

21-8285  
No. \_\_\_\_\_

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IN THE  
Supreme Court of the United States

**DARRYLL JUSTIN LEE REED,**  
*Petitioner,*

v.

**THE STATE OF OKLAHOMA ET AL.,**  
*respondents,*

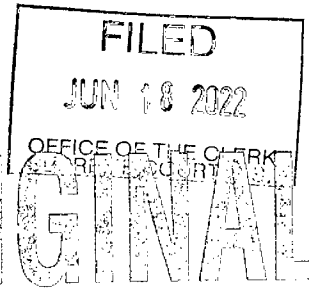
On Petition for a Writ of Certiorari  
to the Oklahoma Court of Criminal Appeals

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION(S) PRESENTED

1.) Is *McGirt* a Substantive or Procedural rule?

2.) Should *McGirt* be applied retroactively?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Pro Se, Darryll Justin Lee Reed respectfully Petitions for a writ of certiorari to review the judgement of the Oklahoma Court of Criminal Appeals in this case.

### OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals denying the rehearing in *Matloff v. Wallace* Case No. PR-2021-366 directly resulted in the denial of post-conviction relief in the matter of *Darryll Justin Lee Reed v. The State of Oklahoma* Case No. CF-2016-5386 and PC-2021-1392.

### JURISDICTION

The Oklahoma Court of Criminal appeals denied a petition for rehearing in *Matloff v. Wallace* Case No. PR-2021-366 on August 31, 2021. This court has jurisdiction pursuant to 28 U.S.C. § 1257 (a).

### STATUTORY PROVISIONS INVOLVED

The Indian Commerce Clause, the Supremacy Clause, the Due Process Clause, and the relevant provisions of Title 18 of the U.S. Code and Title 22 of the Oklahoma Statutes.

### 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 Because the United States promised to reserve certain lands for tribes in the nineteenth century and never rescinded those promises, those lands remain reserved to the tribes today.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 designates that the authority to prosecute crimes committed in “Indian country,” 18 U.S.C. 1151, is governed by a complex patchwork of federal, state, and tribal law.” *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993). By virtue of their admission to the Union, States exercise exclusive authority to prosecute crimes committed by non-Indians against non-Indians in Indian country. See, e.g., *United States v. McBratney*, 104 U.S. 621, 622 (1882). By contrast, the Major Crimes Act gives the federal government exclusive authority to prosecute certain enumerated felonies committed by Indians in Indian Country. See 18 U.S.C. 1153. Only the federal government may prosecute such crimes.

Oklahoma has, however prosecuted many cases involving cases where either the defendant was Indian and the victim was non-Indian or Indian and the crime occurred in “Indian Country” or the defendant was non-Indian and the victim was Indian and the crime occurred in “Indian Country”. Among them is petitioner, Darryll Justin Lee Reed whose victim Leslie Renee Taylor was a card carrying member of the Cherokee Nation since 1988. In 2016, the state of Oklahoma prosecuted petitioner for a crime that all agree occurred within the boundaries of the Creek Nation Reservation. The Creek reservation continues to exist today and is “Indian country” within the meaning of MCA. As confirmed by the holding in *McGirt*, Oklahoma therefore lacked jurisdiction to prosecute cases involving Indian for major crimes committed in Indian Country that authority belongs exclusively to the United States.

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 rejected his claim on the theory that *McGirt* is not retroactive. 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. 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 *Schriro 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. See Pet. App. 5a-8a (citing *Teague v. Lane*, U.S. 288 (1989)).

That decision is 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," *Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016), and "alters... the class of persons that the law punishes," *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. *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. It allows State's to usurp authority that congress has reserved to the United States. And 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 authority to impose. This court should grant this petition to reaffirm *McGirt*'s jurisdictional holding, protect Congress's authority under the Supremacy Clause, and vindicate the liberty interests of individuals to be free from punishment that the States have no power to impose.

## 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." *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 each tribe for itself according to its local customs." *Ex Parte Crow Dog*, 109 U.S. 556, 571-72 (1883). *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's 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. Kogama*, 118 U.S. 375, 382-83 (1886), 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.” 18 U.S.C. § 1153(a); *United States v. John*, 437 U.S. 634, 651 (1978). Accordingly, absent an act of Congress providing otherwise, States lack jurisdiction to prosecute “offenses covered by the Indian MCA.” *Negonsott v. Samuels*, 507 U.S. 99, 102-03 (1993); *see McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 168 (1973) (similar).

## B. The Federal Government’s Promise To The Choctaw Nation

Members of the Choctaw Nation once lived in present-day Mississippi. *See John*, 437 U.S. at 638. When Mississippi became a state in 1817, the Choctaws still retained a claim recognized by the federal government to more than three quarters of embraced in any capital Territory or state.” 7 Stat. 333, art. 4. Rather, the federal government agreed to “forever secure said Choctaw Nation from, and against, all laws except such as from time to time may enacted in their own National Councils” and those that are within Congress’s power “to exercise a legislation over Indian Affairs.” *Id.*

The Choctaws were the first of the Indian Tribes later known as the Five Civilized Tribes to be relocated to the western territories. The relocation was brutal. The Choctaws suffered from floods, blizzards, disease, and starvation, prompting one of Choctaw Chiefs to say that the removal was a “trail of tears and death.”

In the ensuing years, the federal government and the Choctaws signed several treaties that modified the geographical boundaries of the western land under Choctaw control. But each treaty affirmed that the land remained part of the Choctaw Reservation. *Sizemore*, 485 P.3d at 870. “[N]othing in any of those documents showed a congressional intent to erase the boundaries of the Reservation and terminate its existence.” *Id.*

Oklahoma did not become a State until nearly 80 years after the Choctaw 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 “prohibiting state jurisdiction over Indian country.” *C.M.G. v. State*, 594 P.2d 798, 799 (Okla. Crim. App. 1979).

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 MCA to be transferred to federal court. 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, *Ex parte Webb*, 225 U.S. 663, 682-83 (1912). And Section 21 confirmed that federal laws, such as the MCA, that are “not locally inapplicable shall have the same force and effect... as elsewhere.” 34 Stat. 267, 278.

Although federal law unequivocally established exclusive 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 1963 memorandum, this practice was widespread even though “not 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.” *McGirt*, 140 S. Ct. at 2478. Yet “[O]nly the federal government, not the State, may prosecute Indians for major crimes committed in Indian country.” *Id.*

### 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. 140 S. Ct. at 2470-71. Oklahoma has prosecuted and convicted *McGirt*, an enrolled member of the Seminole Nation of Oklahoma, for the 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 means 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 that “Congress established a reservation for the Creeks [i]n a series of treaties.” *Id.* At 2460-62; *see id.* At 2472-76. No “Acts of Congress,” the Court concluded, had rescinded that reservation. *Id.* At 2462-68. And 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 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. But it declined to allow fears about the fallout, including that “[t]housands of Native Americans” might challenge the jurisdictional basis of their Court’s holding. *Id.* The Court raised the possibility that “well-known state and federal limitations on post-conviction review in criminal proceedings” might impose “significant procedural obstacles” to relief. *Id.*; *see also id.* At 2479 n.15 (noting state rule that claims not raised on direct appeal are waived 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 (10<sup>th</sup> Cir. 2017), *aff’d sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020))). But the court did not embrace any such defenses, instead concluding that “the magnitude of a legal wrong is not reason to perpetuate it.” *Id.* At 2480. “[D]ire warnings are just that, and not a license for us to disregard law.” *Id.* At 2481.

### D. The Current Controversy

1. On September 30, 2016 Mr. Darryll Justin Lee Reed was booked into Tulsa County jail on a complaint of Domestic Assault. That charge was later upgraded on October 1, 2016 to first-degree murder. During court proceeding Mr. Reed was advised by his attorney to take a plea deal. The state offered Mr. Reed a 35 year sentence for an exchange of a guilty plea to 1<sup>st</sup> degree Manslaughter as part of a plea deal. Mr. Reed signed the plea deal and was sentenced to 35 years in the custody of the Oklahoma department of corrections.

The Oklahoma Supreme Court denied post-conviction relief stating that *McGirt* does not apply retroactively.

2. Mr. Darryll Justin Lee Reed argued in his Post-Conviction relief that the Creek Nation Boundaries were not disestablished and that his alleged victim was a card carrying member of the Cherokee Nation. He argued that under *McGirt* the Creek nation was and remained “Indian Country.” The crime occurred within the historical boundaries of the Creek Nation. He argued under *McGirt*, the Creek Nation remained “Indian Country” within the meaning of the MCA. He also argued that under *McGirt* that the state of Oklahoma had no jurisdiction to prosecute him because under *McGirt* the United States has to the only jurisdiction for prosecuting crimes by or against an “Indian” withing “Indian Country”.

The Oklahoma Supreme Court 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.” In the Oklahoma court’s view, “*McGirt* did not 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. 13A (*quoting Schriro, 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 Schriro, 542 U.S. at 353*).<sup>7</sup>

The court acknowledged that it had previously “granted post-conviction relief and vacated several capital murder convictions, and at least on noncapital conviction (Jimmy McGirt’s), that were final when *McGirt* was announced.” Those cases had all treated objections to the “State’s “criminal subject matter jurisdiction” as “non-waivable.” Id. But, 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. 7a.

c. Two judges concurred seperately. Vice Presiding Judge Hudson urged “the leaders of the State of Oklahoma, the Tribes and the federal government to address the jurisdictional fallout from the *McGirt* decision.” 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. 22a. 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 24a-25a.

### 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 Major Crimes Act. The decision below 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 lack 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 unreviewed, the decision would condemn many Native American and other defendants that have

committed crimes against Native Americans in “Indian Country” to bear state convictions and serve state sentences that the State had no power to prosecute. Because the State has no authority 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 below 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 by or against Indians in on the Creek reservation. The state has no power to do so, and never has. *McGirt* did not create that rule; rather the 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 (1994)** (“[W]hen this Court construes a statute, it is explaining its understanding of what the statute 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 by or against Indians on a federally recognized reservation. Under the Supremacy Clause, the federal divestiture of state jurisdiction is the “supreme Law of the land.” ***U.S. Const., Art. VI, Cl. 2***. Because Oklahoma has no jurisdiction to proscribe and punish petitioner’s conduct, the State is holding petitioner without and valid 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.” ***Schriro 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 is, by definition, unlawful” and “void.” ***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 person that the law punishes,” ***Schriro*, 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. *Montgomery*, **577 U.S. at 201**. All convictions by a court that lacks jurisdiction are, “by definition, unlawful” and “void”. *Id.* At 201, 203” **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 or against 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 principle of our Constitution, are committed exclusively to government of the Union.” ***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 Oklahoma Court of Criminal Appeals 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 *Schriro*, 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 *Schriro*, 542 U.S. at 352). But 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’s treating of McGirt as shifting the prosecution of a crime from one sovereign to another reflects a basic misunderstanding of our federal 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 the laws of another sovereign.” *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019); see *Heath v. Alabama*, 474 U.S. 82, 92 (1985); *Abbate v. 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. *Gamble*, 139 S. Ct. at 1964. But here, the State has been ousted altogether from prosecuting a crime covered by the Major Crimes Act. That means that it has prosecuted petitioner for no offense at all. “[A]n ‘offense’ 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 ‘offenses’”. 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 provide procedural rules to limit claims in state post-conviction proceedings, it does not extend to nullify 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 effects to that rule.” 577 U.S. at 200.

In *McGirt*, this Court determined that Creek lands qualified as a reservation under duly ratified treaties and that Congress had not disestablished the reservation. That principle applies equally to the Creek and Cherokee Nations as well. See *Sizemore v. State*, 485 P.3d 867 (Okla. Crim. App. 2021) *pet. Cert. Filed No. 21-326 (U.S. Aug. 27, 2021)*. *McGirt* thus means as in *Worcester* itself, that Oklahoma’s prosecution is “repugnant to the Constitution, laws, and treaties of the United States,” *Worcester*, 31 U.S. at 561. And that federal law determination is “binding on state courts,” *Montgomery*, 577 U.S. at 200. Accordingly, because *McGirt* is a substantive rule with constitutional force, federal law requires that state court apply it on a 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.”).

Although the Oklahoma court asserted that state-law retroactivity rules barred for petitioner, that is not an adequate and independent barrier to this Court's review, for at least two reasons.

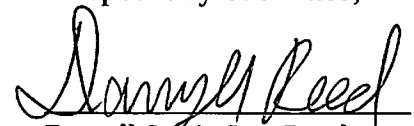
First, if McGirt is a substantive, constitutional rule-as petitioner contends under *Montgomery v. Louisiana*, it is retroactive as a matter of federal law. As *Montgomery* explained, "[i]f... the Constitution establishes a rule and requires that the rule have retroactive effect is reviewable by this court." 577 U.S. at 197. 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 Tech., LLC v. Howard*, 568 U.S. 17, 19-20 (2012) (*per curiam*); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 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. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983); see *McGirt*, 140 S. Ct. at 2479 n.15 (applying *Long* to determine that this Court of Criminal Appeals' decision on the effect of the MCA on McGirt's conviction). The decision below took its retroactivity standards directly from this Court's retroactivity jurisprudence. (citing *Teague*, *Gosa v. Mayden*, 413 U.S. 665 (1973), and *Schriro*). Thus, "the adequacy and independence of any possible state law is not clear from the face of the opinion." *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.* At 1041. In that situation, this Court has jurisdiction to review the state court's application of federal standards. See, e.g., *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804 (1986); *Three Affiliated Tribes of the Fort Berthold Rsrv. v. Wold Eng'g P.C.*, 467 U.S. 138 (1984); *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942).

### Conclusion

Oklahoma Lacks jurisdiction based on McGirt and this matter is not a matter of retroactivity. It is a substantive rule and the petitioner's case should be over turned and the petition for a writ of certiorari should be granted.

Respectfully Submitted,



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