

No. 21-6680

IN THE
Supreme Court of the United States

JEMAINÉ MONTEIL CANNON,
Petitioner,

v.

OKLAHOMA,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether federal law requires state courts to apply *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), retroactively on state postconviction review.
2. Whether the Court of Criminal Appeals was required to apply *McGirt* retroactively in petitioner's specific case where the federal courts refused to procedurally bar any claims of ineffective assistance of trial counsel.

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BRIEF IN OPPOSITION

Petitioner's first question presented relies entirely upon the arguments advanced in the petition in *Parish v. Oklahoma*, No. 21-467, as a basis for certiorari in this case. This Court denied certiorari in *Parish* on January 10, 2022. For the reasons given in the State's brief in opposition in *Parish*, certiorari should be denied in this case as it was in *Parish*. Petitioner's second question presented is inadequately developed, was not pressed or passed upon below, and presents no compelling question. Certiorari should be denied on that question, too.

1. Petitioner Jemaine Monteil Cannon murdered his girlfriend, Sharonda Clark, by stabbing her multiple times. He was sentenced to death. His conviction and sentence were affirmed on direct appeal in 1998. *See Cannon v. State*, 961 P.2d 838, 843 (Okla. Crim. App. 1998).

2. In 2020, after *McGirt* was decided, petitioner filed a second application for postconviction relief in state court. For the first time, petitioner argued that the State lacked authority to prosecute him because he claims to be an Indian and his crimes occurred within the borders of the historical Muscogee (Creek) territory. The Oklahoma Court of Criminal Appeals remanded the case for an evidentiary hearing.

Before the hearing was held, the Court of Criminal Appeals in another case held as a matter of state law that *McGirt* was not retroactively applicable to void state convictions on state postconviction review. *See State ex rel. Matloff v. Wallace*, 497 P.3d 686 (Okla. Crim. App. 2021). The Court of Criminal Appeals then applied that decision, which was the subject of the certiorari petition in *Parish*, to deny petitioner's claim in this case. Pet. App. A.

3. As more fully explained in *Parish*, when this Court decided *McGirt*, it recognized that many state inmates who attempt to seek release under its decision would nonetheless remain in state custody "thanks to well-known state and federal limitations on postconviction review in criminal proceedings." 140 S. Ct. at 2479. The Oklahoma

Court of Criminal Appeals took *McGirt* at its word, applying one such well-known limitation: claims seeking to apply new decisions retroactively are, as a general rule, not redressable when raised for the first time on postconviction review.

Petitioner, who stands convicted of murder after a full and fair trial and appellate process (where his current contentions were never raised), nonetheless seeks review of the Court of Criminal Appeals' state law decision. For the reasons given by the State in *Parish*, certiorari is unwarranted as it was in *Parish*. The State respectfully requests that the Court refer to that brief when considering the petition here, and to deny certiorari in this case as it did in *Parish*.

4. Petitioner's second question presented should also be denied for several reasons. First, "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Sup. Ct. R. 14.4. Petitioner asserts that "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." Pet. 11. That is the sum total of petitioner's argument in support of his second question presented. He makes no claim to a compelling reason for this Court's review. *See* Sup. Ct. R. 10, 14.1(h). He makes no attempt to connect the federal court's finding regarding appellate counsel to the Court of Criminal Appeals' holding, more than twenty years after the direct appeal, that *McGirt* does not apply retroactively to cases on collateral review. For this reason alone, certiorari should be denied.

In addition, this question was neither pressed nor passed upon below. This Court is "a court of review, not of first view[.]" *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Thus, this Court does not decide questions that were not presented or decided below, except in exceptional

circumstances. *Brumfield v. Cain*, 576 U.S. 305, 322-23 (2015) (refusing to consider an issue that was not presented below or in the brief in opposition); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011) (refusing to consider arguments that were not decided below); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 305-06 (2010) (refusing to consider an issue that was not presented below or in the brief in opposition); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992) (stating that, when directly reviewing state court judgments, this Court “has, with very rare exceptions, refused to consider petitioners’ claims that were not raised or addressed below”). Petitioner did not present this argument below, nor was it passed upon by the Court of Criminal Appeals.

Further, there is no compelling reason for this Court to consider petitioner’s second question presented. At best, petitioner seeks mere error-correction. *See Sup. Ct. R. 10.*

Finally, petitioner’s question presented is meritless. The federal district court held that petitioner’s trial and direct appeal counsel were not “separate” such that the federal court could not give effect to the Court of Criminal Appeals’ application of a procedural bar to claims of ineffective assistance of trial counsel not raised on direct appeal. Pet. App. D 19-23; *see English v. Cody*, 146 F.3d 1257, 1263 (10th Cir. 1998) (claims of ineffective assistance of trial counsel will be considered procedurally defaulted where not raised on direct appeal only if the petitioner had separate counsel on direct appeal and state law provided a mechanism to develop the record on appeal). Petitioner is not raising an ineffective assistance of trial counsel claim. And whether appellate counsel challenged the State’s exercise of prosecutorial authority is irrelevant. The Court of Criminal Appeals did not deny petitioner’s claim because he failed to raise it on direct appeal. Rather, it held that *McGirt* does not apply retroactively to cases on collateral review. Pet. App. A. Petitioner’s second question presented fails as a matter of law and logic.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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