NO. 22-5324

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL DEL BRUMIT, PETITIONER,

vs.

WARDEN LUKE PETTIGREW,

EX. REL. STATE OF OKLAHOMA RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

OKLAHOMA CRIMINAL COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the provisions of the Treaty of Dancing Rabbit Creek, how does the Government and its Citizens have an obligation to protect the Red People and their descendants from State Criminal laws within the Choctaw-Chickasaw reservation boundaries?

2. On collateral appeal, where in the controlling case a State has discussed or waived all of its defenses, is there equal protection under the law so that res judicata and collateral estoppel can work for the inmate in the same way it can work against an inmate?

3. Does the AEDPA instruct federal courts to give full faith and credit to State Court judgments and decrees which have clearly on its face usurped exclusive federal jurisdiction over Indians?

4. Did the OCCA abuse its discretion and create a defect in the integrity of the post-conviction procedures to enforce judgments and decrees, against Indians in Indian country, which were decided before McGirt?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, *pro se,* Daniel Del Brumit respectfully requests the issuance of a Writ of Certiorari to review the judgment of the Oklahoma Criminal Court of Appeals

DECISIONS BELOW

The opinion of the Oklahoma Criminal Court of Appeals to review the merits appears at Appendix A to the petition and is unpublished

JURISDICTION

The Oklahoma Criminal Court of Appeals entered judgment on April 1st, 2022. See Pet. App. A. Justice Gorsuch extended the time in which to file this Petition to and including August 29th, 2022. Pet. App. B The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTION, TREATY, AND STATUTES INVOLVED

U.S. Const. Art. I §8 cl. 3 Regulation of Commerce

The Congres shall have Power...To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

U.S. Const. Art I §9 cl. 2 Suspension of Habeas Corpus

The Priviledge of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invation the public safety may require it.

U.S. Const. Art. IV cl. 1 Full Faith and Credit

Section 1 Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every State And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. Art. VI cl. 2 Supreme Law of the Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. Any Thing in the Constitution or any Laws of any State to the Contrary, notwithstanding.

U.S. Const. Amendment 6 Jury Trials for Crimes and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial , by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amendment 10 Reserved Powers to States

The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amendment 14 §1 Priviledges and Immunities

¤¤¤ No State shall make or enforce any law which shall abridge the priviledge or immunities of citizens of the United States;¤¤¤

U.S. Const. Amendment 14 §1 Equal Protection under the laws

¤¤¤ nor deny any person within its jurisdiction equal protection of the laws.

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

Except as otherwise provided in sections 1154 and 1156 of this title, the terms "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and , including right of way running through the reservation. (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including right of way running through the same.

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

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assualt under section 113, an assualt against an individual who has not attained the age of 16 years, a felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalty as all other person committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offenses referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

18 U.S.C. §1162 State Jurisdiction over offenses committed by or against Indians in the Indian country.....See Annex _C1___

25 U.S.C. §§ 1321 Assumption by State of criminal jurisdiction....See Annex__C2__

28 U.S.C. §2244 Finality of determination.....See Annex_C3___

28 U.S.C. §2254 State Custody; remedies in Federal courts.....See Annex_C4__

FRCP Rule 60 Relief From Judgment or Order.....See Annex_C5__

Oklahoma Const. Art. 1 §1 Supreme law of the land

The State of Oklahoma is an inseperable part of the Federal Union, and the Constitution of the United States is the supreme law of the land.

Oklahoma Const. Art. 1 §3 Unappropriated public lands—Indian lands—Jurisdiction of the United States

The People inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation, and that until the title to any such public land shall have been extinguished by the United States, the same shall remain subject to the jurisdiction, disposal and control of the United States. Land belonging to the citizens of the United States shall never be taxed at a higher rate than land belonging to residents thereof. No taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.

21 O.S. §1123 (A)(1) Lewd or indecent proposals or acts to a child under 16 or person believed to be under 16—Sexual battery

A. It is a felony for any person to knowingly and intentionally:

1. Make any oral, written or electronically or computer generated lewd or indecent proposal to any child under sixteen (16) years of age, or other individual the person believes to be a child under sixteen (16) years of age, for the child to have unlawful sexual relations or sexual intercourse with any person; or

22 Okla.St.Ann § 1080 Post Conviction Procedure Act—Right to challenge conviction or sentence; §1081 Commencement of Proceedings; §1083 Response by State—Disposition of application; §1084 Evidentiary hearing—Finding of fact and conclusion of law; §1085 Finding in favor of applicant; §1086 Subsequent application; §1087 Appeal to Court of Criminal Appeals.....See Annex _C7__

Treaty of Dancing Rabbit Creek..... See Annex_C8__

STATEMENT OF THE CASE

Mr. Brumit is a citizen of the Choctaw Nation of Oklahoma. His Membership number is CN145512. His 2006 conviction and 2007 sentencing occurred in Grady county, Oklahoma which is within the limits of the Choctaw-Chickasaw reservation. The Choctaw-Chickasaw reservation is in Oklahoma and Oklahoma is in the reservation. The Treaty of Dancing Rabbit Creek is the Supreme Law of the Land in the Choctaw-Chickasaw Nation's reservation. *U.S.C.A. Const. Art. VI §2* The State recognizes it is subject to the supremacy clause. *Okla. Const. Art. 1 §1, Goforth v. State 644 P.2d 114 (OCCA, 1982) In re State Question No. 807 468 P.3d 383, 388 (S.C. Okla., 2020)* Any ambiguity in sovereignty must be resolved in the Choctaw's favor. *Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. XVIII last sentence.*

In 2006, Mr. Brumit was arrested in Grady county. While traveling to jail, Mr. Brumit informed the officer he was Choctaw. However, neither understood the significance of this evidence so it went no farther. *U.S. v. Cruz 554 F.3d 840, 845 (9th Cir. 2009)* [d]efendant's Indian status is an essential element." What's more, the significance would have been a factor if not for fraud on the OCCA in 2004. *See Murphy v. Royal 875 F.3d 896, 925 (10th Cir. 2017) (detailing OCCA's refusal to answer reservation question in Murphy's favor.)*

In 2007, Mr. Brumit was sentenced for five (5) counts of Lewd or Indecent proposals or acts to a child under sixteen (16), *State law 21 O.S. §§1123 (A)(1) Oklahoma Case No. CF-2006-115 (unpublished)* On direct appeal, the State provided Mr. Brumit an indigent lawyer due to Mr. Brumit's misunderstanding(s) and because of a

Departmental policy created by the District Attorney to not afford plea bargains to any of the clientele of Mr. Brumit's trial lawyer. Mr. Brumit never saw his indigent lawyer, nor was he questioned about his Indian status. The Federal Government never secured a lawyer to argue immunity from State law. The OCCA rejected the direct appeal, and due to prison related trauma, Mr. Brumit did not pursue the direct appeal further.

In Feb. 2021, in compliance with 28 U.S.C. §2254, Petitioner, *pro se,* filed a post conviction application with the Grady county Trial Court in accordance with 22 Okl.St. Ann. §1080 et al. (Post Conviction Procedures Act) This post conviction was based on his Indian status afforded him political immunity and preemption from State criminal laws due to (1) *18 U.S.C. §§1151,1153* (2) *The Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. 4, Stat. 333,334, 336* (3) *Okla. Const. Art. 1 §3* and (4) Oklahoma's failure to apply *Public Law 280 , 67 Stat. 588* as amended by the *Indian Civil Rights Act of 1968, 25 Stat. 1321.* Petitioner also alleged Oklahoma law dictates subject matter jurisdiction cannot be waived and can be brought up for the first time on collateral appeal, and in fact that has been the standard for Indian country and subject matter jurisdictional claims decided before McGirt. *Armstrong v. State 248 P. 877, 878 (OCCA, 1926) Cravatt v. State 825 P.2d 277,79 (OCCA, 1992) C.M.G. v. State 594 P.2d 798 n. 1 (OCCA, 1979) State v. Klindt 782 P.2d 401,403 (OCCA, 1989) State v. Littlechief 573 P.2d 263, 264 (OCCA, 1978) Wallace v. State 935 P.2d 366, 372 (OCCA, 1997) Johnson v. State 611 P.2d 1137, 1145 (OCCA, 1980) Ex parte Duty 318 P.2d 900,901 (OCCA, 1957)Forester v. State 252 P.861, 862(OCCA 1927) Wackerly v. State 237 P.3d 795, 797 (OCCA, 2010) Tucker v. Cockran Firm, C.D.B. 341 P.3d 673 n. 16 (S.C.Okla., 2014)*

The State of Oklahoma has never filed any defense against Mr. Brumit's post conviction and was procedurally barred after thirty (30) days from original post-conviction filing date. *22 Okl.St.Ann §1083* On April 1, 2022, the trial court assumed *sua sponte* and applied an Oklahoma *"Teague"* type of defense of nonretroactivity due to Matloff v. Wallace. *Matloff v. Wallace 497 P.3d 686,90,94 (OCCA, 2021)(hereafter Matloff)*

In 2020, Clifford Parish, an Indian, filed a State post-conviction on collateral review of the McGirt decision. Judge Wallace found Mr. Parish's conviction for 2nd degree murder was void and ordered the charge dismissed. Mark Matloff, District Attorney of Pushmataha County, petitioned the OCCA for a Writ of Prohibition to vacate Judge Wallace's order based on an abuse of discretion. The OCCA determined, "because the Respondent's order is unauthorized by law and prohibition is a proper remedy, the Writ is granted." *Matloff p. 687* The OCCA, on its own motion, stayed all proceedings and directed counsel for the interested parties to submit briefs on the following question:

> In light of Ferrell v. State 1995 OK CR 54, 902 P.2d 1113, U.S. v. Cuch 79 F.3d 987 (10th Cir., 1996), Edwards v. Vannoy (No. 19-5807) U.S.----[141 S.Ct. 1547, 209 L.Ed.2d 651] (May 17, 2021), cases cited therein, and related authorities, should the recent judicial recognition of criminal jurisdiction in the Creek and Choctaw Reservations announced in McGirt and Sizemore be applied retroactively to void a state conviction that was final when McGirt and Sizemore were announced?" *Matloff p. 687, 688 (2021)*

The OCCA held:

(1.) rule in *McGirt v. Oklahoma* did not apply retroactively to convictions that were final at the time it was decided overruling *Bosse v. State 484 P.3d 286, Cole v. State 492 P.3d 11, Ryder v. State 489 P.3d 528, and Bench v. State 492 P.3d 19*

(2.) rule announced in McGirt was procedural

(3.) rule announced in McGirt was new

(4.) trial court judge could not apply rule in McGirt retroactively.

Petitioner reads *Matloff* to suggest federal jurisdiction over Indians and their Treaties are procedural and new. *Matloff p. 691,692* And Petitioner alleges the OCCA failed to consider its own Constitution in *Matloff*. *Okla. Const. Art. 1 §3*

While the OCCA has declared *McGirt* new, the lower federal courts have ruled *McGirt* not new. *Murphy v. Royal 875 F.3d 8967 F.3d n. 36, Voyles v. Crow 2022 WL954993 (c) (Okla. W.D. 2022) Maples v. Whitten 2021 WL425515 p.5 (Okla. N.D. 2021) Cecil v. Nunn 2022 WL2071107 p. 4 (Okla. W.D. 2021)* [T]he Tenth Circuit has addressed McGirt in a different context and expressed doubt the the (*McGirt*) decision presented a new rule of constitutional law." Therefore, Petitioner alleges there is confusion and conflict between the State and Federal courts.

McGirt is new as it relates to how the State and Federal courts must respond. Guidance is needed and this Court has the power to help with the transition. The Petitioner, *pro se,* brings to this Court the following reasons to Grant this Petition and set precedence in place to instruct all involved, State, Federal, and Citizens alike.

Basis for Federal Jurisdiction

At every stage of Mr. Brumit's post-conviction, Petitioner, *pro se,* has invoked the Treaty of Dancing Rabbit Creek and has argued immunity because the treaty preempts State laws. To the trial court and the OCCA, Petitioner has argued preemption involves both State statutory and common laws. At each stage of Mr. Brumit's post conviction,

Petitioner, *pro se*, has raised the fact he was acting *pro se* until the Government afforded him counsel.

Question One has basis for federal jurisdiction because, since Congress has plenary powers, it involves the validity of an Indian Treaty and its operation. *U.S. Const. Art. 1 §8 cl. 3; Art. 6 §2* Collaterally, it asks whether the Treaty guarantees representation to secure immunity for descendants from State laws. *U.S. Const. Amendment 14 §1 Privileges and Immunities*

Concerning Question 2, Petitioner first presented the issue of res judicata and collateral estoppel at his first appearance before the trial court at the Indian Country Jurisdictional Docket due to the court setting Mr. Brumit's case in abeyance pending Bosse v. State. *Bosse v. Oklahoma 142 S.Ct. 1136 (2022)(both parties agreed to dismiss)* In an unanswered Traverse, Petitioner argued relevancy since the State had not presented a defense against Mr. Brumit and since the State had waived or discussed its defenses in McGirt, any light Bosse might bring would be res judicata or collateral estoppel should be applied.

Question 2 has a basis for federal jurisdiction because it involves whether there really is equal protection under the law for those similarly situated attaching collaterally so that they aren't forced to refight issues that should be res judicata. It is mainly a 14th Amendment challenge and involves the discretionary power and authority of the Federal Courts.

Concerning Question 3, Petitioner has argued during his State post conviction and it is clear, Oklahoma usurped federal jurisdiction in Indian country so that its judgments and decrees are void ab initio and in toto, a nullity.

Federal courts do apply AEDPA and it is not repugnant to the Suspension clause. *U.S. Const. Art. 1 §9 cl.2* This question is federal because it involves whether the federal court preconclude finality or second and successive, by applying AEDPA, when it is clear the State Judgment was in want of jurisdiction and had usurped federal

jurisdiction. Question 3 involves *U.S. Const. Art. 4 cl. 1* and *Amendments 6, and 14* His argument has always included the harmonizing of Treaty and law.

Related to Question 4, When the Trial Court applied the State's doctrine of nonretroactivity *sua sponte,* Petitioner made his appeal to the OCCA regarding the validity of *Matloff* in the instant case. His argument has always included the harmonizing of Treaty and law.

Because the OCCA invaded the sovereignty of the Choctaw Nation and the plenary and exclusive authority of Congress, Question 4 has federal character. It inolves U.S. Const. Art. 1 §8 cl. 3, Art. 6 §2, Amendment 14 and FRCP Rule 60

REASONS FOR GRANTING THE PETITION

Question One

> Question 1. Under the provisions of the Treaty of Dancing Rabbit Creek, how does the Government and its Citizens have an obligation to protect the Red People and their descendants from State Criminal laws within the Choctaw-Chickasaw reservation boundaries?

Following this Court's ruling in McGirt, the OCCA subsequently acknowledged the geographical boundaries of the Cherokee, Chickasaw, Choctaw, and Seminole Nations. *McGirt v. State 140 S.Ct. 2452 (2020) see i.e. Sizemore v. State 485 P.3d 867 (OCCA, 2021)(establishing Choctaw reservation)* However, Treaties are more than maps and the Government and its Citizens are still in contempt of the provisions of the Treaty of Dancing Rabbit Creek.

The Treaty of Dancing Rabbit Creek, Art. 4 demands:

> "The government and the People of the United States are hereby obligated to secure to said Nation of Red People...that no territory or State shall ever have

the right to pass laws for the government of the Nation of Red People or their descendants...but the United States shall forever secure said Nation from, and against, all such laws." *Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. 4, Stat. 333-334 Oklahoma Tax Comm'n v. Chickasaw Nation 515 U.S. 450, 465, 468 (1995)*

The State of Oklahoma is in contempt of the Treaty. Although the State is obligated to the Supremacy clause, *U.S. Const. Art. 6 §2*, through *Oklahoma Const. Art. 1 §1*, its criminal courts continue to apply State common law rules to maintain State statutory laws against Indian descendants which are immune from both. *See DeoGeofroy v. Riggs 133 U.S. 258, 267 (1890)(State common law is preempted by Treaty)* Additionally, the Governor and his Pardon and Parole Board have yet to commute sentences for Indians based on the Choctaw Treaty. Prison officials are unable to do anything due to fears of criminal and occupational retalitation from the State. *(cannot assist escape)*

The Federal Government and its Citizens are in contempt of the Treaty. The federal government has and continues to not enforce the Treaty rights within the Choctaw-Chickasaw reservation. Even after McGirt, incarcerated Indians, who are protected by the Government and its People, are still fighting their post convictions as *pro se*. *U.S. Const. Amendment 6, 14* Then to add injury to insult, the lower federal courts are giving full faith and credit to State court rulings which should, by the terms of the Treaty, be deemed a nullity. *28 U.S.C. §§2244, 2254, U.S. Const. Art. 4 §1 See Baker v. Carr 369 U.S. 186, 212 (1962) (Treaty preempts State law) U.S. v. Lee Yen Tai 185 U.S. 213, 222*

(1902) (treaty law and federal statutes can harmonize) Hauenstein v. Lynham 100 U.S. 483, 489, 490 (1879) (Treaties are superior to State laws and sovereign in States)

Congress has plenary and exclusive power over Indian affairs. *U.S. Const. Art. 1 §8 cl. 3, U.S. v. Lara 541 U.S. 193, 194 (2004)* Only Congress can diminish the timeframe of a treaty right. *Murphy v. Royal 875 F.3d 896, 917,918 (2017)(citing Lonewolf v. Hitchcock 187 U.S. 553 (1903))* The timeline for the obligations of the Treaty are clear. It began with the agreement between Congress and the Choctaw Nation in 1830, had a change in 1866 in regards to boundary, and its affirmations, "stand to this day." *Chickasaw Nation v. Oklahoma Tax Comm'n 31 F.3d 964, 978 (10th Cir., 1994)*

Oklahoma could have assumed jurisdiction to apply State common and statutory laws via Public law 280, *18 U.S.C. §1162, 67 Stat. 588* and the Indian Civil Rights Act of 1968. *25 U.S.C. §1321, 82 Stat. 77* However, Oklahoma failed to impliment the necessary requirements to do such. *Indian Country U.S.A Inc v. Okla. Tax Comm'n 829 F.2d 967 n.6 (10th Cir. 1987)* Therefore, nothing has abrogated the demands of Art. 4 of the Treaty of Dancing Rabbit Creek and it is the Law of the Land.

> In spite of the promise to protect the Indians' land and sovereignty, it was clear that the United States was unable and unwilling to prevent the States and their citizens from violating Indian rights." *Choctaw Nation v. Oklahoma 25 L.Ed.2d 615, 625 (1970)*

The above accusation and citation discussed why the Treaty of Dancing Rabbit Creek was agreed upon by Congress and the Choctaw Nation. However, it would seem that only time and location have changed.

This Court should grant Writ of Certiorari because the observance and enforcement of the Treaty rests on the Government and its Citizens. The Petitioner, *pro se,* has invoked the Treaty on the State Courts, but they will not acknowledge preemption or their duty. Daniel Del Brumit, a descendant of the Choctaw Nation, invokes the Treaty upon this Court because Treaty violations are going unchecked and Tribal sovereignty and immunities are diminished.

Question Two

> Question 2. On collateral appeal, where in the controlling case a State has discussed or waived all of its defenses, is there equal protection under the law so that res judicata and collateral estoppel can work for the inmate in the same way it can work against an inmate?

If an inmate sets aside his defenses or presents an argument, once a judgment in a court of competent jurisdiction is final, he has waived those defenses for further review by the doctrines of res judicata and collateral estoppel. Fairness as a rule, the same standard should equally apply against a sovereign where it has done the same.

> Res judicata and collaral estoppel relieve parties of cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry 449 U.S. 90, 94 (1890)*

Since McGirt, similarly situated inmates have been subject to those defenses which were waived or discussed by the parties to which this Court made its final ruling. In McGirt, this Court recognized Oklahoma has "put aside whatever procedural defenses it might have" to contest the reservation theory. *McGirt p. 2460* However, conversly, this

Court also stated, "other defendants who do try to challenge their state convictions may face significant procedural obstacles." *McGirt p. 2479* But if res judicata and collateral estoppel are enforced against the State from arguing procedural defenses against those similarly situated, what procedural obstacles remain? Therein lies the problem.

In *Woods v. Milyard*, this Court observed, "It would be 'an abuse of discretion,' we observed for a court 'to override a State's deliberate waiver of a limitation defense." *Wood v. Milyard 566 U.S. 463, 472, 473 (2012)(quoting Day v. Greer 198 U.S. 202 (2006) discussing AEDPA sua sponte)* "A 'waived' claim or defense is one that a party has knowingly and intelligently relinquishes." *Milyard p. 470* "An affirmative defense, once forfeited, is excluded from the case, and , as a rule cannot be asserted on appeal." *Milyard p. 470*

In McGirt, Oklahoma knowingly and intelligently relinquished its procedural objections and provided this Court with six (6) defenses. In the sixth defense, "Oklahoma abandons any pretense of law and speaks openly about the potentially transform[ative] effect of a loss today. Brief for Respondent 43" *McGirt p. 2478* They argue, "[t]housands' of Native Americans like McGirt are 'waiting in the wings" to challenge the jurisdictional basis for their state court convictions. Brief for the respondent 3." *McGirt p. 2479* In dumb Okie terms, they were asking this Court to make McGirt nonretroactive. Therefore, even the issue of retroactivity was final by this Court.

In August, 2021, the OCCA applied nonretroactivity to all preMcGirt post convictions, sua sponte, Indian and Non-Indian alike, due to its belief that the Supreme Court had created a variance to res judicata and collateral estoppel because this Court said,

> "Many other legal doctrines—procedural bars, res judicata, statutes of repose, and latches ot name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law." *Matloff v. Wallace 497 P.3d 686, 693 (quoting McGirt p. 2481, discussing reliance interests)*

Now the problem has matured!

In the Federal courts there is a twin. Jimcy McGirt's crimes happened in 1996 and the one year statute of limitations of AEDPA had long ran its course. *28 U.S.C. §2244* (d) Oklahoma diliberately waived its defense of limitations. However, the federal courts are applying the AEDPA statute of limitations anyway, sometimes sua sponte. "An affirmative defense, once forfeited, is excluded from the case, and, as a rule cannot be asserted on [collateral review]" *Milyard p. 470 (in brackets added for effect)* Anything less would be an abuse of discretion. *Milyard p. 472,473*

This Court should grant a Petition for Certiorari because this Court would be best suited to explain its dicta in McGirt more than any other Court. The number one purpose of res judicata and collateral estoppel is to conserve judicial resources, to leave the doors of justice open for all, and the answer to this question accomplishes the same thing. Also, this Court should grant a Petition for Certiorari because everyone is a

winner when the rules apply fairly. Equal protection under the law should apply res judicata and collateral estoppel equally and collaterally to those similarly situated.

Question Three

Question 3. Does the AEDPA instruct federal courts to give full faith and credit to State Court judgments and decrees which have clearly on its face usurped exclusive federal jurisdiction over Indians?

The AEDPA is no silk purse, but Congress never intended any court to use the AEDPA in violation of the Constitution. Petitioner does not agrue the AEDPA to be repugnant to the Constitution. Petitioner argues Congress was fully aware of the Full Faith and Credit clause and expected Court to use the AEDPA and U.S. Const. Art. 4 §1 in harmony with each other.

This Court has said, " A [sovereign] is not required, however, to afford full faith and credit by a court that did not have jurisdiction over the subject matter or the relevant parties. *U.S. Const. Art. 4 §1 V.L. v. E.L. 577 U.S. 404, 407 (2016)* "Where important federal interests are at stake, as in enforcement of federal criminal statutes, comity yields. *U.S. Const. Art. 6 §2, Amendment 10" U.S. v. Gillock 445 U.S. 360, 373 (1980)*

It has also been said, "Judgments rendered by a court lacking jurisdiction are void." *U.S. v. Bigford 365 F.3d 859, 865 (10th Cir. 2004)* and a "void judgment is a legal nullity." *United Students Aids Funds Inc. v. Espinosa 559 U.S. 260, 270, 271 (2010)*

Therefore, a judgment from a court without competent jurisdiction should be considered void ab inito and in toto, primo fronte.

The problem arises if and when a federal district court preconcludes a State criminal judgment which is void on its face, has "final" or "second and successive" effect so as to apply 28 U.S.C. §2244 claims *sua sponte*. This Court has discussed that an appellate court has discretion to address §2244 claims *sua sponte*, but "should reserve that authority for use in exceptional cases." *Milyard p.473* So the appellate court has discretion; but that discretion should be legally sound in all ways. This is especially true as it pertains to *AEDPA §2244* (3) (E). Therefore, an appellate court cannot give credence, full faith and credit, to any State criminal court proceedings and judgments which were clearly without jurisdiction. *U.S. Const. Art. 4 §1.*

The problem also arises when a State presents an affirmative defense of timeliness from the judgment of a court without competent jurisdiction. Again, the judgment and the preceeding proceedings are a nullity; they have no legal effect. Like fruit of the poisonous tree, it is not admissable.

It was never Congress' intent when creating the AEDPA to allow State courts to commit fraud against the sovereignty of Indians or that of United States with impunity. When it is clear and in plain view that a State has exercised its authority over an Indian in Indian country who are protected by Treaty, federal Indian policies, and/or State laws, those judgments and proceeding should not be given comity and the AEDPA should not attach. *Magnan v. Trammell 719 F.3d 1159, 1177, 1178 (10th Cir. 2013)*

(AEDPA noncompatable) Indian Country U.S.A. Inc. v. Oklahoma Tax Comm'n 829 F.2d 967 (10thCir. 1987)(recognizing Oklahoma Indian reservations) Murphy v. Royal 875 F.3d 896 (10th Cir. 2017)(recognizing the OCCA's 2004 fraud) McGirt v. State 140 S.Ct. 2452 (held Oklahoma is not exempt from the MCA)

This Court should grant a Petition for Certiorari because the AEDPA should be applied to Constitutionally to avoid federal courts from giving full faith and credit to State courts who commit fraud against the sovereignty of the Indian Nations and the U.S. Government. The integrity of the habeas is at stake.

Question Four

> Question 4. Did the OCCA abuse its discretion and create a defect in the integrity of the post-conviction procedures to enforce judgments and decrees, against Indians in Indian country, which were decided before McGirt?

The Petitioner, *pro se,* alleges this Court should overturn Matloff v. Wallace. The OCCA's ruling is arbitrary and capricious, created multiple reversable errors, and amounts to fraud on the court. The Petitioner argues (1) the OCCA violated and was preempted by the Choctaw Treaty and federal Indian policy. (2) the defense of nonretroactivity was discussed and forfeited in McGirt (3) the OCCA's decision contradicts superior court's precedence and McGirt does not announce a new rule and Teague defense is moot. (4) Writ of Prohibition was improper vehicle in leau of proper appeal.

1. The OCCA's ruling in Matloff is invalid and should be overturned because Parish is an Indian and Pushmataha county resides within the Choctaw reservation. *Ibid p. 5,6* Mr. Parish was protected by the Choctaw treaty as well as Oklahoma's disclaimer, *Okla Const. Art 1 §3.*, and, therefore, immune to State statutes and common law. The State of Oklahoma does not have jurisdiction over criminal offenses involving Indians in Indian country. *U.S. v. Sands 968 F.2d 1058, 1062 (10th Cir., 1992)*

The OCCA is not Congress. The OCCA cannot diminish or disestablish an Indian reservation or an Indian sovereign by setting McGirt as a precedent in time. Congress set aside the Choctaw reservation in 1830 and, in part, diminished a western portion in 1866 due to the Choctaws alliance with the Confederacy. **Once** Congress sets aside land as Indian country, it retains that character until Congress says otherwise. *Solem v. Bartlett 465 U.S. 463 (1984)*

2. The defense of nonretroactivity was discussed and forfeited in McGirt so the doctrines of res judicata and collateral estoppel apply. Ibid Question 2

However, even if nonretroactivity was still on the table, the *"Teague"* rule the OCCA uses fails due to immunity status of Indians. Congress has given Indians a special place in law. *See i.e. 25 U.S.C.(entitled Indian) and 18 U.S.C. §1153* Therefore, Oklahoma failed to consider Parish's Indian status when they applied the *"Teague"* rule.

3. The OCCA is bound by the supremacy clause. *Okla Const. Art. 1 §1* The OCCA determined McGirt is a new procedural rule contrary to the 10th Circuit precedent. *See Murphy v. Royal 875 F.3d 896 n.36 (10th Cir., 2017) or Cecil v. Nunn WL2071107 p.4 (Okla. N.D., 2021)* Like the Creek treaty, the Choctaw treaty is neither new or procedural; and the guardian/ward relationship between Congress and the Indians, from which the *MCA* and *Okla. Const. Art. 1 §3* were born, are neither new nor procedural. The Promises Congress has made to the Indians is of substance and is substantive law.

4. The OCCA's ruling in *Matloff* was the improper vehicle to entertain a Writ of Prohibition in leau of proper appeal. The Writ of Prohibition is not a substitute for appeal, *Farmer v. Sanford 353 P.2d 709, 710,712 (OCCA, 1960)* and

> "may not issue to prevent inferior court from erroneously exercising jurisdiction, but only to prohibit proceedings as to which inferior tribunal is wholly without jurisdiction, ir threatens to act in excess of jurisdiction." *State v. Lackey 257 P.2d 849, 854 (OCCA, 1953)*

Judge Wallace was well within the law to issue her decree *(OK ST.T.22 §1087)* The OCCA holding that trial court could not apply McGirt retroactively is arbitrary and capricious, fraud on the court. The Petitioner invokes *FRCP Rule 60 (b)(3)(4)*

CONCLUSION

Mr. Brumit would like to state for the record he does not want his name in the law books. His name is Brumit, not Smith, Jones, or John Doe. **However**, the Treaty of

Dancing Rabbit Creek obligates the People and he is a citizen of the United States. Therefore, he has no choice but to fight or be a traitor. The Treaty demands proactivity and retroactivity, and sets no limits to the defending of it. Maybe that involves a lawyer or maybe that involves abrogating a State from the Union, or simply turning a blind eye to an inmate escape. That is a matter of law.

The Petitioner believes in fairness and it hardly seems fair that a State with all its resources are held to lesser standard than a *pro se* inmate with no training in law. If res judicata and collateral estoppel can bar an inmate, the State cannot be held immune.

The Petitioner believes in the integrity of the Court, and fraud of any kind from a tribunal should never stand. The AEDPA is a very hard standard, but it was never intended to usurp the Constitution or intended to allow or to perpetuate a void judgment that has usurped federal authority.

The Petitioner urges this Court to overturn *Matloff v. Wallace* and revoke those OCCA decisions applied collaterally from *Matloff* because of the reasons stated herewithin. The decision in *Matloff* is Vespertilio Cacas Rabidus (having no basis in logic or reason) and must be corrected along with those who have violated the Treaty of Dancing Rabbit Creek.

Petitioner believes, that if this Court grants a Writ of Certiorari, it will help all parties involved. Where confusion and doubt exists, this Court can set healthy boundaries. Where promises were made, this Court can provide hope. Where it is

possible some inmates may be released, the reliance on the law is to the interests of every citizen.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel Del Brumit

Daniel Del Brumit, Petitioner, *pro-se*

July 29th, 2022

Date