

**ORIGINAL**

Supreme Court, U.S.  
FILED

**JAN 04 2023**

OFFICE OF THE CLERK

No. 22-6607

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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**BILLY JOE WOLFE, JR.- PETITIONER**

**VS.**

**DEXTER PAYNE, Director AR DOC- RESPONDENT**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
the Eighth Circuit Court of Appeals**

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**Billy Joe Wolfe, Jr. #40444**  
**James Crabtree Correctional Center**  
**216 North Murray Street**  
**Helena, Oklahoma 73741-1017**  
**(572) 568-6000**

## **QUESTIONS PRESENTED**

(1) Whether the time of filing limitations of Antiterrorism Effective Death Penalty Act (AEDPA) were intended by Congress to prevent consideration of lack of subject matter jurisdiction in the trial court?

(2) Whether AEDPA conflicts with Congresses plenary power with respect to Indian affairs?

## **LIST OF PARTIES**

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

## **CONSTITUTION AND STATUTORY PROVISIONS INVOKED**

United States Constitution, Article I, cl. 8; Article VI, cl. 2

United States Constitution Amendments 1, 4, 5, 6, and 14

Treaty of New Echota, Article 5, 7 Stat 478 (1835)

Treaty of Washington, Articles 12, 13, 14 Stat 799

18 USC §§ 1151-1153

5 USC § 701 et seq.

IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

## JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was September 13, 2022

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 17, 2022, and a copy of the order denying rehearing appears at Appendix A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U.S.C. § <sup>1651</sup>~~1251~~(a).

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## STATEMENT OF THE CASE

Appellant, an enrolled member of the Cherokee Nation, has diligently pursued his jurisdictional claims from the time of his arrest, from the moment that McGirt was decided, which also lifted the stay on Murphy and until this moment and has sought habeas corpus relief for judgment and sentence in the District Court of Benton County, Arkansas. Relying on treaties between the Cherokee Nation and the United States and 18 USC §§ 1151-1153, 25 USC § 1301, Appellant claimed in federal district court that (a) state courts violated tribal sovereignty and therefore lacked jurisdiction to arrest him on the Cherokee Nation reservation and allotted land; (b) seize his property from that same reservation and allotted land; (c) prosecute him in a sister state neighboring the reservation; (d) failed to provide specific performance of the agreed sentence to life *with* parole for Capital Murder; (e) trial counsel was ineffective for failure to investigate and pursue treaty violation/Fourth Amendment claims. The district court dismissed the petition as time-barred. The Eighth Circuit Court of Appeals affirmed.

## REASONS FOR GRANTING THE WRIT

Appellant is an enrolled member of the Cherokee Nation. His Indian blood quantum is 9/16<sup>th</sup>. The crime(s) of conviction, i.e. Capital Murder and Kidnapping occurred at Benton County, Arkansas. Appellant was arrested in

Kenwood, Oklahoma (located in Mayes County, Oklahoma) within the boundaries of the Cherokee Nation reservation, on Indian allotted land, by Delaware County, Oklahoma Sheriff Department authorities with the assistance of Benton County, Arkansas Sheriff Department authorities. Along with the arrest of Appellant, his white Chevrolet truck and other personal property were taken into custody by the arresting authorities. Neither the arrest nor property seizure were authorized by tribal or federal warrants or supported by the participation of tribal or federal officials.

Additionally, Appellant entered into a written agreement with the convicting court and the prosecutor for a sentence of life with the possibility of parole. Yet, Appellant received a sentence of life without the possibility of parole by the convicting court without prior agreement to a modified sentence.

The time limitations of Anti-terrorism Effective Death Penalty Act (AEDPA) as applied in this case are unconstitutional and not consistent with the purpose of the Act.

The instant case involves a state district court's judgment of criminal conviction and sentence despite lack of subject matter jurisdiction given that Appellant is an enrolled Cherokee Indian and the treaties between the Cherokee Nation and the United States excludes state criminal jurisdiction *by tribal members wherever crimes occur* and reserves jurisdiction over

issuance of arrest/search/seizure warrant to the Tribe. (See Articles 13 and 26, 1866 Treaty of Washington, 14 Stat 799; Montana v. United States, 490 US 544 (1981)) The federal habeas court below applied AEDPA in time-barring Appellant's petition. However, this application of AEDPA violates the Constitution in the following ways:

(i) It violates the exclusive and plenary power of Congress to confer jurisdiction on a sovereign with respect to crimes committed by or against Indians or in Indian country (See US Const. Article I § 8). According to the United States Constitution, Congress has exclusive and plenary power to confer jurisdiction to a government over an Indian reservation. (US Const., art. I § 8) (Ex parte Wilson, 140 US 575, 577 (1891))(Only Congress has "power... to provide for the punishment of all offenses committed [on Indian reservations], by whomsoever committed.") Time-barring Appellant's petition leaves in place a criminal conviction obtained in a state court that had no jurisdiction. This effectively grants jurisdiction to the state court contrary to the purpose and meaning of AEDPA, especially since Appellant is still serving the sentence for the conviction.

(ii) It violates the Supremacy Clause of the United States Constitution (See US Const. Article VI § 2). The Supremacy Clause of the Constitution (US Const., art. VI § 2) states that federal treaties and federal statutes are the "supreme law of the land." Treaties, therefore are superior to state



constitutions and state statute. If a state law conflicts with the provisions of a treaty, the treaty prevails. In the instant case, AEDPA, an act of Congress, would have equal status to the treaty provisions; the later repealing the earlier of the two *if they conflict*. Here, AEDPA does not conflict with the treaty provisions. Consequently, the treaty provisions prevail.

(iii) It violates the Suspension Clause, US Const. Article I § 9 by rendering the habeas corpus proceeding inadequate and ineffective. (*Tristman V. US*, 124 F3d 361, 373-380 (1997); *Miller v. Marr*, 141 F3d 976, 977 (10<sup>th</sup> Cir 1998)

Appellant was entitled to statutory tolling under 2244(d)(1)(A) because Appellant's conviction is not a "judgment" which could become final within the meaning of AEDPA because the "judgment" was obtained in violation of Cherokee Nation's sovereignty. (See *Montana*, supra) "Indian country is subject to exclusive federal jurisdiction or tribal jurisdiction...Congress has granted general criminal jurisdiction to some states over Indian country within their borders, but no such provisions have been made for Oklahoma." *Ross v. Neff*, 905 F2d 1349 (10<sup>th</sup> Cir. 1990) The court states, "[b]ecause the State of Oklahoma has neither received by expressed grant or acted pursuant to congressional authorization to assume criminal over this Indian country, Adair county, its sheriff, and its subordinate police officers had no jurisdiction to arrest..."Id. While not addressing Indian country, the

Arkansas Court of Appeals has passed on the issue of officers acting outside of their jurisdiction by stating, "if an officer does not have an arrest warrant or statutory authority to make an arrest outside his jurisdiction, his arrest powers are the same as those of a private citizen." *Thomas v. State*, 65 Ark. App. 134 (Ark. App 1999) Therefore, neither the Oklahoma nor the Arkansas authorities were endowed with powers to arrest or search or seize on Indian allotted land or Cherokee Nation reservation.

A presumption of regularity attaches to final judgments in state courts. (*Parke v. Raley*, 506 US 20, 29 (1992)) However, the presumption may be overcome with clear and convincing evidence. AEDPA presumes that the final conviction it refers to in 2244(d)(1)(A) occurred in a court of competent jurisdiction. Yet, Appellant maintains in his petition for writ of habeas corpus that the convicting court had no such jurisdiction and therefore, the "conviction" is not a judgment for AEDPA purposes.

"[I]f the [conviction] is void on its face for want of jurisdiction, it is the duty of this and every other court to disregard it." (*Wilson v. Carr*, 41 F2d 704, 706 (9<sup>th</sup> Cir 1930) AEDPA, therefore, should not assume the Oklahoma court judgment to be final.

Additionally, the purpose of AEDPA is "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases" and "to further the principles of comity, finality, and federalism."

(Woodford v. Garceau, 538 US 202, 206 (2003)) Again, this presumes regularity of the state court proceedings. In Appellant's case, the state court trial officers themselves were unaware the court lacked jurisdiction. Therefore, in the instant case, using a void conviction for purposes of applying AEDPA was not the intent of Congress.

Appellant was entitled to equitable tolling. AEDPA is not jurisdictional. (Day v. McDonough, 547 US 198 (2006)) The statute has a rebuttable presumption in *favor* of equitable tolling and other equitable considerations. (Holland v. Florida, 560 US 631, 645-646)

Equitable considerations seek to achieve fairness. Black's Law Dictionary defines the "interests of justice" as "the proper view of what is fair and right in a matter in which the decision maker has been granted discretion." It also defines "miscarriage of justice" as "a grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."

It is patently unfair that when a defendant is convicted of a crime in a court without jurisdiction and sentenced to death, imprisonment and/or substantial fine, that he will not be able to seek habeas corpus relief simply because his judgment and sentence was "final" too long ago. In such cases, we cannot know whether the judgment of conviction is just or whether the sentence meted out is just.

More to the point here, Appellant is entitled to equitable tolling because of the extraordinary ineffectiveness of trial counsel and the general misunderstanding between federal authorities and state authorities as to whether any reservations continued to exist in Oklahoma. Appellant's trial counsel abandoned a meritorious issue of treaty violation requiring suppression of evidence. Instead, counsel negotiated a plea agreement for *life with parole* in exchange for Appellant to plead guilty, but then allowed Appellant to be sentenced to *life without parole* in violation of the written agreement.

Meanwhile, defense attorneys failed to make such jurisdictional claims for their clients, or even advise their clients that such claims could be made, based on crimes allegedly occurring or arrests/seizures occurring on Indian reservations, due to federal statutes, or treaty provisions. For over 100 years, prosecutors and judges (who are required to ascertain whether they have proper jurisdiction in any case before the<sup>1</sup>) asserted jurisdiction over cases and persons that federal law and federal treaties reserved to other sovereigns. The *McGirt v. Oklahoma*, 140 SCt 2452 (2020) Court reaffirmed the legal understanding that a reservation continues to be a reservation until such time as Congress diminishes or disestablished it. McGirt also reaffirmed the procedure the state must undertake to determine

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<sup>1</sup> *Sheffer v. Buffalo Run Casino, PIE, Inc.*, 315 P3d 359 (2013)(state district court sua sponte dismissal for lack of jurisdiction affirmed)

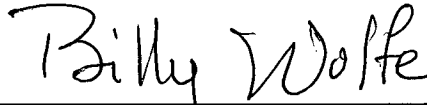
whether a reservation has been diminished or disestablished. (See *Solem v. Bartlett*, 465 US 463 (1984) While the Tenth Circuit announced that the Muscogee (Creek) Nation reservation continued to exist in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), tipping off state and federal authorities that jurisdictional claims based on reservation and Indian status could be made, that decision was stayed pending appeal. Arkansas courts would not have granted collateral on these cases, denying them as premature. However, Appellant has diligently pursued his jurisdictional claims from the time of his arrest, from the moment that *McGirt* was decided, which also lifted the stay on *Murphy* and until this moment.

Most important here, the Administrative Procedure Act (5 USC §§701 et seq) clearly provides that federal agencies are to do their duty and, even in discretionary actions, must not abuse that discretion. Surely the APA required the Department of Justice and Department of Interior to act to ensure treaty provisions are complied with.

## CONCLUSION

The Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,

A handwritten signature in cursive script that reads "Billy Wolfe".

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