No. 22-5910

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Ex parte MARK E. LEWIS - Petitioner

vs.

KAMERON HARVANEK – Respondent

ON PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS

OKLAHOMA COURT OF CRIMINAL APPEALS

EXTRAORDINARY WRIT OF HABEAS CORPUS

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QUESTION(S) PRESENTED

1. Whether a state court acting beyond its legislated authority - and without subject-matter jurisdiction in the first instance - can render a judgment of conviction, if void - worthy of "finality" for the purpose of AEDPA's 1-year statute of limitations? Is AEDPA 1-year statute of limitations triggered by a state court that has unlawfully exercised - and usurped - exclusive federal criminal jurisdiction in violation of supremacy clause and federal statutes?

2. Whether Oklahoma Court of Criminal Appeals' ruling that *McGirt* decision will not be applied "retroactively" to cases on collateral review can cure the fatal defect of a court acting without legislated jurisdiction where none existed in the first instance? The MCN reservation existed before Oklahoma became a state, exclusive federal jurisdiction through Supremacy Clause and Major Crimes Act immediately applied at statehood, can such a holding of non-retroactivity legally overcome the fact that Congress has never legislated or conferred such jurisdiction on the state of Oklahoma?

3. Whether the passage of time can confer criminal jurisdiction on a state court when it has not been legislated in the first instance?

4. Whether the Tenth Circuit Court of Appeals and the federal district courts of Oklahoma ruling that a habeas claim predicated upon a convicting court's lack of subject matter jurisdiction is subject to dismissal for untimeliness is contrary to - and conflicts with - this Honorable Court's holding that defects in a court's subject matter jurisdiction can never be forfeited or waived, and requires correction regardless?

5. Whether Petitioner - who is equally/similarly situated as Mr. McGirt - is legally entitled to the same equal protection of the law under the 14th Amendment?

6. Whether Suspension Clause guarantees a certain minimum content of judicial inquiry into the lawfulness of detention?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Direct Appeal, Oklahoma Court of Criminal Appeals, Case No. F-1990-918, Lewis v. State, Denied March 25, 1993(Unpublished).

First Application for Post-Conviction relief, Tulsa Co. District Court, Case No. CF-1989-3106, Lewis v. State, Denied October 20, 1997.

First Post-Conviction Appeal, Oklahoma Court of Criminal Appeals, Case No. PC-1997-1640, Lewis v. State, Denied January 28, 1998.

First Application for Writ of Habeas Corpus, U.S. District Court Northern District of Oklahoma, Case No. 98-cv-715-TCK, Lewis v. Boone, Denied August 10, 1999.

Request for C.O.A., U.S. Court of Appeals, Tenth Circuit, appeal No, 99-10257, 202 F.3d 282, Lewis v. Boone, Denied December 20, 1999 (Unpublished).

Writ of Certiorari, Supreme Court of the United States, 531 U.S. 869, Lewis v. Boone, Denied October 2, 2000 (Memo).

Application for Writ of Habeas Corpus challenging case CF-1981-1315, U.S. District Court Northern District of Oklahoma, Case No. 08-CV-676-TCK-FHM, Lewis v. Addison, Denied January 13, 2010 (Unpublished).

Second Application for Post-Conviction relief, Tulsa Co. District Court, Case No. CF-1989-3106, Lewis v. State, Denied April 20, 2021 (Unpublished).

Second Post-Conviction Appeal, Oklahoma Court of Criminal Appeals, Appellate Case No. PC-2021-505, Lewis v. State, denied October 2, 2021.

Motion for Authorization, U.S. Court of Appeals, Tenth Circuit, Appeal No. 22-5038, In re Lewis, Denied June 16, 2022.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS

Petitioner respectfully prays that an extraordinary writ of habeas corpus issue regarding the judgment below.

OPINIONS BELOW

For cases from **state courts**:

The opinion of the Oklahoma Court of Criminal Appeals, highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The opinion of the Tulsa County district court appears at Appendix B to the petition and is unpublished

JURISDICTION

For cases from **state courts**:

The date on which the highest state court decided my case was October 2, 2021.
A copy of that decision appears at Appendix A.

A timely petition for rehearing was not filed.

The jurisdiction of this Court is invoked under U.S.C.A. Const. Art. 3, §2, cl. 1, and 28 U.S.C. §§ 2241 and 2254(a), for the Petitioner to file an original application in this Honorable Court for a petition seeking an Extraordinary Writ of Habeas Corpus. See also *Felker v. Turpin*, 518 U.S. 651, 661-662 (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.A. Const. Art.1, § 9, cl. 2. Suspension of Habeas Corpus

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of rebellion or Invasion the public Safety may require it.

U.S.C.A. Const. Art. 3, §2, cl. 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;...

U.S.C.A. Const. Art. 6 cl. 2. Supreme Law of 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, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

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

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as defined 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 rights-of-way running through the reservation.

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

(a)

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

18 U.S.C. § 3242. Indians Committing Certain Offenses; Acts on Reservations

All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offenses within the exclusive jurisdiction of the United States.

28 U.S.C. § 2241. Power to Grant Writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complaint of is had.

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

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(3)(E) The Grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. §2254. State Custody; Remedies in federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

OK Const. Art. 1, §3. Unappropriated public lands-Indian lands-Jurisdiction of 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 be and remain subject to the jurisdiction, disposal, and control of the United States.

STATEMENT OF THE CASE

Petitioner filed his application for post-conviction relief in Tulsa Co. District Court in Case No. CF-1989-3106 on February 2, 2021 challenging the State court's subject-matter jurisdiction over him based on the *McGirt* Court's ruling that the Muscogee (Creek) Nation reservation has not been disestablished as historically held by Oklahoma, and that Petitioner's sentences were unlawfully enhanced under an unlawful after former conviction from 1985 originating in Tulsa Co. District Court case no. CF-1981-1315, *Accessory After the Fact.* On April 20, 2021 the district court denied relief . (see Appendix B *Order Denying Petitioner's Application*).

Petitioner appealed to the Oklahoma Court of Criminal Appeals (hereinafter OCCA), Appellate Case No. PC-2021-505. On October 2, 2021 the appeal was denied. (see Appendix A *Order Affirming Denial of Post-Conviction Relief*).

On May 18th, 2022, Petitioner filed his *Motion for Authorization* to file a second or successive application for writ of habeas corpus pursuant to §2244(3)(A) in the Tenth Circuit Court of Appeals, Appeal No. 22-5038, *In re Lewis*. Petitioner's Motion for Authorization was subsequently denied June 16, 2022. (see Appendix C Order).

Having fully exhausted state and federal avenues of legal redress, Petitioner's only available remedy left to him is to seek original application for an Extraordinary Writ of Habeas Corpus in this Honorable Court.

REASONS FOR GRANTING THE PETITION

I. EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THIS HONORABLE COURT'S DISCRETIONARY POWERS

Adequate relief cannot be obtained in any other form or from any other court. Petitioner has found himself in a *Catch-22* as he is being denied meaningful opportunity and access to both State and Federal courts, but for opposing reasons. This Honorable Court has long held that defects in a court's subject matter jurisdiction can **never** be forfeited or waived, and requires correction regardless. However, the Tenth Circuit Court of Appeals and federal district courts of Oklahoma repeatedly reject this holding – ruling that a habeas claim predicated upon a convicting court's lack of subject matter jurisdiction is subject to dismissal for untimeliness and that AEDPA 1-year statute of limitations does not recognize any such exceptions - citing

Morales v. Jones, 417 F. App'x 746, 749 (10th Cir. 2011)(unpublished); *Murrell v. Crow*, 793 F. App'x 675, 679 (10th Cir. 2019)(unpublished).

Without addressing the fatal defect of the sentencing court's lack of jurisdiction, the Oklahoma Court of Criminal Appeals held that the *McGirt* decision is a "new" procedural rule, and therefore, will not be applied retroactively. In *State ex rel Matloff v. Wallace*, 479 P.3d 686, 689-690 (Okla.Crim.App. 2021), the court held the ruling announced in *McGirt* was new, and would not apply retroactively to convictions that were "final" at the time *McGirt* was decided. That the "new rule" only imposed new and different obligations on state and federal government, and the rule also broke new legal ground in the sense that it was not dictated by Supreme Court precedent, contrary to the fact that *McGirt's* decision is based on existing precedent.

It was further held that the decision was only a "procedural change in law" and did not constitute a substantive rule that would permit retroactive collateral attacks. It was a significant change only to the extent of state and federal criminal jurisdiction affected only the manner of determining the defendant's culpability.

Further, the Federal Court Cases that the OCCA cites and relies on in *Matloff* to justify its non-retroactivity position have no relevance in this instant case and do not apply in this matter. This is addressed more fully starting on page 10.

The Tenth Circuit Court of Appeals has taken an opposite stance, holding the *McGirt* decision is "not" a new rule of constitutional law, and therefore, is not made retroactive to cases on collateral review. The only way the Supreme Court could make a rule retroactively applicable is through a holding to that effect. See *In re Jones*, 847 F.3d 1293, 1295 (10th Cir. 2017). While the *McGirt* Court's recognition of the continued existence of the Muscogee (Creek) Nation reservation is certainly "new", the *McGirt* Court did not newly recognize a criminal defendant's

constitutional due process right to be tried by a court of competent jurisdiction, that a sentencing court's lack of jurisdiction is no different than any other due process claim and can be waived. Because the decision did not recognize any new constitutional right, 28 U.S.C. § 2244 (b)(2)(B)(i) does not apply. See Appendix C, *Order*, (This denial was not appealable nor was it grounds for seeking certiorari. See § 2244 (b)(3)(E)).

This Honorable Court is the only court available to seek relief. These rulings are effectively denying Petitioner - and all petitioners similarly situated like him - any meaningful access to the courts and has denied him any meaningful opportunity to present his case for a review and ruling on the merits.

II. STATEMENT REQUIRED BY 28 U.S.C.A. § 2242 AND RULE 20.4(a) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The reasons for not making application to the district court of the district in which Petitioner is held is because he was denied permission by the Tenth Circuit Court of Appeals. This is his second § 2254 application challenging this conviction and 28 U.S.C. §2244(3)(A) requires that he first seek and receive permission in the appropriate court of appeals for an order authorizing the district court to consider the application. The court rejected Petitioner's argument based on *Panetti v. Quarterman*, 551 U.S. 930 (2007) and *Magwood v. Patterson*, 561 U.S. 320 (2010) that Petitioner's habeas should not be considered as second or successive as this claim was not ripe and could not have been presented before *McGirt*. The Motion was denied. See Appendix C, *Order*.

III. SUMMARY ARGUMENT

This Honorable Court has long held that defects in a court's subject-matter jurisdiction must be corrected regardless, that it can never be waived or forfeited. This is so because a court's

authority is legislated by statute, and common law cannot confer jurisdiction on any court that never had it in the first instance. Every act of a court beyond its jurisdiction is void, and cannot yield a final, binding decision or judgment. Habeas in its purest sense demands a conviction by a court of competent jurisdiction and the issue of whether the State court lawfully exercised jurisdiction is an important federal constitutional question that is cognizable under habeas review. See *United States v. Cotton*, 535 U.S. 625,630 (2002) (This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court.); *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("Subject-matter jurisdiction can never be waived or forfeited.").

As in *McGirt,* and *Murphy*, statutory text decides this case. In light of this Honorable Court's ruling that the Muscogee (Creek) Nation reservation (hereinafter MCN) has not been disestablished, the Major Crimes Act pursuant to the Supremacy Clause preempts State law, rendering Petitioner's Oklahoma State court convictions unlawful and his imprisonment a violation of the United States Constitution. Petitioner is Native American and the complained offenses occurred within the historical boundaries of the MCN and Cherokee Nation reservations, "Indian country". U.S.C.A. Const. Art. 6 cl. 2, and Federal statutes 18 U.S.C. §§ 1153 and 3242, guarantees the substantive rights and protections of Indians in a federal tribunal and gives the United States exclusive jurisdiction over Native Americans and their conduct in Indian country, preempting state criminal jurisdiction and effectively placing such conduct beyond the State's judicial criminal authority.

Tulsa Co. District court was outside the limitations prescribed by statute. No court has the authority to imprison a person or detain him in custody in violation of the Constitution.

Retroactive concerns are not implicated here as it is not an intrusion upon State sovereignty or its interests in finality. There are no concerns for AEDPA deference to the State for the purpose of comity or federalism. The State violated federal law in acquiring these convictions. This is an exceptional case in which the convicting court lacked even an arguable basis for jurisdiction. To deny Petitioner relief would "elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." Petitioner is lawfully entitled to Habeas relief.

A. PETITIONER'S CONVICTION AND IMPRISONMENT IS UNLAWFUL AND IS IN VIOLATION OF THE UNITED STATES CONSTITUTION

Petitioner is a citizen of the Muscogee Nation, ID No. 4132811, Roll No. 48768 (see Appendix D through H). The complained offenses occurred at the following locations: 2102 E. 51st St., Tulsa, OK 74012; ¼ mile east of 61st St. and Lynn Lane, Broken Arrow, OK 74012; and 6943 E. Latimer Pl., Tulsa, OK 74115. The First two addresses are located within the Muscogee (Creek) Nation reservation boundaries.(see Appendix I). The third address is located within the historical boundaries of the Cherokee Nation reservation.

U.S.C.A. Const. Art. 6, cl. 2, the Supremacy Clause supplies a rule of priority. It provides that the "Constitution, and Laws of the United States which shall be made in pursuance thereof," are "the supreme Law of the Land... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Federal statutes 18 U.S.C §§ 1153 and 3242, effectively preempt and proscribe State criminal jurisdiction and penal statutes over a claim against conduct by Indians arising in "Indian country". Sections 1153 and 3242 does not merely allocate exclusive federal jurisdiction, it guarantees the substantive rights and protections of Indians in a federal tribunal. Any court's attempt to exercise authority beyond those limits is an illegitimate assumption of

power, exceeding its jurisdiction that renders its judgment void. It is a rule well established that a void judgment may be vacated at any time and the doctrines of laches and estoppel do not apply.

18 U.S.C. § 3242 provides that all Indians committing any offenses under the first paragraph of section 1153 within Indian country "shall be tried in the same courts and in the same manner as are all other persons committing such offenses within the exclusive jurisdiction of the United States." Apart from legislative enactment, state courts cannot lawfully expand its jurisdiction nor can it apply its penal statutes in Indian country. See *United States v. Bryant*, 579 U.S. 140, 146 (2016); See also *United States v. John*, 437 U.S. 634, 651 (1978) (That §1153 ordinarily is pre-emptive of state jurisdiction).

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and that power has always been deemed a political one, not subject to be controlled by the judicial department of the government. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). Only Congress has the power to abrogate these statutes and treaties with Indians.

B. NON-RETROACTIVE APPLICATION CANNOT CURE THE FATAL DEFECT OF A COURT'S ABSENCE OF FUNDAMENTAL JURISDICTION

Ultimately, jurisdiction is an essential part of what makes a court a court, and distinguishes it from a person who in somber robes and tone undertake to tell others how they ought to behave. From the elemental, legitimating quality of jurisdiction, it follows that whatever other powers a court may have, it cannot generate its own jurisdiction. Jurisdiction must come from some external source, typically the relevant Constitution or legislature. The inability of a court to generate its own jurisdiction makes the absence of jurisdiction fatal to a particular adjudication, other legal consideration notwithstanding. This total dependence of a court on its

jurisdiction is purely one of legislation, not common law. The passage of time, no matter its length, cannot confer jurisdiction on a court that never legislatively obtained it in the first instance, nor can it overcome the statutory text. See *Nebraska v. Parker*, 77 U.S. 481, 493 (2017).

In disposing of the post-conviction appeal, the OCCA did not establish by what authority the State court retains lawful jurisdiction:

> "Petitioner Proposition I argues he is entitled to post-conviction relief pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, __ P.3d __ , this Court determined that the United States Supreme Court decision in McGirt, because it is a new procedural rule, is not retroactive and does not void final state convictions. See *Matloff*, 2021 OK CR 21, ¶¶ 27-28, 40." See Appendix A, *Order Affirming Denial of post-Conviction relief, id.*, p.2, ¶2.

In *Matloff*, the OCCA engaged in some creative "legal gymnastics to keep from voiding judgments rendered by a court without jurisdiction". Judge Lumpkin in his Specially Concurring opinion addressed the OCCA's lack of jurisdiction in that case:

> "Keeping the policy decisions reflected in those opinions in mind, I do diverge from the court in labeling the McGirt ruling as procedural. **When the federal government pre-empts a field of law, the legal effect is to deprive states of their jurisdiction in that area of the law. If a court lacks jurisdiction to act then any rulings and judgments would appear to be void when rendered**." *Id.*, *Matloff*, 497 P.3d at 695, ¶3, & n.1, (emphasis added).

The OCCA's prospective only ruling in *Matloff* is based on the court's misinterpretation of *United States v. Cuch*, 79 F.3d 987(10th Cir. 1996) and *Hagen v. Utah*, 510 U.S. 399 (1994) and has no relevance here. At the time of Mr. Cuch and Mr. Appawoo's crimes, federal courts were the **only** tribunals available, the state of Utah was barred from prosecuting such crimes from 1976 to 1994. Prior to the *Hagen* decision – which, by the way, was based on the specific language contained within the Treaties and Acts unique to the tribes in Utah, and has no bearing on the treaties and tribes in Oklahoma - the land was still within the historical boundaries of the Uintah Reservation, and they were sentenced to federal prison for crimes committed in violation

of federal law. The Honorable Circuit Judge Anderson explains in detail the reason behind the court's prospectivity decision. See *Cuch*, 79 F. 3d at 992-93. To the contrary, Oklahoma has **never** legislatively possessed criminal jurisdiction over this reservation land as the Supremacy Clause and MCA immediately applied at statehood.

The OCCA's defense of non-retroactive application cannot cure the fatal defect of the sentencing court's absence of fundamental jurisdiction. This lack of jurisdiction did not arise from a new rule of criminal procedure. Simply concluding that *McGirt* "is a new procedural rule" and will not be applied retroactively to void final state convictions does not establish the court's jurisdictional authority where it does not exist. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998) (For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.).

Further, by the very language used in *McGirt v. Oklahoma*, 140 S.Ct. 2454 (2020), retrospective effect is expected. The Court addressed the State and dissent's worry and concerns regarding the consequences that would follow from an adverse ruling and the effect it will have on settled convictions stated:

> "What are the consequences the State and dissent worry might follow from an adverse ruling anyway? Primarily, they argue that recognizing the continued existence of the Creek Reservation could unsettle an untold number of **convictions** and frustrate the State's ability to prosecute crimes in the future. But the MCA applies only to certain crimes committed in Indian country by Indian defendants." *Id.*, 140 S.Ct. at 2479, (*emphasis added*).

And:

> "What's more, a decision for either party today risks **upsetting some convictions**. Accepting the State's argument that the MCA never applied in Oklahoma would preserve the state-court convictions of people like Mr. McGirt, but simultaneously **call into question every federal conviction** obtained for crimes committed on

> trust lands and restricted Indian allotments since Oklahoma recognized its jurisdictional error **more than 30 years ago**." *Id.*, 140 S.Ct. at 2480, (*emphasis added*).

Mr. Chief justice Roberts in his dissenting opinion specifically hit the nail on the head:

> "**Most immediately**, the Court's decision draws into question thousands of **convictions** obtained by the State for crimes involving Indian defendants or Indian victims **across several decades**... Such **convictions are now** subject to jurisdictional challenges... Certainly defendants like McGirt convicted of serious crimes and sentenced to 1,000 years plus life in prison will not adopt a strategy of running out the clock on their state sentences. At the end of the day, there is no escaping that today's decision will undermine numerous **convictions** obtained by the State, as well as the State's ability to prosecute serious crimes committed in the future." *Id.*, 140 S.Ct. at 2500-2501, (emphasis *added*).

Clearly, the Court's ruling that the MCN reservation has not been disestablished and that the MCA does apply was retroactively applied to Mr. McGirt. His collateral challenge to the state court's jurisdiction was decades after the fact. The Court and the dissent understood the decision would be applied retroactively to convictions like Mr. McGirt. Otherwise, why address the concern of convictions "across several decades" – that being convictions that are twenty plus years old – if the decision would have no impact. Besides, these convictions were obtained unlawfully, surely no Justice of the Supreme Court would sanction such acts.

States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge. *Montgomery v. Louisiana*, 577 U.S. 190 (2016) clearly sets out the parameters that state courts must follow in retroactively applying rulings by this Honorable Court. If a state collateral proceeding is open to a claim controlled by federal law, the state court "has a duty to grant the relief that federal law requires":

> "Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. If a state collateral proceeding is open to a claim controlled by federal law, the state court "has a duty to grant the relief that federal law requires." *Id.* 577 U.S. at 204.

And:

> "As a final point, it must be noted that the retroactive application of substantive rules does not implicate a State's weighty interests in ensuring the finality of convictions and sentences"... "for no resource marshaled by a State could preserve a conviction or sentence that the **Constitution deprives the State of power to impose**." *Id.* 577 U.S. at 205, (*emphasis added*).

It is fundamental that a conviction by a tribunal lacking jurisdiction may be set aside by habeas proceedings. Petitioner is in state custody in violation of congressional treaty, federal statutes, and the United States Constitution.

The *McGirt* decision vindicates that promise by Congress allowing only the federal government, not the States, to try Native Americans for major crimes that occur within Indian country. See also *Rice v. Olson*, 324 U.S. 786, 789 (1945). No court has discretion to refuse to vacate that conviction once it recognizes its lack of jurisdiction. The state court was unlawfully constituted, in violation of Congress, the Consitution, and federal statute, having no legislated criminal authority over the Petitioner or the subject matter.

States cannot, in the exercise of control over local laws and practice, vest courts with power to violate the supreme law of the land, there being no presumption of law in favor of jurisdiction of such a court. The United States Constitution grants Congress exclusive power to regulate the affairs of Indians in Indian country, and states cannot assert its criminal authority over Indians' conduct in Indian country absent congressional and tribal consent. Oklahoma's Constitution Art. 1, § 3 clearly states Oklahoma "forever disclaims all right and title to any and all Tribal Indian land".

Once Petitioner presented *prima facie* proof that the MCN reservation is not disestablished, the land being "Indian country" as defined by 18 U.S.C. § 1151, and under exclusive federal jurisdiction pursuant to §§1153 and 3242, the burden of establishing jurisdiction shifted to the court to overcome that proof. Since this jurisdictional issue can never be forfeited or waived, the OCCA is legally bound by law to inquire into the question of the

lower court's jurisdiction, as well as its own jurisdiction. If the convicting court lacked jurisdiction, then it follows that the OCCA is also without lawful jurisdiction. The OCCA never established by what authority the State retains lawful jurisdiction where such jurisdiction is effectively preempted by federal statute. See *Murphy v. Royal*, 866 F.3d at 1195 (10th Cir. 2017). The state court is without jurisdiction today, and it is without jurisdiction at the time of Petitioner's arrest and convictions.

Petitioner's Proposition IV challenged the State's use of an unconstitutionally acquired prior conviction of *Accessory After the Fact*, case no. CF-1981-1315, to enhance Petitioner's sentence. (see Appendix J). Not only was the State without authority of law and jurisdiction because he is Indian but he was never formally charged with the crime of *Accessory After the Fact.* At no point did the State formally charge him with a crime of *Accessory After the Fact.* Neither the State nor the court set forth any acts constituting a crime, never established a principle crime, and never established to whom Petitioner was an alleged accessory. See *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt); see also *Thompson v. City of Louisville*, 362 U.S. 624, 206 (1960) (Just as 'conviction upon a charge not made would be sheer denial of due process', so is it a violation of due process to convict and punish a man without evidence of his guilt.); *In re Winship*, 397 U.S. 358, 361 (1970) (The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.).

This Court has long held that a prisoner in state custody who claims that the state sentence he is serving was enhanced by an unconstitutional prior conviction for which the sentence had fully expired satisfied the "in custody" requirement for federal habeas jurisdiction,

construing the petition as challenge to sentence he is currently serving. See *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 401 (2001); *Alaska v. Wright*, 141 S.Ct. 1467,1468 (2021).

Because the OCCA did not establish by what authority the court retains jurisdiction and did not address the merits of the claims, the ruling does not activate any AEDPA deference to the OCCA's decision. See *Cone v. Bell*, 556 U.S. 449, 472 (2009); *Murphy*, 875 F.3d at 925.

C. UNTIL *MCGIRT* THE FACTUAL PREDICATE FOR THIS CLAIM DID NOT EXIST AND COULD NOT HAVE BEEN DISCOVERED ANY SOONER THROUGH DUE DILIGENCE

Determination of "Indian country" is relevant to the question of federal criminal jurisdiction and is the touchstone of this instant claim. It is one of the essential "elements" that must be established under § 1153 that implicates exclusive federal jurisdiction, and proscribing state jurisdiction. Petitioner's standing is totally and utterly dependent upon the factual, legal determination that the complained crimes occurred within the boundaries of "Indian country" as defined by 18 U.S.C § 1151. See *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 424, 354 (1962) (The case turns upon the current status of the Colville Indian reservation.).

The singular focus of *McGirt* was the definitive determination of whether or not the MCN reservation had been disestablished as historically practiced by Oklahoma and the government. The jurisdictional issue arose as a collateral consequence, which immediately implicated exclusive federal jurisdiction, preempting and nullifying all State jurisdiction pursuant to federal statutes. Oklahoma was immediately divested of subject-matter jurisdiction as a matter of federal statute.

Since statehood, not a single criminal case involving an Indian defendant has been tried in any federal court on the theory that the eastern half of Oklahoma is a reservation. Until *McGirt*,

there were no government prosecutions under 18 U.S.C. §§1151 & 1153 anywhere in eastern Oklahoma unless the alleged crime occurred on a recognized, surviving "Indian allotment".

Though *McGirt* did not announce a "new" rule of law *per se*, and the decision was based on existing precedent at the time of Petitioner's complained crimes, the legal determination and ruling that Congress has not disestablished the MCN reservation is new law, overruling a century of existing State and federal courts' rulings to the contrary.

This jurisdictional claim could not have been presented any earlier because the legal basis for the claim was unripe and unavailable. The OCCA ruled in *Bosse v. State*, 499 P.3d 771 (Okla.Crim.App. 2021):

> "We further concluded that Mr. Bosse's Indian Country claim was cognizable in this second post-conviction application. Because the legal basis was unavailable at the time of his direct appeal and prior post-conviction application, **because no final decision of an Oklahoma or federal appellate court had recognized any of the Five tribes' historic reservations as Indian Country prior to *McGirt*** in 2020." *Id.* at 774,¶9, (*emphasis added*).

See also *Martinez v. State*, 502 P.3d 1115, 1117 ¶7 (Okla.Crim.App. 2021). More importantly, in *McGirt*, the Mr. Justice Gorsuch specifically set forth:

> "**If** the Creek lands really were part of a reservation, the argument goes, all of these cases should have been tried in federal court pursuant to the MCA. **Yet, until the Tenth Circuit's Murphy decision a few years ago, no court embraced that possibility**. See Murphy, 875 F. 3d 896." *Id.* 140 S.Ct. at 2470, (emphasis *added*).

This Honorable Court granted certiorari because this legal question needed to be settled.

Prior to *Murphy*, both Oklahoma and federal courts ruled there are no Indian reservations in Oklahoma. At the time of Petitioner's alleged offenses, July of 1989, Oklahoma unquestionably exercised exclusive criminal jurisdiction over Indians accused of a crime anywhere within the State. See *Ex Parte Nowabbi*, 61 P.2d 1139 (Okla.Crim.App. 1936). *Nowabbi* was subsequently overruled by *State v. Klindt*, 782 P.2d 401, 403-404 (Okla.Crim.App. 1989), filed October 31, 1989, **but only as far as recognizing surviving "Indian" allotments**.

Both the State and federal courts still held that **no Indian reservations existed within Oklahoma**. See *Cravatt v. State*, 825 P.2d 277, 279, P13-14 (Okla.Crim.App. 1992), which specifically dealt with a complained crime occurring on a "restricted Indian allotment":

> "Although the United States and the State of Oklahoma are in agreement with the trial court's finding that the situs of the murder was "Indian County," **both** urge us to find that the trial court's finding of federal preemption was in error. They do so, however, for different reasons. The United States asserts that "**as a result of congressional enactments around the turn of the century, Oklahoma, not the United States, has exclusive criminal jurisdiction in Indian country within the former territory of the Five Civilized Tribes**, and thus in this case." Second Supplemental Memorandum of the United States as Amicus Curiae, p. 3. This position has been previously argued by the United States **in several other cases**." *Id.*, at 279, ¶13, (*emphasis added*).

See also *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, (E.D. Okla. 2007):

> "While the historical boundaries of once tribally owned land within Oklahoma may still be determinable today, there is no question, based on the history of the Creek nation, that **Indian reservations do not exist in Oklahoma**. State laws have applied over the lands within the historical boundaries of the Creek Nation for over a hundred years. *See*, Oklahoma Enabling Act, 34 Stat. 267 and other cases cited herein." *Id.*, at 1289-1290, (emphasis *added*).

See *Muscogee (Creek) Nation v. Henry*, 867 F. Supp. 2d 1197, (E.D. Okla. 2010) citing Tenth Circuit's ruling in *Osage Nation v. Irby*:

> "The original Muscogee reservation created by treaty was disestablished as a part of the allotment process. *Murphy vs. Sirmons*, 497 F.Supp.2d 1257, 1290 (E.D. Okla. 2007), citing and collecting authorities, **including Congressional recognition that all Indian reservations, as such, have ceased to exist in Oklahoma**. "The Indians of Oklahoma were an anomaly in Indian-white relations ... There were no Indian reservations in Oklahoma ... The reservation experience that was fundamental for most Indian groups in the twentieth century was not part of Oklahoma Indian history." *Osage Nation v. Irby*, 597 F.3d 1117, 1125 (10th Cir. 2010)." *Id.*, at 1210, (emphasis *added*).

State and federal courts' ruling that there "were no Indian reservations in Oklahoma" was the law and binding at that time. Primacy of State jurisdiction was considered settled.

Not only was the legal basis for this claim unavailable prior to *McGirt*, but it was **unripe** as no court had recognized the existence of Oklahoma Indian reservations. The Honorable Chief

Judge Tymkovich in his concurring opinion in the denial of rehearing *en banc* concluded that the *Murphy* case "makes a good candidate for Supreme Court review."*Murphy v. Royal*, 875 F.3d 896, at 968.

In *Richardson v. Malone*, 762 F. Supp. 1463, 1465 (N.D. Okla. 1991), Chief Judge Cook stated that perhaps in no other state has there been more confusion over who has jurisdiction in Indian country than in the state of Oklahoma. In 1934, Oklahoma Senator Elmer Thomas - member of the Senate Committee on Indian Affairs - in response to the Indian Rights Act (IRA) said, "The Indians here (Oklahoma) have no reservation.". See *Roth v. State*, 499 P.3d 23, 32 & n.1 (Okla.Crim.App. 2021). Throughout this State's history there has been this common theme of recurring tension between federal jurisdiction and state law. Oklahoma has not easily accepted the fact that federal law and federal courts must be deemed the controlling considerations in dealing with Indians, as federal district courts have original jurisdiction pursuant to 18 U.S.C. § 3231. See *Oneida Indian Nation v. County of Oneida*, 414 U.S 661, 678 (1974).

In *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985) the Tenth Circuit concluded:

> "Criminal jurisdiction in Osage County, Oklahoma depends on the site of the crime; jurisdiction changes from property to property depending on the current status of the particular allotment on which the crime occurs." *Id.*, at 597.

In delivering the Court's opinion, the Honorable District Court Judge Carrigan clearly captured the pre-*McGirt* legal landscape for all of eastern Oklahoma. Judge Carrigan went on to note in the Court's opinion that the"unfortunate patchwork nature of law enforcement led to **confusion** of who had original jurisdiction between the Government or Oklahoma."*Burnett*, 777 F.2d at 597.

Prior to *McGirt*, whether a particular tract of land was in fact Indian country was a question of fact which was to be determined on a case-by-case basis and the idea of an existing reservation was not a consideration. However, it does not matter who holds title to the land, it still retains its reservation status until Congress says otherwise. *Solem v. Bartlett*, 465 U.S.463,

470(1984). See also *United States v. Celestine*, 215 U.S. 278, 285 (1909) (When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.) This alone renders the State and government's "patchwork" and "checkerboard" jurisdictional concerns legally irrelevant and meaningless.

The Government, after successful prosecution of Mr. Sands, did a *180°* turn about contending that the federal courts are without jurisdiction, urging the Court to adopt its frequently raised argument that the State of Oklahoma retained exclusive jurisdiction over criminal offenses in Indian country. In a nutshell, the Government claimed that the MCA does not apply because the restricted allotment was not Indian country as defined by § 1151, and again, referring to jurisdiction over "checkerboard" Indian allotments. See *United States v. Sands*, 968 F.2d 1058, 1061-1062 (10th Cir. 1992)

The Government did not recognize the surrounding lands as tribal reservation land. Obviously so, because again, there were no federal prosecutions under 18 U.S.C. §1153 on any of the lands surrounding the "checkerboard"restricted allotments. See *Brief for the United States as Amicus Curiae Supporting Respondent*, *McGirt v. Oklahoma*, No. 18-9526, WL 2020 1478583 (March 20, 2020) *id.*, at *4 ("The federal government would be required for the first time since statehood, to assume jurisdiction over all crimes involving Indians"); *Magnan v. State*, 207 P.3d 397, 405-406 (Okla.Crim.App. 2009). Mr. Magnan subsequently prevailed in a 28 U.S.C. § 2254 petition, *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013); *Murphy v. Sirmons*, 497 F.Supp.2d 1257, 1291 (E.D. Okla. 2007). It is clear from the government's historical position that they operated from the legal standing that reservations were non-existent, or at the very least, had been disestablished and that Oklahoma jurisdiction preempted the governments. See *Solem*, 465 U.S. at 467 & n.8.

As Mr. Justice Gorsuch stated:

> "A State exercises jurisdiction over Native Americans **with such persistence that the practice seems normal**. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, **not the rule of law**.*Id., McGirt,* 140 S.Ct. at 2474, (emphasis *added*).

See also Mr. Chief Justice Roberts' dissent, *id.*, 140 S. Ct. at 2497.

Only when the *McGirt* Court overruled Oklahoma, and the government, settling the question, making the definitive ruling that the MCN reservation has not been disestablished, and is "Indian country" for the purpose of the Indian Major Crimes Act did the legal basis for this claim become ripe, and therefore, available to the petitioner. To hold otherwise would violate Petitioner's due process right to Notice.

As a court's authority is established and regulated by statute, it was legally necessary that there be a final determination of law, and of fact, that not only is the land in question a reservation, but is it Indian country as defined by 18 U.S.C. § 1151 because official reservation status is not dispositive. See *U.S. v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999).

Unlike Mr. Murphy, Petitioner's alleged offenses did not occur on any known surviving "Indian" allotment. In both *Murphy* and *Magnan*, their challenges were based on the recognition that their alleged crimes occurred on what they knew to be surviving Indian allotments, not a surviving reservation.

Like *Magwood* and *Panetti*, Petitioner's application should be considered by this Honorable Court as there was no way Petitioner could have presented such a complicated claim

as ripe, and he was fraudulently deceived by the State and government's steadfast assertions that the land in question was not a reservation. See *Magwood v. Patterson*, 561 U.S. 320, 332 (2010); Panetti v. Quarterman, 551 U.S. 930, 944, 947 (2007).

D. PETITIONER'S ALLEGED CRIMES ARE AGAINST THE UNITED STATES, NOT OKLAHOMA

The typical standard of review set forth in AEDPA doesn't apply because this case turns on jurisdictional questions, specifically, whether the controversy is one reserved solely for federal courts for resolution. Crimes committed by an Indian within the boundaries of a United States Indian reservation is therefore a crime against the authority of the United States, expressly punishable by federal statute. See *Apapas v. United States*, 233 U.S. 587 (1914):

> "We say so because the prosecution was for murder committed by Indians on a United States Indian reservation, and therefore was a crime against the authority of the United States,..". *Id.,* 590.

Because jurisdiction over Petitioner's crimes rests exclusively with the United States rather than the State of Oklahoma, it therefore presents a federal question that sustains federal jurisdiction. For purposes of AEDPA, there can be no finality, or even deference of comity and federalism, resulting from an unlawful conviction by a state court that usurped exclusive jurisdiction from federal and tribal courts. It is fundamentally void of jurisdiction. Legally, Petitioner's complained crimes are against the United States, not Oklahoma and AEDPA 1 year bar is not activated. See *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (AEDPA's 1-year limitations period "quite plainly serves the well-recognized interest in the finality of state court judgments.). See also *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be

raised at particular times... Objections to subject-matter jurisdiction, however, may be raised at any time.); *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013).

Every act of a court beyond its jurisdiction is void. A court acting without jurisdiction cannot yield a binding decision or judgment, and by default, there cannot be "finality". To hold otherwise would be putting the proverbial "cart before the horse", confusing the caboose of the train for its engine. Statutory and, especially, constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998); *Waskey v. Hammer*, 223 U.S. 85, 94 (1912) (The general rule of law is that an act in violation of a statutory prohibition is void and confers no right upon the wrongdoer.).

Federal statutes §§ 1153 and 3242 unquestionably preempt here, effectively nullifying all criminal jurisdiction by the State court over the Petitioner. In *United States v. Bryant*, 579 U.S. 140, 146 (2016), the Court clarified its decision based on state jurisdiction in Indian country as only "States so empowered" by Congress to exercise criminal jurisdiction in Indian country "may apply their own criminal laws" to offenses committed by Indians within all Indian country within the state."

In *Steel Co.*, 523 U.S. 83 (1998) the Court ruled:

> "Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause...**The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States, and is inflexible and without exception**. "*Id.*; at 94-95, (emphasis *added*).

And in *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604 (1990):

> "The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books... Traditionally that proposition was embodied in

> the phrase *coram non judice*, "before a person not a judge"—meaning in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a *judgment*." *Id.*, at 608-609.

It is axiomatic that absent clear congressional authorization, state courts lack jurisdiction to hear cases against Native Americans arising from **conduct** in Indian country. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1204 (10th Cir. 2018). See, e.g., *Williams v. Lee*, 358 U.S. 217, 223 (1959). The *Navajo Nation* Court determined that not only is congressional approval necessary before a state can exercise criminal jurisdiction over Indians in Indian country, it is a "threshold requirement" that must be met. Oklahoma has never met this requirement.

In *Johnson v. Zerbst*, 304 U.S. 458 (1938) the Court ruled:

> "The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States-to whom a petition for habeas corpus is addressed-should be alert to examine 'the facts for himself when if true as alleged they make the trial absolutely void'." *Id.*, at 468.

Clearly, any court acting beyond the limits of its legislated jurisdictional authority cannot render a final judgment of conviction worthy of AEDPA finality or comity.

It follows then, that if the convicting court lacks fundamental jurisdiction in the traditional sense, its judgment being null and void, then by the same standards, the "final determination" by the OCCA is also void and cannot satisfy the "finality" requirements to activate the deferential standards of AEDPA. See *Freytag v. C.I.R.*, 501 U.S. 868, 896-97 (1991).

Historically, if a court acts without authority of law, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to reversal. See *Elliott v. Peirsol's Lessee*, 26 U.S. 328, 329 (1828). See also *Ex parte Reed*, 100 U.S. 13, 23 (Every act of a court beyond its jurisdiction is

void.); *U.S. v. Tony*, 637 F.3d 1153, 1157-1158 (10th Cir. 2011); *U.S. v. Bigford*, 365 F.3d 859, 865-86 (10th Cir. 2004) (Such a judgment, if void, would be a nullity from the outset.); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224-225 (10th Cir. 1979) ([V]oidness usually arises for lack of subject matter jurisdiction or jurisdiction over the parties. It may also arise if the court's action involves a plain usurpation of power or if the court has acted in a manner inconsistent with due process of law.)

The Honorable Circuit Judge Hartz in his concurring opinion in *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013) concluded:

> "[F]ederal courts do not defer to a state court's determination of jurisdiction when the state assumed jurisdiction in violation of a grant of exclusive jurisdiction to the federal courts."... and ..."Certainly the comity considerations that animated AEDPA do not apply to prosecutions that usurped exclusive federal jurisdiction." *Id.*, at 1177-1178.

And in *U.S. v. Magnan*, 622 Fed. Appx. 719 (10th Cir. 2015), the Honorable Circuit Judge Lucero held:

> "But a determination that a trial court lacked jurisdiction does more than vacate a judgment; it voids each and every action taken by the court." *Id.*, 622 Fed. Appx. at 720.

And:

> "It is well settled that '[t]he judgment of conviction pronounced by a court without jurisdiction is void.' " *Id.*, 622 Fed. Appx. at 722.

That necessarily includes a court's finding of guilt or innocence. Oklahoma's Penal Statutes possess no lawful authority over conduct by an Indian on reservation lands. Federal statutes §§ 1153 and 3242 supersedes, effectively nullifying the application of any Oklahoma penal statute for any conduct in Indian country by an Indian.

E. THE COURT'S RULING THAT THE MCN RESERVATION HAS NOT BEEN DISESTABLISHED WAS RETROACTIVELY APPLIED TO MR. MCGIRT. PETITIONER IS IDENTICALLY SITUATED LEGALLY AS MR. MCGIRT AND IS ENTITLED TO THE SAME EVENHANDED JUSTICE AND EQUAL PROTECTION GUARANTEED BY THE 14TH AMENDMENT

The ruling that the MCN reservation was not disestablished and that the MCA applied immediately according to its plain terms when Oklahoma won statehood in 1907, was retroactively applied to Mr. McGirt's case by this Honorable Court. Legally, Petitioner is identically situated as Mr. McGirt and has a liberty interest in the same legal/constitutional protections as guaranteed under the Constitution's 14th Amendment. Mr. Mcgirt had been incarcerated for over twenty years before he pursued this jurisdictional claim, and only did so after he became aware of the Tenth Circuit's 2017 ruling in *Murphy v. Royal*. In 1996 Mr. McGirt was formally charged in Wagoner Co. District Court for crimes committed at his residence in Broken Arrow, Tulsa's largest suburb. The residence is not a surviving Indian allotment and was not recognized as being within the historical boundaries of a reservation.

Likewise, Petitioner was formally charged in Tulsa Co. District Court for alleged crimes within the cities of Tulsa and Broken Arrow. Similarly, the complained crimes did not occur on any Indian allotment and was not recognized as being within the historical boundaries of a reservation.

Mr. McGirt did not pursue any legal redress or raise his jurisdictional claim for the first 20 years of his incarceration. Mr. McGirt's application to the U.S. Supreme Court for a writ of Certiorari was from the OCCA's denial of his post-conviction appeal, a collateral attack on his conviction. The principle of treating similar cases alike would dictate that this case on collateral review receive the same protections of the *McGirt* and *Murphy* rulings.

Petitioner's legal standing is identical to Mr. McGirt, equal protection of the law, fundamental fairness, and evenhanded justice requires that Petitioner receive the same constitutional/legal rights and protections afforded to Mr. McGirt.

F. THE SUSPENSION CLAUSE GUARANTEES A CERTAIN MINIMUM CONTENT OF JUDICIAL INQUIRY INTO THE LAWFULNESS OF DETENTION

The right of access to habeas is particularly fundamental and is indeed so important to the constitutional tradition that it is singled out for constitutional protection. See *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (declaring that the right to habeas corpus is "shaped to guarantee the most fundamental of all rights"); *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971) (listing the right to the writ of habeas corpus among rights that are "to be regarded as of the very essence of constitutional liberty"). Reviewing the lawfulness of executive detention lay at the "historical core" of the writ of habeas corpus. The Suspension Clause, U.S. Const. art. 1, § 9, cl. 2, except when the writ is properly suspended, guarantees that the habeas corpus remedy shall remain open to afford the necessary hearing and a meaningful opportunity to demonstrate the unlawfulness of a petitioner's detention and a permanent minimum content for the judicial remedy against that unlawful detention.

The founders of this great Nation took great care to ensure that the availability of habeas corpus was not dependent upon executive or legislative grace. See *I.N.S. v. St. Cyr*, 533 U.S. 289, 304 n. 24 (noting Suspension Clause protects against loss of right to pursue habeas claim by "either the inaction or the action of Congress."). Thus, the Constitution's right to habeas relief exists even in the absence of statutory authorization and may be suspended only by explicit congressional action and only under limited conditions. See *Johnson v. Eisentrager*, 339 U.S. 763, 767-768 (1950) (assuming that, in the absence of statutory right to habeas, petitioner could

bring claim directly under Constitution to the extent their claims fell within the scope of habeas protected by the Suspension Clause.)

In *Boumediene v. Bush*, 553 U.S. 723 (2008) the Court's opinion referred to the eighteenth-century practice as an important factor in specifying the scope of judicial authority preserved by the Suspension Clause:

> "But the analysis may begin with precedents as of 1789, for the Court has said that 'at the absolute minimum' the Clause protects the writ as it existed when the Constitution was drafted and ratified.". *Id.*, 553 U.S. at 746.

The minimum content guaranteed by the Suspension Clause includes at least those powers exercised by habeas courts in 1789 and preserves the purpose of the writ as it was written and understood when the Constitution was ratified, guaranteeing some constitutional minimum of meaningful habeas relief. In *Townsend v. Sain*, 372 U.S. 293 (1963) (abrogated on other grounds), the Court recognized:

> "State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, **must <u>never</u> be totally foreclosed.**" *Id.*, 372 U.S. at 312, (emphasis *added*).

Some district courts have indicated that even a valid dismissal of an untimely federal habeas petition should not unequivocally bar the petitioner from merits review. See *Rosa v. Senkowski*, No. 97 CIV. 2468 (RWS), 1997 WL 436484 at *5 (S.D.N.Y. 1997) (holding that strict application of AEDPA's time limits, without a showing of prejudice to the state, violates suspension clause); *cf. Rodriguez v. Artuz*, 990 F.Supp. 275, 281-282 (S.D.N.Y. 1998) (holding that AEDPA's time limits do not violate the suspension clause "per se," but there may be cases in which strict application of time limits is unconstitutional,). The Writ is an extraordinary

remedy that guards only against extreme malfunctions in the state criminal justice systems and is necessary to enforce federal rights which are unpopular in many states.

The Suspension Clause not only regulates temporary suspension of the privilege of the writ, but permanently requires a right to habeas corpus with a minimum content when the writ has not been suspended. Here, by contrast, a denial of Petitioner's habeas would forever extinguish any judicial review of his right not to be tried by an unlawful tribunal and would therefore by default reduce to zero the numbers of tribunals authorized to hear and determine such rights of others who are similarly situated as Petitioner. If Petitioner is denied access to the Court and denied review of the merits of his claim due to AEDPA restrictions and limitations, then § 2254 procedure is proven to be both "inadequate and ineffective", offending the very essence of equal justice under the law, and violating The Suspension Clause.

CONCLUSION

The application for the extraordinary writ of habeas corpus should be granted.

Respectfully submitted,

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Dated October 18, 2022

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on October 18, 2022.

Executed on October 18, 2022.

Mark E. Lewis

Petitioner pro se