

Capital Case

Case No. _____

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

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

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

PETITION FOR A WRIT OF CERTIORARI

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December 15, 2021

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No. _____

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), applies retroactively to convictions that were final when *McGirt* was announced.
2. Can a state provide conflicted direct-appeal counsel and then bar a Petitioner from raising a jurisdictional claim for the first time in post-conviction proceedings after a petitioner's conviction becomes final?

PARTIES TO THE PROCEEDINGS

The parties to this action are named in the caption.

RELATED PROCEEDINGS

Cannon v. State, No. PCD-2020-620, Oklahoma Court of Criminal Appeals, Successive Application for Post-Conviction Relief denied September 16, 2021.

Cannon v. Trammell, No. 13-5071, United States Court of Appeals for the Tenth Circuit. Judgment entered August 11, 2015, 796 F.3d 1256 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 2517, No. 15-9058 (June 27, 2016).

Cannon v. Mullin, No. 03-5008, United States Court of Appeals for the Tenth Circuit. Judgment entered September 13, 2004, 383 F.3d 1152 (10th Cir. 2004), *cert. denied*, 544 U.S. 928, No. 04-8192 (Mar. 21, 2005).

Cannon v. Mullin, No. CIV-99-297, United States District Court for the Northern District of Oklahoma. Judgment entered April 30, 2013.

Cannon v. State, No. PCD-1998-179, Oklahoma Court of Criminal Appeals. Judgment entered April 9, 1999.

Cannon v. State, No. D-1996-369, Oklahoma Court of Criminal Appeals. Judgment and Sentence affirming lower court entered May 8, 1998.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jemaine Monteil Cannon, respectfully petitions this Court for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals (OCCA) in *Cannon v. State*, No. PCD-2020-620 (Okla. Crim. App. Sept. 16, 2021).

OPINIONS AND ORDERS BELOW

The opinion of the OCCA denying Mr. Cannon’s *pro se* successive state post-conviction action is unpublished but available in the appendix. *See* Appendix A (Pet. App. at 1-3) (*Cannon v. State*, Order Denying Successive Application for Capital Post-Conviction Relief, No. PCD-2020-620 (Okla. Crim. App. Sept. 16, 2021)). The OCCA’s Order finding the issue of jurisdiction pursuant to *McGirt* properly before it and remanding for an evidentiary hearing

is unpublished but available in the appendix. *See* Appendix B (Pet. App. at 4-9). (*Cannon v. State*, Order Remanding for Determination of Counsel and Evidentiary Hearing, No. PCD-2020-620 (Okla. Crim. App. Sept. 25, 2020).

JURISDICTION

The OCCA denied post-conviction relief on September 16, 2021. This petition is being filed within 90 days of that denial pursuant to Rule 13, Rules of the Supreme Court of the United States. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Indian Commerce Clause of the United States Constitution, Article I, Section 8, provides in relevant part:

The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

The Supremacy Clause to the United States Constitution, Article VI, provides in relevant part:

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 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.

The Due Process Clause of the Fourteenth Amendment, Section 1, to the U.S. Constitution provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Title 18, United States Code, Section 1151 (Indian country defined) provides:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Title 18, United States Code, Section 1152 (Laws governing) provides in relevant part:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Section 1080 of Title 22 of the Oklahoma Statutes provides:

Any person who has been convicted of, or sentenced for, a crime and who claims:

- (a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;
- (b) that the court was without jurisdiction to impose sentence;
- (c) that the sentence exceeds the maximum authorized by law;
- (d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

Section 1089(D) of Title 22 of the Oklahoma Statutes provides in relevant part:

8. If an original application for post-conviction relief is untimely or if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent or untimely original application unless:

a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or

9. For purposes of this act, a legal basis of a claim is unavailable on or before a date described by this subsection if the legal basis:

a. was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or

b. is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

STATEMENT OF THE CASE

A. Prior History

Mr. Cannon was charged in Tulsa County District Court Case No. CF-95-727 with Murder in the First Degree after former conviction. On March 15, 1996, the jury found Mr. Cannon guilty and assessed punishment at death. On March 26, 1996, the court formally sentenced Mr. Cannon in accordance with the jury's verdict. Oklahoma provided counsel to Petitioner for trial who did not raise a jurisdictional challenge.

Mr. Cannon appealed his conviction and sentence to the OCCA, which affirmed the same. *Cannon v. State*, 961 P.2d 838 (Okla. Crim. App. 1998). Oklahoma provided direct-appeal counsel who did not raise a jurisdictional challenge. Mr. Cannon next petitioned the OCCA *pro se* for post-conviction relief. The court denied the petition in an unpublished decision. Opinion Denying Application for Post-Conviction Relief, *Cannon v. State*, Case No. PCD-1998-179 (Okla. Crim. App. Apr. 9, 1999).

Mr. Cannon filed a *pro se* petition for habeas corpus in the United States District Court for the Northern District of Oklahoma. *Cannon v. Gibson*, No. CIV-99-297 (N.D. Okla. Oct. 15, 1999). The district court denied relief. *Cannon v. Mullin*, No. CIV-99-297, 2002 WL 35630319 (N.D. Okla. Dec. 9, 2002).

Mr. Cannon appealed *pro se* to the Tenth Circuit Court of Appeals on January 7, 2003, *Cannon v. Mullin*, No. 03-5008. On September 13, 2004, the Tenth Circuit affirmed in part and remanded the case back to the district court. *Cannon v. Mullin*, 383 F.3d 1152 (10th Cir. 2004), *cert. denied*, 544 U.S. 928, No. 04-8192 (Mar. 21, 2005). During remanded proceedings before the district court, The Honorable Terence Kern, United States District Judge, found that Oklahoma provided petitioner with appellate and trial counsel that were not “separate.” See Appendix D (Order) (Pet. App. at 18-27). In other words, Oklahoma provided Petitioner with conflicted counsel. After remanded proceedings were concluded, the district court again denied relief. *Cannon v. Trammell*, 2013 WL 11317628, No. CIV-99-297 (N.D. Okla. Apr. 30, 2013). Mr. Cannon again appealed to the Tenth Circuit Court of Appeals on May 29, 2013, *Cannon v. Trammell*, No. 13-5071. On August 11, 2015, the Tenth Circuit denied relief. *Cannon v. Trammell*, 796 F.3d 1256 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 2517, No. 15-9058 (June 27, 2016).

B. Current Controversy

On September 11, 2020, Mr. Cannon filed a *pro se* subsequent application for post-conviction relief challenging the State's jurisdiction to prosecute him. See Appendix C (Pet. App. at 10-17) (*Pro Se Application for Post-Conviction Relief*¹, *Cannon v. State*, PCD-2020-620 (Okla. Crim. App. Sept. 11, 2020)). Relying on *McGirt v. Oklahoma*,¹⁴⁰ S. Ct. 2452 (2020), and mindful of Oklahoma's longstanding rule that subject-matter jurisdiction can never be waived or forfeited and therefore can be raised at any time, Mr. Cannon asserted exclusive jurisdiction rests with the federal courts because he is Cherokee Indian and the crime occurred within the boundaries of the Muscogee (Creek) Nation. Shortly thereafter, the OCCA remanded Mr. Cannon's post-conviction case to the District Court for Tulsa County for an evidentiary hearing to determine Mr. Cannon's Indian status and whether the location of the crime was in Indian Country after determining Petitioner's claim was reviewable. See Appendix B (Pet. App. at 4-9) (Order Remanding for Determination of Counsel and Evidentiary Hearing, *Cannon v. State*, No. PCD-2020-620) (Okla. Crim. App. Sept. 25, 2020). On June 11, 2021, the OCCA stayed Petitioner's pending hearing to consider *McGirt's* retroactive application to final convictions, a

¹The exhibits attached to Appendix C are not included in this filing due to the voluminous personal identifiers, however, are available upon request.

question raised in *State ex rel. Matloff v. Wallace*, No. PR-2021-366, 497 P.3d 686 (Okla. Crim. App. Aug. 12, 2021), *petition for certiorari filed, sub nom., Parish v. Oklahoma* (Sept. 29, 2021 U.S.) (N. 21-467). *See* Appendix E (Pet. App. at 28 - 38).

Mr. Cannon’s case was still pending in the District Court for Tulsa County when the Oklahoma Court of Criminal Appeals issued *Matloff* on August 12, 2021, reversing course and discarding settled law and bedrock jurisdictional principles it had been relying on for years. In *Matloff*, the OCCA held *McGirt* “announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction.” *See* Appendix E (Pet. App. at 30). The OCCA explained that in previously granting post-conviction *McGirt* relief to petitioners like Mr. Cannon, its attention had not “been drawn to the potential non-retroactivity of *McGirt*.” *See* Appendix E (Pet. App. at 31).

Before Mr. Cannon’s evidentiary hearing was conducted, the OCCA on September 16, 2021, entered its Opinion Denying Successive Application for Capital Post-Conviction Relief regarding Mr. Cannon. *See* Appendix A (Pet. App. at 1-3). The OCCA premised its decision to deny post-conviction relief exclusively on *Matloff*, which found *McGirt* “ announced a new rule of criminal procedure.”

As discussed above, Mr. Cannon was denied conflict-free, direct-appeal counsel. As such, he was denied a procedural mechanism to raise a jurisdictional challenge prior to his conviction being final.

INTRODUCTION

In *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir.1990), Oklahoma was put on notice that “Indian country is subject to exclusive federal or tribal criminal jurisdiction ‘[e]xcept as otherwise expressly provided by law.’ 18 U.S.C. § 1152.”

Congress has also provided in 25 U.S.C. § 1321, “a statutory method by which a state, with the consent of the tribe, can assume jurisdiction over Indian country.” *United States v. Burnett*, 777 F.2d 593, 597 (10th Cir. 1985). Oklahoma, however, has not acted to assume jurisdiction by this method. See *Citizens Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Comm’n*, 888 F.2d 1303, 1307 (10th Cir. 1989); *Burnett*, 777 F.2d at 597; *State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989). If there has been no express delegation of jurisdiction to the state, a fortiori, there has been no grant of local jurisdiction.

Never has congress or the Muscogee (Creek) Nation expressly authorized or granted Oklahoma authority to assume criminal jurisdiction over the Creek Reservation. Nor has Oklahoma ever sought authorization to assume criminal jurisdiction over the Creek Reservation from congress or the Muscogee (Creek)

Nation. Oklahoma has no authority and is not competent to apply and impose its criminal laws, procedures, or statutes to Indians on the Creek Reservation. Nonetheless, since statehood, Oklahoma has unlawfully arrested, charged, tried, convicted, sentenced, incarcerated, and put to death, thousands of Indians like Petitioner.

In *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020), this Court reaffirmed that the Major Crimes Act (MCA) provides that, “within ‘the indian country,’ ‘[a]ny Indian who commits’ certain enumerated offenses . . . ‘shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States.’ 18 U.S.C. § 1153(a).” “[I]ndian country” includes “all land within the limits of any Indian reservation under the jurisdiction of the United States government.” (citing 18 U.S.C. § 1151(a)). This Court held that for MCA purposes, land reserved for the Creek Nation since the 19th Century remains “Indian country.”

This Court did not announce “a new rule of criminal procedure” in *McGirt*. This Court simply reaffirmed and acknowledged the existence of continuous longstanding law. *See McGirt*, 140 S. Ct. at 2470-71 (holding that Oklahoma’s “longstanding practice of asserting jurisdiction over Native Americans” for crimes covered by the MCA was unlawful).

The only avenue where “*McGirt*” could be deemed “new” is if the holding were classified to be a new substantive rule of constitutional law. But even then, no question of retroactivity can exist because retroactivity would be automatic. When the Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events regardless of whether such events predate or post date the Court’s announcement of the rule.

REASONS THE PETITION SHOULD BE GRANTED

At every judicial level, Oklahoma continues to repeatedly demonstrate its unwillingness to accept or comply with long-settled federal constitutional law. Without specific, unequivocal intervention by this Court, Oklahoma will never voluntarily align itself with federal constitutional law.

Oklahoma continues to unlawfully assume criminal jurisdiction over Petitioner after it unlawfully provided trial and appellate counsel who were conflicted, thereby denying Petitioner an opportunity to raise a jurisdictional challenge prior to the unlawful state conviction becoming final.

Oklahoma refuses to comply with its own longstanding rule that subject matter jurisdiction can never be waived or forfeited and can be raised at any time. *See McGirt*, 140 S. Ct. at 2501 n.9 (Roberts, C.J., dissenting) (noting that

under Oklahoma law, jurisdictional objections are “never waived and can therefore be raised on a collateral appeal.”)

Oklahoma is not only violating Petitioner’s individual rights and liberty interests, but that of a whole class of persons similarly situated and under the unquestionable authority of congress and the federal government.

The petition for writ of certiorari in *Parish v. Oklahoma*, No. 21-467 (arising from *Matloff*), presents the same question presented in this case. See *State ex rel. Matloff v. Wallace*, 497 P.3d 686 (Okla. Crim. App. Aug. 12, 2021),² petition for cert. filed sub nom., *Parish v. Oklahoma* (U.S. Sept. 29, 2021) (No. 21-467). As explained in the petition for writ of certiorari in *Parish*, *McGirt* must apply retroactively to convictions that were final when *McGirt* was announced. Mr. Cannon’s petition for writ of certiorari is one of several that follows *Parish* and presents the same question.

Under *McGirt*, the federal government has—and always had—exclusive jurisdiction to prosecute the crimes of which Mr. Cannon was convicted that occurred in Indian Country. The State has never had the power to do so. By holding *McGirt* is a mere procedural rule that is not retroactive to cases on

² The Oklahoma Court of Criminal Appeals’ decision conflicts and fails to recognize the fact that both the Petitioners in *McGirt* and *Murphy* (*Sharp v. Murphy*, 140 S. Ct. 2412 (2020)) had final state convictions when they sought and received relief from this Court.

collateral review, the OCCA has sought to preserve legally void convictions that the State never had authority to impose. Such a regime violates the Supremacy Clause by treating an exclusive allocation of power to the federal government as a mere regulation of the State's "manner" of trying a case. The decision also violates bedrock principles of due process and centuries-old understandings of habeas corpus. A conviction cannot stand where a State lacks authority to criminalize the conduct, and habeas courts have long set aside judgments by a court that lacks jurisdiction. If left unreviewed, *Matloff* would condemn many people, including Mr. Cannon, to bear state convictions and serve state sentences for crimes the State had no power to prosecute.

A favorable decision in *Parish* would vindicate Mr. Cannon's argument that *McGirt* applies retroactively to convictions that were final when *McGirt* was announced. Because the question presented in this case is before the Court in *Parish*, Mr. Cannon respectfully requests that the Court hold this petition pending the Court's decision in *Parish*.

CONCLUSION

Oklahoma has no jurisdiction to proscribe and punish Mr. Cannon's conduct, and the State is now holding him without any valid authority to do so. Mr. Cannon respectfully requests the Court hold this petition pending disposition of the petition for a writ of certiorari in *Parish v. Oklahoma*, No. 21-

467, and then dispose of it as appropriate. If *Parish* is resolved in the petitioner's favor, the Court should grant certiorari, vacate the judgment below, and remand for further proceedings.

Respectfully submitted,

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Dated this 15th day of December, 2021