

**ORIGINAL**

Supreme Court, U.S.  
FILED

**MAR 05 2022**

OFFICE OF THE CLERK

21-7379

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

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

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**PATRICK JOSEPH TERRY – Petitioner**

**-vs-**

**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 WRIT OF CERTIORARI**

**Patrick Joseph Terry  
Petitioner pro se  
1011 S. Muskogee Avenue  
Tahlequah OK 74464**

**March 5, 2022**

## QUESTION(S) PRESENTED

1. “Did the State of Oklahoma’s refusal to provide the relief directed by this Court in *Terry v Oklahoma*, 141 S, Ct. 191 (2020), rise to the level of a Constitutional violation requiring immediate and direct action by this Court?”
2. “Does Oklahoma’s application of the newly conceived ‘procedural bar’ espoused in *State ex. rel. Wallace v Matloff*, 2021 OK CR 21, \_\_\_ P.3d \_\_\_, implicate the Constitutional prohibition against *ex post facto* laws?”
3. “Does Oklahoma’s application of the newly conceived ‘procedural bar’ espoused in *State ex. rel. Wallace v Matloff*, 2021 OK CR 21, \_\_\_ P.3d \_\_\_, have the collateral consequence in creating a specific, separate, “suspect” class of citizens who are entirely comprised of Native American people?”

*In the  
Supreme Court of the United States*

PETITION FOR WRIT OF CERTIORARI

PARTIES TO THIS ACTION

All parties to this action are listed on the cover page of the Petition..

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

**XX** This is a case arising from post-conviction proceedings in state courts:

The Order of the state district court, The 13<sup>th</sup> Judicial District Court in Ottawa County Oklahoma Case No. CF-2012-242, was entered on September 17, 2018. The opinion of the state district court asked to review the merits is unpublished

The Order of the highest state court addressing criminal matters, the Oklahoma Court of Criminal Appeals, was entered on October 6, 2021. The opinion of this highest state court to review the merits appears at **Appendix G** to the petition and is unpublished..

JURISDICTION

**XX** This is a case arising from post-conviction proceedings in the following state court(s):

The date on which the state district court decided my case was on September 17, 2018 (unpublished). Timely appealed.

The date on which the highest state court decided my case was on October 6, 2021. **Appendix G** to the petition (unpublished).

The jurisdiction of this Honorable Court is invoked under **28 U.S.C. § 1257(a)**,

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. **Article VI** to the United States Constitution provides, in part:

. [t]his 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, anything in the Constitution or laws of any State to the contrary." U.S. Const. Art. VI (1791).

2. U.S. Const. Art. 1, § 9, cl. 3 (1791) provides:

"-No bill of attainder or ex post facto Law shall be passed -"

3. The Fifth Amendment to the United States Constitution provides, in part:

"[n]o person . . . shall be deprived of life, liberty or property without due process of law. . . ". U.S. Const. Amend. V (1791).

4. The Sixth Amendment to the United States Constitution provides, in part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ". U.S. Const. Amend. VI (1791)

5. The Fourteenth Amendment to the United States Constitution provides, in part:

"Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV (1868).

6. 22 O.S. 1971, § 1080 (b) provides:

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

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

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.

7. 22 O.S. Chap. 18, App., *The Rules of the Court of Criminal Appeals for the State of Oklahoma*, § X, Rule 10.1 provides that:

“A. This Court may entertain certain extraordinary writs which arise out of criminal matters. Such extraordinary writs include writs of mandamus, prohibition, and habeas corpus. “

8. 22 O.S. 1971, § 1087 provides, in part

:

“A final judgment entered under this act may be appealed to the Court of Criminal Appeals on petition in error filed either by the applicant or the state within thirty (30) days from the entry of the judgment. . . .”

9. U.S. Const. Art. III, § 1 provides, in part:

“The judicial power of the United States shall be vested in one Supreme Court . . .”

U.S. Const. Art. III, § 2 provides, in part:

“The judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made . . . in all cases . . . and those in which a state shall be a party, the Supreme Court shall have original jurisdiction.”

### **Anatomy of State Court Proceedings**

After a non-Jury trial in a state district court, Petitioner was convicted of the following offenses in Ottawa County Oklahoma Case No. CF-2012-242: Count 1: Manufacturing a controlled dangerous substance within 2000 feet of a public school,

in violation of **63 O.S. § 2-401(G)**; Count 2: Possession of a controlled dangerous substance in violation of **63 O.S. § 2-402 (A)**; and, Count 3: Unlawful possession of Drug Paraphernalia in violation of **63 O.S. § 2-405**.

Testimony at trial revealed that the evidence was obtained during a nonconsensual, warrantless search of Petitioner's home by agents of the state, county Sherriff's office. An ongoing Motion to Suppress was asserted by Petitioner throughout the state district court proceedings and was ultimately denied by the state trial court judge. Upon the finding of guilt, Petitioner was sentenced to: Count 1: Thirty (30) years in the care and custody of the Oklahoma Department of Corrections and a \$10,000.00 Fine; Count 2: Six (6) years in the care and custody of the Oklahoma Department of Corrections and a \$1,000.00 Fine; and, Count 3: One (1) year in the County Jail and a \$200.00 Fine, all sentences to run concurrently each with the other, with no credit for time served.

A direct appeal was taken before the highest state appellate court. Trial Court's verdict was "affirmed" by published opinion in **2014 OK CR 14 (9/18/2014)**. Certiorari was sought before this Honorable Court in the matter styled *Patrick Joseph Terry v. State of Oklahoma*, in SCOUS Case No. **14-1064**, filed February 14, 2015. Certiorari was denied by this Court on May 4, 2015. See: **135 S. Ct. 2053**

Petitioner then sought relief from the state district court through a properly filed state court post-conviction application on February 25, 2016, which trial Court denied on May 2, 2016. Review of the state district Court decision was timely

sought before the highest state appellate court in OCCA Case No. PC-2016-412. The highest state appellate court affirmed trial court's order denying relief by unpublished opinion on July 21, 2016.

A petition for a writ of habeas corpus was timely filed by Petitioner in the United States District Court for the Northern District of Oklahoma on September 19, 2016 in Case No. IG-CV-604. The petition was denied by the District Court and an appeal was timely sought before the United States Court of Appeals for the Tenth Circuit in Case No. 19-5098, styled *Patrick Joseph Terry v Carl Bear, Warden*. The petition has been stayed and held in abeyance since January 7, 2021, pending resolution of the matter currently before this Court.

On April 23, 2018, Petitioner filed a second state court post-conviction petition before the state district trial court in Ottawa County Oklahoma Case No. CF-2012-242. The state trial Court judge denied the petition on September 18, 2018. Appeal of the state trial court order was timely sought before the highest state appellate court on October 22, 2018, in OCCA Case No. PC-2018-1076. The state appellate court affirmed the trial court's order by unpublished opinion on February 25, 2019.

Petitioner timely sought certiorari before this Honorable Court. See: SCOUS No. 18-8801. The *petition for a writ of certiorari and application to proceed in forma pauperis* was granted on July 9, 2020. See: *Terry v Oklahoma*, 141 S. Ct. 191 (2020). The matter was remanded to the Court below, with instructions.

On October 14, 2020, the OCCA published an *Order Remanding for Evidentiary Hearing* and directed that this cause be remanded to the District Court of Ottawa County Oklahoma for evidentiary hearing within “60 days of the date of this order” (See: Appendix C) (Order at 2) or by December 13, 2020];

By agreement of all parties, Mike Hunter, Attorney General for the State of Oklahoma, by his agents and servants, moved the OCCA for additional time in which to conduct the Evidentiary Hearing contemplated in the October 14, 2020, Order by that Court; and, on December 18, 2020, the OCCA entered an *Order Granting Motion for Extension of Time to Conduct Evidentiary Hearing*, extending the deadline for sixty (60) days.

On January 19, 2021, Evidentiary Hearing was had before the Honorable Barry Denny, Judge, 13th Judicial District Court, State of Oklahoma (See: Appendix D, Transcript). During the Hearing, Oklahoma stipulated as a fact that Petitioner was a Native American affiliated with a federally recognized tribe (Cherokee Nation) (See: Appendix E). Oklahoma further stipulated as fact that the search incident to arrest occurred at a location now seen to be within the historical reservation boundary of the Ottawa Indian Tribe (See: Appendix F) as established by the Congress in the *Treaty of February 23, 1867, 15 Stat. 513 (February 23, 1867)*.

On October 6, 2021, the OCCA entered an *Order Affirming Denial of Post-Conviction Relief* (See: Appendix G, Order). On October 13, 2021, the Clerk of



Court for Ottawa County Oklahoma filed a *Return of the Court Clerk* (See: Appendix H).

On January 4, 2022, the Honorable Mr. Neil M. Gorsuch, Associate Justice, granted Petitioner's *Application for Enlargement of Time*, No. 21A290 and extended the deadline for this action up to, and including, March 5, 2022 (See: Appendix J).

In every action had before both the state district and appellate courts, Petitioner sought Evidentiary Hearing by filing separate, specific motions dedicated to that single request. In all proceedings had before both state district and appellate courts, Petitioner's multiple requests for Evidentiary Hearing were, in each instance, summarily denied.

**Summary of the Argument**  
**Reasons why the Writ should be Granted**

**Question #1:**

“Did the State of Oklahoma’s refusal to provide the relief directed by this Court in *Terry v Oklahoma*, 141 S, Ct. 191 (2020), rise to the level of a Constitutional violation requiring immediate and direct action by this Court?”

The *Order* (Appendix A) and *Mandate* (Appendix B) of July 9, 2020, addressing Petitioner’s claims in SCOUS Case No. 18-8801 written from the Bench of the Honorable Mr. Chief Justice John G. Roberts, Jr., was executed under the absolute Authority of the United States Constitution. U.S. Const. Art. III, § 1 provides (in part):

“The judicial power of the United States shall be vested in one Supreme Court . . .”

U.S. Const. Art. III, § 2 provides in part:

“The judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made . . .in all cases . . . and those in which a state shall be a party, the Supreme Court shall have original jurisdiction.”

Petitioner points to such Constitutional authority when asserting his argument that Oklahoma erred in applying a procedural bar, created after-the-fact, promulgated thru *ex rel. Wallace v Matloff*, 2021 OK CR 21, \_\_\_ P.3d. \_\_\_, to legally justify refusal to comply with the remedy proscribed by this Court. The *Mandate* was clear and correct in directing that “this cause is remanded to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and Laws of the United States.” Roberts, Chief Justice.

Oklahoma did not have discretion to elect to refuse this Court’s directives by, instead, imposing a procedural bar, created after the fact, as legal justification to bar the relief ordered by this Court. A review of U.S. Const. Art. VI, cl. 2, may prove instructive:

“The 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, anything in the Constitution or laws of any State to the contrary notwithstanding.”

The judges in every State shall be bound thereby, the Constitution provides. Clear and direct, leaving no option but to comply. However, Oklahoma did not do so,

and such refusal by Oklahoma rises to the level of a Constitutional error which must be corrected.

**Question #2:**

“Does Oklahoma’s application of the newly conceived ‘procedural bar’ espoused in *State ex. rel. Wallace v Matloff*, 2021 OK CR 21, \_\_\_ P.3d \_\_\_, implicate the Constitutional prohibition against *ex post facto* laws?”

It is a well settled rule of Constitutional law that U.S. Const. Art. 1, § 9, cl. 3 (1791), the *ex post facto clause*, at its heart, bars application of a law that changes the punishment, and inflicts greater punishment, than the law annexed to the offense when committed. *see: Calder v Bull*, 3 U.S. 286, 390, 1 L.Ed. 648 (1798) Oklahoma's Const Art. 2 § 15 like U.S. Const. Art. 1, § 9, cl. 3 (1798) directs that “. . . [n]o . . . ex post facto law . . shall ever be passed . . .” As such, any law or judicial directive that changes punishment, and inflicts a greater punishment, than the law annexed to the crime when committed constitutes an impermissible implication of the *ex post facto clause*, *Calder*, 3 U.S. at 386, and must be corrected.

The Clause presents, then, as the Constitutionally guaranteed protection which is aimed at laws, or decisions, that retroactively alters the definition of crimes or increase the punishment for criminal acts. *Collins v Youngblood*, 457 U.S. 37, 41, 110 S. Ct. 27 (19\_\_); and, *see: Calder*, 3 U.S. (Dall.) 386, 391-92 (opinion of Chase, J.) Here, Oklahoma's reliance on 22 O.S. Chap. 18, App., *The Rules of the Court of Criminal Appeals for the State of Oklahoma*, § X to

provide the vehicle which drove *Wallace's* adulteration of the use of such statute, and implicates the provisions of the *clause*.

In *Bouie v. Columbia*, 378 U.S. 347, 353-54 (1964), this Court held that the retroactive application of judicial decisions that significantly change prior law may violate due process: [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law . . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

Significantly, the *Calder* Court did not specify that retroactive changes in "criminal procedure" as opposed to "evidence" were covered by the Clause. See *Duncan v. Missouri*, 152 U.S. 377, 382-83 (1894) (depriving an accused of "substantial protections with which the existing law surround the person accused of crime are not considered within the constitutional inhibition"). This Court, however, held in later cases that certain changes in criminal procedure violated the Clause—procedural changes that deprive the defendant of a substantial right. See *Beazell v. Ohio*, 269 U.S. 167, 171 (1925) (A procedural change may constitute an *ex post facto* violation if it "affected matters of substance"). The "matter of substance" affected here is Petitioner's, (and all Indians who have been convicted by the State of Oklahoma), Constitutional right to seek collateral review and relief from what is clearly an unlawful sentence.

Notwithstanding the fact that the procedural 'bar' espoused under *Wallace* was, literally, created out of thin air, it is evident that application of the new bar implicates the *ex post facto clause's* prohibition against ". . . [a] law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." *Black's Law Dictionary* 4th Ed. c. 1968, at 662." *Starkey v Oklahoma D.O.C.*, 2013 OK CR 43, 305 P.3d 1004, 1018 (Okl. 2013) (citing *Beazell v Ohio*, 269 U.S. 167,170, 46 S. Ct. 68 (1925)).

In *Beazell*, this Court defined the scope of the constitutional ex post facto restrictions:

"It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*."

Judges, like other government officials, cannot always be trusted to safeguard the rights of the people. *Crawford v Washington*, 541 U.S. 36, 68 (2004) (Scalia, Associate Justice) Application of *Wallace* by the Oklahoma Court's to bar relief solely on Petitioner's *race* constitutes a fundamental miscarriage of justice and is repugnant to the principles of due process and equal protection.

**c. Question #3**

"Does Oklahoma's application of the newly conceived 'procedural bar' espoused in *State ex. rel. Wallace v Matloff*, 2021 OK CR 21,

\_\_\_ P.3d \_\_\_, have the collateral consequence in creating a specific, separate, “suspect” class of citizens who are entirely comprised of Native American people?

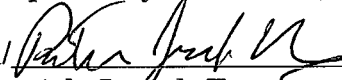
Application of *Wallace* as a bar to relief from what is clearly seen as an unjust and unlawful conviction is the Genesis of a new, and distinct, ‘suspect’ class of citizens who present with four (4) unique characteristics: (1) that the person is a Native American affiliated with a federally recognized Indian tribe; (2) that such person has been prosecuted and convicted by the State of Oklahoma for a felony offense; (3) that such conviction occurred before July 9, 2020; and, (4) that since the conviction, a Judicial determination has published reaffirming that the geographic location where the incident occurred is now, and was at the time of the incident, 'Indian country'.

As such, the collateral effect of application of *Wallace* as a bar has, as a dire consequence, created a new, separate and distinct “suspect” class of people, entirely comprised of Native American tribal members. Such classification of citizens’ based on race is repugnant to the Constitution; to continue to do so would be a fundamental miscarriage of justice.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/   
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