No. _____
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OKLAHOMA, *Applicant*,

-vs-

SHAUN MICHAEL BOSSE, *Respondent*.

To the Honorable Neil M. Gorsuch,
Associate Justice of the United States Supreme Court and
Circuit Justice for the Tenth Circuit

APPLICATION TO STAY MANDATE OF THE OKLAHOMA COURT OF CRIMINAL APPEALS PENDING REVIEW ON CERTIORARI

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PARTIES TO THE PROCEEDING

Applicant (Respondent below) is the State of Oklahoma.

Respondent (Petitioner below) is Shaun Michael Bosse.

RELATED PROCEEDINGS

Oklahoma Court of Criminal Appeals:

Bosse v. State, 360 P.3d 1203 (Okla. Crim. App. 2015), *cert. granted, judgment vacated,* 137 S. Ct. 1 (2016), *aff'd upon remand Bosse v. State*, 400 P.3d 834 (Okla. Crim. App. 2017), *aff'd on reh'g Bosse v. State*, 406 P.3d 26 (Okla. Crim. App. 2017)

Bosse v. State, No. PCD-2013-360 (Dec. 16, 2015)

Bosse v. State, No. PCD-2019-124, ___ P.3d ___, 2021 WL 958372 (Okla. Crim. App. Mar. 11, 2021), *as corrected* March 19, 2021

United States District Court (W.D. Okla.):

Bosse v. Sharp, No. CIV-18-204-JD, Stayed by orders entered Apr. 2, 2019 and Aug. 12, 2020

Supreme Court of the United States:

Bosse v. Oklahoma, ___ U.S. ___, 137 S. Ct. 1 (2016) (*per curiam*)

Bosse v. Oklahoma, 138 S. Ct. 1264 (Mar. 5, 2018) (Mem.)

INTRODUCTION

Pursuant to Rule 23 of this Court and 28 U.S.C. § 2101(f), the Attorney General of Oklahoma, on behalf of the State of Oklahoma, respectfully applies for an order granting or extending a stay of the mandate of the Oklahoma Court of Criminal Appeals ("OCCA") until this Court has an opportunity to rule on Applicant's forthcoming petition for certiorari and, if certiorari is granted, the merits of this case.

Since this Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) regarding the Muscogee (Creek) reservation, hundreds (if not thousands) of prisoners have begun to seek release claiming that they or their victims are Indian, and that they committed their crimes on an Indian reservation. Last month, the OCCA issued a series of decisions holding that, under *McGirt*, Congress had created and never disestablished the reservations of the other four of the "Five Tribes"—the Cherokee, Chickasaw, Choctaw, and Seminole. This result, not unexpected, means that over 1.8 million citizens in Oklahoma now reside on recognized Indian reservations. *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting). This triples the total population that lives on Indian country in the United States, raising significantly both the importance of many open questions in Indian law and the frequency with which they will arise. Answering those questions has also become vital to public safety in Oklahoma.

This case raises two such questions of federal law that have a reasonable probability of certiorari, a significant possibility of reversal, and—given the critical law enforcement interests at stake—a strong likelihood of inflicting irreparable harm on the State and its citizens if the judgment below is not stayed pending certiorari.

First, despite this Court's assurances that many state convictions will not be invalidated because of "significant procedural obstacles" and "well-known state and federal limitations on postconviction review in criminal proceedings," *McGirt*, 140 S. Ct. at 2479 & n.15; *see also id.* at 2481, the court below held that federal law prohibited the State from imposing such post-conviction procedural bars.

Second, while *McGirt* held the State lacked jurisdiction over crimes committed by Indians on Indian country under the Major Crimes Act, 18 U.S.C. § 1153, this case concerns whether states have jurisdiction over crimes committed by *non-Indians* against Indians in Indian country, concurrent with the federal government's jurisdiction under the General Crimes Act, 18 U.S.C. § 1152. This Court has in dicta intimated that states lack such jurisdiction but has never squarely confronted a case on this issue. Given the recent recognition of the country's most populous reservations, which are overwhelmingly non-Indian, the time has come to grant certiorari to answer that question. And given that *McGirt* emphasized the text of statutes controls, including in Indian law, the chance of reversal is significant because nothing in the text of the General Crimes Act overcomes the strong presumption against preemption—a presumption that remains true even when the federal government also has jurisdiction and even when states are enforcing laws against non-Indians on Indian country.

Absent a stay, the state faces irreparable harm of potentially being unable to return Respondent to death row after the federal government takes custody of him, even if this Court ultimately rules that the State can impose procedural bars to his

post-conviction claims and/or has jurisdiction over his crimes concurrent with the federal government. And while Respondent will be transferred to federal custody if released by the State, hundreds of other state inmates will also likely be released absent a stay before this Court has the opportunity to review this case, many of whom may not be able to be retried by the federal government because of statutes of limitations, resource limitations, or other issues that frequently arise with prosecuting crimes committed long ago. *See McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting). Meanwhile, Respondent would suffer no harm from a stay of the mandate, since he would simply remain in state custody instead of being transferred to federal custody.

Likely recognizing these realities, the court below found good cause to stay its own mandate for 45 days, which allows Applicant to now seek a further stay pending certiorari from this Court. For the reasons more fully stated below, this Court should further stay the mandate of the court below until Applicant can file a timely petition for certiorari and this Court has ruled on that petition and this case.

STATEMENT

In 2012, Respondent was convicted of, and sentenced to death for, the murders of Katrina Griffin and her two young children. *Bosse v. State*, 360 P.3d 1203, 1211-14 (Okla. Crim. App. 2015). In an effort to get away with the theft of some of the family's property, Respondent stabbed Ms. Griffin and her 8-year-old son to death, then locked Ms. Griffin's 6-year-old daughter in a closet and set the home on fire. *Id.*

In February 2019, as the case of *Sharp v. Murphy*, No. 17-1107, was pending in this Court, Respondent filed a successive post-conviction application in state court. Respondent (who is not himself an Indian) argued that Ms. Griffin and her children were Indian, that he murdered them within the boundaries of an Indian reservation, and thus that the state courts lacked jurisdiction over his crimes.

On July 9, 2020, this Court held that the Muscogee (Creek) Nation was given a reservation in Eastern Oklahoma that had not been disestablished, and that the state lacked jurisdiction over an Indian who committed a crime against another Indian under the Major Crimes Act, 18 U.S.C. § 1153. *McGirt*, 140 S. Ct. at 2459. On the same day, and for the reasons stated in *McGirt*, this Court affirmed the Tenth Circuit's same conclusion in *Murphy*. *Sharp v. Murphy*, 140 S. Ct. 2412 (2020).

In this case, after remanding to the state district court for an evidentiary hearing, the OCCA agreed with Respondent that the state lacked jurisdiction over his crimes, which it found were committed within the boundaries of the Chickasaw Nation's reservation. Appendix 1. In reaching its decision, the OCCA held the State's assertions that Respondent's claims are procedurally barred and subject to laches were foreclosed by this Court's decision in *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Appendix 1 at 16-19. And the OCCA rejected the State's assertion of jurisdiction, concurrent with the federal government's General Crimes Act jurisdiction, over the non-Indian Respondent. Appendix 1 at 19-23.

The State asked the OCCA to stay its mandate pending both a motion to file a petition for rehearing and a petition for writ of certiorari in this Court. The OCCA

granted the stay pending its disposition of the State's motion to file a petition for rehearing, but made no mention of the State's alternative request for a stay during proceedings in this Court. Appendix 2. The Chickasaw Nation also tendered for filing an *amicus curiae* brief in which it asked the OCCA to stay its mandate for 60 days to facilitate inter-governmental cooperation in implementing the decision.

On April 7, 2021, the OCCA denied the State's motion to file a petition for rehearing and issued the mandate without comment on the State's alternative request for a stay, or the Chickasaw Nation's request. Appendix 3, 4. The State immediately filed a motion to recall the mandate, which the OCCA set for oral argument on April 15, 2021. On April 8, 2021, the State filed an emergency motion to temporarily recall the mandate pending oral argument and the OCCA's decision on the motion to be argued. The OCCA granted the request for a temporary recall of the mandate on April 9, 2021. Appendix 5. At the OCCA's invitation, the Chickasaw Nation filed a second *amicus curiae* brief in which it re-urged its earlier request for a 60-day stay of the mandate.

After hearing argument, the OCCA granted the State's motion to stay the mandate, in part. Appendix 6. In a written order, the OCCA stayed its mandate for 45 days from April 15, 2021, which would give the State further time to pursue a stay in this Court.[1] In its earlier oral ruling on the motion, the OCCA made clear this 45-

[1] Judge Robert L. Hudson would have granted the stay "for the pendency of the State's certiorari appeal to the United States Supreme Court." Appendix 6 at 54 (Hudson, J., concurring in part/dissenting in part).

day stay would be the final such stay from that court. By issuing the stay, the OCCA necessarily determined the State had established good cause. *See* Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, OKLA. STAT. tit. 22, Ch. 18, App. ("The mandate shall not be recalled, nor stayed pending an appeal to any other court . . . unless a majority of the Court, for good cause shown, recalls or stays the mandate"); *cf. Holtzman v. Schlesinger*, 414 U.S. 1304, 1314 (1973) (decision of court below on stay "entitled to great weight") (Marshall, J., in chambers).

While appreciating this temporary stay, the State now requests a further stay from this Court to allow adequate opportunity for the State to file a timely petition for certiorari and for the Court to rule on this case. Without a further stay, the State, and its citizens, are likely to suffer irreparable harm. This harm is avoidable because the State has compelling, meritorious issues to present in its certiorari petition.

ARGUMENT

This Court will grant a stay of a lower court's mandate pending this Court's review if: (1) there is a reasonable probability that four members of this Court will be of the opinion that the issues are sufficiently meritorious to warrant a grant of certiorari, as well as a significant possibility of reversal of the lower court's decision, and (2) it is likely that irreparable harm will result from issuance of the mandate. *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers). While "[t]his is always a difficult and speculative inquiry," in this case "a stay is warranted." *I.N.S. v. Legalization Assistance Project of Los Angeles Cty. Fed'n of Labor*, 510 U.S. 1301,

1304 (1993) (O'Connor, J., in chambers). Because the State can show both these factors are met, this Court should grant a further stay of the mandate.

I. There is a reasonable probability this Court will grant certiorari and a significant possibility of reversal.

Many issues in Indian law have long gone underdeveloped, but the vast expansion of what is recognized as Indian country under *McGirt* has now made these issues pressing. Here, the OCCA ruled on important federal questions that are in tension with, or have gone unanswered by, this Court's precedent in a manner that is highly consequential for public safety. There is therefore a reasonable probability that this Court will grant certiorari and, because the OCCA ultimately erred, a significant possibility of reversal.

A. This Court is likely to grant certiorari and reverse on the question of whether federal law permits state procedural bars of *McGirt*-related claims.

In *McGirt*, this Court predicted that the State's and dissent's concern that many inmates would challenge their convictions would be mitigated by "procedural obstacles" such as "well-known state and federal limitations on postconviction review in criminal proceedings." *McGirt*, 140 S. Ct. at 2479. In the ensuing footnote, the Court gave the example of Oklahoma's "general rule that 'issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review.'" *Id.* at 2479 n.15 (citing *Logan v. State*, 293 P.3d 969, 973 (Okla. Crim. App. 2013)). This Court further said:

> Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches,

> to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are "fre[e] to say what we know to be true … today, while leaving questions about … reliance interest[s] for later proceedings crafted to account for them."

Id. at 2481 (alterations adopted) (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1407 (2020) (plurality op.)). The OCCA nonetheless ruled that federal law prohibited the State from applying the very types of procedural bars and equitable doctrines this Court countenanced in *McGirt* and that federal courts of appeals have applied in Indian country cases. Certiorari is warranted to resolve such conflicts and, given this Court's statements in *McGirt*, reversal is a significant possibility.

The OCCA based its ruling on the belief that, under this Court's decision in *Gonzalez*, 565 U.S. at 141, "[i]t is settled law that '[s]ubject-matter jurisdiction can never be waived or forfeited.'" Appendix 1 at 18 (second alteration adopted). This is a misreading of precedent. *Gonzalez* never held that the Constitution prohibited states from subjecting jurisdictional claims to procedural bars or equitable doctrines. Rather, the *Gonzalez* dicta quoted by the OCCA concerned the interpretation of 28 U.S.C. § 2253, a congressionally-enacted limitation on federal appellate courts' ability to hear federal habeas appeals. Indeed, if the law is as "settled" on this issue as the OCCA claims, this Court's statements in *McGirt* directly to the contrary would have been obviously wrong—and inexplicably so.

Moreover, the OCCA's interpretation of *Gonzalez* creates a conflict with courts of appeals that have held that claims related to Indian country jurisdiction *can* be waived or otherwise barred. In the specific context of post-*McGirt* federal habeas, the

Tenth Circuit has already held that such claims cannot be raised in a successive habeas petition. *In re: Morgan*, No. 20-6123, Order (10th Cir. Sept. 18, 2020) (unpublished); *see also Ross v. Pettigrew*, No. 20-CV-0396-JED-CDL, 2021 WL 1535365, *3 n.5 (N.D. Okla. Apr. 19, 2021) (unpublished) (dismissing habeas petition filed by Oklahoma prisoner, and predicated on *McGirt*, as time-barred because "the plain language of [28 U.S.C.] § 2244(d)(1) provides no exception for due-process claims challenging subject-matter jurisdiction"); *Kirk v. State of Oklahoma & Hicks, et al.*, No. CIV-21-164-J, 2021 WL 1316075, *2 (W.D. Okla. Apr. 8, 2021) (unpublished) (refusing to consider a claim premised on *McGirt* which was raised for the first time in an objection to the magistrate judge's report and recommendation). On the other side of the same coin, courts have held that challenges to federal Indian country jurisdiction are waivable. *See United States v. Tony*, 637 F.3d 1153, 1157-60 (10th Cir. 2011); *United States v. Pemberton*, 405 F.3d 656, 659 (8th Cir. 2005); *United States v. White Horse*, 316 F.3d 769, 772 (8th Cir. 2003); *United States v. Prentiss*, 256 F.3d 971, 981-82 (10th Cir. 2001) (en banc), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625, 631 (2002); *Welch v. United States*, No. 2:05CR8, 2008 WL 4981352, at *2 & n. 2 (W.D.N.C. Nov. 19, 2008) (unpublished).

The OCCA's conflict with the Tenth Circuit is particularly problematic, as it results in a curious dichotomy in which Indian country jurisdictional claims can *never* be waived in Oklahoma state courts but *can* be waived in the federal courts that have jurisdiction over Oklahoma. If anything, one would expect the opposite. *See United States v. Prentiss*, 206 F.3d 960, 967 (10th Cir. 2000) ("Federal criminal jurisdiction

is limited by federalism concerns; states retain primary criminal jurisdiction in our system."); *Application of Poston*, 281 P.2d 776, 784 (Okla. Crim. App. 1955) ("The district courts of Oklahoma are courts of general jurisdiction.").

Putting aside whether true "subject matter jurisdiction" claims are non-waivable as a matter of federal constitutional law, courts have held the claims challenging Indian country jurisdiction are not ones implicating subject matter jurisdiction.[2] In *Cotton*, this Court held that "[subject matter] jurisdiction means . . . the courts' statutory or constitutional *power* to adjudicate the case." 535 U.S. at 630 (citation and internal marks omitted). This followed the Seventh Circuit's ruling in *Hugi v. United States*, 164 F.3d 378, 380-81 (7th Cir. 1999), which held a federal court's power to adjudicate cases is derived from 18 U.S.C. § 3231, providing that "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

Here, Oklahoma constitutional and statutory law confers on state district courts the *power* to adjudicate criminal cases arising from crimes committed within the State's borders. *See* OKLA. CONST. Art. 7, § 7 ("The District Court[s of Oklahoma]

[2] As with some other litigants and courts, the State may have in the past been imprecise with the use of the phrase "subject matter jurisdiction." *See Gonzalez*, 565 U.S. at 141 ("This Court has endeavored in recent years to bring some discipline to the use of the term 'jurisdictional,'" given "our less than meticulous use of the term in the past" (citation and select quotation marks omitted)); *Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999) ("Lawyers and judges sometimes refer to the interstate-commerce element that appears in many federal crimes as the 'jurisdictional element,' but this is a colloquialism—or perhaps a demonstration that the word 'jurisdiction' has so many different uses that confusion ensues."). Regardless, the State's unwavering position has been that Petitioner's claim, whatever it is called, can be waived.

shall have unlimited original jurisdiction of all justiciable matters . . . ."); *see also* Appendix 1 at 27-32 (Rowland, V.P.J., concurring in results); *id.* at 41 (Hudson, J., concurring in results). Thus, "the subject matter in this case is a murder prosecution." Appendix 1 at 28 (Rowland, V.P.J., concurring in results). Regardless of whether federal law nonetheless preempts that prosecution, in terms of subject matter jurisdiction, "[t]hat's the beginning and the end of the 'jurisdictional' inquiry." *Hugi*, 164 F.3d at 380. Claims that the Major Crimes Act or General Crimes Act direct such cases to federal courts alone are thus not subject matter jurisdictional claims, and therefore not subject to any constitutional prohibition on waiver. In light of this Court's statements in *McGirt* and the holdings of this Court and other federal courts, there is a significant possibility this Court will grant certiorari and reverse the OCCA's holding that Indian country jurisdictional claims can never be barred. *See* SUP. CT. R. 10(b) & (c).[3]

The case for certiorari is even more compelling given the public safety issues at stake. Unfortunately, the *McGirt* dissent's prediction that "decades of past convictions" will be challenged has proven to be true. *See McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting). Oklahoma's state district courts have hundreds of

[3] To the extent it may seem the OCCA also addressed the procedural bars on the basis of state statute, certiorari and reversal are still warranted. *See Three Affiliated Tribes of Fort Berthold Rsrv. V. Wold Eng'g, P.C.*, 467 US 138, 152 (1984)(("It is . . . well established . . . that [the Supreme] Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law."). There is certainly no "plain statement" that the decision below "rests upon adequate and independent state grounds." *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Further, this Court has jurisdiction to correct the OCCA's refusal to apply laches, which was based solely on its mistaken belief that *McGirt*-related claims can never be waived. Appendix 1 at n.9.

postconviction applications pending that challenge state convictions under *McGirt*. While the State is still attempting to gather more comprehensive data, a sample of one county that was the location of the crime in *McGirt*—Wagoner County—illustrates the problem. The Wagoner County District Attorney's Office has provided the Attorney General's Office with data on its more than 200 *McGirt*-related claims, of which 50 are post-conviction claims. Wagoner County has a population of around 80,000, but more than 1,890,000 people live in counties that have now been found to be wholly or nearly entirely within a reservation. *See McGirt*, 140 S. Ct. 2452; *Grayson v. State*, ___ P.3d ___, 2021 WL 1231591 (Okla. Crim. App. Apr. 1, 2021) (Seminole); *Sizemore v. State*, ___ P.3d ___, 2021 WL 1231493 (Okla. Crim. App. Apr. 1, 2021) (Choctaw); *Hogner v. State*, ___ P.3d ___, 2021 WL 958412 (Okla. Crim. App. Mar. 11, 2021) (Cherokee); Appendix 1 at 8-10 (Chickasaw). Nor is Wagoner County unusual: in Rogers County, with a population just over 90,000 people, some 400 cases were recently dismissed because it has now been adjudicated to be in the Cherokee reservation.[4]

If Wagoner County's rate of post-conviction Indian Country jurisdictional claims is indicative of other Eastern Oklahoma counties, then overall there are nearly 1,200 pending post-conviction applications raising *McGirt*-related claims so far. And because many of these post-conviction claims would be subject to the state procedural

[4] Lily Cummings, *400 criminal cases dismissed in Rogers County following McGirt*, KTUL, https://ktul.com/news/local/400-criminal-cases-dismissed-in-rogers-co-following-mcgirt (Mar. 4, 2021).

and equitable bars the court below wrongly believed inapplicable under federal law, at stake are likely hundreds of long-settled convictions for very serious crimes.

While the family of the victims of Respondent's crime at least have the small comfort that the federal government will attempt to re-convict him, many other victims may not have even that because federal and tribal statutes of limitations, lack of resources, or the loss of evidence due to the passage of time, will preclude retrial. *See* 18 U.S.C. § 3282(a) (providing a general five year statute of limitations for federal crimes).

For example, David Paul Worthington was convicted of first-degree robbery, first-degree rape, and kidnapping in the District Court of Washington County Case No. CF-1986-52. Mr. Worthington was also convicted, in Washington County Case No. CF-1986-53, of three counts of kidnapping, one count of first-degree rape, and one count of assault with a dangerous weapon. In the 1970's, Mr. Worthington was convicted, in four separate cases, of larceny from a person, two counts of robbery with a firearm, and third-degree arson. Some thirty-five years after his crime spree was ended by the State, Mr. Worthington has proven that he is an Indian, and alleges that he committed his crimes within the boundaries of the Cherokee reservation. If the decision below remains and is therefore applied in Mr. Worthington's case, it is only a matter of time before Mr. Worthington is released from prison. To the best of the State's information and belief, because of statutes of limitations, no other

sovereign will be able to prosecute this very dangerous individual. And Mr. Worthington is far from alone.[5]

The eight examples discussed above are from the 30 post-conviction cases that the OCCA has remanded to state district courts for evidentiary hearings since *McGirt*. Therefore, it appears likely that 27% of convicts who raise *McGirt* post-conviction claims have a good chance of going free without re-prosecution by the federal government. Given the hundreds of post-conviction cases now accumulating in district courts, the public safety considerations are frightening.[6]

For these reasons, there is a reasonable probability this Court will grant certiorari on whether federal law prohibits states from imposing equitable or procedural bars on post-conviction claims relying on *McGirt* and, if certiorari is granted, there is a significant possibility this Court will reverse.

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[5] *See, e.g.*, *Compelleebee v. State*, OCCA No. PC-20-667 (Indian who committed first degree robbery, grand larceny, and assault and battery on the Creek reservation **in 2005**); *Mitchell v. State*, OCCA No. PC-20-675 (Indian who committed first degree murder on the Cherokee reservation **in 1988**; while there is no applicable statute of limitations, it is unknown whether the federal government can convict Mr. Mitchell after so many years); *Francis v. State*, OCCA No. PC-20-705 (Indian who committed, *inter alia*, assault and battery with a dangerous weapon and driving under the influence on the Creek reservation **in 2005**); *Bruner v. State*, OCCA No. PC-20-843 (Indian who committed first degree robbery on the Creek reservation **in 2010**); *Doak v. State*, OCCA No. PC-20-698 (Indian, and prior convicted felon, who was in possession of a firearm on the Cherokee reservation **in 1998**); *Rogers v. State*, OCCA No. PC-20-752 (Indian who committed robbery with a firearm on the Cherokee reservation **in 2013**); *Taylor v. State*, OCCA No. PC-20-643 (Indian who committed assault and battery with a deadly weapon on the Cherokee reservation **in 2008**).

[6] *See, e.g., Judge Dismisses Case Against Woman Convicted of Killing 5 in DUI Hit-And-Run*, NEWSON6, https://www.newson6.com/story/606fb92899e20e0bc10e104c/judge-dismisses-case-against-woman-convicted-of-killing-5-in-dui-hitandrun- (Apr. 8, 2021) (describing release of defendant convicted of killing five people while driving under the influence in 2009, and who likely cannot be prosecuted in federal court).

B. This Court is likely to grant certiorari and reverse on the question of whether states have jurisdiction, concurrent with the federal government, over non-Indians who commit crimes against Indians on Indian country.

Although the Court in dicta has suggested the state lacks jurisdiction over a case like this one, *see* Appendix 1 at 20-21, this Court has never squarely confronted the question of whether states lack jurisdiction to prosecute non-Indians who commit their crimes against Indians because of the General Crimes Act. But since *McGirt* and its progeny have recognized the most populous reservations in the country—which, unlike many other reservations are 85-90% non-Indian, *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting)—that question is now one of enormous importance to the State and to Indian victims. Certiorari is likely to be granted to resolve this "important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c).

The practical importance of granting certiorari to resolve whether states have jurisdiction, concurrent with the federal government, over non-Indians who victimize Indians is immense. State jurisdiction furthers both federal and tribal interests by providing additional assurance that tribal members who are victims of crime will receive justice, either from the federal government, state government, or both. It minimizes the chances abusers and murderers of Indians will escape punishment and maximizes the protection from violence perpetrated on Native Americans. This is critical because, as commentators have expressed in fear after *McGirt*, federal

authorities frequently decline to prosecute crimes against Indians on reservations.[7] There is also no reason to believe the State of Oklahoma will not vigorously defend the rights of Indian victims, as it has for a century. *See Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 608-09 (1943) ("Oklahoma supplies [Indians] and their children schools, roads, courts, police protection and all the other benefits of an ordered society."). In fact, this very case shows it will.

While Respondent may be subject to federal prosecution, there is a significant risk that less major crimes will go unprosecuted as federal prosecutors are busy with the most serious offenses. The Northern District of Oklahoma has already seen a 300-400% increase in criminal cases.[8] In the Eastern District of Oklahoma, the U.S. Attorney had indicted only 3 Indian country crimes in 2017, but in just the first few months following *McGirt*, that office has already been referred 571 such cases with respect to the Creek reservation alone, not including the other recently-recognized reservations.[9] Indeed, the former Principal Chief of the Creek Nation, whose pickup

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[7] *See, e.g.*, David Heska Wanbli Weiden, *This 19th-Century Law Helps Shape Criminal Justice in Indian Country And that's a problem — especially for Native American women, and especially in rape cases*, N.Y. TIMES (July 19, 2020), https://www.nytimes.com/2020/07/19/opinion/mcgirt-native-reservation-implications.html.

[8] *See* Alanna Durkin Richer, Sean Murphy and Michael Balsamo, *Tribal cases swamp US prosecutors*, ASSOC. PRESS, https://indiancountrytoday.com/news/tribal-cases-swamp-us-prosecutors (Mar. 18, 2021).

[9] Curtis Killman, *Supreme Court ruling affects more than 800 'Indian Country' criminal cases in Oklahoma so far*, TULSA WORLD, https://tulsaworld.com/news/local/crime-and-courts/supreme-court-ruling-affects-more-than-800-indian-country-criminal-cases-in-oklahoma-so-far/article_ee591c26-fc32-11ea-b0d7-1fe32cb9baca.html#tncms-source=login (Sept. 22, 2020).

trucks were recently stolen, echoed the fear that the sheer volume of crimes shifting jurisdiction will mean non-major crimes will go unaddressed.[10]

Many of these crimes involve non-Indians who commit crimes against Indians. For example, of the 88 cases the OCCA has remanded for evidentiary hearings (both direct appeals and post-conviction) since *McGirt*, 18—or 20%—involve non-Indian defendants who claim their victims were Indian. If this percentage is representative of the state as a whole, such that approximately 20% of *McGirt*-related claims in this state will involve non-Indian defendants, this Court's decision will likely affect thousands of cases. This includes not just existing final convictions—like those subject to the equitable and procedural bar issues raised in this case—but also pending prosecutions and crimes not yet committed against the Indian citizens of the state. And the percentage is likely higher given that it takes more time for criminals to determine the Indian status of their victim than their own Indian status, meaning that there are likely many cases to come where non-Indians will challenge the State's jurisdiction based on the Indian status of their victim.

In addition to the sheer numbers, a recent triple murder illustrates the extraordinary level of difficulty Oklahoma's criminal justice system will face if the decision below is not reviewed. Lawrence Anderson murdered his neighbor, Andrea Blankenship, cut her heart out and cooked it to serve to his family. Mr. Anderson

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[10] Curtis Killman, *Former principal chief isn't happy as McGirt decision hits home*, TULSA WORLD, https://tulsaworld.com/news/local/crime-and-courts/former-principal-chief-isnt-happy-as-mcgirt-decision-hits-home/article_69b3113c-7df3-11eb-9195-47a90f57db12.html#tncms-source=login (Mar. 7, 2021).

then killed his uncle, Leon Pye, and Mr. Pye's four-year-old granddaughter. Mr. Anderson also stabbed his aunt, Delsie Pye.[11] Upon information and belief, Mr. Anderson is not Indian, two of Mr. Anderson's victims are Indian, and two of his victims are not. Under the OCCA's reasoning in *Bosse*, Mr. Anderson must be tried twice for the same criminal transaction—once in state court and once in federal court. This incongruous result does nothing to further tribal sovereignty. The same is true in this case. *See* E.H. Tr. 16 (proffer from the District Attorney that "it would be the[] preference [of the family of Ms. Griffin and her children, the Indians in this case,] that the State retain jurisdiction, and that the non-Indian defendant in this case, Bosse -- that his conviction remain intact")).[12]

If certiorari is granted, there is also a significant possibility of reversal. Although the court below relied on a longstanding assumption about the scope of state jurisdiction, if *McGirt* makes one thing clear, longstanding assumptions cannot substitute for statutory text. And while the General Crimes Act grants the federal government jurisdiction over certain crimes in Indian Country, nothing in that Act explicitly preempts the State's jurisdiction. The text of the General Crimes Act states, 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

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[11] *See* Caitlin Huggins, *Chickasha triple murder suspect released from prison early*, KJRH, https://www.kjrh.com/news/local-news/chickasha-triple-murder-suspect-released-from-prison-early (Feb. 24, 2021).

[12] This citation refers to the transcript of the remanded evidentiary hearing on Respondent's Indian Country jurisdictional claim, held on September 30, 2020.

> within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

18 U.S.C. § 1152.

Although the statute refers to the "exclusive jurisdiction of the United States," it does not confer exclusive jurisdiction on the United States. Rather, as this Court has already held, the phrase "within the sole and exclusive jurisdiction of the United States" specifies what law applies (*i.e.* the law that applies to federal enclaves that are within the exclusive jurisdiction of the United States), not that the federal government's jurisdiction in Indian country for these crimes is exclusive. *Ex parte Wilson*, 140 U.S. 575, 578 (1891) (under the General Crimes Act "the jurisdiction of the United States courts was not sole and exclusive over all offenses committed within the limits of an Indian reservation" because "[t]he words 'sole and exclusive,' in [the General Crimes Act] do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it"); *see also Donnelly v. United States*, 228 U.S. 243, 268 (1913) ("[T]he words 'sole and exclusive jurisdiction,' as employed in [the General Crimes Act] do not mean that the United States must have sole and exclusive jurisdiction over the Indian country in order that that may apply to it; the words are used in order to describe the laws of the United States, which, by that section, are extended to the Indian country.").

Despite these binding interpretations of the text of the General Crimes Act, the court below held that the exercise of state jurisdiction is contrary to the "clear language of … statute." Appendix 1 at 20. The OCCA attempted to distinguish *Ex*

parte Wilson by noting the case arose in a different factual context. Appendix 1 at 21, n.10. But just because cases like *Wilson* and *Donnelly* involved different facts doesn't change the meaning of the text of the General Crimes Act. To hold that the meaning of the text changes with the facts of a case "'would render every statute a chameleon,' and 'would establish within our jurisprudence . . . the dangerous principle that judges can give the same statutory text different meanings in different cases.'" *United States v. Santos*, 553 U.S. 507, 522 (2008) (quoting *Clark v. Martinez*, 543 U.S. 371, 378 (2005)) (internal citations omitted). Thus, under the principles firmly established by *McGirt*—where the analysis begins and ends with the text—while the General Crimes Act confers federal jurisdiction over Respondent's crimes, nothing in the text of that law deprives the State of concurrent jurisdiction over the same crimes.

This is especially true because there exists a strong presumption against preemption of state law, so "unless that was the clear and manifest purpose of Congress," courts cannot find preemption of state police powers merely because Congress also provided for federal jurisdiction. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted). Even though this Court has held that the federal government has jurisdiction over non-Indians who commit crimes against Indians under the General Crimes Act, *Donnelly*, 228 U.S. at 271-72, the state and federal governments "exercise concurrent sovereignty" and "the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). To hold otherwise would run afoul of the "'deeply rooted presumption in favor of

concurrent state court jurisdiction' over federal claims"—a presumption that applies with even more force against arguments attempting to "strip[] state courts of jurisdiction to hear their own state claims." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349-52 (2020) (citation omitted). Congress does not "take such an extraordinary step by implication," and to do so Congress must be "[e]xplicit, unmistakable, and clear." *Id.* The text of the General Crimes Act doesn't even come close.

While the OCCA appears to have presumed that "where federal jurisdiction exists by statute, states [do not] have concurrent jurisdiction," Appendix 1 at 20, that presumption is directly opposite of this Court's precedent cited above. Nor do those presumptions against preemption change in the field of Indian law when non-Indians are at issue. States presumptively have jurisdiction over non-Indians, including on reservations, even when they are interacting with Indians. *See, e.g.*, *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992) (noting "the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands"); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). In the closest analogous civil context, this Court "repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country," because "tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against

a non-Indian concerning a claim arising in Indian country." *Three Affiliated Tribes*, 467 U.S. at 148-49.

This presumption against preemption of state jurisdiction over non-Indians can only be more true in the criminal context where it is the State, not the victim, that is the party bringing prosecution, *see Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), making *both* parties to the suit non-Indian. And indeed this Court's decision in *McBratney* that states have exclusive jurisdiction over crimes committed by non-Indians against non-Indians in Indian country was based on the idea that when admitted to the Union a state "has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, . . . and that [a] reservation is no longer within the sole and exclusive jurisdiction of the United States," unless Congress expressly provides otherwise. *United States v. McBratney*, 104 U.S. 621, 623-24 (1881).

Nor is it the case that a state's exercise of jurisdiction over non-Indians would "interfere with reservation self-government or impair a right granted or reserved by federal law." *Cty. of Yakima*, 502 U.S. at 257-58. As commentators have recognized, "[n]o tribal interest appears implicated by state prosecution of non-Indians for Indian country crimes, since tribes lack criminal jurisdiction over non-Indians," and no federal interest is impaired because "state prosecution of a non-Indian does not bar a subsequent federal prosecution of the same person for the same conduct." AM. INDIAN LAW DESKBOOK § 4:9 (citing, inter alia, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Abbate v. United States*, 359 U.S. 187 (1959)).

With no adequate justification in the text of the General Crimes Act or the general presumptions about state jurisdiction, including on Indian country, the court below ultimately relied upon inferences from statutes passed over a hundred years later and dicta from this Court's cases. Appendix 1 at 19-23. But this is precisely the sort of authority that *McGirt* rejected in the absence of clear text. *Compare McGirt*, 140 S. Ct. at 2498 & n.7, 2500 (Roberts, C.J., dissenting) *with id.* at 2473 n.14 (majority op.).[13] Based on the plain text of the General Crimes Act, there is a significant possibility that this Court will reverse the OCCA's decision on this important question of federal law.

II. The State is likely to suffer irreparable harm absent a stay.

If this Court does not further stay the mandate of the OCCA pending a decision on certiorari and the merits, there is a likelihood that Applicant's ability to enforce its judgment and sentence against Respondent will be irreparably harmed. The federal government has filed charges against Respondent and will assume custody if his state convictions are vacated and he is released. This transfer of custody will trigger the Interstate Agreement on Detainers' so-called anti-shuttling provision,

[13] For example, the court below relies heavily on inferences from Public Law 280, Appendix 1 at 22-23, which grants "any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume" such jurisdiction "with the consent of the Indian tribe," 25 U.S.C. § 1321. But Public Law 280 has nearly the same language with respect to civil jurisdiction, allowing "any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe," such civil jurisdiction. 25 U.S.C. § 1322. And yet, as noted above, this language has not precluded this Court from ruling that, even without Public Law 280, states generally have jurisdiction over civil actions with Indians as plaintiffs. *See Three Affiliated Tribes*, 467 U.S. at 148-49.

thereby preventing the federal government from returning Respondent to state custody without risking dismissal of its case with prejudice. 18 U.S.C. App. 2, § 2, Art. IV(e). Further, if Respondent is convicted in federal court, and this Court grants certiorari and affirms the State's concurrent jurisdiction, the State may be unable to re-obtain custody over Respondent and return him to death row—especially if the federal government is opposed to the state jury's imposition of the death penalty. *Cf. Wise v. Lipscomb*, 434 U.S. 1329, 1334 (1977) (Powell, J., in chambers) (recalling the mandate because "the capacity of the incumbent city council *may* be impaired if the judgment is not stayed") (emphasis added).

Meanwhile, no prejudice will fall on Respondent if the mandate is further stayed. During this Court's consideration of the case, Respondent will wait in state custody if the mandate is stayed, rather than in federal custody if it is not. The same was true, for example, of Mr. Murphy as he waited years for this Court's decision after the Tenth Circuit stayed the mandate in his case. *Murphy v. Royal*, Nos. 07-7068, 15-7041, Order (10th Cir. Nov. 16, 2017); *see Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers) (noting that in deciding on a stay, the Court must "'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large," and granting a stay because "of no irreparable harm that granting the stay would produce" (citation omitted)).

Moreover, as described above, hundreds of more cases raising these issues are pending, wherein state convictions risk being vacated absent a stay of the mandate

pending this Court's review. For those older convictions where the statute of limitations has run or re-trial is otherwise difficult, criminals will be let loose while review is pending at this Court, free to victimize others. The same is likely also to happen for new prosecutions of non-Indians who have victimized Indians, as federal prosecutors are swamped with cases on the newly-recognized reservations and tribal prosecutors are mostly without jurisdiction over non-Indians who victimize their members. All this can be avoided if the mandate is further stayed pending this Court's review.

CONCLUSION

The court below has interpreted federal law in a way that imperils the people of Oklahoma. If the mandate is not stayed, the consequences of that decision will begin before this Court has the opportunity to correct the OCCA's mistakes. The State has shown a reasonable probability that four members of this Court will grant certiorari, a significant possibility of reversal of the lower court's decision, and that it is likely irreparable harm will result from immediate implementation of the OCCA's decision. The mandate of the OCCA should be further stayed pending the timely filing of a petition for certiorari, this Court's disposition of that petition, and, if certiorari is granted, this Court's disposition of this case on the merits. Respondent respectfully requests a decision on this stay application prior to the expiration of the OCCA's 45-day stay (June 1, 2021).

Respectfully submitted,

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Appendix 1

ORIGINAL

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FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 11 2021

JOHN D. HADDEN
CLERK

2021 OK CR 3
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,	)	**FOR PUBLICATION**
Petitioner,	)	
vs.	)	**No. PCD-2019-124**
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

OPINION GRANTING POST-CONVICTION RELIEF

KUEHN, PRESIDING JUDGE:

¶1 Shaun Michael Bosse was tried by jury and convicted of three counts of First Degree Murder and one count of First Degree Arson in the District Court of McClain County, Case No. CR-2010-213. He was sentenced to death on the murder counts and to thirty-five (35) years imprisonment and a $25,000.00 fine for the arson count.

¶2 On direct appeal, this Court upheld Petitioner's convictions and sentences.[1] Petitioner's first Application for Post-Conviction Relief in this Court was denied.[2] Petitioner filed this Successive Application

[1] *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834, *reh'g granted and relief denied*, 2017 OK CR 19, 406 P.3d 26, *cert. denied*, 138 S.Ct. 1264 (2018).
[2] *Bosse v. State*, No. PCD-2013-360 (Okl.Cr. Dec.16, 2015) (not for publication).

for Post-Conviction Relief on February 20, 2019. The crux of Petitioner's Application lies in his jurisdictional challenge.

¶3 In Proposition I Petitioner claims the District Court lacked jurisdiction to try him. Petitioner argues that his victims were citizens of the Chickasaw Nation, and the crime occurred within the boundaries of the Chickasaw Nation. He relies on *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) in which the United States Supreme Court reaffirms the basic law regarding federal, state and tribal jurisdiction over crimes, which is based on the location of the crimes themselves and the Indian status of the parties. The Court first determined that Congress, through treaty and statute, established a reservation for the Muscogee Creek Nation. *Id.*, 140 S.Ct. at 2460-62. Having established the reservation, only Congress may disestablish it. *Id.*, 140 S.Ct. at 2463; *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Congress must clearly express its intent to disestablish a reservation, commonly with an "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt*, 140 S.Ct. at 2462 (quoting *Nebraska v. Parker*, 136 S.Ct. 1072, 1079 (2016)). The Court concluded that Congress had not disestablished the Muscogee Creek Reservation. *McGirt*, 140 S.Ct. at 2468. Consequently, the

federal and tribal governments, not the State of Oklahoma, have jurisdiction to prosecute crimes committed by or against Indians on the Muscogee Creek Reservation. 18 U.S.C. §§ 1152, 1153.

¶4 The question of whether Congress has disestablished a reservation is primarily established by the language of the law – statutes and treaties – concerning relations between the United States and a tribe. *McGirt*, 140 S.Ct. at 2468. "There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms." *McGirt*, 140 S.Ct. at 2469. Neither historical practices, nor demographics, nor contemporary events, are useful measures of Congress's intent unless there is some ambiguity in statute or treaty language. *Id.* at 2468-69; *see also Oneida Nation v. Village of Hobart*, 968 F.3d 664, 675 n.4 (7th Cir. 2020) (*McGirt* "establish[ed] statutory ambiguity as a threshold for any consideration of context and later history."). Thus our analysis begins, and in the case of the Chickasaw Nation, ends, with the plain language of the treaties.

¶5 *McGirt* itself concerns only the prosecution of crimes on the Muscogee Creek Reservation. However, its reasoning applies to every claim that the State lacks jurisdiction to prosecute a defendant under

18 U.S.C. §§ 1152, 1153. Of course, not every tribe will be found to have a reservation; nor will every reservation continue to the present. "Each tribe's treaties must be considered on their own terms. . . ." *McGirt*, 140 S.Ct. at 2479. The treaties concerning the Five Tribes which were resettled in Oklahoma in the mid-1800s (the Muscogee Creek, Cherokee, Chickasaw, Choctaw, and Seminole) have significantly similar provisions; indeed, several of the same treaties applied to more than one of those tribes. It is in that context that we review Petitioner's claim.

¶6 On August 12, 2020, this Court remanded this case to the District Court of McClain County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) the victims' status as Indians; and (b) whether the crime occurred in Indian Country, within the boundaries of the Chickasaw Nation Reservation. Our Order provided that the parties could enter into written stipulations. On October 13, 2020, the District Court filed its Findings of Fact and Conclusions of Law in the District Court.

Stipulations regarding victims' Indian status

¶7 The parties stipulated that all three victims of the crime, Katrina and Christian Griffin and Chasity Hammer, were members of the Chickasaw Nation. This stipulation included recognition that the Chickasaw Nation is a federally recognized tribe. The District Court concluded as a matter of law that all three victims had some Indian blood and were recognized as Indian by a tribe or the federal government. We adopt these findings and conclusions, and find that the victims in this case were members of the Chickasaw Nation.

District Court Findings of Fact

¶8 The District Court found that Congress established a reservation for the Chickasaw Nation of Oklahoma. The District Court found these facts:

(1) The Indian Removal Act of 1830 authorized the federal government to negotiate with Native American tribes for their removal to territory west of the Mississippi River in exchange for the tribes' ancestral lands. Indian Removal Act of 1830, § 3, 4 Stat. 411, 412.

(2) The 1830 Treaty of Dancing Rabbit Creek (1830 Treaty) granted citizens of the Choctaw Nation and their descendants specific

land in fee simple, "while they shall exist as a nation and live on it," in exchange for cession of the Choctaw Nation lands east of the Mississippi River. Treaty of Dancing Rabbit Creek, art. 2, Sept. 27, 1830, 7 Stat 333. The Treaty provided that any territory or state should have neither the right to pass laws governing the Choctaw Nation nor embrace any part of the land granted the Choctaw Nation by the treaty. *Id.* art. 4. The land boundaries were:

> [B]eginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork; if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning.

Id. art. 2.

(3) The 1837 Treaty of Doaksville (1837 Treaty) granted the Chickasaw Nation a district within the boundaries of the 1830 Treaty of Dancing Rabbit Creek, to be held by the Chickasaw Nation on the same terms as were granted to the Choctaw Nation. 1837 Treaty of Doaksville, art. 1, Jan. 17, 1837, 11 Stat 573.

(4) Congress modified the western boundary of the Chickasaw Nation in the 1855 Treaty of Washington (1855 Treaty), pledging

to "forever secure and guarantee" the land to those tribes, and reserving them from sale without both tribes' consent. 1855 Treaty of Washington with the Choctaw and the Chickasaw, art. 1, 2, June 22, 1855, 11 Stat. 611. This Treaty also reaffirmed the Chickasaw Nation's right of self-government. *Id.* art. 7.

(5) In 1866, the United States entered into the 1866 Treaty of Washington (1866 Treaty), which reaffirmed both the boundaries of the Chickasaw Nation and its right to self-governance. 1866 Treaty of Washington with the Chickasaw and Choctaw, art. 10, Apr. 28, 1866, 14 Stat. 699.

(6) The parties stipulated that the location of the crime, 15634 212th St., Purcell, OK, is within the boundaries of the Chickasaw Nation set forth in the 1855 and 1866 Treaties.

(7) The property at which the crime occurred was transferred directly in 1905 from the Choctaw and Chickasaw Nations to George Roberts, in a Homestead Patent. Title may be traced directly to the Reservation lands granted the Choctaw and Chickasaw Nations, and subsequently allotted to individuals, and was never owned by the State of Oklahoma.

(8) The Chickasaw Nation is a federally recognized Indian tribe, exercising sovereign authority under a constitution approved by the United States Secretary of the Interior.

(9) No evidence before the District Court showed that the treaties were formally nullified or modified in any way to reduce or cede Chickasaw lands to the United States or to any other state or territory.

(10) The parties stipulated that if the District Court determined the treaties established a reservation, and if the District Court concluded that Congress never explicitly erased the boundaries and disestablished the reservation, then the crime occurred within Indian Country as defined by 18 U.S.C. § 1151(a).

District Court Conclusions of Law

¶9 The District Court first found, and this Court agrees, that the absence of the word "reservation" in the 1855 and1866 Treaties is not dispositive. *McGirt*, 140 S.Ct. at 2461. The court emphasized the language in the 1830 Treaty that granted the land "in fee simple to them and their descendants, to inure to them while they shall exist as a nation." 1830 Treaty, art. 2. The 1830 Treaty secured rights of self-government and jurisdiction over all persons and property with Treaty

territory, promising that no state should interfere with the rights granted under the Treaty. *Id.* art. 4. That treaty applies to the Chickasaw Nation under the 1837 Treaty of Doaksville, which guaranteed the Chickasaw Nation the same privileges, rights of homeland ownership and occupancy granted the Choctaw Nation by the 1830 Treaty. 1837 Treaty, art.1. In the 1855 Treaty, the United States promised to "forever secure and guarantee" specific lands to the Choctaw and Chickasaw Nations, and reaffirmed those tribes' rights to self-government and full jurisdiction over persons and property within their limits. 1855 Treaty arts. 1, 7. This was reaffirmed in the 1866 Treaty, by which the Chickasaw and Choctaw Nations agreed to cede defined lands to the United States for a sum certain. 1866 Treaty, art. 3. Thus, the District Court concluded, the treaty promises to the Chickasaw Nation were not gratuitous. *McGirt*, 140 S.Ct. at 2460.

¶10 Based on this law, the District Court concluded that Congress established a reservation for the Chickasaw Nation. We adopt this conclusion of law.

¶11 The District Court found that Congress has not disestablished the Chickasaw Nation Reservation. After Congress has established a reservation, only Congress may disestablish it, by clearly

expressing its intent to do so; usually this will require "an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt*, 140 S.Ct. at 2463 (quoting *Parker*, 136 S.Ct. at 1079). The District Court found no explicit indication or expression of Congressional intent to disestablish the Chickasaw Reservation. The Court specifically stated, "No evidence was presented that the Chickasaw reservation was 'restored to public domain,' 'discontinued, abolished or vacated.' Without, [sic] explicit evidence of a present and total surrender of all tribal interests, the Court cannot find the Chickasaw reservation was disestablished." Findings of Fact and Conclusions of Law, CF-2010-213, PCD-2019-124, Oct. 13, 2020 at 9-10 (internal citations omitted).

¶12 Based on the evidence, the District Court concluded that Congress never erased the boundaries and disestablished the Chickasaw Nation Reservation. The Court further concluded that the crimes at issue occurred in Indian Country. We adopt these conclusions.

The State's Arguments

¶13 After the evidentiary hearing, a supplemental brief was filed on behalf of the State of Oklahoma by the District Attorney for McClain

County. The Attorney General and District Attorney ask this Court to find that the State of Oklahoma has concurrent jurisdiction with the federal and tribal governments where, as here, a non-Indian commits a crime against Indian victims in Indian Country. The Attorney General and the District Attorney suggest that various procedural defenses should apply. The District Attorney also raises a separate claim, arguing that this Court should alter its definition of Indian status, an argument not raised by the Attorney General.

Blood Quantum

¶14 The District Attorney states that the District Judge avoided the issue of blood quantum when making her findings and conclusions.[3] He now requests that this Court require a specific blood quantum to meet the definition of Indian status to avoid a "jurisdictional loophole". In the Remand Order, and in the numerous similar Orders in which we remanded other cases for consideration of the jurisdictional question, this Court clearly set out the definition of Indian it expected lower courts to use. We directed the District Court

[3] The Judge did not avoid the issue. She refused to set a quantum amount as requested by the District Attorney and followed this Court's Remand Order directing her to find "some" Indian blood under the definitions recognized by the Tenth Circuit opinions referenced.

to "determine whether (1) the victims had some Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government." This test, often referred to as the *Rogers*[4] test, is used in a majority of jurisdictions, including in cases cited by the District Attorney.

¶15 In stating this test we cited two cases from the Tenth Circuit, *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001).[5] The references clearly state the test to be used in determining Indian status. *Prentiss* discusses the history, wide acceptance, and application of the *Rogers* test. The opinion notes that the first prong of the test may be proved by a variety of evidence, which may include a certificate of tribal enrollment which sets forth the person's degree of Indian blood, or a listing on a tribal roll which requires a certain degree of Indian blood. *Prentiss*, 273 F.3d at 1282-83. *Diaz* states that the Tenth Circuit uses a "totality-of-the-evidence approach," which may

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[4] *United States v. Rogers*, 45 U.S. 567, 572-73 (1846).

[5] In support of his claim that more than "some" Indian blood is required, Respondent cites dicta in *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116. With almost a quarter blood quantum, the defendant easily met the requirement of the first prong, and this Court did not further analyze that issue. However, in referring to the two-part test, this Court in a 1982 decision, used the word "significant" rather than "some." *Id.* This single word, describing an issue not the focus of the appeal, does not substitute for the entire body of state and federal jurisprudence correctly stating the test.

include proof of blood quantum, but only if a particular tribe requires it. *Diaz*, 679 F.3d at 1187.

¶16 The District Attorney correctly observes that a minority of courts have chosen to impose a particular blood quantum, or to state in individual cases whether a specific blood quantum meets the threshold of "some blood." The State of Oklahoma is within the jurisdictional boundaries of the Tenth Circuit. If the jurisdictional test is met and it is determined that a particular case must be prosecuted in a federal district court, the Tenth Circuit definition will govern in that court. There is simply no rhyme nor reason to require a test for Indian status in our Oklahoma state courts that is significantly different from that used in the comparable federal courts.[6] Consistency and economy of judicial resources compel us to adopt the same definition as that used by the Tenth Circuit.[7]

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[6] Interestingly, the District Attorney argues instead that a "loophole" will exist if we do not have the same standard as the Tenth Circuit.

[7] In addition, to require a specific blood quantum would be out of step with other recent developments. In 2018, Congress amended the Stigler Act. Enacted in 1947, that Act was one of several Acts restricting the conveyance of lands that were allotted to citizens of the Five Tribes, if the owner had one-half or more of Indian blood. The restrictions on conveyance were designed to protect tribal citizens. As time passed, requiring such a high blood quantum stripped those protections from many owners and reduced the amount of restricted land. The recent amendment struck this provision, replacing it with the phrase "of whatever degree of Indian blood." Stigler Act Amendments of 2018, P.L. 115-399, Sec. 1(a). We will not

¶17 Without any foundation in law, the District Attorney speculates that, without a precise blood quantum requirement, a defendant might claim he is Indian in a state court – thus defeating state court jurisdiction – and yet be found not Indian in federal court, escaping criminal prosecution altogether. He cites no relevant or persuasive law to support this speculation. The District Attorney relies on a single case from the State of Washington, *State v. Dennis*, 840 P.2d 909 (Wash. App. 1992). Blood quantum was not an issue in that case and is not mentioned in the opinion. The defendant, a member of a Canadian tribe, was charged in state court with murdering his wife. In state court, defendant successfully argued that he was an Indian under the Major Crimes Act, Section 1153, and thus not subject to State jurisdiction. Of course, the federal district court found otherwise, since defendant was not a member of a federally recognized tribe. *Id.*, 840 P.2d at 910. The State never appealed the initial dismissal in state district court. After federal charges were dismissed, the State of Washington attempted to reinstate the charges. The Washington Court of Appeals found that, given the State's failure to appeal the initial state

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disregard this clear statement of Congressional intent regarding a blood quantum requirement for the Five Tribes.

court ruling, the State was precluded by statute from reinstating the case. *Id.* at 910-11. The appellate court specifically noted that the problem in this case was not the defendant's claim, but that the trial court made a mistake of law in concluding defendant was Indian under the Major Crimes Act. *Id.* If anything, this case underscores the utility and flexibility of the *Rogers* test, when correctly applied. It is clear that, using that test, jurisdiction always lay with the State of Washington.

¶18 There simply is no jurisdictional loophole as described by the District Attorney. To cure this nonexistent problem, the State would have this Court adopt a test which is different from, and potentially more restrictive than, the test used in our corresponding federal system. This would be far more likely to result in the kind of confusion the District Attorney warns against. Say this Court were to adopt a particular blood quantum number. A defendant could be a member of a federally recognized tribe, with Indian blood less than that quantum. He would not be Indian in state court, and the State would retain jurisdiction. However, when the convicted defendant filed a writ of habeas corpus in federal court, because he had some Indian blood, he would meet the *Rogers* test. The federal court would find that the State had no jurisdiction, and the defendant should have been tried in

federal court to begin with – just like *McGirt*. Consistency and economy of judicial resources compel us to adopt the same definition as that used by the Tenth Circuit.

¶19 Furthermore, we find it inappropriate for this Court to be in the business of deciding who is Indian. As sovereigns, tribes have the authority to determine tribal citizenship. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008); *see also United States v. Antelope*, 430 U.S. 641, 646 (1977) (Indian status determined by recognition by tribe acting as separate sovereign, not by racial classification). Some tribes have a blood quantum requirement, and some do not. Of those that do, the percentage differs among individual tribes. If a person charged with a crime has some Indian blood, and they are recognized as being an Indian by a tribe or the federal government, this Court need not second-guess that recognition based on an arbitrary mathematical formula. The District Court correctly followed this Court's instructions in the Order remanding this case, determining that the victims had some Indian blood.

Procedural Defenses

¶20 Both the Attorney General and the District Court ask this Court to consider this case barred for a variety of procedural reasons:

waiver under the successive capital post-conviction statute, 22 O.S.2011, § 1089(D), and waiver of the jurisdictional challenge; failure to meet the sixty-day filing deadline to raise a previously unavailable legal or factual basis in subsequent post-conviction applications under Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021); and the doctrine of laches. Through the District Attorney, the State admits that this Court has resolved these issues in this case in our Order remanding for an evidentiary hearing:

> Under the particular facts and circumstances of this case, and based on the pleadings in this case before the Court, we find that Petitioner's claim is properly before this court. The issue could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020).

Bosse v. State, PCD-2019-124, *Order Remanding for Evidentiary Hearing* at 2 (Okl.Cr. Aug. 12, 2020). The State asks us to reconsider this determination, but offers no compelling arguments in support.[8]

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[8] The State argues both that application of *McGirt* will have significant consequences for criminal prosecutions, and that waiver should apply because there is really nothing new about the claim. Taken as a whole, the arguments advanced by the State in both its Response and Supplemental Brief support a conclusion that, although similar claims may have been raised in the past in other cases, the primacy of State jurisdiction was considered settled and those claims had not been expected to prevail. The legal basis for this claim was unavailable under Section 1089(D).

¶21 It is settled law that "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). The District Attorney admits that generally litigants "cannot waive the argument that the district court lacks subject-matter jurisdiction," citing *United States v. Green*, 886 F.3d 1300, 1304 (10th Cir. 2018); *see also United States v. Garcia*, 936 F.3d 1128, 1140-41 (10th Cir. 2019) (parties can neither waive subject-matter jurisdiction nor consent to trial in a court without jurisdiction). This Court has repeatedly held that the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction. *Wackerly v. State*, 2010 OK CR 16, ¶ 4, 237 P.3d 795, 797; *Wallace v. State*, 1997 OK CR 18, ¶ 15, 935 P.2d 366, 372; *see also Murphy v. State*, 2005 OK CR 25, ¶¶ 5-7, 124 P.3d 1198, 1200 (recognizing limited scope of post-conviction review, then addressing newly raised jurisdictional claim on the merits). In *Wackerly*, we also held the time limit on newly raised issues in Rule 9.7 did not apply to jurisdictional questions. *Wackerly*, 2010 OK CR 16, ¶ 4, 237 P.3d at 797.[9]

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[9] The principle that subject-matter jurisdiction may not be waived also settles the State's argument based on laches – that Petitioner waited too long to raise his claim, and the passage of time makes resolution of the issue, or a grant of relief, difficult to determine or implement. None of the cases on which the State relies concern a claim of lack of jurisdiction.

¶22 *McGirt* provides a previously unavailable legal basis for this claim. Subject-matter jurisdiction may – indeed, must – be raised at any time. No procedural bar applies, and this issue is properly before us. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a).

There is no concurrent jurisdiction.

¶23 The General Crimes Act and the Major Crimes Act give federal courts jurisdiction over crimes committed by or against Indians in Indian Country. 18 U.S.C. §§ 1152, 1153. Congress provides that crimes committed in certain locations or under some specific circumstances are within the sole and exclusive jurisdiction of the United States. Section 1152, the General Crimes Act, brings crimes committed in Indian Country within that jurisdiction, unless they lie within the jurisdiction of tribal courts or jurisdiction is otherwise expressly provided by federal law. 18 U.S.C. § 1152; see also 18 U.S.C. § 1153 (Major Crimes Act). This gives federal courts jurisdiction over Indians and non-Indians who commit crimes against Indians in Indian Country. By explicitly noting that it may expressly provide otherwise, Congress has preempted jurisdiction over these crimes in state courts. Indeed, this Court has held that federal law preempts state jurisdiction over crimes committed by or

against an Indian in Indian Country. *Cravatt v. State*, 1992 OK CR 6, ¶ 20, 825 P.2d 277, 280. State courts retain jurisdiction over non-Indians who commit crimes against non-Indians in Indian Country. *Id.*; *Solem*, 463 U.S. at 465 n.2; *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946).

¶24 The State argues that, despite the clear language of both statute and case law, federal and state courts have concurrent jurisdiction over non-Indians under the General Crimes Act. The law does not support this argument. The Attorney General relies in part on United *States v. McBratney*, 104 U.S. 621 (1881) to support his argument. However, in *McBratney*, a non-Indian murdered another non-Indian within the boundaries of the Ute Reservation. The Supreme Court held that the federal government had no jurisdiction to prosecute a crime committed in Indian Country where neither the perpetrator nor the victim were Indian. *Id.*, 104 U.S. at 624. Nothing in that opinion supports a conclusion that, where federal jurisdiction exists by statute, states have concurrent jurisdiction as well. And the Supreme Court itself later refuted any such interpretation. In *Donnelly v. United States*, the Court held that *McBratney* did not apply to "offenses committed by or against Indians," which were

subject to federal jurisdiction. *Donnelly*, 228 U.S. 243, 271-72 (1913). In the context of federal criminal jurisprudence and Indian Country, *Donnelly* reaffirmed Congress's preemption of state jurisdiction over crimes by or against Indians.[10] More recently, the Court has noted that where federal jurisdiction lies under Section 1153, it preempts state jurisdiction. *United States v. John*, 437 U.S. 634, 651 (1978); see also *Goforth v. State*, 1982 OK CR 48, ¶ 5, 644 P.2d 114, 115-16 (federal jurisdiction under §§ 1152, 1153 preempts state jurisdiction except as to crimes among non-Indians).

¶25 The General Crimes Act provides that federal jurisdiction may be changed by law. 18 U.S.C. § 1152. And Congress has done so, giving the State of Kansas criminal jurisdiction on Indian reservations in that state. The Kansas Act conferred jurisdiction on Kansas courts for offenses of state law committed by or against Indians on reservations in Kansas. 18 U.S.C. § 3243. The Supreme

[10] Respondent also misunderstands the discussion in *Ex parte Wilson*, 140 U.S. 575 (1891). There, the defendant and victim were non-Indian. The defendant argued that the federal government could not retain jurisdiction over crimes committed by and against Indians while allowing state jurisdiction over crimes involving non-Indians committed on a reservation; he claimed that either the federal government had sole and exclusive jurisdiction over every crime, or it had none at all. *Id.* at 577. The Court rejected this argument, noting that Congress had the power to grant and limit jurisdiction in federal courts. *Id.* at 578.

Court determined that this Act confers concurrent jurisdiction on State courts only to the extent that the State of Kansas may prosecute people for state law offenses that are also punishable as offenses under federal law; otherwise, the jurisdiction to prosecute federal crimes committed on Kansas reservations lies with the federal government. *Negonsott v. Samuels*, 507 U.S. 99, 105–106 (1993).

¶26 Congress also created the opportunity for six specific states to exercise jurisdiction over crimes committed in Indian Country by enacting Public Law 280. Act of Aug. 15, 1953, Pub. L. No. 67, Stat. 588, codified at 18 U.S.C. § 1162, 25 U.S.C. § 1321-26; 18 U.S.C. § 1162(a). In a separate provision, P.L. 280 created a framework for other states to assume jurisdiction over crimes committed in Indian Country, with the consent of the affected tribe; the state and the federal government may have concurrent jurisdiction if the affected tribe requests it and with the consent of the Attorney General. 25 U.S.C. § 1321(a). Oklahoma has not exercised the options for criminal jurisdiction afforded by P.L. 280. *Cravatt*, ¶ 15, 825 P.2d at 279.

¶27 The Kansas Act and P.L. 280 would have been unnecessary if, as the State argues, state and federal governments already have

concurrent jurisdiction over non-Indians who commit crimes in Indian Country. Rather, these Acts are examples of how Congress may implement the provision in Section 1152, allowing for an exception to federal jurisdiction. Congress has written no law similarly conferring jurisdiction on Oklahoma courts, or otherwise modifying the statutory provisions granting jurisdiction for prosecution of crimes in Indian Country to federal courts in Oklahoma. Respondent does not suggest it has.

¶28 Absent any law, compact, or treaty allowing for jurisdiction in state, federal or tribal courts, federal and tribal governments have jurisdiction over crimes committed by or against Indians in Indian Country, and state jurisdiction over those crimes is preempted by federal law. The State of Oklahoma does not have concurrent jurisdiction to prosecute Petitioner.

Conclusion

¶29 Petitioner's victims were Indian, and this crime was committed in Indian Country. The federal government, not the State of Oklahoma, has jurisdiction to prosecute Petitioner. Proposition I is granted. Propositions II and III are moot.

DECISION

¶30 The Judgment and Sentence of the District Court of McClain County is **REVERSED** and the case is **REMANDED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **STAYED** for twenty (20) days from the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF McCLAIN COUNTY
THE HONORABLE LEAH EDWARDS, DISTRICT JUDGE

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OPINION BY KUEHN, P.J.

ROWLAND, V.P.J.:	CONCUR IN RESULTS
LUMPKIN, J.:	CONCUR IN RESULTS
LEWIS, J.:	SPECIALLY CONCUR
HUDSON, J.:	CONCUR IN RESULTS

ROWLAND, VICE PRESIDING JUDGE, CONCURRING IN RESULTS:

¶1 I concur in the result of the majority opinion, but write separately to relate my views on two of the issues discussed therein, namely the test for Indian status and the use of the term subject matter jurisdiction.

A. The Test for Indian Status

¶2 My first objection with the majority opinion is its dismissal of the thought that this Court should decide who is Indian. Making a finding on the defendant's Indian status is precisely what we must do in order to determine whether the State of Oklahoma has jurisdiction since federal jurisdiction applies only to Indians. One question before us is what test we should employ to decide this particular component of Bosse's claim. In that regard, I agree fully with the majority that our test for Indian status must be identical to that used by the United States Court of Appeals for the Tenth Circuit.

¶3 The Major Crimes Act is pre-emptive of state criminal jurisdiction "**when it applies**...." *United States v. John,* 437 U.S. 634, 651 (1978) (emphasis added). If the Indian Country Crimes Act or Major Crimes Act do not apply, then the State of Oklahoma, as a sovereign with general police powers, has obvious authority to

prosecute and punish crimes within its borders. Adopting a test different from that used by federal courts risks this Court dismissing a case where the crime was committed in Indian country on the basis that a defendant is Indian and the federal court, under a different test, determining the defendant is not Indian and thus there is no federal jurisdiction.[1] That is the type of jurisdictional void this Court warned of in *Goforth v. State*, 1982 OK CR 48, 644 P.2d 114, where we interpreted Article 1, Section 3 of the Oklahoma Constitution to disclaim jurisdiction over Indian lands only when federal jurisdiction is apparent. "[W]here federal law does not purport to confer jurisdiction on the United States courts, the Oklahoma Constitution does not deprive Oklahoma courts from obtaining jurisdiction over the matter." *Id.* 1982 OK CR 48, ¶ 8, 644 P.2d at 116.

B. Subject Matter Jurisdiction

¶4 The other portion of today's majority opinion with which I do not agree is that the federal criminal statutes involved here deprive Oklahoma courts of subject matter jurisdiction. "Subject matter jurisdiction defines the court's authority to hear a given type of case."

[1] Because, as explained later in this writing, I do not think subject matter jurisdiction is implicated, I see no reason the State could not refile its charges in such an instance, but that is, of course, not before the Court at this time.

Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 639 (2009). Our cases recognize three components to jurisdiction: "(1) jurisdiction over the subject matter—the subject matter in this connection was the criminal offense of murder, (2) jurisdiction over the person, and (3) the authority under law to pronounce the particular judgment and sentence herein rendered." *Petition of Dare*, 1962 OK CR 35, ¶ 5, 370 P.2d 846, 850–51. Like *Dare*, the subject matter in this case is a murder prosecution. The subject matter jurisdiction of Oklahoma courts is established by Article 7 of our State Constitution and Title 20 of our statutes which grant general jurisdiction, including over murder cases, to our district trial courts. Basic rules of federalism dictate that Congress has no power to expand or diminish that jurisdiction except where Congress has created a federal cause of action and allowed state courts to assume jurisdiction. *See Simard v. Resolution Tr. Corp.*, 639 A.2d 540, 545 (D.C. 1994) (noting presumption of concurrent jurisdiction among federal and state courts is rebutted only by a clear expression by Congress vesting federal courts with exclusive jurisdiction). Were it otherwise, Congress could legislatively tinker with the authority of state courts to hear all type of state crimes or civil causes of action.

¶5 What Congress can do and has done is exercise its own territorial jurisdiction over Indians in Indian Country by virtue of its plenary power to regulate affairs with Indian tribes. "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Federal criminal authority over so-called "federal enclaves" is found at 18 U.S.C. § 7, which begins with the words, "The term 'special maritime and **territorial jurisdiction** of the United States', as used in this title, includes...." (emphasis added). The Indian Country Crimes Act, 18 U.S.C. § 1152, with exceptions, "extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country...." *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993). Thus a plain reading of *Negonsott* in tandem with Section 7 makes clear that it is territorial jurisdiction, not subject matter jurisdiction, which is at issue. *See also United States v. Smith*, 925 F.3d 410, 415 (9th Cir.), *cert. denied*, 140 S.Ct. 407 (2019) (finding Indian Country is a federal enclave for purposes of 18 U.S.C. § 7). This is likely why none of the cases cited in the majority opinion hold that the state lacks subject matter jurisdiction over crimes by or against Indians in Indian Country. In *United States v.*

Langford, 641 F.3d 1195, 1197 n.1 (10th Cir. 2011), the Tenth Circuit stated explicitly that the federal jurisdiction under these statutes is not subject matter jurisdiction:

> When we speak of jurisdiction, **we mean sovereign authority, not subject matter jurisdiction**. *Cf. Prentiss*, 256 F.3d at 982 (disclaiming the application of subject matter jurisdiction analysis to cases involving an inquiry under the ICCA). This is consistent with use of the term in *United States v. McBratney*, 104 U.S. 621, 623–4, 26 L.Ed. 869 (1881).

(Emphasis added).

¶6 This is an important distinction, because as the majority makes clear, the lack of subject matter jurisdiction cannot be waived or forfeited and may be raised at any point in the litigation. Conversely, territorial jurisdiction may be subject to waiver. *See Application of Poston*, 1955 OK CR 39, ¶ 35, 281 P.2d 776, 785 (request for relief on ground that district court did not have territorial jurisdiction was denied; claim was deemed waived because it was not raised below). *See also State v. Randle*, 2002 WI App 116, ¶ 14, 252 Wis. 2d 743, 751, 647 N.W.2d 324, 329 (concluding territorial jurisdiction subject to waiver in some instances); *Porter v. Commonwealth*, 276 Va. 203, 229, 661 S.E.2d 415, 427 (Va.2008) (territorial jurisdiction is waived if not properly and timely raised); *In*

re Teagan K.-O., 335 Conn. 745, 765 n. 22, 242 A.3d 59, 73 n. 22 (Conn.2020) (territorial jurisdiction may be subject to waiver). *But see State* v. *Dudley*, 364 S.C. 578, 582, 614 S.E.2d 623, 625-26 (2005) ("Although territorial jurisdiction is not a component of subject matter jurisdiction, we hold that it is a fundamental issue that may be raised by a party or by a court at any point in the proceeding.... The exercise of extraterritorial jurisdiction implicates the state's sovereignty, a question so elemental that we hold it cannot be waived by conduct or by consent." (Citation and footnote omitted.)).

¶7 Characterizing Sections 1152 and 1153 as implicating subject matter jurisdiction would allow a defendant, knowing he is Indian and that his crimes fall within the Major Crimes Act, to forum shop, by rolling the dice at a state trial and then wiping that slate clean if he receives an unsatisfactory verdict by asserting his Indian status. Viewing it as territorial jurisdiction avoids this absurdity, and would allow the possibility that procedural bars, laches, etc. might preclude some *McGirt* claims.[2]

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[2] The *McGirt* opinion tacitly acknowledges potential procedural bars, noting the State of Oklahoma had "put aside whatever procedural defenses it might have."

¶8 In this case, however, I agree with the majority that our earlier ruling in our Remand Order—that Bosse timely met the requirements for raising a claim based on new law under the Capital Post-Conviction Act—resolved any claim that Bosse is procedurally barred from asserting this claim on post-conviction. Accordingly, I concur in the result.

McGirt, 140 S.Ct. at 2460. Those defenses would not be relevant if subject matter jurisdiction, which is non-waivable, were concerned.

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

¶1 Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, __ U.S. __, 140 S. Ct. 2452 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt* I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas I was forced to conclude the Majority had totally failed to follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

¶2 My quandary is one of ethics and morality. One of the first things I was taught when I began my service in the Marine Corps was that I had a duty to follow lawful orders, and that same duty required me to resist unlawful orders. Chief Justice Roberts' scholarly and judicially penned dissent, actually following the Court's precedents and required analysis, vividly reveals the failure of the majority opinion to follow the rule of law and apply over a century of precedent and history, and to accept the fact that no Indian reservations remain in the State of Oklahoma.[1] The result seems to be some form of "social

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[1] Senator Elmer Thomas, D-Oklahoma, was a member of the Senate Committee on Indian Affairs. After hearing the Commissioner's speech regarding the Indian Reorganization Act (IRA) in 1934, Senator Thomas opined as follows:

> I can hardly see where it (the IRA) could operate in a State like mine where the Indians are all scattered out among the whites and **they have no reservation**, and they could not get them into a community without you would go and buy land and put them on it. Then they would be surrounded very likely with thickly populated white section with whom they would trade and associate. I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly-settled population. (emphasis added).

John Collier, Commissioner of Indian Affairs, *Memorandum of Explanation* (regarding S. 2755), p. 145, hearing before the United States Senate Committee on Indian Affairs, February 27, 1934. Senator Morris Sheppard, D-Texas, also on the Senate Committee on Indian Affairs, stated in response to the Commissioner's speech that in Oklahoma, he did not think "we could look forward to building up huge reservations such as we have granted to the Indians in the past." *Id.* at 157. In 1940, in the Foreword to Felix S. Cohen, *Handbook of Federal Indian Law* (1942), Secretary of the Interior Harold Ickes wrote in support of the IRA, "[t]he

justice" created out of whole cloth rather than a continuation of the solid precedents the Court has established over the last 100 years or more.

¶3 The question I see presented is should I blindly follow and apply the majority opinion or do I join with Chief Justice Roberts and the dissenters in *McGirt* and recognize "the emperor has no clothes" as to the adherence to following the rule of law in the application of the *McGirt* decision?

¶4 My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had

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continued application of the allotment laws, **under which Indian wards have lost more than two-thirds of their reservation lands**, while the costs of Federal administration of these lands have steadily mounted, must be terminated." (emphasis added).

been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.

LEWIS, JUDGE, SPECIALLY CONCURRING:

¶1 I write separately to address the notion that *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020) addresses something less than subject matter jurisdiction over an Indian who commits a crime in Indian Country or over any person who commits a crime against an Indian in Indian Country. *McGirt*, of course, serves as the latest waypoint for our discussion on the treatment of criminal cases arising within the historic boundaries of Indian reservations which were granted by the United States Government many years ago. *McGirt*, 140 S.Ct. at 2460, 2480. The main issue in *McGirt* was whether those reservations were disestablished by legislative action at any point after being granted.

¶2 *McGirt* deals specifically, and exclusively, with the boundaries of the reservation granted to the Muscogee (Creek) Nation. *McGirt*, 140 S.Ct. at 2459, 2479. However, the other Indian Nations comprising the Five Civilized Tribes have historical treaties with language indistinct from the treaty between the Muscogee (Creek) Nation and the federal government. Therefore, this case involving a crime occurring within the historical boundaries of the Chickasaw Nation Reservation must be analyzed in the same manner

as the boundaries of the Muscogee (Creek) Nation Reservation. The District Court below conducted a thorough analysis and concluded that the reservation was not disestablished. I agree with this conclusion.

¶3 *McGirt* was also clear that if the reservation was not disestablished by the U.S. Congress, Oklahoma has no right to prosecute Indians for crimes committed within the historical boundaries of the Indian reservations. *McGirt*, 140 S.Ct. at 2460. Therefore, because the Chickasaw Nation Reservation was not disestablished, the State of Oklahoma has no authority to prosecute Indians for crimes committed within the boundaries of the Chickasaw Nation Reservation, nor does Oklahoma have jurisdiction over any person who commits a crime against an Indian within the boundaries of the Chickasaw Nation Reservation as was the case here. The federal government has exclusive jurisdiction over those cases. 18 U.S.C. § 1153(a).

¶4 A lack of subject matter jurisdiction leaves a court without authority to adjudicate a matter. This Court has held that subject matter jurisdiction cannot be conferred by consent, nor can it be waived, and it may be raised at any time. *Armstrong v. State*, 1926

OK CR 259, 248 P. 877, 878; *Cravatt v. State*, 1992 OK CR 6, ¶ 7, 825 P.2d 277, 280; *Magnan v. State*, 2009 OK CR 16, ¶¶ 9 & 12, 207 P.3d 397, 402 (holding that jurisdiction over major crimes in Indian Country is exclusively federal).

¶5 Because the issue in this case is one of subject matter jurisdiction, I concur that this case must be reversed and remanded with instructions to dismiss.

HUDSON, J., CONCURRING IN RESULTS:

¶1 Today's decision applies *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) to the facts of this case. I concur in the result of the majority's opinion based on the stipulations below concerning the victims' Indian status and the location of these crimes within the historic boundaries of the Chickasaw Reservation. Under *McGirt*, the State cannot prosecute Petitioner because of the Indian status of the victims and the location of this crime within Indian Country as defined by federal law. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶2 I disagree, however, with the majority's adoption as binding precedent of the District Court's finding that Congress never disestablished the Chickasaw Reservation. Here, the State took no position below on whether the Chickasaw Nation has, or had, a reservation. The State's tactic of passivity has created a legal void in this Court's ability to adjudicate properly the facts underlying Petitioner's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. We should find no abuse of discretion based on the record evidence presented.

But we should not establish as binding precedent that the Chickasaw Nation was never disestablished based on this record.

¶3 I also fully join Judge Rowland's special writing concerning the test for Indian status and the use of the term subject matter jurisdiction.

¶4 Finally, I write separately to note that *McGirt* resurrects an odd sort of Indian reservation. One where a vast network of cities and towns dominate the regional economy and provide modern cultural, social, educational and employment opportunities for all people on the reservation. Where the landscape is blanketed by modern roads and highways. Where non-Indians own property (lots of it), run businesses and make up the vast majority of inhabitants. On its face, this reservation looks like any other slice of the American heartland—one dotted with large urban centers, small rural towns and suburbs all linked by a modern infrastructure that connects its inhabitants, regardless of race (or creed), and drives a surprisingly diverse economy. This is an impressive place—a modern marvel in some ways—where Indians and non-Indians have lived and worked together since at least statehood, over a century.

¶5 *McGirt* orders us to forget all of that and instead focus on whether Congress expressly disestablished the reservation. We are told this is a cut-and-dried legal matter. One resolved by reference to treaties made with the Five Civilized Tribes dating back to the nineteenth century. Ignore that Oklahoma has continuously asserted jurisdiction over this land since statehood, let alone the modern demographics of the area.

¶6 The immediate effect under federal law is to prevent state courts from exercising criminal jurisdiction over a large swath of Greater Tulsa and much of eastern Oklahoma. Yet the effects of *McGirt* range much further. The present case illuminates some of that decision's consequences. Crime victims and their family members in this and a myriad of other cases previously prosecuted by the State can look forward to a do-over in federal court of the criminal proceedings where *McGirt* applies. And they are the lucky ones. Some cases may not be prosecuted at all by federal authorities because of issues with the statute of limitations, the loss of evidence, missing witnesses or simply the passage of time. All of this foreshadows a hugely destabilizing force to public safety in eastern Oklahoma.

¶7 *McGirt* must seem like a cruel joke for those victims and their family members who are forced to endure such extreme consequences in *their* case. One can certainly be forgiven for having difficulty seeing where—or even when—the reservation begins and ends in this new legal landscape. Today's decision on its face does little to vindicate tribal sovereignty and even less to persuade that a reservation in name only is necessary for anybody's well-being. The latter point has become painfully obvious from the growing number of cases like this one that come before this Court where non-Indian defendants are challenging their state convictions using *McGirt* because *their victims* were Indian.

¶8 Congress may have the final say on *McGirt*. In *McGirt*, the court recognized that Congress has the authority to take corrective action, up to and including disestablishment of the reservation. We shall see if any practical solution is reached as one is surely needed. In the meantime, cases like Petitioner's remain in limbo until federal authorities can work them out. Crime victims and their families are left to run the gauntlet of the criminal justice system once again, this time in federal court. And the clock is running on whether the federal

system can keep up with the large volume of new cases undoubtedly heading their way from state court.

Appendix 2

ORIGINAL

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 31 2021

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,	)	NOT FOR PUBLICATION
Petitioner,	)	
vs.	)	No. PCD-2019-124
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

ORDER STAYING ISSUANCE OF MANDATE

On March 31, 2021, Respondent filed with this Court a Motion for Leave to File Petition for Rehearing in this capital post-conviction case granting relief, *Bosse v. State*, 2021 OK CR 3. In accordance with Rules 5.5 and 3.15(A), this Court stayed issuance of mandate for twenty days from the filing and delivery of the Opinion. Rule 5.5, 3.15(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021).

Mandate in this case is hereby **STAYED** until this court issues a decision on Respondent's Motion for Leave to File Petition for Rehearing.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

31st day of March, 2021.

DANA KUEHN, Presiding Judge

SCOTT ROWLAND, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

ROBERT L. HUDSON, Judge

ATTEST:

John D. Hadden

Clerk

Appendix 3

ORIGINAL

1048396452
FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR - 7 2021
JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,	)	NOT FOR PUBLICATION
Petitioner,	)	
vs.	)	No. PCD-2019-124
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DENYING MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND DIRECTING COURT CLERK TO RETURN DOCUMENTS

On March 31, 2021, Respondent filed with this Court a Motion for Leave to File Petition for Rehearing in this capital post-conviction case granting relief, *Bosse v. State*, 2021 OK CR 3.

As Respondent admits, this Court's Rule 5.5 prohibits this filing. Rule 5.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). Once this Court has rendered its decision in a post-conviction appeal that decision shall constitute a final order. A petition for rehearing is not allowed, and we will not review such a request.[1] The Clerk of this Court is directed to return Respondent's

[1] The State argues that application of this rule is unfair because it is "seemingly happenstance" that these issues were first raised in a post-conviction proceeding. However, this Court notes that the State, as a party to the case, chose this case in which to raise these issues.

documents, and to transmit a copy of this order to the District Court of McLain County, the Honorable Leah Edwards, District Judge; the Court Clerk of McLain County; counsel of record and Respondent.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th day of April, 2021.

DANA KUEHN, Presiding Judge

SCOTT ROWLAND, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

ROBERT L. HUDSON, Judge

ATTEST:

John D. Hadden

Clerk

Appendix 4

ORIGINAL

1048396487

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR - 7 2021
JOHN D. HADDEN
CLERK

TO: JOHN HADDEN, CLERK
THE COURT OF CRIMINAL APPEALS

ORDER FOR MANDATE TO ISSUE

Now, on the 7th of April, 2021, the Clerk of this Court is hereby ordered to issue the mandate in the following styled and numbered cause:

Case No.	Case Name
PCD-2019-124	Bosse, Shaun Michael
F-2018-340	Krafft, Jacob

WITNESS MY HAND AND THE SEAL OF THIS COURT this 7th day of April, 2021.

DANA KUEHN, Presiding Judge

ATTEST:

John D. Hadden
Clerk

Appendix 5

ORIGINAL

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR - 9 2021

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE, Petitioner, vs. THE STATE OF OKLAHOMA, Respondent.	NOT FOR PUBLICATION No. PCD-2019-124

ORDER GRANTING EMERGENCY MOTION TO TEMPORARILY RECALL THE MANDATE PENDING ORAL ARGUMENT

On April 7, 2021, this Court issued the mandate in this capital post-conviction case granting relief, *Bosse v. State*, 2021 OK CR 3. Respondent then filed with this Court a motion to recall the mandate. On April 8, 2021, we set that motion for oral argument on Thursday, April 15, 2021, at 10:00 a.m.

On April 8, 2021, Respondent filed an emergency motion to temporarily recall the mandate pending oral argument in this Court. Respondent's request to temporarily recall the mandate pending oral argument in this Court is **GRANTED**. The Clerk of this Court is directed to transmit a copy of this order to the District Court of McLain County, the Honorable Leah Edwards, District Judge; the Court Clerk of McLain County; counsel of record, amicus curiae, and Respondent.

IT IS SO ORDERED.

WITNESS MY HAND AND THE SEAL OF THIS COURT this 9th day of April, 2021.

DANA KUEHN, Presiding Judge

ATTEST:

John D. Hadden
Clerk

Appendix 6

ORIGINAL

1048396808
FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 15 2021
JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,	)	
	)	NOT FOR PUBLICATION
Petitioner,	)	
vs.	)	No. PCD-2019-124
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER STAYING ISSUANCE OF MANDATE

On April 7, 2021, Respondent filed with this Court a motion to recall the mandate in this capital post-conviction case granting relief, *Bosse v. State*, 2021 OK CR 3. Oral argument was heard on this request on April 15, 2021. Respondent's request is **GRANTED**. This Court hereby stays issuance of the mandate for forty-five (45) days from the date of this Order. Mandate will automatically issue at the end of forty-five days.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 15th day of April, 2021.

DANA KUEHN, Presiding Judge

SCOTT ROWLAND, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

Robert L. Hudson CIP/DIP writing attached.

ROBERT L. HUDSON, Judge

ATTEST:

John D. Hadden

Clerk

HUDSON, J., : CONCURRING IN PART/DISSENTING IN PART

I concur in today's decision to grant a stay of mandate for forty-five days. However, I would go further and continue the stay of mandate for the pendency of the State's certiorari appeal to the United States Supreme Court.