

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

JOHNNY ELLERY SMITH,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH
TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE UNITED STATES
SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to Supreme Court Rule 13.5, Applicant Johnny Ellery Smith requests a 30-day extension of time, to and including February 10, 2023, within which to file a petition for a writ of certiorari in this case. The Ninth Circuit issued its memorandum opinion and entered judgment in this matter on August 4, 2022. App. A. The court denied Applicant's timely petition for panel rehearing and rehearing en banc on October 13, 2022. App. B. Absent an extension of time, Applicant's petition for certiorari would be due on or before January 11, 2023. This application complies with Rules 13.5 and 30.2 because it is being

filed ten days or more before the petition is due. This Court’s jurisdiction would be invoked under 28 U.S.C. § 1254(1).

1. Applicant is an enrolled member of the Confederated Tribes of Warm Springs who is challenging federal court jurisdiction over the state crime of eluding tribal police on Indian country, an offense not listed in the Major Crimes Act and covered by the Warm Springs Tribal Code.

2. The district court and the court of appeals held that, because Indian country constitutes a federal enclave under the General Crimes Act, the Assimilative Crimes Act provided federal jurisdiction notwithstanding treaty rights of the Tribes to “exclusive use” of the reservation as Indian country under 18 U.S.C. §§ 1151 and 1162(a).

3. Applicant contends that the lower court rulings are inconsistent with the holdings and reasoning of this Court’s jurisdictional decisions in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and *Oklahoma v. Castro-Huerta*, 142 S. Ct. 1612 (2022).

4. Applicant respectfully requests a 30-day extension of time to file a petition for certiorari, to and including February 10, 2023.

5. There is good cause for this extension to allow Applicant to coordinate with potential co-counsel in preparing his petition, to consult with interested parties regarding the impact of the decisions below, and to address counsel’s other pressing matters in the weeks leading up to and following the current deadline.

For the foregoing reasons, Applicant respectfully request that the time for filing a petition for a writ of certiorari in this case be extended by 30 days, to and including February 10, 2023.

Respectfully submitted this 15th day of December, 2022.

/s/ Stephen R. Sady _____

Stephen R. Sady

Attorney for Applicant

APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 4 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 21-35036

Plaintiff-Appellee,

D.C. Nos. 3:20-cv-01951-JO
3:16-cr-00436-JO-1

v.

JOHNNY ELLERY SMITH,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted February 7, 2022
Portland, Oregon

Before: PAEZ and NGUYEN, Circuit Judges, and TUNHEIM,** District Judge.

Defendant Johnny Ellery Smith, an enrolled member of the Confederated Tribes of Warm Springs, appeals the district court’s denial of his 28 U.S.C. § 2255 motion. We previously affirmed Smith’s convictions on direct appeal, holding that the federal government had jurisdiction to prosecute him for violations of Oregon

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

law committed on the Warm Springs Reservation because the Assimilative Crimes Act (“ACA”) applies to Indian country. *United States v. Smith*, 925 F.3d 410 (9th Cir. 2019). Smith now seeks to vacate his convictions on the ground that the Supreme Court’s subsequent decisions in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) and *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) are “clearly irreconcilable” with our prior holding. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

In *Smith*, we held that the ACA applies to Indian country via the Indian Country Crimes Act (“ICCA”). 925 F.3d at 418. The ICCA extends to Indian country the “general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States.” 18 U.S.C. § 1152. We reasoned in *Smith* that the “general laws” referred to in the ICCA are the laws governing federal enclaves. 925 F.3d at 418. Therefore, “[t]he ACA, as a federal enclave law, . . . applies to Indian country by operation of the ICCA.” *Id.*

Castro-Huerta is not clearly irreconcilable with that holding. Smith does not dispute that the “general laws” extended to Indian country by the ICCA are the “federal laws that apply in federal enclaves.” *Castro-Huerta*, 142 S. Ct. at 2495. Rather, he contends that the ACA is not among such “general laws” because “the ACA is not a federal criminal law.” That question, however, was not decided in

Castro-Huerta, which made no mention of the ACA. The relevant portion of *Castro-Huerta* focused instead on whether the text of the ICCA rendered Indian country the equivalent of a federal enclave such that the federal government had exclusive jurisdiction to prosecute criminal offenses committed there. *Id.*

Finally, we also reject as unpersuasive Smith’s contention that *McGirt* is clearly irreconcilable with our prior holding that his prosecution was not prohibited by the third exception to the ICCA’s scope, which applies when a treaty stipulation reserves for a tribe “exclusive jurisdiction over [the relevant] offenses.” *See Smith*, 925 F.3d at 420 (quoting 18 U.S.C. § 1152).¹ *McGirt* does not address the ICCA exceptions, and its reasoning does not undermine *Smith*’s analysis of them. *See id.* at 420–21.

AFFIRMED.

¹ *Smith* also held that the ACA applies to Indian country by its own terms (and not just via the ICCA). *See* 925 F.3d at 415–18. We reasoned that Indian country qualifies as a “federal enclave” under the ACA, and thus the ACA’s provisions apply there. *Id.* Smith contends that this holding is undermined by *McGirt* because there is no clear expression of congressional intent to apply the ACA to the Reservation, and by *Castro-Huerta* because it implicitly held that Indian country and federal enclaves are not equivalents. We need not reach these arguments in light of our conclusion that the ACA applies to Indian country via the ICCA.

APPENDIX B

FILED

UNITED STATES COURT OF APPEALS

OCT 13 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 21-35036

Plaintiff-Appellee,

D.C. Nos. 3:20-cv-01951-JO
3:16-cr-00436-JO-1

v.

District of Oregon,
Portland

JOHNNY ELLERY SMITH,

ORDER

Defendant-Appellant.

Before: PAEZ and NGUYEN, Circuit Judges, and TUNHEIM,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Nguyen has voted to deny the petition for rehearing en banc, and Judge Paez and Judge Tunheim have so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See Fed. R. App. P. 35.* The petition for rehearing en banc is denied.

* The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

CERTIFICATE OF SERVICE

I, Stephen R. Sady, a member of the bar of this Court, certify that on December 15, 2022, all parties required to be served were served copies of the foregoing, via hand-delivery, at the address listed below:

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/s/ Stephen R. Sady

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