No. 22A545

IN THE

Supreme Court of the United States

JOHNNY ELLERY SMITH,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR SECOND EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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

Pursuant to this Court's Rule 13.5, applicant Johnny Ellery Smith respectfully requests a second extension of time, to and including March 10, 2023, to file a petition for a writ of certiorari in this case.

1. The Ninth Circuit entered judgment on August 4, 2022, *see* App. A, and denied Mr. Smith's timely petition for panel rehearing and rehearing en banc on October 13, 2022, *see* App. B. On December 19, 2022, Justice Kagan granted a 30-day extension of time in which to file a petition for a writ of certiorari. Absent a second extension, Smith's petition for a writ of certiorari would be due on February 10, 2023. This Court's jurisdiction would be invoked under 28 U.S.C. §1254(1).

2. This case presents the question whether the Assimilative Crimes Act, 18 U.S.C. §13, applies to Indian country—either on its own or through the General Crimes

Act, 18 U.S.C. §1152—such that the federal government may prosecute Indians for virtually any state-law offense committed on Indian lands, including lands promised by treaty for the "exclusive use" of Indian tribes. The Ninth Circuit's holding that the answer to that question is yes conflicts with this Court's holdings and reasoning in *McGirt* v. *Oklahoma*, 140 S.Ct 2452 (2020), and *Oklahoma* v. *Castro-Huerta*, 142 S.Ct. 2486 (2022). The Ninth Circuit's holding also infringes core aspects of tribal sovereignty.

3. The additional extension of time is requested because undersigned counsel from Wilmer Cutler Pickering Hale and Dorr LLP have only recently been engaged. Additional time is warranted to allow counsel to coordinate with Mr. Smith and his other counsel, as well as to allow counsel to consult interested parties regarding the impact of the holdings below.

For the foregoing reasons, Smith requests that the time for filing a petition for a writ of certiorari in this case be extended to and including March 10, 2023.

January 24, 2023

Respectfully submitted.

/s/ Seth P. Waxman

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APPENDIX A

NOT FOR PUBLICATION

FILED

AUG 4 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHNNY ELLERY SMITH, Defendant-Appellant.	No. 21-35036 D.C. Nos. 3:20-cv-01951-JO 3:16-cr-00436-JO-1 MEMORANDUM*

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

OCT 13 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHNNY ELLERY SMITH, Defendant-Appellant.	No. 21-35036 D.C. Nos. 3:20-cv-01951-JO 3:16-cr-00436-JO-1 District of Oregon, Portland ORDER

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, Daniel S. Volchok, a member of the bar of the Court, certify that on January 24, 2023, counsel for all parties required to be served have been served copies of the foregoing application via first-class mail and electronic mail at the addresses below:

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