NO. 21-_____

In the Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

ROBERT ERIC WADKINS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JOHN M. O'CONNOR
ATTORNEY GENERAL
MITHUN MANSINGHANI
SOLICITOR GENERAL
COUNSEL OF RECORD
BRYAN CLEVELAND
AUDREY WEAVER
ASSISTANT SOLICITORS GENERAL
CAROLINE HUNT
JENNIFER CRABB
ASSISTANT ATTORNEYS GENERAL
OFFICE OF THE OKLAHOMA ATTORNEY GENERAL
313 N.E. TWENTY-FIRST STREET
OKLAHOMA CITY, OK 73105
(405) 522-4392
MITHUN.MANSINGHANI@OAG.OK.GOV

FEBRUARY 25, 2022 *COUNSEL FOR PETITIONER*

QUESTION PRESENTED

What requirements must a criminal defendant satisfy to qualify as an "Indian" under the Major Crimes Act, 18 U.S.C. § 1153?

LIST OF PROCEEDINGS

Oklahoma Court of Criminal Appeals

No. F-2018-790

Robert Eric Wadkins, Appellant, *v.*
The State of Oklahoma, Appellee

Date of Final Opinion: October 28, 2021

Oklahoma District Court (Choctaw County)

Case No. CF-2017-126

The State of Oklahoma, Plaintiff, *v.*
Robert Eric Wadkins, Defendant

Date of Judgment and Sentencing: July 10, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

OPINION IN RELATED CASE

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

In the Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

ROBERT ERIC WADKINS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals, dated October 28, 2021, is included in the Appendix at App.1a. The Findings of Fact and Conclusions of Law of the District Court in and for Choctaw County, State of Oklahoma, dated April 26, 2021, is included below at App.23a. The Order of the Oklahoma Court of Criminal Appeal remanding the case for an evidentiary hearing, dated August 19, 2020, is included below at App.26a. These opinions and orders were not originally designated for publication, but the Oklahoma Court of Criminal Appeals subsequently published its opinion at 2022 OK CR 2. App.21a.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on October 28, 2021. App.1a. Justice Gorsuch granted an application to extend the time to file this petition to February 25, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1153 (in relevant part)
Law governing Indian country

> Any Indian who commits against the person or property of another Indian or 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 the 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

Whether an individual is an "Indian" is an inquiry upon which numerous aspects of federal law turn, including the applicability of the Major Crimes Act, 18 U.S.C. § 1153. But this Court has never set forth a test to determine Indian status for purposes of federal criminal law, instead explicitly leaving open questions such as whether a person not enrolled with a tribe qualifies as an "Indian." *See United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977).

As a result, lower courts have developed a well-recognized split on determining Indian status, leading to multi-factor tests that inevitably generate inconsistent results in the courts and practical impossibilities for law enforcement on the ground. *See* App.7a n.4. With the vast expansion of the number of Americans subject to the criminal rules of Indian country after this Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), clarity on the question presented has never been more important. The decision below illustrates why: the court, based primarily on racial considerations (*e.g.*, having 3/16 Indian ancestry) and racial stereotypes (*e.g.*, having a hawk feather in his pocket when arrested), held that a white supremacist gang-member never enrolled with a tribe at the time of the offense was nonetheless "Indian" enough to deprive the state of its prosecutorial authority. Certiorari should be granted to answer the question of Indian status that this Court had reserved in prior cases, has divided lower courts, and has yielded the erroneous decision below.

A. Background

The Major Crimes Act subjects to federal jurisdiction "[a]ny Indian" who commits any one of a list of enumerated offenses in Indian country. 18 U.S.C. § 1153. But the statute never defines who qualifies as an "Indian." And "[w]ho counts as an Indian for purposes of federal Indian law varies according to the legal context. There is no universally applicable definition." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 3.03[1], 3.03[4].

Nor has this Court ever fully defined "Indian" for purposes of federal criminal law. Instead, a handful of cases have excluded and included categories of individuals from that term. In *United States v. Rogers*, 45 U.S. 567, 571 (1846), "a white man," challenged a federal indictment on jurisdictional grounds, alleging "he intermarried with an Indian Cherokee woman, . . . [was] adopted by the said tribe as one of them," and was therefore a Cherokee Indian. *Id.* at 568, 571. The *Rogers* Court held that the Indian-on-Indian crime exception of the General Crimes Act (currently codified at 18 U.S.C. § 1152) "does not embrace the case of a white man who, at mature age, is adopted into an Indian tribe. He is not an 'Indian,' within the meaning of the law." *Id.* at 571, 573. But *Rogers* never set forth a test for who *does* qualify as an "Indian"; instead, it only held that adoption into a tribe through marriage is not alone sufficient to convey Indian status. *Rogers*, like this Court's later nineteenth century cases, was focused on race to determine Indian status, excluding those not of the Indian "race" from the scope of criminal laws governing Indians. *See, e.g., Westmoreland v. United States*, 155 U.S. 545, 548 (1895) ("the term 'Indian,' in section

2146, is one descriptive of race"); *see also Roff v. Burney*, 168 U.S. 218, 223 (1897); *Alberty v. United States*, 162 U.S. 499, 501 (1896).

The Civil War, the Fourteenth Amendment, and the growth of equal protection law meant that courts were not long going to rely on race alone to determine Indian status. *Cf. United States v. Zepeda*, 792 F.3d 1103, 1118 (9th Cir. 2015) (en banc) (Kozinski, J., concurring in the judgment). In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court for the first time made clear that the determination of Indian status turns on political affiliation with a tribe. The Court held that a hiring preference for Indians was not unconstitutional discrimination when it "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. A BIA preference for Indians who were members of tribes is a political classification "reasonably designed to further the cause of Indian self-government" rather than a racial law. *Id.*

This Court then extended this view of Indian status into criminal law. *See Antelope*, 430 U.S. at 646. Although federal criminal law regarding Indians is concerned "not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country," the same essential principle still applies: "Federal regulation of Indian tribes . . . is governance of once-sovereign political communities." *Antelope*, 430 U.S. at 646-47. Thus, the Court held, the criminal defendants in that case "were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe." *Id.* at 646. Yet

the Court noted that some lower courts have held "enrollment in an official tribe" is not "an absolute requirement for federal jurisdiction," though the Court was "not called on to decide whether nonenrolled Indians are subject to 18 U.S.C. § 1153, and we therefore intimate no views on the matter." *Id.* at 646 n.7.

In sum, under *Antelope*, those who are enrolled in a federally-recognized tribe are subject to federal criminal statutes like the Major Crimes Act, and under *Rogers*, they must also racially be Indian. And under *Antelope*'s political requirement, the Major Crimes Act "does not apply to 'many individuals who are racially to be classified as "Indians."'" *Id.* at 646 n.7 (quoting *Mancari*, 417 U.S. at 553 n.24). Yet the Court has never articulated a test, beyond these limited and somewhat vague inclusions and exclusions, for who is an "Indian" under the Major Crimes Act. And the Court explicitly left open the question of Indian status in a case such as this, involving someone with some Indian blood but not enrolled in any tribe.

B. Facts and Procedural History

1. On June 6, 2017, the respondent Robert Wadkins, a serial rapist, kidnapped and brutally raped twenty-two (22) year old T.H., a young mother, in a deserted area near the Choctaw and Pushmataha County lines (I Tr. 127-43, 144-85).[1]

In the early-morning hours of June 6, 2017, T.H. borrowed a housemate's truck to drive the respondent to retrieve an item from the home of a family friend.

---

[1] All fact citations are to the transcript of and exhibits from respondent's trial, which are available below. *See* Sup. Ct. R. 12.7.

(I Tr. 148-51). After a few stops and changes of plans during the trip, respondent directed T.H. to stop the truck on a dirt road and exit the vehicle. (I Tr. 157-62). Respondent yanked the driver's side door open, unzipped and unbuttoned T.H.'s pants, pulled T.H.'s pants to her knees, and pulled T.H. on top of him into the truck (I Tr. 163, 197-200). The respondent then penetrated T.H.'s vagina with his penis, turned on the truck, and started operating the truck's pedals; the respondent also demanded that T.H. control the steering wheel (I Tr. 163-64). T.H., crammed on top of the respondent sideways with her feet against the driver's side door, attempted to steer the truck as best as she could (I Tr. 163-64, 200-01). T.H. was screaming and crying, so the respondent grabbed T.H. by the hair and slammed her head against the dashboard and radio, causing at least one of her false eyelashes (and some of her hair extensions) to fall off (I Tr. 163-64, 201-02). After the respondent slammed T.H.'s head, she pulled herself off the respondent and crawled into the passenger's seat, still crying and screaming (I Tr. 163-64, 203). Respondent threatened T.H., telling her he was going to kill her if she did not keep her mouth shut (I Tr. 164, 202).

At some point, respondent drove up to some railroad tracks and got the truck stuck in the gravel (I Tr. 167-69; II Tr. 27). As soon as the truck stopped, T.H. jumped out onto the tracks and attempted to turn on her cell phone, but it was dead (I Tr. 170). Respondent broke her phone with a baseball bat and then hit her with the bat. (I Tr. 170-71). Following this, respondent and T.H. walked along the railroad tracks and argued about the situation (I Tr. 172-73).

Respondent eventually sat down on the tracks, pulled T.H. on top of him, and forcefully penetrated her vagina once again (I Tr. 175-76, 212). T.H. cried, told the respondent she did not want this, and begged him to stop (I Tr. 176). After respondent finished, T.H. threw his bat into the woods and took off running. (I Tr. 181). Respondent went looking for the bat and did not follow her. (I Tr. 181).

At trial, a jury convicted respondent of first-degree rape and of kidnapping. He was sentenced to forty years in prison.

2. After this Court issued its decision in *McGirt*, the Court of Criminal Appeals remanded the case to the trial court for an evidentiary hearing on the Indian status of respondent and whether the crime occurred in Indian country. App.24a. To determine whether respondent was an Indian, the district court applied a test purportedly gleaned from *Rogers*. The district court found that, although respondent had 3/16th Indian blood of the Choctaw tribe, he was not enrolled as a member of the Choctaw tribe at the time of his crime. App.24a. It found that respondent failed to seek membership in the Choctaw Nation until after his conviction, voluntarily associated with the Universal Aryan Brotherhood, was unfamiliar with tribal leaders, lacked credible evidence that any benefits he received were exclusive to tribal members, and lacked credible evidence of social recognition as an Indian. App.24a. Thus, it held that, while the crime occurred in Indian country, respondent was not an Indian for purposes of the Major Crimes Act. App.25a.

3. With the state district court's findings of fact and conclusions of law, the case returned to the Oklahoma Court of Criminal Appeals. The Court of

Criminal Appeals reversed the district court's finding that respondent was not an Indian, relying on standards it adopted in an earlier decision, *Parker v. State*, 495 P.3d 653 (Okla. Crim. App. 2021). In *Parker*, the Court of Criminal Appeals held that a defendant is an Indian if "he has [1] some Indian blood and [2] that he was recognized as an Indian by a tribe or the federal government." *Id.* at 664-65. But, rejecting the State's argument for a bright-line rule that the second prong must be shown by actual enrollment with a tribe at the time of the crime, it also held that "a person may be an Indian for purposes of federal criminal jurisdiction even if he or she is not formally enrolled in any tribe." *Id.* at 665-66.

The court held this second prong would require considering, at least to start, "four core factors": "1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life." *Id.* at 666. But the Court of Criminal Appeals noted that yet more factors can be considered in its totality of the evidence approach, acknowledging the division among federal courts on these factors. *Id.* at 667 n.15; *see also* App.6a-7a & n.4.

Applying the four factors adopted in *Parker*, the Court of Criminal Appeals held that respondent in this case was an Indian despite not being enrolled with the tribe at the time of the crime. *First*, it found the district court erred by not giving weight to respondent's enrollment in a tribe after his conviction in state court and after this Court decided *McGirt*. App.9a-10a. It also observed that the district court errantly

found that respondent did not have a Certificate of Degree of Indian Blood (CDIB) card, which is distinct from enrollment but which the Court of Criminal Appeals found relevant. App.9a-10a. *Second*, it found that the district court erred by finding that the health benefits respondent received were not exclusive to Indians, since respondent received free services on account of possessing a CDIB card. App.10a-11a. *Third*, it found that respondent's use of his Indian blood to obtain benefits was sufficient to show he received the benefits of tribal affiliation, although admitting that he did not partake in many other tribal benefits, such as voting in tribal elections, in part because of his lengthy prior incarcerations. App.11a-12a. *Fourth*, it found respondent credible on his own testimony of his social recognition as an Indian—such as his attendance at powwows, a sweat lodge ceremony in prison, and holding himself out as an Indian. App.12a-13a. It pointed specifically to the fact that respondent "had a red-tail hawk feather in his possession at the time of his arrest." App.14a.

Based on this view of the facts, the Court of Criminal Appeals concluded that three factors convinced it respondent was recognized as an Indian: enrollment after his conviction in state court, having a card showing his Indian blood, and receiving health services based on that card. App.14a. Thus, the Court of Criminal Appeals reversed all of respondent's convictions. The federal government has since filed charges against respondent. *See United States v. Wadkins*, No. 6:21-cr-370 (E.D. Okla. Dec. 8, 2021).

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED HAS NEVER BEEN ANSWERED BY THIS COURT AND HAS DIVIDED LOWER COURTS

As explained above, "determining who is an Indian under [the Major Crimes Act] is not easy, as the statute does not define the term 'Indian.'" *United States v. LaBuff*, 658 F.3d 873, 874 (9th Cir. 2011). This Court has never developed a test for determining Indian status, instead explicitly leaving unresolved the question of whether someone like respondent can qualify as an Indian. As a result, lower courts have adopted disparate approaches to answer the question. Certiorari is needed to resolve this split and provide a clear answer on this important issue.

1. This Court has never set forth a clear test to determine Indian status for purposes of federal criminal law. At most, *Rogers* indicates that those who are not racially Indian do not qualify, 45 U.S. at 571, 573, and *Antelope* held that the defendants in that case who were enrolled with the tribe did qualify, 430 U.S. at 646-47. But how much tribal ancestry is necessary to satisfy the racial component of *Rogers*? And can a person with Indian genetics qualify as Indian if he—like respondent in this case—is not enrolled with a tribe? This Court has never confronted the first question and, in *Antelope*, explicitly left open the second, 430 U.S. at 646 n.7. No other precedent from the Court sets forth a comprehensive test for Indian status.

To be sure, lower courts have muddled along without this Court settling the issue. The Washington Supreme Court was perhaps the first to innovate. It purportedly relied on *Rogers* to invent a two-part test, concluding that Indian status requires both "(a) a substantial percentage of Indian blood and (b) recognition as an Indian." *Makah Indian Tribe v. Clallam Cty.*, 440 P.2d 442, 444 (Wash. 1968). None of the cases it cited articulated that test, including *Rogers*. *See id.* The Washington Supreme Court appears to have instead derived the test by importing the definition of "Indian" in the 1934 Indian Reorganization Act, which provides that "Indian … shall include all persons of Indian descent who are members of any Recognized Indian tribe Now under Federal jurisdiction." *See Makah*, 440 P.2d at 444-45 (quoting Wheeler-Howard Act, § 19, June 18, 1934, 48 Stat. 988).

Nonetheless, other courts began to adopt *Makah*'s test for criminal law purposes, repeating the test without analysis of the origins and with each court citing the prior one. *See, e.g.*, *State v. Attebery*, 519 P.2d 53, 54 (Ariz. 1974) (citing *Makah*); *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976) (citing *Attebery* and *Makah*, though acknowledging "[t]he definition of exactly who is and who is not an Indian is very imprecise"). The Oklahoma courts also fell into this pattern. *See Goforth v. State*, 644 P.2d 114, 116 (Okla. Crim. App. 1982) (citing *Makah* and *Dodge*).

But adoption of this test has not been without contention: the federal government disputed the so-called *Rogers* test in the past. *See, e.g.*, *United States v. Prentiss*, 273 F.3d 1277, 1281 & n.3 (10th Cir. 2001) (quoting the federal government's brief). More importantly, even assuming *Makah*'s two-part test is justified

by this Court's precedent, this Court has never squarely addressed the issues concerning what blood quantum is sufficient and whether (and when) persons not enrolled with any tribe are "Indian" for purposes of federal criminal law. As a result, courts widely diverge on the nature of the requirements imposed by those two prongs.

2. The first part of the test by the lower courts fairly emerges from *Rogers*: whether a person has Indian blood. But lower courts diverge on how much or little Indian blood is required to satisfy the first prong. Some courts, like the court below, have held that only "some" Indian blood—effectively any amount above zero—is sufficient for this aspect of Indian status. *See*, *e.g.*, *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); App.3a, 45a. But other courts require a "substantial," "significant," or "sufficient" amount of Indian blood. *See Vialpando v. State*, 640 P.2d 77, 80 (Wyo. 1982); *Makah Indian Tribe v. Clallam Cty.*, 440 P.2d 442, 444 (Wash. 1968); *State v. Perank*, 858 P.2d 927, 932-33 (Utah 1992); *United States v. LaBuff*, 658 F.3d 873, 874-75 (9th Cir. 2011); *United States v. Loera*, 952 F.Supp. 2d 862, 870 (D. Ariz. 2013) (holding that defendant with 3/16ths Indian blood "barely" satisfied the Ninth Circuit's test). And courts have also toiled with the type of Indian blood required under *Rogers* when the originating tribe no longer exists, has been terminated, or was never federally recognized. *See, e.g., United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (en banc) (reversing a prior Ninth Circuit decision requiring the bloodline derive from a federally recognized tribe).

Accordingly, lower courts have reached divergent conclusions about what blood quantum is necessary

for categorizing a person as an Indian. *Compare Vialpando*, 640 P.2d at 80 ("We hold that one-eighth Indian blood is not a 'substantial amount of Indian blood' to classify appellant as an Indian" for purposes of criminal jurisdiction.) *with United States v. Bruce*, 394 F.3d 1215, 1227 (9th Cir. 2005) (1/8 Indian blood sufficient); *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) ("The parties agree that the first Rogers criterion is satisfied because Stymiest has three thirty-seconds Indian blood"). Oklahoma courts have recognized that even the tiniest amounts of blood—sometimes as low as 1/128—is sufficient, while other courts have held a firmer line. *Compare Perry v. State*, No. F-2020-46 (Okla. Crim. App. Apr. 1, 2021) *with State v. Reber*, 171 P.3d 406, 410 (Utah 2007) (1/16th Indian blood insufficient); *United States v. Maggi*, 598 F.3d 1073, 1081 (9th Cir. 2010), *overruled on other grounds by United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (en banc) (questioning whether 1/64th Indian blood is sufficient, where that quantum corresponds to "just one full-blooded Blackfeet ancestor in seven generations or . . . one great-great-great-great-great grand-parent who was full-blooded Blackfeet, and sixty three great-great-great-great-great grandparents who had no Blackfeet blood"). Clarity from this Court is needed to know whether even those with only the most distant Indian ancestry qualify as "Indian" under federal criminal law.

3. The second part of the lower courts' test that this Court left open in *Antelope*—political recognition as an Indian—also varies widely among lower courts. Numerous courts have concluded that enrollment in a federally recognized tribe is dispositive. *See, e.g.*, *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th

Cir. 1979). But in response to this Court's footnote in *Antelope*, 430 U.S. at 647 n.7, some lower courts have also stated that *lack* of enrollment is *not* dispositive. Accordingly, they have developed differing multi-factor tests to address non-enrolled defendants, and in doing so have recognized the growing division of courts on the appropriate test.

The most cited test in recent jurisprudence is from *St. Cloud v. United States*, 702 F.Supp. 1456, 1460 (D.S.D. 1988). There, the district court set out four factors, ranked in descending order of importance: "1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life." *Id.* at 1461. But the court clarified the factors "merely guide the analysis" and "do not establish a precise formula . . . ." *Id.*

From *St. Cloud*, a circuit split developed, as the decision below recognized. App.7a n.4. The Ninth Circuit has adopted the four factors set forth in *St. Cloud* as the exclusive factors for Indian recognition, in contrast to *St. Cloud*'s own language rejecting a precise formula. *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005); *see also United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc).

The Tenth Circuit, on the other hand, has opted for "a totality-of-the-evidence approach to determining Indian status." *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). Recent Tenth Circuit cases cite the *St. Cloud* factors but reiterate those factors "are not exclusive." *United States v. Nowlin*, 555 F. App'x

820, 823 (10th Cir. 2014). Thus, the Tenth Circuit's test is open to an unlimited number of factors.

In similar fashion, the Eighth Circuit has applied the *St. Cloud* factors but regards them as not exclusive, concluding: "the *St. Cloud* factors may prove useful, depending upon the evidence, but they should not be considered exhaustive. Nor should they be tied to an order of importance, unless the defendant is an enrolled tribal member, in which case that factor becomes dispositive." *United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009); *cf. also United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995) (affirming the district court's adoption of the *St. Cloud* framework).

This split involves not only what factors are at issue but also the proper weight to attribute to the various factors. Some courts consider factors in declining order of importance, like the District of South Dakota in *St. Cloud* and the Ninth Circuit in *Bruce*. Other courts decline to adopt any order of importance in factors, other than to prioritize the occasionally dispositive tribal enrollment factor, like the Eighth Circuit in *Stymiest*. So, for example, though the Ninth Circuit has twice found that a person who uses health services for Indians and has tribal court convictions has Indian status despite not being enrolled in any tribe, the Eighth Circuit has questioned whether these same factors are sufficient to satisfy the test. *Compare United States v. LaBuff*, 658 F.3d 873, 879 (9th Cir. 2011); *Bruce*, 394 F.3d at 1226 *with Stymiest*, 581 F.3d at 764-65.

While Indian country cases overwhelmingly occur in the Eighth, Ninth, and Tenth Circuits, the test is similarly fractured in the district courts in other

circuits. Some courts in those circuits have even created new tests. *See, e.g.*, *United States. v. Delacruz-Slavik*, 2010 WL 4038758 (E.D. Mich. 2010) (explaining analysis of the *St. Cloud* factors "requires an analysis from the perspective of both the tribe and the individual . . ."); *Perkins v. Lake County Dept. of Utilities*, 860 F.Supp. 1262, 1274 (N.D. Ohio 1994) (listing the degree of Indian blood as among the factors the court considers in the political recognition prong).

State supreme courts also split in their application of the Indian status test. Some have adopted the Ninth Circuit's approach of exclusively using the four *St. Cloud* factors. *State v. Sebastian*, 701 A.2d 13, 24 (Conn. 1997); *see also State v. George*, 422 P.3d 1142, 1145-46 (Idaho 2018); *State v. Perank*, 858 P.2d 927, 933 (Utah 1992); *State v. LaPier*, 790 P.2d 983, 986 (Mont. 1990). Others adopt some variant of the non-exclusive factors approaches used by the Eighth and Tenth Circuits. *See, e.g., State v. Nobles*, 838 S.E.2d 373, 378 (N.C. 2020); *see also State v. Daniels*, 16 P.3d 650, 654-55 (Wash. App. 2001). And because the federal courts and state courts in some states do not apply the same test, the potential for incongruous results—where neither court has jurisdiction—arises. *Compare Nobles*, 838 S.E.2d at 378 *with United States v. Flores*, 2018 WL 6528475 (W.D.N.C. 2018) (adopting the Ninth Circuit's exclusive use of the *St. Cloud* factors).

In Oklahoma, the state's highest criminal court has adopted and "applies the same Indian status test used by the Tenth Circuit." *Parker*, 495 P.3d at 665. The Oklahoma Court of Criminal Appeals therefore considers the "four core" *St. Cloud* factors while applying the Tenth Circuit's totality of the evidence

approach that can brook the inclusion of yet more factors. *Id.* at 667 n.15. Indeed, in the decision below, the court below examined the four factors, plus four or five other considerations. App.9a-14a.

This split across courts is further compounded because even courts who nominally use the same test engage in divergent analysis. For example, some jurisdictions submit the factors to a jury, where predominantly non-Indian juries consider multiple factors to assess whether someone is Indian enough. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 3.03[4]. Others, like the court below, have the determination made by courts—although even that does not yield consistent results. In this case, for example, the trial court and the Court of Criminal Appeals reached different conclusions on Indian status using the same test. *Compare* App.14a, *with* App.25a.

Essentially every federal circuit and state supreme court with a significant Indian law docket has weighed in on this split, and no uniformity is in sight. This Court's review is needed to end the conflict and determine the correct test for Indian status.

II. Review Is Warranted Because the Test Set Forth By the Decision Below Is Wrong.

Each of these various multi-faceted tests proffered by lower courts, including the court below, is in tension with this Court's precedent. This Court's cases have focused on tribal enrollment as the saving grace that allows treating "Indians" differently under the law while avoiding equal protection problems. Laws based on Indian status are not pure racial discrimination only if they apply exclusively to those that have chosen to politically affiliate with the tribe and the tribe has

affirmatively accepted that affiliation. But by incorrectly answering the question reserved in *Antelope* and permitting those not enrolled with any tribe to be considered "Indians," the court below has impermissibly centered the Indian-status test on racial considerations.

1. For most of the twentieth century, the only opinion to find Indian status under the Major Crimes Act apart from tribal enrollment was a single 1938 decision from the Seventh Circuit. In that case, a person that was racially a Chippewa was denied enrollment as a child in the tribe due to his affiliation with the St. Croix Lost Band of Chippewas, which was not federally recognized at the time he tried to enroll. *See Ex Parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938). The Lost Band became federally recognized by the time of the litigation (and, likely, the crime), and the court decided to nonetheless consider the defendant an Indian despite lack of enrollment. *See A History of the St. Croix People, St. Croix Chippewa Indians of Wisconsin*, https://stcroixojibwe-nsn.gov/culture/who-we-are/ (last accessed Feb. 3, 2022). Despite *Pero*'s unique facts, courts often cite it when repeating in dicta that tribal enrollment is not dispositive of Indian status.

For decades, the courts citing *Pero* still reached results consistent with a strict enrollment test anyway. *See, e.g.*, *United States v. Indian Boy X,* 565 F.2d 585 (9th Cir. 1977) (enrolled person is an Indian); *United States v. Ives,* 504 F.2d 935 (9th Cir. 1974) (enrolled person is an Indian); *Azure v. United States*, 248 F.2d 335, 337 (8th Cir. 1957) (noting defendants were "enrolled Indians"); *see also State v. LaPier*, 790 P.2d 983, 987-88 (Mont. 1990) (non-enrolled person is not an Indian); *United States v. Lawrence*, 51 F.3d 150,

154 (8th Cir. 1995) (non-enrolled person is not an Indian). Indeed, the original articulation of the two-part test alluded to the Indian Reorganization Act, which centers Indian status on tribal membership. *See Makah*, 440 P.2d at 444-45 (quoting Wheeler-Howard Act, § 19, June 18, 1934, 48 Stat. 988).

It was only after the District of South Dakota departed from enrollment in *St. Cloud*, that other lower courts followed, leading to the disparate and multifarious tests described above. The *St. Cloud* court created the four-factor test discussed above, which it purported to "glean[] from case law," without explaining where, exactly, it found the factors. *See* 702 F.Supp. at 1461. Indeed, one factor—the "social recognition factor"—was found only in law reviews and not in this Court's precedent. *See State v. Bonaparte*, 759 P.2d 83, 85 (Idaho Ct. App. 1988).[2] Then the circuits and state supreme courts who were grasping for a test for Indian status started copying the *St. Cloud* test without analysis of where it obtained its factors. *See, e.g.*, *Bruce*, 394 F.3d at 1224; *State v. Sebastian*, 701 A.2d 13, 24 (Conn. 1997); *State v. LaPier*, 790 P.2d 983, 986 (Mont. 1990). But decisions to recognize as Indians those not actually enrolled with a tribe, like the one below, create significant tension with this Court's precedent.

---

[2] As one scholar acknowledged prior to *St. Cloud*, this Court's opinion in *Antelope* seemed to reject a definition based on "racial ancestry and social recognition," requiring instead "some political and legal recognition" and approving of lower court opinions that applied the more stringent test. *See* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 576 (Editors Note).

2. As lower courts hinge Indian-status on broad considerations like "social recognition," they inevitably run up against the requirement that Indian status be a political one, as required by *Mancari* and its progeny, and instead collapse the inquiry solely into race and racial stereotypes.

Mancari upheld a law singling out Indians—like the Major Crimes Act singles out Indians—only because it addressed "Indians not as a discrete racial group, but, rather, as *members* of quasi-sovereign tribal entities." 417 U.S. at 554 (emphasis added); *see also id.* at 553 n.24 ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to *members of 'federally recognized' tribes*. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." (emphasis added)). This accords with earlier understandings of Indian status, including in the criminal context. *See United States v. Kagama*, 118 U.S. 375, 383 (1886) (upholding constitutionality of the Major Crimes Act and stating "the fair inference is that the offending Indian shall belong to that or some other tribe").

Later cases similarly focused on tribal membership. When addressing the status of native Hawaiians, this Court stated that *Mancari* concerned "Indians in organized tribes" and that its rule was only about "Indian tribes" as opposed to "persons of tribal ancestry." *Rice v. Cayetano*, 528 U.S. 495, 518 (2000). It was only the dissenting justices in *Rice* who thought the rule in *Mancari* could properly extend beyond tribal membership, arguing that native Hawaiians should

be within *Mancari* as a result. *See id.* at 535 (Stevens, J., dissenting).

Likewise, when addressing preferences in government contracting, the Court strongly suggested that the *Mancari* rule is about tribal membership. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 207, 235 (1995). Preferences for "Native American" contractors regardless of tribal affiliation, the Court explained, were racial preferences subject to strict scrutiny, even when not all Indians received the preference due to additional economic criteria. *See id.* The dissenting justices in *Adarand* explained how *Adarand*'s holding undermines a broader reading of *Mancari*: if a hiring preference affecting fewer than all racial Indians was still an impermissible racial preference, then *Mancari* was solely about tribal affiliation and did not otherwise authorize laws that reach fewer than all racial Indians. *Id.* at 244 n.3 (Stevens, J., dissenting). Thus, the Court had again ruled in a fashion that viewed *Mancari* as permitting only Indian laws that are limited to tribal *members*, as opposed to others with Indian ancestry. *See also Duro v. Reina*, 495 U.S. 676, 692 (1990), *superseded by statute as recognized in United States v. Lara*, 541 U.S. 193, 197-98 (2004) (recognizing the federal government's "broad authority to legislate with respect to *enrolled* Indians as a class" (emphasis added)). So while *Rogers* certainly requires a racial component to determine Indian status under federal criminal statutes, *Mancari* and it progeny requires enrollment as an additional requirement in order for a law applying specially to "Indians" to survive constitutional muster.

Mancari's emphasis that "Indian" include a political classification requires an affirmative bilateral

choice to affiliate between the sovereign and subject. Normally, this is satisfied by tribal requirements for a person to be a citizen or an enrolled member. But regardless of terminology or process of enrollment, it necessitates that the individual voluntarily subject himself to the burdens and responsibilities of tribal citizenship (and all federal consequences that come along), and that the tribe affirmatively grant the individual all rights and privileges of tribal citizenship, such as the right to vote in tribal elections and run for tribal office. But courts that have adopted *St. Cloud* reject such requirements of political affiliation, sometimes going so far as to declare that a person is an Indian even over the tribe's objection. *See State v. Perank*, 858 P.2d 927, 932 (Utah 1992).

A clear test requiring enrollment also avoids the numerous practical problems, more fully explained below, in administering the various multi-factor tests developed by the lower courts. Because in modern times tribes consistently "keep formal, written rolls," there is no need to resort to older "generalized" tests that focus on uncertain criteria like "retaining tribal relations." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra*, at § 3.03[2]. Meanwhile, a lack of clear definition for who is Indian "can result in court challenges causing confusion and delay when a victim or perpetrator initially appears to be a Native American for federal jurisdictional purposes, but is later determined to be a non-Indian or vice-versa." *See* Troy A. Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1098 (2010).

To be sure, there may be exceptional cases where enrollment cannot be the only factor, such as the

situation in *Pero* or cases involving young minors. *E.g.*, *United States v. Keys,* 103 F.3d 758, 760-61 (9th Cir. 1996) (case involving a non-enrolled minor victim who had an enrolled mother required different Indian-status analysis since the victim was so young as to be "incapable of enrolling herself"); *see also United States v. Drewry*, 365 F.3d 957, 961 (10th Cir. 2004), *cert. granted, judgment vacated on other grounds*, 543 U.S. 1103 (2005). But an expansive test that departs widely from enrollment to allow those of Indian ancestry who are *not* tribal members to be counted as "Indian"—and thus treated differently under federal law—conflicts with the principles set forth in *Mancari* and its progeny.

3. The decision below is an excellent vehicle to correct the lower courts' departure from *Mancari* and erroneous answers to the question left open by *Antelope*. Respondent was not enrolled with a tribe at the time the offense was committed, instead affiliating with a white supremacist gang, but the court below nonetheless determined he was an "Indian." App.14a.

The Court of Criminal Appeals reached that conclusion based on several factors, but each show just how problematic it is to hold that an individual can be politically an "Indian" without being enrolled with a tribe. To start, the court pointed to respondent's enrollment with the tribe *after* his crimes and *after* this Court decided *McGirt*. App.9a. But all agree that the relevant time for determining Indian status is at the time of the offense. *See Zepeda*, 792 F.3d at 1113; *Perank*, 858 P.2d at 932; *Goforth*, 644 P.2d at 116. All respondents' subsequent enrollment tells us is that he is now trying to escape justice, whereas prior to the offense he did not take the requisite action to

politically bind himself to the tribe. His earlier failed attempt to enroll, App.9a, likewise only shows that the *tribe*, by its rules, declined to politically affiliate with him.

Next, the court below pointed to respondent's possession of a Certificate of Degree of Indian Blood (CDIB). App.10a. But as the name implies, this speaks only of respondent's racial makeup, putting the court's reliance on this in square conflict with *Mancari*, *Rice*, and *Adarand*. The same is thus necessarily true of his receipt of free healthcare benefits because he possessed a CDIB. App.10a-12a; *cf. United States v. Cruz*, 554 F.3d 840, 849 (9th Cir. 2009) (explaining that "many descendants of Indians are eligible for tribal benefits based exclusively on their blood heritage" and that relying on use of benefits to show political recognition "in most, if not all, cases would transform the entire . . . analysis into a 'blood test.'"). Absent an enrollment requirement, it's race all the way down.

The court below also looked to respondent's claims of receiving tribal benefits, although admitting that these claims were not documented, that the district court found them not credible, and that he did not enjoy many core privileges of tribal citizenship, such as voting in tribal elections. App.12a.

Finally, turning to "social recognition," the Court of Criminal Appeals' analysis becomes most gelatinous. Examining social ties, after all, is perilous given the many non-Indians that participate in tribal communities, *see Bruce*, 394 F.3d at 1234 (Rymer, J., dissenting), especially in Oklahoma where tribal culture is woven into the fabric of the State despite the vast majority of Oklahomans being non-Indian. The Court of Criminal Appeals here first points to respondent's possession

of "a red-tail hawk feather . . . at the time of his arrest," App.12a, which leans more toward racial stereotyping than a political choice to subject oneself to a separate sovereign. Meanwhile, the enrollment of family members, App.12a, only highlights his lack of enrollment. And his unconfirmed cultural activities—occasionally attending a powwow, creating Native American art, knowing a few Choctaw phrases and letters, *etc.*—form a similarly thin basis to conclude that the lower court's test truly reflects a bilateral political affiliation with the tribe. After all, it is a well-recognized problem that there are millions of Americans who hold themselves "out as Indian," App.12a, yet fail to, in any meaningful sense, subject themselves tribal government.

Thus, this petition presents an optimal case to address the lower courts' departure from *Mancari* and to resolve the split among lower courts on determining Indian status. The Court has the opportunity to create clarity in this murky area of law, which now governs millions in Oklahoma, in addition to the hundreds of thousands elsewhere in the country.

III. WHO QUALIFIES AS AN "INDIAN" IS AN IMPORTANT QUESTION OF FEDERAL LAW THIS COURT SHOULD ANSWER

The question of Indian status under federal criminal law is also exceedingly important, especially after *McGirt*, and thus warrants this Court's review. *McGirt* vastly expanded the number of people in the United States living on land recognized as an Indian reservation, instantly creating the most populous Indian reservations in the country. With *McGirt* and the decisions that followed it, the reservation population in the United States has tripled. Prose-

cutorial authorities, citizens, and courts alike now need clear answers to the questions concerning who among these millions of people are "Indian." Providing a clear answer to this basic question—Who is an Indian?—that is applicable across all jurisdictions thus has never been more important. Fundamental legal issues, including the appropriate prosecutorial authority for crimes on Indian country, turn on this question.

The disparate legal tests adopted by lower courts to answer the question of Indian status is causing numerous practical problems. The unbounded factors analyzed by the court below—Had respondent received healthcare from tribal facilities in the past? Was that healthcare also available to non-Indians? Did he attend a few powwows growing up? Did he have a feather in his pocket when arrested?—exemplify the unworkability of the varying answers lower courts have provided. As a result, "case outcomes have not formed a consistent pattern," which has caused "commentators [to] criticize[] these inconsistencies, and urge[] adoption of a single, clearly articulated definition." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 3.03[4].

In the meantime, law enforcement and courts are left to guess using these multi-factor tests whether any person is "Indian enough," risking reversal of a justified and hard-fought conviction. State officers on the ground—especially those that are not cross-deputized as tribal or federal officers—must determine Indian status in order to act within the bounds of federal Indian law. But without a clear rule from this Court on who is an Indian, they must apply the multifarious test of their jurisdiction, which as seen

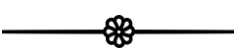
in this case often requires an inquiry into the whole life history of the accused.

These multi-factor tests allow for criminal defendants to pick and choose Indian status. Many people living in Oklahoma—with its strong tribal heritage—have some fraction of Indian ancestry and interaction with tribal institutions and culture. But without a clear test from this Court on who is an Indian, and instead with the infinitely malleable test adopted by the lower court, the criminal element now has the incentive to cherry-pick that portion of their background to identify as an Indian when it allows them to escape their state conviction.

In addition, competing standards of evidence between state and federal prosecutors and differing applications of Indian status tests may result in further jurisdictional gamesmanship. *Cf. State v. Dennis*, 840 P.2d 909, 910-11 (Wash. App. 1992). The federal government bears the burden of proving Indian status beyond a reasonable doubt. *See United States v. Haggerty*, 20-50203, 2021 WL 1827316 (5th Cir. May 7, 2021), *cert. denied, Haggerty v. United States*, 142 S.Ct. 759 (2022); *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001) (en banc), *overruled on other grounds in United States v. Sinks*, 473 F.3d 1315, 1317 (10th Cir. 2007); *see also Lucas v. United States*, 163 U.S. 612, 617 (1896). But in the decision below, respondent was able to argue that he is an Indian, and therefore immune from state prosecution, using a preponderance of the evidence standard. App.8a. This makes it easier for criminals to escape state prosecution than it is for federal prosecutors to indict them under the Major Crimes Act, even when the federal and state courts are applying the same test. Evidence may be too weak

to prove Indian status for federal prosecution but strong enough to prove Indian status for state prosecution, giving the criminal the upper hand in plea negotiations whenever the federal government tries to prosecute a case dismissed in state court. And this is assuming the federal and state courts within the same state apply the same test for Indian status—which is not always true. *Compare United States v. Flores*, 2018 WL 6528475 (W.D.N.C. 2018) (adopting exclusive use of four factors) *with State v. Nobles*, 838 S.E.2d 373, 378 (N.C. 2020) (four factors not exclusive).

The Court has never set forth a test for Indian status under the Major Crimes Act and instead explicitly left open the question raised by this case. That silence has resulted in widespread division among lower courts, has engendered numerous practical difficulties, and has only grown in importance since millions more are now recognized to live in Indian country. The Court should grant certiorari to resolve this important question.



CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

JOHN M. O'CONNOR
ATTORNEY GENERAL
MITHUN MANSINGHANI
SOLICITOR GENERAL
COUNSEL OF RECORD
BRYAN CLEVELAND
AUDREY WEAVER
ASSISTANT SOLICITORS GENERAL
CAROLINE HUNT
JENNIFER CRABB
ASSISTANT ATTORNEYS GENERAL
OFFICE OF THE OKLAHOMA
ATTORNEY GENERAL
313 N.E. TWENTY-FIRST STREET
OKLAHOMA CITY, OK 73105
(405) 522-4392
MITHUN.MANSINGHANI@OAG.OK.GOV

COUNSEL FOR PETITIONER

FEBRUARY 25, 2022