No. 23-_____

IN THE

SUPREME COURT OF THE UNITED STATES

JERIAH SCOTT BUDDER, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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December 5, 2023

QUESTION PRESENTED

Several months after Petitioner shot and killed another man in self-defense, this Honorable Court issued its decision in *McGirt v. Oklahoma*, 591 U.S. ----, 140 S. Ct. 2452 (2020), holding that Congress never disestablished the Muscogee (Creek) Reservation in eastern Oklahoma and, thus, it constitutes Indian country for purposes of exclusive federal criminal jurisdiction under the federal Major Crimes Act. The State of Oklahoma's prosecution of Petitioner, a registered citizen of the Cherokee Nation, for manslaughter was consequently dismissed for lack of subject matter jurisdiction, and the federal government brought charges against him for first-degree murder in Indian country. A federal jury convicted Petitioner of the lesser-included offense of voluntary manslaughter under federal law, but stated in its unanimous response to a special interrogatory that it would have acquitted him, had Oklahoma state law regarding justifiable homicide applied.

The question presented is:

Whether the Tenth Circuit contravened this Court's precedents in ruling that Petitioner was not denied due process of law – based on *ex post facto* principles – when he was convicted for a fatal shooting that the federal jury unanimously found occurred in self-defense as defined by the Oklahoma law that governed his conduct at the time and place, before this Court announced its *McGirt* decision?

PARTIES TO THE PROCEEDING AND RELATED CASES

Petitioner is Jeriah Scott Budder, an individual. Respondent is the United States of America.

The only two directly related cases are the criminal proceedings below:

- *United States v. Budder*, No. 6:21-CR-00099-DCJ-1, United States District Court for the Eastern District of Oklahoma. Judgment entered June 13, 2022.
- *United States v. Budder*, No. 22-7027, United States Court of Appeals for the Tenth Circuit. Judgment entered August 7, 2023.

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Jeriah Scott Budder respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The published opinion of the Tenth Circuit, captioned *United States v. Budder*, No. 22-7027 (August 7, 2023), is reported at 76 F.4th 1007, and is attached as Appendix A. The United States District Court for the Eastern District of Oklahoma's memorandum order, captioned *United States v. Budder*, No. 6:21-CR-00099-DCJ (April 29, 2022), is reported at 601 F.Supp.3d 1105, and is attached as Appendix B.

JURISDICTION

The Tenth Circuit issued its opinion on August 7, 2023. On November 1, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including December 5, 2023. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in part, that: "No person shall be … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Ex Post Facto clause provides that: "No … ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3.

The federal Major Crimes Act provides that "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United

States Government." 18 U.S.C. § 1151. It also provides, in part, that: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, … shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

The State of Oklahoma's Justifiable Homicide Statute provides, in part, that: "Homicide is also justifiable when committed by any person … 1. When committed in the lawful defense of such person or of another, when the person using force reasonably believes such force is necessary to prevent death or great bodily harm to himself or herself or another or to terminate or prevent the commission of a forcible felony; … B. As used in this section, 'forcible felony' means any felony which involves the use or threat of physical force or violence against any person." 21 Okla. Stat. § 733.

STATEMENT OF THE CASE

A. Factual and Procedural Background

The District Court's memorandum order denying Mr. Budder's motion to dismiss the superseding indictment for denial of due process and fair notice thoroughly and accurately recounts the factual and procedural background. *See* 601 F.Supp.3d at 1107-11. Budder adopts these background sections of the District Court's order for purposes of this petition.[1]

[1] Although not inaccurate, the Tenth Circuit's abbreviated recitation of the facts omits some of the details relevant to Budder's contention that he was acting in self-defense. *See* 76 F.4th at 1010-11.

To summarize succinctly, on April 24, 2019, Budder, a registered citizen of the Cherokee Nation (a federally recognized tribe) who was an eighteen-year-old high school senior, was involved in an altercation that resulted in the shooting death of David Wayne Jumper, a much bigger man twice his age who had threatened violence against him on previous occasions. On the date in question, Mr. Jumper was angry and had been drinking liquor, remarked to a third party that Budder was a "punk" who he wanted to teach "a lesson," and later initiated a violent physical attack. These events, which involved an instance of justifiable homicide in self-defense by Budder under Oklahoma law – as eventually and unanimously determined by the jury in response to a special interrogatory – occurred in the City of Tahlequah in Cherokee County, Oklahoma. On May 13, 2020, the State of Oklahoma, through its Cherokee County District Attorney's office, charged Budder with manslaughter.

On July 9, 2020, this Court issued its decision in *McGirt v. Oklahoma*, 591 U.S. ----, 140 S. Ct. 2452 (2020), which "effectively divested Oklahoma of jurisdiction and extended jurisdiction over the offense conduct to the United States Attorney under the Major Crimes Act." 601 F.Supp.3d at 1108, citing *McGirt* and 18 U.S.C. § 1153. After state charges against Budder were later dismissed for lack of subject matter jurisdiction in the wake of *McGirt*, on April 15, 2021, the United States indicted Budder for first-degree murder in Indian Country in violation of 18 U.S.C. §§ 1111(a), 1151, and 1153(a), and later filed a Superseding Indictment charging additional counts of Using, Carrying, Brandishing, and Discharging a Firearm

During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A), and Causing the Death of a Person in the Course of a Violation of 18 U.S.C. § 924(c), in violation of 18 U.S.C. § 924(j)(1), as well as a forfeiture allegation.

Prior to trial, Budder unsuccessfully moved to dismiss the superseding indictment, and "also filed a motion requesting that the Court apply the Oklahoma state law of self-defense, arguing that the change from the Oklahoma law to the somewhat narrower federal law of self-defense violated the Constitution's Ex-Post Facto Clause and otherwise violated his right to due process under the law." *Budder*, 601 F.Supp.3d at 1109. The District Court denied the motion as initially presented in part and deferred ruling in part, but, "finding Defendant's arguments and authority compelling," remained open to posing a special interrogatory to jurors if Budder presented evidence of self-defense at trial, "thus allowing a determination of whether the jury believed that the Oklahoma law of self-defense would have applied differently to the facts of this case than federal law." *Id.* at 1109-10.[2]

After a three-day trial in which Budder presented evidence of self-defense, the jury returned a guilty verdict on the lesser-included offense of voluntary manslaughter under federal law. Importantly, however, the jury answered in the negative the ultimate question posed by the Special Interrogatory: "If the Oklahoma law of self-defense is determined to be applicable in this case, has the Government

[2] The District Court's Minute Ruling stated the motion was "DEFERRED as to the Constitutional implications should the jury enter a finding of guilty as to Count 1 of the Superseding Indictment with a concurrent finding by the jury that the Defendant's conduct would qualify as justifiable homicide under Oklahoma law." Vol. 1, at 127-28 (3/10/2022 Minute Sheet); *see also* Vol. 3, at 8-12 ("If the answer is, yes, and if they otherwise convict the defendant of the crimes charged in the indictment, then we have an issue, a constitutional issue we need to decide at that point.").

proved beyond a reasonable doubt that the Defendant did not act in self-defense for the conduct charged in Count One of the Superseding Indictment?" Vol 2, Sealed Pleadings, at 10-11 (4/7/2022 Verdict Form).

As the District Court described in its memorandum order:

> In response to the "Special Interrogatory," however, the jury answered "No," determining that the government had not proved beyond a reasonable doubt that Budder had not acted in self-defense under Oklahoma law. As such, the jury found that application of Oklahoma's law of self-defense to the facts of this case would have operated to acquit the Defendant. After the trial, the Defendant renewed his Motion to Dismiss arguing that the change wrought in *McGirt*, which precluded him from asserting the self-defense law of Oklahoma, raises *ex post facto* and due process issues. This issue is now ripe for ruling.

601 F.Supp.3d at 1111 (footnote omitted).

The District Court thoroughly and thoughtfully considered the significant constitutional issues presented under the facts of this case, but, despite its "expressed concerns with due process afforded" Budder, ultimately declined to vacate his conviction because of the absence of prior precedent on the ultimate question presented. *Id.* at 1116-17. The Tenth Circuit affirmed the result, based on an analysis that lacks depth and puts forth on an incorrect interpretation and application of this Court's governing precedents. *See* 76 F.4th at 1015-16.

B. Legal Framework

1. Oklahoma's Law of Deadly Force in Self-Defense

As described by the District Court in its special interrogatory given to the jury, in relevant part:

> Under Oklahoma law, a person is justified in using deadly force in self-defense if that person reasonably believed that use of deadly force was necessary to:
>
> a) prevent death or great bodily harm to himself; *or*
>
> b) *to terminate or prevent the commission of a forcible felony against himself*.
>
> … A forcible felony is any felony which involves the use or threat of physical force or violence against any person.

601 F.Supp.3d at 1110 (emphasis added, footnote omitted); *see also* 21 Okla. Stat. § 733. As the District Court correctly recognized, "[t]he inclusion of the 'forcible felony provision' broadens the law of self-defense in Oklahoma beyond the federal law of self-defense." 601 F.Supp.3d at 1116 n.18.[3] The Tenth Circuit dismissed this critical fact, stating that "[t]he contours of Oklahoma law on voluntary manslaughter are irrelevant." 76 F.4th at 1016.

2. The Federal Major Crimes Act (MCA)

The MCA provides that "[a]ny Indian who commits" certain enumerated offenses, including murder and manslaughter, "within the Indian country, shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151.

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[3] Federal criminal law, as the District Court instructed jurors, "permits lethal force to be used in self-defense '*only if* he reasonably believes that force is necessary to prevent death or great bodily harm to himself.'" 601 F.Supp.3d at 1116 n.18 (citing 10th Circuit Pattern Jury Instruction 1.28, accessed at: https://www.ca10.uscourts.gov/ form/criminal-pattern-jury-instructions) (emphasis added).

3. *McGirt v. Oklahoma*

In *McGirt*, this Court held that Congress never disestablished the Creek Reservation in eastern Oklahoma and, thus, it constitutes Indian country for purposes of federal criminal jurisdiction. *See* 140 S. Ct. at 2482. *McGirt* "resolved a question of 'statutory interpretation,' surveying many 'treaties and statutes,' to determine that '[t]he federal government promised the Creek a reservation in perpetuity' and 'has never withdrawn the promised reservation.'" *Pacheco v. Al Habti*, 48 F.4th 1179, 1192 (10th Cir. 2022), quoting *McGirt*, 140 S. Ct. at 2474, 2476, 2482.

The Court's four dissenting Justices expressed significant concern with the Court's holding, which they maintained was: (a) based on an "improbable ground … unbeknownst to anyone for the past century;" (b) unwarranted because "Congress [had] disestablished any reservation in a series of statutes leading up to Oklahoma statehood at the turn of the 19th century," and thus "a reservation did not exist when McGirt committed his crimes;" (c) created "significant uncertainty for the State's continuing authority over any area that touches Indian affairs;" and (d) arrived at "only by disregarding the 'well-settled' approach required by our precedents." *McGirt*, 140 S. Ct. at 2482.

The five-Justice *McGirt* majority acknowledged the dissent's "concern for reliance interests," and endorsed the view that lower courts should take into consideration legitimate reliance interests through "other legal doctrines … designed *to protect those who have reasonably labored under a mistaken understanding of the law*." 140 S. Ct. at 2481 (emphasis added). The Court

expressly left "questions about … reliance interest[s] for later proceedings crafted to account for them." *Id*., quoting *Ramos v. Louisiana*, 590 U.S. ----, 140 S. Ct. 1390, 1407 (2020) (plurality opinion).

4. Historical Context, *Ex Post Facto* Laws, and Due Process

The fundamental proposition that the law should not criminalize or punish conduct that was lawful when committed, long predates the Constitution. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) (the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal"); The Federalist No. 84, at 511-12 (C. Rossiter ed., 1961) (Alexander Hamilton) ("the subjecting of men to punishment for things which, when they were done, were breaches of no law," was among "the favorite and most formidable instruments of tyranny").

The Constitution prohibits both federal and state governments from enacting any "*ex post facto* Law." Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. This prohibition forbids enactment of "any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Weaver v. Graham*, 450 U.S. 24, 28 (1981), quoting *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 325-26 (1867); *see also Calder v. Bull*, 3 U.S. 386, 390 (1798) (defining an *ex post facto* law as one "that makes an action done before

the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that aggravates a crime, or makes it greater than it was, when committed").

The Ex Post Facto Clause also furthers a more generalized interest in "fundamental justice" – "[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Id*. The government runs afoul of this fairness interest when it passes an *ex post facto* law that makes it easier, after the fact, to convict or punish its citizens. *See Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (Ex Post Facto clause prohibits application of any law "which punishes as a crime an act previously committed, *which was innocent when done*, which makes more burdensome the punishment for a crime, after its commission, *or which deprives one charged with crime of any defense available according to law at the time when the act was committed*.") (emphasis added).

Courts are no less a part of the government than are legislatures. *See Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("Judges, it is sometimes necessary to remind ourselves, are a part of the State."). Beginning in the 1960s, this Court came to acknowledge that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law." *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964). Just as the Ex Post Facto Clause prohibits Congress and the states from criminalizing

conduct that was legal when undertaken, the Due Process Clause bars courts from "achieving precisely the same result by judicial construction." *Id*. at 353; *see also United States v. Lanier*, 520 U.S. 259, 265-66 (1987) (the fair warning requirement "bars *courts* from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope") (emphasis added); *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (due process is concerned with fundamental fairness and protects against judicial lawmaking by safeguarding defendants against unpredictable breaks with prior law).

The Due Process Clause thus entitles defendants to fair warning of the conduct that constitutes a crime. *See Bouie*, 378 U.S. at 350; *Marks v. United States*, 430 U.S. 188, 992-93 (1977) ("a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty"). Fair warning exists only if defendants could reasonably foresee the legal consequences of their conduct. *See Lanier*, 520 U.S. at 270-71. And, because the deprivation of the right to fair warning can result from an unforeseeable and retroactive judicial expansion of a criminal statute, *Bouie*, at 352, the Due Process Clause imposes "limitations on ex post facto judicial decisionmaking." *Rogers*, 532 U.S. at 456, 459. Under this Due Process framework, "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect."

Bouie, 378 U.S. at 354, quoting Hall, General Principles of Criminal Law (2d ed. 1960), at 61.

C. Decisions Below

1. District Court

The District Court's decision denying Budder's motion to dismiss the Superseding Indictment is thorough and accurate in its recitation of the facts, governing legal frameworks, and relevant precedents. Its analysis is mostly spot on and appropriately frames the clear constitutional dilemma this case presents:

> [T]here can be no doubt that on the night of April 24, 2019, the Defendant would have had every reason to believe that he was subject to Oklahoma criminal law. Indeed, the Oklahoma prosecutorial authorities also reasonably believed that Oklahoma law applied to Budder, as evidenced by his arrest and initial prosecution in state court. Only after *McGirt* was decided did any party to this case come to understand that federal Indian Country jurisdiction applied and that therefore federal self-defense laws would apply to Budder's actions.
>
> … [I]t meant that Budder could no longer assert the affirmative defense that his actions were justified in order "to terminate or prevent the commission of a forcible felony against himself." 21 OKLA. STAT. § 733(A)(2).
>
> Here, the practical and retroactive application of the *McGirt* decision to Budder, as a member of the Cherokee nation, resulted in his conviction of Voluntary Manslaughter under federal law. Were Budder not a Native American or in absence of the *McGirt* decision, the jury determined that his actions would have constituted justifiable homicide under Oklahoma law, ***and he would have been acquitted***.

601 F.Supp.3d at 1116 (footnotes omitted, emphasis added).

Despite its own "expressed concerns with the due process afforded to this Defendant under the facts of this case," the District Court nevertheless declined to

vacate Budder's conviction, noting the absence of "analogous Tenth Circuit or Supreme Court precedent." *Id*.

2. Tenth Circuit

The analysis section of the Tenth Circuit's opinion (titled "Application to This Case") is all of two paragraphs and a footnote. *See* 76 F.4th at 1015-16 & n.3. A deeper analysis, set forth below, shows that the Tenth Circuit misconstrued and misapplied this Court's governing precedents. To let its decision stand would represent a significant departure from established concepts of criminal law and constitutional liberty, and, in the march of time, would cause great confusion, as well as constitutional harm not only to Budder's due process rights, but also to those of society.

REASONS FOR GRANTING THE PETITION

This case presents compelling arguments that the Tenth Circuit's published decision in this case decided an important federal constitutional question that has not been, but should be, settled by this Court, and in ways that conflict with and contravene this Court's relevant decisions, making this case an especially worthy candidate for the Court's certiorari review. *See* Sup. Ct. R. 10(c).

Although *McGirt* was a 5-4 decision, all nine of this Court's Honorable Justices agreed that it brought a monumental change that would engender important legal issues. *See* 140 S. Ct. at 2481 ("we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so

long"); *id.* at 2502 (*McGirt*'s "consequences are drastic precisely because they depart from how the law has been applied for more than a century") (Roberts, C.J., dissenting). This case is exactly the sort envisioned by *McGirt* in its anticipation of "leaving questions about … reliance interest[s] for later proceedings crafted to account for them." 140 S. Ct. at 2481, quoting *Ramos*, 140 S. Ct. at 1407. Respectfully, the Tenth Circuit got the law wrong. This Court's intervention is necessary to correct the misinterpretation of it prior precedent, to avoid the erosion of fundamental justice principles, and to prevent unwarranted threats to our nation's concept of constitutional liberty.

A. The decision below is legally incorrect and conflicts with this Court's precedents.

The Tenth Circuit based its decision on a misguided, surface-level analysis that incorrectly states the law and misinterprets this Court's precedents.

1. *Rogers v. Tennessee*

According to the Tenth Circuit, "under the *Rogers* standard we can easily reject Defendant's argument." 76 F.4th at 1015. *Rogers* does not so dictate. The Court in *Rogers* determined that an "obsolete" and "outdated relic of the common law" year-and-a-day rule could not be applied to invalidate a conviction for a stabbing in the heart leading to a coma the victim fell into for over a year until his eventual death. 532 U.S. at 462-63. The Tenth Circuit' decision below described the reasoning the *Rogers* majority applied in reaching that conclusion:

> Not only had the year-and-a-day rule "been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue," but also it "had only the most tenuous foothold as part of the

> criminal law of the State of Tennessee" at the time of the offense ("The rule did not exist as part of Tennessee's statutory criminal code. And while the Supreme Court of Tennessee concluded that the rule persisted at common law, it also pointedly observed that the rule had never once served as a ground of decision in any prosecution for murder in the State. Indeed, in all the reported Tennessee cases, the rule has been mentioned only three times, and each time in dicta."). Thus, the decision abolishing the rule "was a routine exercise of common law decisionmaking," rather than "a marked and unpredictable departure from prior precedent."

76 F.4th at 1015, quoting *Rogers*, 532 U.S. at 463, 464, 467.

The *Rogers* Court made clear that: "Our decision in *Bouie* was rooted firmly in well established notions of *due process* … [and] rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct." 532 U.S. at 459 (emphasis in original). In *Rogers*, the writing of the year-and-a-day rule's demise was plainly on the wall; here, by stark contrast, over a century of legal practice suddenly changed when the Court announced *McGirt*, the essential conclusion of which was previously "unbeknownst to anyone for the past century" and which overturned a century of "unquestioned" and "settled understanding." *McGirt*, 140 S. Ct. at 2483, 2500 (Roberts, C.J., dissenting).

In his dissent in *Rogers*, Justice Scalia bemoaned what he called "a curious constitution" produced by the majority's decision: "One in which (by virtue of the *Ex Post Facto* Clause) the elected representatives of all the people cannot retroactively make murder what was not murder when the act was committed; but in which unelected judges can do precisely that." *Id.* at 468. His caution of "what a court

cannot do, consistent with due process," is precisely the effect *McGirt* had here: "avowedly *change* (to the defendant's disadvantage) the criminal law governing past acts." *Id.* at 481 (emphasis in original).

Justices Stevens and Breyer, each in their own short dissent, made additional points that counsel toward relief for Budder in this case. *See id.* at 467 ("the majority has undervalued the threat to liberty that is posed whenever the criminal law is changed retroactively") (Stevens, J., dissenting); *id.* at 481-82 ("[T]he Due Process Clause … provides protection against after-the-fact changes in criminal law that deprive defendants of fair warning of the nature and consequences of their actions. It does not enshrine Blackstone's 'ancient dogma that the law declared by … courts had a Platonic or ideal existence before the act of declaration.'") (Breyer, J., dissenting), quoting *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 365 (1932) (Cardozo, J.).

The *Rogers* majority "readily agree[d] with Justice Scalia that fundamental due process prohibits the punishment of conduct that cannot fairly be said to have been criminal at the time the conduct occurred," but concluded that was not what took place on the facts before it. 532 U.S. at 466; *see id.* at 467 ("Far from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decision making in which the court brought the law into conformity with reason and common sense. It did so by laying to rest an archaic and outdated rule that had never been relied upon as a ground of decision in any reported Tennessee case."). The case at bar presents a far different scenario.

Budder does not quibble with the Tenth Circuit's description of the standard articulated in *Rogers*:

> The most recent, and controlling, formulation of the due-process retroactivity test appears in *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001): "[I]f a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, the construction must not be given retroactive effect" (original brackets and internal quotation marks omitted). This approach provides the necessary breathing room for traditional judicial decisionmaking. *See id.* at 460, 121 S.Ct. 1693 (declining to "extend[] the strictures of the *Ex Post Facto* Clause to the context of common law judging"). The proper concern is with "unpredictable shifts in the law," not "the resolution of uncertainty that marks any evolving legal system." *United States v. Burnom*, 27 F.3d 283, 284-85 (7th Cir. 1994).

76 F.4th at 1013. But the Tenth Circuit's opinion in this case is the *only* decision to assert that *McGirt* was something other than an "unpredictable shift in the law." The overwhelming majority of judicial decisions have described *McGirt* as effecting an abrupt and massive change.

When Budder committed his alleged offense in April 2019, the State of Oklahoma had a "long historical prosecutorial practice of asserting jurisdiction over Indians in state court, even for serious crimes on the contested [Creek] lands." *McGirt*, 140 S. Ct. at 2470. Indeed, the State had "maintained *unquestioned* jurisdiction for more than 100 years" over the area now understood to be part of the Muscogee (Creek) Nation Reservation. *Id.* at 2485 (Roberts, C.J., dissenting) (emphasis added); *see also Oklahoma v. Castro-Huerta*, 597 U.S. ----, 142 S. Ct. 2486, 2499 (2022) ("Until the Court's decision in *McGirt* two years ago, … [m]ost everyone in Oklahoma previously understood that the State included almost no

Indian country. But after *McGirt,* about 43% of Oklahoma – including Tulsa – is now considered Indian country. Therefore, the question of whether the State of Oklahoma retains concurrent jurisdiction to prosecute non-Indian on Indian crimes in Indian country has *suddenly* assumed immense importance.") (emphasis added); *Rogers Cnty. Bd. of Tax Roll Corrections v. Video Gaming Techs., Inc.*, 141 S. Ct. 24 (2020) (Thomas, J., dissenting from denial of certiorari) ("Earlier this year, the Court 'disregard[ed] the 'well settled' approach required by our precedents' and transformed half of Oklahoma into tribal land. That decision 'profoundly destabilized the governance of eastern Oklahoma' and 'create[d] significant uncertainty' about basic government functions like 'taxation.' The least we could do now is mitigate some of that uncertainty.") (quoting Justice Roberts' *McGirt* dissent, 140 S. Ct. at 2482-83).

Oklahoma's highest courts, too, have uniformly stated that *McGirt* "broke new legal ground in the sense that it was not dictated by, and indeed, arguably involved controversial innovations upon, Supreme Court precedent." *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶¶ 28-32 & n.6, 497 P.3d 686, 692 (Okla. Crim. App.) (recognizing that until *McGirt*, Oklahoma courts, and law enforcement officials "generally, declined to recognize the historic boundaries of any Five Tribes reservation, as such, as Indian Country"); *see also Bench v. State*, 2021 OK CR 39, ¶ 8, 504 P.3d 592, 597 (Okla. Crim. App.) ("*McGirt* rule was new because it broke new ground, imposed new obligations on both the state and the federal governments and the result was not required by precedent").

Even the Tenth Circuit here acknowledged: "To be sure, *McGirt* changed long-standing practice of the criminal-justice system in Oklahoma." 76 F.4th at 1013. Its next sentence, however – "[b]ut such practice does not define the law" (*Id.*) – ignores a century of settled criminal justice practice based on the law as understood by all parties prior to *McGirt*, and conjures the fanciful notion Justice Breyer alluded to in his individual *Rogers* dissent: a "Platonic or ideal existence before the act of declaration" that was *McGirt*.

The argument that *McGirt* was predictable and merely a continuation of known law is belied by the simple, telling fact that the federal government did not prosecute this case until after *McGirt* was decided, consistent with the actions of the federal government in not prosecuting similar cases for the previous century. Had it been so predictably a federal matter, the United States Attorney's Office and federal law enforcement agents would have led the investigation. They did not. In short, *McGirt* was unforeseeable in light of prior understanding and practice. It suddenly reversed the understanding held by all interested parties for the prior century that alleged crimes in eastern Oklahoma were to be prosecuted by state authorities based on state law.

2. *Sharp v. Murphy*

The Tenth Circuit's statement that "there was more notice that Oklahoma practice violated federal law than that Tennessee would abandon its year-and-a-day rule" (76 F.4th at 1016), is contradicted by its own description of *Rogers* above. Its reliance on *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom Sharp v.*

Murphy, 140 S. Ct. 2412 (2020), is misplaced, and ignores the factual record. At the unopposed request of Warden Royal and for good cause shown, the Tenth Circuit *stayed* its *Murphy* decision for the purpose of awaiting this Court's decision on the issue presented, recognizing that, if and when it issued, the mandate would "create the need to execute a significant shift in how law enforcement and criminal prosecution is conducted in the area at issue, involving substantial resource expenditure by state, federal, and tribal governments," and that "other litigation may be generated in the interim, including over civil and regulatory issues in the area and the reservation status of other Oklahoma tribes," none of which would be necessary in light of the possibility that this Court would reverse the Tenth Circuit's decision. *See Murphy v. Royal*, No. 07-7068 & 15-7041, Unopposed Motion to Stay the Mandate Pending the Filing of a Petition for Writ of Certiorari dated 11/13/2017,¶ 5. When this Court granted certiorari in *Murphy*, Justice Gorsuch recused himself; the Court later granted certiorari in *McGirt*, presumably because Justice Gorsuch had no reason to recuse himself and so that all nine Justices could participate, thereby avoiding a 4-4 split.

For the entire length of time *Murphy* was stayed, and until this Court's July 9, 2020, rulings in *McGirt* and *Murphy*, all government prosecutorial and investigative authorities continued the very same practices they had followed for the prior century with respect to major crimes occurring in eastern Oklahoma. The Tenth Circuit points to no authority that believed *Murphy* was the operative law, and, notably, there is no procedural or appellate rule in either the Tenth Circuit or

this Court that explains the precedential effect – if any – of a published decision from a federal court of appeals for which the mandate has been stayed pending the filing and resolution of petition for a writ of certiorari.

Not until *McGirt* was decided did the law become clear or predictable – the Court's *per curiam* decision in *Sharp v Murphy*, issued the same day as *McGirt*, stated, in its entirety: "The judgment of the United States Court of Appeals for the Tenth Circuit is affirmed for the reasons stated in [*McGirt*]. It is so ordered." 140 S. Ct. 2412. Moreover, both *Murphy* and *McGirt* concerned *only* the Muscogee (Creek) reservation, whereas the crime alleged here occurred within the boundaries *of the Cherokee Nation*. For Budder to be on fair notice that state law of justifiable homicide was supplanted by federal law, he would have to have foreseen not only that *McGirt* (and thus *Murphy*) would be decided the way they eventually turned out, but also that the same result would subsequently be extended to Cherokee lands and applied to Cherokee people. The federal district courts – at least initially – suggested that was not a foregone conclusion. *See, e.g., Berry v. Braggs*, No. 19-CV-0706-GKF-FHM, 2020 WL 6205849, at *5 (N.D. Okla. Oct. 22, 2020) (Not Reported in Fed. Supp.) ("*McGirt* said nothing about whether major crimes committed within the boundaries of the Cherokee Nation Reservation must be prosecuted in federal court."), quoting *McGirt* at 2479 ("Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek."); *see also United States v. Barnes,* 846 F. App'x 730, 731 (10th Cir. 2021) (noting that *McGirt* only considered whether specific land in Oklahoma was "Indian

country" under the MCA). If it was not plain or predictable to even the state and/or federal courts that *McGirt* would be extended to other tribes and reservations, surely it is unfair and unreasonable to attribute such anticipation to Budder. The Tenth Circuit's footnote 3 (76 F.4th at 1016) proves Budder's point: every case cited in the footnote extending *McGirt*'s reasoning to reservations other than the Creek was decided long after Budder's conduct and after *McGirt* and *Sharp v. Murphy* issued.

In sum, the Tenth Circuit' theory of the law is that Budder should have somehow foreseen, not only that more than a century of criminal justice practices would be upended, but also that the same result would apply to different lands not at issue or even mentioned in *Murphy* or *McGirt*. Ignorance of the law, of course, is no excuse. But anticipation of a sea change in the law in criminal jurisdiction that was previously "unbeknownst to anyone" is a bar much too high to expect as fair and/or reasonably foreseeable. This Court's "declar[ation] in *McGirt* that its conclusion was compelled by precedent," 76 F.4th at 1015, was not only hotly disputed among this Court's learned Justices, it is also beside the point. The supposedly obvious precedent cited in *McGirt* had been on the books for decades, without any change in behavior as between state and federal authorities and prosecutions. *See Solem v. Bartlett*, 465 U.S. 463 (1984). And, four Honorable Justices believed that the Court had reached "the opposite conclusion only by *disregarding* the 'well settled' approach *required* by our precedents." *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting) (emphasis added), citing *Nebraska v. Parker*,

577 U. S. 481, 487 (2016).

B. The question presented is important and invited by the Court's prior decisions.

In *McGirt*, the Court expressly recognized that its decision "risks upsetting some convictions" and purposefully left open questions about reliance interests for later proceedings. *Id*. at 2480-81. The case at bar presents substantial due process and reliance questions that have the potential to impact any number of criminal defendants. If left uncorrected, the Tenth Circuit's decision would threaten basic constitutional liberty interests, while undermining long-established constitutional precedent and fundamental fairness principles.

Chief Justice Roberts, moreover, observed in his *McGirt* dissent: "The decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law." 140 S. Ct. at 2482 (Roberts, C.J., dissenting). The Court has since recognized the "significant challenge for the Federal Government and for the people of Oklahoma" in the wake of *McGirt*. *Castro-Huerta*, 142 S. Ct. at 2492; *see also id.* ("Going forward, the State estimates that it will have to transfer prosecutorial responsibility for more than 18,000 cases per year to the Federal and Tribal Governments."). This is an important case for the Court to review because it can allow the Court to appropriately articulate the contours of the law in this area following in the wake of *McGirt*.

C. This case is a perfect vehicle for the Court to clarify the standards applicable to recurring issues involving due process implications of judicial decisions with *ex post facto* effects.

1. The jury's response to the special interrogatory presents a clear-cut question.

The ultimate question presented here is purely a legal one of federal constitutional law – *i.e.*, whether judicial *ex post facto* application of *McGirt* violated Budder's rights to due process by criminalizing conduct the federal jury unanimously determined, based on the evidence presented at trial, would have constituted lawful self-defense under Oklahoma's definition, which justifies homicide "when the person using force reasonably believes such force is necessary to … terminate or prevent the commission of a forcible felony." 21 Okla. Stat. § 733. The District Court properly instructed the jury that, while assault and battery are misdemeanors, attempted aggravated assault and battery is a felony (601 F.Supp.3d at 1110; *see also* Vol. 1, at 172-73); and the jury by its answer to the special interrogatory plainly determined that the evidence showed Jumper's aggressive and violent conduct rose to the level of attempted aggravated assault and battery.[4]

The jury's response to the special interrogatory reflected its determination that Budder's shooting of Jumper was precipitated by Jumper's commission of a forcible felony against him. No guesswork is required because the jury gave a clear and unanimous answer to the question. Had Oklahoma's definition of self-defense applied – as any reasonable Oklahoman would have believed at the time – the jury

[4] The District Court acted appropriately and well within its discretion in giving the special interrogatory. *See Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1483 (10th Cir. 1985) ("The submission of special interrogatories lies within the discretion of the trial court and will not be reversed absent an abuse of discretion."), citing *Miller's Nat'l Ins. Co. v. Wichita Flour Mills Co.*, 257 F.2d 93, 101 (10th Cir. 1958).

would have acquitted because, under state law, Budder's conduct was lawful and thus *innocent* when it occurred.

2. The Tenth Circuit's decision conflicts with its own precedents.

In *Smith v. Scott*, 223 F.3d 1191 (10th Cir. 2000), the Tenth Circuit concluded that habeas relief was warranted for "a violation of the Ex Post Facto Clause and due process notions of fair notice" resulting from the Oklahoma Department of Corrections (ODOC)'s rescission of certain earned time credits based on amended ODOC regulation. Quoting this Court, it explained that, "[t]o fall within the ex post facto prohibition, a law must be retrospective – that is, it must apply to events occurring before its enactment – and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime." *Smith*, 223 F.3d at 1194, quoting *Lynce v. Mathis*, 519 U.S. 433, 441 (1997), and citing *Weaver*, 450 U.S. at 29. These requirements are indisputably met here: the deprivation of Budder's complete defense under Oklahoma law of self-defense is the direct result of *McGirt*'s retrospective application to his conduct, and the jury's indication through special interrogatory that it would have acquitted Budder under Oklahoma law of self-defense could not be a clearer expression of the degree to which *McGirt*'s retrospective application disadvantaged Budder. *See Lopez v. McCotter*, 875 F.2d 273, 278 (10th Cir. 1989) ("Because the decision of the New Mexico Court of Appeals was unforeseeable and retroactively rendered Mr. Lopez's conduct criminal by depriving him of the bail bondsman's privilege, it violated the due process clause.").

In *United States v. Patterson*, No. 21-7053, 2022 WL 17685602 (10th Cir. Dec. 15, 2022) (Not Reported in Fed. Rptr.), the Tenth Circuit rejected the argument that its stayed 2017 *Murphy v. Royal* decision provided appropriate notice that eastern Oklahoma was an Indian reservation:

> Patterson's contention that Deputy Youngblood knew or should have known the warrant was defective because *Murphy* had been decided two years earlier is unpersuasive. When Deputy Youngblood obtained and executed the warrant, "Oklahoma's long historical prosecutorial practice" was for state law enforcement to investigate crimes on the land where the offense here occurred and to prosecute them in state court. *McGirt*, 140 S.Ct. at 2470. And Oklahoma courts, including the district court in this case, did not regard *Murphy* as binding because the Tenth Circuit's mandate in that case had not issued.

Patterson, at *5 & n.8, citing *McGirt v. Oklahoma*, No. PC-2018-1057 (Okla. Crim. App. Feb. 25, 2019) (unpublished) ("*Murphy* is not a final decision and Petitioner has cited no other authority that refutes the jurisdictional provisions of the Oklahoma Constitution."), and *Bosse v. State*, 2021 OK CR 30, ¶ 9, 499 P.3d 771, 774 (Okla. Crim. App. 2021) ("[N]o final decision of an Oklahoma or federal appellate court had recognized any of the Five Tribes' historic reservations as Indian Country prior to *McGirt* in 2020."). Again, neither state nor federal prosecutors or other law enforcement authorities changed their behavior in the wake of *Murphy v. Royal*, while it lay in abatement until *McGirt* was decided.

An obvious tension exists between the Tenth Circuit's decisions in *Patterson* and *Budder*.[5] To have one understanding of what is fair and reasonable for police

[5] As noted by the District Court, *see Budder*, 601 F. Supp. 3d at 1115, the district court in *Patterson* stated that it could not "close its eyes and pretend the last century of state court prosecutions did not happen." *See United States v. Patterson*, No. CR-20-71-RAW, 2021 WL

officers and another for criminal defendants is untenable and the sort of unfair discrepancy that the Due Process Clause was designed to guard against. The Tenth Circuit did not even mention *Patterson* or other Fourth or Fifth Amendment suppression / good-faith exception cases, although they were raised in the briefing below.

The government's own words in briefing such cases undermine any argument that *McGirt* did not create a new state of affairs that was contrary to settled understanding before the decision. *See, e.g.,* Government's brief in *Patterson*, No. 21-7053, 2022 WL 1190256, at *19 (10th Cir. Apr. 19, 2022) ("Deputy Youngblood had no idea whatsoever that he was in Indian Country or investigating a crime that occurred in Indian Country. … As of July 2019, Oklahoma had 'maintained unquestioned jurisdiction for more than 100 years'…."), quoting *McGirt*, 140 S. Ct. at 2485 (Roberts, C.J., dissenting); Government's response to motion to suppress in *United States v. Sherwood*, No. 4:20-cr-00307-CVE, 2021 WL 5863517, at *5 (N.D. Okla. Apr. 26, 2021) ("*McGirt* upended over 100 years of legal understanding by lawyers, lawmakers, and police forces"). This same reasoning should apply to Budder (or other similarly situated criminal defendants), who like those officers, had *no* reason to believe he was in "Indian country" at the time of the alleged offense and, instead, had *every* reason to believe that he was subject to the state laws of Oklahoma, including the broader right of self-defense afforded by those laws. *See Budder*, 601 F. Supp. 3d at 1115 ("Put simply, both the Oklahoma

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633022 at *4 (E.D. Okla. Feb. 18, 2021). Yet this is precisely what the Tenth Circuit did in the case at bar.

authorities and the Defendant had every reason to believe that on April 24, 2019, Budder's actions were subject to Oklahoma law.").

3. The Tenth Circuit ignored other relevant cases.

The Tenth Circuit similarly did not even bother to address another set of cases Budder raised in briefing below, in an analogous context where *ex post facto*-based due process principles were properly given effect. These cases arose from a December 2002 determination by the Department of Justice, communicated by memoranda to the Federal Bureau of Prisons (BOP) and to federal judges, regarding a sudden realization of BOP's lack of authority to house certain convicts in community corrections centers (CCCs or halfway houses) for the imprisonment portion of their sentences. *See United States v. Eakman*, 378 F.3d 294 (3d Cir. 2004) (holding that "the sentence imposed violated due process" where the sentencing "judge relied on a mistaken understanding of the law in believing that the [BOP] had the discretion to place him in a community corrections center (also known as a 'halfway-house'), when in fact the [BOP] lacked such authority under the law"); *Ashkenazi v. Attorney General of the United States*, 246 F. Supp. 2d 1, 7 (D.D.C. 2003) (granting preliminary injunction to inmate where "[t]here [was] nothing in the statute or BOP's prior implementation of the statute to suggest that this well-known and long-standing policy would be abruptly changed") (dismissed as moot on appeal, 346 F.3d 191 (D.C. Cir. 2003)); *United States v. Serpa*, 251 F. Supp. 2d 988, 993 (D. Mass. 2003) (granting sentencing downward departure for defendant who pled guilty before the December 2002 directive because "a sentence

that did not make any allowances for [his] reasonable *inability* to foresee such a change when deciding whether to plead guilty would, in this Court's view, raise the specter of an ex post facto violation") (emphasis in original). These cases instruct that a mistake in the government's understanding of authority to act can result in a due process violation.

Despite the absence of a perfect analogue, Budder's case falls squarely within this Court's decisions on "judicial ex post facto" due process violations resulting from judicial interpretations making certain conduct criminal which had before been legal. *See Bouie*, 378 U.S. 347 (South Carolina supreme court expanded scope of trespass statute applied to civil rights protesters at lunch counter); *Marks*, 430 U.S. 188 (Court expanded scope of illegal obscenity applied to marketers of pornographic films).

Under the standards established by these cases and their progeny, which standards focus on whether the new judicial decision was foreseeable in light of the "law which had been expressed prior to the conduct in issue," this Court must hold that the *McGirt* decision "was unforeseeable, and that its retroactive application [to Budder] thereby violated due process." *Devine v. New Mexico Dept. of Corrections*, 866 F.2d 339, 345 (10th Cir. 1989); *cf. Ashkenazi*, 246 F. Supp. 2d at 6-7 ("Relying on the *Weaver* court's emphasis on 'fair notice,' numerous other courts have concluded that the *ex post facto* prohibition applies to administrative rules that purport to correct or clarify a misapplied existing law, provided the new rule was not foreseeable.") (collecting cases, footnote omitted). To suggest that *McGirt* should

be retroactively applied to Budder's April 2019 conduct because this Court's decision was foreseeable at that time would attribute to him a level of clairvoyance that the Due Process Clause cannot tolerate. *See Douglas v. Buder*, 412 U.S. 430, 432 (1973) (rejecting argument that state law be interpreted to equate a traffic citation to an arrest for purposes of probation revocation, where "the unforeseeable application of that interpretation in the case before us deprived petitioner of due process"). Straightforward application of *Bouie* and its progeny suggests that reversal of Budder's conviction is constitutionally required.

Indeed, according to at least one scholarly treatise, this is actually an "easy" case:

> it is obvious that the rationale behind the ex post facto prohibition … is relevant in the situation where a judicial decision is applied retroactively to the disadvantage of a defendant in a criminal case…. ***Perhaps the easiest case is that in which a judicial decision subsequent to the defendant's conduct operates to his detriment by overruling a prior decision which, if applied to the defendant's case, would result in his acquittal.***

1 Wayne R. LaFave, Substantive Criminal Law § 2.4(c), at 162 (2d ed. 2003) (footnotes omitted, emphasis added). There are two inter-related due process considerations at issue in this case: fair warning and a complete defense. Retroactive application of *McGirt* denied Budder of both.

In assessing retroactivity of a new statutory provision, the Court has said:

> the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of

> retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, … familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Landgraf, 511 U.S. at 269-70. In its cursory and dismissive opinion here, the Tenth Circuit improperly ignored such guidance, which it led it to the wrong result. That result contravenes sixty years of precedent and threatens intolerable damage to core due process principles. This Court's review is necessary.

CONCLUSION

For the foregoing reasons, Mr. Budder respectfully asks this Honorable Court to grant his petition for a writ of certiorari to review this case.

Respectfully submitted this 5th day of December, 2023.

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