

**Capital Case**

Case No. \_\_\_\_\_

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

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JOHN FITZGERALD HANSON,  
*Petitioner,*  
v.  
THE STATE OF OKLAHOMA,  
*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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**CAPITAL CASE**

**QUESTION PRESENTED**

Whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), applies retroactively to convictions that were final when *McGirt* was announced.

## PARTIES TO THE PROCEEDINGS

The parties to this action are named in the caption. The parties are Petitioner, John Fitzgerald Hanson, and Respondent, the State of Oklahoma, by and through John M. O'Connor, Attorney General for the State of Oklahoma.

## RELATED PROCEEDINGS

### Oklahoma Court of Criminal Appeals:

*Hanson v. State*, Case No. PCD-2020-611, Successive Application for Post-Conviction Relief (regarding *McGirt* and *Murphy* decisions). Opinion denying relief issued September 9, 2021 (unpublished).

*Hanson v. State*, Case No. PCD-2020-611, Order Remanding for Evidentiary Hearing issued April 2, 2021.

*Hanson v. State*, Case No. PCD-2011-58, Second Application for Post-Conviction Relief denied March 22, 2011.

*Hanson v. State*, Case No. PCD-2006-614, Application for Post-Conviction Relief denied June 2, 2009.

*Hanson v. State*, Case No. D-2006-126, Direct Appeal Opinion reaffirming death sentence after remand issued April 13, 2009. *Hanson v. State*, 206 P.3d 1020 (Okla. Crim. App. 2009), *cert. denied*, *Hanson v. Oklahoma*, 558 U.S. 1081 (2009), Case No. 09-7194.

*Hanson v. State*, Case No. D-2001-717, Direct Appeal Opinion issued June 11, 2003 (reversed and remanded for resentencing). *Hanson v. State*, 72 P.3d 40 (Okla. Crim. App. 2003).

**Oklahoma District Court of Tulsa County:**

*State v. Hanson*, Case No. CF-1999-4583 (Tulsa Cnty. Dist. Ct. Feb. 7, 2006) (Judgment and Sentence of Death imposed entered after resentencing).

**United States District Court (Northern District of Oklahoma):**

*Hanson v. Sherrod*, et al., Opinion and Order denying federal habeas relief issued July 1, 2013 in an unpublished opinion, *Hanson v. Sherrod*, No. CIV-10-113-CVE-TLW, 2013 WL 3307111 (N.D. Okla. July 1, 2013).

**Tenth Circuit Court of Appeals:**

*Hanson v. Sherrod*, 797 F.3d 910 (10th Cir. 2015). Case No. 13-5100. Opinion and Order affirming the district court's denial of the federal habeas petition issued August 13, 2015. Petition for Certiorari denied in *Hanson v. Sherrod*, 578 U.S. 979 (2016), Case No. 15-8396.

**Supreme Court of the United States:**

*Hanson v. Oklahoma*, 558 U.S. 1081 (2009), Case No. 09-7194 (certiorari denial from *Hanson v. State*, 206 P.3d 1020 (Okla. Crim. App. 2009), direct appeal case No. D-2006-126).

*Hanson v. Sherrod*, 578 U.S. 979 (2016), Case No. 15-8396 (certiorari denial from *Hanson v. Sherrod*, 797 F.3d 910 (10th Cir. 2015)).

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**PETITION FOR A WRIT OF CERTIORARI**

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Petitioner, John Hanson, respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the Oklahoma Court of Criminal Appeals (OCCA) in *Hanson v. State*, No. PCD-2020-611, issued September 9, 2021.

**OPINIONS AND ORDERS BELOW**

The opinion of the OCCA, issued September 9, 2021, denying Mr. Hanson's *McGirt* successive state post-conviction action is unpublished but available in the appendix. See Appendix A (Pet. App. at 1-4) (*Hanson v. State*, Opinion Denying Successive Application for Capital Post-Conviction Relief, No. PCD-2020-611 (Okla. Crim. App. Sep. 9, 2021) (unpublished)). On April 2, 2021, the

OCCA issued an order remanding his case back to the District Court of Tulsa County for an evidentiary hearing to determine Hanson's Indian Status and whether the crime occurred in Indian country. This Order is unpublished but available in the appendix. *See* Appendix C (Pet. App. at 49-54) (Order Remanding for Evidentiary Hearing).

### **JURISDICTION**

The Oklahoma Court of Criminal Appeals rendered its opinion denying post-conviction relief on September 9, 2021. This petition is being filed within 90 days of that denial pursuant to Rule 13, Rules of the Supreme Court of the United States. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the United States Constitution, Article I, Section 8, provides in relevant part:

The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

The Supremacy Clause to the United States Constitution, Article VI, provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Due Process Clause of the Fourteenth Amendment, Section 1, to the U.S. Constitution provides in relevant part:

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

Title 18, United States Code, Section 1151 (Indian country defined) provides:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Title 18, United States Code, Section 1152 (Laws governing) provides in relevant part:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Section 1080 of Title 22 of the Oklahoma Statutes provides:

Any person who has been convicted of, or sentenced for, a crime and who claims:

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

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

(c) that the sentence exceeds the maximum authorized by law;

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

(e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

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

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

Section 1089(D) of Title 22 of the Oklahoma Statutes provides in relevant part:

8. If an original application for post-conviction relief is untimely or if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent or untimely original application unless:

a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or ....

9. For purposes of this act, a legal basis of a claim is unavailable on or before a date described by this subsection if the legal basis:

a. was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or

b. is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

## STATEMENT OF THE CASE

### A. Prior History

On September 22, 1999, Mr. Hanson was charged by Information in Tulsa County District Court Case No. CF-1999-4583 with two counts of Murder in the First Degree of Mary Bowles and Jerald Thurman. Mr. Hanson was charged jointly with co-defendant, Victor Miller. The counts were charged alternatively as malice aforethought or felony murder. (O.R. 53-58, 95-101). Mr. Hanson and co-defendant Miller's cases were severed for trial. On February 28, 2000, the State of Oklahoma filed a Bill of Particulars, alleging three aggravating circumstances: (1) Mr. Hanson was previously convicted of a felony involving use or threat of force, (2) there exists a probability that the defendant will commit acts of violence that would constitute a continuing threat to society, and (3) Mr. Hanson knowingly created a great risk of death to more than one person.

Mr Hanson's original jury trial was held from May 7 - 23, 2001. The jury found Mr. Hanson guilty of both counts. In Count I, Mr. Hanson was sentenced to death for the malice aforethought murder of Mary Bowles. (O.R. 544). As to Count I, the jury found the following aggravating circumstances: (1) Mr. Hanson was previously convicted of a felony involving use or threat of force, (2) there exists a probability that the defendant will commit acts of violence that would constitute a continuing threat to society, and (3) Mr. Hanson knowingly created

a great risk of death to more than one person. (O.R. 542). In Count II, Mr. Hanson was sentenced to life without the possibility of parole for the felony murder of Jerald Thurman. (O.R. 548). Despite finding Mr. Thurman's death was aggravated by two factors, prior violent felony convictions and continuing threat, the jury still imposed a non-death sentence in Count II. (O.R. 544). On June 8, 2001, the trial court formally sentenced Mr. Hanson in accordance with the jury's verdict (O.R. 548).

Mr. Hanson appealed his convictions and sentences to the OCCA, Case No. D-2001-717. On June 11, 2003, the conviction and sentence for Count II were affirmed; however, while the conviction in Count I was affirmed, the court reversed and remanded the death sentence for a new sentencing trial. *Hanson v. State*, 72 P.3d 40 (Okla. Crim. App. 2003). Mr. Hanson's death sentence was reversed for a host of reasons, including, *inter alia*, trial court error in excluding expert witness testimony; trial court error in not allowing the defense to *voir dire* jurors on whether the death penalty would be automatically imposed; trial court error in not removing a juror for cause; failure to instruct the jury on the continuing threat aggravating circumstance; trial court's refusal to instruct the jury on Mr. Hanson's proffered list of mitigating circumstances; and admission of improper victim impact evidence. *Id.*



At the time of reversal of his death sentence, Mr. Hanson was engaged in state collateral proceedings and had a pending Application for Post-Conviction Relief (APCR) on file with the OCCA. That APCR was assigned Case No. PCD-2002-628. On June 17, 2003, the OCCA dismissed the application as being mooted by the court's disposition of the direct appeal case.

Just before the re-sentencing was set to begin, the State disclosed new evidence that co-defendant Miller had confessed to shooting victim, Mary Bowles. In response to the new evidence, trial counsel filed an Application for Post-Conviction Relief and Brief in Support of New Trial in Tulsa County on January 14, 2005, in Case No. CF-99-4583, which resulted in Mr. Hanson being granted a new trial. (O.R. 1252-64, 1352-53). The State appealed and moved for a Writ of Prohibition against the trial court's grant of a new trial, Case No. PR-2005-350, which the OCCA granted by vacating the trial court's order as void for lack of jurisdiction. The trial court then commenced the re-sentencing hearing, and Mr. Hanson was sentenced to death on Count I on 1-25-2006. (O.R. 1560). The re-sentencing jury found the existence of the following aggravating factors: (1) Mr. Hanson was previously convicted of a violent felony, (2) Mr. Hanson created a great risk of death to more than one person, and (3) the murder was committed for purposes of avoiding arrest or prosecution. (O.R. 1563).

Mr. Hanson timely appealed his death sentence on direct appeal to the Oklahoma Court of Criminal Appeals in Case No. D-2006-126. The OCCA struck the jury's finding of the great risk of death aggravating circumstance; however, the court affirmed his sentence of death. *Hanson v. State*, 206 P.3d 1020 (Okla. Crim. App. 2009). Mr. Hanson sought certiorari in this Court, which was denied in *Hanson v. Oklahoma*, 558 U.S. 1081 (Dec. 7, 2009).

Mr. Hanson then pursued his federal habeas petition. On December 6, 2010, Mr. Hanson, filed in the United States Court for the Northern District of Oklahoma for a Writ of Habeas Corpus, Case No. CIV-10-113-CVE-TWL. The district court denied his habeas petition on July 1, 2013, in an unpublished opinion. *See Hanson v. Sherrod*, No. CIV-10-113-CVE-TLW, 2013 WL 3307111 (N.D. Okla. July 1, 2013). On August 13, 2015, the Tenth Circuit Court of Appeals affirmed in Case No. 13-5100, *Hanson v. Sherrod*, 797 F.3d 810 (10th Cir. 2015), *cert. denied*, 578 U.S. 979 (2016).

## **B. Current Controversy**

On September 8, 2020, Mr. Hanson filed a Successive Application for Post-Conviction Relief challenging the State's jurisdiction to prosecute him under *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020). *See* Appendix B (Pet. App. at 5-44) (Successive Application for Post-Conviction Relief, Death Penalty, *Hanson v. State*, PCD-2020-611 (Okla. Crim.

App. Sept. 8, 2020)). Mr. Hanson asserted exclusive jurisdiction rests with the federal courts because the crimes committed occurred within the boundaries of the Cherokee Nation Reservation. Mr. Hanson’s official documents proving he is a member of and enrolled in the Muscogee (Creek) Nation were filed as a supplement to his successive application. *See* Appendix B (Pet. App. at 45-48).

On March 11, 2021, the OCCA expanded the ruling in *McGirt* to apply to the Cherokee Nation Reservation. *Hogner v. State*, \_\_\_ P.3d \_\_\_, No. F-2018-138, 2021 WL 958412 (Okla. Crim. App. Mar. 11, 2021). Similar rulings applied *McGirt* to each of Oklahoma’s “Five Civilized Tribes.” The OCCA issued published opinions granting post-conviction relief to several capital defendants convicted absent jurisdiction in Oklahoma state courts. These grants were made regardless of whether the void state court convictions were final when *McGirt* was announced.<sup>1</sup>

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<sup>1</sup> *See, e.g., Bosse v. State*, 484 P.3d 286 (Okla. Crim. App. Mar. 11, 2021) (opinion granting post-conviction relief); *Ryder v. State*, 489 P.3d 528 (Okla. Crim. App. Apr. 29, 2021) (opinion granting post-conviction relief); *Cole v. State*, 492 P.3d 11 (Okla. Crim. App. Apr. 29, 2021) (opinion granting post-conviction relief); and *Bench v. State*, 492 P.3d 19 (Okla. Crim. App. May 6, 2021) (opinion granting post-conviction relief). Consistent with the State’s arguments in Mr. Ryder’s and others’ cases, in granting post-conviction relief to Shaun Bosse, the OCCA noted the State had argued “that waiver should apply because there is really nothing new about the claim.” *Bosse*, 484 P.3d at 293 n.8, *withdrawn, but cited from Bosse v. Oklahoma, petition for cert. filed* Nov. 22, 2021, Case No. \_\_\_\_\_ at his Appendix C, Pet. App. at 24.

On April 2, 2021, the OCCA remanded Mr. Hanson's case back to the District Court for Tulsa County, Case No. CF-1999-4583, for an evidentiary hearing. See Appendix C (Pet. App. at 49-54) (Order Remanding for Evidentiary Hearing). Prior to the evidentiary hearing, both parties filed evidentiary hearing briefs on May 25, 2021, addressing, *inter alia*, the merits of *McGirt's* application to the present action. Petitioner Hanson filed a remanded evidentiary hearing brief (Appendix D, Pet. App. at 55-80), as did Respondent (Appendix E, Pet. App. at 81-100).

Tulsa County District Judge, Dawn Moody, held a bifurcated evidentiary hearing on May 25, 2021 and June 3, 2021, concluding under *Hogner* that the Cherokee Reservation remained intact and that Petitioner, John Hanson, committed his crimes in Indian Country pursuant 18 U.S.C. § 1151.

On June 11, 2021, however, the Oklahoma Court of Criminal Appeals *sua sponte* stayed Mr. Hanson's matter pending its decision in *State of Oklahoma ex rel. Matloff v. Wallace*, Case No. PR-2021-366. See Appendix F (Pet. App. at 101-102) (Order Staying Evidentiary Hearing). The *Matloff* case was filed in the OCCA on April 27, 2021, and decided on August 12, 2021, *State ex rel. Matloff, District Attorney v. Wallace*, \_\_\_ P.3d \_\_\_, No. PR-2021-366, 2021 WL 3578089 (Okla. Crim. App. Aug. 12, 2021), *petition for cert. filed sub nom. Parish v. Oklahoma, et. al.* (U.S. 9-29-21) (No. 21-467). See Appendix G (Pet. App. at

103-113) (hereinafter *Matloff*). In *Matloff*, the OCCA reversed course and discarded the settled law and bedrock jurisdictional principles it had relied on. The OCCA held “*McGirt v. Oklahoma* announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction,” *Matloff*, 2021 WL 3578089, at \*2 (Appendix G, Pet. App. at 105).<sup>2</sup> The OCCA explained that in previously granting post-conviction *McGirt* relief to petitioners like Mr. Hanson, its attention had not “been drawn to the potential non-retroactivity of *McGirt*.” *Matloff, Id.* at \*3 (Appendix G, Pet. Att. at 106).

The Oklahoma Court of Criminal Appeals, pursuant to their opinion in *Matloff v. Wallace* issued August 12, 2021, vacated opinions granting post-conviction relief in several other similarly-situated cases and superseded with opinions denying post-conviction relief.<sup>3</sup>

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<sup>2</sup> Counsel in Mr. Hanson’s case submitted an amicus brief in *Matloff*. See Appendix H (Pet. App. at 114-130) (*Amicus Curiae* Brief of the Capital Habeas Unit of the Federal Public Defender for the Western District of Oklahoma in Support of Respondent),

<sup>3</sup> See, e.g., *Bosse v. State*, 484 P.3d 286 (Okla. Crim. App. Mar. 11, 2021) (opinion granting relief), *withdrawn and vacated in* 495 P.3d 669 (Okla. Crim. App. Aug. 31, 2021), *opinion superseded by* \_\_ P.3d \_\_, No. PCD-2019-124, 2021 WL 4704316 (Okla. Crim. App. Oct. 7, 2021) (opinion denying relief); See, e.g., *Ryder v. State*, 489 P.3d 528 (Okla. Crim. App. Apr. 29, 2021) (opinion granting post-conviction relief), *withdrawn and vacated in* 495 P.3d 669 (Okla. Crim. App. Aug. 31, 2021), *opinion superseded by* \_\_ P.3d \_\_, No. PCD-2020-613, 2021 WL (continued...)

On September 2, 2021, Respondent, State of Oklahoma, filed a Motion to File a Supplemental Brief in Light of *State ex rel. District Attorney v. Wallace*, tendering for filing its supplemental brief. See Appendix I (Pet. App. at 131-138). On September 7, 2021, Petitioner, Hanson, filed his Response, see Appendix J (Pet. App. at 139-142), noting “the State specifically acknowledges it ‘has not previously argued in this case the retroactivity question decided in *Wallace*.’” Appendix J (Pet. App. at 139). On that same day, Petitioner filed a Motion to Continue Stay of Proceedings and Brief in Support requesting the post-conviction action to be stayed pending the Supreme Court’s ruling in *Matloff*. See Appendix K (Pet. App. at 143-150). On September 9, 2021, the OCCA denied this motion and denied staying the proceedings. See Appendix L (Pet. App. at 151-152 (Order Denying Petitioner’s Request to Continue Stay of Proceedings)).

Simultaneously, on September 9, 2021, the Oklahoma Court of Criminal Appeals issued its unpublished opinion denying Hanson’s Successive Post-

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<sup>3</sup>(...continued)

4929914 (Okla. Crim. App. Oct. 21, 2021) (opinion denying relief); *Cole v. State*, 492 P.3d 11 (Okla. Crim. App. April 29, 2021) (opinion granting post-conviction relief), *withdrawn and vacated in* 495 P.3d 670 (Okla. Crim. App. Aug. 31, 2021), *opinion superseded by* \_\_ P.3d \_\_, No. PCD-2020-529, 2021 WL 4704035 (Okla. Crim. App. Oct. 7, 2021) (opinion denying relief); *Bench v. State*, 492 P.3d 19, No. PCD-2015-698 (Okla. Crim. App. May 6, 2021) (opinion granting post-conviction relief), *withdrawn and vacated in* 495 P.3d 670 (Okla. Crim. App. Aug. 31, 2021).

Conviction Application regarding *McGirt* in PCD-2020-611. *See* Appendix A (Pet. App. at 1-4). The court's mandate was issued on September 9, 2021. *See* Appendix M (Pet. Att. at 153) (Mandate).

Petitioner, John Hanson, filed a Motion to Recall Mandate on September 10, 2021, based upon the filing of an appeal to the Supreme Court of the United States regarding the *Matloff* decision, *see* Appendix N (App. Pet. at 154-162), which the OCCA denied on September 20, 2021, *see* Appendix O (App. Pet. at 163-164).

#### **REASONS THE PETITION SHOULD BE GRANTED**

The petition for writ of certiorari in *Parish v. Oklahoma*, No. 21-467 (arising from *Matloff*), presents the same question presented in this case. *See State ex rel. Matloff v. Wallace*, \_\_ P.3d \_\_, Case No. PR-2021-366, 2021 WL 3578089 (Okla. Crim. App. Aug. 12, 2021), *petition for cert. filed sub nom. Parish v. Oklahoma* (U.S. Sept. 29, 2021) (No. 21-467). As explained in the petition for writ of certiorari in *Parish*, *McGirt* must apply retroactively to convictions that were final when *McGirt* was announced. Mr. Hanson's petition for writ of certiorari is one of several that follows *Parish* and presents the same question.

Under *McGirt*, the federal government has—and always had—exclusive jurisdiction to prosecute the crimes of which Mr. Hanson was convicted that occurred in Indian Country. The State has never had the power to do so. By

holding *McGirt* is a mere procedural rule that is not retroactive to cases on collateral review, the OCCA has sought to preserve legally void convictions that the State never had authority to impose. Such a regime violates the Supremacy Clause by treating an exclusive allocation of power to the federal government as a mere regulation of the State's "manner" of trying a case. The decision also violates bedrock principles of due process and centuries-old understandings of habeas corpus. A conviction cannot stand where a State lacks authority to criminalize the conduct, and habeas courts have long set aside judgments by a court that lacks jurisdiction. If left unreviewed, *Matloff* would condemn many people, including Mr. Hanson, to bear state convictions and serve state sentences for crimes the State had no power to prosecute.

A favorable decision in *Parish* would vindicate Mr. Hanson's argument that *McGirt* applies retroactively to convictions that were final when *McGirt* was announced. Because the question presented in this case is before the Court in *Parish*, Mr. Hanson respectfully requests that the Court hold this petition pending the Court's decision in *Parish*.



## CONCLUSION

Oklahoma has no jurisdiction to proscribe and punish Mr. Hanson's conduct, and the State is now holding him without any valid authority to do so. Mr. Hanson respectfully requests the Court hold this petition pending disposition of the petition for a writ of certiorari in *Parish v. Oklahoma*, No. 21-467, and then dispose of it as appropriate. If *Parish* is resolved in the petitioner's favor, the Court should grant certiorari, vacate the judgment below, and remand for further proceedings.

Respectfully submitted,

*s/ Sarah M. Jernigan*

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