Case No. 20-8335

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE A. CHRISTIAN, JR.,

***Petitioner*,**

v.

THE STATE OF OKLAHOMA,

***Respondent*.**

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

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should consider petitioner's claim respondent lacked jurisdiction to prosecute him when that claim was neither pressed nor passed upon below.

2. Whether respondent had jurisdiction to prosecute petitioner for crimes committed in Oklahoma County, Oklahoma.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Court should deny the petition for writ of certiorari to review the challenged Order of the Oklahoma Court of Criminal Appeals ("OCCA") entered on March 23, 2021. *See* Pet. App. A. Petitioner claims he is entitled to relief under *McGirt v. Oklahom*a, 140 S. Ct. 2452 (2020). However, petitioner never raised this claim in the courts below, nor did those courts address the issue. Accordingly, certiorari should not be granted to address a claim raised for the first time in this Court. Moreover, even assuming this Court considers petitioner's *McGirt* claim in the first instance, nothing in the record supports the argument that petitioner is entitled to relief under *McGirt*. The county in which petitioner committed his crime is not within the 1866 boundaries of the Seminole Nation or any of the other Five Tribes. And nothing in the record supports petitioner's claim that he is an Indian for purposes of the Major Crimes Act, 18 U.S.C. 1153. For any of these reasons, the petition should be denied.

STATEMENT OF THE CASE

On May 3, 1999, petitioner pleaded guilty to Kidnapping, after being formerly convicted of two or more felonies, in Oklahoma County District Court Case No. CF-98-3134.[1] As the underlying factual basis of his guilty plea, Petitioner admitted, "On

[1] In addition to the Kidnapping charge, Petitioner was also charged by Information in CF-1998-3134 with Robbery in the First Degree, after former conviction of two or more felonies, Assault and Battery with a Dangerous Weapon, after former conviction of two or more felonies, and Forcible Oral Sodomy, after former conviction of two or more felonies. Pursuant to the plea negotiations, the State agreed to dismiss the second page of the Information as well as these other counts.

or about May 11 & 12, 1998, in Oklahoma County, OK, I confined Vicki Hensley in this State against her will by taking her vehicle while she was in the vehicle." Resp. App. 6 at 047a. Petitioner was sentenced to five years imprisonment, with all five years suspended. He was advised of his right to appeal.[2]

Petitioner timely filed a motion to withdraw his guilty plea. Resp. App. 3 at 016a-017a. In his motion, petitioner alleged his guilty plea was a "mistake" resulting from him being "under alot [sic] of pressure and stress and due to the unusual circumstances" from his time in county jail. Resp. App. 3 at 016a. The hearing to consider petitioner's motion to withdraw was originally set in the state district court on May 24, 1999, but was continued to June 2, 1999. Resp. App. 6 at 064a. On that date, however, petitioner's motion to withdraw his guilty plea was stricken by the court for failure to present. *Id.*

Seventeen years later, on November 1, 2016, petitioner, *pro se*, filed an application for state post-conviction relief out-of-time, wherein he again moved to withdraw his plea and requested other unspecified collateral relief. Resp. App. 1-6. Several weeks later, petitioner filed a motion for discovery. Resp. App. 7. Then, in

[2] On March 2, 1999, the day before petitioner pleaded guilty, he filed a Petition for Writ of Habeas Corpus attacking a state detainer in the United States District Court for the Western District of Oklahoma, Case No. CIV-1999-272-C. Therein he challenged his confinement in the Oklahoma County Detention Center on the grounds insufficient evidence was presented at the preliminary hearing to bind him over for trial, witness perjury occurred, and he allegedly received the ineffective assistance of counsel. On May 18, 1999, the petition was dismissed without prejudice for failure to exhaust state remedies and under the abstention doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971).

2019, petitioner unsuccessfully sought mandamus relief from the OCCA, which declined to exercise jurisdiction. Resp. App. 9-10.

The following year, petitioner filed an amended application for state post-conviction relief out of time—the action at issue now. Resp. App. 11 at 107a-113a. Notably, this application failed to raise any challenge to the State's prosecutorial authority, based on the Major Crimes Act, 18 U.S.C. 1153, or otherwise. On January 7, 2021, the state district court applied laches to deny as untimely petitioner's request for post-conviction relief out of time. Pet. App. B. The court further held that, even without applying laches, petitioner had waived his right to an appeal out of time by abandoning his May 1999 request to withdraw his plea. Along with these procedural hurdles, each of petitioner's claims were waived because the claims could have been raised in his motion to withdraw his plea and any subsequent certiorari appeal (had he initiated one) but were not. Additionally, laches was applied to preclude petitioner from seeking collateral relief. And even considering the underlying merits of petitioner's claims, the state district court found the claims meritless.

On March 8, 2021, petitioner tendered for filing an Amended Application for Post-Conviction Relief with the OCCA. Resp. App. 14 at 120a-146a. Petitioner's attempt to "amend" his post-conviction application on appeal was improper, *cf.* OKLA. STAT. tit. 21, 1081, 1083, but regardless, even his amended application did not raise his present challenge to the State's jurisdiction.

On March 23, 2021, the OCCA affirmed the state district court's denial of post-conviction relief and denied petitioner's request to file an amended request for post-

conviction relief. Pet. App. A. On June 4, 2021, the instant Petition for a Writ of Certiorari was placed on this Court's docket.[3]

REASONS FOR DENYING THE PETITION

This case presents no "compelling reason" for this Court to grant certiorari. SUP. CT. R. 10(a). This Court's practice is to deny review of a question not argued or addressed below. Here, petitioner's claim that he is Indian and that his crime occurred within the allegedly undiminished boundaries of the Seminole Nation reservation, such that the State lacks jurisdiction over his crime, was never presented to or addressed by any of the courts below. Even assuming this Court is willing to consider petitioner's claim, the record is entirely devoid of any facts that would support the claim. No part of Oklahoma County, where petitioner's crime occurred, is within the 1866 boundaries of the Seminole Nation. Nor did petitioner present any evidence below to show that he is an "Indian" for purposes of federal criminal law. Any of these reasons standing alone warrants denial of the petition.

A. This Court should not reach the question of the state's jurisdiction presented because that question was never pressed or passed upon below.

"Under [28 U.S.C. 1257(a)] and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v.*

[3] Petitioner incorrectly alleges the state district court and OCCA denied his claim that his counsel was ineffective for failure to raise his *McGirt* argument. Pet. at 1. In fact, petitioner never raised such a claim in the courts below.

Mississippi, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*)). When the issue presented on certiorari has not been addressed by the state court, this Court presumes "the issue was not properly presented" and places the burden on petitioner to show "that the state court had 'a fair opportunity to address the federal question that is sought to be presented here[.]'" *Adams*, 520 U.S. at 87 (quoting *Webb v. Webb,* 451 U.S. 493, 501 (1981)). Failure to do so precludes this Court from addressing the issue a petitioner seeks to be addressed for the first time in this Court. *Id*. at 90.

Refusal to consider claims raised in the first instance reinforces the role of this Court as a "court of review, not of first view." *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018). Indeed, the longstanding practice of the Court is to refrain from considering a question not pressed or passed upon below. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005); *United States v. Williams*, 504 U.S. 36, 41 (1992); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . . .").

Strict refusal to consider claims not raised and addressed below furthers the interests of comity by allowing the states the first opportunity to address federal law concerns and resolve any potential questions on state-law grounds. *Adams*, 520 U.S. at 90; *see also Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 (2018) (court "will ordinarily await 'thorough lower court opinions to guide our analysis of the merits'" (citation omitted)); *Illinois v. Gates*, 462 U.S. 213, 221-22 (1983). A further benefit of refusing

to consider claims not raised below is a practical one—"the creation of an adequate factual and legal record" developed by the court below to better aid this Court's understanding and determination of the case presented. *Adams*, 520 U.S. at 90-91.

Here, the petition should be denied as petitioner has never presented any court with the *McGirt* claim he advances for the first time here. In petitioner's requests for post-conviction relief before the state district court, he never presented a claim that the State lacked authority to prosecute him because of the location of the crime or his alleged Indian status. Rather, he alleged that: (1) counsel was ineffective for failing to conduct an adequate pre-trial investigation and for operating under a conflict of interest; (2) his plea was entered into unknowingly and without deliberation; (3) prosecutorial misconduct occurred, including a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), improper elicitation of testimony, improper statements, and failure to correct testimony; (4) the trial court's decision regarding an unspecified matter was "an unreasonable determination of the facts and contrary to clearly established federal law"; and (5) he is entitled to an appeal out of time. Resp. App. 1 at 001a-010a; Resp. App. 11 at 107a-110a. The state district court did not address the State's prosecutorial authority because no challenge to that authority was raised. When petitioner appealed the denial of post-conviction relief to the OCCA, he merely resubmitted the claims he raised in state district court. In affirming the state district court's denial of post-conviction relief, the OCCA addressed only the claims that were raised below. Having never been presented with a *McGirt* claim, the OCCA never addressed *McGirt*.

Petitioner cannot overcome the presumption that his claim was never properly presented to the state court below. *Adams*, 520 U.S. at 87. As a result, this Court should maintain its general practice of refusing to act as a court of first view. *Id.* at 90. The petition should be denied.

B. The record does not support the alleged facts underlying petitioner's *McGirt* claim.

As this Court is aware, the State of Oklahoma has asked this Court to consider overruling *McGirt* in multiple petitions currently pending before the Court. *See, e.g.*, *Oklahoma v. Williams*, No. 21-265; *Oklahoma v. Mitchell*, No. 21-254. But here, the record facts do not justify granting petitioner relief under *McGirt* even if that decision is maintained. Assuming petitioner is entitled to review of his *McGirt* claim on the merits, he must at a bare minimum make two showings—that his crime occurred in Indian country and that he is Indian. Petitioner has shown neither.[4]

First, contrary to petitioner's suggestion, no part of Oklahoma County—the locus of his crime—falls within the historical boundaries of the Seminole Nation, regardless of the reservation status of historic Seminole lands. Indeed, petitioner acknowledges that the Seminole Nation's historic boundaries "mainly track the borders of Seminole County, with a slight deviation in the northeastern region," Pet. 6; *see also Grayson v. State*, 485 P.3d 250, 253-54 (Okla. Crim. App. 2021), *cert. pet.*

[4] Petitioner alleges he is Indian. Pet. at 2. Therefore, his *McGirt* claim does not implicate—as he misleadingly suggests, Pet. at 3—the State's argument advanced in other petitions before this Court that the State maintains prosecutorial authority concurrent with the federal government over crimes by non-Indians against Indians in Indian country under the General Crimes Act.

filed No. 21-324. But petitioner was convicted in Oklahoma County, which is northwest of Seminole County, with Pottawatomie County lying in between the two.[5]

Second, while there is no statutory definition of "Indian" for purposes of federal criminal laws such as the Major Crimes Act, courts have relied on the two-part test for Indian status derived from this Court's decision in *United States v. Rogers*, 45 U.S. 567 (1846). Under this test, an Indian is one who (1) has Indian blood, and (2) is recognized as an Indian by a federally-recognized tribe or the federal government. *Id.*; *see also United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001). Petitioner alleges he is Indian because he is an enrolled member of the Seminole Nation, yet he fails to point to documentation or proof of this claim in the record. No evidence was introduced in the lower courts on this score. Moreover, petitioner does not even allege, much less point to record evidence showing, he has any quantum of Indian blood. Without any showing of any degree of Indian blood, petitioner cannot satisfy the bare

[5] Perhaps recognizing this fact, petitioner makes a fleeting argument that Oklahoma has no jurisdiction over any part of the state based on OKLA. CONST. art. I, § 3. Pet. at 3. The OCCA long ago rejected this interpretation of state law, *Goforth v. State*, 644 P.2d 114, 116-17 (Okla. Crim. App. 1982), and petitioner provides no reason to suggest this Court can or should review this state-law determination. *See also Organized Vill. of Kake v. Egan*, 369 U.S. 60, 64-71 (1962) (construing similar language in the Alaska Constitution). Petitioner also makes several isolated references to committing his crime within the historic boundaries of the Creek Nation. But as with historic Seminole lands, Oklahoma County does not fall within the boundaries of the Creek reservation even assuming *McGirt* was correctly decided. *See Barnett v. Fed. Bureau of Prisons*, Civ. No. 20-00757-JD, 2021 WL 325716, *5 (W.D. Okla. Feb. 1, 2021) (slip op.) ("Oklahoma County lies outside of the boundaries of the Creek Nation."); *Canady v. Bryant*, Civ. No. 18-677-HE, 2018 WL 3812259, *1 (W.D. Okla. Aug. 10, 2018) (finding Oklahoma County does not fall within the boundaries of the Creek Nation recognized by *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017)).

minimum requirements of the two-part *Rogers* test for Indian status to establish the applicability of federal Indian country criminal laws.[6]

* * *

Petitioner's *McGirt* claim was neither pressed nor passed upon below. Unsurprisingly, petitioner has not developed the record on either the location of his crime or Indian status. In any event, petitioner's crime certainly did not occur within the historic boundaries of the Seminole Nation. Certiorari should be denied.

CONCLUSION

For the reasons set forth above, respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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[6] Petitioner makes an isolated statement that his victim was also Indian but he likewise fails to substantiate that claim. Pet. at 6.