NO. 21-467

In the Supreme Court of the United States

CLIFTON MERRILL PARISH,

Petitioner,

v.

OKLAHOMA ET AL.,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENT THE STATE OF OKLAHOMA

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QUESTION PRESENTED

Whether federal law requires state courts to apply *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), retroactively on state postconviction review.

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INTRODUCTION

When this Court decided *McGirt v. Oklahoma*, it recognized that many state inmates who attempt to seek release under its decision would nonetheless remain in state custody "thanks to well-known state and federal limitations on postconviction review in criminal proceedings." 140 S.Ct. 2452, 2479 (2020). The Oklahoma Court of Criminal Appeals took *McGirt* at its word, applying one such well-known limitation: claims seeking to apply new decisions retroactively are, as a general rule, not redressable when raised for the first time on postconviction review. The court did so clearly and repeatedly as a matter of state law.

Petitioner, who stands convicted of murder after a full and fair trial and appellate process (where his current contentions were never raised), nonetheless seeks review of the Court of Criminal Appeals' state law decision. Certiorari is unwarranted.

To start, this Court does not review state court decisions, like the one below, based on independent and adequate state law. Attempting to sidestep that jurisdictional and prudential limitation, petitioner seeks review arguing—for the first time in this Court—*McGirt* gives him a constitutional right to postconviction relief in state court notwithstanding state law procedural or equitable limitations on such a remedy. But nothing in *McGirt* was a constitutional holding or a matter of constitutional rights. Nor does any constitutional provision give petitioner a right to postconviction relief in this case. The Court, for example, has long held that the Supremacy Clause does not create federal rights and that the source of any

deprivation of state authority in Indian country is statutory, not by direct operation of the Commerce Clause. Petitioner's newly raised constitutional theories do not justify review of the state law determination below.

Even putting aside the state-law nature of this case and assuming that federal retroactivity jurisprudence controls, this Court has never held that a decision like *McGirt* establishes a substantive rule that is retroactively applicable on postconviction review. The types of rules this Court has held retroactive are ones holding that certain conduct is not constitutionally punishable, or that the punishment itself is unconstitutional, or that the statutory language of conviction did not cover the conduct at issue. But when this Court has confronted a new ruling on whether a case proceeded in the proper court, it has turned down attempts to apply it retroactively. Lower federal courts have done the same, including with respect to Indian country claims.

These decisions accord with the basis of retroactivity jurisprudence, which recognizes that federal (and here, state) law grants equitable discretion in fashioning postconviction relief and appreciates the manifest injustice of vacating the long-final convictions of those unquestionably guilty of conduct that is unquestionably a crime (such as murder). Retrial in these circumstances is often either impossible or comes at great cost, imposing enormous harm on the victims of crime, their families, the State, and the public at large. With no conflict between the decision below and rulings from either this Court or other lower courts, the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

1. Petitioner Clifton Merrill Parish came to believe that a man named Robert Strickland was romantically involved with Parish's girlfriend, so he and several other individuals formed a plan to rob Mr. Strickland. On April 5, 2010, petitioner and his co-conspirators lured Mr. Strickland to an isolated location where they beat him to death. Tr. 335-37, 356-57, 365, 388-425, 496-515, 712-18.[1] Petitioner was convicted of second-degree felony murder and sentenced to twenty-five years of imprisonment.

The Oklahoma Court of Criminal Appeals affirmed petitioner's conviction. *Parish v. State*, No. F-2012-335 (Okla. Crim. App. Mar. 6, 2014). Petitioner did not again challenge his conviction until August 2020, after this Court decided *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). Petitioner applied for state postconviction relief in state district court, claiming that he is a Choctaw Indian, and that he committed the murder within the Choctaw Nation's reservation. While his petition was pending, the Oklahoma Court of Criminal appeals in another case held, based on *McGirt*, that Congress had created a reservation for the Choctaw Nation that had never been disestablished. *See Sizemore v. State*, 485 P.3d 867 (Okla. Crim. App. 2021), *pet. for cert. filed*, No. 21-326 (U.S.). A week later, the state district court granted postconviction relief. Pet.App. 30a-31a.

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[1] All fact citations are to the transcript of petitioner's trial (Tr.). *See* Sup. Ct. R. 12.7.

2. The State filed a petition for writ of prohibition in the Court of Criminal Appeals, arguing that *McGirt* and its state court progeny (such as *Sizemore*) should not apply retroactively on state postconviction review to invalidate convictions that were final when *McGirt* was decided. The court, in a thorough, written opinion, granted the State's petition. Pet.App.1a.

The Oklahoma Court of Criminal Appeals began its analysis by explaining "its own non-retroactivity doctrine—often drawing on, but independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus." Pet.App.4a (citing, *inter alia*, *Ferrell v. State*, 902 P.2d 1113 (Okla. Crim. App. 1995)). The Court of Criminal Appeals recounted that, like this Court, its retroactivity jurisprudence is part of its "independent authority to interpret the remedial scope of state post-conviction statutes." Pet.App.6a (citations omitted). And like this Court, that approach includes equitable considerations that take into account "the narrow purposes of collateral review, and the reliance, finality, and public safety interests in factually accurate convictions and just punishments," recognizing that retroactivity "invites burdensome litigation and potential reversals unrelated to accurate verdicts, undermining the deterrent effect of the criminal law." Pet.App.5a-6a (citation omitted).

In answering the specific question presented, the Court of Criminal Appeals looked to similar decisions of this Court and the United States Court of Appeals for the Tenth Circuit on federal habeas review for guidance, finding those decisions "very persuasive in our analysis of the state law question today." Pet. App.7a. The court primarily examined the Tenth Circuit's decision in *United States v. Cuch*, 79 F.3d 987

(10th Cir. 1996), which held that this Court's decision in *Hagen v. Utah*, 510 U.S. 399 (1994), regarding the boundaries of the Uintah reservation, should not be applied retroactively to invalidate final federal convictions on habeas review. Pet.App.8a-12a.

Having examined its own precedent and sought guidance from federal case law, the Court of Criminal Appeals decided that "[f]or purposes of [its] state law retroactivity analysis, *McGirt*'s holding" was not "substantive." Pet.App.12a-13a. *McGirt*, the court explained, "did not determine whether specific conduct is criminal, or whether a punishment for a class of persons is forbidden by their status," but instead was "procedural" in that it "effectively decided which sovereign must prosecute major crimes committed by or against Indians within" historic Muscogee (Creek) lands. *Id.* The court also held that *McGirt* was "new" in that it "imposed new and different obligations on the state and federal governments" and "it was not dictated by, and indeed, arguably involved controversial innovations upon, Supreme Court precedent," pointing to the reasoned disagreement between the Justices of this Court. Pet.App.13a-16a. And the Court of Criminal Appeals noted that *McGirt* itself did not require undoing all prior inconsistent final state convictions, but instead contemplated the exact opposite. Pet.App. 16a-17a (citing *McGirt*, 140 S.Ct. at 2479, 2481).

The state court then weighed the equities of affording relief based on *McGirt* on state postconviction review, finding that while relief is available on direct review, "[t]he balance of competing interests is very different in a final conviction," and denying relief in the latter cases "strik[es] a proper balance between the public safety, finality, and reliance interests in settled

convictions against the competing interests of those tried and sentenced under the prior jurisdictional rule"—jurisdiction that "went wholly unchallenged, as it did at Mr. Parish's trial in 2012." Pet.App.17a-19a.

Judge Hudson concurred to summarize his understanding of the majority's application "on state law grounds the retroactivity principles" also endorsed in this Court's jurisprudence. Pet.App.20a. In addition to "fully concur[ring]" in the decision, Judge Hudson noted that "[w]hile this decision resolves one aspect of the post-*McGirt* jurisdictional puzzle, many challenges remain for which there are no easy answers," and "[s]o far, Congress has missed the opportunity to implement a practical solution which, at this point, seems unlikely." Pet.App.21a. Judge Lumpkin also concurred, stating that the majority's opinion, like this Court's own retroactivity jurisprudence, is based primarily on equitable considerations and such "application of legal policy" is "hard to explain in an objective legal context but provides a just and pragmatic resolution." Pet.App.22a-25a.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW RESTS ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

The decision below was explicitly an exercise of the Oklahoma Court of Criminal Appeals' "independent authority to interpret the remedial scope of state post-conviction statutes" to hold that *McGirt* and its state-court progeny do not, under state law, "apply retroactively to void a conviction that was final when *McGirt* was decided." Pet.App.8a. That interpretation of state statutes by the highest state court on criminal matters is "binding on federal courts" and this Court has held itself to be without "any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (citations omitted). "This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules." *Id.* (citation omitted). This Court's refusal to "review judgments of state courts that rest on adequate and independent state grounds" is based not only on federalism concerns, but also "in the limitations of [this Court's] own jurisdiction." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). Accordingly, certiorari is not warranted, or even available, to review the decision below.

Petitioner acknowledges the Oklahoma Court of Criminal Appeals' decision rested on "Oklahoma's doctrine" of retroactivity that is "independent from" federal jurisprudence on federal habeas corpus. Pet.14 (quoting Pet.App.4a). He nonetheless argues the

decision below did not, in fact, rely on independent and adequate state grounds because the Court of Criminal Appeals "took its retroactivity standards directly from this Court's retroactivity jurisprudence." Pet.29-30. That is incorrect.

This Court will not exercise its certiorari jurisdiction on the sole grounds that a "state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Rather, when a state court does so, "it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Id.* In addition, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds," this Court "will not undertake to review the decision." *Id.*

Here, the Court of Criminal Appeals repeatedly did both. Citing state-court precedent, the court below began by stating that "[i]n state post-conviction proceedings," the court "ha[d] previously applied its own non-retroactivity doctrine—often drawing on, but independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus." Pet.App.4a (citations omitted). That doctrine, the court explained, is based on its "independent authority to interpret the remedial scope of state post-conviction statutes," Pet.App.6a, and the court reached that holding by "exercising [that] independent state law authority," Pet.App.8a; *see also* Pet.App.16 (analyzing *McGirt* as part of its "independent exercise of authority to impose remedial constraints under state law"); Pet.App.20a-

21a (Hudson, J., concurring) (interpreting the majority opinion as resting "on state law grounds"). Those statements are consistent with the Court of Criminal Appeals' longstanding application of retroactivity principles as a matter of state law. *See Ferrell*, 902 P.2d at 1114; *see also Burleson v. Saffle*, 278 F.3d 1136, 1141 n.5 (10th Cir. 2002).

The Court of Criminal Appeals' analysis of the Tenth Circuit's decision in *Cuch* further illustrates the point. The Court of Criminal Appeals was of course aware that it was not bound by *Cuch*. *See, e.g.*, *Martinez v. State*, 442 P.3d 154, 156 (Okla. Crim. App. 2019). Instead, in looking to that decision, the court plainly stated that it found the decision "very persuasive in our analysis of the state law question today." Pet.App.7a; *see also* Pet.App.12a ("We find *Cuch*'s analysis and authorities persuasive as we consider the independent state law question of collateral non-retroactivity for *McGirt*.").

The independent and adequate state law grounds are readily apparent on the face of the opinion below. The petition should be denied on that basis alone.

II. PETITIONER'S NEWLY RAISED CONSTITUTIONAL ARGUMENTS DO NOT WARRANT THIS COURT'S REVIEW OF A STATE LAW QUESTION.

The general rule is that "States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (citations omitted). "The States thus have great latitude to establish the structure and jurisdiction of their own courts." *Id.* So, for example, in *Johnson v. Frankell* this Court held that state courts were not obligated to hear

interlocutory qualified immunity appeals in § 1983 actions even though there is such a federal procedural right in federal courts. 520 U.S. at 919-23.

Petitioner points to the narrow exception to that rule created in *Montgomery v. Louisiana*: "[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." 577 U.S. 190, 200 (2016); *see* Pet.29. But *McGirt* is not a new "rule of constitutional law," nor does it "set forth categorical constitutional guarantees" or constitute "a controlling right asserted under the Constitution." *Id.* at 200-05. Instead, *McGirt* was a statutory decision regarding the statutes enacted in the process of Oklahoma statehood, the mode of analyzing those statutes, and preemption of Oklahoma's prosecutorial authority under the Major Crimes Act (18 U.S.C. § 1153).[2]

In fact, *McGirt* contemplated that its holding would not result in postconviction relief. The *McGirt* Court predicted that those attempting to vacate their final convictions may be prevented from doing so "thanks to well-known state and federal limitations on postconviction review in criminal proceedings." *McGirt*, 140 S.Ct. at 2479. Such limitations include the general rule against a retroactive remedy that this Court embraced in *Teague v. Lane*, 489 U.S. 288 (1989), and that Oklahoma state courts endorsed in

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[2] As this Court is aware, respondent is asking the Court to overrule *McGirt*. *See, e.g.*, *Oklahoma v. Castro-Huerta*, No. 21-429. If this Court grants that relief, it would provide an alternative ground to affirm the judgment below—yet another reason why certiorari is not warranted.

cases like *Ferrell* and the decision below. Indeed, the Court in *McGirt* endorsed the consideration of "reliance interests" though doctrines like "procedural bars" and "laches" in order "to protect those who have reasonably labored under a mistaken understanding of the law," *id.* at 2481—precisely the sort of equitable considerations upon which the court below relied when it declined to apply *McGirt* retroactively, *see, e.g.*, Pet. App.5a-6a, 9a-11a, 17a-19a. Thus, it can hardly be said that "allowing the State to maintain convictions" like petitioner's "diminishes *McGirt*'s significance and undermines the Court's holding." Pet.23.[3]

To fit *McGirt* into *Montgomery*'s rule, petitioner attempts to squeeze three constitutional rulings from *McGirt*. As an initial matter, petitioner forfeited those arguments by failing to raise them below. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *see also, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005). In any event, none of petitioner's new constitutional impositions on *McGirt* hold water.[4]

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[3] In fact, these portions of *McGirt* quoted the Court's decision in *Ramos v. Louisiana* that left "questions about reliance interests for later proceedings crafted to account for them." 140 S.Ct. at 2481 (quoting 140 S.Ct. 1390, 1407 (2020)) (internal marks omitted). That quote from *Ramos*, in turn, was specifically referring to whether its decision should be applied retroactively under *Teague*, which this Court later answered in the negative in *Edwards v. Vannoy*, 141 S.Ct. 1547 (2021).

[4] *Montgomery* is also not applicable because, as explained *infra* Part III, *McGirt* did not create a retroactively applicable "substantive" rule. Nor was petitioner's *McGirt* claim "properly presented." *Montgomery*, 577 U.S. at 205. Under state postconviction statutes, petitioner cannot raise his Indian country claim because it was "not so raised" previously and he has not shown "sufficient reason" for not previously raising it. 22 O.S.2021,

1. Petitioner first argues that *McGirt* created a "substantive rule with constitutional force" because it is "enforced by the Supremacy Clause." Pet.3-4; *see also* Pet.16-17. But the Supremacy Clause merely "creates a rule of decision"; it is "is not the 'source of any federal rights.'" *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989)). The Supremacy Clause is thus not "understood to give affected parties a constitutional . . . right to enforce federal laws against the States" or to provide "private rights against the States." *Id.* at 325. That federal law would preempt a state prosecution if raised at trial does not create a constitutional right to be free from state custody after a conviction became final.[5]

Nor do limitations on relief for belatedly raised claims constitute violations of the Supremacy Clause or signal that a state has "upend[ed] the Constitution's structural allocation of authority" and "usurp[ed] authority that Congress has reserved to the United States." Pet.3. If that were the case, *every* time an inmate raised a federal claim on state postconviction review, any procedural or equitable barrier to that

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§ 1086; *see also Logan v. State*, 293 P.3d 969, 973 (Okla. Crim. App. 2013). While the Court of Criminal Appeals had declined to apply such statutory bars to *McGirt* claims in a previous case, that opinion was later withdrawn in light of the decision below. *See Bosse v. State*, 484 P.3d 286 (Okla. Crim. App. 2021), *opinion withdrawn and vacated*, 495 P.3d 669 (Okla. Crim. App. 2021).

[5] That is why, for example, preemption claims are not cognizable under Section 1983's cause of action for violation of federal rights. *See, e.g.*, *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476 (10th Cir. 1985) *abrogated on other grounds by Dennis v. Higgins*, 498 U.S. 439 (1991).

claim would be a Supremacy Clause violation—a rule that would functionally eviscerate all limitations on postconviction relief. *But see McGirt*, 140 S.Ct. at 2479, 2481 & n.15. Every litigant subject to the decision below, including petitioner, failed to raise an Indian country jurisdictional claim at trial as well as on any direct appeal or certiorari review. Denying them relief does not threaten our constitutional structure.

In fact, the equitable considerations relied upon by the court below in developing its retroactivity jurisprudence are functionally indistinguishable from other equitable doctrines like laches and waiver that regularly preclude otherwise meritorious claims. The difference between the state court's "non-retroactivity" doctrine and other equitable doctrines appears to be one of label more than substance. *Cf. Danforth*, 552 U.S. at 271 & n.5 (noting that the "word 'retroactivity' is misleading" and the doctrine is better understood as concerning the availability of a postconviction remedy). No authority supports the idea that the Supremacy Clause creates a constitutional right to postconviction relief under *McGirt*, overriding all procedural and equitable rules.

2. Petitioner also attempts to conjure a constitutional rule from *McGirt* through the Indian Commerce Clause and the decision in *Worcester v. Georgia*, 31 U.S. 515 (1832). But *McGirt* did not rule that Oklahoma was constitutionally forbidden from prosecuting Indians; rather, it held Oklahoma's prosecutorial authority in that case was preempted because of a statute, the Major Crimes Act. *McGirt*, 140 S.Ct. at 2476-78.

Petitioner appears to rely on *Worcester*'s idea that "the whole intercourse" with Indian tribes is vested by the Constitution with the United States,

implying states are constitutionally forbidden from any legal imposition on tribes or their members. Pet.4 (quoting 31 U.S. at 561); *see also* Pet.17, 19-23. But Indian law has not stayed stagnant over two centuries, and "Mr. Chief Justice Marshall's view in *Worcester* . . . has given way" to a modern jurisprudence that rejects "the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-48 (1973). States today engage in pervasive regulation of tribal members without violating federal law. *See id.* at 148-49. Even in Indian country, "it was long ago that the Court departed from Chief Justice Marshall's view" in *Worcester* "that the laws of a State can have no force within reservation boundaries." *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (cleaned up) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980)); *see also Organized Vill. of Kake v. Egan*, 369 U.S. 60, 71-72 (1962).

In addition, "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973). So it is "clear that the basis for the invalidity" of state laws imposed on Indians in certain circumstances is that they are "found to be inconsistent with existing federal statutes" and "not any automatic exemptions 'as a matter of constitutional law' . . . under the Commerce Clause." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 481 & n.17 (1976); *see also Hicks*, 533 U.S. at 363.

Petitioner is thus wrong to assert a *constitutional* "divestment of state authority (absent a contrary

provision by Congress) to proscribe and prosecute major crimes by Indians on federally recognized reservations." Pet.17. Indeed, petitioner has it backwards: the rule is that "each state ha[s] a right to exercise jurisdiction over Indian reservations within its boundaries" absent "a limiting treaty obligation or Congressional enactment." *People of State of N.Y. ex rel. Ray v. Martin*, 326 U.S. 496, 499 (1946) (citing, *inter alia*, *United States v. McGowan*, 302 U.S. 535, 539 (1938); *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930)). This Court's modern cases have accordingly examined whether a state's authority over Indians violated federal statutory law, not the Constitution. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989); *Bracker*, 448 U.S. at 144-45.

The decision in *McGirt* too centered on questions of statutory interpretation: namely, whether Congress had established, and subsequently disestablished, a reservation. *McGirt* 140 S.Ct. at 2460-76. After the Court held that the area was a reservation and therefore "Indian country" for purposes of 18 U.S.C. 1151, the Court then analyzed whether the Major Crimes Act preempted state law. *Id.* at 2476-78. The deprivation of state authority under *McGirt* is therefore statutory and not a constitutional rule subject to *Montgomery*.

3. Finally, petitioner points to his claimed federal habeas rights. Pet.23-25. But if petitioner wants to attempt to vindicate his federal habeas corpus rights, he should bring a federal habeas claim. True, once in federal court he would have to overcome similar barriers to postconviction relief. *See, e.g.*, 28 U.S.C. 2244(b), (d)(1); *Dopp v. Martin*, 750 Fed. Appx. 754, 756-757 (10th Cir. 2018); *In re Davis*, No. 21-7030, at 1-2 (10th Cir. July 6, 2021); *Jones v. Pettigrew*, CIV-

18-633-G, 2021 WL 3854755, at *3 (W.D. Okla. Aug. 27, 2021). But again, this is all how *McGirt* itself predicted both federal and state postconviction claims would play out. *See* 140 S.Ct. at 2479, 2481.

All of this belies petitioner's claim that the decision below is a fundamental violation of due process. Indeed, taken to its logical endpoint, petitioner's argument that every barrier to jurisdictional claims for postconviction relief is an affront to core due process rights means that a prisoner could raise a *McGirt* claim at *any* time, including for the first time at this Court, as some have attempted to do. *E.g.*, *Christian v. Oklahoma*, No. 20-8335 (U.S.).

Moreover, even if petitioner is correct that a subject matter jurisdiction claim warrants ignoring limitations on postconviction relief, he does not attempt to show that Major Crimes Act preemption deprives state courts of subject matter jurisdiction. The word "jurisdictional" is "generally reserved" for statutory provisions "delineating the classes of cases a court may entertain (subject-matter jurisdiction)" and "the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." *Fort Bend County v. Davis*, 139 S.Ct. 1843, 1848 (2019) (citation omitted). Accordingly, a statutory provision "counts as jurisdictional" only where Congress "clearly states" that fact, *id.* at 1850 (citation omitted); Congress usually identifies jurisdictional rules by using language that speaks in terms of a "court's power," *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015).

The Major Crimes Act does not speak in terms of a state court's power over a particular subject matter. Instead, it addresses the federal government's authority to define and prosecute crimes in Indian country. *See*

18 U.S.C. 1153. That authority refers to the "legislative" authority of United States, *see Negonsott v. Samuels*, 507 U.S. 99, 105 (1993), not "the courts' statutory or constitutional power to adjudicate the case," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Oklahoma state courts have subject-matter jurisdiction over prosecutions for murder under the Oklahoma Constitution. *See* Okla. Const. art. 7, § 7. While federal Indian law may preempt state criminal law in particular cases, such preemption does not divest the state court of their subject-matter jurisdiction. Thus, in federal prosecutions for crimes committed in Indian country, lower courts have consistently held the federal government's failure to prove the status of the defendant or the victim as an Indian results in acquittal for failure to prove an element of the offense, not in dismissal for lack of jurisdiction.[6]

In sum, petitioner provides no legitimate basis to claim he has a constitutional right to relief under *McGirt* in state postconviction proceedings. *Montgomery* is therefore inapplicable.

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[6] *See*, *e.g.*, *United States v. Tony*, 637 F.3d 1153, 1158-59 (10th Cir. 2011); *United States v. Pemberton*, 405 F.3d 656, 659 (8th Cir. 2005); *United States v. White Horse*, 316 F.3d 769, 772 (8th Cir. 2003); *United States v. Prentiss*, 256 F.3d 971, 981-82 (10th Cir. 2001) (en banc), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625, 631 (2002); *Welch v. United States*, No. 2:05CR8, 2008 WL 4981352, at *2 & n. 2 (W.D.N.C. Nov. 19, 2008) (unpublished). In these cases, subject matter jurisdiction is based on 18 U.S.C. 3231, not the Major Crimes Act. *See Cotton*, 535 U.S. at 630-631; *Hugi v. United States*, 164 F.3d 378, 380-381 (7th Cir. 1999).

III. *McGirt* Is Not a Substantive Rule Retroactively Applicable on Postconviction Review.

Even if the Court was to apply federal retroactivity jurisprudence to displace the separate state law doctrine, this Court's prior cases have never applied a rule like *McGirt*'s retroactively. This case should not be the first.

1. The Court's retroactivity rules start with the recognition that applying new decisions retroactively on postconviction review "seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Edwards v. Vannoy*, 141 S.Ct. 1574, 1554 (2021) (citation omitted). Meanwhile, "the costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application." *Id.* at 1555 (citation and internal quotation marks omitted).

Especially with respect to *McGirt*, application of a new ruling "retroactively would potentially overturn decades of convictions obtained in reliance on" previous court cases. *Id.* at 1554. "[C]onducting scores of retrials years after the crimes occurred would require significant state resources," and the State "may not be able to retry some defendants at all because of lost evidence, faulty memory, and missing witnesses." *Id.* "Even when the evidence can be reassembled, conducting retrials years later inflicts substantial pain on crime victims who must testify again and endure new trials." *Id.* at 1554-55 (citations and internal marks omitted).

2. Because the federal habeas statute grants this Court remedial discretion to take into account such

equitable and prudential considerations, *id.* at 1554, the Court has adopted "a general rule of non-retroactivity," *Danforth*, 552 U.S. at 278, affording retroactive relief on postconviction review for only a few narrow categories of "substantive" rules. *McGirt* fits into none of them.

McGirt is not a decision on the "kind of conduct that cannot constitutionally be punished in the first instance" and thus that "could not properly be prosecuted at all" in any court. *E.g., United States v. U.S. Coin & Curre*ncy, 401 U.S. 715, 723 (1971). *McGirt* also does not interpret existing statutes to limit the conduct criminalized by those laws such that the legislative authority did not seek to penalize the conduct at issue. *See*, *Bousley v. United States*, 523 U.S. 614, 620-21 (1998). Nor is *McGirt* a decision that a particular type of punishment is impermissible, such as the death penalty for a certain category of offenders, regardless of the sovereign prosecuting them. *E.g., Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

Thus, *McGirt* is not an exception to the general rule against retroactive remedies. Regardless of whether state or federal law is applicable, "[t]he proscribed conduct in the instant case is capital murder, the prosecution of which is, to put it mildly, not prohibited by the rule in" *McGirt. Butler v. McKellar*, 494 U.S. 407, 415 (1990). Preemption under *McGirt* is not within the limited "substantive" rule exceptions to the general rule of nonretroactivity that this Court has previously recognized.

3. Indeed, to the extent this Court has addressed decisions like *McGirt*, it has refused to apply such

rulings retroactively. In *Gosa v. Mayden*, 413 U.S. 665 (1973), this Court declined to apply retroactively its ruling in *O'Callahan v. Parker*, 395 U.S. 258 (1969), which held that military courts could not try service members for crimes not "service connected." The *Gosa* Court held that "the validity of convictions by military tribunals, now said to have exercised jurisdiction inappropriately over nonservice-connected offenses is not sufficiently in doubt so as to require the reversal of all such convictions rendered." 413 U.S. at 676. In so holding, *Gosa* distinguished cases that "dealt with the kind of conduct that cannot constitutionally be punished in the first instance" such that it was "conduct constitutionally immune from punishment in any court," *id.* at 677 (internal marks omitted). The Court explained that the question before it "was not whether [the defendant] could have been prosecuted; it was, instead, one related to the forum." *Id.*[7]

Like *Gosa*, the issue in *McGirt* was the proper forum of prosecution for conduct unquestionably made criminal by the laws of all forums. *See also Caspari v. Bohlen*, 510 U.S. 383, 396 (1994) (new double jeopardy decision not retroactive since defendant still "subject to imprisonment"). To use Justice Harlan's words in his pathmarking concurrence on retroactivity, because *McGirt* is not a rule that "free[s] individuals from punishment for conduct that is constitutionally

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[7] While decisions like *Gosa* preceded *Teague*'s now-controlling retroactivity framework, "[b]ecause *Teague* tightened the previous standard," such earlier decisions holding a rule was not retroactive are instructive (even if "pre-*Teague* decisions holding that a rule is retroactive are not as relevant"). *Edwards*, 141 S.Ct. at 1558 n.5.

protected," applying it retroactively would not avoid "the adverse collateral consequences of retrial," and therefore retroactivity is neither equitably nor prudentially justified. *Mackey v. U.S.*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgment). Thus, this Court's consistent practice is to deny postconviction relief in cases like this. *See also Toy v. Hopkins*, 212 U.S. 542, 548-49 (1909) (denying habeas corpus to Indian who claimed federal government lacked jurisdiction on crime committed on allotment that was not Indian country because fee patent had issued).

4. Not surprisingly, then, the decision below is in harmony with federal court rulings on analogous issues. As the state court explored in depth, the Tenth Circuit has held that when this Court renders a new decision on the diminishment or disestablishment of an Indian reservation, the changed rules regarding the proper prosecutorial forum do not apply retroactively on postconviction review. *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996). Unlike retroactively applicable decisions, the Tenth Circuit reasoned, criminal convictions secured based on a misunderstanding of reservation boundaries "involved conduct made criminal by both state and federal law." *Id.* at 992. The question in such cases solely "focuses on *where* these Indian defendants should have been tried for committing major crimes." *Id.* at 992. There is no "complete miscarriage of justice to these movants that would mandate or counsel retroactive application . . . to invalidate these convictions." *Id.* at 994 (internal marks omitted).

Other courts of appeals have reached the same result in similar circumstances. *See McSparran v.*

Weist, 402 F.2d 867, 876-77 (3d Cir. 1968) (en banc) (new decision regarding scope of federal diversity jurisdiction applied prospectively only). And in federal court Indian country cases, the lack of prosecutorial authority under the Major Crimes Act is not an issue that can reach back to vacate a final conviction. *See supra* n.6; *see also Davis v. Johnston*, 144 F.2d 862, 862 (9th Cir. 1944).

Finally, petitioner believes certiorari should be granted because of the importance of this case, since review risks freeing thousands of violent criminals from state custody. Pet.4, 16, 25-26. The premise is correct; petitioner's conclusion could not be more wrong. Granting postconviction relief to inmates like petitioner guarantees victims and their families will be retraumatized by any retrial—and maybe even revictimized because in many cases statutes of limitations, stale or lost evidence, missing or forgetful witnesses, or resource constraints will prevent federal or tribal reprosecution. *See Edwards*, 141 S.Ct. at 1554-55; *McGirt*, 140 S.Ct. at 2501 (Roberts, C.J., dissenting). After the decision below was rendered, even tribes in Oklahoma hailed it as "a positive result for the victims of crimes and their families" for which the tribes were "deeply grateful." *See* Allison Herrera, *Court: 'McGirt v. Oklahoma' Ruling Applies Only Going Forward, Not Retroactively*, KOSU (Aug. 13, 2021);[8] s*ee also* Creek Nation Amicus Br. at 6-8, *Oklahoma v. Mize*, No. 21-274 (Oct. 5, 2021).

The fallout from *McGirt* has been bad enough. *See Castro-Huerta*, *supra*, Pet.18-27. This Court should

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[8] https://www.kosu.org/local-news/2021-08-13/court-mcgirt-v-oklahoma-ruling-applies-only-going-forward-not-retroactively.

not set aside its jurisdictional limitations on review of state court decisions, greatly expand its already controversial holding in *Montgomery*, *see* 577 U.S. at 214-23 (Scalia, J., dissenting), or consider creating a new category of retroactive rules, just to make the situation in Oklahoma even worse.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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