

No. 21-7257

FILED

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SUPREME COURT U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

JIMMY DALE STONE – PETITIONER

vs.

KAMERON HARVONEK (WARDEN) – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

Jimmy Dale Stone # 245269
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QUESTIONS PRESENTED

- 1) Did the Oklahoma Court of Criminal Appeals violate Mr. Stone's Fourteenth Amendment right to Due Process by:
 - a) affirming the district court's Denial of Mr. Stone's application for Post-Conviction relief even though Mr. Stone had shown *prima facie* evidence of his Indian Status and the locale of the alleged Crime?
 - b) affirming the district court's decision to deny Mr. Stone's application for Post-Conviction based on the erroneous legal analysis in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___?
- 2) Whether Oklahoma courts may exercise criminal jurisdiction over a Choctaw Indian in violation of treaty provisions between the Choctaw Indians and the United States?
- 3) Does U.S. Constitution Art. 1, Section 8, deny criminal jurisdiction to any State absent a grant by Congress?
- 4) Since the State of Oklahoma did not enact Public Law 83-280, how can the State exercise jurisdiction over Indian territory?

LIST OF PARTIES

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

RELATED CASES

Stone v. State, No. CF-16-370, Garvin County District Court, State of Oklahoma, Judgment entered September 20, 2021. (PCR denial)

Stone v. State, No. PC-2021-1226, Oklahoma Court of Criminal Appeals, Judgment entered, November 19, 2021. (OCCA Denial)

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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

The opinion of the Oklahoma Court of Criminal Appeals, Nov. 19, 2021, appears at Appendix A to the petition and is unpublished.

The opinion of the Garvin County District Court, Sep. 20, 2021, appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the Oklahoma Court of Criminal Appeals decided my case was November 19, 2021.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

Amendment XIV (Due Process)

U.S. Const. Art. VI cl. 2 (Supreme Law of The Land)

STATUTORY PROVISIONS

18 U.S.C. § 1151 (Indian country defined)

18 U.S.C. § 1152 (Laws governing)

18 U.S.C. § 1153 (Offenses committed within Indian country)

18 U.S.C. § 1162(b) (State jurisdiction over offenses committed by or against Indians in the
Indian country)

18 U.S.C. § 3242 (Indians committing certain offenses; acts on reservations)

25 U.S.C. § 71 (Future treaties with Indian tribes)

25 U.S.C. §1321(a) (Assumption by State of Criminal Jurisdiction)

25 U.S.C. §1322(a) (Assumption by State of Civil Jurisdiction)

25 U.S.C. §1326 (Special election)

STATEMENT OF THE CASE

The Petitioner, Jimmy Stone, was convicted of 3 Counts of Lewd Acts in the District Court of Garvin County on June 6, 2018. Mr. Stone was sentenced to 3 Life Sentences running concurrent on June 6, 2018. On November 19, 2021, the Oklahoma Court of Criminal Appeals, hereinafter OCCA, issued a summary opinion affirming the judgement and sentence of the District Court. *Stone v. State*, No. PC-2021-1226 .

OVERVIEW OF THE STATE COURTS DETERMINATION OF FACTS

On August 31, 2020, Mr. Stone filed the instant application for post-conviction relief in the District Court of Garvin County based on the U.S. Supreme Court ruling of *McGirt v. Oklahoma*, 148 S. Ct. 2452, 2020 WL 3848063. Mr. Stone's propositions included a claim that the District Court lacked jurisdiction to charge, try, and sentence him being that he is a member of the Choctaw Nation, and that his alleged crime occurred within the boundaries of the historic Chickasaw Nation Reservation.

Mr. Stone's Post-Conviction application was stayed by the District Court on June 28, 2021, pending the outcome of *Bosse v. State*, 2021 OK CR 3, ¶ 21, 484 P.3d 286, 293-94.

On September 20, 2021, the District Court entered an Order denying Petitioner's application without conducting an evidentiary hearing pursuant to 22 O.S.2011 § 1084. The District Court denied Mr. Stone's Post-Conviction Application for lack of Subject Matter Jurisdiction based upon the ruling by the OCCA in *Matloff v. Wallace*, 2021 CR OK 21, ___ P.3d ___, stating "*McGirt* [...] shall not apply retroactively to void a conviction that was final at the time *McGirt* was decided."

REASONS FOR GRANTING THE WRIT

Mr. Stone filed a Post-Conviction Application based on the recent U.S. Supreme Court ruling in *McGirt vs. Oklahoma*, 140 S.Ct. 2454 (2020). Due to the OCCA'S ruling in *Matloff vs. Wallace*, 2021 OK CR 21, the district court erroneously ruled that the ruling in *McGirt* created new procedural rules and that the ruling was not retroactive to the cases that have been

adjudicated beyond direct appeal. However, no new rule was created by the *McGirt* ruling and this ruling did not circumvent the fact that jurisdictional issues cannot be waived.

Despite being clearly presented with this issue, the decision in *Matloff* did not address the issue of whether the rule in *McGirt* is substantive. "New substantive rules generally apply retroactively" while "[n]ew rules of procedure... generally do not." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004)

New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with the past law." See *Carter v. State*, 2006 OK CR 42, § 4, 147 P.3d 243, 244 (citing *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)) (applying new instructional rule of *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273) citing *Matloff vs. Wallace*, 2021 OK CR 21.

By holding that *McGirt* is a mere procedural rule, that is not retroactive to cases on collateral review, the OCCA has sought to preserve legally void convictions that the state never had authority to impose.

McGirt gave effect to a fundamental structural principle governing criminal jurisdiction over Indian-Country crimes: states have no authority to prosecute crimes covered by the Major Crimes Act. 18 U.S.C. § 1153.

Following *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny, we would apply a new *substantive* rule to final convictions if it placed certain primary (private) conduct beyond the power of Legislature to punish, or categorically barred certain punishments for classes of persons because of their status (capital punishment of persons with insanity or intellectual disability, or juveniles, for example.) See, e.g., *Pickens v. State*, 2003 OK CR 16 § 8-9, 74 P.3d 601, 603

(retroactively applying *Atkins v. Virginia*, 536 U.S. 304 (2002) because *Atkins* barred capital punishment for persons with intellectual disability).

" Substantive rules" of constitutional law for criminal cases, which are not subject to the *Teague* general bar on retroactively applying new constitutional rules of criminal procedure to convictions that were final when the new rule was announced, included rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. *Montgomery v. Louisiana*, 570 U.S. 190, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016). A conviction under an unconstitutional law is not merely erroneous, but it is illegal and void, and cannot be a legal cause of imprisonment. *Ibid.*

If, however, the Constitution establishes a rule and requires that the rule have retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by this Court. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) citing *Montgomery, supra*.

The State of Oklahoma had no jurisdiction to charge, try, or sentence Mr. Stone due to his arrest being within the boundaries of the Chickasaw Nation and because of his tribal membership in the Choctaw Nation.

The District Court of Garvin County never had subject matter jurisdiction in Mr. Stone's case to ever charge Mr. Stone with a crime, effectively ignoring the Treaty with the Chickasaw, 1866, Article 13 which states in part:

"The Chickasaw also agree that a court or courts may be established by the United States in said Territory, with such jurisdiction and organized in such a manner as may be prescribed by law; *provided*, that the judicial tribunals of the nation shall be

allowed to retain **exclusive** jurisdiction in all civil and criminal cases arising within their country....”(Emphasis added)

The State of Oklahoma has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced. "The retroactive application of substantive rules of federal constitutional rule does not implicate a State's weighty interests in ensuring the finality of convictions and sentences; no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose." Quoting *Montgomery v. Louisiana*, 570 U.S. 190, 136 S.Ct. 718, 193 L.ed.2d 599 (2016)

REASONS FOR GRANTING THE PETITION

For nearly all of its history, the State of Oklahoma has ignored or violated the United States Constitution (USCA Const. Art. VI § 2), treaties with Indian tribes, federal statutes (18 U.S.C. 1151-1153), decisions of this High Court, and most ashamedly, its own constitution (OK Const. Art. I § 3) when it comes to the prosecution of Indians. Sadly, federal authorities responsible for holding Oklahoma to the rule of law have been complicit in Oklahoma's rebellion.

As recently as October 2018, this Court held that treaties matter. *Washington State Department of Licensing v. Cougar Den*, 139 S.Ct. 1000 (2019).

In Mr. Stone's Post-Conviction Application, he claimed that only his tribe or the Federal Government had the authority to prosecute him through treaties established with the Chickasaw

Nation based on this Court's ruling in *McGirt* which has effectively confirmed tribal sovereignty for the Cherokee Nation.

In 1835, articles of the Treaty of Echota, Article 5 states:

"The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any state or territory."

See also, The Treaty of the Chickasaw , 1866, Article 13, which states:

" The Chickasaw also agree that a court or courts may be established by the United States in said Territory, with such jurisdiction and organized in such a manner as may be prescribed by law; *provided*, that the judicial tribunals of the Nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty."

As Justice Neil Gorsuch explained in a concurring opinion, "We are charged with adopting the interpretation most consistent with the treaty's original meaning." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-535 (1991)." He further explained, "When we're dealing with a tribal treaty, too, we must 'give effect to the terms as the Indians themselves would have understood them.' *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)."

This Court's responsibility is to state "what the law is," *Madison v. Marbury*, 5 U.S. 137 (1803) and that no State is above the law. The law states that only the federal government or the Chickasaw Nation may prosecute an Indian for crimes in the State of Oklahoma. In no case does the State of Oklahoma possess the right to prosecute an Indian on tribal land.

According to the Major Crimes Act¹, certain crimes committed by Indians in Indian Country are within the exclusive jurisdiction of the federal government. “A state or local police officer who arrested an individual for the commission of a federal crime **would** have to turn that individual over to the appropriate federal authorities. The crime must still be prosecuted in the appropriate sovereigns’ tribunal, and according to that sovereign’s laws.” See *AG Opinion 90-32*, WL 567868. “...Generally speaking, primary jurisdiction over land that is Indian Country rests with the Federal Government and the Indian tribe inhabiting it and now with the states.” See *AG Op. No. 06-6*, 2006 WL 768662. “...It being understood that any prosecution would have to occur in the Federal Court.” See *AG Op. 79-216*, 1979 WL 37653. (Emphasis added)

The state court has no authority to pronounce a valid judgment. Therefore, to rule against Mr. Stone’s Federal claims would be equally void, as it had no jurisdiction in the first instance, as this case involves questions of federal law and statutes. The Oklahoma Supreme Court noted that, “...the lack of judicial power inheres in every stage of the proceedings by which color of authority is sought to be imparted to the void judgment, and a subsequent order by the same court denying a motion to vacate such void judgment, is likewise void for the same reasons.” *Neal v. Travelers Ins. Co.*, 188 Okla. 131, 106 P.2d 811, 1940 OK 314

As Judge Easterbrook succinctly observed, “...subject matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231 ‘that’s the beginning and the end of the jurisdictional inquiry...’” *Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999) quoting *United States v. White Horse*, 316 F.3d 769 (8th Cir. 2015).

¹ 18 U.S.C. 1153

U.S. Const. Art. VI cl. 2 Supreme Law of the land states,

"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 in any Thing in the Constitution or Laws of any States to the Contrary notwithstanding."

The Indian Treaties are still in force and preserved as this Court noted in *U.S. v. Lara*, 541 U.S. 193, 124 S.Ct. 1628, 158 L.Ed 2d 420(2004), "We recognize that in 1871 Congress ended the practice of entering into treaties with the Indian Tribes. 25 U.S.C. § 71, stating that tribes are not entities 'with whom the United States may contract by treaty.'" But the statute saved existing treaties from being "invalidated or impaired," *ibid.*, and the Supreme Court has explicitly stated that the statute "in no way affected Congress' plenary powers to legislate on problems of Indians," *Antoine v. Washington*, 420 U.S. 194, 203, 95 S.Ct. 944, 43 L.Ed. 2d 129 (1975). Any state argument to the contrary cannot withstand the voluminous evidence that the federal government today treats Oklahoma Tribes and their territory the same as it treats tribes and their lands elsewhere.

One important law enacted in 1953, Public Law 83-280, 67 Stat. 588 (1953)(hereinafter, Public Law 280) addressed state jurisdiction. It allowed some states to assert limited civil and broad criminal jurisdiction in Indian country. *Indian Country, U.S.A.*, 829 F.2d at 980 (Ch. 505, 67 Stat. 588 (1953)(codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360)). Public Law 280 delegated to five, later six states, jurisdiction over most crimes throughout most of the Indian country within their borders. *Cohen* at 537. It offered any other state the option of accepting the same jurisdiction until a 1968 amendment made subsequent

assumptions of jurisdiction subject to Indian consent. *Id.* at 537-538; see 25 U.S.C. §§ 1321(a), 1322(a) & 1326.

The State of Oklahoma apparently has never acted pursuant to Public Law 83-280 or *Title IV* and assumed jurisdiction over the Indian country within its borders. See *Confederated Bands of the Yakima Indian Nation v. Washington*, 550 F.2d 443 (9th Cir. 1977) at note 3. Quoting *State v. LittleChief*, 573 P.2d 263, 1978 OK CR 2 (OCCA). The *LittleChief* court also stated that a determination of issue by United States federal district court judge was binding on the State unless and until determination was overturned by a United States Court of Appeals or this Court, in view of the fact that issue involved construction and application of federal statutes. *Civil Rights Act of 1968 §§ 401-406I*, 25 U.S.C.A. §§ 1321-1326. When Oklahoma became a state, *Proclamation of November 16, 1907*, 35 Stat. 2160-2161, it was already well settled that the authority of the United States to prosecute crimes not committed by or against Indians on reservations ended at statehood. *United States v. McBratney*, 104 U.S. 621, 624 (1881); *Draper v. United States*, 164 U.S. 240 (1896).

Despite having no legal basis, federal and state officials acted as if statehood also marked the end of federal authority over prosecution of all crimes by or against Indians in Indian country under the General Crimes Act and on reservations under the Major Crimes Act. This viewpoint was contrary to an early Oklahoma Supreme Court decision, *Higgins v. Brown*, 94 P.2d 703, 730 (1908). Although *Higgins* did not involve claims that the crime occurred on a reservation, it provided guidance regarding any future cases involving Indian country jurisdiction. The Court found that § 1628 of the Enabling Act was intended to vest in the federal courts the continued prosecution of criminal cases of a federal character and to continue in the state courts, the prosecutions of a local or municipal character. *Id.* at 725.

It accordingly found that prosecutions under a general law relating to crimes against the United States of which a federal court would have had jurisdiction even had the crime been committed within a state, were to be transferred to the federal courts. *Id.* at 725. See also *Ex parte Buchanan*, 94 P. 943, 944-945 (Okla. Crim. App. 1908); *Ex parte Curlee*, 95 P. 414 (Okla. Crim. App. 1908)(of course, non-pending actions of a federal character would necessarily vest in the United States courts in the other states.) A few years after these Oklahoma decisions, the Supreme Court ruled that **Oklahoma statehood did not change the Indian country status of lands in Indian territory or the applicability of federal criminal laws on those lands.** *United States v. Wright*, 229 U.S. 226 (1913).

In *Wright*, the United States charged the defendant in Federal Court in Oklahoma for violation of Rev. Stat. § 2139, which prohibited introduction of liquor into Indian country. *Id.* at 226-227. The Supreme Court concluded that § 2139 was applicable to Indian country throughout the states and territories generally, and that the Enabling Act did not repeal its applicability in Oklahoma. *Id.* at 238; See also *United States Exp. Co. v. Friedman*, 191 Fed. 673, 678-679 (8th Cir. 1911)(rejecting broad contention “Indian Territory ceased to be Indian country upon the admission of Oklahoma as a state”); and *Southern Surety Company v. State of Oklahoma*, 241 U.S. 582, 585-586 (1916)(The test of the jurisdiction of the state courts was to be the same that would have applied had the Indian Territory been a state when the offenses were committed.)

When a crime occurs in Indian County and is alleged to have been committed by an Indian, the jurisdiction is exclusively federal. 18 U.S.C. § 1153. Any state court conviction of a defendant involving an Indian or a crime in Indian country is rendered without jurisdiction and is, therefore, void *ab initio*. *State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989) (nothing

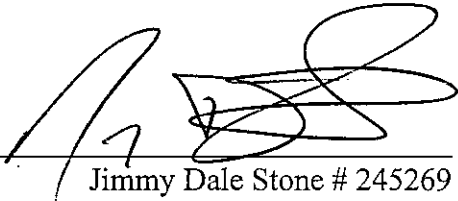
that “the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian country”).

The Major Crimes Act is the jurisdictional statute at the heart of this case. It applies to enumerated crimes committed by Indians in “Indian country.” When the Major Crimes Act applies, jurisdiction is exclusively federal. *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) (“[F]ederal jurisdiction over the offenses covered by the Indian Major Crimes Act is exclusive of state jurisdiction.” (quotations omitted)); *United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992) (“The State of Oklahoma does not have jurisdiction over a criminal offense committed by one Choctaw Indian in Indian country.”); *Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) (“[Q]uite simply the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian country.” (quotations omitted)). “The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.” *Rice v. Olson*, 324 U.S. 786, 789 (1945) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

Conclusion

The District Court of Garvin County along with the OCCA has denied Mr. Stone relief relying on cases that never justify the legal questions of Federal law that specifically address Subject Matter Jurisdiction. The State of Oklahoma is simply delaying the inevitable by denying applications for post-conviction that argue subject matter jurisdiction, by simply stating that retroactivity cannot be applied. At first, the State of Oklahoma argued that congress essentially disestablished the reservations at statehood, then later went on to argue, in other application denials, that retroactivity does not and cannot apply to the *McGirt* analysis. Since the State of Oklahoma never enacted Public Law 280, jurisdiction to prosecute crimes committed by

or against Indians in Indian territory was never relinquished to the State of Oklahoma. If the State has **never** had jurisdiction, then **any** prosecution made by the State involving an Indian or a crime involving Indian territory would be effectively null and void altogether negating any argument that the *McGirt* analysis would be retroactive or non-retroactive. It appears that the Courts in these cases are attempting to find any way possible to deny other defendants along with Mr. Stone, to avoid the possible dismissal of thousands of wrongful state prosecutions. Mr. Stone is asking this Honorable Court to GRANT the Writ and REMAND with instructions to Dismiss.(Emphasis added)

/s/ 
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