

No. \_\_\_\_\_

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21-6848 ORIGINAL

In The  
Supreme Court of the United States

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JAN 03 2022

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

JUAN MANUAL LOPEZ,

*Petitioner,*

v.

THE STATE OF OKLAHOMA,

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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Juan M. Lopez, #794511  
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*Pro se Petitioner*

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## QUESTIONS PRESENTED

1. Whether *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), announced a new rule of criminal procedure.
2. Whether the Oklahoma Court of Criminal Appeals' independent determination that *McGirt* announced a "new rule of criminal procedure" rest on an "independent and adequate" state-law ground.
3. Whether the Oklahoma Court of Criminal Appeals' determination that subject matter jurisdiction claims which are grounded upon the Native American ethnic group and the Federal Major Crimes Act may be forfeited or waived violates the Equal Protection Clause.

## PARTIES TO THE PROCEEDINGS

Petitioner is Juan Manual Lopez.

Respondent is the State of Oklahoma. The Oklahoma Court of Criminal Appeals denied Mr. Lopez's request for post-conviction relief.

## RELATED PROCEEDINGS

Oklahoma District Court (Caddo County):

*State of Oklahoma v. Juan Manuel Lopez*, CF-2016-163 (Caddo Cnty., Okla. Dist. Ct.)

Oklahoma Court of Criminal Appeals:

*Juan Manuel Lopez v. State of Oklahoma*, No. PC-2021-731 (Okla. Crim. App.)

*State of Oklahoma ex rel. Matloff v. Wallace*, No. PR-2021-366 (Okla. Crim. App.)

Supreme Court of the United States:

*Clifton Merrill Parish v. The State of Oklahoma, et al.*, No. 21-467 (Sup. Ct. Pet. for Cert., filed on September 29, 2021)

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IN THE  
SUPREME COURT OF THE UNITED STATES

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**PETITION FOR WRIT OF CERTIORARI**

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The Petitioner, Juan Manuel Lopez, respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals in this case.

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**OPINIONS BELOW**

The opinion of the Oklahoma Court of Criminal Appeals denying post-conviction relief is unpublished but available at Pet. App. 1–3. That court’s opinion granting Oklahoma’s writ of prohibition and determining non-retroactivity (Pet. App. 4–35) is available at 2021 WL 3578089. The trial court’s order denying post-conviction relief is unpublished but available at Pet. App. 36–42.

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**JURISDICTION**

The Oklahoma Court of Criminal Appeals denied post-conviction relief on October 5, 2021. Pet. App. 1. This petition is being filed within ninety (90) days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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**RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The Indian Commerce Clause, the Supremacy Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution, as well as the relevant provisions of Title 18 of the U.S. Code are set forth in the Appendix. The

Oklahoma Supremacy Clause and Article I, Section 3, of the Oklahoma Constitution, as well as the relevant provisions of Title 22 of the Oklahoma Statutes are set forth in the Appendix (Pet. App. 60–63).

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## INTRODUCTION

In *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), this Court held that the federal government must be held to its word. Because the United States promised to reserve certain lands for tribes in the nineteenth century and never rescinded those promises, those lands remain reserved to the tribes today. In particular, these lands remain “Indian country” within the meaning of the Major Crimes Act (“MCA”), which divests States of jurisdiction to prosecute “[a]ny Indian” who committed one of the offenses enumerated in Section 1153(a) of Title 18 of the U.S. Code while in “Indian country.” *See* 18 U.S.C. § 1153(a). Only the federal government may prosecute such crimes.

Oklahoma has, however, prosecuted many Indians for such offenses. Among them is the Petitioner, Juan Lopez, a registered member of the Kiowa Tribe. In 2016, Oklahoma prosecuted the Petitioner for a crime that occurred on the Kiowa, Comanche, and Apache Nation Reservation (hereinafter, “KCA Reservation”). Pet. App. 36–42. The KCA Reservation continues to exist today and is “Indian country” within the meaning of the MCA. As confirmed by the holding in *McGirt*, Oklahoma therefore lacked jurisdiction to prosecute the Petitioner for an enumerated major crime. The State never had jurisdiction to prosecute Indians for major crimes committed in Indian country; that

authority belongs exclusively to the United States. *See* 18 U.S.C. § 1153(a); *and see* Okla. Const. art. I, § 3.

Nevertheless, when the Petitioner sought post-conviction relief contesting Oklahoma's jurisdiction to try and sentence him under *McGirt*, the Oklahoma Court of Criminal Appeals (herein after, "OCCA") rejected the Petitioner's claim on the theory that *McGirt* announced a new rule of criminal procedure and is not retroactive. Pet. App. 1–3. In its view, *McGirt* amounts to a mere "procedural rule" that determined only "which sovereign must prosecute major crimes committed by or against Indians within" Indian country. Pet. App. 19–20. Despite this Court's emphatic holding that the State lacked power to prosecute Indians for major crimes on tribal land, the Oklahoma court believed that the *McGirt* rule affected "only the manner of determining the defendant's culpability," and thus "imposed only procedural changes." *Id.* (quoting *Schrivo v. Summerlin*, 542 U.S. 348, 353 (2004)). Because it viewed *McGirt* as a new rule of criminal procedure, the Oklahoma court held that this Court's holding did not apply retroactively to convictions that were final when *McGirt* was announced. Pet. App. 7–12 (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

That decision is inherently wrong: *McGirt's* rule is a substantive rule with constitutional force, not a procedural rule. It thus applies retroactively on collateral review as a matter of federal law. *McGirt* "place[s] certain criminal laws and punishments altogether beyond the State's power to impose," *see Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016), and "alters...the class of persons that the law punishes." *See Schriro*, 542 U.S. at 353. Because *McGirt* announced a substantive rule

enforced by the Supremacy Clause, federal law requires its retroactive application in state-court proceedings. *See Montgomery*, 577 U.S. at 205.

The Oklahoma court's ruling also has sweeping implications. It upends the Constitution's structural allocation of authority between the state and federal governments and it allows the State to usurp authority that Congress has reserved to the United States. Additionally, the State's refusal to grant relief from its *ultra vires* convictions violates fundamental due process principles that have long been vindicated on habeas corpus; *viz.* that only a court of competent jurisdiction may impose a valid criminal conviction or sentence.

If allowed to stand, the Oklahoma court's decision will leave thousands of individuals with state convictions that the State had no lawful authority to impose. This Court should grant this petition to reaffirm *McGirt*'s jurisdictional holding, protect Congress' authority under the Supremacy Clause, and vindicate the liberty interests of individuals to be free from punishment that the State has no power to impose.

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## STATEMENT

### A. FEDERAL REGULATION OF INDIAN COUNTRY CRIMES.

For nearly two centuries, this Court has recognized that “[t]he whole intercourse between the United States and [Indian tribes], is, by our Constitution and laws, vested in the Government of the United States.” *See Worcester v. Georgia*, 31 U.S. 515, 561 (1832). In the earliest years of our nation, Congress withheld the exercise of its exclusive power to prosecute at least some crimes involving Indians on tribal lands. For example, under a 1796 law, Congress provided that “offenses committed by Indians...against each other

were left to be dealt with by each tribe for itself according to its local customs.” *See Ex parte Crow Dog*, 109 U.S. 556, 571–72 (1883) (“*Crow Dog*”). *Crow Dog* set aside a federal conviction of an Indian in a territorial court, based on its conclusion that, despite an agreement with the Sioux tribe to allow federal prosecutions for murder, the treaty had not repealed Congress’ exemption of crimes by Indians against each other. Accordingly, the Court held the federal territorial court “was without jurisdiction to find or try the indictment against the prisoner,” such that “the conviction and sentence are void, and that his imprisonment is illegal.” *Id.* at 572.

In part in reaction to *Crow Dog* (see *United States v. Kagama*, 118 U.S. 375, 382–83 (1886)), in 1885 Congress enacted the MCA. *See* Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, codified at 18 U.S.C. § 1153. The MCA gives the federal government exclusive jurisdiction to prosecute certain felonies committed by Indians in “Indian country.” *See* 18 U.S.C. § 1153(a); *and see United States v. John*, 437 U.S. 634, 651 (1978) (“*John*”).<sup>1</sup> Accordingly, absent an Act of Congress providing otherwise, States lack jurisdiction to prosecute “offenses covered by the Indian Major Crimes Act.” *See Negonsott v. Samuels*, 507 U.S. 99, 102–03 (1993); *and see McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 168 (1973) (similar).

#### **B. THE FEDERAL GOVERNMENT’S PROMISE TO THE KIOWA, COMANCHE, AND APACHE NATIONS.**

In the mid-1800s when most Indian reservations were created, the lands typically were “reserved for occupation and use by the Indians” to protect the possession of the

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<sup>1</sup> The MCA originally used the term “reservation,” but in 1948 Congress replaced the term “reservation” with the broader term “Indian country,” which was “used in most of the other special statutes referring to Indians[.]” *See John*, 437 U.S. at 634, 647 n. 16, 649 (citing 18 U.S.C. § 1153).

land for the Indians as wards of the federal government, until such time as they could be integrated into American society as full citizens. *See Solem v. Bartlett*, 465 U.S. 463, 466–67 (1984). At the turn of the century, Congress anticipated the early demise of the reservation system, yet this Court has not extrapolated from this exception a concomitant boundary diminishment in the passage of every surplus land act. Instead, it has examined each act on the case-by-case basis, holding that some of the acts diminished reservations and others did not. *See Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1395 (10th Cir. 1990).

In disputes over reservation boundaries, this Court has applied a long-standing presumption that ambiguous congressional action affecting the rights of Indians is to be resolved to the benefit of the Indians. *See Yazzie*, 909 F.2d at 1394. The analysis established a distinction between title and boundary and requires that specific congressional intent to diminish boundaries—and not just Indian land titles—be clearly established in each alleged diminishment statute whose meaning subsequently became a source of dispute. *Id.*, 909 F.2d at 1394–95.

The Comanche Nation, Oklahoma, and the Kiowa Nation entered into the First Treaty of Medicine Lodge Creek (hereinafter, “First Treaty”) with the United States on October 21, 1867, establishing the original boundaries of the reservation for these two tribes. *See Comanche Nation v. United States*, 393 F.Supp.2d 1196, 1200 (W.D. Okla. 2005). This First Treaty provided that no tribe could be added to and permitted to share the Kiowa and Comanche Reservation without the consent of the two tribes. On the same date, the Kiowa Tribe, Comanche Nation, and Apache Tribe entered into the

Second Treaty of Medicine Lodge Creek (hereinafter, "Second Treaty") with the United States, in which the Kiowa Tribe and Comanche Nation consented to share their reservation – established by the First Treaty – with the Apache Tribe. *See Comanche Nation*, 393 F.Supp.2d at 1200. The Second Treaty reaffirmed the requirement that in order for the United States to add any tribe to the reservation, it would have to obtain the consent of the three tribes. *Id.*, at 1200–01.

The Jerome Agreement was ratified as a treaty on June 6, 1900. *See Ahboah v. Housing Auth. of the Kiowa Tribe of Indians*, 1983 OK 20, ¶ 11, 660 P.2d 625, 627–28. The Treaty incorporated by reference the terms of the General Allotment Act of 1887, which made individual allottees subject to the civil and criminal laws of the state or territory in which they resided once the allotments were made and trust patents issued. *See Ahboah*, 660 P.2d at 628. However, the Act was amended in 1906 to postpone the operation of the state or territorial jurisdiction until the expiration of the trust period and issuance of fee simple patents. The trust status of the allotments was duly extended by executive order and no simple patents have been issued. *Id.*

This Court noted that only Congress had the authority to terminate tribal relations and divest the federal government of jurisdiction over the trust allotments and allottees. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). This Court held provisions for continuing federal supervision of allotted land and Indian activities showed no congressional intent to terminate tribal relations immediately by enacting the General Allotment Act of 1887. *See Ahboah*, 660 P.2d at 628. The grant of citizenship was found not to be incompatible with continuing tribal relations and the wardship status of

Indians. Thus, trust allotments remain under the exclusive jurisdiction and control of Congress during the trust period for all purposes relating to the guardianship and protection of Indians. *Id.*

Extensive federal regulation of the leasing allotments, even to non-Indian lessees, shows Congressional intent that the leased allotments remain Indian Country. In addition, this Court has held that an interest in Indian lands in less than fee simple, held by a non-Indian, does not deprive the lands of their Indian character. *Id.*, 660 P.2d at 629.

Public Law 280 (Act of August 15, 1953) (hereinafter, "P.L. 280") embodies express Congressional consent to state assumption of civil and/or criminal jurisdiction over Indians and Indian activities within Indian Country, provided that certain conditions are met. *Id.*, 660 P.2d at 630. As originally enacted, states were divided into two groups: mandatory states (those required to assume civil and criminal jurisdiction) and optional states (which could voluntarily assume jurisdiction by affirmative legislative action). *Id.* The optional states were further divided into two groups: those whose constitutions and enabling acts disclaimed all title to – and interest in – Indian land within state borders, and those states not having no such disclaimer. Disclaimer states were required to amend their constitutions "where necessary" as well as to take affirmative action to assume jurisdiction. Oklahoma is among the disclaimer states. *Id.*

P.L. 280 was amended by the Civil Rights Act of 1968 by removing the requirement for affirmative legislative action and consent by tribal referendum was required before state jurisdiction could be assumed. *Id.* The Kiowa Tribe has not

assented to the assumption of jurisdiction by the State of Oklahoma. Therefore, to assume jurisdiction under P.L. 280, Oklahoma must have done so under the original 280 Act before the amendment by the Civil Rights Act of 1968. *Id.* Moreover, Oklahoma has long recognized that it “has not acquired jurisdiction over any Indian lands in Oklahoma pursuant to Public Law 280, a federal statute authorizing state criminal jurisdiction and limited civil jurisdiction over Indian country lands,” to include the KCA Reservation, and that “[t]he tribes have their own law enforcement and courts, or rely upon federal agencies, such as the Bureau of Indian Affairs (BIA) for such services.” Pet. App. 43–54. All this supports that there was no congressional intent, as Oklahoma as always been aware, to diminish the boundaries of the KCA Reservation.

Oklahoma did not become a state for more than forty (40) years after the KCA had established their home there. In 1907, Oklahoma joined the United States after meeting the conditions of the federal Oklahoma Enabling Act. *See* Act of June 16, 1906, ch. 3335, 34 Stat. 267. Under that Act, those living in Oklahoma “forever disclaim[ed] all right and title to any unappropriated public lands lying within the boundaries” of land “owned or held by any Indian, tribe, or nation.” *Id.* § 3. Only the federal government could extinguish that title, and unless it did so, those lands “shall be and remain subject to the jurisdiction, disposal, and control of the United States.” *Id.* Because the provision “prohibit[ing] state jurisdiction over Indian Country” has never been altered, “the Federal Government still has exclusive jurisdiction over Indian Country.” *See C.M.G. v. State*, 1979 OK CR 39, 594 P.2d 798, 799.

Other provisions of the Oklahoma Enabling Act underscore the exclusive jurisdiction of the United States over Indian lands. Section 16 required any then-pending cases “arising under the Constitution, laws, or treaties of the United States,” 34 Stat. 267, 276 — which would include cases arising under the MCA — to be transferred to *federal* court.<sup>2</sup> Section 1 prohibited Oklahoma from limiting federal authority “to make any law or regulation respecting such Indians, their lands, property, or other rights,” *id.* at 267 — which this Court has interpreted to preserve “established [federal] laws and regulations” concerning Indians. *See Ex parte Webb*, 225 U.S. 663, 682–83 (1912). Section 21 confirmed that federal laws, such as the MCA, that are “not locally inapplicable shall have the same force and effect...as elsewhere.” *See* 34 Stat. 267, 278.

Although federal law unequivocally established exclusive federal jurisdiction to prosecute tribal members for crimes committed in Indian country, many States nevertheless asserted civil and criminal jurisdiction in those lands. *See* App. 7a, U.S. Amicus Br., *Sharp v. Murphy*, No. 17-1107 (filed July 30, 2018). As the U.S. Department of Interior explained in a 1963 memorandum, this practice was widespread even though “no Federal statutes of relinquishment and transfer” authorized these States to prosecute Indians who committed crimes in Indian country. *Id.* 7a–8a. Rather, perhaps because of the absence or ineffectiveness of tribal courts, “many States joined Oklahoma in prosecuting Indians without proper jurisdiction.” *See McGirt*, 140 S.Ct. at 2478. Yet

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<sup>2</sup> In 1907, Congress amended the Oklahoma Enabling Act to confirm that the transfer to federal court was required for “[p]rosecutions for all crimes and offenses...pending...upon...admission” to statehood “which, had then been committed within a State, would have been cognizable in the Federal courts.” *See* Act of Mar. 4, 1907, ch. 2911, § 3, 34 Stat. 1286, 1287.

“[o]nly the federal government, not the State, may prosecute Indians for major crimes committed in Indian country.” *Id.*; *cf.*, Okla. Const. art. I, § 3.

The location of the Petitioner’s crime alleged in his case occurred on the KCA Reservation. The KCA Reservation encompasses seven counties, including the entirety of Caddo County. Pet. App. 55–59. The scene of the crime in the Petitioner’s case is located at 313 W. Mississippi in Anadarko, Oklahoma (Pet. App. 37), which is within the southern half of Caddo County and, thus, is located on the KCA Reservation. The Petitioner’s crimes were charged and tried in the District Court of Caddo County. Thus, the Petitioner has satisfied his burden of showing that the crime occurred in Indian country.

Past governmental authority over the Reservation has included criminal prosecutions of Indians, like the Petitioner. This exercise of State authority, however, has not disestablished the KCA Reservation. Past failure to challenge Oklahoma’s jurisdiction over KCA lands, or treat them as reservation lands, does not divest the federal government of its exclusive authority over relations with the KCA Nation or negate Congress’ intent to protect the tribal lands and governance of these three tribes. Therefore, under the *Solem* analysis, there is no evidence to conclude Congress disestablished the KCA Reservation.

The State of Oklahoma did not have jurisdiction to prosecute the Petitioner’s crimes. As a result, neither the State of Oklahoma nor the Caddo County District Court had jurisdiction to accept the Petitioner’s plea of guilty and then subsequently sentence him. Under the MCA, the Petitioner is an “Indian” for purposes of federal law. Pet. App.

38. The Petitioner's crime occurred in Indian country, as the residence was located on the KCA Reservation. If the Petitioner were to be prosecuted at all, it should have been by the federal authorities.

**C. THIS COURT'S DECISION IN *McGIRT*.**

In *McGirt*, this Court held that Oklahoma's "longstanding practice of asserting jurisdiction over Native Americans" for crimes covered by the MCA was unlawful. See *McGirt*, 104 S.Ct. at 2470–71. Oklahoma had prosecuted and convicted Jimcy McGirt, an enrolled member of the Seminole Nation of Oklahoma, for three sexual offenses, all of which were committed on the Creek Reservation. *Id.* at 2459. McGirt argued in post-conviction proceedings that the State lacked jurisdiction to prosecute him and that any new trial must take place in federal court. *Id.* Oklahoma disputed that the Creek Reservation remained "Indian country" within the meaning of the MCA, contending instead that land given to the Creeks in an 1866 treaty and federal statute became property of Oklahoma in the intervening years. *Id.* at 2460.

The Court rejected Oklahoma's position. The Court explained, "Congress established a reservation for the Creeks [i]n a series of treaties." *Id.* at 2460–62, 2472–76. No "Acts of Congress," the Court concluded, had rescinded that reservation. *Id.* at 2462–68. Therefore, courts and "States have no authority to reduce federal reservations." *Id.* at 2462. Nor, the Court reasoned, can "historical practices and demographics...around the time of and long after the enactment of all the relevant legislation...prove disestablishment." *Id.* at 2468. Finally, the Court rejected the State's argument that the MCA was inapplicable to Oklahoma or some subsection of it. *Id.* at 2476–78. Instead,

the Court reaffirmed, “Congress allowed only the federal government, not the States, to try tribal members for major crimes.” *Id.* at 2480.

The Court acknowledged that its holding might affect “perhaps as much as half [Oklahoma’s] land and roughly 1.8 million of its residents.” *Id.* at 2479. It declined, however, to allow fears about the fallout, including the possibility that “[t]housands’ of Native Americans” might “challenge the jurisdictional basis of their state-court convictions,” to stand in the way of the Court’s holding. *Id.* The Court raised the possibility that “well-known state and federal limitations on postconviction review in criminal proceedings” might impose “significant procedural obstacles” to relief. *Id.*; and at 2479 n. 15 (noting state rule that claims not raised on direct appeal are waived on collateral attack); *but see id.* at 2501 n. 9 (Roberts, C.J., dissenting) (“[U]nder Oklahoma law, it appears that there may be little bar to state habeas relief because ‘issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal.’”)

(quoting *Murphy v. Royal*, 875 F.3d 896, 907 n. 5 (10th Cir. 2017), *aff’d sub nom. Sharp v. Murphy*, 140 S.Ct. 2412 (2020)). However, the Court did not embrace any such defenses, instead concluding that that “the magnitude of a legal wrong is no reason to perpetuate it.” *Id.* at 2480. “[D]ire warnings are just that, and not a license for us to disregard the law.” *Id.* at 2481.

#### **D. THE CURRENT CONTROVERSY.**

1. On April 29, 2016, Oklahoma charged the Petitioner with one count of felony child abuse by injury, *see* Okla. Stat. tit. 21, Supp. 2014, § 834.5(A), in Caddo County District Court. The Petitioner entered a guilty plea to the offense as charged and the trial court sentenced him to twenty (20) years in the custody of the Oklahoma

Department of Corrections. Pet. App. 36–42. The Petitioner did not seek to withdraw his plea or otherwise seek direct review of his conviction and sentence. The Petitioner’s conviction and sentence became final on or about April 9, 2018.

2. On November 5, 2020, Petitioner filed an application for post-conviction relief. In the application, the Petitioner stated that he was an enrolled member of the Kiowa Tribe of Indians and that his crime occurred within the historical boundaries of the KCA Reservation. The Petitioner argued that, under *McGirt*, the KCA Reservation remained “Indian country” within the meaning of the MCA. As a result, the Petitioner contended, the federal government had exclusive jurisdiction to prosecute him and his Oklahoma conviction was void for lack of subject-matter jurisdiction. Accordingly, the Petitioner asked the court to vacate his conviction. *Id.* at App. 37.

The State did not file a formal response.<sup>3</sup> However, the trial court recognized that the Petitioner established a *prima facie* case by attaching a certification issued by Liz Ware, Enrollment Officer, and Matthew M. Komalty, Chairman of the Kiowa Tribe, that the Petitioner is, and was at the time of the offense, an enrolled member of the Kiowa Tribe with 3/8 degree of Kiowa Tribal Blood, and that the Kiowa Tribe of Indians is a Tribe recognized by the Federal Government. *Id.* at App. 38.

3. The trial court acknowledged that the location where the Petitioner’s offense occurred is within the territory set aside by the Federal Government for the “Kiowa, Comanche and Apache Reservation.” *Id.* at App. 38–39. Notwithstanding this recognition, the trial court concluded that the location where the offense occurred is not Indian country, ultimately denying post-conviction relief. *Id.* at App. 42.

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<sup>3</sup> See Dkt., *Oklahoma v. Lopez*, CF-2016-00163 (Okla. Dist. Ct., Caddo Cnty.).

In concluding that the KCA Reservation is not Indian country, the trial court stated:

"The City of Anadarko as the County Seat of Caddo County, is a political subdivision of the State of Oklahoma.... As a County Seat the City of Anadarko, as a matter of law cannot be under federal superintendence, since the City is the site of the Caddo County Courthouse which is governed by the Commissioners of Caddo County, with the law enforced by Sheriff and Deputies for Caddo County. The Caddo County Courthouse is also the site of the District Court of Caddo County. Further the City of Anadarko is governed pursuant to its city charter with elected municipal officials and a standing municipal police force. The City of Anadarko which includes Caddo County Governmental Courthouse are political subdivisions of the State of Oklahoma and as a matter of law cannot be under federal superintendence, therefore the second element for dependent Indian community has failed";

"[T]he 10<sup>th</sup> Circuit of the United States Court of Appeals in *Tooisagah v. United States*, 186 F.2d 93 (10 Cir. App., 1950) involving the former Kiowa, Comanche and Apache Reservation held that the reservation was disestablished"; and,

"[T]he United States Government, pursuant to the Jerome Agreement disbursed the Indian Reservations of the KCA and WCD by purchasing their surplus lands not allotted to individual tribal members, then Congress exercised its Plenary Powers by the **Organic Act, 26 Statutes At Large §81, and Enabling Act, 34 Statutes At Large 267** to create the State of Oklahoma with all of its political subdivisions. It is inconceivable that the United States would create the State of Oklahoma to stand on equal footing with other states with KCA Indian Reservation and WCD Indian Reservation to continue to exist, since together they would encompass the entirety of Caddo County."

*Id.* at App. 39–41 (emphasis in original).

4. a. The Petitioner timely appealed the trial court's denial of post-conviction relief to the OCCA on July 19, 2021. While the Petitioner's appeal was pending, the State's request for a writ of prohibition in *Parish v. State* was also pending in the OCCA, wherein the State sought an order vacating the trial court's order granting post-conviction relief in *Parish v. State*, Case No. CF-2010-26, and further prohibiting the trial court from doing the same.

*Id.* at App. 4–35. The district attorney for Pushmataha County also asked the OCCA for a “stay of all trial court proceedings,” which the OCCA granted. *Id.* at App. 7–8.

b. In that case, and on its own motion, the OCCA directed the parties to brief whether “the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw reservations announced in *McGirt* and *Sizemore* [should] be applied retroactively to void a state conviction that was final when *McGirt* and *Sizemore* were announced?” *Id.*<sup>4</sup> After receiving briefing on that issue, the court granted the writ of prohibition and reversed the trial court’s order granting post-conviction relief to Petitioner. *Id.* at App. 8.

The OCCA explained that whether petitioner was entitled to post-conviction relief turned on Oklahoma’s doctrine governing when new rules apply to convictions that were final when the rule was announced. That doctrine, the court stated, “draw[s] on, but” is “independent from, the Supreme Court’s non-retroactivity doctrine in federal habeas corpus,” as developed in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, “to bar the application of new procedural rules to convictions that were final when the rule was announced.” *Id.* at App. 8–9.

Under that doctrine, the court stated, “new rules” of “criminal procedure” “generally do not apply retroactively to convictions that are final, with a few narrow exceptions.” *Id.* In contrast, “a new *substantive* rule” applies “to final convictions if it placed certain primary (private) conduct beyond the power of the Legislature to punish, or categorically barred certain punishments for classes of persons because of their status

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<sup>4</sup> The OCCA framed this directive “[i]n light of *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *Edwards v. Vannoy* (No. 19-5807), 593 U.S. \_\_\_\_ (May 17, 2021), cases cited therein, and related authorities.” Pet. App. 7–8.

(capital punishment of persons with insanity or intellectual disability, or juveniles, for example).” *Id.* at App. 10.

The OCCA then held that *McGirt* does “not apply retroactively to void a conviction that was final when *McGirt* was decided” because it “announced a rule of criminal procedure.” *Id.* at App. 14, 18–19. In the Oklahoma court’s view, “*McGirt* did not ‘alter[] the range of conduct or the class of persons that the law punishes,’ but merely ‘decided which sovereign must prosecute major crimes committed by or against Indians within its boundaries.’” *Id.* at App. 19–20 (quoting *Schiro*, 542 U.S. at 353). Because it believed that “the extent of state and federal criminal jurisdiction affected ‘only the manner of determining the defendant’s culpability,’ the court held that *McGirt* announced a procedural rather than substantive rule. *Id.* (quoting *Schiro*, 542 U.S. at 353).<sup>5</sup>

The OCCA acknowledged that it had previously “granted post-conviction relief and vacated several capital murder convictions, and at least one non-capital conviction (Jimcy McGirt), that were final when *McGirt* was announced.” *Id.* at App. 12–13. Those cases had all treated objections to the State’s “criminal subject matter jurisdiction” as “non-waivable.” *Id.* Nevertheless, the court contended it “acted in those post-conviction cases without our attention ever having been drawn to the potential non-retroactivity of *McGirt*.” *Id.*

Two judges concurred separately. Vice Presiding Judge, Hudson urged “the leaders of the State of Oklahoma, the Tribes, and the federal government to address the

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<sup>5</sup> The OCCA also rejected the argument that *McGirt*’s rule applied retroactively because it was “new.” See Pet. App. 20–21. *McGirt*, the court opined, “imposed new and different obligations on the state and federal governments.” *Id.* at App. 21. The court also thought that *McGirt* was new because “it was not dictated by, and indeed, arguably involved controversial innovations upon, Supreme Court precedent.” *Id.*

jurisdictional fallout from *McGirt*.” *Id.* at App. 30. Judge Lumpkin believed that the criminal judgments entered by courts without “jurisdiction to render them” should be deemed “void” *ab initio*, rather than analyzed under the framework of retroactivity doctrine. *Id.* at App. 31–32. For that reason, Judge Lumpkin disagreed with the court’s conclusion that *McGirt* announced a “procedural” rule. *Id.* Nevertheless, Judge Lumpkin concurred for “pragmatic” reasons: to avoid “retroactive application of cases based on the chaos, confusion, harm to victims, etc., if retroactive application occurred.” *Id.* at App. 34–35.

c. In the Petitioner’s post-conviction appeal, rather than addressing the claims presented in the appeal, the OCCA determined the Petitioner’s conviction was final before the July 9, 2020, decision in *McGirt* and, in light of the *Wallace* decision, this Court’s “holding in *McGirt* does not apply.” *Id.* at App. 1–3.

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#### REASONS FOR GRANTING THE PETITION

*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 MCA. The OCCA’s decision in *Wallace* flouts that principle. By holding that *McGirt* is a mere procedural rule that is not retroactive to cases on collateral review, the Oklahoma court 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.

Beyond the Oklahoma court's legal errors, its decision has enormous practical importance. If left to stand, the decision would condemn many Native American defendants to bear state convictions and serve state sentences for crimes the State had no power to prosecute. Because the State has no power to preserve convictions that are inherently void, and because of the legal and practical importance of the issue in this case, this Court's review of the decision is warranted.

**A. THE DECISION BELOW IS INCORRECT.**

Federal law requires that *McGirt* be applied retroactively in state post-conviction proceedings. Under *McGirt*, the federal government has – and always had – exclusive jurisdiction to prosecute major crimes committed by Indians on the KCA Reservation. The State has no power to do so, and never has. *McGirt* did not create that rule; rather, this Court's interpretation of federal treaties and statutes is inherently retroactive to the date of their ratification and enactment. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n. 12 (1944) (“[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law.”). That allocation of authority is not a mere procedural rule. Rather, it goes to the heart of the Constitution's divestment of state authority (absent a contrary provision by Congress) to proscribe and prosecute major crimes by Indians on federally recognized reservations. *See Worcester v. Georgia*, 31 U.S. 515, 561 (1832). Under the Supremacy Clause, the federal divestiture of state jurisdiction is the “Supreme Law of the land.” *See*

U.S. Const., art. VI, cl. 2. Because Oklahoma has no jurisdiction to prescribe and punish Petitioner's conduct, the State is holding Petitioner without any authority to do so. A jurisdictional ruling of that character is necessarily retroactive as a matter of federal law, and the Oklahoma court's incorrect decision to the contrary merits this Court's review.

1. "New *substantive* rules generally apply retroactively" while "[n]ew rules of procedure...generally do not." *Schrivo v. Summerlin*, 542 U.S. 348, 351–52 (2004). The rule announced in *McGirt* is substantive. Substantive rules include those that "alter[] the range of conduct or the class of persons that the law punishes." *Id.*, at 352. "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant'...faces a punishment that the law cannot impose upon him." *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). In these cases, "when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful" and "void." *See Montgomery v. Louisiana*, 577 U.S. 190, 200–03 (2016).

*McGirt*'s jurisdictional ruling satisfies the standards for a substantive rule. By excluding a certain class of defendants from state prosecution for certain crimes, the *McGirt* rule both "place[s] certain criminal laws and punishments altogether beyond the State's power to impose," *id.*, at 201, and "alters...the class of persons that the law punishes." *See Schrivo*, 542 U.S. at 352. Where a State has no authority to prosecute a defendant for a crime, no "possibility of a valid result" can exist. *See Montgomery*, 577 U.S. at 201. All convictions by a court that lacks jurisdiction are, "by definition, unlawful" and "void." *Id.*, at 201–03; *and see Waley v. Johnston*, 316 U.S. 101, 104–05 (1942) (per

curiam) (“[J]udgment of conviction is void for want of jurisdiction of the trial court to render it.”).

Here, the lack of jurisdiction is not solely a want of judicial power; Oklahoma lacks authority to criminalize major crimes by Indians in Indian country. Because Congress has given no authority to Oklahoma to extend its laws to Petitioner’s conduct, the State’s regulatory effort is “repugnant to the Constitution, laws, and treaties of the United States” and an interference with powers that, “according to the settled principles of our Constitution, are committed exclusively to the government of the Union.” *See Worcester*, 31 U.S. at 561. *McGirt* thus means that Oklahoma is holding Petitioner for an offense that – as to him – it lacked legislative power to enact, executive power to prosecute, and judicial power to enforce. His conduct cannot constitute an offense because Oklahoma cannot apply its law to him at all.

2. The OCCA refused to apply *McGirt* retroactively because, it asserted, the rule is procedural. That conclusion is wrong. Procedural rules “are designed to enhance the accuracy of a conviction or sentence by regulating ‘the manner of determining the defendant’s culpability.’” *Montgomery*, 577 U.S. at 201 (quoting *Schrivo*, 542 U.S. at 353) (emphasis omitted). “Those rules ‘merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.’” *Id.* (quoting *Schrivo*, 542 U.S. at 352). However, that reasoning cannot apply when *no* state procedures could lead to a valid result. As this Court has explained, “[t]he same possibility of a valid result does not exist where a substantive rule has eliminated a

State's power to proscribe the defendant's conduct or impose a given punishment." *Id.* That is the case here.

The Oklahoma court's treatment of *McGirt* as merely shifting the prosecution of a crime from one sovereign to another reflects a basic misunderstanding of our federalist system. Under the Constitution's recognition of separate state and federal sovereignty, a state crime is not the same offense as a federal crime. Rather, as the Double Jeopardy Clause's dual-sovereignty doctrine recognizes, the States and the federal government are separate sovereigns invested with independent powers to proscribe conduct and punish crimes. "[A] crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign." *See Gamble v. United States*, 139 S.Ct. 1960, 1964 (2019); and *see Heath v. Alabama*, 474 U.S. 82, 92 (1985); *Abbate v. United States*, 359 U.S. 187, 195 (1959); *United States v. Wheeler*, 435 U.S. 313 (1978).

In ordinary circumstances, the dual-sovereignty doctrine means that both the state and federal governments can prosecute a defendant for the same conduct. *See Gamble*, 139 S.Ct. at 1964. However, here, the State has been ousted altogether from prosecuting a crime covered by the MCA. That means that it has prosecuted Petitioner for no offense at all. "[A]n 'offence' is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws and two 'offences.'" *Id.*, at 1965. But where only one sovereign has the power to prosecute, only one law and one offense can exist — and here, it is not the law of Oklahoma.

3. As this Court recently held in *Montgomery*, federal law requires retroactive application of new substantive rules in state post-conviction proceedings. Whatever

latitude exists for state courts to devise procedural rules to limit claims in state post-conviction proceedings, it does not extend to nullifying federal substantive rules backed by constitutional guarantees. As *Montgomery* explained: “[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.” *See Montgomery*, 577 U.S. at 200.

In *McGirt*, this Court determined that the Creek lands qualified as a reservation under duly ratified treaties and that Congress had not disestablished the reservation. That principle applies equally to the KCA Reservation, for the same reasons. *McGirt* thus means, as in *Worcester* itself, that Oklahoma’s prosecution is “repugnant to the Constitution, laws, and treaties of the United States.” *See Worcester*, 31 U.S. at 561. That federal-law determination is “binding on state courts.” *See Montgomery*, 577 U.S. at 200. Accordingly, because *McGirt* is a “substantive” constitutional rule, federal law requires that state courts apply it on collateral review. *Id.*, at 205 (“Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.”).<sup>6</sup>

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<sup>6</sup> Substantive rules are not an exception to *Teague*; such rules are “not subject to the bar” at all. *See Schriro*, 542 U.S. at 352 n. 4. However, even if *Teague* were deemed applicable, it would not bar application of *McGirt* on collateral review. As the Tenth Circuit explained in announcing the rule later affirmed by *McGirt*, a rule is not a “new” rule “under *Teague* ‘when it is merely an application of the principle that governed a prior decision to a different set of facts.’” *See Murphy v. Royal*, 875 F.3d 896, 929 n. 36 (10th Cir. 2017) (quoting *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013)), *aff’d sub nom. Sharp v. Murphy*, 140 S.Ct. 2412 (2020). That is the case with *McGirt*. *See McGirt*, 140 S.Ct. at 2462, 2465, 2468–70 (applying the framework announced in *Solem v. Bartlett*, 465 U.S. 463 (1984)); *Murphy*, 875 F.3d at 929 n. 36 (same); *see also* Cap. Habeas Unit of the Fed. Pub. Def. for the W. Dist. of Okla. Amicus Br. 2–7, *State v. Hon. Jana Wallace*, No. PR-2021-366 (Okla. Crim. App. July 2, 2021); Cherokee Nation et al. Amici Br. 7–9, *State v. Hon. Jana Wallace*, No. PR-2021-366 (Okla. Crim. App. July 2, 2021).

## B. THE DECISION BELOW IMPLICATES VITALLY IMPORTANT INTERESTS.

This Court's intervention is warranted not only to correct a fundamental legal error by the court below, but also because the Oklahoma court's decision undermines this Court's decision in *McGirt*, diminishes federal authority, disregards individual rights, violates equal protection of the law, and threatens to leave in place a significant number of state convictions that never had any valid legal basis.

1. The OCCA's ruling undermines this Court's decision in *McGirt* and transgresses the constitutional allocation of authority over Indian tribes. As *McGirt* explained, the Constitution "entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the 'Supreme Law of the land.'" *See McGirt*, 140 S.Ct. at 2462 (quoting U.S. Const., art. VI, cl. 2). The paramount federal rule over Indian affairs has been recognized since the Nation's early years. *See Worcester*, 31 U.S. at 561 (1832). Absent congressional authorization, the State had no power to act. *See Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history.").

The decision below cannot be reconciled with these central structural features of the Constitution. Nor can it be reconciled with *McGirt*'s enforcement of the Nation's promises to the tribes when they were relocated to the Oklahoma territory. As this Court recognized, "[o]n the far end of the Trail of Tears was a promise," and this Court's decision "h[e]ld the government to its word." *See McGirt*, 140 S.Ct. at 2459. The decision below, treating *McGirt* as a mere procedural rule and allowing the State to maintain convictions that it never has authority to impose, diminishes *McGirt*'s significance and undermines

this Court's holding as well as the predominant congressional authority over Indian country crimes.

2. The Oklahoma court's ruling also warrants review because of its intrusion on a core feature of individual liberty that has been protected by the writ of habeas corpus for centuries. More than a century ago, this Court deemed it "perfectly well settled" that, to accord with "due process" in the constitutional sense, "a criminal prosecution in the courts of a state" must be in "a court of *competent jurisdiction*." *See Frank v. Mangum*, 237 U.S. 309, 326 (1915) (emphasis added). The holding below violates that basic principle. Under the reasoning of *McGirt*, the Oklahoma courts lacked jurisdiction to convict or sentence Petitioner, and the Oklahoma legislature lacked power to confer that jurisdiction on the Oklahoma courts. As a result, Petitioner's conviction violates a fundamental feature of due process that has prevailed for centuries — that a court without jurisdiction cannot impose a valid criminal judgment.

The writ of habeas corpus was originally created for situations like the Petitioner's here. Originating in England, the Great Writ allowed courts "to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner." *See Boumediene v. Bush*, 553 U.S. 723, 741 (2008). That is, the writ protected any defendant who had been "restrained of his liberty by order or decree of any illegal court," including a court lacking jurisdiction to impose the conviction or punishment. *See* 1 William Blackstone, *COMMENTARIES ON THE LAWS OF ENGLAND* 135 (1765).

This Court has repeatedly confirmed that a court's lack of jurisdiction is a quintessential basis for invoking the writ of habeas corpus. In *Ex parte Lange*, 85 U.S.

163 (1873), this Court held that the defendant was entitled to the writ because the trial court lacked jurisdiction to impose his sentence. In *Ex parte Wilson*, 114 U.S. 417 (1885), this Court held that the defendant was entitled to a writ of habeas corpus because the trial court had exceeded its jurisdiction in trying, convicting, and sentencing him. In *The Ku Klux Cases*, 110 U.S. 651 (1884), this Court found it “well settled that when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the supreme court, but it is its duty, to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter of which such court had no jurisdiction, to discharge the prisoner from confinement.” *Id.*, 110 U.S. at 653. In *Crow Dog*, this Court applied that principle to vacate a federal conviction on habeas corpus as “void” where a federal territorial court lacked “jurisdiction” over an Indian-on-Indian crime. *See Crow Dog*, 109 U.S. at 557, 572. The same established principles apply here.

In sum, granting post-conviction relief to Petitioner because the Oklahoma courts lacked jurisdiction to convict him effectuates the original purpose of habeas corpus and reaffirms the fundamental due process principle that only courts of competent jurisdiction may impose criminal penalties. The Oklahoma court’s decision casts those principles aside. Certiorari is warranted to reinstate them.

3. The OCCA’s decision in *Wallace* that subject-matter jurisdiction claims grounded upon the Native American ethnic group and the MCA will only be applied prospectively violates equal protection of the law in direct contravention of the

Fourteenth Amendment to the United States Constitution, as well as Article II, Section 2 of the Oklahoma Constitution, underscoring the need for this Court's review.

As a matter of well-settled rule of law, subject matter jurisdiction applies to a court's authority to adjudicate a particular type of controversy. *See Cox v. State*, 2006 OK CR 51, ¶ 8, 152 P.3d 244, 248. Also as a matter of well-settled rule of law, subject matter jurisdiction cannot be waived to confer jurisdiction on a court lacking the power to adjudicate a particular type of controversy. *Id.* As such, it is well-settled law that claims involving subject-matter jurisdiction can never be forfeited or waived, and can be raised at any time. *Id.* (citing *Bowen v. State*, 1972 OK CR 146, ¶ 8, 497 P.2d 1094, 1097 (“jurisdiction of subject matter can neither be waived nor conferred by consent”); and see *United States v. Cooper*, 956 F.2d 960, 962 (10th Cir. 1992) (same); *see also* Pet App. 12 (“Before and after *McGirt*, this Court has treated Indian country claims as presenting non-waivable challenges to criminal subject matter jurisdiction. *See Bosse v. State*, 2021 OK CR 3, ¶¶ 20–21, 484 P.3d 286, 293–94; *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (both characterizing claim as subject matter jurisdictional challenge that may be raised at any time”)).

Notably, and rightly so, in *Wallace* the OCCA did not abrogate the familiar rule of law that subject matter jurisdiction cannot be waived or forfeited, and may be raised at any time. *See* Pet. App. 4–35. Rather, as it specifically pertains to subject matter jurisdiction claims involving the Native American ethnic group, the OCCA changed its course and limited the scope of subject matter jurisdictional claims which cannot be waived or forfeited. The OCCA declared that the familiar rule that challenges to criminal

subject matter jurisdictional claims are non-waivable and can never be forfeited is indeed forfeitable when such claim specifically involves the Native American ethnic group and the MCA. Consequently, in that view, all subject matter jurisdictional claims which do not involve the Native American ethnic group and the MCA “can never be waived or forfeited” continues to be applied equally.

The Equal Protection Clause of the United States Constitution, U.S.C.A. Const., Amend. XIV, states, “No state shall...deny to any person within its jurisdiction the equal protection of the laws.” (Emphasis added). Oklahoma’s Constitution contains a parallel Equal Protection Clause at Art. II, § 2: “All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.”

The principle of equal protection admits no “artificial line of a ‘two-class theory’” that “permits the recognition of special wards entitled to a degree of protection greater than that accorded others.” *See Fisher v. University of Texas at Austin*, 570 U.S. 297, 307 (2013). Any judicial decisions which exclude application of well-settled legal principles for one ethnic group while affording those same legal principles to all other ethnic groups must meet strict scrutiny, for when judicial decisions “touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”

*Id.* “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people.” *See Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (internal quotation marks omitted). Therefore, such distinctions “are contrary to our traditions and hence constitutionally suspect.” *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

“[B]ecause [ethnic] characteristics so seldom provide a relevant basis for disparate treatment,” *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533–534 (1980) (Stevens, J., dissenting) (alterations added)), “the Equal Protection Clause demands that [ethnic] classifications...be subjected to the ‘most rigid scrutiny.’” *See Loving v. Virginia*, 388 U.S. 1, 11 (1967) (alteration added).

By any measure, a state court determination that precludes the application of a well-settled rule of law to a specific ethnic group while permitting the application of the same rule of law to all other ethnic groups gives the question presented the degree of practical significance that warrants this Court’s review.

4. The number of convictions at stake further underscores the need for this Court’s review. Oklahoma itself has stressed the importance of the question presented in this petition. It has filed multiple petitions with this Court, asking it to address the grant of post-conviction relief to certain of those defendants.<sup>7</sup> By its own calculations, the Oklahoma Department of Corrections has already released more than 150 prisoners who succeeded in such challenges. *See* Pet. for Cert. at 23, *Oklahoma v. Bosse*, No. 21-186 (filed Aug. 10, 2021), *cert. dismissed* (Sept. 3, 2021). Additionally, more than 3,000 applications for post-conviction relief have been filed by prisoners seeking to overturn their state convictions based on *McGirt*. *Id.*

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<sup>7</sup> *See, e.g.*, Pet., *Oklahoma v. Spears*, No. 21-323 (filed Aug. 28, 2021); Pet., *Oklahoma v. Bain*, No. 21-319 (filed Aug. 27, 2021); Pet., *Oklahoma v. Perry*, No. 21-320 (filed Aug. 27, 2021); Pet., *Oklahoma v. Johnson*, No. 21-321 (filed Aug. 27, 2021); Pet., *Oklahoma v. Harjo*, No. 21-322 (filed Aug. 27, 2021); Pet., *Oklahoma v. Grayson*, No. 21-324 (filed Aug. 27, 2021); Pet., *Oklahoma v. Janson*, No. 21-325 (filed Aug. 27, 2021); Pet., *Oklahoma v. Sizemore*, No. 21-326 (filed Aug. 27, 2021); and Pet., *Oklahoma v. Ball*, No. 21-327 (filed Aug. 27, 2021).

*McGirt* recognized the monumental implications of its decision. As the Court acknowledged, “[t]housands’ of Native Americans like Mr. *McGirt*” may “wait in the wings’ to challenge the jurisdictional basis of their state-court convictions.” *See McGirt*, 140 S.Ct. at 2479. The dissenting opinion recognized that the Court’s decision “draws into question thousands of convictions obtained by the State” as “now subject to jurisdictional challenges.” *Id.*, at 2500 (Roberts, C.J., dissenting); *see also id.*, at 2501 (“At the end of the day, there is no escaping that today’s decision will undermine numerous convictions obtained by the State.”). Of course, some of these individuals “may choose to finish their state sentences rather than risk reprocsecution in federal court where sentences can be graver.” *Id.*, at 2479.<sup>8</sup> Nevertheless, by any measure, the sheer number of convictions at issue gives this question presented the degree of practical significance that warrants this Court’s review.

**C. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO ADDRESS THE RETROACTIVITY OF *McGIRT*.**

This case affords a perfect vehicle for resolving the questions presented. The issue of *McGirt*’s retroactivity was preserved throughout the trial court and appellate proceedings in *Parish*, was thoroughly considered by the OCCA, and is outcome-determinative here.

1. In the trial court proceedings below, the issue of retroactivity was never raised by the State as a defense nor applied by the trial court in its order denying relief. *See Pet.*

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<sup>8</sup> Shortly after the trial court’s ruling in *Parish v. State*, Case No. CF-2010-26, the federal government charged Clifton Parish with one count of first-degree murder in the Eastern District of Oklahoma. *See* Compl., *United States v. Parish*, No. 6:21-cr-140 (E.D. Okla. Apr. 20, 2021), Dkt. No. 1. After a magistrate judge issued a warrant for Parish’s arrest, a special agent of the FBI arrested Parish. The magistrate judge then ordered Parish detained pending his federal trial. He is presently in the custody of the U.S. Marshals Service.

App. 36—42. As the Petitioner elucidated in his application for post-conviction relief, because the Petitioner is federally recognized as an “Indian” and the offense occurred in “Indian country,” federal law controls whether the Petitioner may be prosecuted in state court. Further, relying on Congress’ exclusive power to prosecute major crimes committed by Indians in Indian country, the Petitioner contended that a conviction rendered by a court that lacks jurisdiction must be set aside at any time, even in post-conviction proceedings.

Oklahoma clearly took no defensive position to the Petitioner’s claim. However, on its own authority, and without considering retroactivity, the trial court concluded the KCA Reservation was disestablished and denied relief. *Id.*

On appeal, the Petitioner addressed the trial court’s basis for denying relief as an abuse of discretion. The OCCA directly passed on the abuse of discretion claim. In the OCCA’s view, *McGirt* announced a new rule that was merely procedural, did not apply retroactively, and affirmed the trial court’s denial of post-conviction relief. *See* Pet. App. 1–3. Its decision necessarily rejected federal authority — that federal law of its own force, *not* “*McGirt*,” must be applied in state collateral-review proceedings.

2. The question presented also determines the outcome of Petitioner’s request for post-conviction relief. The OCCA relied directly on retroactivity alone as a bar to applying longstanding federal law to Petitioner’s conviction, not on any waiver principle. Justifiably so, the State cannot now invoke a waiver rationale to shield its decision, because no such principle would be “consistently or regularly applied.” *See Johnson v. Mississippi*, 486 U.S. 578, 588–89 (1988); and *see McGirt*, 140 S.Ct. at 1501 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”) (internal quotation marks omitted); *and see* Pet. App. 12–13 (the OCCA acknowledged that “[a]fter *McGirt* was decided, relying on the theory of non-waivability, this Court initially granted post-conviction relief and vacated several...convictions...that were final when *McGirt* was announced”); *see also* Nat'l Ass'n of Crim. Def. Laws. Amicus Br. 3–5, *McGirt v. Oklahoma*, No. 18-9526 (U.S. Feb. 11, 2020) (describing Oklahoma's longstanding rule that subject matter jurisdiction is never waived). As a result, if *McGirt* is held to apply retroactively to state convictions that were final when it was decided because it announced a substantive rule, the Petitioner will be entitled to post-conviction relief.

3. Although the OCCA asserted that state-law retroactivity rules barred relief for the Petitioner, that is not an adequate and independent barrier to this Court's review, for at least three reasons.

First, if *McGirt* is a substantive constitutional rule — as Petitioner contends, under *Montgomery v. Louisiana*, it is retroactive as a matter of federal law. As *Montgomery* explained, “[i]f ...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.” *See Montgomery*, 577 U.S. at 179. The State cannot evade a federal requirement that a rule applies retroactively by relying on a state-law holding that it does not. No state-law principles can obstruct the preemptive operation of federal law. *See Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 19–20 (2012) (per curium); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 180, 387–88 (1986).

Second, even taking the Oklahoma court's *Teague* ruling on its own terms, that decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and thus falls within this Court's jurisdiction. *See Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983); *and see McGirt*, 140 S.Ct. at 2479 n. 15 (applying *Long* to determine that this court had jurisdiction to review the Oklahoma Court of Criminal Appeals' decision on the effect of the MCA on McGirt's conviction). The decision of the OCCA took its retroactivity standards directly from this Court's retroactivity jurisprudence. *See* Pet. App. 10–12, 14–16, 20–21 (citing *Teague*, *Gosa v. Mayden*, 413 U.S. 665 (1973), and *Schrivo*). Thus, "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *See Long*, 463 U.S. at 1040–41. To the contrary, "the most reasonable explanation" of the Oklahoma court's decision is "that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* 463 U.S. at 1041. In that situation, this Court has jurisdiction to review the state court's application of federal standards. *See, e.g., Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986); *Three Affiliated Tribes of the Fort Berthold Rsr. v. Wold Eng'g, P.C.*, 467 U.S. 138 (1984); *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942).

Third, the OCCA's determination that *McGirt* announced a "new rule of criminal procedure" is inapposite to the characterization and scope of rules of criminal procedure, and contrary to the logic and effect of *McGirt*. Rules of criminal procedure dictate the scope and process of actions within established courts. Therefore, rules of criminal procedure dictate the process parties to actions in criminal courts must undergo throughout the criminal process. In Oklahoma, rules of criminal procedure are set forth

in Title 22, entitled Criminal Procedure, of the Oklahoma Statutes. As reflected in Title 22, *all* sections contained therein apply to issues which – either directly or indirectly – involve *court proceedings*. Nothing characterized as a “rule of criminal procedure” involves any action or process which is not initiated in a criminal court. By definition, a process which does not concern court proceedings in any manner cannot amount to a “rule of criminal procedure.”

Moreover, Oklahoma’s Post-Conviction Procedure Act requires trial courts hold evidentiary hearings for all claims which involve material issues of fact. *See* 22 O.S.Supp.2020, § 1083(B) (“Dispositions on the pleadings and record is not proper if there exists a material issue of fact.”); *cf.*, 22 O.S.2011, § 1084, entitled Evidentiary hearing—Findings of fact and conclusions of law (“If the application cannot be disposed of in the pleadings and record, *or there exists a material issue of fact, the court shall conduct an evidentiary hearing....*”). Claims relating to subject matter jurisdiction involve mixed questions of law and fact, and § 1084 is the rule of criminal procedure trial courts must adhere to when resolving such claims.

Nothing contained within the Oklahoma Statutes, the Rules of the District Courts, or the Rules of the Oklahoma Court of Criminal Appeals set forth the “procedure” trial courts must adhere to during the evidentiary hearing process for the adjudication of material issues of fact. When a post-conviction applicant raises a claim of subject matter jurisdiction, at the evidentiary hearing trial courts are free to “received proof by affidavits, depositions, oral testimony, or other evidence” for the purpose of adjudicating the claim. *See* 22 O.S.2011, § 1084.

Regardless of the *substance* of the subject matter jurisdiction claim, the facts presented to the trial court in support of the claim are left to the discretion of the parties to the proceeding. For example, if a convicted defendant raises a subject matter jurisdiction claim asserting the trial court lacked jurisdiction to prosecute because the defendant is a foreign diplomat entitled to diplomatic immunity, whatever “evidence” is presented to address the material issue of fact is not, and cannot be, considered a “rule of criminal procedure.” Likewise, the process of presenting evidence at evidentiary hearings involving Native American subject matter jurisdiction claims (e.g., whether the defendant or the victim is federally recognized as Indian and whether the location of the offense occurred within Indian country) is not a “rule of criminal procedure.”

Assuming *arguendo* that *McGirt* did announce a new rule of criminal procedure which does not apply retroactively, then the question presented is what “new” procedure *actually* takes place in a criminal court. If *McGirt* does not present any prisoner whose conviction has become final with an avenue for post-conviction relief, then nothing about *McGirt* involves criminal procedures in criminal courts.

When *McGirt* applies in only a prospective manner, nothing concerning the determination of which sovereign – federal or state – has jurisdiction to prosecute crimes involving Indians in Indian country takes place inside a courtroom. Viewing *McGirt* prospectively only, if a person commits a crime today, before the federal or state government files a criminal charge against said person no federal or state court determines which sovereign has jurisdiction over prosecution of the offense. Rather, the determination of which sovereign has jurisdiction to prosecute *lies exclusively* with law

enforcement agencies prior to the filing of a criminal information in a court. Therefore, if *McGirt* is prospectively only, no rules of criminal procedure apply because determination of which sovereign has jurisdiction is made without court involvement. As such, by definition, no “rule of criminal procedure” exists which can be applied in the wake of *McGirt*.

Put another way, when *McGirt* is applied retroactively, at some point there will be no prisoner left in state custody which can raise a subject-matter claim based upon *McGirt* — or based upon federal law involving Indian status and Indian country for that matter — because all future decisions concerning which sovereign has subject-matter jurisdiction are decided by law enforcement agencies alone *prior* to any charge being filed within a criminal court; federal or state.

Second, the decision in *Wallace* is contrary to the logic and effect of *McGirt*. The *McGirt* Court recognized that federal law preempts state jurisdiction for crimes committed by or against Indians in Indian country. *See generally McGirt*. In making its decision, the *McGirt* Court stated, “In saying this we say nothing new.” *See McGirt*, 140 S.Ct. at 2464. The *McGirt* Court recognized that Oklahoma’s practice of prosecuting defendants whom are Indian – or whose victims are Indian – is done in complete violation of federal law. Moreover, the *McGirt* Court did not announce nor hint at any new rule of criminal procedure.

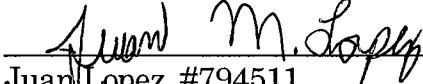
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## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, or, in the alternative, the Court should consider summarily reversing or vacating the decision below.

Dated: December 30, 2021.

Respectfully Submitted,

  
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