

**In the Supreme Court of the United States**

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STATE OF OKLAHOMA,

*Petitioner,*

v.

EMMITT G. SAM,

*Respondent.*

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**On Petition for a Writ of Certiorari to the  
Oklahoma Court of Criminal Appeals**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

What requirements must a criminal defendant satisfy to qualify as an “Indian” under the Major Crimes Act, 18 U.S.C. § 1153?

**LIST OF PROCEEDINGS**

Oklahoma Court of Criminal Appeals

No. F-2017-1300

*Emmitt G. Sam*, Appellant, *v.*

*The State of Oklahoma*, Appellee

Date of Final Opinion: December 2, 2021

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Oklahoma District Court (Tulsa County)

Case No. CF-2016-3789

*The State of Oklahoma*, Plaintiff, *v.*

*Emmitt G. Sam*, Defendant

Date of Judgment and Sentencing: November 21, 2017

**TABLE OF CONTENTS**

	Page
QUESTION PRESENTED .....	i
LIST OF PROCEEDINGS.....	ii
TABLE OF AUTHORITIES .....	v
OPINIONS BELOW .....	1
JURISDICTION.....	2
STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE PETITION.....	6
CONCLUSION.....	7

**TABLE OF CONTENTS – Continued**

Page

**APPENDIX TABLE OF CONTENTS**

Opinion of the Oklahoma Court of Criminal Appeals (December 2, 2021) ..... 1a

Findings of Fact and Conclusions of Law of the District Court of Tulsa County, State of Oklahoma (Signed June 28, 2021; Filed June 29, 2021)..... 13a

Order of the Oklahoma Court of Criminal Appeals, Remanding for Evidentiary Hearing (August 24, 2020) ..... 24a

## TABLE OF AUTHORITIES

Page

### CASES

<i>McGirt v. Oklahoma</i> , 140 S.Ct. 2452 (2020) .....	3, 6
<i>Murphy v. Royal</i> , 866 F.3d 1164 (10th Cir. 2017) .....	4
<i>Oklahoma v. Wadkins</i> , No. 21-____ .....	3, 5, 6, 7
<i>Sharp v. Murphy</i> , 140 S.Ct. 2412 (2020) .....	4
<i>United States v. Antelope</i> , 430 U.S. 641 (1977) .....	6

### STATUTES

18 U.S.C. § 1153, Major Crimes Act .....	i, 2, 3, 6
28 U.S.C. § 1257(a) .....	2

### JUDICIAL RULES

Sup. Ct. R. 12.7 .....	3
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**OPINIONS BELOW**

The opinion of the Oklahoma Court of Criminal Appeals, dated December 2, 2021, is included in the Appendix at App.1a-12a. The order of the Oklahoma Court of Criminal Appeals, dated August 24, 2020, remanding the case for an evidentiary hearing is included below at App.24a-28a. The Findings of Fact and Conclusions of Law of the District Court in and for Tulsa County, State of Oklahoma, dated June 29, 2021, is included below at App.13a-23a. These opinions and orders were not designated for publication.



## JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on December 2, 2021. App.1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



## STATUTORY PROVISIONS INVOLVED

### **18 U.S.C. § 1153 (in relevant part)** **Law governing Indian country**

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.





## STATEMENT OF THE CASE

Like the pending petition in *Oklahoma v. Wadkins*, No. 21-\_\_\_\_, this case presents the critical question of how courts are to determine who qualifies as an “Indian” under the Major Crimes Act, 18 U.S.C. § 1153. For the same reasons given in the *Wadkins* petition, review is warranted to examine that question. The petition in *Wadkins* should be granted, and this petition should be held pending a decision there. In the alternative, the petition in this case should be granted.

1. On June 24, 2016, respondent and an accomplice went on a deadly crime spree in Tulsa, Oklahoma. The two men carjacked a number of cars at gunpoint, and shot and killed Jonathan Stephens (Tr. 291-301, 392-95, 416-21).<sup>\*</sup> They then led police on a high speed chase before they were ultimately apprehended (Tr. 434-40).

Respondent was convicted of first degree murder and two counts of robbery with a firearm. He was sentenced to life imprisonment with the possibility of parole for the murder, and received two sentences of seven years imprisonment for the robbery convictions.

2. After this Court issued its decision in *McGirt*, the Court of Criminal Appeals remanded the case to the district court for an evidentiary hearing. On remand, the district court accepted the parties’ stipulations that the crimes occurred within the historical boundaries of the Muscogee (Creek) reservation, and that

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<sup>\*</sup> All fact citations are to the transcript of respondent’s trial (Tr.), which is available below. *See* Sup. Ct. R. 12.7.

respondent has 41/128 Indian blood but was not an enrolled member of the Cherokee Nation at the time of the crimes. App.17a.

As to the disputed question whether respondent was recognized as an Indian, the court refused to apply the bright-line, membership-only test urged by the State. App.21a. To prove Indian status at the time of the crimes—in spite of his lack of enrollment—respondent presented his medical records, and the testimony of his mother and former high school counselor. App.15a-16a. The district court based its determination that respondent was an Indian on services his mother received on his behalf throughout his life. App.18a-19a. For example, respondent was born at an Indian hospital, was placed in foster care as a toddler through the Indian Child Welfare Act, and received medical treatment through the Indian Health Resource Center. App.18a. But almost none of the evidence upon which the trial court relied was temporally proximate to the crimes. App.18a-21a.

The court considered the fact that respondent was a minor at the time of the crimes to be a factor distinguishing this case from cases involving adult offenders. App.18a. Yet, respondent was no young child—he was seventeen years old when he committed the crimes. App.4a. Further, after attaining adulthood, respondent was not enrolled with the Tribe until he was nearly twenty. 8/24/2018 Motion to Supplement Appellant's Application to Supplement Appeal Record or in the Alternative Remand for Evidentiary Hearing on Sixth Amendment Claims. And even then, respondent did not enroll himself. Rather, after the Tenth Circuit's decision in *Murphy v. Royal*, 866 F.3d 1164, 1169 (10th Cir. 2017), *aff'd sub nom Sharp v. Murphy*, 140 S.Ct. 2412 (2020), his mother enrolled him.

The State presented evidence that respondent has repeatedly been identified (and has self-identified) as a member of a black street gang. App.22a. Respondent was even in an altercation with a member of a rival Native American gang in prison. App.22a. The State further presented evidence that respondent had never sought or received any services provided for Indians on his own behalf. App.22a.

Citing the “very low burden” it assigned to respondent, the district court found he was “formally and informally recognized as an Indian by a tribe or the federal government at the time of the offense.” App.22a-23a.

3. The case returned to the Court of Criminal Appeals, which rejected any requirement of formal tribal enrollment. App.4a. With the four factors discussed in the *Wadkins* petition as a “guide,” the court determined that the district court’s decision was not an abuse of discretion. App.4a-6a. Respondent’s convictions were dismissed. App.7a.

The federal government has since filed charges against respondent. *See United States v. Sam*, No. 4:22-cr-13-gif-1 (N.D. Okla.).



## REASONS FOR GRANTING THE PETITION

In the decision below, the Oklahoma Court of Criminal Appeals again ordered the release of a criminal from state custody after finding he was Indian enough, although not enrolled with any tribe at the time of his crimes. As the State of Oklahoma explains in its petition in *Wadkins*, this Court has never set forth a test to determine Indian status for purposes of federal criminal law, instead explicitly leaving open questions such as whether a person not enrolled with a tribe qualifies as an “Indian.” See *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977). Moreover, lower courts are split in numerous ways on how to determine who qualifies as “Indian” for purposes of the Major Crimes Act, 18 U.S.C. § 1153. And the test applied by the court here is in tension with precedent from this Court which prohibits a finding of Indian status based solely on racial considerations. In light of this Court’s holding in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) that millions of Oklahomans now live on Indian reservations, it is crucial that this Court provide clarity and certainty for law enforcement and courts alike on the question presented.



## CONCLUSION

The petition for a writ of certiorari in *Wadkins* should be granted, and the petition in this case should be held pending a decision there and then disposed of as is appropriate. In the alternative, this petition should be granted.

Respectfully submitted,

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MARCH 2, 2022