No. 24A167

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

BRYAN CHRISTOPHER O'ROURKE, PETITIONER,

vs.

STATE OF OKLAHOMA, RESPONDENT

Supreme Court, U.S.
FILED
MAR 23 2024
OFFICE OF THE CLERK

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

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

Petitioner, *pro se*:

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Dated: March 23, 2024

To the Honorable Justice Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

Petitioner Bryan Christopher O'Rourke, *pro se*, and pursuant to 28 U.S.C. §§ 1257(a), 2101(c), 2102, and Supreme Court Rules 13(5), 18, 21, 22, and 39, respectfully seeks a 60-day extension of time, to and including Monday, June 10, 2024, in which to file a petition for a writ of certiorari.[1]

Summary

There are two parts to this case which will be filed in separate petitions. One will be a joint petition for writ of certiorari and original habeas for several people challenging the constitutionality of the definition of "Indian" under the Major Crimes Act (MCA), 18 U.S.C. § 1153, and the second will be solely for Mr. O'Rourke challenging the State of Oklahoma's (State) retroactive application of *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2496 (2022) to his case, in violation of due process. *See Rogers v. Tennessee*, 532 U.S. 451 (2001).

A. The Major Crimes Act is Unconstitutionally Reliant on Race

Mr. O'Rourke and several Freedmen members of the Cherokee Nation intend to challenge the facial and as-applied constitutionality of the MCA because the statute's definition of "Indian" is impermissibly reliant on race in violation of the Fifth Amendment, U.S. Const. Amend. V, and this Court's equal protection cases. This will be submitted in a combined petition for writ of certiorari and original habeas corpus, and your Petitioners will show there is no adequate or effective remedy in the state and federal courts below because, among other reasons, the MCA's definition of Indian is expounded from a decision of this Court and the lower courts are bound by vertical *stare decisis* to apply it to all Indian country cases.

We will show that the MCA is unconstitutional both facially and as-applied because it is reliant on race and proxies for race to determine who is, and who is not an "Indian." The MCA does not define the term Indian; instead, the definition was expounded by the Federal Circuits from an antebellum case decided by the Taney Court, *U.S. v. Rogers*, 45 U.S. (4 How.) 567 (1846). As a general matter, *Rogers* ushered in to federal – and then tribal – Indian law the false notion that Indians are a "biological population" as opposed to a political population, *see* Paul Spruhan, *A Legal history of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L.Rev. 1, 48

[1] The requested 60-day extension falls on Saturday, June 8, 2024. Pursuant to this Court's Rules, Mr. O'Rourke requests the deadline be extended to the following Monday, June 10, 2024.

(2006) (describing *Rogers* as constructing Indians as a "biological population"), and that it set the tone for tribal enrollment criteria and federal Indian jurisprudence. *See* Frank Shockey, Note, *"Invidious" American Indian Tribal Sovereignty: Morton v. Mancari Contra Adarand Constructors, Inc. v. Pena, Rice v. Cayetano, and Other Recent Cases*, 25 Am. Indian L.Rev. 275, 286 (2001) ("Most importantly, *Rogers* approved the use of racial criteria in determining tribal membership, and implicitly, in other matters relating to Indians. Subsequent cases expanded that approval luxuriantly.").

To determine who is an Indian, tribal, state, and federal courts throughout Indian country require proof of one's possession of "Indian blood," a clear proxy for one's biological race, and proof of membership in or affiliation with a federally recognized tribe. The first and second prongs of the so-called *Rogers* test were deemed as a political classification by the Court in *U.S. v. Antelope*, 430 U.S. 641 (1977), relying on the Court's analysis in *Morton v. Mancari*, 417 U.S. 535 552-554 (1974) (upholding limited employment preference for Indians by the BIA because "preference … is granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities").

The *Antelope* Court made its determination based on the fact the defendants were enrolled tribal members, which significantly undermined but did not limit the *Rogers* test or overrule *Rogers*. *Cf. Antelope*, 430 U.S. at 645-646 (holding statutes allowing federal prosecution of enrolled Indians did not violate Fifth Amendment Due Process Clause based on race) with *Rogers*, 45 U.S. at 572-573 (for the purposes of federal criminal law, Indian "does not speak of members of a tribe, but of the race generally").

The *Antelope* Court also stated that enrollment in a federally recognized tribe has never been an absolute requirement for federal preemption and jurisdiction under the MCA. *See Antelope*, 430 U.S. at 646 n.7. Nor should it be today – any bright line rule requiring tribal enrollment under the MCA would serve only to further disenfranchise Freedmen (black Indian) and Intermarriage (white Indian) descendants of the Five Tribes,[2] will likely disrupt reliance interests of prior tribal and federal convictions under the General Crimes Act (GCA), 18 U.S.C. § 1152, and the MCA, and will more deeply entrench the false notion that biological race is determinative of who is – and who isn't – an Indian under federal law, would render other Acts of Congress unconstitutional, and would abrogate a prior decision of the Court.

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[2] The Cherokee, Chickasaw, Choctaw, Muscogee, and Seminole Nations of Oklahoma.

Additionally, courts throughout Indian country utilize another test – the *St. Cloud* factors – to determine one's "Indianness" for the purposes of the MCA. *See St. Cloud v. United States*, 702 F.Supp. 1456, 1461 (D.S.D. 1988) (establishing the following factors to determine one's Indianness: (1) enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe). Courts have extended the *St. Cloud* factors in various fashions, and your Petitioners will show that each of the *St. Cloud* factors are also impermissible proxies for race.

Many courts presiding over Indian country cases consider tribal enrollment to be dispositive. This is problematic for several reasons that will be fully explained in our petition. For example, tribal membership in the Five Tribes is determined by proof of one's direct lineal descent from an original signer of each Tribe's Dawes Rolls. *See Indian Country, U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 977 (10th Cir. 1987) ("In 1893, reflecting federal policies to forcibly assimilate Indians into the non-Indian culture and to eventually create a new state in the Indian Territory, Congress created the Dawes Commission to negotiate with the Five Civilized Tribes….").

In 1896, Congress established the Commission to the Five Tribes to prepare membership rolls in anticipation of breaking-up and allotting their respective lands. Act of June 10, 1896, ch. 398, 29 Stat. 321, 339-40. In 1898, Congress passed the Curtis Act, 30 Stat. 495, providing for a new tribal census roll to supersede all previous rolls of citizens for each of the Five Tribes. These censuses were recorded first by tribal political affiliation and *then* by biological race. *See* 29 Stat. 321 at 340 (emphasis added). These censuses became commonly known as the "Dawes Rolls."

The Dawes Rolls encompass original tribal allotees and members as: Indians by blood; Freedmen (black) Indians, and; Intermarried Whites or Intermarriage (white) Indians.[3] Congress directed the Commission to determine applications for citizenship in each of the Five Tribes in accordance with their laws "not inconsistent with the laws of the United States, and all treaties

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[3] The Cherokee, Chickasaw, and Choctaw Nations have Dawes Rolls for each of the three races. The Muscogee and Seminole Nations Dawes Rolls include only original tribal members "by blood" and their Freedmen.

with … said … tribes," (emphasis added) and giving "due force and effect to the rolls, usages, and customs of each…." 29 Stat. 321 at 339.

Non-native census takers introduced the idea of "blood quantum" – a Euroamerican concept completely foreign to the tribes. *See* Kimberly Tallbear, "DNA, Blood, and Racializing the Tribes." *Wicazo Sa Review*, University of Minnesota Press (2003). The census takers recorded an arbitrary, physical appearance guess subject only to their own assumptions, opinions, stereotypes, and methods of a person's percentage of Indian ancestry. Celia E. Naylor, "African Cherokees in Indian Territory: From Chattel to Citizens" University of North Carolina Press (2009); Kent Carter, "The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914" Ancestry Publishing (2009); "Native Americans are the only racial group defined by blood. Even that was arbitrary. In the 1890s, siblings who talked to different commissioners emerged with different blood quantum. Because they didn't apply together, some of them have different blood degrees." Alysa Landry, *Paying to Play Indian: The Dawes Commission and the Legacy of $5 Indians*, ICT News (Sept. 13, 2018).[4] "In short, the Dawes Rolls forever changed the way the federal government defined Indians – and, in many cases, the way Indians still define themselves." *Id.* at p.2. *Cf.* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L.Rev. 503, 520 (1976) ("[T]he inquiry in all cases where Indian status is in issue for jurisdictional purposes should be whether the person has some demonstrable biological identification as an Indian….") (emphasis added).

Many black Indians are racially Native American, but were recorded by the Dawes Commission on each of the Tribes' Freedmen Rolls because of the "one-drop rule, or the rule of 'hypodescent,' " which "defines any person with even 'one drop' of Black blood as Black." Terrion L. Williamson, *The Plight of "Nappy-Headed" Indians: The Role of Tribal Sovereignty in the Systematic Discrimination Against Black Freedmen by the Federal Government and Native American Tribes*, 10 Mich. J. Race & L. 223 (2004) (internal citations omitted).[5] "In

[4] Available at https://ictnews.org/archive/playing-play-indian-dawes-rolls-legacy-5-indians.

[5] Available at https://repository.law.umich.edu/mjrl/vol10/iss1/7. Like many Freedmen of the Five Tribes, some of your tribally enrolled Cherokee Freedmen Petitioners can *genetically* prove they have Native American ancestry, and some can even point to Dawes Commission documents showing they are descended from a Cherokee "by blood." But because of the race-based rules utilized by the Dawes Commission, they were recorded on the Five Tribes' Freedmen Rolls. They were fully disenfranchised by their ancestral tribe until 2017. See *In re Effect of*

1900, one woman registered on the rolls with 1/256 Cherokee blood. Now, some enrolled members of the Cherokee Nation have as little as 1/8,196 Indian blood." Landry, *Paying to Play Indian*, at *3 (quoting Gene Norris, Cherokee National Historical Society genealogist). The one-drop rule is alive and well in tribal and Federal Indian law and treats similarly situated descendants of the Five Tribes original members recorded on each Tribe's Dawes Rolls differently based solely on our race.

Similarly, *Rogers* and the Dawes Commission's concepts of race infected the status of the descendants of the Five Tribes white Indians. The Commission:

> rejected the unconscionable claim that a white person once admitted into the tribe by marriage to an Indian could confer citizenship upon any white person whom he might afterwards marry and upon his white descendants.

Angie Debo, "And Still the Waters Run: The Betrayal of the Five Civilized Tribes." Princeton: Princeton University Press, 1940; new edition, Norman: University of Oklahoma Press, 1984, p. 39. *But see Choctaw Citizenship Cases*, 26 U.S. Op. Atty. Gen. 127, 145-151, 1907 WL 450 at **12-16 (Feb. 19, 1907) (granting Choctaw citizenship and enrollment on the "blood" roll for Cyrus H. Kingsbury and Lucy E. Littlepage, white children of white parents, and assuming their parents' Choctaw citizenship status).

If a direct lineal descendant of an original enrollee "by blood" enumerated on the Dawes Rolls for any of the Five Tribes does not wish to be enrolled as a tribal member, the Tribes, by and through the Department of Interior's Bureau of Indian Affairs (BIA), will grant federal recognition as Indian to the person by issuing them a "Certificate of Degree of Indian Blood." The certificates are based on the best-guess fraction of "Indian blood" recorded for their ancestor(s) on the Dawes Rolls. But black and white Indians like your Petitioners, whom were previously or still excluded from tribal enrollment based solely on our racial descendancy, are similarly excluded by the BIA from recognition as Indian for the same racial descendancy reasoning.

Despite the fact our ancestors are original tribal members of the Five Tribes, the MCA excludes us because, as a matter of biological race and/or legal fiction, we cannot prove we possess one-drop of "Indian blood."

Cherokee Nation v. Nash, SC-17-07 (Cherokee Supreme Court, Feb. 22, 2020) (holding that the constitutional amendment restricting tribal enrollment only to descendants of its "by blood" Dawes Rolls violated its 1866 Treaty, is void ab initio, and is "illegal, obsolete, and repugnant to the ideal of liberty").

Mr. O'Rourke is a racially "white" direct lineal descendant of a racially white original member of the Choctaw Nation of Oklahoma, Annie Cooper Payton. Annie married a racially Native American "full blood" Mississippi Choctaw, and was adopted by the Choctaw Nation and enrolled on its base roll of original members.[6] Unlike the defendant and victim in *Rogers*, 45 U.S., who was adopted solely by the Cherokee Nation, Annie's tribal enrollment was approved by both the Tribe and the Government. Still, O'Rourke is ineligible for tribal enrollment in his ancestral tribe solely because of his racial descendancy. This may seem morally and legally repugnant to some, but this is not a case about enrollment in the Choctaw Nation or any other tribe. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("a Native American tribe has broad authority to define its membership").

Instead, our challenge revolves around the fact that we are not recognized as Indian by the Government under the MCA based solely on our racial descendancy. This is unconstitutional. U.S. Const. Amend. V. Critically, the State never did – and could not – argue below that O'Rourke is not descended from an original tribal member, nor that he is affiliated with the Choctaw Nation by his ancestral descent from one of the Tribe's original members, nor that his political affiliations with the Cherokee and Muscogee Nations by his participation in their polities are insufficient under the second prong of the *Rogers* test. Instead, the State argued below only that he is beyond the reach of the MCA because he and his great-great-grandmother are racially white and therefore, he can never be "Indian." But for his race, O'Rourke would be recognized by the Government as an Indian under the MCA.

These concepts of white supremacy and assimilation were deliberately introduced to the Five Tribes to undermine and eliminate Indianness; now, after generations of Euroamerican subjugation and Federal termination policies, the test to determine one's Indianness under the

[6] All modern tribal members of the Five Tribes must establish their direct lineal descent from an original member recorded on their respective Tribe's Dawes Rolls to be approved for tribal enrollment, unless their ancestral tribe considers their ancestor (and them) to be a member of the wrong race. O'Rourke's ancestor married a tribal member "by blood," had mixed-race children with him, spoke the Choctaw language and lived as a Choctaw. When he died, she eventually remarried a white man and had children with him. O'Rourke descends from his ancestor's second marriage. Even though the Choctaw Nation – and even the Government – could have objected to her tribal enrollment due to her remarriage, they did not. She was allotted land, lived her entire life within the Choctaw and Chickasaw Reservations, taught her children and grandchildren (O'Rourke's grandfather, Clarence Jesse Hopkins) the Choctaw language and culture, died, and was buried within the Choctaw Reservation. O'Rourke has many cousins whom are enrolled members of the Choctaw Nation to this day.

MCA hinges on race and proxies for race that would never be allowed in any other area of the law.

Your Petitioners will show that *Rogers*, 45 U.S.:

- was wrong the day it was decided;
- is a remedial decision well-past its expiration date;
- shares some of the same racist and bigoted reasoning displayed by Chief Justice Taney in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by* U.S. Const. Amend. XIV, and shares similarities with other unfortunate "anticanon" decisions from the Court;[7] and,
- has been significantly contradicted and undermined by both the 1885 passage of the MCA and the Court's political classification doctrine first expounded in *Mancari*, 417 U.S., and applied to the MCA in *Antelope*, 430 U.S., this renders the biological race requirement unnecessary, because "proof of one's relationship with a tribe as a political entity, not blood, constitutes the quintessence of what it means to be an 'Indian.' " *U.S. v. Prentiss*, 273 F.3d 1277, 1281 (10th Cir. 2001) (Henry, CJ) (quoting Aple's Supl. Br. At 7);[8] and,
- is inapposite of our claim to Federal recognition as Indian because the defendant in *Rogers* was adopted solely by the Cherokee Nation. Conversely, our ancestors' tribal enrollment was approved by the Five Tribes and the Government (Dawes Commission).

It is important to note that although the Cherokee Nation opposed our challenge to the MCA several years ago when O'Rourke discussed it with high level tribal officials, they now agree with our position that proof of Indian blood needs to change. *See* Cherokee Nation Press

[7] The *Rogers* decision shares aspects with several of the Court's cases widely recognized as its anticanon. For example, in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by* U.S. Const. Amend. XIV, and in *Rogers*, CJ Taney called both black slaves and Indians an "unfortunate race." *Cf. Rogers*, 45 U.S. at 572 and *Dred Scott*, 60 U.S. at 407. *See also, e.g., Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70 (1872) (blacks are an "unfortunate race"); *Felix v. Patrick*, 145 U.S. 317, 330 (1892) (Indians are an "unfortunate race").

[8] In *Prentiss*, the Government argued that the racial Indian blood test was undermined by *U.S. v. Antelope*, 430 U.S. 641 (1977), and is no longer necessary because of the political classification of Indian described in *Antelope*. Mr. O'Rourke recently spoke to Judge Henry about this issue, and Judge Henry agreed that he believes the Indian blood requirement is likely to be struck down by the Court because it is unnecessary for a political classification. Still, Judge Henry made clear that the Tenth Circuit panel in *Prentiss* felt bound by *Rogers*, 45 U.S., despite the Government's assertion that proof of Indian blood was no longer necessary. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' ") (quoting *Rodriquez de Quijas v. Shearson / Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)). *Accord Jewell v. United States*, 749 F.3d 1295, 1300 (10th Cir. 2014) (lower courts "are obliged to follow Supreme Court precedent, even when it might be viewed as 'inequitable' or as 'form over substance' ").

Release, *Cherokee Nation Principal Chief Hoskin Seeks to Change Federal Major Crimes Act*, Anadisgoi (Feb. 19, 2024) ("By our Cherokee Nation Constitution and our tribal statutes, all Cherokee citizens are treated equally under our laws including criminal laws, irrespective of their descendancy … We are asking for this change [to the MCA] through an act of Congress *or through the courts*");[9] Felix Clary, *Cherokee Nation lobbying Congress*, Tulsa World (Feb. 20, 2024) ("The Cherokee Nation is lobbying Congress to address justice system inequality for [F]reedmen [and Intermarriage] descendants, a result of the 2020 *McGirt* [*v. Oklahoma*, 140 S.Ct. 2452 (July 9, 2020)] decision in the Supreme Court, by changing the Major Crimes Act.").[10]

Rogers should not stand to exclude us from the MCA's definition of Indian or should be overruled; the Indian blood prong and other proxies for race should be eliminated from federal criminal law, or; the Court should establish a modern, race-neutral test to determine who is Indian that does not exclude the Five Tribes' black and white Indian descendants from the MCA and gives equitable consideration that does not exclude such descendants whose ancestral tribes have expelled and disenfranchised us based solely on our race. In other words, the Court should reject the Five Tribes' likely argument in favor of a bright-line rule requiring tribal enrollment to be recognized as Indian under the MCA.

(i) The Five Tribes' Black and White Indian Descendants Should be Recognized as Indian Under the MCA Pursuant to the Indian Reorganization Act

But for our race, we would also be recognized as Indian by the Government under the Indian Reorganization Act (IRA), 25 U.S.C. § 5129, *see U.S. v. John*, 437 U.S. 634 (1978) (extending federal recognition pursuant to the IRA to an unenrolled "full blood" Indian).[11]

[9] Available at https://www.anadisgoi.com/index.php/government-stories/cherokee-nation-principal-chief-hoskin-seeks-changes-to-federal-major-crimes-act and attached at Appendix (App.) 1.

[10] Available at https://tulsaworld.com/news/local/indigenous/cherokee-nation-freedmen-congress-justice/article_3174e6d3-cf48-11ee-9772-f32c14bdb76.html and attached as App. 2.

[11] *See* 25 U.S.C. § 5129 ("The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, *and all other persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation*, and shall further include all other persons of one-half or more Indian blood."). The IRA applies to Oklahoma's federally recognized tribes pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. § 5202.

When the Indian canon of construction is applied to the Five Tribes' Treaties, the MCA and the IRA, and are given a "fair appraisal," *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 744 (1985) (citation omitted) under the Fifth Amendment, the only difference between the Five Tribes' black and white Indians and the Indians within the scope of those statutes is our biological race – our lack of just one-drop of "Indian blood." The liberal-construction principle means that the Government "in effect, must demonstrate that its [race-based] reading is clearly required by [the MCA and IRA's] statutory language." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012).

There is no unequivocal statement from Congress that one must be racially Native American to be politically classified as an Indian under the MCA and IRA. Removing racial considerations under the MCA completely, and extending the IRA's "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," 25 U.S.C. § 5129, to black and white Indian descendants of the Five Tribes does nothing to upend these statutory schemes. It also does nothing to upend tribal self-determination of its membership eligibility criteria. *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

In short, requiring proof of one's race for a preemption defense in state court or as an element of an alleged crime in tribal or federal court is "one step too many." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2117 (2022). In 2024, race cannot be used as a negative, lack an endpoint, stereotype, deploy arbitrary categories, or pursue interests that courts can't reliably measure. *See Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 213, 225, 230 (2023). That is exactly what the *Rogers* test and *St. Cloud* factors do.

Your Petitioners will show that the MCA should include Federal recognition of all Dawes Rolls descendants as Indian or should be struck down as unconstitutional. Our case is worthy of this Court's review. *See Haaland v. Brackeen*, 143 S.Ct. 1609, 1661 (2023) ("In my view, the equal protection issue [of a race-based challenge to the constitutionality of the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.*] is serious.") (Kavanaugh, J., concurring).

B. The Retroactive Application of *Castro-Huerta* to O'Rourke Violates Due Process

In a separate petition for writ of certiorari, Mr. O'Rourke will challenge the retroactive application of *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2496 (2022) (holding the General Crimes Act, 18 U.S.C. § 1152, does not preempt concurrent state jurisdiction for alleged crimes

by a non-Indian against an Indian). He will show that the State's retroactive application of *Castro-Huerta* to the specific and narrow facts of his case violates due process. *See Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) (due process is violated when a judicially expanded statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue"). *Cf. Castro-Huerta*, 142 S.Ct. at 2510 (Gorsuch, J., dissenting) ("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.") (emphasis added).

Additionally, O'Rourke will show the State suppressed material exculpatory and impeachment evidence supporting both his factual innocence and his *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) direct appeal preemption claim in violation of *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), and will show both the State and the Oklahoma Court of Criminal Appeals (OCCA) are so hostile to this Court's *McGirt* decision that they continue to engage in bad faith and "procedural ingenuity" to sustain unlawful convictions – including offending the vertical *stare decisis* of this Court and engaging in subterfuge to evade these purely federal issues. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975). United States District Judge for the Northern District of Oklahoma recently pointed out an example of this hostility. *See Graham v. White*, --- F.Supp.3d. ----, ----, 2023 WL 414662 at *16 (N.D. Okla. June 22, 2023) (case granting post-conviction relief pursuant to *McGirt* where the "OCCA majority inadvertently overlooked (or intentionally ignored) Graham's Fourteenth Amendment due process claim") (Eagan, J.) (emphasis added).

Our case is the right vehicle to resolve the issues presented because it provides the Court its first opportunity to consider the MCA's application to white Indians since 1846, *see Rogers*, 45 U.S., and for black Indians for the first time since 1896. *See Lucas v. United States*, 163 U.S. 612, 617 (1896); *Alberty v. United States*, 162 U.S. 499, 501 (1896). It also provides an opportunity for the Court to settle significant and recognized splits between our Tribal, Federal, and State courts. Sup. Ct. R. 10(a). Finally, it provides the Court an opportunity to prevent the State from providing meaningful appellate review and fully and fairly applying federal law, even when the State disfavors the asserted rights established by this Court's precedents.

Request for Extension

In support of this request for a 60-day extension, Mr. O'Rourke states as follows:

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. The Tulsa County District Court (trial court) imposed a 120 consecutive years sentence in the custody of the Oklahoma Department of Corrections.

- The Oklahoma Court of Criminal Appeals (OCCA) affirmed the conviction on direct appeal. *See* F-2019-935 (April 15, 2021) (unpublished opinion attached as App. 3);

- The OCCA next denied post-conviction relief on June 30, 2023. *See* PC-2023-332 (Okl.Cr. June 30, 2023) (attached as App. 4);

- Next, he timely filed for federal habeas pursuant to 28 U.S.C. § 2254. *See* 4:23-cv-290-JDR-CDL (N.D. Okla.). This case is pending and O'Rourke has requested a protective stay and abeyance while he seeks certiorari and original habeas relief in this Court;

- Pursuant to Oklahoma law, Mr. O'Rourke sought original state habeas relief in the county of his confinement, which denied relief. *See* WH-2023-3 (Alfalfa County, Okla., Sept. 11, 2023) (attached as App. 5);

- He next sought original habeas in the Oklahoma Supreme Court, and even though it has jurisdiction to hear such appeals under the Oklahoma Constitution when challenging the legality of one's confinement, *see* Okla. Const. Art. 2, § 10; Okla. Const. Art. 7, § 4, and by statute, *see* 12 O.S. § 1333 ("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"), it claimed it *did not* have jurisdiction and transferred the appeal to the OCCA. *See* No. 121,704 (Okla. Dec. 18, 2023) (attached as App. 6);

- After the Oklahoma Supreme Court transferred the original habeas appeal to the OCCA, it declined jurisdiction to hear the appeal. *See* HC-2023-1022 (Okl.Cr. Jan. 10, 2024) (attached as App. 7).

Without an extension of time, the time to petition for a writ of certiorari from the OCCA in this Honorable Court would expire on April 10, 2024, which is the ninetieth day from January 11, 2024 – the next day following the date of the OCCA's opinion and judgment. *See* App. 7. *See also* Sup. Ct. R. 13(1). This application is being filed more than ten days before that date. *See* Sup. Ct. R. 13(5).

BACKGROUND

2. Mr. O'Rourke is a direct lineal descendant of an original signer of the Choctaw Nation of Oklahoma's Dawes Rolls. However, he is currently ineligible for tribal enrollment in his ancestral tribe and for recognition as an unenrolled Indian for the purposes of the MCA

because his great-great-grandmother is recorded on the Choctaw Nation's 'Intermarried Whites' Dawes Rolls.[12] While federally recognized tribes have the sovereign right to determine their own membership criteria, the Government's exclusion of Mr. O'Rourke and similarly situated Freedmen (black) and Intermarriage (white) Indians under the MCA is a violation of equal protection under the Fifth Amendment, U.S. Const. Amend. V, and is a continuing badge of slavery. U.S. Const. Amend. XIII.

3. In March of 2017, Mr. O'Rourke's teenage stepdaughter falsely accused him of sexually abusing her. He asserts his innocence and has diligently collected and provided proof to the courts below that the State unlawfully suppressed material exculpatory and impeachment evidence which supports his factual innocence.

4. After the allegations, the Oklahoma Department of Human Services (OKDHS) became involved. Eventually, the State filed a Termination of Parental Rights (TPR) proceeding in the Tulsa County Juvenile Division Court. *See* JD-2017-290 (filed June 7, 2017). On July 17, 2017, the juvenile division court adjudicated Mr. O'Rourke's stepchildren, including the complainant, as Choctaw Indians. This was shortly before the Tenth Circuit decided *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. Aug. 8, 2017), *amended and superseded on denial of rehearing en banc by Murphy v. Royal*, 875 F.3d 896 (10th Cir. Nov. 9, 2017) (holding the Muscogee Nation Reservation was never disestablished by Congress and remains Indian country for federal criminal jurisdiction purposes).

5. It is well known in the legal community that the Tulsa County District Attorney's Office (TCDA) and OKDHS often utilizes the statutory privacy protections of the juvenile

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[12] The Dawes Rolls encompass the base rolls of original tribal members for each of the Five Tribes. The Rolls recorded original members by their race – tribal members "by blood;" "Intermarriage" or "Intermarried Whites," white people that were married to tribal members by blood, and; "Freedmen," the former slaves of tribal members. Original tribal members, irrespective of their race, were approved for adoption by both the United States and their respective Tribes. Each of the Five Tribes have "by blood" and "Freedmen" Rolls. Only the Cherokee, Chickasaw, and Choctaw Nations have "Intermarriage," "Intermarried Whites," or "Adopted Whites" Rolls. Tribal membership requires proof of one's direct lineal descent from an original tribal member by blood in the Chickasaw, Choctaw, Muscogee, and Seminole Nations. The Seminole Nation allows second-class tribal "citizenship" to its enrolled Freedmen, whom are not provided the full benefits of tribal enrollment as its members by blood. The Cherokee Nation is the only one of the Five Tribes that grants full tribal enrollment to all direct lineal descendants of its blood, Freedmen, and Intermarried White Dawes Rolls. The Cherokee Nation also adopted certain Delaware and Shawnee tribal members into the Cherokee Nation even though they do not have "Cherokee blood" or any other political connection to the Cherokee Nation. The Chickasaw, Choctaw, and Muscogee Nations have fully disenfranchised and expelled their Freedmen and Intermarriage descendants despite their 1866 and older Treaty obligations.

division courts and Oklahoma's Title 10A (juvenile code) for the purposes of self-incrimination, impeachment, and to suppress material exculpatory and impeachment evidence that is favorable to the accused.

6. On August 3, 2017, the State filed criminal charges in Tulsa County case no. CF-2017-4236.

7. Prior to trial, O'Rourke's trial attorneys requested disclosure of all material exculpatory and impeachment evidence hidden by the State (TCDA) in the juvenile proceedings. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). The trial judge signed the order releasing information, including the complainant's adjudicated Choctaw Indian status, and other material exculpatory and impeaching evidence supporting O'Rourke's claim of factual innocence. However, these materials were never actually disclosed to the defense nor received in discovery. Instead, O'Rourke received these documents from an anonymous source in the TCDA's Office after his post-conviction proceedings were completed and after he had filed for federal habeas relief in the United States District Court for the Northern District of Oklahoma.

8. Mr. O'Rourke was convicted after jury trial on September 13, 2019. While his direct appeal was pending, the Court affirmed the Tenth Circuit's decision in *Murphy* when it decided *McGirt v. Oklahoma*, 140 S.Ct. 2452 (July 9, 2020).[13] Because O'Rourke's direct appeal was pending when the Court decided *McGirt*, it applies *ab initio*. *See Teague v. Lane*, 489 U.S. 288 (1989).

9. His attorney on direct appeal timely raised a preemption claim. It was filed on July 14, 2020 making it the first, or at least one of the very first *McGirt*- based claims presented on direct appeal. He did so without the benefit of the suppressed information of the complainant's adjudicated Choctaw Indian status from the juvenile court TPR proceedings. Under this Court's precedent in *Ritchie*, 480 U.S., and Rules 2.2(B) and 3.2(C)(1), *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2020), the State – including the Oklahoma Attorney General (OAG) – had an obligation to disclose the suppressed information in order for appellate counsel to perfect his appeal.[14]

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[13] *See Sharp v. Murphy*, 140 S.Ct. 2412 (July 9, 2020) (sub nom).

[14] Because O'Rourke's trial counsel requested disclosure of all material exculpatory and impeachment evidence from the TPR case, the trial judge approved the request and signed the order. However, the State never actually turned over the information to trial counsel nor to appellate counsel under its obligation to produce the entire record for appeal. O'Rourke's appellate attorney, Kevin Adams, confirmed this fact on an Oklahoma Department of

10. Mr. O'Rourke also explained to his appellate counsel his status as an unenrolled, white Choctaw Indian, provided proof of his direct lineal descent from an original signer of the Choctaw Nation's "Intermarried White" Dawes Rolls, his political affiliations with both the Cherokee and Muscogee Nations, and his preferred business relationships with several other federally recognized tribes. He demanded appellate counsel to challenge the MCA as unconstitutionally reliant on race because the law should be extended to the Five Tribes' black and white Indian descendants, changed to remove the Indian blood prong and other proxies for race under the *Rogers* test and *St. Cloud* factors, or struck down completely.

11. His appellate counsel refused, calling it a "loser argument." Under current *stare decisis* it is a losing argument – but the request to challenge the existing law and to seek the implementation of modern, race-neutral alternatives is a good faith effort to update and eliminate racist, bigoted, and xenophobic antebellum law. O'Rourke's demand to challenge the MCA on direct appeal is in alignment with an attorney's obligations under Oklahoma's *Code of Professional Conduct*. *See* T. 5, Ch. 1, App. 3-A, Rule 3.1, Meritorious Claims and Contentions ("A lawyer shall not bring … a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.") (emphasis added). *See also id.* at Cmt. [1] ("[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken on the law's ambiguities and potential for change."), and; Cmt. [2] ("What is required of lawyers, … is that they inform themselves about the facts of the clients' cases and the applicable law and determine that they can make good faith arguments in support of their client's positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail.") (emphasis added). It is also consistent with the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 11(b)(2) ("[T]he claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law").

Corrections recorded telephone call. His attorney also confirmed that had the complainant's adjudicated Choctaw Indian status been provided by the State, he would have transferred the direct appeal to the OCCA's 'Accelerated Docket.' This was well-before the State contrived its § 1152 concurrent jurisdiction theory decided by this Court nearly two years later in *Castro-Huerta*, 142 S.Ct.

12. On April 15, 2021, and without a properly designated appellate record, the OCCA denied the *McGirt*- based preemption claim, *see* App. 3 at pp. 2-3, claiming that the proposition was not supported by sufficient *prima facie* evidence. Of course, the evidence of the complainant's adjudicated Choctaw Indian status was suppressed by the State. The OCCA was also critical of appellate counsel's failure to follow the court's rules and to request an evidentiary hearing.

13. Mr. O'Rourke did not seek certiorari review in this Court, and his conviction was final on September 13, 2021.[15]

14. On September 17, 2021, four days after O'Rourke's conviction was final (emphasis added), the State sought certiorari review in *Castro-Huerta* and eventually a number of other cases where the OCCA vacated convictions based on federal preemption pursuant to § 1152.

15. The OCCA rejected the State's argument that § 1152 did not preempt the State's criminal jurisdiction, but that it had concurrent jurisdiction with the Government. *See, e.g.*, *Oklahoma v. 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).

16. On June 29, 2022, this Court decided *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486 (2022) (holding that 18 U.S.C. § 1152 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).

17. 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 request an evidentiary hearing, and for refusing to raise his challenge to the constitutionality of the MCA. He strengthened his § 1152 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 family. He also made clear in his post-conviction brief that the OCCA itself had determined *Castro-Huerta*

[15] 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* 589 U.S. ---- (2020) (Miscellaneous Order). That Order remained in effect until July 19, 2021. *See* Order, 589 U.S. at 1.

was prospective only, and asserted that the retroactive application of *Castro-Huerta* to his case would violate due process. He further asserted that *Castro-Huerta* was wrongly decided, adopting Justice Gorsuch's dissent.

18. He also included his challenges to *Rogers*, 45 U.S., and the MCA, for the purposes of preservation to ultimately appeal the issue to this Court. However, he did ask the trial court to grant an evidentiary hearing and to expand the record with proof of his descent from an original tribal member and his political affiliations with several federally recognized tribes. He further asked the trial court, and eventually the OCCA, to provide their input on the equal protection issues in *Rogers*, 45 U.S., and the MCA. Both courts declined to do so.

19. O'Rourke timely appealed the trial court's denial of post-conviction relief to the OCCA. 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 Oklahoma 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.[16]

20. O'Rourke filed a 'Notice of Non-Completion of Record' with the trial court and the OCCA, informing them the appellate record was incomplete because it did not include the TPR records adjudicating the complainant as an Indian. He specifically demanded the OCCA to take judicial notice of the proceedings in the juvenile court, case no. 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.").

21. Curiously, at all stages of the proceedings below, including up to federal habeas, the State continues to deny the complainant was adjudicated as an Indian in the TPR proceedings despite those very documents being provided in his post-conviction, state habeas, and federal habeas appeals.

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[16] 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 and legal innocence. 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 nor his appellate counsel.

22. On June 30, 2023, the OCCA denied post conviction relief.[17] It did not take judicial notice of the complainant's adjudicated Indian status, and it sustained the trial court's holding that the claim was foreclosed by *Castro-Huerta*, and his §§ 1152 and 1153 preemption claims were otherwise procedurally barred. *See* App. 4. This, despite the fact that "under Oklahoma law, … 'issues of subject matter jurisdiction are never waived and can therefore be raised on collateral appeal.' " *McGirt*, 140 S.Ct. at 2501 n.9 (Roberts, CJ, joined by Alito, J., and Kavanaugh, J., dissenting) (quoting *Murphy*, 857 F.3d at 907, n.5, *in turn quoting Wallace v. State*, 935 P.2d 366, 372 (Okl.Cr. 1997)). 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.").

23. Pursuant to Oklahoma law, Mr. O'Rourke sought original state habeas in the county of his confinement, which denied relief by applying Oklahoma's Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq*, despite original state habeas being governed by 12 O.S. § 1331, *et seq*. *See* App. 5. He was essentially forced to seek state habeas for several reasons: First, Oklahoma law requires courts to provide an immediate hearing when challenging the legality of one's confinement. *See* 12 O.S. § 1333; Second, it is extremely difficult to expand the record and receive an evidentiary hearing in federal habeas proceedings, even when it is warranted. *See* Rules 6 & 7, *Rules Governing § 2254 Cases*, 28 U.S.C. foll. § 2254; and finally, because O'Rourke is *pro se* and has no legal training, further legal research allowed him to refine his preemption claims.

24. For example, this Court has said that a federal habeas petitioner does not:

> *ordinarily* have any claim of reliance on past judicial precedent as a basis for his actions that corresponds to the State's interest described in the quotation from *Butler*, *supra*. The result of these differences is that the State will benefit from our *Teague* decision in some federal habeas cases, while the habeas

[17] While neither the trial court nor the OCCA made any mention of it, O'Rourke's contention that *Teague* and similar cases prevented the retroactive application of *Castro-Huerta* was incorrect, but his argument that *Castro-Huerta's* retroactive application to his case violated due process is correct. Importantly, the trial court and OCCA rarely, if ever, provide liberal construction to the pleadings of *pro se* appellants. *See Haines v. Kerner*, 404 U.S. 519, 520-521 (1972).

> petitioner will not. This result is not, as the dissent would have it, a "windfall" for the State, but instead is a perfectly logical limitation of *Teague* to the circumstances which gave rise to it.

Lockhart v. Fretwell, 506 U.S. 364, 373 (1993).[18]

25. However, the U.S. Constitution requires more. The Court has long recognized that an *ex post facto* law that eliminates any defense may not be applied retroactively. *See Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (Ex Post Facto Clause prohibits the application of any law "which deprives one charged with crime of any defense available according to the law at the time with the act that was committed."). *Cf. Collins v. Youngblood*, 497 U.S. 37, 51 (1990) (although "the right to a jury trial is obviously a 'substantial' one, ... it has [nothing] to do with the definition of crimes, defenses, or punishments, which is the concern of the Ex Post Facto Clause.").

26. The Court has also long recognized that "limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process." *Rogers*, 532 U.S. at 456. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope") (citations omitted). *Cf. Castro-Huerta*, 142 S.Ct. at 2510 (Gorsuch, J., dissenting) ("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.") (emphasis added).

27. Because his direct appeal was pending when *McGirt*, 140 S.Ct., was decided, the § 1152 preemption defense was available to O'Rourke *ab initio* and through the finality of his judgment. But because *Castro-Huerta* eliminated it, his case is not an ordinary scenario under *Lockhart* or Blackstonian judicial retroactivity principles.[19]

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[18] Mr. O'Rourke preserved his claim that the *Teague* finality framework should apply both to criminal defendants and the government, as described by Justice Stevens in his dissent. *See Lockhart*, 506 U.S. at 387-388 & n.11 (Stevens, J., dissenting) (noting contraction of defendants' procedural protections since 1985 and arguing that equality demands prosecution should also be bound by *Teague*).

[19] Judicial decisions are not always retroactive. In 1675, only a little over a century prior to the adoption of our Constitution, English chancery practice with its reliance on equitable considerations had approved prospective application of a judicial decision in order to protect a party that had relied on prior law. *See Lord Nottingham's Chancery Cases*, 73 Selden Society 182 (1954) (cited in *Justice Roger Traynor, Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L.J. 533, 567 (1977)). And nineteenth-century American courts, though steeped in the Blackstonian view, nevertheless issued some prospective rulings based on the same reliance

28. The retroactive application of *Castro-Huerta* to the narrow facts of O'Rourke's case violates substantive due process. "Absence of jurisdiction in the convicting court is indeed a basis for federal habeas corpus relief cognizable under the Due Process Clause." *Yellowbear v. Wyo. Attorney Gen.*, 525 F.3d 921, 924 (10th Cir. 2008) (citation omitted). While labeled as a procedural matter by the State and the OCCA in other cases, "it is the effect, not the form, of the law that determines whether it is *ex post facto*." *Weaver v. Graham*, 540 U.S. 24, 31 (1981). As a substantive defense, it rises to the level of elements which must be proved by both the State and the Government beyond a reasonable doubt. *See Collins*, 497 U.S. at 51 (concern of ex post facto is the definition of crimes, defenses, or punishments); *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116 (Okl.Cr. 1982) (for the purposes of a preemption defense under Oklahoma law "[t]wo elements must be satisfied before it can be found that the appellant is an Indian under federal law."); *In re Winship*, 397 U.S. 358 (1970) (state must prove every element of the crime beyond a reasonable doubt). *See also Pacheco v. Habti*, 62 F.4th 1233 (10th Cir. 2023) (leaving open the question of whether Indian country preemption involves or requires an element under Oklahoma law).

29. The Court has explained the test for whether the retroactive application of a judicial decision violates due process is the "foreseeability" of the decision. *Rogers*, 532 U.S. at 459 (citations omitted); *Fultz v. Embry*, 158 F.3d 1101, 1103 (10th Cir. 1998) (test for deciding if a retroactive application of a judicial decision violates due process is one of foreseeability). *See also United States v. Qualls*, 172 F.3d 1136, 1138 n.1 (9th Cir. 1999) ("The Supreme Court has held that a change in the law is foreseeable when circuits are split on the proper construction of a statute.") (relying on *United States v. Rodgers*, 466 U.S. 475, 484 (1981)); *McSherry v. Block*, 880 F.2d 1049, 1053 (9th Cir. 1989) (the "crucial test" is "whether the construction actually given the statute was foreseeable") (citation omitted).

30. Like the Ninth Circuit, the Tenth Circuit, relying on *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), has determined that a "judicial construction of a statute is unforeseeable if it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue.' " *U.S. v. Hansen*, 9 Fed.Appx. 955, 956 (10th Cir. 2001) (unpublished). It considered the Tenth Circuit's prior rulings on the same issue, and upheld the

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concerns as Lord Nottingham. *See, e.g., Gelpcke v. City of Dubuque*, 68 U.S. 175 (1863); *Bingham v. Miller*, 17 Ohio 445 (1848).

application of a judicial decision to the defendant in *Hansen* because a split between the Federal Circuits made the new judicial decision foreseeable. *Id.*

31. That simply is not the case for *Castro-Huerta*. Before *Castro-Huerta*, there is no legislative or judicial history supporting the expansion of § 1152, and there exists not a single split between the states and the Federal Circuits. Until *Castro-Huerta*, the State and the OCCA recognized the viability of the statutory and common law preemptive effect of § 1152 since Statehood in 1907. *See, e.g., 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); *State ex rel. Matloff v. Wallace*, 497 P.3d 686, 692 (Okl.Cr. 2021) (*McGirt* "imposed new and different obligations on the state and federal governments" by imposing Federal "jurisdiction over the apprehension and prosecution of major crimes by or against Indians in a vastly expanded Indian Country"). *See also, e.g., Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979) ("[C]riminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress in the exercise of its plenary power over Indian affairs has expressly provided that State laws shall apply.") (citation and internal quotation marks omitted).

32. There is a glaring retroactivity and foreseeability problem here. The State suppressed the complainant's adjudicated Choctaw Indian status at every stage and denied her Indian status in the post-conviction proceedings. The OAG was made aware by the TCDA that O'Rourke's case was subject to *McGirt* during the pendency of his direct appeal but did not disclose the information in its possession. The OAG opposes discovery and an evidentiary hearing on that very matter in the federal habeas court, denied the complainant's adjudicated Indian status during state original habeas, and continues to deny her Indian status in federal habeas. These are not failures attributable to Mr. O'Rourke, his trial counsel, nor his appellate counsel.

33. *Castro-Huerta* is a judicial construction of a statue that violates O'Rourke's right to due process because he was "unfairly surprised in a way that affected his legal defense," *Darnell v. Swinney*, 823 F.2d 299, 301 (9th Cir. 1987), and an "unforeseeable, albeit legitimate, construction of a state [or Federal] law by the courts may not be retroactively applied to a defendant." *Oxborrow v. Eikenberry*, 877 F.2d 1395, 1399 (9th Cir. 1989). "[D]ue process bars

courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266. "Unlike the void-for-vagueness doctrine and the rule of lenity, this rule of nonretroactivity is not a rule of statutory interpretation." Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 745 Cal. L.R. 455, 469 (2001). Rather, it provides that "once a court has decided to interpret a statute a certain way, the court may not apply that interpretation retroactively if the text of the statute, or prior constructions of it, did not fairly disclose the possibility that the statute could be read that way." *Id. Cf. United States v. Budder*, 76 F.4th 1007, 1015-16 (10th Cir. 2023) (holding that *McGirt* was not "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," because the Tenth Circuit had come to the same conclusion, more than two years before *McGirt* was issued by applying the Court's precedent in *Solem v. Bartlett*, 465 U.S. 463 (1984)) (quoting *Rogers*, 532 U.S. at 457).

Reasons for Granting an Extension of Time

34. This case involves serious and important questions about race-based equal protection and the State's refusal to adhere to this Court's *stare decisis* because of its animosity to the decision in *McGirt*, 140 S.Ct.

35. Additionally, there is a recognized split between the tribal, state, and Federal Circuit courts on the determination of Indian status under the MCA utilizing the *Rogers* test and *St. Cloud* factors.

36. An extension of time is necessary to adequately prepare the petition for writ of certiorari. This is a legally complex case, your Petitioners are *pro se* and cannot afford counsel, and there is a significant amount of information that needs to be conveyed within the petition so that this Court will be able to meaningfully exercise its discretion as to whether or not to grant a writ of certiorari and original habeas. Presenting these issues directly, clearly, concisely, and with brevity, as required by Sup. Ct. R. 14, is especially difficult and time-consuming for *pro se* litigants.

37. I am an indigent, *pro se* prisoner and have been working diligently on this petition, but have been prevented from completing it by other significant appellate responsibilities which require substantial time and effort, including:

- Preparation of my state habeas petition and time sensitive coordination with the tribally enrolled Cherokee Freedmen Petitioners whom are in county jails (pretrial) and different prisons than O'Rourke to simultaneously file our state habeas petitions in order to invoke this Court's Rule 11.

- Federal habeas corpus in 4:23-CV-00290-JDR-CDL (N.D. Okla.). I currently have a deadline within the next two-weeks to enter my reply, but have requested a protective stay and abeyance in order to submit my petitions to this Court.

38. I was recently transferred to a different prison, and pursuant to the transfer policies of the Oklahoma Department of Corrections, I was not allowed to bring my discovery, supporting documents, and copies of motions filed in these cases, which is a substantial impediment. *See, e.g.*, *Aragon v. Williams*, 819 F. App'x 610, 613 (10th Cir. 2020), *cert. denied*, 141 S.Ct. 1106 (2021) (Mem.) (28 U.S.C. § 2244(d)(1)(B) "typically applies when the State thwarts a prisoner's access to the courts, for example, by denying an inmate access to his legal materials or a law library.").

39. My prison was recently affected by a bacterial meningitis outbreak, and I was subjected to a 10-day in-cell lockdown without access to my legal materials and one of my petitions stored on the law library computer.[20]

40. Given the amount of work that remains to be done between these cases, it will not be possible to file the petitions in this Court by the current due date of April 10, 2024, and especially not in the comprehensive form and manner deserving of this Honorable Court and the important constitutional, statutory, and *stare decisis* questions sought to be reviewed.

41. The requested extension of time is for sixty days. *See* Sup. Ct. R. 13(5) (authorizing extension of up to sixty days for the filing of a petition for writ of certiorari). I have attempted to contact the Oklahoma Attorney General to inquire if they would object to the requested extension of time, but have been unsuccessful in reaching them. Because the United States is not a party to our challenge to the facial and as-applied constitutionality of the MCA,

[20] I am almost finished with my petition challenging the retroactive application of *Castro-Huerta*. If not for the quarantine lockdown, I would have timely submitted that certiorari petition without the necessity of an extension. *See* https://www.news9.com/story/65f8c481cd4a4d0c7694e2e0/great-plains-correctional-facility-closes-to-visitors-after-bacterial-meningitis-death (Mar. 18, 2024).

the United States Solicitor General has been mailed a copy of this request. *See* 28 U.S.C. § 2403(a); Sup. Ct. R. 29.4(b).

WHEREFORE, Petitioner Bryan O'Rourke respectfully requests than an order be entered extending his time in which to petition for writ of certiorari to and including Monday, June 10, 2024.

Respectfully submitted this 23rd day of January 2024,

Bryan Christopher O'Rourke
#854732
GPCC Unit EE-09
P.O. Box 700
Hinton, OK 73047

ORIGINAL

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FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 10 2024

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE CLERK SHALL ENTER THE FOLLOWING ORDERS OF THE COURT:

1 PC-2023-964
Oklahoma County
Case No. CF-2014-2033
Honorable Kathryn Savage
District Judge

LAVONTE JOHNSON v. THE STATE OF OKLAHOMA

ORDER DECLINING JURISDICTION

Petitioner's request for post-conviction relief was denied by the District Court in an order filed September 26, 2023. Petitioner's Petition in Error should have been filed with this Court on or before November 27, 2023, but was not filed until November 29, 2023. Petitioner failed to timely file the Petition in Error with the Clerk of this Court within sixty (60) days from the filing date of the District Court's final order. *See* Rule 5.2(C)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2024). The Court **DECLINES** jurisdiction and **DISMISSES** this matter. If Petitioner feels he has been denied a post-conviction appeal through no fault of his own, he may seek the appropriate relief with the District Court. *See* Rule 2.1(E)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2024).

CONCUR: Rowland, P.J.; Musseman, V.P.J.; Lumpkin, J.; Lewis, J.; Hudson, J.

2 MA-2023-1012
Canadian County
Case Nos. CF-2019-284
and CF-2018-113
Honorable Paul Hesse
District Judge

DOUGLAS EDWARD DUNNAM v. THE STATE OF OKLAHOMA

ORDER DECLINING JURISDICTION

This Court will only entertain writs for extraordinary relief if Petitioner has sought and been denied relief in the District Court. Rule 10.1(A), *Rules of the*

Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2024). Petitioner is required to file with this Court, among other things, a certified copy of the District Court order denying his request for relief. *See* Rule 10.1(C)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2024). 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. The Court **DECLINES** jurisdiction and **DISMISSES** this matter.

CONCUR: Rowland, P.J.; Musseman, V.P.J.; Lumpkin, J.; Lewis, J.; Hudson, J.

3 **HC-2023-1022**
Tulsa County
Case No. CF-2017-4236
Honorable David Guten
District Judge

BRYAN CHRISTOPHER O'ROURKE v. CARRIE BRIDGES, WARDEN

ORDER DECLINING JURISDICTION

This Court will only entertain writs for extraordinary relief if Petitioner has sought and been denied relief in the District Court. Rule 10.1(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2024). Petitioner is required to file with this Court, among other things, a certified copy of the District Court order denying his request for relief. *See* Rule 10.1(C)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2024). 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. The Court **DECLINES** jurisdiction and **DISMISSES** this matter.

CONCUR: Rowland, P.J.; Lumpkin, J.; Lewis, J.; Hudson, J.
RECUSE: Musseman, V.P.J.

4 **MA-2023-1018**
Oklahoma County
Case No. None
Honorable None
District Judge

THOMAS CARL DODDS, JR.
v. STEVEN HARPE,
DIRECTOR DEPT. OF
CORRECTIONS

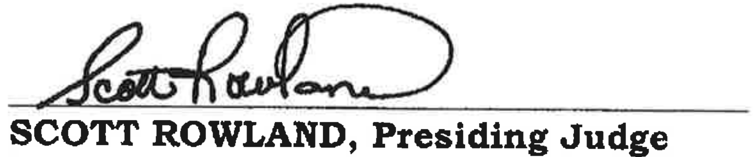
ORDER DECLINING JURISDICTION

This Court will only entertain writs for extraordinary relief if Petitioner has sought and been denied relief in the District Court. Rule 10.1(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2024). Petitioner is required to file with this Court, among other things, a certified copy of the District Court order denying his request for relief. *See* Rule 10.1(C)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2024). 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. The Court **DECLINES** jurisdiction and **DISMISSES** this matter.

CONCUR: Rowland, P.J.; Musseman, V.P.J.; Lumpkin, J.; Lewis, J.; Hudson, J.

IT IS SO ORDERED.

WITNESS MY HAND AND THE SEAL OF THIS COURT this 12th day of January, 2024.



SCOTT ROWLAND, Presiding Judge

ATTEST:

Clerk