

No. 22-5910

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

PETITION FOR REHEARING

Mark E. Lewis #126478

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REASON FOR GRANTING REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner respectfully seeks rehearing of the Extraordinary Writ of Habeas Corpus denied on November 21, 2022 without opinion. Petitioner recognizes that rehearing is an extraordinary remedy and respectfully submits that it is warranted in this case for three reasons:

1. With all due respect to Mr. Justice Gorsuch, and this Honorable Court, the opinion in *McGirt* did not conclusively address the holding’s retrospective effect on the hundreds of those like the Petitioner who are similarly situated like Mr. McGirt.
2. In touching upon Oklahoma and dissent’s fear of thousands waiting in the wings to challenge the jurisdictional basis of their state-court convictions, the *McGirt* opinion did not conclusively address the issue of “significant procedural obstacles”, leaving the lower courts to reimagine and reinvent “significant procedural obstacles” into “significant procedural bars” effectively denying any opportunity of legal redress and adjudication on the merits.
3. This issue runs much deeper than the State unlawfully exercising criminal jurisdiction in Indian country. Unless Congress clearly authorizes State law to apply in Indian country, State law is excluded. Since Congress has never empowered Oklahoma to exercise criminal jurisdiction or **apply its laws in Indian country over Indians**, then it is axiomatic that Oklahoma does not have the authority to charge an offense that would trigger State court jurisdiction in the first place.

ARGUMENT

I. THE COURT'S OPINION INADEQUATELY ADDRESSES THE RETROSPECTIVE APPLICATION OF THE CONTINUING EXISTANCE OF THE CREEK RESERVATION TO THE NUMEROUS INDIVIDUALS LIKE MR. McGIRT

No court knows the complexity and depth of Indian country jurisdictional issues more intimately than this Honorable Court. Federal statutes governing criminal jurisdiction in Indian country are extraordinarily complex and involves a number of competing policy considerations. This Nation's courts look to this Court for guidance and direction on how to properly adjudicate these complex issues. And petitioners look to this Honorable Court for the enforcement of their due process rights and protections as guaranteed by the Constitution, and as promised by this Country through Treaties and Statutes.

Keeping in mind, Oklahoma usurped Congress' authority when it disestablished the Creek reservation, and it usurped exclusive federal jurisdiction in acquiring these convictions. In fact, this Court called these actions "unlawful". *Id., McGirt v. Oklahoma*, 140 S.Ct. 2452, at 2482 (2020) (Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.) Surely this Court is not going to sanction or turn a blind eye to this unlawful act.

Even though the dicta of the opinion reads to embrace retrospective effect and application to all cases like Mr. McGirt, otherwise why would the Court specifically focus on addressing Oklahoma and the dissents concern of an adverse ruling's effect of unsettling an untold number of convictions over several decades. *Id., McGirt*, 140 S.Ct., at 2479, the lower courts do not acknowledge it. Where is our vindication of that replacement promise by Congress allowing only the federal government, not the states, to try us for major crimes. We are entitled to the same protections.

II. THE COURT'S OPINION INADEQUATELY ADDRESSES THE "SIGNIFICANT PROCEDURAL OBSTACLES" OF WELL KNOWN STATE AND FEDERAL LIMITATIONS ON POSTCONVICTION REVIEW

At no point in the Court's opinion did the Court establish that these jurisdictional challenges should be, or could be barred. Facing significant procedural "obstacles" is not the same as having to face significant procedural "bars". Both the State and the Federal District Courts have taken this "may face significant procedural obstacles" *id.*, *McGirt*, 140 S.Ct., at 2479, out of context and as a command by this Court to apply any and all procedural **bars**:

"The Supreme Court predicted that *McGirt*'s disruptive potential to unsettle convictions ultimately would be limited by 'other legal doctrines-procedural bars, res judicata, statutes of repose, and laches to name a few, designed to 'protect those who have reasonably labored under a mistaken understanding of the law.' *McGirt*, 40 S.Ct. at 2481.' *Id.*, *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶35, 497 P.3d 686, at 693.

And:

"In its holding, **the Supreme Court clarified that state and federal procedural bars still are applicable to claims regarding Indian Country**. See *McGirt*, 140 S.Ct. at 2479 ("Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on post-conviction review in criminal proceedings."); *id.* At 2481 ("Many other legal doctrines-procedural bars, res judicata, statutes of repose, and laches, to name a few-are designed to protect those who have reasonably labored under a mistaken understanding of the law."). *Id.*, *Sanders v. Pettigrew*, Case No. CIV 20-350-RAW-KEW at*5, 2021 WL 3291792, (E.D. Okla. 2021) (*emphasis added*).

At no point in the Court's opinion did it suggest these jurisdictional challenges could be barred by any legal doctrines, not even AEDPA statute of limitations. This really needs to be addressed and clarified by this Honorable Court because the lower courts have erected an impenetrable wall preventing and denying any access to the courts and the opportunity to be heard and have a ruling on the merit.

III. WITHOUT CONGRESSIONAL EMPOWERMENT, OKLAHOMA CANNOT APPLY ITS PENAL STATUTES OVER NATIVE AMERICANS' CONDUCT WITHIN INDIAN COUNTRY

The charges under which Petitioner was convicted and sentenced to imprisonment charged no offense for which the Petitioner was punishable in that court - or of which that court could take cognizance - and consequently, that the proceeding were *coram non judice*. Oklahoma cannot apply its penal statutes to Petitioner. Apart from congressional enactment, state courts cannot expand its jurisdiction **nor can it apply its penal statutes in Indian country**. This Court in referencing 18 U.S.C. § 1162, and 25 U.S.C. § 1321, ruled that, only:

“States so empowered (by Congress) may apply their own criminal laws to ‘offenses committed by or against Indians within all Indian country within the State.’ *Id.*, *U.S. v. Bryant*, 579 U.S. 140, at 146 (2016).

See also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, at 207 (1987) (It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided.). The Court went on to state, “If the intent of a state law is generally to prohibit a certain conduct, it falls within Pub.L. 280’s grant of criminal jurisdiction”, *id.*, at 209. 18 U.S.C. § 1162 “State jurisdiction over offenses committed by or against Indians in Indian country”, subdivision (a) explicitly governs and regulates both a state’s court criminal jurisdiction as well as its criminal laws in Indian country. And 25 U.S.C. § 1321 “Assumption by State of criminal jurisdiction” further reaffirms Congress’ intent to **expressly preempt** not only state criminal jurisdiction, but state law as well, and until a state meets this threshold, a state cannot exercise criminal jurisdiction, and it cannot apply its criminal statutes. Period. Indian tribes retain attributes of sovereignty over both their members and their territory, and this sovereignty is dependent on, and subordinate to, only the federal government, not the states. See *Cabazon*, 480 U.S. at 207. See also *Negonsott v. Samuels*, 507 U.S. 99, at 104 (1993) (“Our task

is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must be regarded as conclusive.”).

Due to the complexity and depth of these issues and the rights and protections at stake, Petitioner respectfully urges this Honorable Court to grant this rehearing.

CONCLUSION

Petitioner respectfully requests that this Court grant rehearing of its order dated November 21, 2022, which denied habeas corpus, and that the Court now grant habeas.

CERTIFICATE OF COUNSEL

I, Mark E. Lewis as Petitioner *pro se*, hereby certify that this Petition for Rehearing is presented in good faith and not for delay and it is restricted to the grounds specified in Rule 44.2. of the Supreme Court.

Date: 12-15-2022



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I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this **Petition for Rehearing** was placed in the prison mailing system on December 15, 2022.

Executed on December , 2022.



Petitioner *pro se*