No. 21-1214

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,

v.

EMMITT G. SAM,
Respondent.

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

BRIEF IN OPPOSITION

CINDY BROWN DANNER
NICOLLETTE BRANDT
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P.O. Box 926
Norman, OK 73070
(405) 801-2601

LEONARD R. POWELL
Counsel of Record
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
leonardpowell@jenner.com

QUESTION PRESENTED

Did the Oklahoma Court of Criminal Appeals correctly hold that Respondent—an enrolled citizen of the Cherokee Nation with nearly one-third Cherokee ancestry who was a minor at the time of the alleged offenses—is an "Indian" for purposes of federal criminal law because he was eligible for citizenship at the time of the alleged offenses; because as a minor he was unable to enroll himself in the Cherokee Nation; because his mother (herself an enrolled Cherokee citizen) sought formal enrollment for him before the alleged offenses occurred; because throughout his life he has received medical care from federally funded tribal medical centers on the basis of being an Indian; because he was given school benefits and attended summer camps available only to Indians; because as a young child he was temporarily placed in a foster home pursuant to the Indian Child Welfare Act; because he spent the first part of his life in a traditional Cherokee community; and because after he moved to Tulsa he continued to visit his original home regularly where he spent time with members of his family who spoke primarily Cherokee and who held positions of importance at a traditional family stomp grounds?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Oklahoma asks this Court to grant the petition in *Oklahoma v. Wadkins*, No. 21-1193, and hold this petition, or, in the alternative, to grant this petition. Pet. 3, 7. Review is unwarranted for the reasons explained in the Brief in Opposition in *Wadkins* ("*Wadkins* Opp. __"). And Oklahoma's certiorari arguments are especially bereft of merit as applied to this case. Oklahoma's core argument is that nonenrolled Native Americans cannot be "Indians" for purposes of federal criminal law. But here, Respondent was a minor at the time of the alleged offenses, and Oklahoma concedes an exception to its rule would likely be necessary for cases like this one. The petition should be denied.

STATEMENT OF THE CASE

A. Legal Background

Under the Major Crimes Act ("MCA"), 18 U.S.C. § 1153, and the General Crimes Act ("GCA"), 18 U.S.C. § 1152, federal authority to prosecute crimes in Indian country turns on whether the defendant or the victim is an "Indian." State criminal jurisdiction in Indian country, too, can turn on "Indian" status. *E.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020).

In *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), this Court addressed whether a white man who was "adopted" by the Cherokee Nation was an "Indian" for purposes of the GCA. *Id.* at 572. Answering no, the Court explained that while someone who is not Native American "may by … adoption become entitled to certain privileges in the tribe," the statute, by use of the term "Indian," "does not speak of members of a tribe."

Id. at 573. Thus, "Indian" for purposes of federal criminal law "was not intended to … embrace[]" "a white man who at mature age is adopted in an Indian tribe." *Id.* at 572-73.

The lower courts have universally derived a two-pronged test from *Rogers*. First, an "Indian" is a person who has "some degree of Indian blood." *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976). Second, an "Indian" is a person who is "recognized as an Indian" by a tribe or the federal government. *Id.*

The lower courts agree that the second *Rogers* prong is satisfied when a person with Native American ancestry is an enrolled member of a federally recognized Indian tribe. *E.g.*, *United States v. Nowlin*, 555 F. App'x 820, 823 (10th Cir. 2014); *United States v. Stymiest*, 581 F.3d 759, 764 & n.2 (8th Cir. 2009); *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996). The lower courts also agree that *lack* of enrollment is not dispositive. *E.g.*, *Nowlin*, 555 F. App'x at 823-24; *Stymiest*, 581 F.3d at 764; *United States v. Bruce*, 394 F.3d 1215, 1224-25 (9th Cir. 2005).

To assess whether the second *Rogers* prong is satisfied, lower courts use the factors first articulated by *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988). The factors are: "1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying the benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life." *Id.* at 1461. When a person is an enrolled tribal member, the first factor is dispositive; otherwise, all the factors are

considered. *See id.* Ultimately, these factors merely "guide the analysis of whether a person is recognized as an Indian." *Id.* They "are not exclusive." *United States v. LaBuff*, 658 F.3d 873, 877 (9th Cir. 2011).

B. Respondent Emmitt G. Sam

Respondent Emmitt G. Sam is an enrolled Cherokee citizen of 41/128—or about one-third—Cherokee ancestry. Pet. App. 15a. At the time of the alleged offenses, he was a minor. Pet. App. 4a. Respondent's mother is also an enrolled Cherokee citizen, and has been since before Respondent was born. Pet. App. 5a. Minors cannot enroll themselves in the Cherokee Nation, and hence Respondent "did not have a choice as to whether [his mother] pursued membership for him as a minor child." Pet. App. 19a.

Respondent's mother tried to enroll Respondent in the Nation on several occasions before the alleged offenses. *Id.* A tragic procedural obstacle, however, prevented her from doing so. Respondent's father died when Respondent was young, and he was not listed on Respondent's birth certificate. Pet. App. 5a-6a. Without the involvement of Respondent's father in the enrollment application process, the applications were returned. Pet. App. 6a.

Respondent was raised in a traditional Cherokee community until his mother moved them to Tulsa in 2005. Pet. App. 20a. After moving to Tulsa, Respondent regularly visited his family at his former home on weekends and holidays, as well as during summers. *Id.* Respondent spent time with his paternal grandmother, who spoke her first language of Cherokee far more often than she spoke English. *Id.* Respondent also spent time

with other family members who held positions of importance at a family stomp grounds where powwows and other religious ceremonies were held. *Id.* Respondent's uncle, in particular, was influential in Respondent's life after Respondent's father died. Pet. App. 5a. Respondent's uncle was a chief in the family's stomp grounds. *Id.*

While he was still alive, Respondent's father was abusive. *Id.* When Respondent was one year old, Respondent had to be removed from his home due to his father's abuse. *Id.* Because Respondent was Cherokee, Respondent was temporarily placed in a foster home pursuant to the Indian Child Welfare Act. Pet. App. 20a-21a. The placement was with Respondent's first cousin. Pet. App. 21a.

Throughout his life, Respondent has received federal and tribal assistance reserved only to Indians. Pet. App. 18a. He was born at W.W. Hastings Hospital ("Hastings Hospital"), and was provided medical treatment there as well as at Wilma Mankiller Health Center and the Indian Healthcare Resource Center of Tulsa ("IHRC") from his birth until three months before the alleged offenses. Pet. App. 18a-19a. Hastings Hospital and the IHRC are funded at least partially by the federal Indian Health Service.[1] Respondent's mother also works for the

---

[1] *See Inpatient Care*, Cherokee Nation, https://health.cherokee.org/health-center-and-hospital-locations/inpatient-care/ (last visited May 6, 2022); *History*, Indian Health Care Resource Center of Tulsa, https://www.ihcrc.org/misson (last visited May 6, 2022).

The source of the Wilma Mankiller Health Center's funding is less clear from publicly available information, but the Center is run by the Cherokee Nation. *See Outpatient Care*, Cherokee Nation,

IHRC. Pet. App. 19a. To be eligible to receive treatment at these three facilities, one must be an Indian. Pet. App. 18a-19a. And to receive treatment from Hastings Hospital and the IHRC in particular, one must ordinarily be a member of a federally recognized tribe. Pet. App. 5a, 19a. But because Respondent was a minor, he was able to receive medical care at Hastings Hospital and at the IHRC based on his mother's enrollment. *Id.*

By virtue of being a patient at IHRC, Respondent attended spring break and summer camps reserved solely for Indian youth where he learned about tribal culture and participated in cultural activities and recreation. *Id.* Meanwhile, in school, Respondent received benefits such as tutoring, school supplies, and counseling that were funded by a federal program available only to Indians. Pet. App. 5a, 19a-20a.

After Respondent was arrested and incarcerated, he joined a prison gang for protection. *See* Pet. App. 21a-22a. He chose the 52 Red Mob Gangsters, a subset of a black street gang. *Id.* Individuals who are not black can join the 52 Red Mob Gangsters. *See* Appellant's Supplemental Brief at 17, *Sam v. Oklahoma*, No. F-2017-1300 (Okla. Ct. Crim. App. July 21, 2021).

At the time of the alleged offenses, Respondent was eligible for enrollment in the Cherokee Nation, though he had not been formally enrolled. Pet. App. 4a. In 2018, Respondent officially became a Cherokee citizen. Pet. App. 3a.

---

https://health.cherokee.org/health-center-and-hospital-locations/outpatient-care/ (last visited May 6, 2022).

C. This Case

Oklahoma charged Respondent for alleged offenses committed within the boundaries of the Creek Reservation. Pet. App. 3a. Respondent was convicted. Pet. App. 1a. On appeal, Respondent challenged Oklahoma's jurisdiction on the ground that he is an Indian and the alleged offenses occurred in Indian country. Pet. App. 2a. The OCCA remanded for an evidentiary hearing on Respondent's Indian status. Pet. App. 26a.

The district court determined that Respondent is an "Indian" for purposes of federal criminal law. Pet. App. 16a-23a. Oklahoma agreed there was "no doubt that [Respondent] possesses Indian blood" and that the first prong of the *Rogers* test was satisfied. Appellee's Evidentiary Hearing Brief at 3, *Sam v. Oklahoma*, No. CF-2016-3789 (Okla. Dist. Ct., Tulsa Cnty. Apr. 21, 2021). The district court thus focused on the second *Rogers* prong. Because Respondent was not an enrolled Cherokee citizen at the time of the alleged offenses, the district court used the *St. Cloud* factors (as articulated by the Tenth Circuit in *United States v. Drewry*, 365 F.3d 957 (10th Cir. 2005)) to assess whether Respondent was recognized as an Indian. *See* Pet. App. 17a-18a.

The district court "t[ook] [Respondent's] age at the time the [alleged] offenses were committed into consideration." Pet. App. 18a. The court explained that Respondent "was a minor when he [allegedly] committed these offenses and thus reliant on his mother to make application for his membership in the tribe and for access to benefits and services." *Id.* Indeed, "[a]rguably, his participation in social and/or cultural

activities were also dependent on his mother's decisions in that regard." *Id.* The court accordingly "f[ound] this case to be distinguishable from others wherein the offender is an adult and wholly responsible for establishing membership in a tribe, gaining access to benefits or services and making choices to participate in Indian social life or cultural activities." *Id.*

The district court easily concluded that Respondent is an "Indian" for purposes of federal criminal law. It reasoned that "[n]otwithstanding [Respondent's] apparent association with a black street gang, as opposed to an Indian gang, particularly once incarcerated, [Respondent's] evidence showed that from birth until shortly before the offenses were [allegedly] committed, he received assistance reserved only for Indians, was subject to the Indian Child Welfare Act when taken from his mother's custody, enjoyed benefits through tribal affiliation and participated in Indian social life with his extended family." Pet. App. 22a-23a. Thus, the court found that Respondent "was formally and informally recognized as an Indian by a tribe or the federal government" at the time of the alleged offenses. Pet. App. 23a.

The OCCA unanimously affirmed. Given that Oklahoma disputed only the second *Rogers* prong, the OCCA, like the district court, confined its analysis to that issue. *See* Pet. App. 3a-4a. The OCCA noted that it "follow[s] the rule that a person may be Indian for purposes of federal criminal jurisdiction whether or not the person is formally enrolled in the federally recognized tribe of which he claims membership." Pet. App. 4a. So it turned to the *St. Cloud* factors. *Id.* After

reviewing the record, the OCCA "adopt[ed] the trial court's findings of fact and conclusions of law." Pet. App. 6a-7a.

The OCCA thus concluded that Oklahoma lacked jurisdiction to prosecute Respondent. Pet. App. 7a. On December 2, 2021, the OCCA ordered Respondent's case dismissed. Pet. App. 1a, 7a. On December 29, 2021, the district court dismissed the case. Dismissal Order, *Sam v. Oklahoma*, No. CF-2016-3789 (Okla. Dist. Ct., Tulsa Cnty. Dec. 29, 2021).

By then, the federal government had charged Respondent and taken him into custody. Complaint at 1 (N.D. Okla. Dec. 26, 2021), ECF No. 2; Writ of Habeas Corpus Ad Prosequendum for Cause at 1-2 (N.D. Okla. Dec. 29, 2021), ECF No. 5.[2] Trial is set for September 19, 2022. Order (N.D. Okla. Feb. 22, 2022), ECF No. 31.

REASONS FOR DENYING THE PETITION

As explained in the *Wadkins* Brief in Opposition, the question of "who is an Indian" is a factbound, splitless issue that does not merit review in either of these two cases. The Court should deny this petition, however, for an even more basic reason: this case is an extraordinarily poor vehicle for considering Oklahoma's argument that only enrolled members of federally recognized tribes can be "Indians" for purposes of federal criminal law.

That is because Oklahoma concedes that, even under its unprecedented rule, "there may be exceptional cases where enrollment cannot be the only factor, such as …

---

[2] References to filings in Respondent's federal criminal case are to Case No. 4:22-cr-13 (N.D. Okla.).

cases involving young minors." *Wadkins* Pet. 23-24. This is just such a case. It is undisputed that minors cannot enroll themselves in the Cherokee Nation and that Respondent "did not have a choice as to whether [his mother] pursued membership for him as a minor child." Pet. App. 19a. It would be extraordinarily strange to entertain Oklahoma's proposed rule in a case that Oklahoma concedes *is not governed by* that rule.

Indeed, this case would not merit review even if Respondent had been an adult at the time of the alleged offenses. Oklahoma claims courts are divided on how to apply the two prongs of the *Rogers* test. But that is false. *Wadkins* Opp. 12-13. And regardless, Oklahoma's nonexistent splits are not even implicated by this case.

On the first *Rogers* prong, Oklahoma maintains courts have split over whether 1/8 degree of Native American ancestry suffices. But Respondent has nearly *1/3* Cherokee ancestry, and Oklahoma conceded below that the first *Rogers* prong was satisfied—a concession that, for good measure, deprives this Court of jurisdiction over this issue. *Heath v. Alabama*, 474 U.S. 82, 87 (1985). Nor, regardless, has Oklahoma identified a cert-worthy split even on the "1/8" issue. Respondent's conflict boils down to nothing more than a Ninth Circuit decision that recognized a degree of ancestry *far less* than Respondent's can suffice, and a 1982 Wyoming state court decision that has never been followed. *Wadkins* Opp. 11-12.

Oklahoma also says courts divide over the second *Rogers* prong. But every modern decision uses the *St. Cloud* factors to evaluate the second prong. And every court to have considered the question agrees that the

word "Indian" for purposes of federal criminal law is not limited to enrolled tribal members. *Wadkins* Opp. 13.

Undeterred, Oklahoma insists that courts do not agree on whether the *St. Cloud* factors are exclusive and whether they are tied to an order of priority. But to begin, neither supposed split is implicated by this case. The district court and the OCCA held that every *St. Cloud* factor other than enrollment confirmed that Respondent is an Indian. *See* Pet. App. 21a. So if the courts below had *not* given the most weight to the enrollment factor, the conclusion that Respondent is an Indian would have only been stronger. Similarly, the single non-*St. Cloud* factor discussed below was the one *Oklahoma* advocated for: Respondent's membership in a prison gang affiliated with a black street gang. *See* Pet. App. 21a-23a. So again, if the courts below *had* ignored that consideration and treated the *St. Cloud* factors as exclusive, the conclusion that Respondent is an Indian would have been even stronger.

Regardless, Oklahoma's alleged splits do not warrant certiorari even on their own terms. There is no conflict on exclusivity: Every court agrees the *St. Cloud* factors are not exclusive. And Oklahoma likewise fails to identify any two decisions, ever, that have reached conflicting outcomes based on the weight assigned to the factors. *Wadkins* Opp. 13-15, 17.

Oklahoma provides no reason to grant certiorari in the absence of a split. It says the stakes are high in the wake of *McGirt*, but it has filed only two petitions raising this issue—and the rule Oklahoma advocates for would not even matter in this case. *Supra* 8-9. Nor do on-the-ground law-enforcement considerations support review.

Cross-deputization agreements—as well as states' inherent authority to detain individuals until jurisdiction is ascertained—ensure that state officers can arrest regardless of Indian status. The truth is that granting certiorari would undermine, not improve, sound law enforcement: Oklahoma's position, if accepted, would invalidate longstanding *federal* convictions that could go unprosecuted at the state level. *Wadkins* Opp. 18-20.

The decision below is also correct. As explained in the *Wadkins* Brief in Opposition, Oklahoma's position conflicts with statutory text, history, and precedent. And Oklahoma's equal-protection argument is meritless. The *St. Cloud* factors ask a political, not racial, question—namely, whether a person is affiliated with a federally recognized Indian tribe. Adopting Oklahoma's contrary position would potentially throw into chaos numerous federal programs tied to Indian status and jeopardize the United States' solemn commitments toward countless nonenrolled Indians. *Wadkins* Opp. 20-27.

CONCLUSION

The petition should be denied.

Respectfully submitted,

CINDY BROWN DANNER
NICOLLETTE BRANDT
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P.O. Box 926
Norman, OK 73070
(405) 801-2601

LEONARD R. POWELL
Counsel of Record
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
leonardpowell@jenner.com