No. 23-_____

IN THE

Supreme Court of the United States

DELILA PACHECO
Petitioner,

v.

ABOUTANAA EL HABTI,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

Petition for Writ of Certiorari

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Question Presented

The miscarriage-of-justice gateway excuses a habeas petitioner from complying with certain procedural hurdles like AEDPA's statute of limitations if, for example, she can prove that she is actually innocent.

The question presented in this case is whether the miscarriage-of-justice gateway applies only where a petitioner can prove that she is "moral[ly]" or "completely" innocent of any crime, as the court below and Eleventh Circuit have held; or whether it is sufficient for her to prove her innocence of the offense holding her in custody, as the Second, Third, Fourth, Sixth, and Eighth Circuits have held—in this case, because the convicting court lacked subject-matter jurisdiction, a fundamental defect historically remediable in habeas without the application of procedural bars to relief.

Parties to the Proceeding

Delila Pacheco was the defendant or petitioner in all proceedings listed below.

The State of Oklahoma was the plaintiff in the state-court proceedings listed below and respondent in the petition filed before this Court. Aboutanaa El Habti, the warden of the Mabel Bassett Correctional Center, was the respondent in the federal collateral review proceedings.

Related Proceedings

Pacheco v. El Habti, No. 20-7002 (10th Cir.)

Pacheco v. El Habti, No. 16-cv-00450 (E.D. Okla.)

Pacheco v. Oklahoma, No. 21-923 (U.S.)

State v. Pacheco, Nos. F-2014-1029, PC-2018-129, PC-2020-635 (Okla. Crim. App.)

State v. Pacheco, No. CF-2013-00535 (Okla. D. Ct., Cherokee County)

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PETITION FOR WRIT OF CERIORARI

Opinions Below

The Tenth Circuit order denying Ms. Pacheco's petition for rehearing but sua sponte amending its opinion, along with its revised opinion, is in the Appendix at 1a and reported at *Pacheco v. El Habti*, 62 F.4th 1233 (10th Cir. 2023). The federal district court order denying Ms. Pacheco's motion to amend is at App. 25a.

Basis for Jurisdiction

The Tenth Circuit entered judgment on September 15, 2022, and denied Ms. Pacheco's timely petition for rehearing on January 25, 2023. App. 1a. Ms. Pacheco's petition for a writ of certiorari is timely filed within 90 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Relevant Constitutional and Statutory Provisions

Article VI of the U.S. Constitution provides in Clause 2:

> 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 Laws of any State to the Contrary notwithstanding.

Section 1153(a) of Title 18, United States Code, provides, in relevant part:

> Any Indian who commits . . . murder . . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing [murder] within the exclusive jurisdiction of the United States.

Additional relevant provisions are set forth at App. 34a.

Introduction

The decision below deepens a circuit split over whether the miscarriage-of-justice gateway is satisfied whenever a petitioner shows that a reasonable jury would not convict her of the crime holding her in custody, as five courts of appeals hold; or if she must somehow prove her complete, moral innocence as well—including, for example, of lesser offenses and crimes in other jurisdictions—as two courts of appeals require.

This case also raises important questions about the interplay between the historic core of habeas and modern habeas theory and jurisprudence. That is because the Tenth Circuit's erroneous reliance on the minority test led it to deny an actually innocent petitioner access to the miscarriage-of-justice gateway even though she was subjected to a fundamental miscarriage of justice historically cognizable in habeas without the application of procedural bars: usurpation of power by a court lacking subject-matter jurisdiction.

Historically, procedural rules restricting habeas did not apply to state petitioners over whom federal courts had long exercised exclusive criminal jurisdiction. And in this case, Oklahoma unquestionably lacked subject-matter jurisdiction to prosecute Delila Pacheco in connection with the death of her foster daughter: newly presented evidence demonstrates that Ms. Pacheco is an Indian, and that the homicide occurred entirely within Indian country.

Yet the Tenth Circuit refused to allow Ms. Pacheco to use the miscarriage-of-justice gateway to add an exhausted constitutional claim under *McGirt v. Oklahoma*,

140 S. Ct. 2452 (2020), to her otherwise-timely initial habeas petition. Concerned only with "moral culpability"—complete innocence in the colloquial sense, rather than the "literal[]" offense-specific actual-innocence test articulated by this Court—it rejected her claim as barred by AEDPA's statute of limitations because her evidence of innocence concerned a jurisdictional element. *Pacheco*, 62 F.4th at 1242, 1244.

By ignoring the historic function of habeas, and the historical scope and purpose of procedural bars, the Tenth Circuit got things exactly backwards. The court below treated moral culpability as the exclusive metric by which to measure a miscarriage of justice, whereas habeas jurisprudence has always been most concerned with abuses of authority, and particularly has provided a remedy where state prosecutions interfere with important matters of federal concern. Moreover, key thinkers behind modern procedural bars explicitly exempted jurisdictional claims from their proposals to consider innocence as a way to curb access to the writ.

The Tenth Circuit erred because it failed to recognize that conviction by a court lacking subject-matter jurisdiction is always a fundamental miscarriage of justice that has not been and should not now be subject to basic procedural habeas bars. This Court should grant certiorari and reverse.

Statement

A. State court proceedings.

In 2014, Delila Pacheco was convicted of Oklahoma first-degree child-abuse murder in connection with the death of her two-year-old foster daughter in their

shared home. R1:368–70.[1] The girl died from what the medical examiner described as internal bleeding from a liver laceration caused by "a hard, fast impact" that was "not likely" accidental. R1:367–71. Although there was no direct evidence that Ms. Pacheco inflicted the fatal blow, Oklahoma presented some evidence that she had the opportunity to do so and that no one else committed the crime. *Id.* The state then relied on the broad definition of murder in Okla. Stat. tit. 21, § 701.7(c) to ask the jury to convict without any finding of malice if it believed that the child's death resulted from the willful application of more force than would ordinarily be used to discipline. R2:681, 692–93. No evidence was presented of Ms. Pacheco's heritage or tribal affiliation, or that the alleged crime took place entirely on Indian land.

Ms. Pacheco received the mandatory minimum sentence of life in prison with the possibility of parole. R2:795; Okla. Stat. tit. 21, § 701.9 (2004). The Oklahoma Court of Criminal Appeals (OCCA) upheld her conviction on direct appeal. R1:204. She did not file a petition for certiorari at that time.

Later, in a state collateral attack, Ms. Pacheco argued that Oklahoma lacked jurisdiction over her and her case because she is an Indian and she was accused of committing homicide in Indian country. Although the state trial court found that she has "1/2 Indian Blood and is a recognized member of the Keetoowah Band of the Cherokee Nation" (and so is "an Indian for the purposes of federal law") and that her conviction was for a crime that "did occur within the boundary of the Cherokee Nation

[1] Citations to "R1" and "R2" refer to the volumes of the appellate record below.

Reservation" (which is "within the boundaries of a recognized Indian Reservation as outlined in *McGirt*"), App. 32a–33a, the OCCA denied relief, App. 29a–31a. It did not base this decision on any procedural bars or factual disputes. Rather, it held that "*McGirt* does not apply" to convictions like Ms. Pacheco's that became final before *McGirt* was decided. App. 30a (citing *State ex rel. Matloff v. Wallace*, 497 P.3d 686 (Okla. Crim. App. 2021)).

This Court declined to grant Ms. Pacheco's petition for certiorari from the state court judgment denying postconviction relief. Case No. 21-923.

B. Federal court proceedings.

Ms. Pacheco timely challenged her state conviction in the U.S. District Court for the Eastern District of Oklahoma in a petition filed under 28 U.S.C. § 2254. R1:5–16. She did not raise any jurisdictional claims at that time. *Id.* Three years later, however, she moved for leave to amend her still-pending initial habeas petition to raise a due process challenge to the Oklahoma court's jurisdiction. R1:356–60. Without providing either party with prior notice or an opportunity to be heard, the district court sua sponte determined that Ms. Pacheco's proposed amendment was untimely under AEDPA's one-year statute of limitations. R1:363–65. It then denied the remainder of her petition, denied a certificate of appealability, and entered judgment for the state. R1:367–89.

Ms. Pacheco timely appealed to the Tenth Circuit, R1:390, which appointed counsel and granted a certificate of appealability on whether her jurisdictional claim was time-barred, *Pacheco*, 62 F.4th at 1237. Ms. Pacheco proceeded to argue that her

McGirt claim was exempt from AEDPA's statute of limitations under the miscarriage-of-justice gateway. Oklahoma maintained that it was not.

The Tenth Circuit affirmed, concluding that it did not matter if it was "literally accurate" that no reasonable, properly instructed jury, considering all of the evidence, would convict Ms. Pacheco of her state offense—the test of actual innocence announced by this Court time and again, and which is followed to the letter by at least five circuit courts, though not by two others. Instead, the Tenth Circuit held that "jurisdictional elements are different"—and therefore irrelevant to the miscarriage-of-justice gateway—because "[t]hey are unrelated to moral culpability." *Pacheco*, 62 F.4th at 1241–46.

Ms. Pacheco timely petitioned for rehearing on October 27, 2022. After ordering a response, the Tenth Circuit denied her petition on January 25, 2023, but made some minor amendments to its prior published decision. App. 1a.

Reasons for Granting the Petition.

This Court should grant certiorari to resolve a longstanding circuit split regarding the meaning of actual innocence. Following the minority position that requires "complete[]" or "moral" innocence, the court below refused to apply the gateway where new evidence not only undermined a jurisdictional element but also demonstrated that the state court lacked subject-matter jurisdiction entirely. Yet basic procedural hurdles created to limit habeas' expansion historically did not apply, and were never intended to apply, to state petitioners raising claims at the historic core of the writ. The rule followed below upsets a constitutional allocation of authority

transcending any one case or party: a balance that Congress struck in the exercise of its constitutional powers. It also interferes with individual rights, allowing usurping jurisdictions to apply harsher criminal laws and impose more serious punishments, up to and including death. Here, Ms. Pacheco received a mandatory life sentence under a state theory of first-degree murder that does not require proof of malice—and so, federally, is only manslaughter. This case is an excellent vehicle to address these important issues, as resolution of the question presented in Ms. Pacheco's favor will allow the district court to reach the merits of her underlying claim.

I. The courts of appeals are split over the meaning of actual innocence.

This Court has long applied the miscarriage-of-justice gateway to excuse an actually innocent habeas petitioner from certain procedural hurdles, including AEDPA's statute of limitations, if she can demonstrate her likely innocence of the specific offense holding her in custody. At least five courts of appeals dutifully apply this test to petitioners like Ms. Pacheco, who present new evidence undermining at least one element of their offense of conviction, even if they may be guilty of something else (for example, a crime in another jurisdiction or a lesser-included offense). But two circuits require more—what they call "moral" or "complete[]" innocence—which precludes relief to people like Ms. Pacheco who cannot show that the wrong person was convicted or that their actions were fully justified under any law.

A. Five circuits follow this Court's actual-innocence cases and only consider the specific offense holding a petitioner in custody.

Actual-innocence claims call on a reviewing court to consider only the specific offense holding a petitioner in custody. That is how this Court applies the actual-

innocence doctrine, and it is the law in at least five federal courts of appeals. Under this correct definition of actual innocence, Ms. Pacheco would prevail.

1. This Court has long applied the fundamental-miscarriage-of-justice gateway to a petitioner who is actually "innocent of *the charge for which he was incarcerated*." *Schlup v. Delo*, 513 U.S. 298, 321 (1995) (emphasis added) (quotation marks omitted). Thus, "[t]o establish actual innocence" after trial, "[a] petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted" her of the offense holding her in custody. *Bousley v. United States*, 523 U.S. 614, 624 (1998). (After a guilty plea, of course, a court must also consider offenses forwent by the prosecution as a result of plea negotiations. *Id.*)

A petitioner can be actually innocent of "using" a firearm in violation of 18 U.S.C. § 924(c), even if it could be said that he is guilty of "carrying" a firearm in violation of that very same statute. *Bousley*, 523 U.S. at 624. Thus, while the "proto-typical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person," *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992), this Court has defined actual innocence differently, "incorporat[ing] the understanding that proof beyond a reasonable doubt"—rather than blamelessness—"marks the legal boundary between guilt and innocence," *Schlup*, 513 U.S. at 328.

In four decades, this Court has considered question after question about the *application* of the actual innocence test. *E.g., McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (AEDPA statute of limitations); *Dretke v. Haley*, 541 U.S. 386, 388 (2004) (non-capital recidivism enhancement); *Bousley*, 523 U.S. at 623 (after guilty plea); *Schlup*,

513 U.S. at 301 (standard of proof at guilt phase); *Herrera v. Collins*, 506 U.S. 390 (1993) (availability as substantive claim); *Sawyer*, 505 U.S. at 336 (death-penalty-phase claims). But the Court's *definition* of actual innocence has not changed.

2. At least five circuits follow this Court's guidance and hold that actual-innocence claims are offense specific. These courts allow innocence claims based on any element of the offense of conviction (or offense forwent by the government as a result of plea negotiations), regardless whether the petitioner would still be guilty of a lesser offense or of an offense in another jurisdiction.

The Third and Sixth Circuits have held that petitioners are actually innocent based only on evidence undermining jurisdictional elements of charged offenses. *United States v. Davies*, 394 F.3d 182, 191–96 (3d Cir. 2005); *Waucaush v. United States*, 380 F.3d 251, 254–56 (6th Cir. 2004). In *Davies*, for example, the Third Circuit found a petitioner actually innocent of federal arson because "the church building he burned was not used in interstate commerce or in any activity affecting interstate commerce within the meaning of th[e] statutory text as interpreted by the Supreme Court." 394 F.3d at 191–96 (quotation and alteration marks omitted). And in *Waucaush*, the Sixth Circuit found a petitioner "actually innocent of violating RICO" because there was no evidence that his street gang was "involved in any sort of economic enterprise" as opposed to "violence qua violence." *Waucaush*, 380 F.3d at 254–56. In

both cases, the petitioners surely could be proven guilty of some state criminal offense, such as arson or assault. But hypothetical guilt of some crime somewhere did not preclude these courts from providing relief from procedural habeas bars.[2]

Similarly, the Second, Fourth, and Eighth Circuits allow actual innocence to be premised on new evidence of a partial affirmative defense. *Murden v. Artuz*, 497 F.3d 178, 194–195 (2d Cir. 2007); *Wilson v. Greene*, 155 F.3d 396, 405 (4th Cir. 1998); *Jones v. Delo*, 56 F.3d 878, 883 (8th Cir. 1995); Brian R. Means, Federal Habeas Manual § 9B:81 (2022). In these courts, a petitioner convicted of murder can concede guilt of another offense like manslaughter and still be actually innocent, so long as he can demonstrate that "no reasonable juror would have convicted him of murder." *Murden*, 497 F.3d at 195.

3. Ms. Pacheco would be considered actually innocent for purposes of the miscarriage-of-justice gateway in these circuits, since her new evidence would preclude any reasonable, properly instructed jury from convicting her of the state offense holding her in custody. Whether jurisdiction is an element of every offense in Oklahoma, *Sweden v. State*, 172 P.2d 432, 435 (Okla. Crim. App. 1946), or whether Indian-based jurisdictional arguments are merely affirmative defenses, *State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989), newly-presented evidence of Indian status and Indian country demonstrates that it is more likely than not that no reasonable, properly

[2] Additionally, the Ninth Circuit has indicated that a petitioner could demonstrate actual innocence of federal bank robbery by proving "that the branch of the U.S. Bank he victimized was not federally insured on the date of his crimes." *United States v. Ratigan*, 351 F.3d 957, 965 (9th Cir. 2003).

instructed juror would have convicted Ms. Pacheco of Oklahoma child-abuse murder—the crime she was convicted of at trial.

Even if Ms. Pacheco had conceded guilt of a different crime—and she did not—a plurality of circuits recognize that the actual-innocence doctrine is concerned with the offense of conviction, not with guilt in a moral, complete, or colloquial sense.

B. Two circuits instead demand complete or moral innocence.

In contrast to the five courts discussed above, the Tenth and Eleventh Circuits have long required more than proof of innocence of the offense of conviction (or charges foregone via plea negotiation). Instead, they require petitioners to prove innocence of other offenses as well. In the Tenth Circuit, this is framed as a type of "moral" innocence. *Pacheco*, 62 F.4th at 1244. The Eleventh Circuit uses the language "completely innocent." *Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1016 (11th Cir. 2012). Ultimately, this amounts to the same thing: both circuits refuse to apply the miscarriage-of-justice gateway if some jury somewhere would still find guilt of something. Ms. Pacheco was not able to prevail under this minority rule.

Applying a complete-innocence requirement, both the Tenth and Eleventh Circuits have long "rejected claims of actual innocence based on partial affirmative defenses that only reduce the degree of guilt." *Pacheco*, 62 F.4th at 1243 n.8 (recognizing "divergent views" in other circuits); *see also Black v. Workman*, 682 F.3d 880, 915 (10th Cir. 2012) (rejecting actual-innocence claim because prisoner "could have been convicted of the lesser offense of manslaughter"); *Beavers v. Saffle*, 216 F.3d 918 (10th Cir. 2000); *Rozzelle*, 672 F.3d at 1015 (11th Cir. 2012) ("*Schlup*'s actual innocence

gateway does not extend to petitioners, like Rozzelle, who did the killing and whose alleged actual innocence of a noncapital homicide conviction is premised on being guilty of only a lesser degree of homicide.") (internal quotation marks omitted).

In the decision below, the Tenth Circuit again applied a complete-innocence requirement to reject an "actual-innocence claim [that was] not based on evidence regarding what [the petitioner] did, but on where she did it." *Pacheco*, 62 F.4th at 1245. Specifically, it held that actual innocence cannot be based on evidence undermining jurisdictional elements, because they are "unrelated to moral culpability." *Id.* at 1244; *cf. United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996) ("There is no question of guilt or innocence . . . [where conduct was] made criminal by both state and federal law."). It recognized that its holding was at odds with this Court's "general rule [that] a claim of actual innocence can be based on the failure to establish an element of the offense on which the defendant was prosecuted." *Pacheco*, 62 F.4th at 1244 (citing *Bousley*, 523 U.S. at 623–240). Nonetheless, and despite recognizing that Ms. Pacheco could be "literally" innocent under that general rule, *id.* at 1242, the court denied Ms. Pacheco recourse to the miscarriage-of-justice gateway.

That is to say, the Tenth Circuit tasked district courts with assessing moral innocence—blamelessness—rather than actual innocence in the "legal" sense of a failure of "proof beyond a reasonable doubt," as required by *Schlup*, 513 U.S. at 328. It did so despite this Court's warning that a habeas court's use of its "conscience as a measure of equity" leads to "arbitrary" results. *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) (citing 1 J. Story, Commentaries on Equity Jurisprudence 16 (13th ed. 1886)).

And it did so without any indication whatsoever from Congress that it should be deciding questions of morality rather than law.

Thus, Ms. Pacheco was denied recourse to the miscarriage-of-justice gateway because she could not prove that she was morally or completely innocent of any offense anywhere, as the Tenth and Eleventh Circuits require. But she would have qualified for the gateway in the Second, Third, Fourth, Sixth, and Eighth Circuits, because she is actually innocent of the only charge holding her in custody: Oklahoma first-degree child-abuse murder.

II. The Tenth Circuit erred when it denied Ms. Pacheco recourse to the fundamental-miscarriage-of-justice gateway despite Oklahoma's lack of subject-matter jurisdiction over her case.

The Tenth Circuit erred when it refused to allow Ms. Pacheco recourse to the miscarriage-of-justice gateway. A federal habeas forum has long been available to individuals like Ms. Pacheco who are unlawfully detained by states, notwithstanding any basic procedural bars intended to limit the expansion of habeas beyond that historic core. Oklahoma's improper exercise of jurisdiction in this case is an affront against constitutional allocations of power that goes to the very foundation of our legal system. The considerations that would generally counsel in favor of enforcing a procedural bar in a case like Ms. Pacheco's—the history of the writ, comity and federalism, and finality of judgment—instead counsel in favor of allowing her to raise her seemingly tardy but exhausted jurisdictional claim in federal district court using the fundamental-miscarriage-of-justice gateway.

A. Historically, the Great Writ was available to those held under a usurpation of authority (including by a state), without application of basic procedural bars.

Those wrongfully incarcerated by states under a usurpation of exclusive federal criminal jurisdiction have long been permitted to seek habeas relief in federal court, notwithstanding basic procedural bars intended to regulate habeas' expansion beyond its historic core.

1. Under "both English and American law," the writ of habeas corpus ad subjiciendum historically allowed for "relief" where "the court of conviction lacked jurisdiction over the defendant or his offense." *Brown v. Davenport*, 142 S. Ct. 1510, 1520–21 (2022); *Ex parte Watkins*, 28 U.S. 193, 201–02 (1830); Note, Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1038, 1042–43 (1970). As early as the fourteenth century, British courts used writs of habeas corpus to safeguard their jurisdiction, without regard for "the guilt or innocence of the party confined." W. Duker, A Constitutional History of Habeas Corpus 62 (1980) (Duker). By the mid-eighteenth century, it was black-letter law that a habeas petitioner should be "discharge[d]" from "imprisonment for criminal offenses . . . [i]f it appear[ed] clearly that . . . [she was] committed . . . by a person who ha[d] no jurisdiction." *Opinion on the Writ of Habeas Corpus*, Wilm. 77, 97 Eng. Rep. 29 (K.B. 1758).

In this country, habeas relief has long been available to state prisoners—without procedural limitations—in situations where their continued detention challenged federal primacy in important areas of federal concern. Decades before the Civil War, as Congress began to preempt states' ability to prosecute certain crimes, it simulta-

neously provided a federal habeas forum for those occasions when states would pursue prosecution nonetheless. Bankruptcy Act of 1800, § 38, 2 Stat. 32 (repealed 1803); Force Act of 1833, § 7, 4 Stat. 633–35, *codified as amended at* 28 U.S.C. § 2241(c)(2); Act of Aug. 29, 1842, 5 Stat. 539–40, *codified as amended at* 28 U.S.C. § 2241(c)(4). Thus, in accord with the first Congress's recognition that writs are "necessary for the exercise of the[] respective jurisdiction[]" of federal courts," First Judiciary Act, 1 Stat. 81–82 (1789), other antebellum Congresses explicitly provided groups of state prisoners access to federal habeas in order to maintain federal primacy in the fields of bankruptcy, enforcement of federal law, and international relations.[3]

2. After the Civil War, when Congress legislated that state prisoners should have more general access to federal habeas relief, Act of February 5, 1867, 14 Stat. 385, this Court began to impose procedural restrictions "aimed at returning the Great Writ closer to its historic office," *Edwards v. Vannoy*, 141 S. Ct. 1547, 1523 (2021)

[3] The short-lived Bankruptcy Act of 1800 accorded with the Framers' "inten[t] to give Congress the power to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders." *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 374 (2006); *accord id.* at 390–91 (Thomas, J., dissenting). The Force Act of 1833 was prompted by "the nullification controversy in South Carolina" regarding the enforcement of federal revenue laws, and it was applied during other well-known instances of state resistance to the supremacy of federal law as well: "to release officers acting under the Fugitive Slave Act" and "federal officers in southern states following the Civil War." Duker, *supra*, 187–88. And the 1842 Act passed after New York indicted a Canadian soldier for what the British government claimed to be an act of state, arguably placing the countries on the brink of war. Duker, *supra*, 188–89; R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1197 (7th ed. 2015); *see also In re Brosnahan*, 18 F. 62, 70 (W.D. Mo. 1883) (explaining act "was called into existence by the necessity of preventing a single state from interfering with our foreign relations").

(Gorsuch, J., concurring). From the beginning, those hurdles did not apply to state petitioners over whom the federal courts had exclusive criminal jurisdiction.

In a series of cases in the late nineteenth century, this Court both created an exhaustion requirement for certain state petitioners and exempted from that requirement claims that state courts had usurped exclusive federal criminal jurisdiction. Duker, *supra*, 202. The basic premise behind the exhaustion rule was that federal courts should generally refrain from interfering in state cases mid-prosecution. *Ex parte Royall*, 117 U.S. 241, 251–52 (1886). But because the balance of interests definitively shifts in cases "involving the authority and operations of the general government," exhaustion was not required in "special circumstances" where a state confined a person for enforcing federal law or a foreign national acting under authority of a foreign state, and "in such and like cases of urgency." *Id.* at 251–53.

In other words, this Court did not require state-court exhaustion in cases "within the exclusive jurisdiction of the courts of the United States." *Thomas v. Loney*, 134 U.S. 372, 375–76 (1890). This was so even if a "general provision" of state law seemed, by its terms, to govern the state detainee's case, *id.*, and even if the state charge was murder, *Cunningham v. Neagle*, 135 U.S. 1, 69–70 (1890). It was true if the petitioner could be said to be innocent of *any* offense under state or federal law, *Cunningham*, 135 U.S. at 76, and it was true if the petitioner's only argument was that he should have been prosecuted in federal court due to the nature of the alleged offense, *Thomas*, 134 U.S. at 375. And it was true even if the petitioner's claim for habeas relief did not fit within the language of the Force Act or the 1842 Act, but

rather involved another "like" federal concern, *Royall*, 117 U.S. at 253. For example, this Court affirmed the grant of a writ of habeas corpus—despite failure to exhaust—where the petitioner was charged in state court with committing perjury in a federal proceeding relating to "a contested election of a member of congress," explaining simply that such matters are reserved exclusively to "the national tribunals." *Thomas*, 134 U.S. at 375.

B. Oklahoma's usurpation of federal power means that Ms. Pacheco may rely on the miscarriage-of-justice gateway to raise her jurisdictional claim in federal court.

While the Tenth Circuit was correct that "jurisdiction[]" can be "different," it was wrong to think that actual innocence based on a jurisdictional argument somehow matters *less* than innocence in a "moral[]," complete, or colloquial sense. Because Oklahoma's improper exercise of power goes to the very foundation of our legal system, Ms. Pacheco may rely on the miscarriage-of-justice gateway to raise her otherwise tardy jurisdictional claim in federal court.

1. The twentieth century brought additional judicial expansions of federal habeas to state petitioners, and additional actions by courts and Congress to constrain access to the writ. *Lonchar*, 517 U.S. at 323–24; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1217 (AEDPA). These developments are well documented. *E.g.*, R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1274–1355 (7th ed. 2015).

What is important here is this Court's elucidation of the miscarriage-of-justice gateway, an equitable doctrine that allows a small group of habeas petitioners to

overcome many procedural hurdles. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). As relevant here, the gateway predates and survives AEDPA "intact and unrestricted" to excuse compliance with AEDPA's statute of limitations. *Id.* at 393, 397.

2. The miscarriage-of-justice gateway "see[ks] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Id.* at 393 (quotation marks omitted). Given these considerations, basic procedural bars should not be applied in true jurisdictional cases like this one, where a state's prosecution is a direct challenge to Congress's exercise of power in an important area of federal concern. The injury in such a case is not merely to the individual wrongly prosecuted, but to the federal government's sovereignty as well—here, its constitutional power to allocate authority to regulate the affairs of Indians in Indian country.

Although there has been some scholarly debate about the exact contours of the historic writ, no one disagrees that it encompassed the type of jurisdictional issue presented here: "the question of [a] court's competence to deal with the class of offenses charged and the person of the prisoner." Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 470 (1963) (Bator). Ms. Pacheco is being held in custody by a state utterly without jurisdiction over her case, because (as the Oklahoma trial court found) she is an Indian accused of a homicide offense in Indian country. 18 U.S.C. § 1153; *see also* U.S. Const. Art. I, § 9, cl. 2; U.S. Const. Art. VI; *McGirt*, 140 S. Ct. at 2459; *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *United States v. Kagama*, 118 U.S. 375, 383–85 (1886); *Hogner v.*

State, 500 P.3d 629, 635 (Okla. Crim. App. 2021). Oklahoma itself recognizes that it has no jurisdiction in such a case. *State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989).

Oklahoma's prosecution and continued detention of Ms. Pacheco, despite its lack of subject-matter jurisdiction over her and her case, is a direct challenge to Congress's exercise of power in an important area of federal concern. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). The framers gave the federal government "broad general powers" over Indian affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004). Although the precise scope of federal power over Indians and state-Indian relations has been the subject of recent debate, *see, e.g.,* G. Ablavsky, Beyond the Indian Commerce Clause, 124 Yale L.J. 882, 1031–32 (2015), it is without question that Congressional authority is at its zenith when legislation relates to Indians "on an Indian Reservation," *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 665 (2013) (Thomas, J., concurring). And when it comes to state and tribal criminal jurisdiction in Indian country, Congress has the power to give and the power to take away. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022); *Lara*, 541 U.S. at 200.

Thus, the jurisdictional question at the heart of this case not only lies at the historic core of habeas, but is also the type of claim that was historically exempt from procedural habeas bars. Like prosecutions involving bankruptcy, federal law enforcement, international relations, or perjury in a federal proceeding connected with a contested Congressional election, it is inextricably intertwined with "the authority

and operation of the general government." Duker, *supra*, 202. The power to prosecute Ms. Pacheco is "within the exclusive jurisdiction of the courts of the United States," even though a "general provision" of Oklahoma law would seem, by its terms, to authorize her prosecution, *Thomas*, 134 U.S. at 375–76, *Cunningham*, 135 U.S. at 69–70. It does not matter whether or not she is claiming to be innocent of any and all offenses under both state and federal law, only that she has properly asserted that Oklahoma lacked authority to prosecute. *Thomas*, 134 U.S. at 375.

3. Even if a petitioner like Ms. Pacheco does not technically qualify for the miscarriage-of-justice gateway under the actual-innocence doctrine, however, the Tenth Circuit still erred. While the gateway's most notable application is for "petitioners asserting actual innocence," *McQuiggin*, 569 U.S. at 396–97, this Court has never limited it to such arguments.[4] Incarceration by an authority completely lacking in jurisdiction is a fundamental miscarriage of justice intentionally exempted from basic procedural bars, without regard to questions of guilt or innocence.

As discussed above, the Great Writ developed as bulwark against authorities imprisoning individuals whom they had no right to detain—a protection against "arbitrary government," The Federalist No. 84 (A. Hamilton) (quoting 1 W. Blackstone, Commentaries on the Laws of England 136 (1765)). In contrast, actual innocence is a

[4] Although the Tenth Circuit considers the miscarriage-of-justice gateway to be coterminous with actual innocence, that is not true of all circuits. *Compare Pacheco*, 62 F.4th at 1241 (stating that "the actual-innocence exception" is "[a]lso known as the 'miscarriage of justice' exception"); *with Gladney v. Pollard*, 799 F.3d 889, 895 (7th Cir. 2015) ("[T]he actual innocence exception is one application of the broader 'fundamental miscarriage of justice' exception[.]")

concept only lately incorporated into habeas jurisprudence after being proposed as a way to limit *federal* encroachment into areas of legitimate state concern.

The main advocates for modern procedural constraints on twentieth-century expansion of the writ called for habeas courts to consider actual innocence—but they explicitly foreswore such a requirement in the case of jurisdictional claims. In fact, they argued that federal courts should reach the merits of jurisdictional claims regarding *state* encroachments into important areas of federal concern.

For example, even as Professor Bator proposed certain prudential limitations on access to the writ in the wake of *Brown v. Allen*, 344 U.S. 443 (1953), he did not suggest imposing them where "the state is made wholly incompetent by federal law to deal with the case." Bator, *supra*, 76 Harv. L. Rev. at 461, 527–28. To the contrary, he explained "that it is one of the historic functions of a court on habeas corpus to pass on the jurisdiction of the committing tribunal," and that a federal court's denial of "conclusive effect" to a state judgment in this circumstance does not offend "our federal-state" allocation of constitutional power. *Id.* at 461. To allow a conviction "to 'count'" in such a situation "would violate the political rules allocating institutional competences to deal with various matters." *Id.* As for finality, "no matter how fully the question has been litigated, if there is a gross absence of competence no subsequent tribunal needs to accept the decision." *Id.* Thus, while Professor Bator generally recommended prudential limitations on the expansion of federal habeas—up to and "including [a] conscientious appraisal of the guilt or innocence of the accused," *id.* at 528—he exempted core jurisdictional claims from his proposal.

Similarly, Judge Friendly's influential actual-innocence test was intended only to limit the expansion of habeas beyond its "original sphere." H. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 Chicago L. Rev. 142, 143–44, 151–52, 160 (1970). Like Professor Bator, Judge Friendly argued that "collateral attack is readily justified" whenever a petitioner has been convicted by "a tribunal lack[ing] jurisdiction," even though such a prisoner may well have had a full and fair opportunity to litigate the issue in state court, and "irrespective of any question of innocence." *Id.* at 151–52. While considerations such as judicial economy and reduction of "state-federal conflict" led Judge Friendly to make his actual innocence proposal more generally, *id.* at 167–68, he counseled in favor of allowing the federal courts to reach jurisdictional claims as they always had.

In other words, modern procedural limitations were not designed for the purpose of restricting the historical core of habeas: as a writ to provide "relief" where "the court of conviction lacked jurisdiction over the defendant or his offense," *Brown*, 142 S. Ct. at 1520–21. Because Oklahoma usurped exclusive federal jurisdiction to prosecute in this case, the miscarriage-of-justice gateway allows Ms. Pacheco to add her exhausted *McGirt*-based claim to her otherwise-timely first habeas petition, whether or not she is actually innocent. "[D]efects in subject-matter jurisdiction require correction." *United States v. Cotton*, 535 U.S. 625, 630 (2002).

III. This case is an excellent vehicle for this Court to address an exceptionally important question.

In addition to implicating an entrenched circuit split about the meaning of the oft-invoked actual-innocence doctrine, this case provides this Court with an excellent vehicle to address important concerns at the heart of federalism and due process.

A. The question presented in this case relates to the basic allocation of constitutional authority within our dual-sovereign system, which transcends any one case or party. Because the case concerns the regulation of Indians in Indian country—an important area of federal concern—the state's general homicide statutes do not apply, and the typical interests involved in this Court's resolution of a state prisoner's federal habeas petition are turned on their head. In such a situation, it makes no logical sense to rely on rules created to limit federal habeas' expansion from its core historic concern with jurisdiction in order to deprive a petitioner of a federal forum to argue that only the federal courts had adjudicatory authority in her case.

In the late nineteenth century, this Court spoke to such considerations when it explained the type of "special circumstances" that were not subject to its newly developed habeas exhaustion rule. *E.g.*, *Cunningham*, 135 U.S. at 69–70; *Thomas*, 134 U.S. at 375–76; *Royall*, 117 U.S. at 251–52. More recently, this Court has reemphasized jurisdiction as the central concern of habeas, *e.g.*, *Brown*, 142 S. Ct. at 1520–21, with several Justices recalling that procedural limitations on habeas were intended to help return habeas "closer to its historic office," *Edwards*, 141 S. Ct. at 1523 (Gorsuch, J., concurring). But the Court has had little chance to provide specific direction about what the federal courts should do when faced with true jurisdictional

claims, particularly when basic procedural bars would appear at first blush to preclude them from being addressed in federal court.

B. The question presented is also important because it matters to an individual as a practical matter where she is charged. Different jurisdictions define and punish crimes in meaningfully different ways. At the most extreme, these are matters of life and death. A state might seek the death penalty for a crime committed in Indian country where the federal government could not. 18 U.S.C. § 3598. Or the Department of Justice might file a capital racketeering indictment in a case that turns out to lack a sufficient interstate-commerce nexus, for a crime committed in a state that never permits capital punishment.

In this case, substantive differences between Oklahoma and federal murder statutes matter to Ms. Pacheco. She was convicted under a special theory of Oklahoma first-degree murder that does not require malice, but only the willful application of more force than that ordinarily used as discipline, and was sentenced to a mandatory term of life in prison. Okla. Stat. tit. 21, §§ 701.7(c), 701.9. In contrast, the federal crime of murder *always* requires malice, even if it involves child abuse, 18 U.S.C. § 1111, and the "unlawful killing of a human being without malice" is manslaughter, which carries a maximum sentence of only 15 years, 18 U.S.C. § 1112. The Tenth Circuit was simply mistaken when it decided that there were no "particular equities favoring Ms. Pacheco in this case." *Pacheco*, 62 F.4th at 1245.

C. The question presented is also important because the decision below raises difficult and avoidable questions about the relationship between the Suspension

Clause, jurisdictional claims, and AEDPA's statute of limitations. A proper understanding of the miscarriage-of-justice gateway raises no such concerns.

The Suspension Clause "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (internal quotation marks omitted). While it has been said that the Suspension Clause does not "require[] Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction," *Swain v. Pressley*, 430 U.S. 372, 385–86 (1977) (Burger, C.J., concurring in part), here Ms. Pacheco's conviction was *not* entered by a court of competent jurisdiction.

Before AEDPA, no statute of limitations governed a state prisoner's ability to challenge her custody in a federal habeas petition, "and the only laches recognized [wa]s that which affect[ed] the State's ability to defend against the claims raised on habeas." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Thus, before AEDPA, there were no time limitations that would have prevented a state prisoner like Ms. Pacheco from raising a jurisdictional claim in a first federal habeas petition. And "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar*, 517 U.S. at 324 (emphasis original).

Additionally, most circuits—including the Tenth and Eleventh—apply the parameters of AEDPA to all petitions challenging a state conviction or sentence, even if the petitioners attempt to invoke an independent path to relief like 28 U.S.C. § 2241.

E.g., *Coady v. Vaughn*, 251 F.3d 480, 484–85 (3d Cir. 2001); *In re Wright*, 826 F.3d 774, 782–83 (4th Cir. 2016); *Hartfield v. Osborne*, 808 F.3d 1066, 1072 (5th Cir. 2015); *Saulsberry v. Lee*, 937 F.3d 644, 647 (6th Cir. 2019); *Walker v. O'Brien*, 216 F.3d 626, 633 (7th Cir. 2000); *Dominguez v. Kernan*, 906 F.3d 1127, 1135 (9th Cir. 2018); *Yellowbear v. Wyoming Atty. Gen.*, 525 F.3d 921, 924 (10th Cir. 2008); *Medberry v. Crosby*, 351 F.3d 1049, 1059 (11th Cir. 2003); Bryan R. Means, Postconviction Remedies § 5:2 (2019). This means that relief available before AEDPA to *any* prisoner held by a state without jurisdiction is now time-restricted in the Tenth and Eleventh Circuits, with no recourse to an alternative writ or statute. However, no Suspension Clause concerns exist where the miscarriage-of-justice gateway provides an avenue for federal review of otherwise-tardy jurisdictional claims.

D. Finally, this case is an ideal vehicle for this Court to address the question presented in this petition. Ms. Pacheco has raised a true jurisdictional claim involving a "court's power to hear a case." *Cotton*, 535 U.S. at 630. She fully exhausted this jurisdictional claim in state court, with the OCCA denying relief based only on a retroactivity determination that is controlled by federal law. *Cruz v. Arizona*, 143 S. Ct. 650, 658–60 (2023); *Montgomery v. Louisiana*, 577 U.S. 190, 197–98 (2016). AEDPA's statute of limitations is the only procedural hurdle that might prevent Ms. Pacheco from raising her jurisdictional claim in federal court. She was granted a certificate of appealability on whether her jurisdictional claim was time-barred; she argued that the miscarriage-of-justice gateway exempted her from AEDPA's statute of limitations; and the Tenth Circuit ruled on that question de novo. Further, this Court has

already held that the miscarriage-of-justice gateway predates and survives AEDPA "intact and unrestricted" to excuse a petitioner from AEDPA's statute of limitations. *McQuiggin*, 569 U.S. at 393, 397. Thus, resolution of the question presented in her favor will allow her to raise her jurisdictional claim in district court as a timely addition to her first habeas petition.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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