice systems. The State's foreboding predictions have been overstated and have not come to pass in the fifteen (15) months since the opinion was released. As predicted in *McGirt* itself, many state inmates have chosen to forego challenging their convictions and instead complete their sentences due to the risk of additional prison time if prosecuted in federal court. *See McGirt*, 140 S.Ct. at 2479. Additionally, federal and tribal courts in Oklahoma have adjusted quickly and efficiently to handle the cases that have flowed to them following *McGirt*'s

recognition that the State does not have jurisdiction over crimes committed in Indian Country.

First, it is clear that the tribes and the federal government are prepared to meet the need to absorb cases following *McGirt*. The United States Attorney for the Northern District of Oklahoma has hired twenty-four (24) additional Assistant United States Attorneys to handle the increased case load. Curtis Killman, *Tulsa U.S. Attorney's Office adds 24 prosecutors to help with surge in cases due to McGirt ruling*, Tulsa World (September 29, 2021). The United States Attorney for the Eastern District of Oklahoma has likewise hired additional assistants and staff to handle the new case load. Amelia Mugavero, *Federal prosecutors busy with cases even after new jurisdiction ruling*, News9.com (September 4, 2021). United States Marshals have been cross-deputized in order to make arrests on tribal land. *Tribal court's response to expanded criminal authority*, American Bar Association Journal, <https://www.americanbar.org/news/abanews/aba-news-archives/2021/10/mcgirt-v-oklahoma-program/>. Tribal courts have adjusted in staffing to meet the increased caseload. For example, the Cherokee Nation has made a \$10 million investment in expanding its justice system. *Cherokee Nation files 1000th case in Tribal Court following McGirt ruling*, Anadisgoi, <https://anadisgoi.com/index.php/government-stories/601-chokeee-nation-files-1000th-case-in-tribal-court-following-mcgirt-ruling> (June 7, 2021). Finally, the United States Judiciary's policy-making body recommended 79 new federal judgeships, including five new

district court judges to serve the Northern and Eastern Districts of Oklahoma. United States Courts, *Judiciary Supplements Judgeship Request, Prioritizes Courthouse Projects*, https://www.uscourts.gov/news/2021/09/28/judiciary-supplements-judgeship-request-prioritizes-courthouse-projects?utm_campaign=usc-news&utm_medium=email&utm_source=govdelivery (September 28, 2021).

In addition, there is no crisis in representation. The Federal Public Defender's Office in the Northern and Eastern Districts of Oklahoma has gradually expanded and prepares for its continued expansion. Since last year, the office has doubled in size, and it is set to double again in 2022. Although there has been an immediate significant increase in cases, the Federal Public Defender's Office has received the help of more than 30 Federal Defender Offices from across the country. These offices, as well as CJA Panel Attorneys, have readily volunteered to step in as counsel for the overflow of cases appointed to the Federal Public Defender. Until the Federal Public Defender's Office is in a position to handle all of its increased caseload, which appears to be soon, its clients are receiving effective, quality representation.

Further, the number of impacted state inmates has been far lower than that predicted by the State. The Oklahoma Department of Corrections has only released approximately 210 inmates due to relief from *McGirt*, and of those inmates only 54 have been

released to the street.⁸ The other 156 inmates have either been turned over to federal or tribal authorities for prosecution or remain in state custody due to other charges. Since the *Matloff* opinion was only issued eleven (11) weeks ago, it is unlikely that those numbers are significantly impacted by the OCCA's holding on non-retroactivity.

The criminal justice system in Oklahoma is appropriately adjusting to the changes brought on by *McGirt's* restoration of tribal sovereignty. Despite the predictions of chaos made by the Oklahoma Attorney General's Office both, before and after *McGirt*, the sky is not falling. As such, there should be no concern that applying *McGirt* to cases on post-conviction review, consistent with the requirements of federal law on the retroactivity of substantive rules and fundamental principles of subject matter jurisdiction, will cause further harm to the system.



⁸ Numbers provided by the Oklahoma Department of Corrections upon request of amicus counsel on October 14, 2021.

CONCLUSION

For all of the reasons stated in Petitioner's petition and herein, the Court should grant the petition.

Respectfully submitted,

ANDREA DIGILIO MILLER

Counsel of Record

800 North Harvey Ave., Suite 317

Oklahoma City, OK 73102

(405) 208-6161-telephone

admiller@okcu.edu

NICOLE DAWN HERRON

KATRINA CONRAD-LEGLER

OKLAHOMA CRIMINAL DEFENSE

LAWYER'S ASSOCIATION

P.O. Box 2272

Oklahoma City, OK 73101