No. 24-5424

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

BRYAN CHRISTOPHER O'ROURKE, PETITIONER,

vs.

CARRIE BRIDGES, WARDEN, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioner, *pro se*:

Bryan Christopher O'Rourke
#854732
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P.O. Box 700
Hinton, OK 73047

Dated: June 7, 2024

Petitioner Bryan Christopher O'Rourke is a *pro se* state prisoner at the Great Plains Correctional Facility, P.O. Box 700 Unit EE-09, Hinton, Oklahoma 73047. The facility phone number is 405-778-7000.

Mr. O'Rourke's pauper's affidavit and other required filing documents were previously submitted to the Court in his request for a 60-day extension of time. *See* Appendix (App.) 1.

QUESTION PRESENTED

This is a case about: (1) the State of Oklahoma's suppression of material and exculpatory impeachment evidence in its possession to evade the presentation and consideration of a complete defense and Federal question, and; (2) the due process requirements forbidding the retroactive application of a judicial interpretation of a federal criminal statute that (a) expanded the statute's scope and (b) eliminated a common law defense available at the time of the alleged conduct, both in an unexpected and indefensible way.

1. Suppression of Evidence

This Court's *Brady v. Maryland*, 373 U.S. 83 (1963) doctrine requires prosecutors to disclose favorable, material evidence to the defense. *Brady* teaches that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. In *Giglio v. United States*, 405 U.S. 150, 154-155 (1972), *Brady* was expanded to include impeachment evidence. Next, *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality), further extended *Brady*, eliminating the requirement that the defendant make a request for the evidence. *See also id.* at 685 (White, J., concurring in part and concurring in the judgment).

The elimination of the need for a defense request placed a self-executing, affirmative obligation on the prosecution to discern and disclose the evidence, independent of any defense action. *Bagley*, 473 U.S. at 682 (plurality opinion); *id.* at 685 (White, J., concurring in part and concurring in the judgment); *Banks v. Dretke*, 540 U.S. 668, 696 (2004). *See* 2 Charles Alan Wright & Peter J. Henning, Federal Practice and Procedure § 256, at 151 (4th ed. 2009) ("The Court reiterated in *Banks v. Dretke* the requirement that prosecutors have an independent duty to disclose *Brady* material that is not conditioned on a defendant's request for such material....") (footnote omitted). *But see Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (plurality) (the "trial court's discretion is not unbounded. If a defendant is aware of specific information contained in

the file (*e.g.*, the medical report), he is free to request it directly from the court, and argue in favor of its materiality").

In *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), this Court again extended *Brady*, announcing that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." These extensions effectuate the original purpose of *Brady*: to prevent the government from suppressing evidence critical to a fair trial.

Under Oklahoma law, the Oklahoma Department of Human Services, its subcontractors (including counselors, therapists, and other medical and mental health professionals), and the police are members of the prosecution team. *See* 10A O.S. § 1-1-105(47) (" 'Multidisciplinary child abuse team' means any team ... of three or more persons who are trained in the prevention, identification, investigation, prosecution, and treatment of physical and sexual child abuse and who are qualified to facilitate a broad range of prevention- and intervention-related services related to child abuse."); 10A O.S. § 1-9-102 (multidisciplinary teams are developed by the district attorney with "team members" "include[ing], but not limited to: Mental health professionals ...; Police officers or other law enforcement agents ...; Medical personnel ...; Child protective services workers within the Department of Human Services; Multidisciplinary child abuse team coordinators, or Child Advocacy Center personnel; and [t]he district attorney or assistant district attorney"); *id.* at 1-9-102(C)(2) ("All investigations of child sexual abuse ... and interviews of child abuse or neglect victims shall be carried out by appropriate personnel using the protocols and procedures specified in this section."). *See also* 10A O.S. § 1-2-102(A)(2)-(3); Okla. Admin. Code 340:75-3-440. These multidisciplinary teams certainly know – or should know – of *Brady* evidence it is obligated to disclose pursuant to *Kyles* irrespective of a disclosure request or a *Ritchie in camera* judicial review request by the defense, whether pretrial or postconviction.

> [U]nder *Brady*[,] the agency ... which has consulted with the prosecutor in the steps leading to prosecution, is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute. The government cannot with its right hand say it has nothing while its left hand holds what is of value. *United States v. Endicott*, 869 F.2d 452, 455 (9th Cir. 1989); *cf. Santobello v. New York*, 404 U.S. 257, 262, ... (1971). The government in the form of the prosecutor cannot tell the court the court that there is

> nothing more to disclose while the agency interested in the prosecution holds in its files information favorable to the defendant.

U.S. v. Wood, 57 F.3d 733, 737 (9th Cir. 1995).

This Court has made statements in *dicta* for its reasoning that the government's duty to disclose material exculpatory and impeachment evidence and to correct perjured testimony seemingly extends to the appellate stages. *See Banks*, 540 U.S. at 675 ("Through direct appeal and state collateral review proceedings, the State continued to hold secret the key witnesses' links to the police and allowed their false statements to stand uncorrected."). "When police and prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Id.* at 675-676. *See also Ritchie*, 480 U.S. at 60 (the government's duty to disclose is "ongoing" because information the reviewing court may deem "immaterial upon original examination may become important as the proceedings progress"). *Ritchie* made clear that, even when *Brady* evidence is contained in privileged and confidential child abuse files, it must be disclosed when it is in the government's possession; the "obligation to disclose exculpatory material does not depend on the presence of a specific request." *Ritchie*, 480 U.S. at 58 n.15. However, the Court has never actually held that the government's disclosure obligations extend to appellate stages – even when, as here, the trial prosecutor has explicitly notified the appellate prosecutor of dispositive information requiring appellate relief. *See, e.g., House v. Hatch*, 527 F.3d 1010, 1017 (10th Cir. 2008) (holding that the absence of clearly established law is dispositive because this Court must expressly extend legal rules to a context).

State prosecutors and appellate judges are no dummies; they recognize that even if a federal habeas court grants relief under *Brady*, the AEDPA limits federal habeas relief to the outright holdings of this Court. *Ritchie* provides a loophole to suppress *Brady* evidence hidden in privileged and confidential juvenile files, and if the evidence is not discovered by a defendant until the state direct and collateral or federal habeas appellate stages, even the innocent risk prolonged languishment in prison. The government can gamify its disclosure obligations as only being constitutionally required pretrial.

In *Ritchie*, 480 U.S., the majority held that under the Due Process Clause of the Fourteenth Amendment, the defendant was entitled to the disclosure of material information contained within confidential files stemming from a juvenile court proceeding.

The Court noted that although a defendant is entitled to discovery of exculpatory information from the government, the defense may not make the sole determination of the evidence to be disclosed. *Ritchie*, 480 U.S. at 60. This is so, according to the majority, because of the compelling state interest in retaining the confidentiality of child abuse investigative files. *Id.* at 60-61. The majority remanded the case and instructed the trial court to review the confidential file *in camera* and to release any material evidence to the defendant. *Id.* ("We find that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the ... files be submitted only to the trial court for *in camera* review.").

While a defendant is entitled to material evidence contained in the juvenile files, *Ritchie*, 480 U.S. at 58, the majority stated that right does "not include the unsupervised authority to search through [the juvenile] files." *Id.* at 60. The majority claimed the Court "has never held – even in the absence of a statute restricting disclosure – that a defendant alone may make the determination as to the materiality of information." *Id.* at 59. This, despite the Court's prior acknowledgement that the "determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis v. United States*, 384 U.S. 855, 875 (1966). The *Ritchie* Court set threshold requirements for *in camera* review of juvenile records; defendants must "establish[] a basis for his claim that it contains material evidence." *Id.* at 58 n.15.

The consistent and nationwide problem with *Ritchie* is that it prevents meaningful review by defense counsel unless they already know something about what the files contain before requesting *in camera* review from the responsible court. *Ritchie's* process genuinely interferes with *Brady's* requirement that material exculpatory and impeachment information be disclosed by the government in all criminal cases. To that end, the State has interpreted *Ritchie* to contain a loophole allowing it to suppress *Brady* evidence in juvenile proceedings related to criminal proceedings. It has gamified criminal prosecutions – and their related appeals – with the very "rule [] declaring [the] 'prosecutor may hide, defendant must seek' " scenario this Court determined is untenable. *Banks*, 540 U.S. at 696. According to the Oklahoma Attorney General, even when the government wins a tainted conviction, it has no continuing affirmative duty to investigate nor identify *Brady* information at any appellate stage like a prosecutor does at the time of trial. However, this case does not involve an appellate prosecutor's obligation to investigate, but to disclose *Brady* information explicitly provided to the Oklahoma Attorney

General during the pendency of O'Rourke's direct appeal by the trial prosecutor. *Cf. Harris v. Farris*, No. CIV-20-282-RAW-KEW, 2022 WL 4553070 at *4 (E.D. Okla. Sept. 29, 2022) (denying habeas petitioner's discovery request for *Brady* materials where petitioner cited "no Supreme Court or lower authority which gives prosecutors in habeas cases the same affirmative duty to *investigate* as that of a district attorney at the time of trial," and stating that the "absence of Supreme Court case law is dispositive of [p]etitioner's claim") (citation omitted).

In a California state habeas proceeding presenting very similar circumstances as here, an appellant claimed her trial was unfair because the government suppressed evidence in violation of *Brady*. She asserted the suppressed evidence would have supported her self-defense claim and the impeachment of a key witness, because the deceased and the key witness had previously been declared wards of the juvenile court based on an aggravated assault incident.

Like the Oklahoma Attorney General in the pending federal habeas proceeding below, the California:

> Attorney General filed an answer stating he had no 'obligation to provide additional evidence' pertaining to [the appeal]. Specifically, the Attorney General maintained he had no constitutional, ethical, or prosecutorial duty to disclose evidence of the alleged prior prosecution in response to [the appeal.]

In re Jenkins, 14 Cal.5th 493, 498, 525 P.3d 1057, 1062 (Cal. 2023).

Relying in part on *Ritchie*, 480 U.S., the California Supreme Court held that the prosecution – including the California Attorney General on appeal – has a constitutional duty, under the Fourteenth Amendment's Due Process Clause, to disclose to the defense material exculpatory evidence, including potential impeaching evidence, and the obligation is not limited to evidence the prosecutor's office itself actually knows of or possesses, but includes evidence known to the others acting on the government's behalf in the case. "[W]here a habeas corpus petitioner claims not to have received a fair trial because a trial prosecutor failed to disclose material evidence in violation of *Brady* – and where the Attorney General has knowledge of, or is in actual or constructive possession of, evidence that the trial prosecutor suppressed in violation of *Brady* – the Attorney General has a constitutional duty under *Brady* to disclose the evidence." *In re Jenkins*, 14 Cal.5th at 512.

The California Supreme Court also held that (1) the California Attorney General has a disclosure duty under California's Attorney Professional Conduct Rule 3.8(d);[1] (2) the AG may plead inability to plead facts about an alleged *Brady* violation due to a disclosure bar under California's statutory scheme governing juvenile court records or a related protective order, but must inform the appellant or appellant's counsel of the procedures to obtain material *Brady* information from the protected and privileged juvenile records, and; (3) the AG must make any such evidence in the government's possession available for *in camera* review. *In re Jenkins*, 14 Cal.5th at 518.

A state appellate court's refusal to adhere to this Court's precedents they disfavor is nothing new. State attorneys general and appellate courts sometimes engage in subterfuge to evade federal questions or engage in procedural ingenuity to do anything but provide the relief this Court's decisions require. Too often, prosecutors whom are more concerned with winning convictions at any cost utilize loopholes – as contemplated by the questions presented here – to evade their obligation to adhere to this Court's precedents. That is precisely what happened below.

If this Court "will not presently shoulder the burden of correcting [its] own mistake [in *Ritchie's* disclosure loophole,]" *Cunningham v. Florida*, 142 S.Ct. 1287, 1288 (2024) (Gorsuch, J., dissenting from the denial of certiorari), the State will continue to misuse the privacy protections of juvenile court proceedings to suppress material exculpatory and impeachment evidence relevant to criminal proceedings.

For more than 6 years O'Rourke has languished in prison for a crime he did not commit, and even though the Oklahoma Attorney General had *Brady* evidence in its possession proving its jurisdiction was preempted and supporting his factual innocence, it utilized *Ritchie's* loophole to evade disclosure to the Defense and to the Oklahoma Court of Criminal Appeals. This case presents an ideal vehicle to close or at least narrow *Ritchie's* loophole. "Justice done late is better than justice not done at all." *Wood*, 57 F.3d at 739.

2. Due Process Requires an Individual Case Basis Inquiry to Determine Whether a New Decision from this Court Can be Retroactively Applied to Deny Relief

The principal of "fair warning" has "long been part of our tradition," *U.S. v. Bass*, 404 U.S. 336, 348 (1971), and is recognized as "fundamental to our concept of constitutional

[1] Oklahoma's rule 3.8(d) is materially identical to California's rule.

liberty." *Marks v. U.S.*, 430 U.S. 188, 191 (1977). This Court has relied on the principle of fair warning time and again in its decisions. *See, e.g., Arthur Anderson LLP v. United States*, 544 U.S. 696, 703 (2005) (" 'We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, ... and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain law is passed' ' ") (citations omitted); *Rogers v. Tennessee*, 532 U.S. 451 (2001) (judicial abrogation of available common law defense violates fair warning principle of Due Process Clause when its retroactive application is unexpected and indefensible); *U.S. v. Lanier*, 520 U.S. 259, 265-266 (1977) (due process bars courts from applying novel construction of criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope); *U.S. v. Aguilar*, 515 U.S. 593, 600 (1995) (fair warning present in catchall provision of federal statute); *Marks*, 430 U.S. at 191-192 (due process precluded retroactive application of standard established in *Miller v. California*, 413 U.S. 15 (1973) to conduct occurring before that decision; however, constitutional principles announced in *Miller* that benefited the petitioners must be applied to their case); *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (retroactive application of unforeseeable state-court construction of criminal statute violates due process) (per curiam); *Rabe v. Washington*, 405 U.S. 313, 316 (1972) (state court interpretation of vague criminal statute violated fair notice principles of due process) (per curium); *Bass*, 404 U.S. at 348 (courts must apply rule of lenity to ambiguous statutes to ensure due process principles of fair warning and to prevent judicial legislation); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (retroactive application of judicial interpretation of criminal statute violated due process).

Oklahoma's federal habeas courts have recognized that the Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), "vastly expanded" federal "jurisdiction over the apprehension and prosecution of major crimes by or against Indians" in "Indian country." *United States v. Budder*, 601 F.Supp.3d 1105, 1114 (E.D. Okla. Apr. 29, 2022) (quoting *State ex rel. Matloff v. Wallace*, 497 P.3d 686, 692 (Okl.Cr. 2021)). The district court recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments "operates to protect criminal defendants from any 'unforeseeable judicial enlargement' which when applied retroactively 'operate precisely like an *ex post facto* law.' " *Budder*, 601 F.Supp.3d at 1112 (quoting *Bouie*, 378 U.S. at 353 and citing *Marks*, 430 U.S. at 192).

The Tenth Circuit agreed that *McGirt* expanded the scope of the MCA, but affirmed the district court's denial of relief. The Tenth Circuit determined that *McGirt* was not unexpected and indefensible by reference to the law which had existed because it relied on this Court's prior precedent to determine the Muscogee Nation Reservation was never disestablished by Congress. *See United States v. Budder*, 76 F.4th 1007, 1015-16 & n.3 (10th Cir. 2023).

According to this Court's latest definitive statement of the fair-warning rule, due process prohibits the retroactive application of judicial interpretations which expand criminal statutes, and separately, the retroactive application of the judicial abolishment of a common law defense available at the time of the alleged criminal conduct when either of those judicial interpretations are "unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue." *Rogers*, 532 U.S. at 461 (quoting *Bouie*, 378 U.S. at 354).

The questions presented is:

> Whether *Brady* and the Fourteenth Amendment requires States to disclose exculpatory and impeachment evidence on direct, collateral and federal habeas appeals, especially where a new decision from this Court applies to cases pending on direct review, the new decision's holding is raised on direct appeal, and evidence in the government's possession relevant to the claim is rendered material pursuant to *Pennsylvania v. Ritchie*.
>
> Whether the Court should reconsider *Pennsylvania v. Ritchie's* exclusion of defense counsel's ability to review privacy-protected juvenile records.
>
> Whether the retroactive application of a judicial decision expanding the scope of a criminal statute which concomitantly eliminated a complete common law defense available at the time of the alleged conduct requires an individual case basis inquiry to determine if the retroactive application of the decision violates due process.

LIST OF PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii):

- *In the Matter of B.G.O. and B.E.O.*, Alleged Deprived Children, No. JD-2017-290 (Tulsa County Juvenile Division) (Termination of Parental Rights (TPR) proceeding);
- *O'Rourke v. State*, MA-2023-891 (Okl.Cr. Nov. 13, 2023) (denying mandamus relief sought in JD-2017-290), transferred from Oklahoma Supreme Court;[2]

[2] Available at: https://oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=MA-2023-891.

- *State of Oklahoma v. Bryan Christopher O'Rourke*, No. CF-2017-4236 (Tulsa County District Court, Sept. 13, 2019, criminal jury trial conviction);[3]
- *O'Rourke v. State*, F-2019-935 (Okl.Cr. April 15, 2021) (direct appeal, conviction affirmed);[4]
- *O'Rourke v. State*, PC-2023-332 (Okl.Cr. June 30, 2023) (post-conviction appeal denied);[5]
- *O'Rourke v. Bridges*, WH-2023-3 (Alfalfa County, Okla., Sept. 11, 2023) (original state habeas appeal denied);[6]
- *O'Rourke v. Angle*, MA-121670 (Okla., writ of prohibition construed by the court as a writ of mandamus, filed Oct. 9, 2023), *transferred to* MA-2023-878 (Okl.Cr. Nov. 13, 2023) (order declining jurisdiction);[7]
- *O'Rourke v. Bridges*, No. 121,704 (Okla. Dec. 18, 2023) (original state habeas appeal) *declining jurisdiction and transferring to Oklahoma Court of Criminal Appeals in* HC-2023-1022 (Okl.Cr. Jan. 10, 2024);[8]
- *O'Rourke v. Hamilton*, No. 23-CV-0290-JDR-CDL (N.D. Okla.) (federal habeas corpus).[9]

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[3] Available at: https://www.oscn.net/dockets/GetCaseInformation.aspx?ct=Tulsa&number=CF-2017-4236.

[4] The direct appeal docket and filed documents are available in PDF format at https://www.oscn.net/dockets/GetCaseInformation.aspx?db=apellate&number=F-2019-935.

[5] The post-conviction appeal docket and filed documents are available in PDF format at https://www.oscn.net/dockets/GetCaseInformation.aspx?db=apellate&number=PC-2023-332.

[6] The original state district habeas docket and filed documents are available in PDF format at: https://www.oscn.net/dockets/GetCaseInformation.aspx?ct=Alfalfa&number=WH-2023-3.

[7] The application filed in the Oklahoma Supreme Court is available at: https://oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=MA-1216708. The same application transferred to the Oklahoma Court of Criminal Appeals is available at: https://oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=MA-2023-878.

[8] The application filed in the Oklahoma Supreme Court is available at: https://oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=HC-121704. The same application transferred to the Oklahoma Court of Criminal Appeals is available at: https://oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=HC-2023-1022.

[9] Mr. O'Rourke has requested the federal district court to place his § 2254 habeas appeal in a protective stay and abeyance pending disposition of his request for certiorari review in this Court and exhaustion of other claims in state court. *See id.* at Doc. 32.

LIST OF APPENDICES

TABLE OF AUTHORITIES

Cases

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CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment states in relevant part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law.

U.S. Const. Amend. XIV.

The Suspension Clause of the U.S. Constitution holds that:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. Const. Art. I, § 9, cl. 2.

The Suspension Clause of the Oklahoma Constitution holds:

> The privilege of the writ of habeas corpus shall never be suspended by the authorities of this State.

Okla. Const. Art. 2, § 10.

Article 7, § 4 of the Oklahoma Constitution holds in relevant part:

> The appellate jurisdiction of the Supreme Court shall be coextensive with the State and shall extend to all cases at law and in equity; except that the Court of Criminal Appeals shall have exclusive appellate jurisdiction in criminal cases until otherwise provided by statute ... The Supreme Court, Court of Criminal Appeals, in criminal matters and all other appellate courts shall have power to issue, hear and determine writs of habeas corpus, ... as may be provided by law and may exercise such other and further jurisdiction as may be conferred by statute.

Okla. Const. Art. 7, § 4.

Article 7, § 7 of the Oklahoma Constitution holds:

> The District Court shall have unlimited original jurisdiction of all justiciable matters, except as otherwise provided in this Article, and such powers of review of administrative action as may be provided by statute.

Okla. Const. Art. 7, § 7.

STATUTORY PROVISIONS INVOLVED

10A O.S. § 1-6-102(E) provides that:

> When confidential records may be relevant in a criminal, civil, or administrative proceeding, an order of the court authorizing the inspection, release, disclosure, correction, or expungement of confidential records shall be entered by the court only after a judicial review of the records and a determination of necessity pursuant to the following procedure:

1. A petition or motion shall be filed with the court describing with specificity the confidential records being sought and setting forth in detail the compelling reason why the inspection, release, disclosure, correction, or expungement of confidential records should be ordered by the court. A petition or motion that does not contain the required specificity or detail may be subject to dismissal by the court;

2. Upon the filing of the petition or motion, the court shall set a date for a hearing and shall require notice of not less than twenty (20) days to the agency or person holding the records and the person who is the subject of the record if such person is eighteen (18) years of age or older or to the parents of a child less than eighteen (18) years of age who is the subject of the record, to the attorneys, if any, of such person, child or parents and any other interested party as ordered by the court. The court may also enter an ex parte order compelling the person or agency holding the records to either produce the records to the court on or before the date set for hearing or file an objection or appear for the hearing. The court may shorten the time allowed for notice due to exigent circumstances;

3. At the hearing, should the court find that a compelling reason does not exist for the confidential records to be judicially reviewed, the matter shall be dismissed; otherwise, the court shall order that the records be produced for a judicial review. The hearing may be closed at the discretion of the court; and

4. The judicial review of the records shall include a determination, with due regard for the confidentiality of the records and the privacy of persons identified in the records, as to whether an order should be entered authorizing the inspection, release, disclosure, correction, or expungement of the records based upon the need for the protection of a legitimate public or private interest.

10A O.S. § 1-9-102 provides in relevant part:[10]

A. 1. In coordination with the Oklahoma Commission on Children and Youth, each district attorney shall develop a multidisciplinary child abuse team in each county of the district attorney or in a contiguous group of counties.

2. The lead agency for the team shall be chosen by the members of the team. The team shall intervene in reports involving child sexual abuse or child physical abuse or neglect.

B. The multidisciplinary child abuse team members shall include, but not be limited to:

[10] Subsections D and E omitted.

1. Mental health professionals licensed pursuant to the laws of this state or licensed professional counselors;

2. Police officers or other law enforcement agents with a role in, or experience or training in child abuse and neglect investigation;

3. Medical personnel with experience in child abuse and neglect identification;

4. Child protective services workers within the Department of Human Services;

5. Multidisciplinary child abuse team coordinators, or Child Advocacy Center personnel; and

6. The district attorney or assistant district attorney.

C. 1. To the extent that resources are available to each of the various multidisciplinary child abuse teams throughout the state, the functions of the team shall include, but not be limited to, the following specific functions:

a. whenever feasible, law enforcement and child welfare staff shall conduct joint investigations in an effort to effectively respond to child abuse reports,

b. develop a written protocol for investigating child sexual abuse and child physical abuse or neglect cases and for interviewing child victims. The purpose of the protocol shall be to ensure coordination and cooperation between all agencies involved so as to increase the efficiency in handling such cases and to minimize the stress created for the allegedly abused child by the legal and investigatory process. In addition, each team shall develop confidentiality statements and interagency agreements signed by member agencies that specify the cooperative effort of the member agencies to the team,

c. increase communication and collaboration among the professionals responsible for the reporting, investigation, prosecution and treatment of child abuse and neglect cases,

d. eliminate duplicative efforts in the investigation and the prosecution of child abuse and neglect cases,

e. identify gaps in service or all untapped resources within the community to improve the delivery of services to the victim and family,

f. encourage the development of expertise through training. Each team member and those conducting child abuse investigations and interviews of child abuse victims shall be trained in the multidisciplinary team approach, conducting legally sound and age-

appropriate interviews, effective investigation techniques and joint investigations as provided through the State Department of Health, the Commission on Children and Youth, or other resources,

g. formalize a case review process and provide data as requested to the Commission for freestanding teams, and

h. standardize investigative procedures for the handling of child abuse and neglect cases.

2. All investigations of child sexual abuse and child physical abuse or neglect and interviews of child abuse or neglect victims shall be carried out by appropriate personnel using the protocols and procedures specified in this section.

3. If trained personnel are not available in a timely fashion and, in the judgment of a law enforcement officer of the Department of Human Services, there is a reasonable cause to believe a delay in investigation or interview of the child victim could place the child in jeopardy of harm or threatened harm to a child's health or welfare, the investigation may proceed without full participation of all personnel. This authority applies only for as long as reasonable danger to the child exists. A reasonable effort to find and provide a trained investigator or interviewer shall be made.

4. Freestanding multidisciplinary child abuse teams shall be approved by the Commission. The Commission shall conduct an annual review of freestanding multidisciplinary teams to ensure that the teams are functioning effectively. Teams not meeting the minimal standards as promulgated by the Commission shall be removed from the list of functioning teams in the state.

F. 2. The multidisciplinary child abuse team used by the child advocacy center for its accreditation shall meet the criteria required by a national association of child advocacy centers and, in addition, the team shall:

a. choose a lead agency for the team,
b. intervene in reports involving child sexual abuse and may intervene in child physical abuse or neglect,

c. promote the joint investigation of child abuse reports between law enforcement and child welfare staff, and

d. formalize standardized investigative procedures for the handling of child abuse and neglect cases.

G. Multidisciplinary child abuse teams and child advocacy centers shall have full access to any service or treatment plan and any personal data known to the Department which is directly related to the implementation of this section.

H. Each member of the team shall be responsible for protecting the confidentiality of the child and any information made available to such person as a member of the team. The multidisciplinary team and any information received by the team shall be exempt from the requirements of Sections 301 through 314 of Title 25 of the Oklahoma Statutes and Sections 24A.1 through 24A.31 of Title 51 of the Oklahoma Statutes.

12 O.S. § 1331 provides that:

Every person restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal.

12 O.S. § 1333 provides that:

Writs of habeas corpus may be granted by any court of record in term time, or by a judge of any such court, either in term or vacation; and upon application the writ shall be granted without delay.

12 O.S. § 1350 provides that:

The officer shall execute the writ by bringing the person therein named before the court or judge; and the like return and proceedings shall be required and had as in case of writs of habeas corpus.

12 O.S. § 2202 provides in relevant part:

A. This section governs only judicial notice of adjudicative facts.

B. A judicially noticed adjudicative fact shall not be subject to reasonable dispute in that it is either:

1. Generally known within the territorial jurisdiction of the trial court; or

2. Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

C. A court may take judicial notice, whether requested or not.

D. A court shall take judicial notice if requested by a party and supplied with the necessary information.

22 O.S. § 1080[11] provides in relevant part:
Any person who has been convicted of, or sentenced for, a crime and who claims:

(a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;

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11 Effective July 1, 1970 to October 31, 2022.

(b) that the court was without jurisdiction to impose sentence;

...

(d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

...

(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

22 O.S. § 1080.1[12] provides in relevant part:

A. A one-year period of limitation shall apply to the filing of any application for post-conviction relief, whether an original application or a subsequent application. The limitation period shall run from the latest of:

1. The date on which the judgment of conviction or revocation of suspended sentence became final by the conclusion of direct review by the Oklahoma Court of Criminal Appeals or the expiration of the time for seeking such review by the Oklahoma Court of Criminal Appeals;

...

3. The date on which any impediment to filing an application created by a state actor in violation of the Constitution of the United States or the Constitution of the State of Oklahoma, or laws of the State of Oklahoma, is removed, if the petitioner was prevented from filing by such action;

...

5. The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

B. Subject to the exceptions provided for in this section, this limitation period shall apply irrespective of the nature of the claims raised in the application and shall include jurisdictional claims that the trial court lacked subject-matter jurisdiction.

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[12] Effective November 1, 2022. Section 1080.1 was the Oklahoma Legislature's response to the Oklahoma Executive's and Judiciary's outcries over the effect of *McGirt*.

C. The provisions of this section shall apply to any post-conviction application filed on or after the effective date of this act.

22 O.S. § 1084 provides that:

> If the application cannot be disposed of on the pleadings and record, or there exists a material issue of fact, the court shall conduct an evidentiary hearing at which time a record shall be made and preserved. The court may receive proof by affidavits, depositions, oral testimony, or other evidence and may order the applicant brought before it for the hearing. A judge should not preside at such a hearing if his testimony is material. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment.

22 O.S. § 1086[13] provides that:

> All grounds for relief available to an applicant under this act must be raised in his or her original supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

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[13] Effective July 1, 1970 to October 31, 2022. Post- *McGirt*, the Oklahoma Legislature amended § 1086 to require "claims challenging the jurisdiction of the trial court" must be raised in the "original, supplemental or amended application" for post-conviction relief.

STATEMENT OF THE CASE[1]

This case arises from a State original habeas corpus appeal of a lewd molestation conviction after jury trial pursuant to 21 O.S. § 1123 . *See* App. 1-7 (Oklahoma Court of Criminal Appeals 'Order Declining Jurisdiction'). The Tulsa County District Court (trial court) imposed a 120 consecutive years sentence in the custody of the Oklahoma Department of Corrections (ODOC).

In March of 2017, Mr. O'Rourke's teenage stepdaughter falsely accused him of sexually abusing her. He is innocent of each count of conviction and continues to diligently collect and provide proof to the courts below that the State unlawfully suppressed material exculpatory and impeachment evidence which supports his factual innocence, as well as *prima facie* evidence in the State's possession before criminal charges were filed against him establishing the complainant's Indian status for the purposes of tribal and federal preemption. O'Rourke is illegally confined because under the extant law of this case, the State of Oklahoma (State) is without criminal jurisdiction to charge, try, convict, and imprison him as it is preempted by Federal law at the time of the alleged conduct. *See McGirt v. Oklahoma*, 140 S.Ct. 2452 (July 9, 2020); *see also* Indian Country General Crimes Act, 18 U.S.C. § 1152 (GCA).

As shown below, under the narrow and specific facts of O'Rourke's case, the OCCA's retroactive application of *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486 (2022) (holding that the GCA does not preempt state jurisdiction, and that the State has concurrent jurisdiction with the Government over alleged crimes by a non-Indian against an Indian in Indian country), violates due process and is objectively unreasonable. This is so because *Castro-Huerta* did two things that prevent its retroactive application: First, it expanded the GCA in an unexpected and indefensible way as-applied to O'Rourke. Second, it eliminated a complete Oklahoma common law preemption defense available to him at the time of the alleged conduct. His direct appeal was pending when the Court decided *McGirt*, 140 S.Ct., it applies to his case *ab initio*, and he was the first (or at least one of the very first) people to raise a GCA preemption defense post- *McGirt* on direct appeal.

Notwithstanding the unexpected and indefensible expansion of the GCA and elimination of the complete GCA preemption defense, this case cries out for the Court's intervention because

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[1] Pursuant to S. Ct. Rule 14.1(g). This Petition is approximately 40 pages from the Statement to its Conclusion. *See* pp. 1-40.

the conviction below is demonstrably tainted by the State's suppression of material exculpatory and impeachment evidence. Without intervention and a prescription of strong medicine, the OCCA will continue to brush aside serious constitutional violations where it disfavors a decision issued by this Court, *e.g.*, *McGirt*, 140 S.Ct., and the State will continue to violate *Brady v. Maryland*, 373 U.S. 83 (1963), and similar cases with impunity. In other words, if this Court "will not presently shoulder the burden of correcting [its] own mistake," *Ritchie v. Cunningham*, --- S.Ct. ----, 2024 WL 2709356 at *2, of leaving a loophole in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the State will continue to abuse the privacy protections of juvenile court proceedings to suppress material exculpatory and impeachment evidence relevant to criminal proceedings.

This case is also worthy of the Court's review because the OCCA refuses to engage in an as-applied due process analysis of whether *Castro-Huerta* can be applied to prevent O'Rourke's GCA preemption defense. In the OCCA's myopic view expressed in a different case that was vacated by the OCCA pursuant to GCA preemption but later vacated by this Court alongside *Castro-Huerta*, the OCCA held that *Castro-Huerta* "is not a substantive change in the criminal law." *Purdom v. State*, 2022 OK CR 31, ¶ 17, 523 P.3d 54, 59.[2] The OCCA further determined that *Castro-Huerta* did not "address the defenses available" and for that reason, Mr. Purdom's retroactive due process challenge failed. *Purdom*, 2022 OK CR at ¶ 17, 523 P.3d at 59.

The OCCA went beyond what was before it in *Purdom*, and its analysis there is misplaced: *Castro-Huerta* was not retroactively applied to *Purdom* because the relief previously granted by the OCCA in that very case was vacated and remanded by this Court pursuant to *Castro-Huerta*. *See Oklahoma v. Purdom*, 142 S.Ct. 2896 (Mem.) (2022). This Court has made clear time-and-again that its decisions apply to the party before it and prospectively thereafter, with limited and defined exceptions. *Castro-Huerta's* holding was not unexpected and indefensible for Mr. Purdom (nor the other appellees whose cases were granted certiorari review alongside Mr. Castro-Huerta). Conversely, O'Rourke's case was not before this Court when *Castro-Huerta* was decided. In fact, his conviction was final before the State even sought certiorari review in *Castro-Huerta*.

As-applied to O'Rourke, the OCCA's reasoning in *Purdom* does not matter, nor does the fact that *Castro-Huerta* did not directly address the elimination of the GCA preemption defense.

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[2] The OCCA says nothing in *Purdom* about the substantive effect of *Castro-Huerta's* expansion of the GCA and elimination of the GCA preemption defense.

What matters is that (1) the record on its face evidences that the State suppressed the complainant's adjudicated Indian status to prevent the OCCA from granting relief and in hopes that the GCA's preemptive effect would not be discovered, and (2) two other outright holdings of this Court require as-applied analyses for whether the retroactive application of a judicial decision that unexpectedly and indefensibly expands the scope of a criminal statute or eliminates any defense available at the time of the alleged criminal conduct violates due process and thus is prohibited.

There is overwhelming evidence the State, including but not limited to the Oklahoma Department of Human Services (OKDHS), the Tulsa County District Attorney's Office (TCDA), and the Oklahoma Attorney General's Office (OAG) suppressed evidence that the complainant in a Termination of Parental Rights (TPR) and criminal proceeding against O'Rourke is an adjudicated Choctaw Indian. The State did this pretrial and during the direct appeal stage – despite O'Rourke's raised preemption defense – and has continued to deny her Indian status in state collateral appeals and in federal habeas proceedings. This, despite a pretrial court order to disclose material exculpatory and impeachment evidence the State attempted to suppress in the TPR proceedings.

There is also evidence the State suborned perjury from an alleged eyewitness yet did nothing to correct it, *see Strickler v. Greene*, 527 U.S. 263 (1999) (alleged eyewitness impeachment documents are favorable and the defense can reasonably rely on government's claims it has complied with its disclosure obligations); *Smith v. Cain*, 565 U.S. 73 (2012) (witness statements made to government soon after alleged crime is material), and entered an immunity agreement with O'Rourke's then-wife (the complainant's natural mother) in exchange for the complete reversal of her prior statements to the State she knew the allegations of sexual abuse were not just false, but impossible, and; provided his ex-wife pecuniary benefits in exchange for her reversed testimony. *See Napue v. Illinois*, 360 U.S. 264 (1959) (false witness testimony that they were provided no benefits for their testimony and government's failure to correct the false testimony violates due process).

As shown in the 'Timeline of Relevant Events' section, the State suppressed the complainant's Indian status because it recognized its preemptive effect; under the extant Oklahoma law of this case, it would have no choice but to dismiss the charges against him and

refer the case to the Muscogee Nation and/or the United States Attorney for the Northern District of Oklahoma.

In an effort to sweep its misdeeds under the rug, the courts below misapplied State law and procedural bars, declined jurisdiction required under Oklahoma's Constitution and statutes, and engaged in subterfuge to evade what was – at the time of the alleged conduct and through the finality of O'Rourke's conviction – a purely federal issue. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975).

Timeline of Relevant Events

In March of 2017, OKDHS initiated an investigation against (1) O'Rourke after his teenage stepdaughter accused him of sexual abuse; (2) his then-wife and the complainant's natural mother for, *inter alia*, failure to protect the complainant from sexual abuse, and; (3) the complainant's natural father for, *inter alia*, failure to protect the complainant from sexual abuse.

On March 23, 2017, OKDHS entered a 'Child Safety Meeting Request Form' based on "sexual abuse" allegations. *See* App. 2 ('Child Safety Meeting Request Form'). The Form lists the complainant and her siblings as "Choctaw/pawnee" (lower case in original). *Id.* It also list's O'Rourke's brother, David O'Rourke, a service-disabled Navy veteran and Department of Defense and U.S. Air Force employee as the "Uncle/safety plan monitor/dad's brother." *Id.*[3]

The OKDHS also initiated its 'Report to District Attorney,' *see* App. 3, on March 23, 2017.[4] The Report lists the complainant and her siblings' tribal affiliation as "Choctaw Nation; OK." *See* App. 3 at p.1, § A. The Report explicitly states they "are *members* of Choctaw tribe" (emphasis added) and that the State notified the "Choctaw Nation; OK," and "Pawnee Tribe; OK" on March 29, 2017. *Id.* at p. 2, § C.[5] *See Wadkins v. State*, 2022 OK CR 2, ¶ 10, 504 P.3d

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[3] This form was never provided to O'Rourke nor his attorneys and was not received by him until after his post-conviction appeal was already pending in the OCCA. Even though he requested the OCCA to take judicial notice of the TPR proceedings pursuant to 12 O.S. § 2202(D) (requiring Oklahoma courts to take judicial notice when asked to do so), it refused. On information and belief, this OKDHS form was part of the information ordered by the trial court to be disclosed. *See infra*.

[4] It seems that the Report was initiated on March 23, 2017, but was not requested for approval by OKDHS caseworker Bridget O'Brien until May 4, 2017, and was approved the next day on May 5, 2017. *See* App. 3 at p. 4(F) (Recommendation to the District Attorney). O'Rourke includes the Report here instead of later in the timeline because it provides helpful insight for his *Brady* and *Ritchie* claims, the lack of thorough and meaningful investigation and bad faith shown by the State, and that the State utilizes juvenile court proceedings to suppress material evidence it knows is fatal to related criminal cases.

[5] This Report was never provided to the Defense, and the copy ultimately received by O'Rourke is only partial, missing pages 14-25. It also contains impeachment evidence against O'Rourke's wife, listing 10 other "Child

605, 610 (to preempt Oklahoma's criminal jurisdiction, "[t]ribal membership is generally dispositive of" tribal "recognition" as Indian).[6] *See also United States v. Knowlin*, 555 Fed.Appx. 820, 823 (10th Cir. 2014) (unpub.) (tribal enrollment is dispositive of Indian status for federal criminal jurisdiction). The Report lists the complainant's "Race" as "American Indian/Alaskan Native." *See* App. 3 at p. 5, § H(3).[7] The Report ultimately recommends the TCDA to initiate "court involvement for a deprived petition." *Id.* at p. 10, § V.

Abuse and Neglect" incidents involving she and her children. Eight of these incidences were before O'Rourke met her, and the other two did not involve him in any way, nor was he made aware of these ten allegations and investigations by OKDHS. *See* App. 3 at p. 2, § B. It also lists her children as being wards of another court in Creek County, Oklahoma case no. JF-2007-38 "from 03/30/2007-03/10/2008." *See* App. 3 at p. 3, § C. The Report also notes that his then-wife admitted to OKDHS that the complainant recanted her allegations of sexual abuse, and that she did not believe the complainant was sexually abused. *Id. See also id.* at p. 6 § I(VI)(1) thru p. 7 (describing prior OKDHS interactions with O'Rourke's then-wife and her children from a previous relationship and marriage, respectively). This brief section further establishes that OKDHS has been involved not only with each of her children, but with each of their biological fathers/stepfathers, including the complainant's biological father, her former stepfather Michael Langston, and O'Rourke. Later in the Report, OKDHS notes that O'Rourke's then-wife called the complainant and her alleged eyewitness brother "liars" and that the complainant recanted the allegations. The Report further states that she "spoke of and displayed diminished protective capacities in regards to keeping" the complainant "and the other children safe from sexual abuse and exposure to domestic violence." *See* App. 3 at p. 7(I)(VI)(4) (Parenting). *See also id.* at p. 8(5) (Adult Functioning) ("Worker observed Mrs. O'Rourke to be non-engaging and misleading with CPS worker. Mrs[.] O'Rourke continually minimized the allegations throughout the investigation."); *id.* at p.9(II) (Protective Capacities) ("Mr. and Mrs. O'Rourke did not display adequate protective capacities during this investigation"); *id.* at p.9(III)(1) ("Mr. O'Rourke has sexually abused" the complainant and "Mrs. O'Rourke has minimized and denied the abuse"); *id.* at p.9(III)(2) (same). Beyond pure conjecture by Ms. O'Brien, this sort of reporting from OKDHS often, if not always, results in criminal charges being filed against the alleged non-protecting parent. However, because the complainant informed the State she would not participate in its criminal prosecution against O'Rourke if her mother were criminally charged, and to reverse her mother's prior statements that she knew that most of the allegations were genuinely impossible, the State entered an immunity agreement and provided Ms. O'Rourke with pecuniary benefits by forgiving her more than $90,000 in taxes owed to the Oklahoma Tax Commission by the family for the 2015 fiscal tax year. The immunity agreement and pecuniary benefits were never disclosed by the State, and O'Rourke only learned of the agreement and benefits after his post-conviction appeal was denied by the trial court. The Report also provides impeachment evidence against both the complainant and her brother, where the complainant's statements alleging her younger sister was sexually abused by O'Rourke were not just disproven, but evidenced coaching when the younger sister told OKDHS she "could not remember what" she was "supposed to say." The complainant's earlier statement that she and her younger brother (the alleged eye witness to sexual abuse) both witnessed domestic violence is contradicted later in the Report where she fails to mention her younger brother's presence for the alleged domestic violence incident. *See* App. 3 at p. 11(VII)(J) (Victim Interview). This interview was performed by OKDHS caseworker Betsy Lambeth, not Bridget O'Brien. *See also id.* at p. 13 (Forensic interview at the OKDHS Children's Advocacy Center by TPD Cpl. Kraft and OKDHS employee Leslie Foster) (the complainant "reported her little brother" – the alleged eyewitness of sexual abuse – "woke up and came into the living room and" O'Rourke "stopped" sexually abusing her "and told" her brother "to go to bed." Here there is no allegation of her brother being awakened by screaming, nor that her brother witnessed any alleged abuse. *Cf. id.* at p. 3(D).

[6] *Wadkins* was decided on January 20, 2022. *Castro-Huerta* was decided more than 5 months later on June 29, 2022.

[7] The Report states that O'Rourke "did not fully cooperate with this investigation and changed his" phone "number during the investigation." *See* App. 3 at p. 7(I)(VI)(3) (Discipline). This is categorically false. O'Rourke

On March 24, 2017, O'Rourke attended a 'Child Safety Meeting' *see* App. 4, and this meeting was audio and video recorded by OKDHS. However, these recordings were never turned over at any point to the defense. At this meeting, the OKDHS caseworker, Bridge O'Brien, was confronted about demonstrably false allegations by the complainant. Ms. O'Brien stated (paraphrased) "Just because she lied about some of the allegations doesn't mean she lied about all of them." *See, e.g.*, App. 5 ('Affidavit of David O'Rourke') (stating that the complainant's brother disclosed to their mother that his sister made him lie to the State about being a witness to the alleged sexual abuse; that OKDHS caseworker Bridget O'Brien confronted O'Rourke's ex-wife in David O'Rourke's presence about the disclosure, that O'Brien would have to file a new report about the disclosure and that new forensic interviews would have to be performed, and; that David O'Rourke was never contacted by the OKDHS, TPD, or TCDA about these and other issues). *Cf.* App. 3 at p. 3 (the complainant's brother "was forensically interviewed and reported one night, he heard [the complainant] screaming ... walked into the living room and saw [her] laying on a massage table with only her bra and panties on and Mr. O'Rourke touching her breasts and vagina").

The Child Safety Meeting 'Verification of Attendance,' App. 6, proves the meeting was attended by O'Rourke and his attorney, Charlie Prather; his brother David O'Rourke; his then-wife Michelle O'Rourke, and; OKDHS caseworker Bridget O'Brien. *See also* App. 7 ('Child Safety Meeting Confidentiality Agreement') (listing the attendees).

Also on March 24, 2017, the OKDHS entered its 'Child Safety Meeting Summary Report.' *See* App. 8. The Summary Report notes that David O'Rourke is the OKDHS approved

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called the general counsel of his several businesses, Matt Christensen, when OKDHS caseworker Bridget O'Brien appeared at the family home unannounced, and ultimately retained counsel – as is his Constitutional right – but this does not in any way indicate how he did not fully cooperate. Further, OKDHS's claim that O'Rourke changed his phone number during the investigation is categorically false. His phone number before and after the investigation was 918-260-1664, and his service provider was Verizon Wireless. From this same phone number, O'Rourke contacted via phone calls and text messages the various OKDHS caseworkers and supervisors involved about ongoing endangerment and neglect of his biological twins by his then-wife. Conversely, not once did OKDHS return his calls, reply to his texts, or investigate reports of endangerment of the Twins by O'Rourke, David O'Rourke, and Ms. O'Rourke's then-roommate, Megan O'Reilly. None of these reports were turned over to the defense. The Report also claims that O'Rourke was "currently under an investigation of sexual abuse in ... Okmulgee County." App. 3 at p. 8(I)(VI)(5) (Adult Functioning). If any allegations made by the complainant involved an investigation in Okmulgee County, these facts were never revealed to the Defense. Further, the only time O'Rourke travelled to Okmulgee County involved his work with the Secretary of Health for the Muscogee Nation. He never travelled to Okmulgee County with the complainant, and any such allegations further establish the categorical dishonesty of the allegations and the bad faith and suppression of *Brady* evidence by the State.

'monitor' over the minor children. It also refers to a 'Safety Plan' that was never disclosed to the defense. *See id.*

On March 29, 2017, the TPD entered its 'Tulsa Police Department Summary Incident Report' listing the complainant's race as "AMER. INDIAN/ALASKAN." *See* App. 9. This document was also suppressed and was received by O'Rourke after the trial court denied his postconviction appeal.

1. Termination of Parental Rights Proceedings

On June 7, 2017, the State filed its 'Out of Custody Petition' and initiated TPR proceedings in Case No. JD-2017-290 (Tulsa County Juvenile Division). *See* App. 10. The Petition further establishes the complainant's Indian status. "UPON information and belief the **children are Indian Children** as that term is defined by the Federal and State Indian Child Welfare Acts, 25 U.S.C. § 1901 *et seq.* and 10 Okla. Stat. § 40 *et seq.* The United States Bureau of Indian Affairs, as well as **Choctaw Nation and Pawnee Tribes**, will be notified of this action." App. 10 at p.3 (bold in original).

On July 13, 2017, the TPR court adjudicated the complainant as a Choctaw Indian. *See* App. 11 ('Adjudication Order'). "The Indian Child Welfare Act **does** apply. The name of the Tribe is: CHOCTAW NATION. The Tribe and BIA, if tribe unknown, **has been** notified." *Id.* at p. 3(D)(D1) (bold in original). The TPR court made placements "in accordance with the placement preferences set forth in 25 U.S.C. [§] 1915." *See* App. 11 at p.3(D)(D3).

On August 3, 2017, the State charged O'Rourke with four- (4) counts of child sexual abuse.[8]

2. *Murphy v. Royal* Puts the State on Notice and Triggers Its Suppression of Evidence

Five days later, the Tenth Circuit decided *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. Aug. 8, 2017) (holding the Muscogee Nation Reservation was never disestablished by Congress and remains Indian country for federal criminal jurisdiction purposes) (*Murphy I*). Because the complainant was already adjudicated as a Choctaw Indian, the State was on notice of the potential preemptive effect of *Murphy I* should it be affirmed by the Tenth Circuit and ultimately

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[8] The State amended the original felony information to lewd molestation of a child under 16, while manipulating the counts from 4 to 9 in attempt to have O'Rourke's already posted bail revoked and reset to an unattainable amount. The trial court eventually did precisely this, revoking his pretrial release and raising his bail to $900,000 without any findings of dangerousness or flight risk. He remained in pretrial detention from February 12, 2018 until his trial, further prejudicing his defense.

this Court. The Tenth Circuit did exactly that 3 months later. *See Murphy v. Royal*, 875 F.3d 896 (10th Cir. Nov. 9, 2017) (*Murphy II*) (amending and superseding *Murphy I* on denial of rehearing en banc).

The State petitioned this Court for certiorari review on February 6, 2018, and the Court granted the petition on May 21, 2018. *See* Dkt. *Sharp v. Murphy*, No. 17-1107. On October 9, 2018, the case was set for argument on November 27, 2018, and arguments for both parties were heard then. *Id.* On December 4, 2018, the Court directed the parties to file supplemental briefs. *Id.* The Court's 2018-2019 term ended with the case deadlocked because of Justice Gorsuch's recusal due to his prior oversight of the case while serving as a circuit judge on the Tenth Circuit. On June 27, 2019, the case was restored to the calendar for reargument. *Id.*

Prior to trial, O'Rourke's trial attorneys requested disclosure of all material exculpatory and impeachment evidence hidden by the State in the TPR proceedings. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). *See also* 10A O.S. § 1-6-102(D); 10A O.S. § 1-6-102(E). The trial judge signed the order releasing information on August 23, 2019. *See* App. 12 ('Order Authorizing Release and Disclosure of Records and for Protective Order'). Unfortunately, the Order does not list which documents were designated for disclosure and is not Bates stamped. These failures by the State and the courts below ultimately led to numerous violations of *Brady*, 373 U.S. *See infra.*

In light of *Murphy II* and this Court's grant of certiorari for that case, effective trial counsel – apprised of the complainant's adjudicated Indian status – would be concerned with preventing any trial in state court at all. Further, *Ritchie's* directive that "the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial," *Ritchie*, 480 U.S. at 60, puts the State and the judge reviewing the State's TPR files on notice that an ultimate decision from this Court regarding the Muscogee Nation's Reservation status was imminent. The trial court order, App. 12, should have included the complainant's adjudicated Choctaw Indian status and other material exculpatory and impeaching evidence supporting O'Rourke's factual innocence.

Once aware of all the suppressed facts from the State's TPR files, effective trial counsel would have requested: (1) a stay in the proceedings pending this Court's decision in *Sharp v. Murphy*, No. 17-1107; (2) that any looming trial date be held in abeyance; (3) to set a trial date

sometime after the Court decided *Sharp v. Murphy*, No. 17-1107, or; (4) to hold the trial with an agreement that if the jury found O'Rourke guilty, the trial court would stay imposition of the judgment and sentence until after this Court resolved *Sharp v. Murphy*, No. 17-1107. Any one of these scenarios is fully supported by the holdings of this Court. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"); *Edwards v. Vannoy*, 593 U.S. 255, 262 (2021) ("A new rule of criminal procedure applies to cases pending in *direct* review, even if the defendant's trial has already concluded.").

However, when the State is able to suppress *Brady* information ostensibly under the authority of *Ritchie*, it is especially troublesome for GCA preemption cases where the State and even the tribes resist or refuse to disclose the Indian status of a criminal complainant because the burden to provide *prima facie* evidence of a party's Indian status rests with the criminal defendant. *See State v. Klindt*, 782 P.2d 401 (Okl.Cr. 1989) (holding (1) State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian country; (2) proof of one's status as an Indian under Federal Indian law is necessary before one can claim exemption from prosecution under state law); *Cravatt v. State*, 825 P.2d 277, 279 (Okl.Cr. 1992) ("[Q]uite simply the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian country.") (quotation omitted).

The State's suppression of the complainant's adjudicated Indian status is exacerbated because the State, its judges, and even some federal judges in Oklahoma have publicly expressed their animosity to this Court's decision in *McGirt*. In the months following *McGirt*, the TCDA identified thousands of cases dating back to the 1980s affected by *McGirt* because the extant Oklahoma law at the time allowed Indian country preemption claims to be raised at any time. *See Wallace v. State*, 1997 OK CR 18, 935 P.2d 366, 372 (Okl.Cr. 1997) ("[I]ssues of subject matter jurisdiction are never waived and can therefore be raised on collateral appeal").[9] Irrespective of the State's preferred terminology, a preempted state court is no longer a court of competent jurisdiction, and the judicial animosity of many Oklahoma judges toward the decision in *McGirt*

[9] The State and the OCCA has since disavowed their prior term of art labeling Indian country preemption as a matter of "subject matter jurisdiction." Nevertheless, Oklahoma law expounded an Indian country defense as an attack on subject matter jurisdiction at the time of the alleged conduct below, and irrespective of the State's preferred terminology today, it is the preemptive effect of federal law that matters. *See Wallace*, 1997 OK CR.

creates a related due process problem relevant here. *See Ritchie*, 480 U.S. at 58 ("[W]e therefore have no reason to believe that relevant information would not be disclosed when a court of competent jurisdiction determines that the information is 'material' to the defense of the accused"). For the reasons laid out below, once this Court issued *McGirt* and affirmed *Murphy II sub nom* in *Sharp v. Murphy*, 140 S.Ct. 2412 (July 9, 2020), the courts at least co-responsible for identifying and disclosing material *Brady* information were no longer courts of competent jurisdiction.

Ritchie deserves a fresh look from this Court for additional reasons. On information and belief, the TCDA sent its compiled list of *McGirt* affected cases – which includes O'Rourke's case – to the OAG and to the U.S. Attorneys' Office for the Northern District of Oklahoma while his direct appeal was pending. At least one state's highest court has held that *Brady*, the Fourteenth Amendment, and California's rules of professional conduct for prosecutors requires the state's Attorney General to disclose *Brady* information in its actual or constructive possession on direct and collateral appeals. *See In re Jenkins*, 14 Cal.5th 493, 525 P.3d 1057 (Cal. 2023). It also held that if the records were subject to a protective order and thus, the Attorney General was prohibited from disclosing the information by California's statutes or rules of professional conduct for prosecutors, that the Attorney General must explain why it is unable to disclose and provide the *pro se* appellant or counsel the steps necessary to request the information from a reviewing court. At a minimum, this Court should consider the additional Fourteenth Amendment protections provided by the California Supreme Court in *In re Jenkins* and effectively close *Ritchie's* evidentiary loophole.

3. Convicted After Jury Trial

Less than 2 weeks before his jury trial, Judge Dawn Moody, the trial judge who signed the App. 12 'Order Authorizing Release And Disclosure of Records, And For Protective Order,' transferred O'Rourke's case to a different trial judge. *See* App. 13 ('Application to Assume Original Jurisdiction and Petition for Writ of Mandamus and Brief in Support' in *O'Rourke v. Priddy*, MA-2019-829).[10] *See also id.* at p. 2 ("3. Judge Priddy was not the original judge assigned to Mr. O'Rourke's case. The matter was originally scheduled to proceed to trial with Judge Moody, however, the case was "farmed out" to Judge Priddy at the last minute for trial.").

[10] Available at: https://oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=MA-2019-829.

Cf. App. 12 at p. 1 (listing Judge Moody, Docket C); *id.* at p. 3 (signature of Dawn Moody, "JUDGE OF THE DISTRICT COURT").

The new trial judge, Tracy Priddy, based her campaign platform on being a survivor of a violent rape while attending law school, and her desire to use the bench to be a voice for similar victims of sexual violence, especially children. *See* App. 13 at p. 2 ("1. While campaigning for the bench, Judge Priddy made multiple statements concerning her status as a survivor of a violent crime and her desire to use her personal experience as a survivor of violent crime to help others affected by acts of violence, especially children. For one example see "Area Judicial Races at a Glance" Tulsa World, November 1, 2018 by Samantha Vincent") (footnote included). *See also id.* at p.3 n.4 ("Despite making her status as a survivor of a violent attack a campaign issue, Judge Priddy declined to disclose the crime she had been a victim of when asked by counsel at the recusal hearing, [a] defense attorney and former prosecutor testified at the November 7, 2019 hearing that it was his understanding Judge Priddy was the victim of a violent rape").

More than a year after this Court granted certiorari in *Sharp v. Murphy*, No. 17-1107, O'Rourke was convicted after jury trial on 8 of the 9 charged counts of lewd molestation. *See* CF-2017-4236 (Sept. 13, 2019). At no point prior to trial did the State disclose the adjudicated Indian status of the complainant, nor the exculpatory and impeaching evidence supporting his actual innocence. Nor did the State do anything to correct trial testimony it knew to be false.

4. Direct Appeal and *McGirt v. Oklahoma*

O'Rourke timely filed his direct appeal in the Oklahoma Court of Criminal Appeals (OCCA). *See* F-2019-935. His attorney on direct appeal, Kevin D. Adams, confirmed on an ODOC recorded phone call that the material exculpatory and impeachment evidence from the TPR proceedings – requested by O'Rourke's trial attorneys and ordered by the trial judge to be disclosed pursuant to *Ritchie*, 480 U.S., and 10A O.S. § 1-6-102(D) and 10A O.S. § 1-6-102(E) – were not included in discovery. *See* App. 12. Mr. Adams also confirmed the State did not include the documents as is required when it designates a trial record for direct appeal. *See* F-2019-935 Dkt. at 12-18-2019 (Mr. Adams 'DESIGNATION OF RECORD' at p. 1, no. 1, requesting "All pleadings and other documents filed in Case No. CF-2017-4236 in the District Court of Tulsa County"), attached at App. 14. *See also id.*, Dkt. at 03-12-2020 (State's 'NOTICE OF COMPLETION OF RECORD ON APPEAL'), attached at App. 15.

On July 9, 2020, and while Mr. O'Rourke's direct appeal was pending, the Court issued its decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) (holding the Muscogee Nation Reservation was not disestablished by Congress). *McGirt* applies to this case *ab initio*, and his attorney on direct appeal filed his preemption claim on July 13, 2020, making it the first – or one of the very first – *McGirt*- based preemption claims filed in the OCCA on direct appeal. *See* Dkt. F-2019-935 at 07-13-2020; App. 16 ('APPELLANT'S MOTION TO SUPPLEMENT THE RECORD TO SHOW LACK OF JURISDICTION UNDER MCGIRT V. OKLAHOMA, CASE NO. 18-9526, 591 U.S. ___ (2020)- TENDERED FOR FILING'). *See also* App. 15-A (Exhibit A, 'Affidavit of Mary Francene Burns'); F-2019-935, Dkt. at 07-13-2020 ('BRIEF OF APPELLANT' at Proposition I).

On April 15, 2021, without an admission by the OAG that it was in actual or constructive possession of *Brady* information that the complainant is an adjudicated Indian, and without a properly designated appellate record because of the State's suppression of the evidence establishing the complainant's adjudicated Indian status, the OCCA denied the *McGirt*- based preemption claim, *see* App. 1-3 at pp. 2-3 (OCCA Direct Appeal 'Summary Opinion'), claiming that the proposition was not supported by sufficient *prima facie* evidence of the complainant's Indian status. *See State v. Klindt*, 1989 OK CR 75, 782 P.2d 401 (Okl.Cr. 1989) ("proof of one's status as an Indian under federal law is necessary before one can claim exemption from prosecution under state law"). The OCCA was also critical of appellate counsel's failure to follow the court's rules and to request an evidentiary hearing on the matter.

Mr. O'Rourke did not seek certiorari review in this Court, and his conviction was final on September 13, 2021.[11] *See* App. 1-3; *O'Rourke v. State*, F-2019-935 (Apr. 15, 2021) (unpublished).

5. *Oklahoma v. Castro-Huerta*

Well after the Court issued its decision in *McGirt*, the State eventually argued that the plain language of the GCA did not preempt concurrent state jurisdiction with the Government for alleged crimes by a non-Indian against an Indian in several cases pending on direct review in the

[11] During the pendency of O'Rourke's direct appeal and the COVID pandemic, the Court entered a Miscellaneous Order extending the time to seek certiorari review from 90-days to 150-days. *See* Miscellaneous Order, 589 U.S. ---- (2020). That Order remained in effect until July 19, 2021. *See* Order, 589 U.S. at 1.

OCCA or otherwise not yet final, and where the OCCA vacated several convictions pursuant to GCA preemption claims.

Relying on more than 200 years of settled practice and precedent in every state and tribal court and every Federal Circuit, the OCCA rejected the State's argument that the GCA did not preempt the State's criminal jurisdiction. *See Bosse v. State*, 2021 OK CR 3, ¶¶ 23-28, 484 P.3d 286, *withdrawn and superseded on other grounds by Bosse v. State*, 2021 OK CR 30, 449 P.3d 771 (declining to retroactively apply *McGirt* to final convictions). *See also Castro-Huerta v. State*, No. F-2017-1203 (Okl.Cr. Apr. 29, 2021) (unpublished) (vacating conviction of crime by a non-Indian against an Indian pursuant to *McGirt*). "We rejected the State's argument regarding concurrent jurisdiction in *Bosse*, ... We do so again in the present case." *Id.* at pp. 4-5.

On September 17, 2021, 4 months, 4 weeks, and 1 day (or 151 days) after the OCCA denied O'Rourke's direct appeal in F-2019-935 (Okl.Cr. Apr. 15, 2021), *see* App. 1-3, and four days after O'Rourke's conviction was final, the State sought certiorari review after the OCCA vacated Mr. Castro-Huerta's conviction on direct appeal. The State asserted it had concurrent jurisdiction with the Government under the GCA. *See* Petition, *Oklahoma v. Castro-Huerta*, No. 21-429 (filed Sept. 17, 2021). Including *Castro-Huerta*, the State sought certiorari on its concurrent jurisdiction theory in 13 total cases where the OCCA had granted relief pursuant to the GCA. Because the State suppressed the complainant's adjudicated Indian status and his conviction was already final before the State even petitioned this Court for certiorari review, O'Rourke's case was not one of those 13 cases.

Unlike those 13 cases, the complainant below was already adjudicated as a Choctaw Indian in the TPR proceedings. As such, O'Rourke's case would not require a remand by the OCCA to the trial court for an evidentiary hearing to make a factual determination of her Indian status. *See* 12 O.S. § 2202(B)(1)-(2) ("A judicially noticed adjudicative fact shall not be subject to reasonable dispute in that it is either (1) Generally known within the territorial jurisdiction of the trial court, or (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). *See also* 12 O.S. § 2202(C) ("A court may take judicial notice, whether requested or not."). Had the State not suppressed the adjudicated Indian status of the complainant on direct appeal, the OCCA would have granted relief to O'Rourke pursuant to *McGirt*, 140 S.Ct., because at that time and for nearly two centuries previous, every court throughout Indian country agreed that the GCA preempted state jurisdiction.

This Court granted certiorari review on January 21, 2022, 4 months, 1 week, and 1 day, or 130 days after O'Rourke's conviction was final. *See Oklahoma v. Castro-Huerta*, 142 S.Ct. 877 (Mem.) (granting cert. limited to the question of whether a state has authority to prosecute non-Indians who commit crimes against Indians in Indian country).

On June 29, 2022, 9 months, 2 weeks, and 2 days (or 289 days) after O'Rourke's conviction was final, this Court issued its decision in *Castro-Huerta*, 142 S.Ct. (holding that the GCA does not preempt state jurisdiction, and that the State has concurrent jurisdiction with the Government over alleged crimes by a non-Indian against an Indian in Indian country).

6. Post-Conviction Appeal

Next, O'Rourke timely filed his application for post-conviction relief on June 30, 2022. On post-conviction, he raised his appellate counsel's ineffectiveness for failing to follow the OCCA's rules to supplement the record with sufficient *prima facie* evidence establishing the complainant's Indian status and appellate counsel's failure to comply with the OCCA's rules to properly request an evidentiary hearing in support of his preemption claim. *See* App. 17 ('Post-Conviction IAAC Claim').

In his third postconviction claim, O'Rourke strengthened his GCA preemption claim – utilizing the *Rogers* test and *St. Cloud* factors – from his personal knowledge about the complainant and her family, including genealogical research of the complainant's family conducted by his own family.[12] O'Rourke also made clear in his post-conviction brief that the OCCA itself had determined *Castro-Huerta* was prospective only, and asserted that the retroactive application of *Castro-Huerta* to his case would violate due process. *See Ricker v. State*, 2022 OK CR 26, ¶ 5, 519 P.3d 1269, 1270-71 (*Castro-Huerta* applies to cases pending on direct appeal); *Purdom v. State*, 2022 OK CR 31, ¶ 15, 523 P.3d 54, 59 (*Castro-Huerta* applies prospectively). He further asserted that *Castro-Huerta* was wrongly decided, adopting Justice Gorsuch's dissent. *See* App. 18 ('Proposition III from Third Supplement for Post-Conviction Relief').

The State argued that post-conviction relief was barred:

- by the newly enacted 22 O.S. § 1080.1, which provides a 1-year statute of limitations to seek post-conviction review;

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[12] *See U.S. v. Rogers*, 45 U.S. (4 How.) 567 (1846); *St. Cloud v. U.S.*, 702 F.Supp. 1456, 1461 (D.S.D. 1988).

- by *res judicata*, because the OCCA denied O'Rourke's preemption claim on direct appeal;
- pursuant to 22 O.S. § 1086, which waives claims that could have been raised on direct appeal but were not, and;
- because *Castro-Huerta* itself barred relief on the claim despite the fact that O'Rourke's conviction was final for roughly 9 ½ months before the Court issued its decision.

The State – represented by one of the very prosecutors who presided over O'Rourke's trial – expressly denied the complainant's Indian status and argued that no evidentiary hearing was necessary. *See* 22 O.S. § 1084.[13]

The trial court incorrectly denied his request for an evidentiary hearing and post-conviction appeal on procedural grounds. This is so because:

- Section 1080.1 was not effective until November 1, 2022 and O'Rourke's post-conviction appeal was filed June 30, 2022, so the trial court's adoption of the State's prepared order violates ex post facto under both the Oklahoma and United States Constitutions;
- Challenges to the State's subject matter jurisdiction pursuant to the extant Oklahoma law of this case can be raised and strengthened at any time. *See McGirt*, 140 S.Ct. at 2501 n.9 (Roberts, CJ, joined by Alito, J., and Kavanaugh, J., dissenting) ("under Oklahoma law, ... 'issues of subject matter jurisdiction are never waived and can therefore be raised on collateral appeal.' " (quoting *Murphy II*, 857 F.3d at 907, n.5, *in turn quoting Wallace v. State*, 935 P.2d 366, 372 (Okl.Cr. 1997)).[14] In fact, the OCCA and Oklahoma Legislature did not change their position on waiving or defaulting a preemption claim until years after O'Rourke's conviction was final. *See Deo v. Parish*, 2023 OK CR 20, 541 P.3d 833 (Dec. 14, 2023); 22 O.S. § 1080.1 (effective Nov. 1, 2022); *Hammon v. State*, 2023 OK CR 19, ¶ 12, 540 P.3d 486, 489 (under § 1080.1, "petitioners whose convictions became final on or before November 1, 2022, had until November 1, 2023, to file their application for post-conviction relief.").
- Ironically, the OCCA compared O'Rourke's direct appeal preemption claim with another case where it denied a direct appeal preemption claim. *See* App. 1-3 at p.2 n.2 ("[O]ur resolution of this claim differs from our handling of a similar issue in

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[13] This, despite the complainant's Indian status being a "material issue of fact" under the statute and necessary to ultimately adjudicate the claim.

[14] O'Rourke's preemption claim was raised on direct appeal and strengthened in his post-conviction appeal with sufficient *prima facie* evidence of the complainant's Indian status utilizing the *Rogers* test and *St. Cloud* factors. The TPR court's 'Out of Custody Petition,' App. 10, demonstrates that the BIA, Pawnee Nation, and Choctaw Nation were notified, and the TPR court's 'Adjudication Order,' App. 11, demonstrates at bottom, tribal recognition of the complainant as a Choctaw Indian prior to the criminal charges in CF-2017-4326 being filed.

Vaught v. State, No. F-2017-869 (Okl.Cr. Oct. 1, 2020) (not for publication)"). However, *res judicata* does not bar preemption claims on collateral review – as evidenced by the appellant in *Vaught* – whom later sought post-conviction relief where he strengthened his preemption claim, and the trial court then granted relief by vacating the judgment and sentence. *See Vaught v. State*, CF-2015-4067 (Tulsa County Dist. Court May 20, 2021) at Dkt. 05-20-2021 ("JUDGE PRIDDY: COURT SIGNS ORDER GRANTING POST-CONVICTION RELIEF, VACATING AND DISMISSING FOR LACK OF JURISDICTION");[15] *id.* at Dkt. 05-25-2021 ("ORDER GRANTING POST CONVICTION RELIEF, VACATING & DISMISSING FOR LACK OF JURISDICTION"). *See also id.* at p. 2, no. 5 ("On October 1, 2020, the [OCCA] denied Petitioner's [direct appeal] application to remand for an evidentiary hearing on the issue of subject matter jurisdiction and affirmed his convictions in *State v. Vaught*, F-2017-869");

- Claims of ineffective assistance of appellate counsel are cognizable for the first time during post-conviction proceedings, and the extant Oklahoma law of the case is that preemption claims can be raised at any time. Thus, § 1086 does not present an adequate or independent state law bar;

- The complainant's Indian status is a material issue of fact, 22 O.S. § 1084, and it was necessary for the trial court on postconviction to determine her Indian status under *Rogers*, 45 U.S., and *St. Cloud*, 702 F.Supp., because the State expressly denied her Indian status altogether and suppressed her adjudicated Indian status. Proof of one's Indian status by sufficient *prima facie* evidence is a necessary element of O'Rourke's GCA preemption claim and that *Castro-Huerta* could not be retroactively applied to him.

- The retroactive application of *Castro-Huerta* to the specific and narrow facts of O'Rourke's case violates due process because the decision expanded the scope of the GCA and eliminated the complete Oklahoma common law preemption defense available at the time of the alleged criminal conduct, both in an unexpected and indefensible way.

O'Rourke timely appealed the trial court's denial of post-conviction relief to the OCCA. *See* Docket, PC-2023-332.[16]

A. First Receipt of Suppressed *Brady* Evidence

During the pendency of the post-conviction appeal to the OCCA, he requested documents from the juvenile court TPR proceedings. He received copies of the information filed by OKDHS and the TCDA, listing the complainant as a Choctaw and Pawnee Indian, a document showing that the complainant is an enrolled Choctaw Indian and that the Choctaw Nation of

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15 Available at: https://www.oscn.net/dockets/GetCaseInformation.aspx?ct=Tulsa&number=CF-2015-4067.

16 Available at: https://oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=PC-2023-332.

Oklahoma and Bureau of Indian Affairs had been notified pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq*, and an adjudication order where the juvenile court adjudicated the complainant as a Choctaw Indian.[17]

While his post-conviction appeal was pending before the OCCA, O'Rourke filed his 'Notice of Non-Completion of Record on Appeal.' *See* App. 19. He requested the OCCA to take judicial notice of the TPR proceedings and documents in JD-2017-290 pursuant to 12 O.S. § 2202(D) ("A court *shall* take judicial notice if requested by a party and supplied with the necessary information.") (emphasis added). He attached various documents from the TPR proceedings which established the complainant's Indian status, and that at a minimum, the State coerced and entered into an undisclosed immunity agreement with O'Rourke's then wife. *See* App. 10 ('Out of Custody Petition'); App. 11 ('Adjudication Order');[18] & App. 22 (OKDHS 'Case Update').[19] He also attached an affidavit from his brother, a service-disabled Navy veteran and employee of the United States Department of Defense with high level security clearances, supporting O'Rourke's factual innocence. *See* App. 5 ('Affidavit of David O'Rourke'). The affidavit provides evidence that, *inter alia*, the State: suborned perjury from the witnesses against O'Rourke; did nothing to correct State witness testimony it knew to be false, and; lied to the trial judge and defense counsel about the availability of a listed State's trial witness (OKDHS caseworker Bridget O'Brien) whose testimony it knew would be fatal to alleged eye-witness testimony the State knew to be false.[20]

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[17] Later, O'Rourke anonymously received documents from the TCDA's Office with copies of the trial court's order to release information from the TPR proceedings and material exculpatory and impeachment evidence supporting his factual innocence and preemption claim. He also learned that the TCDA notified the OAG that his direct appeal was impacted by and required relief pursuant to *McGirt*, but the OAG never revealed the TCDA's notification to O'Rourke, his appellate counsel, nor the OCCA.

[18] *Cf.* the July 13, 2017 'Adjudication Order' adjudicating the complainant as a Choctaw Indian with the Tenth Circuit's August 8, 2017 decision in *Murphy I*, 866 F.3d.

[19] The OKDHS 'Case Update' was filed on August 1, 2017, and states "OKDHS agrees that an In Home Petition is appropriate for N[atural] M[other] with [O'Rourke's Twins] due to unresolved issues surrounding a protective order to N[atural] F[ather] O'Rourke, following through with her divorce to NF O'Rourke and her protective capacities." *Cf.* App. 5 (O'Rourke's wife and the complainant's mother "informed me she was told by [OK]DHS if she did not divorce [O'Rourke] she would lose her children. After this, [the complainant's mother] started changing her story about events that supposedly happened.").

[20] In 2023, and after the OCCA denied his postconviction appeal, O'Rourke received the documentation in Apps. 2-4 & 6-8, further proving the State's suppression of material exculpatory and impeaching evidence hidden in the TPR proceedings, in violation of a trial court order to release the information, and in violation of *Ritchie*, 480 U.S. The documentation received in 2023 predates the documents O'Rourke attached to his postconviction 'Notice of Non-Completion of Record on Appeal. *See* App. 19. On December 1, 2024, O'Rourke's now ex-wife and the

7. The OCCA Refuses to Take Judicial Notice of the Suppressed *Brady* Evidence

Despite O'Rourke's request for the OCCA to take judicial notice of the TPR proceedings documents establishing the complainant's adjudicated Choctaw Indian status and the State's bad faith initiation of the TPR proceedings and that the retroactive application of *Castro-Huerta* to the specific and narrow facts of his case violates due process, it refused to do so and affirmed the trial court's denial of post-conviction relief. *See* App. 1-4 (Order Affirming Denial of Post-Conviction Relief in PC-2023-332).

8. Original State Habeas

Pursuant to Oklahoma law, O'Rourke next sought original state habeas pursuant to U.S. Const. Art. I, § 9, cl. 2; Okla. Const. Art. 2, § 10; Okla. Const. Art. 7, §§ 4, 7, and; 12 O.S. § 1331. *See* WH-2023-3 (Alfalfa County, Okla) ('Petition for Original Writ of Habeas Corpus').[21] *See also id.* ('Petitioner's Motion to Supplement Application to Assume Original Jurisdiction and Original Writ of Habeas Corpus').[22] The State entered its response, *see id.* ('Special Appearance and Motion to Dismiss Petition for Writ of Habeas Corpus'), and O'Rourke filed his Reply. *See id.* ('Petitioner's Reply to Respondent's Motion to Dismiss').

Under Oklahoma law, an application for an original writ of habeas corpus must be filed in the district court where a prisoner is confined. *See In re Gable*, 73 Okla.Crim. 155, 118 P.2d 1035 (1941). Original state habeas requires a petitioner to make a *prima facie* showing that his confinement is illegal, *see Application of Riddle*, 292 P.2d 1043 (Okl.Cr. 1956), *cert. denied*, 76

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complainant's mother made contact with him via the ODOC's messaging system which functions similarly to text messaging. In these messages, verified and preserved by the ODOC, Ms. O'Rourke verified the 'In-Home Visit' discussed in David O'Rourke's affidavit. Although she asserts a different version of the visit than does David O'Rourke, her version still establishes impeachment evidence of the only alleged eyewitness. The State never disclosed this in-home confrontation by Bridget O'Brien, Ms. O'Brien's reporting of the confrontation, the State's interview where the alleged eyewitness admitted the complainant was making him lie, or per Ms. O'Rourke's version of Bridget O'Brien's confrontation: "The bridget meeting was talking about how [the complainant's brother and alleged eyewitness] lied to cover for you and [the complainant] after walking in on it happening. Hi I was there too[.]" *See* App. 20 ('ODOC Verified Securus Messages from Michelle O'Rourke (McCoy) to Bryan O'Rourke'). *See also* App. 21 ('Affidavit from ODOC Employee Ashley Robinson'). Even if Ms. O'Rourke's version of the confrontation were true (it is not), it is still material impeachment evidence the State suppressed in violation of *Brady* and *Ritchie*, and it did not correct the alleged eyewitness's suborned perjury at trial. *See infra*.

[21] Available at: https://www.oscn.net/dockets/GetCaseInformation.aspx?ct=Alfalfa&number=WH-2023-3.

[22] Under Oklahoma law, the district and appellate courts have original, concurrent jurisdiction sitting in habeas, making every habeas court the highest court of the State. *See State v. Powell*, 2010 OK 40, ¶ 2, 237 P.3d 779, 780 (Okla. 2010) ("Under the Constitution and statutes of Oklahoma, the Supreme Court, Court of Criminal Appeals, all other appellate courts and the District Courts have concurrent original jurisdiction to hear and determine habeas corpus.") (citation omitted).

S.Ct. 557 (Mem.) (1956), because the court which rendered the judgment and sentence is without jurisdiction to do so. *See Ex parte Gregory*, 291 P.2d 832 (Okl.Cr. 1955).

Original state habeas fell out of favor after the enactment of Oklahoma's Uniform Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq.* This Court's decision in *McGirt*, 140 S.Ct., made Oklahoma's original habeas statutes a viable vehicle to challenge the legality of one's confinement because of Indian country Federal preemption. After *McGirt*, prisoners began utilizing original state habeas to challenge the legality of their confinement, but the OCCA held in numerous unpublished opinions that those claims must first be exhausted pursuant to § 1080. Of course, O'Rourke raised his GCA preemption claim on direct appeal then strengthened it under his post-conviction appeal. Pursuant to the OCCA's post- *McGirt* original state habeas decisions, his appeal was ripe for original state habeas pursuant to 12 O.S. § 1331, *et seq*. The State disagreed.

In its response, the State stipulated that O'Rourke challenged "the State's authority to prosecute him for his [alleged] crimes under the Supreme Court's decision in *McGirt*, 140 S.Ct. at 2452." *See* 'State's Response' at p. 6. It argued however, that his habeas petition should be dismissed because he "did not perfect service of Process." *Id. See also id.* at pp. 7-8. The State then asserted, and in contradiction to its stipulation that O'Rourke was challenging the State's prosecutorial authority, that he was not attacking the legality of his confinement, but that his "*McGirt* claim is an attack on his underlying convictions and sentences." *Id. See also id.* at pp. 8-11. The State also argued in the alternative that O'Rourke's claims were barred by *res judicata*. *Id.* at p. 10. For this reason, the State argued that because "Tulsa County is the situs of [O'Rourke's] convictions and sentences," his "*McGirt* claim is not properly brought in a writ of state habeas corpus, and his challenge to his Tulsa County judgment and sentence must instead be brought in Tulsa County in a post-conviction application." *Id.* at pp. 6-7.

In his district state habeas reply, O'Rourke disproved each of the State's arguments as factually and legally flawed. *See* 'Habeas Reply' at pp. 3-17. In his petition, he provided the district habeas court with a comprehensive analysis of Oklahoma's original habeas law and why his appeal was properly before that court. *See id.* at pp. 3-10, 14-22.

The district habeas court ultimately denied relief by signing the State's prepared order. *See* App. 1-5 (WH-2023-3 'Order Dismissing Application for Writ of Habeas Corpus'). The district habeas court gave no meaningful review to the petition, and did not order a trial-type

adversary hearing as required under 12 O.S. § 1333, 12 O.S. § 1350. *See* MA-2023-878 ('Application to Assume Original Jurisdiction and Petition for Writ of Prohibition').

A. Oklahoma's Post-Conviction Procedure Act Effectively Suspended the Writ of Habeas Corpus and the Appellate Remedies Below are Inadequate and Ineffective

Oklahoma's Uniform Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq.*, is inadequate and ineffective; it has effectively suspended the writ of habeas corpus because even though it is limited to challenging the legality of one's confinement as the writ originally stood at the time of Statehood, a person like O'Rourke – whose direct appeal was pending when this Court issued *McGirt* – must exhaust the same preemption claim raised on direct appeal before challenging the legality of their confinement via Oklahoma's Suspension Clause and habeas statutes.

The OCCA's Rules prohibit a person with a legitimate preemption/legality of confinement claim from adding their post-conviction appeal to the court's "Accelerated Docket." *See* Rule 11.2(A)(4), *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2021-24) and *cf.* Rule 11.4, *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2021-24) ("The procedures outlined in this Section of the Rules will not apply ... to appeals pursuant to Section V of the Rules of this Court").[23] *See also* Rule 10.1(C)(1), *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2021-24) ("In the absence of an extreme emergency, this Court will not entertain an original application for a writ of habeas corpus where such an application has not been presented to and refused by the District Court of the county where petitioner is restrained."); *Twyman v. Oklahoma Pardon & Parole Bd.*, 837 P.2d 480, 481 ("In the absence of an extreme emergency, this Court will not entertain an original application for a writ of habeas corpus where such an application has not been presented to and refused by the District Court of the county where petitioner is restrained."). *But see Duncan v. Seay*, 1976 OK 26, ¶ 18, 553 P.2d 492, 495 (Okla. 1976) ("[T]he right to an immediate hearing on a Writ of Habeas Corpus should not be abrogated. It is an application for instant relief and should be heard with judicious promptness.") (citing 12 O.S. § 1333).

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[23] Section V of the OCCA's Rules govern post-conviction appeals pursuant to Oklahoma's Uniform Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq.*

While the post- *McGirt* developments in Oklahoma law have likely obviated future scenarios as suffered by O'Rourke, the State's post-conviction procedures have unconstitutionally suspended the writ of habeas corpus as-applied to him, and in violation of the Fourteenth Amendment's Due Process Clause. U.S. Const. Amend. XIV. Combined with the numerous *Brady* violations below, Oklahoma's appellate remedies are inadequate and ineffective.

9. Writ of Prohibition

O'Rourke next sought a writ of prohibition in the Oklahoma Supreme Court because the district habeas court failed to follow Oklahoma law in making its determination. *See O'Rourke v. Angle*, MA-2023-878 (Okl.Cr. Nov. 13, 2023).[24] Because original state habeas, like original habeas in this court, is restricted to challenging the legality of one's confinement and not an underlying judgment and sentence, it is a civil proceeding that is collateral to a criminal proceeding. *Id.* Under the Oklahoma law, the writ should have been considered filed on October 9, 2023. *See* 'Application to Assume Original Jurisdiction and for Writ of Prohibition' at p.13 (verifying under penalty of perjury under the laws of Oklahoma and the United States that the application and petition was submitted to the prison's law library for mailing on October 9, 2023) (citing 12 O.S. § 426, 18 U.S.C. § 1621, 28 U.S.C. § 1746 (declaration under penalty of perjury) and 12 O.S. §§ 990A, 2006 (Oklahoma's mailbox rule).

The Oklahoma Supreme Court declined jurisdiction and transferred his requested writ of prohibition to the OCCA notwithstanding the fact that Oklahoma's constitution and statutes allow for forum selection in matters of original state habeas. *See* App. 1-6 (Oklahoma Supreme Court 'Order' Declining Jurisdiction and Transferring to the OCCA).

The OCCA declined jurisdiction pursuant to its Rule 10.1(C)(2), *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2023) (requiring applications for extraordinary writs to include a certified copy of the district court order denying the requested relief). *See* App. 22 at p. 2 (OCCA 'Order Declining Jurisdiction' for Writ of Prohibition in PR-2023-878). This, despite the fact that O'Rourke submitted his application for a writ of prohibition to the Oklahoma Supreme Court and in compliance with its rules, and without any notice from that

[24] Available at: https://oscn.et/dockets/GetCaseInformation.aspx?db=appellate&number=MA-2023-878.

court that his petition would be transferred or any opportunity to supplement his petition to comply with the OCCA's rules.

Further, and contrary to the OCCA's 'Order Declining Jurisdiction,' O'Rourke provided both a certified copy of the district habeas court's order dismissing his original state habeas appeal and sufficient information to prove he was denied relief in the district habeas court. *Cf.* App. 22 at p. 2 ("Petitioner's pleading requesting extraordinary relief does not contain a copy of a trial court order or records sufficient to prove he was denied relief in the District Court.")[25] with the 'Application to Assume Original Jurisdiction and for Writ of Prohibition' at p.1 (listing "Alfalfa County Case. No. WH-2023-3").

10. Oklahoma's Constitution and Statutes Permit Forum Selection in Original Habeas

Under Oklahoma law, a district habeas court's original habeas determination is not appealable, but because it is an original proceeding it is not considered final. *See State v. Powell*, 2010 OK 40, ¶ 8, 237 P.3d 779, 781 ("The denial of a petition for habeas corpus does not preclude a petitioner from filing another application for habeas corpus as the constitutional right of the writ is not exhausted by the first remanding order.") (citing *Ex parte Johnson*, 1908 OK CR 35, 1 Okla.Crim. 407, 98 P. 461, 462 (syllabus by the court).[26] As such, a habeas petitioner may present his denied claims to any Oklahoma court with the constitutional and statutory authority to sit in habeas, and this is precisely what O'Rourke did. *See O'Rourke v. Bridges*, HC-

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[25] In the same order, the OCCA declined jurisdiction on a petition in error and brief in support which was timely filed in the Oklahoma Supreme Court. *See* App. 22 at p. 3 (*O'Rourke v. State*, MA-2023-891) (available at: https://oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=MA-2023-891). This was an appeal of the TPR court's refusal to release all material exculpatory and impeachment evidence suppressed by the State in the TPR proceedings. *See* JD-2017-290 (Tulsa County Juvenile Division). The Oklahoma Supreme Court construed the appeal as a writ of mandamus and transferred it to the OCCA despite it being a TPR proceeding and within the jurisdiction of the Oklahoma Supreme Court. The OCCA somehow construed it as an appeal from the criminal conviction in CF-2017-4236, despite the fact that Judge Theresa Dreiling presides *only* over cases in the Tulsa County Juvenile Division Court. The OCCA ultimately held that O'Rourke "failed to file the request for extraordinary relief with the Clerk of this Court within thirty (30) days from the filing date of the District Court's order as required by Rule 10.1(C), *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2023)." Of course, the Oklahoma Supreme Court and the OCCA share the same clerk, and the record below proves O'Rourke's appeal was timely filed in the Oklahoma Supreme Court. This is yet another example of the OCCA's hostility toward this Court's decision in *McGirt*, 140 S.Ct., and proof of its willingness to misapply state law to evade consideration of federal preemption claims.

[26] O'Rourke asserted to the Oklahoma Supreme Court that *Powell* and *Ex parte Johnson* disproves the State's argument (and the state district habeas court's adoption of the State's prepared order denying relief) that his preemption claim is barred under the doctrine of *res judicata* without resort to the Suspension Clause of the Oklahoma Constitution. Okla. Const. Art. 2, § 10. *See* 'Application to Assume Original Jurisdiction and Petition for Writ of Habeas Corpus' in HC-121,704 at p. 2.

121,704 (Oklahoma Supreme Court 'Application to Assume Original Jurisdiction and Petition for Original Writ of Habeas Corpus').

A. Original Habeas in the Oklahoma Supreme Court

Mr. O'Rourke next submitted a supplement to his petition for filing in the Oklahoma Supreme Court. *See* HC-121,704 ('Petitioner's Supplement to His Application to Assume Original Jurisdiction and for a Writ of Habeas Corpus').

In his supplement, O'Rourke made clear that the retroactive application of *Castro-Huerta* to his case violates due process and that at each of the previous state appellate stages, the courts had misapplied state procedural bars. *See* HC-121,704, 'Supplement to Petition for Writ of Habeas Corpus' at pp. 2-4, 9-22.

Specifically, O'Rourke made clear that under the extant Oklahoma law of this case, "[s]ubject matter jurisdiction cannot be waived to confer jurisdiction on a court lacking the power to adjudicate a particular type of controversy." *Cox v. State*, 2006 OK CR 51, ¶ 8, 152 P.3d 244, 248. The State's much later contention, and the OCCA's even later determination that a federal preemption defense does not implicate the State's subject matter jurisdiction does not matter. *Cox* teaches that if a state court is preempted by federal law, the state court "lack[s] the power to adjudicate a particular type of controversy." *Id.* at ¶ 8, 152 P.3d at 248. *See* HC-121,704, 'Supplement to Petition for Writ of Habeas Corpus' at p. 2.

O'Rourke additionally argued that the district habeas court erred by refusing to order a trial-type adversary hearing as is required by statute, *see* 12 O.S. §§ 1333, 1350; 'Supplement' at p. 4, that Oklahoma's Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq.*, does not and cannot apply to Oklahoma's original habeas statutes, 12 O.S. § 1331, *et seq.*; 'Supplement' at p. 5, and that because a trial-type adversary hearing is required by §§ 1333; 1350, the appointment of counsel is necessary. *See* 'Supplement' at pp. 5-6.

Next, O'Rourke pointed out that because State and Federal officials have publicly expressed animus toward this Court's *McGirt* decision, the State appellate processes are inadequate and ineffective. He provided several examples where the OCCA ignored and evaded meritorious Fourteenth Amendment unconstitutional risk and appearance of judicial bias claims by misapplying State procedural bars. Ultimately, the federal habeas courts cleaned up these OCCA messes. *See* 'Supplement' at pp. 22-24.

While the federal courts provide deference under the AEDPA and in the furtherance of comity and federalism, the OCCA has no problem wasting the judicial resources of Oklahoma's federal habeas courts. It defies this Court's due process holdings by violating the due process rights of the people the State has wrongfully imprisoned. *See Spano v. New York*, 360 U.S. 315, 320-321 (1959) ("[L]ife and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves").

Finally, O'Rourke provided proof that the State utilized Oklahoma's Juvenile Code, Title 10A, to suppress material exculpatory and impeachment evidence supporting his factual innocence and that the State was preempted by the GCA.[27] *See* 'Supplement' at pp. 24-26; App. 12 (trial court's *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) compliant 'Order Authorizing Release And Disclosure of Records, And For Protective Order'); App. 2 (OKDHS 'Child Safety Meeting Request Form' listing the complainant as "Choctaw and Pawnee"); App. 3 (OKDHS 'Report to District Attorney at pp. 1-2, listing the complainant as "members of Choctaw tribe. It was also reported they are Pawnee ... Tribes Notified: Choctaw Nation, OK, Pawnee Tribe, OK"); App. 9 (Tulsa Police Department 'Summary Incident Report' listing complainant's race as "AMER. INDIAN/ALASKAN").

O'Rourke's appellate attorney, Kevin Adams, entered his appearance to represent O'Rourke "post-trial but prior to imposition of the judgment and sentence in CF-2017-4236." 'Supplement' at p. 25. Mr. Adams confirmed on an ODOC recorded phone call that the State did not include these materials in its required 'Designation of Record,' *see* App. 14, that the materials were not in the box of discovery received from O'Rourke's trial attorneys, and that because the documents are not Bates- stamped they were never disclosed by the State pre-trial.[28] *See* 'Supplement' at p. 25 n.17.

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[27] O'Rourke anonymously received these materials after his first district habeas appeal was dismissed. He did not receive any motion that might have been filed by his trial attorneys requesting disclosure of material exculpatory and impeaching evidence from the TPR proceedings, and his requests to the State to disclose any such motion or *sua sponte* judicial motion to do so have been wholly ignored.

[28] *See, e.g.*, Donna Maddux, Susanne Luse, *Don't Let Discovery Keep You Awake At Night: Best Practices for AUSAs*, 68 DOJJFLP 27 at *35 (discussing the importance of Bates stamping discovery, "Ensuring that your agents understand the stakes involved – and the bright lights that may someday shine on them and their agency if things are not properly produced – is fundamental to functioning as an effective prosecution team."). O'Rourke further showed that the 'Certificate of Service' was not dated or signed. *See* App. 12 at p. 4. This is problematic because it evidences that the authorizing judge never ensured all the items were disclosed especially so after being replaced at the eleventh hour before trial by a judge who campaigned on using the bench to be a "voice" for similar victims of sexual violence as herself, and especially children. *See* App. 13.

Critically, O'Rourke's appellate attorney confirmed that had this information been disclosed pre-trial pursuant to the trial court's order, *see* App. 12, or even provided to him in the State's required 'Designation of Record,' *see* App. 13, he would have moved O'Rourke's direct appeal to the OCCA's Accelerated Docket. *See* Rule 11.3, *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2020). *See also* Rule 12.7(B), *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2020) ("A case assigned to a panel of the Emergency Appellate Division shall be disposed of within ninety (90) days"). And because the suppressed materials, including the complainant's adjudicated Choctaw Indian status, were part of the trial court record, the OCCA would have expedited its § 1152 preemption determination pursuant to its Rule 11.3 without the need for an evidentiary hearing or any other further delay.

In other words, had the State not suppressed these documents, O'Rourke almost certainly would have been the very first OCCA decision vacating a conviction pursuant to *McGirt*, 140 S.Ct.

B. The Oklahoma Supreme Court Declines Jurisdiction in Violation of the Fourteenth Amendment

The Oklahoma Supreme Court declined jurisdiction to evade consideration of O'Rourke's federal claims despite the fact it has jurisdiction to sit in all habeas matters pursuant to the Oklahoma Constitution and statutes. It transferred O'Rourke's habeas petition to the Oklahoma Court of Criminal Appeals. *See* App. 1-6 (Oklahoma Supreme Court 'Order' Transferring Original State Habeas Petition to the OCCA).

C. Original Habeas in the OCCA

The OCCA again employed its familiar subterfuge to evade these purely federal questions by declining jurisdiction. *See* App. 1-7.

The OCCA declined jurisdiction despite Mr. O'Rourke's adherence to both the Oklahoma Supreme Court and OCCA's rules, and despite the fact that he included a certified copy of the Alfalfa County habeas court's denial of his 'Application to Assume Original Jurisdiction and Petition for Writ of Habeas Corpus' in WH-2023-3. O'Rourke also included the necessary information to show his state original writ of habeas corpus was denied by the district habeas court of his confinement, the citation of that case number, and request for the Oklahoma Supreme Court and OCCA to take judicial notice of the denial of his state original habeas

petition in Alfalfa County, Oklahoma. *See* 12 O.S. § 2202(D) ("A court *shall* take judicial notice if requested by a party and supplied with the necessary information.").

The appellate remedies below are inadequate and ineffective and the writ of habeas corpus as-applied to O'Rourke has been effectively suspended. O'Rourke asserts that the State and the OCCA recognizes that this Court's holdings in *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (retroactive application of unexpected and indefensible judicial interpretation of criminal statute violated due process), and *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) (unexpected and indefensible elimination of common law defense available at the time of alleged criminal conduct violates due process) – especially in light of the State's suppression of the complainant's adjudicated Indian status and evidence supporting O'Rourke's factual innocence – prevents the retroactive application of *Castro-Huerta* to deny O'Rourke's preemption claim.

In short, the OCCA's refusal to provide any meaningful consideration of – and worse, its refusal to adhere to – this Court's vertical *stare decisis* should result in this Court issuing strong medicine. Otherwise, the State will continue to suppress material *Brady* evidence by using a loophole in *Ritchie*, 480 U.S., and the OCCA will continue to evade adherence to the decisions from this Court it publicly disfavors. *See, e.g.*, *McGirt*, 140 S.Ct.

REASONS FOR GRANTING THE PETITION

The OCCA's refusal to adhere to this Court's vertical *stare decisis* to arrogate criminal jurisdiction it does not possess under the specific and narrow facts of this case violates due process.

I. This Court's Decision in *McGirt v. Oklahoma* Applies *Ab Initio*

As discussed *supra*, *McGirt*, 140 S.Ct., was issued while O'Rourke's direct appeal was pending, and it applies *ab initio*. *See Edwards*, 141 S.Ct. at 1154 ("A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded.") (emphasis in original). The situs of the alleged crime is wholly within the Muscogee Nation Reservation, and the complainant was adjudicated by the Tulsa County Juvenile Division Court as a Choctaw Indian before the Tenth Circuit decided *Murphy I*, 866 F.3d. *See* App. 3; App. 9; App. 10; App. 11.

Because *McGirt* applies *ab initio*, so too does the availability of O'Rourke's GCA preemption defense. His appellate counsel presented his GCA preemption defense on direct appeal, and the OCCA denied the claim by finding a failure to present sufficient *prima facie*

evidence of the complainant's Indian status. *See* F-2019-935 (April 15, 2021); App. 1-3 at pp. 2-3.

But then, the State suppressed the complainant's adjudicated Indian status pretrial, and the OAG – after being informed by the TCDA that *McGirt* applied to O'Rourke's case – suppressed her Indian status on direct appeal.

II. The State Violated *Brady*, *Pennsylvania v. Ritchie*, Oklahoma's Juvenile Code Discovery Exceptions, and a Pretrial Court Order to Suppress the Complainant's Adjudicated Choctaw Indian Status

Brady's due process doctrine teaches that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. In *Giglio v. United States*, 405 U.S. 150, 154-155 (1972), *Brady* was expanded to include impeachment evidence. Next, *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality), further extended *Brady*, eliminating the requirement that the defendant make a request for the evidence. *See also id.* at 685 (White, J., concurring in part and concurring in the judgment).

Brady imposes a self-executing, affirmative obligation on the prosecution to discern and disclose favorable evidence, independent of any defense action. *Bagley*, 473 U.S. at 682 (plurality opinion); *id.* at 685 (White, J., concurring in part and concurring in the judgment); *Banks v. Dretke*, 540 U.S. 668, 696 (2004). *See* 2 Charles Alan Wright & Peter J. Henning, Federal Practice and Procedure § 256, at 151 (4th ed. 2009) ("The Court reiterated in *Banks v. Dretke* the requirement that prosecutors have an independent duty to disclose *Brady* material that is not conditioned on a defendant's request for such material....") (footnote omitted). *But see Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (plurality) (the "trial court's discretion is not unbounded. If a defendant is aware of specific information contained in the file (*e.g.*, the medical report), he is free to request it directly from the court, and argue in favor of its materiality").

The Court further extended *Brady* in *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), announcing that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." These extensions effectuate the original purpose of *Brady*: to prevent the government from suppressing evidence critical to a fair trial. *Brady* and its derivative cases require a self-executing and affirmative obligation on the government, but not so in Oklahoma. The State and its judges have

turned *Brady* and *Ritchie* on their heads and shifted the burden to the defense. Time and again this Court is presented with evidence that *Brady* does not apply for some Oklahoma prosecutors.

Kyles extends to Oklahoma's multidisciplinary teams, which is a direct extension of the prosecution in cases involving the alleged sexual abuse of a minor. *See* 10A O.S. § 1-1-105(47) (" 'Multidisciplinary child abuse team' means any team ... of three or more persons who are trained in the prevention, identification, investigation, prosecution, and treatment of physical and sexual child abuse and who are qualified to facilitate a broad range of prevention- and intervention-related services related to child abuse."); 10A O.S. § 1-9-102 (multidisciplinary teams are developed by the district attorney); *id.* at 1-9-102(C)(2). *See also* 10A O.S. § 1-2-102(A)(2)-(3); Okla. Admin. Code 340:75-3-440; *Fent v. State ex rel. Dept. of Human Services*, 2010 OK 2, ¶ 20-21 & n.6, 236 P.3d 61, 68-69 & n.6 (describing the purpose and function of the multidisciplinary team); Anna Belle Newport, *Civil Miranda Warnings: The Fight for Parents to Know Their Rights During a Child Protective Services Investigation*, 54 Colum. Hum. Rts. L. Rev. 854, 880 (2023) ("[I]n Oklahoma, the relevant law states that 'law enforcement and child welfare staff shall conduct joint investigations in an effort to effectively respond to child abuse reports.' 10A O.S. § 1-9-102(C)(1)(a). The statute acknowledges that the efforts of CPS and the prosecutor are similar: it justifies the joint investigations as a means to 'eliminate duplicative efforts.' *Id.* § 1-9-102(C)(1)(d)").

The prosecution has a duty to learn of favorable information known to *any* member of the prosecution team, *Kyles*, 514 U.S. at 437, and it certainly knows or should have known of *Brady* evidence collected by its multi-disciplinary child abuse teams.[29] But in Oklahoma, *Ritchie*, 480 U.S., is utilized by the State as a loophole authorizing prosecutorial misconduct and the suppression of favorable evidence because of the decision's categorical exclusion of defense counsel from judicially supervised *in camera* review. Even for actually innocent defendants and appellants like O'Rourke, it is one thing to profess one's innocence and quite another to *prove it* after years of chasing material exculpatory and impeachment evidence suppressed by the State – ostensibly under the majority's holdings in *Ritchie*.

1. The Court Should Reconsider *Ritchie*

[29] As of 2010, "[a]t least nineteen other States have similar statutes in effect that mandate or encourage collaboration between child welfare departments and law enforcement agencies investigating child-abuse allegations." *Brief of the States of Arizona, et al,* in *Camreta v. Greene*, 2010 WL 5168883 (U.S.) at *26.

This Court should reconsider its decision in *Ritchie*, 480 U.S. As officers of the court, defense attorneys should be given the same presumption of honesty and integrity extended to prosecutors and judges, *see Banks*, 540 U.S. at 696, which *Ritchie* denies.

The plurality decision in *Ritchie* not only implies a level of distrust for officers of the court working for the defense, but also – albeit unintentionally – created a loophole the State utilizes not only to evade discovery, but to suppress material evidence entirely. Oklahoma's "prosecutors have for many years thwarted" this Court's disclosure requirements through procedural ingenuity and flat-out dishonesty. *See* Brief of ACLU, *et al*, *Glossip v. Oklahoma*, No. 22-7466 (U.S. Apr. 30, 2024), 2024 WL 1957065 at **13-32.[30]

The Court should close *Ritchie's* loophole by allowing defense counsel, as officers of the court, to attend and participate alongside the government during *in camera* judicial review. Any privacy concerns are easily mitigated by judicial oversight and a reviewing court's ability to enter a protective order over sensitive material under review and released to defense counsel. It also incentivizes prosecutors to maintain honesty and integrity while seeking justice instead of doing whatever it takes to obtain more convictions.

At a minimum, the Court should extend *Ritchie's* "ongoing" duty to disclose to all state and federal appellate proceedings – especially where the trial court ordered disclosure of the juvenile records but the State failed to do so, and also when the trial prosecutor notifies the government's appellate prosecutor that the direct appeal is subject to a complete preemption defense available at the time of the alleged criminal conduct.

2. The State Manipulated *Ritchie* and Oklahoma's Statutory Law to Evade Disclosure and to Suppress Favorable Material Exculpatory and Impeachment Evidence

Since *Ritchie*, the State has manipulated the decision and the privacy of Oklahoma's Title 10A (juvenile code) to suppress material exculpatory and impeachment evidence. It did exactly this to frustrate Mr. O'Rourke's preemption and actual innocence claims despite a pretrial

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[30] O'Rourke's allegations are not bald ones; the amici in *Glossip* have shown the State's suppression of material exculpatory and impeachment evidence is endemic because there are no meaningful consequences for prosecutors who cheat to win wrongful convictions. *Ritchie's* categorical exclusion of defense counsel permits the government to suppress material evidence that the most evenhanded judges, unaware of the facts known by the defense, might consider immaterial. Unless defense counsel is aware of and requests specific files, which the government can easily suppress under *Ritchie*, a defendant's rights to due process and meaningful discovery is significantly hampered.

defense request for disclosure pursuant to 10A O.S. § 1-6-102(E)(1) and a trial court order to release evidence determined by the trial court to be material pursuant to § 1-6-102(E)(4). *See* App. 12 ('Order Authorizing Release and Disclosure of Records and for Protective Order').[31]

The State did this knowing that the trial testimony of its only alleged eyewitness was suborned perjury. The alleged eyewitness disclosed to the State the complainant was "poisoning his mind" and making him lie about witnessing sexual abuse. Soon after the alleged eyewitness disclosed to the State that his sister was making him lie, an OKDHS caseworker made an in-home visit to O'Rourke's then-wife and the complainant's natural mother, confronting her about this disclosure. The OKDHS caseworker was angry and confrontational because the alleged eyewitness's disclosure that his sister made him lie would require OKDHS to perform a new forensic interview. *See* App. 5 (Affidavit of David O'Rourke stating that OKDHS caseworker "Bridget[] [O'Brien] ... came to the house and ... was extremely angry and said [the complainant's brother] had recanted his story because he previously lied for [the complainant]. Bridget[] was yelling at [the complainant's mother] ... and informed [the complainant's mother] and me[] [the complainant's brother] would have to be re-interviewed by [OK]DHS and Bridget[] will have to write a report about [the complainant's brother] saying he previously lied because [the complainant] forced him to lie originally.").

This admission by the State's alleged eyewitness clearly is exculpatory under *Brady*. "If the exculpatory evidence 'creates a reasonable doubt' as to the defendant's culpability, it will be held to be material." *United States v. Starusko*, 729 F.2d 256, 260 (3d Cir. 1984) (quoting *Argurs*, 427 U.S. at 112). *See also Argurs*, 427 U.S. at 110 ("If evidence highly probative of innocence is in [the proseuction's] file, [the prosecutor] should be presumed to recognize its significance even if he has actually overlooked it.").

The alleged eyewitness's disclosure was not revealed to the defense by the State even though OKDHS is required to document such disclosures and all forensic interviews. This OKDHS caseworker always made audio recordings of her in-home visits, and is required to document such visits, but no record of this visit was turned over to the defense. Nor was the new

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[31] The trial court order does not list the documents or other evidence it deemed material and subject to disclosure. Mr. O'Rourke's attorney on direct appeal, Kevin Adams, confirmed that the documents O'Rourke anonymously received after the post-conviction stage were not included in his discovery, nor in the State's 'Designation of Record' on direct appeal. Further, Mr. Adams pointed out that because the documents are not Bates- stamped the State did not turn the material evidence over at all pretrial or at any of the appellate stages.

forensic interview disclosed. However, O'Rourke's brother, the OKDHS appointed guardian of the minor children and a United States Department of Defense and Air Force employee, witnessed the OKDHS caseworker's confrontation about the disclosure, and her statement that the alleged eyewitness would have to be reinterviewed. *See generally* App. 5 ('Affidavit of David O'Rourke'), and *cf.* App. 20 (messages from O'Rourke's ex-wife impeaching the alleged eyewitness, albeit with a different version that was not disclosed to the Defense). To make matters worse, the TCDA told the OKDHS caseworker – a listed State's witness – not to appear at trial, thus eliminating O'Rourke's ability to confront and question her about the disclosure. The State flat out lied to the trial judge and the defense by claiming they had attempted and been unsuccessful in reaching the OKDHS caseworker.

Additionally, the State never disclosed an audio and video recorded initial interview at the OKDHS Office in Tulsa, Oklahoma. The above issues were explicitly addressed at this initial interview, and the OKDHS caseworker, Bridget O'Brien, said something along the line of "just because [the complainant] lied about those allegations does not mean she lied about all of them." *See* App. 5 ("I attended the initial interview with [OK]DHS after [O'Rourke], my brother, asked me to attend with [the complainant's natural mother] and [O'Rourke]. [OK]DHS was/is well aware of these facts."). *Cf.* App. 6 (March 24, 2017 'Verification of Attendance' listing and signed by Bridget O'Brien, DHS, and David O'Rourke). *See also* App. 2 (March 23, 2017 OKDHS 'Child Safety Meeting Request Form' listing Bridget O'Brien as "Worker" and David O'Rourke as "Uncle/safety plan monitor/dad's brother"); App. 7 (March 24, 2017 OKDHS 'Child Safety Meeting Confidentiality Agreement' signed by Bridget O'Brien, DHS, and David O'Rourke).[32]

The State seemingly has construed *Ritchie's* teaching that its "ongoing" "duty to disclose" and that information the trial court may deem "immaterial upon original examination may become important as the proceedings progress," 480 U.S. at 60, only applies pretrial. This

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[32] A private investigation firm working on O'Rourke's behalf as of late 2023 verified with O'Rourke's attorney in attendance at this "initial interview," Charlie Prather, that the attorney signed the 'Verification of Attendance' document. Unfortunately, Mr. Prather recently suffered a stroke and has no recollection of the events at the meeting. Still, OKDHS had audio and video recording equipment set up in the conference room where the meeting was held, but never turned over these recordings or any transcripts where Ms. O'Brien stated (paraphrased) "just because [the complainant] lied about some of the allegations [refuted by her mother, Michelle O'Rourke] does not mean she lied about all of them." O'Rourke expects to be in receipt of the PI's report on his actual innocence investigation soon, and will provide it to the Court and Respondent upon receipt and request.

myopic reading of *Ritchie* encourages the State's bad actors to suppress favorable material evidence under Title 10A because unless it is absolutely forced to disclose the information pretrial, it is incentivized to play the very game of hide and seek this Court has explicitly determined violates due process. *See Banks*, 540 U.S. at 696 (rejecting as untenable the suggested "rule [] declaring [the] 'prosecutor may hide, defendant must seek' ").

If the favorable evidence is not discovered and explicitly requested by the defense pretrial, and the government obtains a tainted conviction, the State has zero incentive – and worse, apparently has no requirement – to disclose the suppressed favorable evidence at any appellate stage. *See Ritchie*, 480 U.S. at 60 ("If a defendant is aware of specific information contained in the file (*e.g.*, the medical report), he is free to request it directly from the court, and argue in favor of its materiality"), and *cf. id.* (court's are obligated "to release information material to the fairness of the trial"). In fact, when O'Rourke requested specific disclosure of known evidence suppressed by the State in the TPR proceedings, the TCDA did not deny the existence of this favorable evidence; instead, it urged the TPR court to decline to order the State to disclose because the case is "closed." *See O'Rourke v. State*, MA-2023-891.

Such a myopic reading of *Ritchie* that alleviates the State from confessing and disclosing error after it has obtained a tainted or wrongful conviction puts juvenile proceedings beyond the reach of *Brady*, and that is untenable.

A. The State Violated the Trial Court's Order to Disclose Evidence Determined to be Material After *In Camera* Review

The trial court order on its face establishes that the State was ordered to disclose material evidence determined by the judge to be beneficial to the defense. *See* App. 12. The State did not comply and continues to refuse to disclose specific evidence identified and requested by O'Rourke – not because the beneficial evidence does not exist – but because the TPR proceedings are "closed." *See O'Rourke v. State*, MA-2023-891.

B. The TCDA Notified the OAG During the Direct Appeal Stage that this Case was Subject to Vacation and Dismissal Pursuant to *McGirt*

Soon after this Court issued *McGirt* and while O'Rourke's direct appeal was still pending, the TCDA compiled a list of some 20,000 cases since 1982 it determined were subject to being vacated under *McGirt*. This included O'Rourke's conviction, which was pending on

direct appeal. The list was provided to the OAG, the OCCA, and to the United States Attorneys' Offices for the Eastern, Northern, and Western Districts of Oklahoma

The TCDA notified the OAG that O'Rourke's case was subject to the decision because the complainant was an adjudicated Choctaw Indian. However, the OAG did not disclose this fact nor did it disclose the complainant's adjudicated Choctaw Indian status which was suppressed by the State pretrial soon after the Tenth Circuit decided *Murphy I.* This is unconstitutional for several reasons.

First, Oklahoma's common law Indian country preemption defense at the time of the alleged conduct below places the burden to provide *prima facie* evidence of Indian status – either the complainant or the defendant – solely on the criminal defendant/appellant. The defense "is not self-executing; one claiming a lack of state jurisdiction in a particular case must make a *prima facie* showing that the defendant or the victim is an Indian and that the crime was committed in Indian country." *Roth v. State*, 2021 OK CR 27, ¶ 6, 499 P.3d 23, 29 (Rowland, PJ, dissenting) (citing *Parker v. State*, 2021 OK CR 17, ¶ 32, 495 P.3d 653, 664; *Goforth v. State*, 1982 OK CR 48, ¶¶ 6-9, 644 P.2d 114, 116-17), *vacated by Oklahoma v. Roth*, 142 S.Ct. 2896 (Mem.) (applying *Castro-Huerta*). "Prima facie evidence is evidence that is 'good and sufficient on its face,' i.e., 'sufficient to establish a given fact, or the group or chain of facts constituting the defendant's claim or defense, and which if not rebutted or contradicted, will remain sufficient to sustain a judgment in favor of the issue which it supports.' " *Cuestra-Rodriguez v. State*, 2011 OK CR 4, ¶ 7, 247 P.3d 1192, 1195 (quoting *Black's Law Dictionary* 1190 (6th ed. 1990)).

The various OKDHS, TPD, and TCDA documents standing alone are sufficient *prima facie* evidence of the complainant's Choctaw Indian status. *See* Apps. 3; 9; 10; 11. The TPR court's 'Adjudication Order' is dispositive. *See* App. 11 (adjudicating the complainant as a Choctaw Indian) and *cf.* 12 O.S. § 2202(B) ("A judicially noticed adjudicative fact shall not be subject to reasonable dispute in that it is either (1) Generally known within the territorial jurisdiction of the trial court, or (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). *See also* App. 19 (requesting the OCCA to take judicial notice of the complainant's adjudicated Indian status).

In the federal habeas proceedings below, the OAG continues to deny the adjudicated Indian status of the complainant, and further asserts it has no duty to disclose material exculpatory and impeachment evidence that was in its possession on direct appeal – evidence the

TCDA provided the OAG during the pendency of O'Rourke's direct appeal containing the very *prima facie* evidence necessary for his direct appeal preemption claim.

Second, the OAG's suppression of the complainant's adjudicated Indian status does more than double down on the TCDA's suppression of the same and flouting of the pretrial court order to release all material exculpatory and impeachment evidence developed in the TPR proceeding. It effectively makes several of this Court's holdings paradoxical.

In *Edwards*, 141 S.Ct. at 1154, this Court made clear that its new rules apply "to cases on *direct* review, even if the defendant's trial has already concluded." After *McGirt*, 140 S.Ct., the State dismissed dozens of pretrial cases subject to GCA preemption and referred those cases to the United States Attorney. After this Court issued *Castro-Huerta* the State did not refile charges against *any* of the defendants whose cases it determined were preempted by the GCA. O'Rourke's case should be treated no differently pursuant to *Edwards*.

In *Ritchie*, the Court clearly explained that the government has an "ongoing" "duty to disclose" and that information the trial court may deem "immaterial upon original examination may become important as the proceedings progress." 480 U.S. at 60. The State somehow believes that *Ritchie* places its obligations under *Brady* on the court reviewing privileged and confidential juvenile records *in camera*, and thus, the OAG has no *Brady* obligation in cases involving a minor complainant during the direct appeal stage.

If the State's theory is correct, then *Ritchie* has provided the very loophole allowing prosecutors to hide favorable material evidence this Court determined is untenable. *Banks*, 540 U.S. at 696. Worse, once an appellant discovers the State hid the very *prima facie* evidence necessary for a complete defense (which then shifts the burden to the State to prove beyond a reasonable doubt its jurisdiction is not preempted), there is zero redressability once an appellant discovers the State's game of " 'hide' " and begins to " 'seek' ". *Id.* By then, according to the State, the trial has concluded, the case is closed, and the game clock permanently stands at zero. Game over, the State says, and it is too late to call foul. This loophole encourages the suppression of favorable evidence – including evidence of O'Rourke's actual innocence – and rewards the State for the very prosecutorial misconduct this Court's holdings should prevent.

For these reasons, the Court should close *Ritchie's* loophole and require the State to reveal favorable material evidence in its possession during the state direct and collateral appeal

stages and during federal habeas, even if narrowly applied to cases pending on direct review or otherwise not yet final when a controlling decision of this Court is issued.

C. The TPR Proceeding Should Be Considered Part of the State Court Record for Federal Habeas Purposes

This Court refers to *Brady* files as case-related files. *See, e.g., Cone v. Bell*, 556 U.S. 449, 459 (2009) (discussing, in the *Brady* context, a criminal defendant's right to review "the prosecutor's file in his case"); *Bagley*, 473 U.S. at 695, 702 (Marshall, J., dissenting) (arguing that *Brady* requires the prosecutor to disclose "all evidence in his files that might reasonably be considered favorable to the defendant's case"); *United States v. Argurs*, 427 U.S. 97, 111 (1976) ("[W]e have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel...."); *Giglio*, 405 U.S. at 154 (discussing, in the *Brady* context, "a combing of the prosecutors' files" (quoting *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968)) (internal quotation marks omitted). The focus on case-related material is further evidenced that open-file policies would be sufficient for *Brady* compliance. *See, e.g., Connick v. Thompson*, 131 S.Ct. 1350, 1386 n.27 (2011) (Ginsburg, J., dissenting); *Strickler*, 527 U.S. at 283 n.22; *Kyles*, 514 U.S. at 437; *Bagley*, 473 U.S. at 699 (Marshall, J., dissenting). This "open-file" reasoning certainly extends to the juvenile court, TPD, and OKDHS records – especially so once the State claims it has fulfilled its pre-trial discovery obligations and its designation of record on appeal.

The trial judge ordered the State to disclose the material exculpatory and impeachment evidence suppressed in the TPR proceedings; its discovery is authorized by state statute. *See* 10A O.S. § 1-6-102(E). At a minimum, and because Oklahoma law explicitly makes the multidisciplinary team a part of the prosecution, *see* 10A O.S. §§ 1-9-102, the juvenile investigation records should be supplied to the federal habeas court for *in camera* review in the presence of the OAG and defense counsel. The State should be required to submit the entire juvenile record – including medical, psychological, psychiatric, and other records labeled as privileged and confidential – as part of the state court record contemplated by Federal Habeas Corpus Rule 2(d). *See* Rule 2, *Rules Governing § 2254 Cases*, 28 U.S.C. foll. § 2254.

D. The Suppressed TPR Case-Related Material Evidence Should Be Subject to Federal Discovery and an Evidentiary Hearing

"Case-related" material refers to information dredged up in the course of investigating the case – the information in the prosecutor's, OKDHS's, and the police department's case files. The above-cited case law makes the prosecutor responsible for everything discovered in the process of investigating the case (*i.e.*, the case-related material), and even unrelated-case material, provided the material is known to some member of the prosecution team. *See* Robert Hochman, Comment, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. Chi. L. Rev. 1673, 1677 (1996) ("A search *Brady* claim arises when the prosecutor fails to gather, or to receive from others, evidence that might be material and favorable to the defense.").

In fact, three of this Court's *Brady* cases involved unrelated-case material. In *Agurs*, 427 U.S. at 100-101, 114, the undisclosed evidence was a murder victim's criminal record, which was not drawn from the particular case. *See also* Brief for the United States, *Agurs*, 427 U.S. 97 (No. 75-491), 1976 WL 181371, at *5-7.

In *Kyles*, 514 U.S. at 428-429, information about a key informant's criminal conduct was among the evidence deemed to be *Brady* material, even though it was unrelated to the case.

In *Ritchie*, 480 U.S. at 43, the Court dealt with a defendant's *Brady* request for child abuse records "related to the immediate charges" as well as earlier records stemming from "a separate report" of the defendant's abuse – a report that was unrelated to the investigation. The *Ritchie* court spent no time distinguishing between case-related and unrelated case material, instead remanding the matter for the state court to conduct an *in camera* review. *Id.* at 61.

This Court should expressly hold that when the government violates *Ritchie* and its obligations to disclose material exculpatory and impeachment evidence to the defense, that the entire juvenile record is subject to *in camera* review by a federal habeas judge and defense counsel, and that the records are subject to federal habeas discovery, *see* Rule 6, *Rules Governing § 2254 Cases*, 28 U.S.C. foll. § 2254, and an evidentiary hearing. *See* Rule 8, *Rules Governing § 2254 Cases*, 28 U.S.C. foll. § 2254. The current *Ritchie* framework allows for the very manipulation of *Brady* and suppression of material exculpatory and impeachment evidence utilized by the State below.

III. The Retroactive Application of *Castro-Huerta* Below is Substantive in Effect and Violates Due Process

The retroactive application of *Castro-Huerta*, 142 S.Ct., here is barred by the principles expounded in *Bouie*, 378 U.S., and *Rogers*, 532 U.S. Although *Rogers* limits the scope of *Bouie*,

it does nothing to prevent relief in this case. This is so because *Castro-Huerta* expanded the scope of the GCA and concomitantly eliminated Oklahoma's common law preemption defense in a way that was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie*, 378 U.S. at 354 (internal quotation marks omitted) (quoted in *Rogers*, 532 U.S. at 461.

The principal difference between *Bouie* and *Rogers* is that *Bouie* concerned a "retroactive judicial expansion of narrow and precise statutory language," *Bouie*, 378 U.S. at 353, whereas the retroactive judicial decision challenged in *Rogers* "involve[d] not the interpretation of a statute but an act of common law judging." *Rogers*, 532 U.S. at 461. The retroactive application of *Castro-Huerta* here implicates both *Bouie* and *Rogers*.

The *Rogers* Court, in assessing whether the abolition of the year-and-a-day rule was "unexpected and indefensible by reference of the law which had been expressed prior to the conduct in issue," based its decision on three considerations:

First, "[t]he year and a day rule [was] widely viewed as an outdated relic of the common law," *Rogers*, 532 U.S. at 462, whereas state, tribal and federal courts throughout Indian country recognized the complete GCA common law preemption defense until *Castro-Huerta*.

Second, "the year and a day rule ha[d] been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue," *Rogers*, 532 U.S. at 463, whereas prior to O'Rourke's alleged conduct and through the finality of his conviction, every state, tribal and federal court throughout Indian country had interpreted the GCA to preempt state jurisdiction for alleged crimes by a non-Indian against an Indian, including the OCCA. "This [c]ourt first rejected the State's concurrent jurisdiction argument in *Bosse v. State*, 2021 OK CR 3, ¶¶ 23-28, ..., and *Ryder v. State*, 2021 OK CR 11, ¶¶ 13-28 ...," and while those decisions were later vacated, the OCCA's "full analysis of the concurrent jurisdiction issue in this case is now controlling authority on this issue in Oklahoma and should be relied upon exclusively by the bench, the bar and public from this date forward." *Roth v. State*, 2021 OK CR 27, ¶ 12 n.2 (emphasis added). O'Rourke's reliance on his GCA preemption defense started on direct appeal, and he took the OCCA at its word. *See Castro-Huerta*, 142 S.Ct. at 2510 ("Oklahoma must pursue a proposition so novel and so unlikely that in over two centuries not a single State has successfully attempted it in this Court.") (Gorsuch, J., dissenting).

Third, "at the time of [Rogers'] crime the year and a day rule had only the most tenuous foothold as part of the criminal law of the State of Tennessee" and "did not exist as part of Tennessee's statutory criminal code," *Rogers*, 532 U.S. at 464, whereas at the time of the allegations against O'Rourke the OCCA wholly embraced and recognized at common law the GCA's preemptive effect.[33] In fact, the OCCA created a reliance interest in the complete GCA preemption defense as-applied to the narrow and specific facts of O'Rourke's case. *See Roth* 2021 OK CR at ¶ 12 n.2 (the GCA's preemptive effect and Oklahoma's lack of concurrent jurisdiction is the "controlling authority on this issue in Oklahoma and should be relied upon exclusively by the bench, the bar and public from this date forward").

The State cannot provide even one example from any state, tribal, or federal court showing the GCA's preemptive effect had "only the most tenuous foothold" as part of Oklahoma's Indian country law. *Rogers*, 532 U.S. at 464.

The Tenth Circuit recently considered a similar issue - the eliminated defense for a defendant whose case was dismissed by the State and prosecuted by the Government post-*McGirt*. *See Budder*, 76 F.4th. The Tenth Circuit recognized that this Court "has held that in certain limited circumstances the retroactive application of a judicial decision interpreting criminal law can violate the Due Process Clause of the Fifth [and Fourteenth] Amendment[s]." *Budder*, 76 F.4th at 1012 & n.2 (citing *Marks v. U.S.*, 430 U.S. 188, 192 (1977)).

The Tenth Circuit reaffirmed that the test for determining such a due process violation "is essentially one of foreseeability." *Budder*, 76 F.4th at 1013 (quotation omitted). "[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." *Id. See Johnson v. Klindt*, 158 F.3d 1060, 1063 (10th Cir. 1998) ("Unforeseeable judicial decisions include expansion of a statute narrow and precise on its face beyond those terms; the overruling of precedent; or when an in-depth inquiry by a dedicated and educated student of the relevant law would have revealed nothing to foreshadow the controlling court opinion."); *Castro-Huerta*, 142 S.Ct. at 2505-27 (Gorsuch, J., joined by Breyer, J., Sotomayor, J., and Kagan, J., dissenting) (pointing out the decision's extreme departure from well-settled Indian

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[33] Like in *Rogers*, the complete GCA preemption defense "did not exist as a part of" Oklahoma's "statutory criminal code," 532 U.S. at 464, but was in full effect under Oklahoma's common law until this Court issued its decision in *Castro-Huerta*.

law). *See also generally* Meg A. Bloom, *The Split from Precedent: An Analysis of the Negative Impact Oklahoma v. Castro-Huerta Will Have in Indian Country*, 48 Am. Indian L.Rev. 1 (2024); Micaela B. Parks, *Narrowing from Below: How Lower Courts Can Limit Castro-Huerta*, 76 Ark. L.Rev. 837, 838 (2024) ("[T]he majority departed from centuries of precedent when deciding *Castro-Huerta*"); Jeremy Rabkin, *Commerce With the Indian Tribes: Original Meanings, Current Implications*, 56 Ind. L.Rev. 279 (2023) ("*Castro-Huerta* defied much current precedent and practice, as four dissenters protested"); W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 Colum. L. Rev. 1533, 1591 (Oct. 2023) ("In *Oklahoma v. Castro-Huerta*, the Court upended the foundational principles of Indian law and the long-settled expectations of criminal jurisdiction in Indian Country.") (footnote omitted); Sandra Day-O'Connor College of Law, *Oklahoma v. Castro-Huerta: Rebalancing Federal-State-Tribal Power* (Stacy Leeds, Dean of Arizona State's Sandra Day-O'Connor College of Law "From an academic standpoint, I am stunned at ... the majority opinion" and "the complete disregard for settled law");[34] Gregory Ablavsky, *Too Much History: Castro-Huerta and the Problem of Change in Indian Law*, 2023 Sup. Ct. Rev. 293, 313-20, 344-50 (arguing that the *Castro-Huerta* decision exemplified "bad history" in Indian law); Nick Martin, *The Supreme Court's Attack on Tribal Sovereignty Explained*, High Country News (July 1, 2022) (stating that *Castro-Huerta* "breaks with centuries of established federal Indian law").[35]

Likewise, lower federal courts have recognized *Castro-Huerta's* significant departure from well-settled Indian country law. *See, e.g., United States v. Lussier*, No. 21-cr-145 (PAM/LIB) (D. Minn. Oct. 11, 2022), 2022 WL 17476661 at *14 (emphasizing *Castro-Huerta's* "majority opinions' departure from almost two hundred years of well settled Indian law").

The Court's ultimate determination in *Castro-Huerta* was not unexpected nor indefensible to the defendant/appellee in that case, nor to the 12 other cases where the Court granted certiorari and reversed the OCCA's grants of relief. *See Castro-Huerta*, 142 S.Ct. 877 (Mem.) (Jan. 21, 2022) (granting cert. limited to the question of whether a state has authority to prosecute non-Indians who commit crimes against Indians in Indian country). *See also*

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34 Available at Vimeo: https://perma.cc/GVR8-EWNE.

35 https://www.hcn.org.articles/indigenous-affairs-justice-law-the-supreme-courts-attack-on-tribal-sovereignty-explained.

Oklahoma v. McDaniel, 142 S.Ct. 2894 (Mem.) (June 30, 2022) (granting certiorari, vacating judgment, and remanding to OCCA for further consideration in light of *Castro-Huerta*, 142 S.Ct.); *Oklahoma v. Williams*, 142 S.Ct. 2895 (Mem.) (same); *Oklahoma v. Jones*, *Miller*, *Roth*, *& Coffman*, 142 S.Ct. 2896 (Mem.) (same); *Oklahoma v. Mize*, *Purdom*, *& White*, 142 S.Ct. 2896 (Mem.) (same); *Oklahoma v. Bailey & Bragg*, 142 S.Ct. 2898 (Mem.) (same), and *Oklahoma v. Lauren Sims*, 143 S.Ct. 70 (Mem.) (Oct. 3, 2022) (same).

When the State sought certiorari review in each of these cases and this Court granted certiorari in *Castro-Huerta*, each of these defendants/appellees was on notice that the Court might agree with the State's presented question. In this way, it was not "unexpected," *Rogers*, 532 U.S. at 461, and because these defendant/appellees were given the opportunity to argue their positions against the State's concurrent jurisdiction theory in this Court, the ultimate holding in *Castro-Huerta* as applied to their cases was not "indefensible." *Id. See Edwards*, 141 S.Ct. at 1154 n.2 ("Before *Griffith v. Kentucky*, 479 U.S. 314, ... (1987), the Court sometimes would decline to apply new procedural rules even to cases on *direct* review ... *Griffith* ended that practice and declared that new rules apply to all cases on direct review.").

As evidenced by the case timelines above and the State's suppression of material exculpatory and impeaching evidence in the TPR proceedings, the exact opposite is true here, and the retroactive application of *Castro-Huerta* here violates due process.

CONCLUSION

For the foregoing reasons, Mr. O'Rourke respectfully requests the Court to Order the State to enter its response, grant certiorari review, schedule this case for briefing, and ultimately vacate the judgment and sentence below.

Dated: June 7, 2024.

Respectfully submitted,

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PROOF OF SERVICE

I, Bryan Christopher O'Rourke, do swear and declare on this date, June 7, 2024, as required by Sup. Ct. Rule 29 I have served the enclosed PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the prison's legal mail system, United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days, or via e mail by agreement.

The name and addresses of those served are as follows:

Attorney General of Oklahoma 313 N.E. 21st Street Oklahoma City, OK 73105	Brian Danker Senior Executive Legal Officer Choctaw Nation of Oklahoma bdanker@choctawnation.com

I declare under penalty of perjury that the foregoing is true and correct to the very best of my knowledge, information, and belief. Sup. Ct. Rule 29(2); 28 U.S.C. § 1746.

Executed on June 7, 2024.

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