

SUBMISSION FOR THE JOSEPH A. CHUBB COMPETITION PRIZE

Victoria Suarez-Palomo
100 Temple St., Apt 204
New Haven, CT 06510

This writing sample is an assignment I submitted to Yale's Supreme Court Advocacy Clinic. I was asked to review the certiorari petition and corresponding files in *State of Oklahoma v. Robert Eric Wadkins*, and then to draft a mock "cert pool memo." The case addressed what requirements a criminal defendant must satisfy to qualify as an "Indian" for purposes of federal criminal law. I recommended the "Court" deny the petition. The assignment did not require formal Bluebook citations, but I have added them for purposes of this submission.

PRELIMINARY MEMORANDUM

August 30, 2022 Conference
List 1, Sheet 1 (Page 3)

No. 21-1193

STATE OF OKLAHOMA

Cert to Okla. Ct. of Crim. App. (Rowland,
Hudson, Lumpkin, Lewis)

v.

ROBERT ERIC WADKINS

State/Criminal

Timely

1. SUMMARY: This case concerns the criteria for determining “Indian” status under the Major Crimes Act (“MCA”), 18 U.S.C. § 1153, and General Crimes Act (“GCA”), 18 U.S.C. § 1152. The government’s authority to prosecute crimes in Indian country depends on whether the defendant, or the victim, is an Indian. But these statutes do not define who qualifies as an Indian. Nor have this Court’s cases, which at most excluded or included discrete categories of persons from the term. Petitioner suggests this lack of a bright-line definition has divided the lower courts. Respondent disagrees, and argues that even if there is division, it is not implicated by these facts. Respondents are correct: This case does not warrant review. DENY

2. FACTS AND DECISION BELOW: Oklahoma charged Respondent with two state offenses: first-degree rape and kidnapping. He was convicted of both. He then appealed to the Oklahoma Court of Criminal Appeals (“OCCA”), challenging the state’s jurisdiction on the grounds that (1) he is an Indian, and (2) the offenses occurred in Indian country. App. 2a. If Respondent were “Indian,” the state would not have jurisdiction. Following this Court’s decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), which clarified the scope of “Indian country,” OCCA remanded the case to the District Court of Choctaw County for an evidentiary hearing on Respondent’s claims. App. 28a. Notably, though, the parties stipulated Petitioner’s offenses occurred in Indian country, meaning remand focused solely on Respondent’s Indian status. *Id.* at 3a, 24a.

On remand, the district court found Respondent “was not Indian.” *Id.* at 25a. It did so by applying the *Rogers* test, 45 U.S. 567 (1846), and the *St. Cloud* factors widely used in explicating it, 702 F.Supp. 1456 (D.S.D. 1988). The *Rogers* test has two prongs: (1) Does the individual have some Indian ancestry? (an issue uncontested here); and (2) if so, have they been “recognized” as Indian by a tribe or the federal government? And to see if there’s been “recognition” per this latter prong, courts look to the *St. Cloud* factors. These consider a person’s: (1) tribal enrollment; (2) receipt of assistance reserved only to Indians; (3) enjoyment of benefits of tribal affiliation; and (4) participation in Indian social life. Based on the new evidentiary hearing, the OCCA found all four factors favored Indian status, and so vacated the convictions. App. 8a. Specifically, it found:

Tribal Enrollment. OCCA credited Respondent’s testimony that he possessed a Certificate of Degree of Indian Blood Card (“CDIB”). App. 9a. It also accepted he had applied for tribal membership, but was a minor at the time, and so failed to obtain it. *Ibid.* And it found Respondent was now an enrolled tribal member, even though he was not one at the time of the crime. *Ibid.*

Receipt of Government Assistance Reserved for Indians. OCCA also found that Respondent had used his CDIB card to access Choctaw medical facilities for more than twenty years. App. 10a. According to the Choctaw Nation’s “Eligibility for Services” policy, with exceptions not applicable here, such medical care is available exclusively to Indians. *Id.* at 10-11a. Respondent’s medical records also stated his Choctaw Nation affiliation. *Id.* at 10a.

Benefits of Tribal Affiliation. OCCA likewise credited Respondent’s receipt of tribal benefits throughout his childhood in the form of food, clothes, and school books. App. 12a. OCCA also credited assistance Respondent received from a tribal case manager in applying for tribal membership. *Ibid.* To the extent that Respondent did not enjoy other tribal benefits (employment, hunting and fishing rights, or the right to vote in tribal elections), OCCA explained that he was unable to do so because of his prior (and unrelated) lengthy periods of incarceration. *Ibid.*

Social Recognition. Finally, OCCA found Respondent knew some Choctaw language, had created Native American art, and that his family members were enrolled tribal members. App. 12a. OCCA also recognized Respondent had attended Indian spiritual ceremonies and was identified by the Department of Corrections as Native American. *Id.* at 12-13a. OCCA noted Respondent joined a white supremacist gang while incarcerated, but credited his testimony that he would have joined the Indian gang had he met that gang’s internal length of incarceration requirement. *Id.* at 13a.

OCCA is the highest court in Oklahoma with appellate jurisdiction in criminal cases. Petitioner then appealed OCCA’s determination of Indian status to this Court.

3. **CONTENTIONS:** In challenging the OCCA’s determination, Petitioner *first* notes this Court has never established a test to determine Indian status under federal criminal law. In *United States v. Antelope*, for instance, this Court held defendants who were enrolled tribal members were subject to federal criminal jurisdiction, but left open “whether a person not enrolled with a tribe qualifies as an ‘Indian.’” Pet’r Br. 3 (citing 430 U.S. 641, 646 n.7 (1977)). Nor, says Petitioner, does the earlier Rogers test adequately fill the gap left by *Antelope*. *Rogers* “at most” says that those who are not “racially Indian do not qualify.” *Id.* at 11. This ambiguity, Petitioner argues, caused a circuit split.

(A) Petitioner argues courts have diverged on the degree of Indian blood required to satisfy the first, Indian ancestry, prong of the *Rogers* test (uncontested here). Pet’r Br. 13. The Third Circuit has held that only “some” Indian blood is necessary, *see United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012), whereas the Tenth Circuit has required a “substantial” amount, *see Valpardo v. State*, 640 P.2d 77, 80 (Wyo. 1982). Petitioner also notes appellate courts have established varying blood quantum thresholds, from 1/8, *see United States v. Bruce*, 394 F. 3d 1215, 1227 (9th Cir. 2005), to 1/128, *see Perry v. State*, No. F-2020-46 (Okla. Crim. App. Apr. 1 2021).

(B) Petitioner also argues courts have diverged on the second, “recognition,” prong of the *Rogers* test. Petitioner suggests, for instance, that “[n]umerous courts” have concluded tribal enrollment is dispositive. Pet’r Br. 14 (citing only *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979)). Other circuits, however, note “that *lack* of enrollment is *not* dispositive,” and instead apply multifactor tests, like *St. Cloud*, disparately. Pet’r Br. 15 (emphasis in original). The Ninth Circuit, for instance, treats the *St. Cloud* factors as exclusive, at least in those cases where there is not tribal enrollment, *see Bruce*, 394 F.3d at 1224. But the Eighth Circuit and Tenth Circuit treats them as non-exclusive considerations, *see United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009); *Diaz*, 679 F.3d at 1187; *United States v. Nowlin*, 555 F. App’x 820, 823 (10th Cir. 2014).

Petitioner further suggests courts have diverged on the weight and priority attributable to the *St. Cloud* factors. Pet'r Br. 16. Petitioner notes that the District of South Dakota in *St. Cloud* and Ninth Circuit in *Bruce* considered the "factors in declining order of importance." *Ibid.* But by contrast, the Eight Circuit in *Stymiest* declined to assign any priority order to such factors (beyond tribal enrollment). *Ibid.* Petitioner notes the Ninth Circuit has twice found that a person who uses health services for Indians and has tribal court convictions has Indian status despite lack of enrollment, but that the Eight Circuit has questioned the sufficiency of those factors. *Ibid.* (comparing *United States v. LaBuff*, 658 F.3d 873, 879 (9th Cir. 2011) and *Bruce*, 394 F.3d at 1226, with *Stymiest*, 581 F.3d at 764-65).

Second, Petitioner argues the decision below substantively violates guarantees of equal protection. Petitioner explains this Court has relied on tribal enrollment—a *political* as opposed to *racial* classification—to justify treating Indian's differently under the law. Pet'r Br. 18-21 (citing *Morton v. Mancari*, 417 U.S. 535, 544 (1974) (upholding Indian-preference law because it addressed Indians not as "racial group" but "as members of quasi-sovereign tribal entities.")). But by applying *St. Cloud* to permit a non-enrolled individual to be considered "Indian," Petitioner contends, OCCA has "impermissibly centered the Indian-status test on racial considerations." *Id.* at 19. And, Petitioner asserts, this tension is an inherent pathology of *St. Cloud*'s multifactor approach. *Id.* at 20.

Third, Petitioner urges this Court to adopt a bright-line test for "Indian" status based on tribal enrollment. Petitioner argues this test avoids the equal protection concerns raised by *St. Cloud* while reducing court challenges, confusion, and delays related to Indian-status determinations. *Id.* at 23. Petitioner concedes that exceptional cases may still fall outside the proposed bright-line test (for example, where young minors are involved, or if a particular tribe is not yet federally recognized). *Id.* at 23-34. But it suggests this case is the proper vehicle to (a) correct the lower courts' departure from *Mancari*'s equal-protection holding and (b) resolve what *Antelope* left open: how to treat defendants *not* enrolled with tribes at the time of their offenses. *Id.* at 24.

Finally, Petitioner argues this case presents an important federal question in light of *McGirt*. Pet'r Br. 26. Because *McGirt* vastly expanded Indian country, potentially subjecting many more cases to federal criminal jurisdiction, multifactor tests that rely on "unbound factors" are now "unworkable," and a new bright-line standard is needed. *Id.* at 26-27. Petitioner also argues multifactor tests, like *St. Cloud*, leave law enforcement and courts unsure as to whether any offender is "Indian enough," risking reversals of convictions. *Id.* at 27. Finally, Petitioner contends that "competing standards of evidence between state and federal prosecutors" as well as "differing applications of Indian status tests" may encourage jurisdictional gamesmanship. *Ibid.*

Respondent counters by *first* suggesting this case implicates no actual split of authority.

(A) Respondent explains there is no split on *Rogers*' ancestry requirement. *First*, because the parties did not contest Respondent's ancestry was Indian, and OCCA therefore did not conduct any analysis of the issue, this Court lacks jurisdiction to address this initial *Rogers* prong. Resp't Br. 11. *Second*, Respondent argues that in any event, the cases Petitioner cites on "whether 1/8 or less degree of ancestry suffices" are not relevant, as here Respondent has 3/16 degree of Indian ancestry. *Id.* at 12. *Finally*, Respondent rejects Petitioner's argument regarding court's varying blood quantum thresholds, noting Petitioner's authorities include only unpublished opinions, references in dicta, or holdings that have been cited only twice and have, Respondent asserts, "never been followed." *Ibid.*

(B) Respondent next argues that “every modern decision” uses the *St. Cloud* factors. Resp’t Br. 12. And on Respondent’s reading, all such courts agree that *St. Cloud* is satisfied by tribal enrollment, but that enrollment is not a *necessary* condition for Indian status. *Id.* at 13.

Respondent also rejects Petitioner’s characterization of division on whether *St. Cloud*’s factors are exclusive, or on whether they have any special weight or priority. Resp’t Br. 13. (i) Regarding exclusivity, Respondent notes *St. Cloud* treated the factors as a guide. *Ibid.* (citing 702 F. Supp. at 1461). Contrary to Petitioner’s position, the Ninth Circuit “affirmed” the *St. Cloud* factors non-exclusivity at least three times, *see United States v. Maggi*, 598 F.3d 1073, 1081 (9th Cir. 2010), *overruled in part on other grounds by United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (en banc); *LaBuff*, 658 F.3d at 877; and *United States v. Juvenile Male*, 666 F.3d 1212, 1215 (9th Cir. 2012). And even the main case Petitioner cited, *Bruce* (Pet’r 15), considered non-*St. Cloud* factors. *Id.* at 15.

(ii) Respondent also rejects Petitioner’s argument that any conflict exists over the weight and priority assigned among *St. Cloud* factors. Resp’t Br. 17. Respondent suggests there are no instances of any cases where disagreement over priority-ordering led to disparate outcomes. *Ibid.* Respondent notes that Petitioner, at most, has shown the Eighth Circuit “questioned” the Ninth Circuit’s reliance on factors like tribal court convictions and health services to establish Indian status (Pet’r 16). But as Respondent explains, the Eighth Circuit has *itself* found Indian status whenever those factors have been present. *Ibid.* (citing *Stymiest*, 581 F.3d at 766) (finding defendant’s prosecutions in tribal court and treatment at an Indian health clinic satisfied *St. Cloud* factors)).

Respondent explains *this case* implicates neither Petitioner’s exclusivity nor prioritization arguments. *First*, OCCA concluded the *St. Cloud* factors alone were sufficient to determine Respondent’s Indian Status. *Second*, OCCA held that every *St. Cloud* factor favored Indian status. As such, Petitioner does not show—and can’t show—how the outcome would have differed had the OCCA limited its consideration to the *St. Cloud* factors or prioritized them differently. *Id.* at 15, 17.

Second, Respondent argues this case does not warrant review in the absence of a circuit split. Resp’t Br. 18. Since *McGirt*, only two petitions for certiorari have raised issues of Indian status, and neither turned on the question posed here. *Ibid.*; *see also Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486 (2022) (concerning state jurisdiction to prosecute crimes by non-Indians against Indians); *Oklahoma v. Sam*, 143 S.Ct. 344 (2022) (mem.) (concerning jurisdiction over juvenile offenders). Respondent rejects claims that defendants can now engage in jurisdictional gamesmanship. *Id.* at 18-19. And he argues that other state powers sufficiently prevent the law-enforcement fears Petitioner raises. *Id.* at 19. Respondent concludes that Petitioner’s position harms law enforcement, as it would alter the class of persons punishable by law and have a retroactive effect on past convictions. *Id.* at 20.

Third, Respondent argues the decision below is substantively correct and rejects Petitioner’s equal protection claim, arguing that both the second *Rogers* prong and the *St. Cloud* factors ask a political, not racial, question. Resp’t Br. 20, 23. And here Respondent relies on *Mancari*’s suggestion that classifications based on tribal status are not racial but “political—because tribes are political entities with a political relationship with the United States.” *Ibid.* (citing 417 U.S. at 551-55). Respondent explains that this “political” inquiry looks not to “racial” Indian identity but to whether a person (a) lacks tribal ties or (b) if their tribe lacks a government-to-government relationship with the United States. *Id.* at 24. Respondent cautioned that any interpretation conflating Indian status with race would “unleash chaos” on the U.S. Code and tribal relations. *Id.* at 25.

Finally, Respondent *concludes* that Petitioner’s arguments on better administrability are not sufficient reason to rewrite the MCA and GCA. Resp’t Br. 27. Even under the Petitioner’s bright-line test, problems would persist as certain exceptions will be necessary (including, as Petitioners concede for minors). *Ibid.* And more importantly, tribes have numerous classes of citizenship unrelated to tribal affiliation, making any proposed bright line ineffective. *Ibid.*

4. DISCUSSION: This case does not appear to implicate an actual split of authority. To the extent there is variation in the application of *St. Cloud*’s factors, this fact-bound dispute offers a poor vehicle for exploring it. The decision below was correct and consistent with established equal protection precedent. Finally, even though *McGirt* vastly expanded Indian country, raising the significance of Indian-status, the issue in this case is an exception. Absent a split of authority, conflict with precedent, or recurrence of the issue presented, this Court should decline to intervene.

Circuit split. Petitioner’s characterization of a circuit split is overstated. Petitioner suggests courts apply disparate blood quantum thresholds to determine Indian ancestry, but the authorities Petitioner relies on are not determinative. *See supra* Part 3. Petitioner further argues courts diverge on whether the *St. Cloud* factors are exclusive or have an order of priority. Regarding exclusivity, as Respondent notes, even the Ninth Circuit has used the *St. Cloud* factors non-exclusively numerous times, and even apparently did so in the *Bruce* case Respondent relies on. And regarding priority of the factors, Petitioner cites no cases where disagreement over priority led to disparate outcomes.

Vehicle. This record is a poor vehicle for exploring inconsistencies in the application of *Rogers* or *St. Cloud*. *First*, the parties agreed that Respondent met *Rogers*’s Indian ancestry requirement. As such, Petitioner’s discussion of blood quantum is not at issue. Even if it were, here Respondent concededly has 3/16 Indian ancestry, while Petitioner asks only if 1/8 or less suffices. *Second*, OCCA ruled all *St. Cloud* factors favored Respondent’s Indian status, and it did not consider any other, non-*St. Cloud* factors. As such, Petitioner’s discussion of exclusivity and priority is simply not implicated.

Precedent. Petitioner argues the second prong of *Rogers*, and the *St. Cloud* factors explicating it, raise equal protection concerns. But as Respondent observes, these tests ask political, not racial, questions. Their inquiries are consistent with what even Petitioner recognizes is required under *Mancari*, as they each underscore “an affirmative bilateral choice between sovereign and subject” and each test “is reasonably designed to further the cause of Indian self-government’ rather than [functioning as] a racial law.” Pet’r Br. 23, 5. This Court already rejected a similar equal protection challenge to the MCA in *Antelope*. Resp’t Br. 24 (citing 430 U.S. at 645). And it should again do so here. Adopting Petitioner’s position—that any laws addressed to Indians might be invidious racial discrimination—could have dire consequences. *Id.* at 24.

Importance, Recurrence. The question of Indian-status determinations is undoubtedly important. But *St. Cloud* factors have been influential for more than 30 years without appearing to raise the law enforcement concerns Petitioner invokes. Moreover, while *McGirt* raised the stakes for Indian-status and potentially subjects numerous new criminal cases to federal jurisdiction, the legal issue here appears isolated to this case. Indeed, since *McGirt*, only *two* petitions for certiorari have raised issues of Indian status and neither turned on this question. *See supra* Part 3.

5. RECOMMENDATION: Deny.