No. 20A161
CAPITAL CASE

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA
Applicant,

v.

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

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

Susan M. Otto
FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF OKLAHOMA
Emma V. Rolls
ASSISTANT FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF OKLAHOMA
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
(405) 609-5975
susan_otto@fd.org
emma_rolls@fd.org

Zachary C. Schauf
Counsel of Record
Allison M. Tjemsland
Victoria Hall-Palerm
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000
zschauf@jenner.com

Counsel for Respondent

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE TENTH CIRCUIT:

In *McGirt v. Oklahoma* and *Sharp v. Murphy*, Oklahoma asked this Court to ratify its century of exercising criminal jurisdiction over Eastern Oklahoma's reservations, basing its argument in no small part on the effects of an adverse decision on existing convictions. Oklahoma explained that a "mountain of precedent in Oklahoma hold[s] that collateral challenges to subject-matter jurisdiction … can be raised at any time." Okla. *Murphy* Suppl. Reply Br. 7; *see* Okla. *McGirt* Br. 43. And the convictions that an adverse ruling would invalidate, it said, included "crimes committed against Indians" by non-Indians, "which the state would not have jurisdiction over." *McGirt* Arg. Tr. 54.

Oklahoma did not make those statements lightly: It understood that the State might lose and need to defend existing convictions. Oklahoma made those statements because they were so obviously *true* as to be no concession at all. Yet Oklahoma now seeks extraordinary relief simply because the Oklahoma Court of Criminal Appeals ("OCCA") held exactly what the State told this Court that it would hold. Oklahoma's arguments lack merit, and its application should be denied.

Oklahoma's first argument seeks review of a question the OCCA did not decide. The State intends to petition on whether "federal law prohibit[s] … post-conviction procedural bars" on *McGirt* claims. App. 2.[1] The OCCA, however, did not address that issue. It interpreted *state law* to allow Mr. Bosse's claim to proceed, in a holding this Court lacks jurisdiction to review. Oklahoma's argument that the OCCA grounded its

[1] "App. _" is Oklahoma's Application to Stay Mandate; "RA-_" is Respondent's Appendix filed with this brief.

decision in federal law—based on one citation to *Gonzalez v. Thaler*—is pure invention. Mr. Bosse never argued that federal law prevented the OCCA from imposing procedural bars. He had no need: For a century, Oklahoma law has recognized that challenges like his cannot be waived. The OCCA then rejected the State's "procedural bar" arguments in two decisions in Mr. Bosse's case—with the first decision citing no federal law and the second reaffirming the first while quoting *Gonzalez* for a boilerplate proposition (that subject-matter jurisdiction is non-waivable). Indeed, the OCCA has since reiterated in a different case that "subject matter jurisdiction is never waived under Oklahoma law," again citing no federal case. *Ryder v. State*, No. PCD-2020-613, ¶5 & n.2 (RA-193–94). On no fair reading has the OCCA adopted the "federal law" rule the State imagines.

This Court is no more likely to grant, or reverse, on Oklahoma's second argument. The State asks this Court to hold that "states have concurrent jurisdiction" over crimes against Indians by non-Indians, which Oklahoma pitches as an "open question[]." App. 1. But for 125 years, this Court's law has been the opposite. The Court recognized in 1896 that States lack jurisdiction over crimes "by … Indians or against Indians," *Draper v. United States*, 164 U.S. 240, 247 (1896); reiterated as much "[u]pon full consideration" in 1913, *Donnelly v. United States*, 228 U.S. 243, 271 (1913); and in 1946 explained again that "the United States, rather than … [the State], ha[s] jurisdiction over offenses committed" in Indian country "by one who is not an Indian against one who is," *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946). Meanwhile, Congress embedded this understanding in statute: It enacted Oklahoma's Enabling Act against the backdrop of *Draper*, reenacted the General Crimes Act when *Williams* was hot off the presses, and

in Public Law 280 (among other statutes) provided States jurisdiction over crimes "by or against Indians"—which would be incoherent if States *already* had such jurisdiction.

Trying to flip the script from its *McGirt* loss, Oklahoma claims to champion the principle that "the text of statutes controls" over "longstanding assumptions." App. 18. But in fact, Oklahoma's position is *McGirt* all over: Once more, it is trying to exercise jurisdiction over Indian reservations that Congress never conferred. To dodge that fact, Oklahoma claims that it has jurisdiction unless an "explicit[]" statement in the General Crimes Act overcomes the "strong presumption against preemption." App. 18, 20. In the Indian-country context, however, this Court has held the very opposite and "rejected the proposition that in order to find … state law to have been preempted …, an express congressional statement … is required." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). Under the Indian-law preemption principles that apply here, *Draper*, *Donnelly*, and *Williams* correctly recognize that unless Congress has conferred criminal jurisdiction, States have none.

Oklahoma also fails to show irreparable harm. Under the judgment below, Mr. Bosse will be turned over to federal officials, who will detain and prosecute him. And if this Court granted and reversed, it would reinstate Mr. Bosse's convictions and sentence. Oklahoma's supposed harm—based on the speculation that the United States may not return Mr. Bosse based on "oppos[ition] to the death penalty," App. 24—ignores that the federal government would be *required* to return him. The State also invokes concerns about other cases where, unlike here, the United States may not detain or prosecute. But if that is the worry, the State should seek stays *there*. It has nothing to do with Mr. Bosse.

STATEMENT OF THE CASE

This case arises out of *McGirt*. This Court has long recognized that "[o]nly Congress can divest a reservation of its land." 140 S. Ct. 2452, 2462 (2020). Oklahoma, however, exercised jurisdiction over the Creek Nation's reservation for a century even though Congress never passed any statute disestablishing it. *Id.* at 2481. In *McGirt* and *Murphy*, Oklahoma urged this Court to find that the Creek reservation had been disestablished in part based on the "consequences" of correcting its century-long practice. *Id.* at 2479. It explained that an adverse holding would apply to reservations of "other tribes." *Id.* It emphasized that such a decision could reopen many "state convictions"—distinguishing "federal habeas" (where relief would face "[b]arriers") from "*state* relief," where it suggested that "there are no barriers." Okla. *Murphy* Suppl. Reply Br. 7 (emphasis in original); *see McGirt* Br. 43; Okla. *Murphy* Suppl. Br. 3 n.1. And Oklahoma observed that an adverse ruling would invalidate convictions not just for Indian defendants but for "crimes committed against Indians" by non-Indians, "which the state would not have jurisdiction over." *McGirt* Arg. Tr. 54; *see Murphy* Pet. 18 ("States lack criminal … jurisdiction … if either the defendant or victim is an Indian.").

This case concerns that scenario: A conviction for a crime on another Eastern Oklahoma reservation (of the Chickasaw Nation), challenged via a successive state post-conviction action, involving a non-Indian defendant and Indian victims. Oklahoma's courts resolved that challenge exactly as Oklahoma told this Court they would.

In 2012, a jury convicted Mr. Bosse of murder and arson in state court. *Bosse v. State*, 360 P.3d 1203, 1211–14 (Okla. Crim. App. 2015). His conviction was affirmed on

direct appeal, and his first application for post-conviction relief was denied. In February 2019, with *Murphy* pending, Mr. Bosse filed a successive state post-conviction action. Pet.'s Second APCR (RA-1). He challenged his conviction on the ground that the Chickasaw reservation had not been disestablished and that the federal government had exclusive jurisdiction. Mr. Bosse argued that under Oklahoma law, jurisdictional challenges "can … be raised at any time, even if not preserved." *Id.* at 16 (RA-16) (citing, *e.g.*, *Buis v. State*, 792 P.2d 427, 428–29 (Okla. Crim. App. 1990)). The OCCA held the application in abeyance. Order Holding Case in Abeyance (RA-68).

After *McGirt*, the OCCA remanded to the district court for an evidentiary hearing. Before doing so, it considered and rejected Oklahoma's argument that Mr. Bosse's challenge was not "properly before the Court" because it did not satisfy the requirements of Title 22, § 1089(D)(8)(a) of the Oklahoma Statutes. *See* Remand Order at 2 (RA-141); *cf.* Okla. Resp. at 22–49 (RA-105–32) (Oklahoma's procedural arguments contesting Mr. Bosse's claim that his challenge could "'be raised at any time' under Oklahoma law"). On remand, the district court found that the alleged crimes were committed within the Chickasaw reservation, that the victims were members of the Chickasaw Nation, and that the reservation had not been disestablished. Opinion Granting Post-Conviction Relief ("PCR Op.") ¶¶ 6–12 (attached as Appendix 1 to Oklahoma's Application to Stay Mandate).

On March 11, 2021, the OCCA adopted the district court's factual conclusions and concluded that Oklahoma courts lacked jurisdiction. *Id.* ¶ 23. Again, Oklahoma urged the OCCA "to consider this case barred for a variety of procedural reasons." *Id.* ¶ 20.

The OCCA, however, observed that it had already "resolved these issues in … remanding," again citing Title 22, § 1089(D)(8)(a) of the Oklahoma Statutes and emphasizing that it had repeatedly held that "the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction." *Id.* ¶¶ 20–21 (citing *Wackerly v. State*, 237 P.3d 795, 797 (Okla. Crim. App. 1998); *Wallace v. State*, 935 P.2d 366, 372 (Okla. Crim. App. 1997); and *Murphy v. State*, 124 P.3d 1198, 1200 (Okla. Crim. App. 2005)). The OCCA cited only Oklahoma statutes and cases applying those statutes, aside from one citation to *Gonzalez* for the proposition that "[s]ubject-matter jurisdiction can never be waived or forfeited." *Id.* ¶21.

The OCCA also rejected Oklahoma's argument that it had "concurrent jurisdiction" over crimes by non-Indians, like Mr. Bosse, against Indians. The OCCA has long "held that federal law preempts state jurisdiction over crimes committed by or against an Indian in Indian Country." *Id.* ¶ 23. The OCCA stressed that Congress has permitted some states to exercise jurisdiction over "offenses … committed by or against Indians on reservations" and that these grants "would have been unnecessary if … state … governments already have concurrent jurisdiction." *Id.* ¶¶ 25, 27.

The OCCA thus granted Mr. Bosse's petition. *Id.* ¶ 29. On April 7, 2021, it denied the State's motion to file a petition for rehearing and issued the mandate on April 7, 2021. Oklahoma then filed an emergency motion to recall the mandate. On April 15, the OCCA granted a 45-day stay of the mandate (to June 1, 2021) to permit the State to seek a stay from this Court. This application followed.

ARGUMENT

"Stays pending appeal to this Court are granted only in extraordinary circumstances," *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers), and "[d]enial … is the norm," *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). This is no extraordinary case. Oklahoma's two arguments are both splitless and meritless, and it has entirely failed to show irreparable harm.

I. The Court Is Unlikely To Grant Or Reverse Based On Oklahoma's Argument About Whether "Federal Law Permits State Procedural Bars Of *McGirt*-Related Claims," Which The OCCA Did Not Address.

Oklahoma first intends to petition on whether "federal law prohibit[s] the State from imposing … post-conviction procedural bars" on *McGirt* claims. App. 2. The Court is not likely to grant or reverse on that issue—because the OCCA did not *decide* it. The OCCA held only that state law permitted Mr. Bosse's petition. Oklahoma builds its argument on a flyby citation to *Gonzalez* that does not remotely transform the OCCA's state-law opinion into a federal-law prohibition on state procedural bars. This Court is "without power" to review the OCCA's interpretation of state law. *Herb v. Pitcairn*, 324 U.S. 117, 123–24 (1945); *cf. Michigan v. Long*, 463 U.S. 1032, 1037–38 (1982).

A. The OCCA Applied State Law To Allow Mr. Bosse's Petition To Proceed.

For a century, Oklahoma courts have applied Oklahoma law to hold that claims like Mr. Bosse's cannot be waived and may be raised without regard to normal limits on successive post-conviction actions. In *Wackerly v. State*, 237 P.3d 795 (Okla. Crim. App. 2010), the OCCA explained that even though state law normally bars successive petitions, "we have recognized that 'issues of subject matter jurisdiction are never waived'" and

may be raised at any time under Oklahoma law.[2] And while the State questions whether Indian-country jurisdictional claims challenge "subject matter jurisdiction" as *this Court* understands that term, App. 10–11, the OCCA has construed *Oklahoma* law to except such claims from normal preservation rules. *See Magnan v. State*, 207 P.3d 397, 402 (Okla. Crim. App. 2009) (applying rule that "subject matter jurisdiction" is nonwaivable to claim that "crime scene is in Indian Country and … beyond the State's jurisdiction"). Indeed, *Murphy* came before this Court only because the OCCA permitted a successive post-conviction action. *Murphy v. Royal*, 875 F.3d 896, 907 n.5 (10th Cir. 2017).

This is the "mountain of precedent" Oklahoma drew to this Court's attention in *Murphy* and *McGirt*. *Murphy* Suppl. Reply Br. 7; *see Murphy* Arg. Tr. 76 (statement that "habeas is not going to help" because there "are no apparent procedural bars in state court"); Okla. *McGirt* Br. 43 ("Oklahoma allows collateral challenges to subject-matter jurisdiction at any time"). Today, Oklahoma makes much of *McGirt*'s observation that "later proceedings crafted to account for" "reliance interest[s]" would consider doctrines such as "procedural bars, res judicata, statutes of repose, and laches." 140 S. Ct. at 2481. But that observation concerned a broad array of supposedly "significant consequences" that Oklahoma invoked in *McGirt*, including "for civil and regulatory law." *Id.* at 2480.

---

[2] 237 P.3d at 797 (quoting *Wallace v. State*, 935 P.2d 366, 372 (Okla. Crim. App. 1997) and citing 22 O.S. § 1089(D) and Oklahoma Court of Criminal Appeals Rule 9.7(G)(3)); *see id.* (applying rule to entertain a successive post-conviction action challenging whether crime "occurred within the 'special maritime and territorial jurisdiction of the United States,' as defined in 18 U.S.C. § 7(3)"); *Armstrong v. State*, 248 P. 877, 878 (Okla. Crim. App. 1926).

This Court certainly did not provide the State any "assurances" about how Oklahoma courts would interpret Oklahoma post-conviction law. App. 2.

After *McGirt*, the OCCA duly considered the State's invitation to break with its precedent and instead reaffirmed its state-law holding that Indian-country jurisdictional claims may be raised at any time. Mr. Bosse's petition invoked the OCCA's decisions in *Magnan* and *Murphy* applying state law to entertain unpreserved jurisdictional objections in "Indian Country cases." Pet.'s Second APCR at 16 (RA-16). In response, the State raised a slew of "procedural defenses" under Oklahoma law, including the limitations on successive petitions in 22 O.S. § 1089(D)(8)(a) and laches. State Response at 22–49 (RA-105–32). It acknowledged that Mr. Bosse's position "finds some support in [the OCCA's] case law" but "urge[d] [the OCCA] to reconsider" its rule "that jurisdictional challenges escape the restrictions of § 1089(D)(8)." *Id.* at 30, 38 (RA-113, RA-121).

The OCCA, however, applied Oklahoma law to reject those arguments. In its post-*McGirt* remand order, it found that Mr. Bosse's challenge was "properly before this court" under "22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a)," explaining that "[t]he issue could not have been previously presented because the legal basis for the claim was unavailable." Remand Order at 2 (RA-141). And after remand, the same thing happened again. Again, the State urged the OCCA to "reconsider" its "previously rejected" arguments based on "the limitations in 22 O.S. 2011, § 1089(D)(8), on successive capital post-conviction applications; the 60-day rule in Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2011); and the doctrine of laches (O.R.

43-70)." Okla. Post-Hearing Br. 16–17 (RA-166–67). It even filed a supplemental brief urging the OCCA to conform its interpretation of "Section 1089" to a "Tenth Circuit[] decision" concerning "28 U.S.C. § 2244(b)(2)(A)." Okla. Suppl. Br. 3-4 (RA-176–77). Mr. Bosse duly responded that he had not "ever claimed" to have invoked the federal law that the Tenth Circuit addressed and instead grounded his position in the OCCA's cases applying Oklahoma law. Bosse Resp. to Suppl. Br. 4–5 (RA-187–88).

In its final decision, the OCCA reaffirmed its prior conclusions. It again recited Oklahoma's arguments that the "Court [should] consider this case barred" based on 22 O.S. § 1089(D), Rule 9.7(G)(3), and "laches." PCR Op. ¶ 20. And again, the OCCA rejected those arguments. First, it reaffirmed its prior holding that these limitations did not apply because "[t]he 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)." *Id.* (quoting Remand Order at 2)). Second, the OCCA pointed to its decisions in *Wackerly*, *Wallace*, and *Murphy*, which had "repeatedly held that the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction." *Id.* ¶ 21.

B. Oklahoma's Arguments Lack Merit.

When set against the reality of what happened below, Oklahoma's arguments crumble. It asks this Court to address whether "federal law prohibit[s] the State from imposing … post-conviction procedural bars" on *McGirt* claims. App. 2. As just shown, however, the OCCA did not decide that issue. Mr. Bosse never argued that federal law *precluded* Oklahoma from imposing procedural bars. He had no need to, given the clear

state law permitting his claims. So, naturally, the State never addressed whether federal law would prohibit Oklahoma from imposing such bars. Instead, it recognized that the OCCA had previously interpreted Oklahoma law not to impose such bars and asked the OCCA to "reconsider" that law. *See* State Resp. at 38 (RA-121); Okla. Post-Hearing Br. 17 (RA-167). All the while, the parties distinguished between federal habeas law (with its more restrictive rules) and Oklahoma law (with its more liberal rules). *See* State Resp. at 34–38 (RA-117–21); Bosse Resp. to Suppl. Br. 5–6 (RA-188–89). And when the OCCA resolved these issues, it grounded its holding in Oklahoma cases and Oklahoma law. Hence, to say that the OCCA's decision rested on an "adequate and independent state ground," *Long*, 463 U.S. at 1038, would understate the point. Its decision rested *only* on state law.

The OCCA's citation to *Gonzalez v. Thaler*—for the boilerplate proposition that "[s]ubject-matter jurisdiction can never be waived," PCR Op. ¶ 21—does not suggest that the OCCA believed that federal law *compelled* its result. Not only did no party ever *make* that argument, but *Gonzalez* (2012) was decided after *Wackerly* (2010), *Magnan* (2009), *Murphy* (2005), and *Wallace* (1997), which were only the latest in Oklahoma's century of decisions reaching the same result. If more were needed, the OCCA's subsequent decision in *Ryder* provides it, putting beyond all doubt that the OCCA relies on "Oklahoma law" for its rule that "subject matter jurisdiction is never waived" and does not view that rule as flowing from *Gonzalez*. *Ryder*, *supra*, ¶5 & n.2 (RA-193–94).[3]

[3] Oklahoma avers that the decision below does not contain a "plain statement that [it] rests on adequate and independent state grounds." App. 11 n.8 (citing *Long*, 463 U.S. at 1041). That is not true. The OCCA's bell-clear cases would satisfy any plain-statement

With Oklahoma's mischaracterization corrected, its arguments melt away. It asserts a "conflict with courts … that have held that claims related to Indian country jurisdiction can be waived" and avers that Indian-country jurisdictional claims are not properly considered to implicate "subject matter jurisdiction." App. 8, 10. The State, however, cites only federal cases holding that certain claims may be waived as a matter of federal law. *Id.* at 8–11. The OCCA did not apply federal law, and the State cannot seek this Court's review of how the OCCA construed "Oklahoma constitutional and statutory law." *Id.* at 10. The State also points to a supposedly "curious dichotomy in which Indian country jurisdictional claims can never be waived in Oklahoma state courts but can be waived in the federal courts" when "[i]f anything, one would expect the opposite." *Id.* at 9. But that is not curious. That is federalism. If the State desires a change in Oklahoma law, it must take that request to Oklahoma courts or legislature.

With no real argument on the law, Oklahoma—as in *McGirt*—relies largely on claims that the OCCA's ruling is "consequential." App. 7, 11–14. But as in *McGirt*, it is "hard to know what to make of this self-defeating argument." 140 S. Ct. at 2479. If the OCCA's decision below permits successive state post-conviction applications based on *McGirt*, that is because the OCCA interprets Oklahoma law to provide for that result.

---

requirement. But regardless, *Long*'s rule does not apply when a decision "fairly appears" to rest exclusively on *state* law. 463 U.S. at 1040–41. Rather, it applies when (for example) a state court interprets state and federal constitutional protections that are arguably coextensive or intertwined. *E.g.*, *Florida v. Powell*, 559 U.S. 50, 55 (2010) (state and federal *Miranda* warnings); *Ohio v. Robinette*, 519 U.S. 33, 36–37 (1996) (state and federal Fourth Amendment). That is not the case here.

II. The Court Is Unlikely To Grant Or Reverse Based On The Argument That States Have Concurrent Jurisdiction Over Indian-Country Crimes By Non-Indians Against Indians.

Oklahoma says *McGirt* will raise "open questions in Indian law." App. 1. Perhaps. But Oklahoma's concurrent-jurisdiction argument is not one. From 1896 and through *McGirt* itself, this Court has recognized that in Indian country, federal courts have exclusive jurisdiction over "crimes … by … Indians or against Indians." *Draper*, 164 U.S. at 247. Oklahoma certainly has not shown a reasonable possibility of a grant or a significant possibility of reversal. Lower courts have uniformly rejected its position, and Oklahoma's preemption argument squarely contradicts this Court's cases.

A. This Court's Cases And Congress's Statutes Have Decisively Rejected Oklahoma's Concurrent-Jurisdiction Argument.

In rejecting Oklahoma's concurrent-jurisdiction argument, the OCCA did not rely on "a longstanding assumption" or mere "dicta intimat[ing] that states lack such jurisdiction." App. 2, 18. This Court's cases have decisively resolved the question Oklahoma poses, in decisions that directly addressed how to draw the relevant jurisdictional lines. More than that, Congress then embedded the same understanding in the statutes that apply both to Oklahoma specifically and to Indian country generally.

This Court first addressed this issue 125 years ago. *Draper* considered how to fit this Court's decision in *United States v. McBratney*, 104 U.S. 622 (1881)—which applied the "equality of statehood" principle to hold that States have jurisdiction over crimes on reservations by non-Indians against non-Indians—with Montana's statehood act. 164 U.S. at 244. That act stipulated that "Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." *Id.* (quoting 25 Stat. 676).

To reconcile the two, this Court set a clear rule: Under *McBratney*, States had jurisdiction of crimes by non-Indians against non-Indians. *Id.* at 243-44. But as to crimes "by … Indians, or against Indians," *McBratney*'s holding—that "state courts were vested with jurisdiction"—did not apply. *Id.* at 242–43; *see id.* at 245.

While *Draper* did not concern a non-Indian defendant and an Indian victim, this Court considered just such a case in *Donnelly v. United States*, 228 U.S. 243 (1913). There, the challenger again argued that a State's admission to the Union changed the jurisdictional balance, leaving the federal government with exclusive jurisdiction only over crimes by Indians. But this Court "[u]pon full consideration" was "satisfied that offenses committed *by or against Indians* are not within the principle of the *McBratney*." *Id.* at 271. Invoking the General Crimes Act, the Court explained that it had sustained exclusive federal jurisdiction "as to crimes committed *by* the Indians … upon the ground that the Indian tribes are the wards of the [N]ation," vesting in the federal government exclusive responsibility for vindicating wrongs concerning Indians. *Id.* at 271–72. This Court explained that "[t]his same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood." *Id.* at 272.

The Court reaffirmed the same rule in *Williams v. United States*, 327 U.S. 711 (1946), another General Crimes Act prosecution of a non-Indian defendant for a crime against an Indian. *Williams* explained that "[w]hile the laws and courts of … Arizona may have jurisdiction over offenses committed on this reservation between persons who

are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there …, by one who is not an Indian against one who is an Indian." *Id.* at 714 & n.10 (footnote omitted).

This Court has reiterated that conclusion many times. In *Williams v. Lee*, 358 U.S. 217 (1959), the Court explained that it had permitted States "to try non-Indians who committed crimes against each other"—but that "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *Id.* at 220. In *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), this Court reaffirmed that "criminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has 'expressly provided that State laws shall apply.'" *Id.* at 470–71 (quoting *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 171 (1973)). And in *McGirt*, the Court explained that the General Crimes Act "provides that federal law applies to a broad[] range of crimes by *or against* Indians" and "States are *otherwise* free to apply their criminal laws in cases of non-Indian *victims and defendants*." 140 S. Ct. at 2479 (emphases added).

Meanwhile, Congress lodged this understanding in statute. When this Court's cases have established a provision's meaning and effect, it "presume[s] that when Congress reenact[s] the same language …, it adopt[s] the earlier judicial construction." *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633–34 (2019). Here, Congress has done that twice. First, after *Draper* construed the Montana statehood act to yield the rule that state jurisdiction did not extend to crimes "by … Indians or against

Indians," 164 U.S. at 244–45, Congress in 1906 used near-identical language in the Oklahoma Enabling Act. *Compare* Act of Feb. 22, 1880, ch. 180, § 4, 25 Stat. 676, *with* Act of June 16, 1906, ch. 3335, § 25, 34 Stat. 267. Then, in 1948, just two years after *Williams*, Congress reenacted the General Crimes Act. All of this underscores just how strained is Oklahoma's claim that this Court has never "squarely" resolved the argument it presents (which is true only in the narrow sense that it has not reversed a state-court conviction of a non-Indian defendant based on lack of jurisdiction). App. 2. Congress's statutes are no less binding than this Court's cases—and here, Congress's statutes put the matter beyond doubt.

Ever since, Congress has read its statutes, and this Court's cases, in the same way. It has passed statute after statute that would become nonsensical if, as Oklahoma says, States *already* had jurisdiction over crimes by non-Indians against Indians. In 1940, Congress conferred on Kansas "[j]urisdiction … over offenses committed by or against Indians on Indian reservations." 18 U.S.C. § 3243. As this Court has explained, that act was "the first major grant of jurisdiction to a State over offenses *involving Indians* committed in Indian country." *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) (emphasis added). Statutes with near-identical language quickly followed for North Dakota, Iowa, and New York, all conferring jurisdiction over "offenses by or against Indians."[4] Then, in 1953, Congress passed Public Law 280, which conferred the same jurisdiction on more States and gave the option to assume such jurisdiction to any other "State *not having*

[4] *See* Act of May 31, 1946, ch. 279, 60 Stat. 229; Act of June 30, 1948, ch. 759, 62 Stat. 1161; Act of July 2, 1948, ch. 809, 62 Stat. 1224; Act of Oct. 5, 1949, ch. 604, 63 Stat. 705.

jurisdiction over criminal offenses committed by or against Indians" in Indian country. 25 U.S.C. § 1321(a)(1) (emphasis added); Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, §§ 2, 7, 67 Stat. 588. Later, Congress amended Public Law 280 to specify that States could obtain such jurisdiction only "with the consent of the [affected] Indian tribe." 25 U.S.C. § 1321(a)(1). These statutes become incoherent if Kansas and every other State *already* had jurisdiction over "offenses … against Indians"; if there was *no* "State not having jurisdiction over criminal offenses committed … against Indians"; and if Indian tribes *never* had any choice as to whether to consent to such jurisdiction. *Id.* Instead, Congress understood that States lacked such jurisdiction unless Congress provided it.[5]

B. Oklahoma's Arguments Are Not Likely To Yield A Grant Or Reversal.

Even if Oklahoma's position presented an open question, none of its arguments suggest this Court is likely to grant or reverse. The typical signal of a cert-worthy issue is a division of authority. Oklahoma points to none. That is because lower courts have uniformly held that "federal courts have exclusive jurisdiction over an offense committed in Indian country by a non-Indian against the person or property of an Indian." *State v. Larson*, 455 N.W.2d 600, 601 (S.D. 1990) (citing 18 U.S.C. § 1152); *see State v. Flint*, 756

[5] Oklahoma tells this Court not to worry that its reading renders the phrase "against Indians" surplusage because, supposedly, Public Law 280's civil provisions contain their own surplusage. App. 23 n.13. The civil provisions authorize state jurisdiction "over civil causes of action between Indians or *to which Indians are parties*." 25 U.S.C. § 1322(a) (emphasis added). The italicized language, Oklahoma says, is redundant in just the same way as the phrase "against Indians"—because "even without Public Law 280, States generally have jurisdiction over civil actions with Indians as plaintiffs." App. 23 n.13. But Oklahoma's comparison runs aground on the text. The phrase "to which Indians are parties" is necessary to confer state jurisdiction over cases with Indian *defendants*. This phrase thus has work to do and at worst is overinclusive. By contrast, under Oklahoma's position, the phrase "against Indians" *never* has any effect.

P.2d 324, 326 (Ariz. Ct. App. 1988) ("the state has no jurisdiction" as to "crimes … by white men against the persons or property of Indian tribes while occupying reservations"), *cert. denied*, 492 U.S. 911 (1989); *State v. Greenwalt*, 663 P.2d 1178, 1182 (Mont. 1983) (rejecting "State's assertion of concurrent jurisdiction … over crimes on the reservation committed by non-Indians against Indians"); *State v. Kuntz*, 66 N.W.2d 531, 532 (N.D. 1954) (state courts "do not have jurisdiction over crimes committed on the Fort Berthold Reservation by one who is not an Indian against one who is an Indian.").[6]

Instead, Oklahoma rests its certiorari argument on the claim that the OCCA got it wrong and that the issue has significant "practical importance" (due largely to Oklahoma's century-long practice of exercising jurisdiction over Indian country that Congress never conferred). Oklahoma's argument, however, collapses on inspection.

First, Oklahoma premises its entire argument on an approach to Indian-country preemption that this Court's cases foreclose. Citing *Wyeth v. Levine*—which concerned preemption under the Food, Drug, and Cosmetic Act—Oklahoma argues that it has jurisdiction unless an "explicit[]" statement in the General Crimes Act overcomes the "strong presumption against preemption of … state police powers." App. 18, 20. In the Indian-country context, however, this Court has "rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an

[6] *Accord United States v. Bruce*, 394 F.3d 1215, 1221 (9th Cir. 2005) ("Crimes in which the victim, but not the perpetrator, is Indian are subject to (a) federal jurisdiction under § 1152, as well as pursuant to federal criminal laws of general applicability, and (b) state jurisdiction where authorized by Congress."); *St. Cloud v. United States*, 702 F. Supp. 1456, 1459 (D.S.D. 1988) ("If the defendant is a non-Indian and the victim is an Indian, federal courts have exclusive jurisdiction over the offense.").

express congressional statement to that effect is required." *Bracker*, 448 U.S. at 144. That is because, in Indian country, the baseline is *not* that States may exercise their traditional police powers but that state laws have "no force." *Williams*, 358 U.S. at 219 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)). While this Court has "modified" *Worcester*'s broad principle, *id.*, the starting point remains that "the States have no power to regulate the affairs of Indians on a reservation" unless Congress confers authority. *Id.* at 220; *see Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976). Hence, the "pre-emption analysis … gives effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes … and to regulate and protect the Indians and the property against … interference." *Bryan*, 426 U.S. at 376 n.2.

Second, under this Court's *actual* approach to Indian-country preemption, the rule of exclusive federal jurisdiction—recognized in *Draper*, *Donnelly*, and *Williams*—is clearly correct. From the start, this Court has understood criminal laws to apply to "offenses committed by Indians against white persons, and by white persons against Indians" in Indian country only when "specifically enumerated and defined." *Ex parte Kan-gi-shun-ca* (*Crow Dog*), 109 U.S. 556, 571 (1883); *see Williams*, 358 U.S. at 220 ("if [a] crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive"). In the General Crimes Act, Congress provided for federal jurisdiction. But it never granted States such general jurisdiction.[7]

[7] This Court's cases also foreclose Oklahoma's argument that, in "the closest analogous civil context," this Court has "approved the exercise of jurisdiction by state courts over claims by Indians against non-Indian." App. 21–22 (quoting *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, P.C.*, 467 U.S. 138, 148–49 (1984)). The civil context differs in a critical respect. There, Indians voluntary enter state courts as private

Meanwhile, state jurisdiction would interfere with the federal government's plenary and excusive role. As *Donnelly* explained, "Indian tribes are the wards of the nation," and reservations were "set apart for the very purpose of segregating [Indians] from the whites and others not of Indian blood." 228 U.S. at 272. It thus falls to the federal government, as the "guardians of the tribes[]," *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 783 (1991), to enforce this separation and punish offenders who harm its "wards." Here, in the 1855 Treaty of Washington, the federal government—and no one else—promised to "protect the … Chickasaws from … white persons not subject to their jurisdiction and laws." Treaty of Washington, June 22, 1855, art. 14, 11 Stat. 611. And it did so after covenanting that it would "secure" the Chickasaw Nation "from, and against, all laws except such as … may be enacted in their own National Councils … and … by Congress" (including that "no … State shall ever have a right to pass laws for [their] government").[8] The federal government thus has the duty and the responsibility to decide whether to prosecute and what charges appropriately redress the injuries its wards have incurred. While Oklahoma claims today that it is equally able to

---

persons. *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, P.C.*, 467 U.S. at 148–49. Here, Oklahoma proceeds as the sovereign enforcer of public laws, in derogation of the "plenary and exclusive power of the Federal Government … to regulate and protect the Indians." *Bryan*, 426 U.S. at 376 n.2. That is why, in *Williams*, this Court recognized that "suits by Indians against outsiders in state courts have been sanctioned" but that "if [a] crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." 358 U.S. at 219-20.

[8] Treaty of Dancing Rabbit Creek, art. 4, Sept. 27, 1830, 7 Stat. 333; *see* Treaty of Doaksville, art. 1, Jan. 18, 1837, 11 Stat. 573 (extending the "rights and privileges" accorded by the 1830 treaty, which concerned the Choctaw Nation, to the Chickasaw).

"vigorously defend the rights of Indian victims," App. 16, Congress did not vest in Oklahoma the power to make that unilateral judgment.[9]

Third, Oklahoma's arguments contradict this Court's cases interpreting the neighboring jurisdictional grant in the Major Crimes Act, 18 U.S.C. § 1153. This Court has held that the Major Crimes Act "ordinarily is pre-emptive of state jurisdiction when it applies." *United States v. John*, 437 U.S. 634, 651 (1978). And it has stressed that the Congress that passed the Major Crimes Act understood such a jurisdictional grant to *preclude* state jurisdiction as to crimes involving Indians. The original bill would have established federal jurisdiction over Indians committing enumerated crimes "within the boundaries of any State …, and either within *or without* an Indian reservation." *Id.* at 651 n.22 (emphasis added) (quoting 16 Cong. Rec. 934 (1885)). But Congress understood that this "language would … 'take away from State courts, whether there be a reservation in the State or not' jurisdiction over the listed crimes when committed by an Indian." *Id.* (quoting 16 Cong. Rec. 2385 (1885)). So the provision "was … amended" to apply only on reservations. *Id.* This same reasoning supports the conclusion that the neighboring General Crimes Act is preemptive (subject to *McBratney*'s rule concerning non-Indian/non-Indian crimes).[10] While this Court's approach to legislative history has

---

[9] It is irrelevant that state prosecution "does not bar a subsequent federal prosecution." App. 22. That simply means the federal government can punish non-Indian offenders *more*. But more punishment is not always better, including for the Indian community affected. And as a practical matter, recognizing concurrent state jurisdiction would mean that Oklahoma, rather than the federal government, would make the relevant charging decisions. Indeed, the entire *premise* of Oklahoma's pragmatic argument, App. 16–17, is that its position will allow the federal government to abdicate responsibility.

[10] The General Crimes Act was enacted in 1817 and has been reenacted with minor amendments several times—including in 1875, shortly before the Major Crimes Act. *See*

shifted since *John*, here the history just reinforces that Congress has acted against the backdrop of the same Indian-law preemption principles this Court has always applied.

Finally, unable to show any split or error, Oklahoma again relies on its old standby—consequences. App. 15–18. But on this issue, its claims are even more strained. Oklahoma warns about the increased workload *McGirt* has yielded for federal prosecutors. App. 16. Oklahoma admits, however, that its concurrent-jurisdiction argument affects only a sliver of this workload (20%, per its back-of-the-envelope math).

Meanwhile, Oklahoma ignores the disruptive consequences of *accepting* its argument. For 125 years, States, tribes, and individuals have structured their affairs in accordance with this Court's clear law that States lack jurisdiction over crimes against Indians in Indian country. When Public Law 280 offered all States the chance to assume jurisdiction of crimes against Indians, for example, some States accepted that invitation. But many declined. And some States that accepted jurisdiction did so only in part, or later "retroceded" jurisdiction.[11] Meanwhile, after Congress amended Public Law 280 to require tribal "consent," tribes have declined to provide consent.[12] Hence, in all the places

---

Act of Mar. 3, 1817, ch. 92, § 2, 3 Stat. 383; Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 318; *see generally United States v. Cowboy*, 694 F.2d 1228, 1232–33 (10th Cir. 1982).

[11] Carole Goldberg, *Tribal Jurisdictional Status Analysis*, Tribal Ct. Clearinghouse, http://www.tribal-institute.org/lists/tjsa.htm (last updated Feb. 16, 2010). For example, Washington State asserted Public Law 280 jurisdiction over certain areas in both 1957 and 1963 but in 2014 partially retroceded that jurisdiction. *See* 1957 Wash. Sess. Laws 941, ch. 240; 1963 Wash. Sess. Laws 346, ch. 36, codified at Wash. Rev. Code § 37.12.010; Act of Aug. 15, 1953, Pub. L. No. 83-280, § 7, 67 Stat. 588, 590; Acceptance of Retrocession of Jurisdiction for Yakama Nation, 80 Fed. Reg. 63,583, 63,583 (Oct. 20, 2015).

[12] 25 U.S.C. § 1326 (1994); Nat'l Inst. of Just., U.S. Dep't of Just., *Public Law 280 & Law Enforcement in Indian Country—Research Priorities* at 4 (Dec. 2005), https://www.ojp.gov/pdffiles1/nij/209839.pdf ("Since 1968, no tribe has consented.").

where States have not received criminal jurisdiction under Public Law 280 (or another grant), States, tribes, and individuals have proceeded on the understanding that crimes against Indians will be subject to federal prosecution and federal penalties, not the different decisions and penalties States might inflict. It would badly disrupt this understanding—and undermine tribal sovereignty—to confer on every State jurisdiction it did not accept and to which the affected Indian tribes did not consent.

III. Oklahoma Has Failed To Show Irreparable Harm.

This Court can also reject Oklahoma's application on the independent ground that it has not met its "heavy burden" to show that it "will suffer irreparable injury" absent a stay. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers); *see Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers). The judgment below's only effect is to invalidate Mr. Bosse's state sentence and send him to federal custody for trial. App. 23. Any harm Oklahoma incurs is not irreparable: If this Court somehow granted and reversed, it would reinstate Mr. Bosse's conviction and death sentence. Oklahoma would be back where it is today.

Straining for harm, Oklahoma avers that the federal government may refuse to hand Mr. Bosse over if it "oppose[s] … the death penalty." App. 24. But for this argument, the word "speculative" is too generous. The Interstate Agreement on Detainers Act ("IADA")—which Oklahoma invokes—would *require* the federal government to relinquish custody. *See* 18 U.S.C. App. 2, § 2, Art. V(e) ("At the earliest practicable time consonant with the purposes of this agreement, the prisoner *shall be returned* to the sending State." (emphasis added)). This Court presumes that executive

officials will follow the law and "properly discharge[] their official duties." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1684 (2019) (Alito, J., concurring in the judgment) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)). Oklahoma knows this presumption well, having invoked it in this Court three times in the last five years.[13] Certainly, the Court does not grant extraordinary relief by presuming the *opposite*.

Even odder is Oklahoma's "anti-shuttling" argument, which posits that the federal government could not "return[] Respondent to state custody without risking dismissal of its case *with prejudice*." App. 24. But it is mystery why Oklahoma believes this creates a problem. If this Court reinstated Mr. Bosse's state sentence, it is unclear whether the federal government would wish to continue trying Mr. Bosse. As Oklahoma elsewhere notes, the U.S. Attorney's office has many claims on its resources. App. 16–17. And if the federal government *did* wish to continue, it would just need to complete the trial, which would trigger a duty to return Mr. Bosse to Oklahoma.[14]

Unable to show any grounds for a stay in this case, Oklahoma avers that it may

---

[13] *See* Texas Br. at 6, *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540 (brief joined by Oklahoma invoking the rule that "government actors are presumed to act in good faith"); Texas Br. at 23, *Trump v. Hawaii*, No. 17-965 (same); Texas Br. at 8, *Rucho v. Common Cause*, No. 18-422 (same).

[14] *See* Writ of Habeas Corpus Ad Prosequendum, *United States v. Roof*, No. 2:15-cr-00472 (D.S.C. July 22, 2015), ECF No. 7 (ordering that the U.S. Marshals take custody from the State and further ordering that federal government "upon the conclusion of this case … shall return the defendant to" the State); Order, *Roof*, No. 2:15-cr-00472 (D.S.C. Apr. 3, 2017), ECF No. 951 (after federal conviction, ordering Roof transferred to local sheriff's office and further ordering that local sheriff's office "shall return Defendant to the custody of the United States upon conclusion of the state proceedings").

incur irreparable harm in other cases where "the statute of limitations has run" and, as a result, "criminals will be let loose while review is pending." App. 25. But if Oklahoma believes it has a better stay argument in some other case, the answer is to seek a stay *in that case*. Indeed, a stay here would not avoid those hypothetical consequences.[15] The OCCA's mandate addresses only Mr. Bosse. The State's claim that "[a]ll" its imagined consequences "can be avoided if the mandate is … stayed" here, App. 25, is fiction.

Given that Oklahoma has shown no harm, its claim that Mr. Bosse will incur "no prejudice," App. 24, is irrelevant. To obtain a stay, Oklahoma—not Mr. Bosse—"must" show "a likelihood of irreparable harm." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991). Oklahoma's claim is also untrue. Mr. Bosse has an interest in not remaining in the custody of a sovereign that lacks jurisdiction over him. More, the federal government has filed a complaint against Mr. Bosse alleging four offenses. The Sixth Amendment recognizes an interest in a "speedy … trial" on criminal charges. U.S. Const. amend. VI. Yet Mr. Bosse cannot begin to assert his defenses in federal court until he is transferred to federal custody and goes before a U.S. magistrate, which triggers the Speedy Trial Act's statutory protections. 18 U.S.C. § 3161.

CONCLUSION

For the foregoing reasons, the Court should deny Oklahoma's application.

---

[15] The same is true of Oklahoma's suggestion that federal prosecutors may not take on "new prosecutions of non-Indians." App. 25. There is no evidence that is occurring. And if it were, it again would have nothing to do with the judgment in Mr. Bosse's case, which binds only him.

Dated: May 7, 2021

Respectfully submitted,

Zachary C. Schauf
Counsel of Record
Allison M. Tjemsland
Victoria Hall-Palerm
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000
zschauf@jenner.com

Susan M. Otto
FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF OKLAHOMA
Emma V. Rolls
ASSISTANT FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF OKLAHOMA
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
(405) 609-5975
susan_otto@fd.org
emma_rolls@fd.org

Counsel for Respondent

TAB 1

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

SHAUN MICHAEL BOSSE,	**McClain County District Court Case No. CF-2010-00213**
Petitioner,	**Court of Criminal Appeals Direct Appeal Case No. D-2012-1128**
-vs-	
THE STATE OF OKLAHOMA,	**Court of Criminal Appeals Prior Post Conviction Case No. PCD-2013-360**
Respondent.	**Post Conviction Case No. PCD-** PCD 2019 1241

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF

- DEATH PENALTY -

Petitioner, Shaun Michael Bosse, through undersigned counsel, submits his second application for post-conviction relief pursuant Section 1089 of Title 22.[1]

The sentences from which relief is sought are: (3) death sentences by lethal injection and First Degree Arson.

PART A: PROCEDURAL HISTORY

1. (a) Court in which sentence was rendered: District Court of McClain County, Oklahoma.
   (b) Case Number: CF-2010-00213.
   (c) Court of Criminal Appeals Direct Appeal Case Number: D-2012-1128.

[1] Pursuant Rule 9.7(A)(3) of the Rules of Court of Criminal Appeals, a copy of the original application for post-conviction relief is attached hereto as Att. 1. The appendix of attachments to the original application have not been attached, but are available should the Court find them necessary for its review of the subject application.

2. Formal sentencing occurred on December 18, 2012.

3. Mr. Bosse received three sentences of death for three counts (Counts I , II, and III) of first degree malice aforethought murder, and thirty-five years for one count (Count IV) of First Degree Arson. All sentences were ordered to run consecutively.

4. The Honorable Greg Dixon presided over the trial and sentencing.

5. Mr. Bosse is currently incarcerated at the Oklahoma State Penitentiary H-Unit. He has no other criminal matters pending in any other courts, nor does he have other sentences to be served in other jurisdictions.

I. Capital Offense Information

6. Mr. Bosse was convicted of the following crime(s) for which a sentence of death was imposed: Three Counts of First Degree Malice Aforethought Murder in violation of Okla. Stat. tit. 21, § 701.7 of the Oklahoma Statutes.

The State alleged the following statutory aggravating factors for the three murder convictions:

a. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;

b. The murder was especially heinous, atrocious, or cruel;

c. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society; and

d. The murders were committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

The jury found the following aggravating factors for the three murder convictions:

a. The murders were especially heinous, atrocious, or cruel;

b. During the commission of the crime the defendant created a great risk of death to more than one person;

c. The murders were committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

The following mitigating factors were provided to the jury:

a. Prior to this crime Mr. Bosse did not have any significant history of previous criminal activity; the only other crimes of which the defendant has committed were non-violent.

b. Mr. Bosse's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was greatly impaired by drugs and alcohol.

c. Mr. Bosse has been involved with drug use since his senior year in high school and has been a regular methamphetamine and pill user.

d. Mr. Bosse's father essentially abandoned him and did not maintain a close relationship depriving him of the opportunity to have a proper male role model.

e. Mr. Bosse's father neglected Mr. Bosse and his brother.

f. As a child, Mr. Bosse suffered from head injuries that may have negatively contributed to his mental health.

g. Mr. Bosse suffered from teasing and bullying from his brother.

h. Mr. Bosse's cellmates, family, and friends describe him as generous and helpful.

i. Mr. Bosse is thirty years old.

j. Mr. Bosse will benefit from the structure of prison life.

k. Family members describe Mr. Bosse as having been helpful, cooperative and a contribution to their lives.

l. To Mr. Bosse's friends and family the commission of this crime was a shock and not expected, as it was out of character with Mr. Bosse's personality of being quiet, shy, not losing his temper, and being nonaggressive.

m. Mr. Bosse provided physical assistance to his mother and grandparents by doing chores for them.

n. Mr. Bosse gladly helped friends and family with any requested tasks.

o. Mr. Bosse's friends and family have maintained a relationship with Mr. Bosse since his incarceration.

p. Mr. Bosse's employers described him as a hard worker who was a self-starter who got along with other coworkers.

q. Mr. Bosse's mother and grandmother maintain a close relationship with Mr. Bosse through daily telephone conversations and weekly visitation.

r. Mr. Bosse had a good relationship with his nephew and supported the child by attending sporting events and playing with the child.

s. Jack Bosse, Mr. Bosse's father's alternative bisexual lifestyle was detrimental to his upbringing.

t. Mr. Bosse's mother struggled to provide for her two children.

u. Mr. Bosse's mother suffered from depression when he was a child and struggled to maintain a clean and proper home for her children.

v. Mr. Bosse has family and friends that love him and wish for him to live.

Victim impact testimony was presented during the trial's penalty phase.

7. The finding of guilt was made after a plea of not guilty.

8. The finding of guilt was made by a jury.

9. The sentences imposed were determined by the jury.

II. Non-Capital Offense Information

10. Mr. Bosse was also convicted of one count (Count IV) of First Degree Arson in violation of 21 O.S. § 1401(A). He received a sentence of thirty-five years imprisonment for Count IV.

11. The finding of guilt was made after a plea of not guilty.

12. The sentence imposed was recommended by the jury.

III. Case Information

13. Trial Counsel: Gary Henry
Formerly with the Oklahoma Indigent Defense System (OIDS)
Capital Trial Division
P.O. Box 926
Norman, Oklahoma 73070-0926

Mary Bruehl (co-counsel)
Formerly with the Oklahoma Indigent Defense System (OIDS)
Capital Trial Division
P.O. Box 926
Norman, Oklahoma 73070-0926

Bobby Lewis
Oklahoma Indigent Defense System (OIDS)
P.O. Box 926
Norman, Oklahoma 73070-0926

14. Counsel were appointed by the courts at all stages of this case.[2]

---

[2] Mr. Bosse remains indigent, and there have been no changes in his financial status since the district court's determination of indigency and appointment of counsel, which is attached hereto pursuant to Rule 9.7 (A)(3)(h), *Rules of the Oklahoma Court of Criminal Appeals*. Att. 2. Petitioner is being represented in this matter by Assistant Federal Public Defenders Michael W. Lieberman and Sarah M. Jernigan.

15. Mr. Bosse appealed his convictions and sentences to this Court, where it was assigned Case No. D-2012-1128. The Brief in Chief was filed August 6, 2014. The Response Brief was filed December 23, 2014, and a Reply Brief was filed January 26, 2015. Oral argument was held on June 30, 2015. This Court affirmed the convictions and sentences on October 16, 2016. *Bosse v. State*, 360 P.3d 1203 (Okla. Crim. App. 2015). No 3.11 motion was filed on direct appeal, and no evidentiary hearing was held. The United States Supreme Court vacated and remanded this Court's ruling for further proceedings. *Bosse v. Oklahoma*, ___ U.S. ___, 137 S. Ct. 1 (2016). After further briefing, this Court again affirmed the convictions and sentences. *Bosse v. State*, 400 P.3d 834 (Okla. Crim. App. 2017), *cert denied* 138 S.Ct. 1264 (2018).

16. Appellate Counsel:
Michael D. Morehead
Jamie D. Pybas
Oklahoma Indigent Defense System
P.O. Box 926
Norman, Oklahoma 73070

17. Mr. Bosse's judgments and sentences were upheld by this Court on May 25, 2017. *Bosse v. State*, 400 P.3d 834 (Okla. Crim. App. 2017).

18. Mr. Bosse sought further review by filing a Petition for Writ of Certiorari in the United Supreme Court, which was denied on March 5, 2018. *Bosse v. Oklahoma*, 138 S. Ct. 1264 (2018).

An Original Application for Post-Conviction Relief was filed in this Court, Case No. PCD-2013-1128, on August 3, 2015. The Court denied Mr. Bosse's original application by way of an unpublished opinion on October 16, 2016. The following grounds for relief were raised in the original application:

Proposition I: MR. BOSSE WAS DENIED A FAIR TRIAL DUE TO IMPROPER COMMUNICATION WITH THE JURY.

Proposition II: THE INTRODUCTION OF IMPROPER EVIDENCE VIOLATED MR. BOSSE'S RIGHT TO A FAIR TRIAL.

Proposition III: PROSECUTORIAL MISCONDUCT DEPRIVED MR. BOSSE OF A FAIR TRIAL.

Proposition IV: COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND THE OKLAHOMA CONSTITUTION BY FAILING TO ADEQUATELY INVESTIGATE EVIDENCE ON BEHALF OF MR. BOSSE.

Proposition V: THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND IN POST CONVICTION RENDERED THE PROCEEDINGS RESULTING IN MR. BOSSE'S DEATH SENTENCES ARBITRARY, CAPRICIOUS, AND UNRELIABLE. THE DEATH SENTENCES IN THIS CASE CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT AND A DENIAL OF DUE PROCESS OF LAW AND MUST BE REVERSED OR MODIFIED TO LIFE IMPRISONMENT OR LIFE WITHOUT PAROLE.

PART B: GROUNDS FOR RELIEF

19. A motion for discovery has not been filed with this application.

20. A Motion for Evidentiary Hearing has been filed with this application.

21. No other motions have been filed with this application or prior to the filing of this application.

22. The propositions raised herein are:

PROPOSITION ONE: BECAUSE JURISDICTION FOR INDIAN COUNTRY CRIMES RESTS EXCLUSIVELY IN FEDERAL COURT, OKLAHOMA LACKED JURISDICTION TO PROSECUTE MR. BOSSE, AND HIS CONVICTIONS ARE VOID *AB INITIO*.

PROPOSITION TWO : TRIAL COUNSEL WERE INEFFECTIVE BY FAILING TO ADEQUATELY INVESTIGATE BOSSE'S LIFE HISTORY, AND FAILING TO ADEQUATELY PREPARE WITNESSES, WHICH DEPRIVED HIM OF A FAIR AND RELIABLE SENTENCING. DIRECT-APPEAL AND POST-CONVICTION COUNSEL WERE EQUALLY INEFFECTIVE FOR FAILING TO RAISE THAT ISSUE. THESE FAILINGS ALL VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

PROPOSITION THREE : THE CUMULATIVE EFFECT OF ERRORS DEPRIVED MR. BOSSE OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR CAPITAL SENTENCING UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

PART C: FACTS

CITATIONS TO THE RECORD

The trial transcript will be referenced as "Tr." then by volume and page. The motion hearing transcripts shall be referenced as "month/day/year Tr." followed by page number. The original record shall be referred to by volume as "O.R." followed by page number. Trial exhibits shall be referenced as "Def. Ex. #," "St. Ex. #," or "Ct. Ex. #." Attachments to the Original Post-Conviction Application shall be referred to as "PC Att. #." Finally, exhibits attached to this Application shall be referred to simply as "Att." followed by the number.

STATEMENT OF THE CASE

On August 6, 2010, Mr. Bosse was charged by Information in McClain County District Court Case No. CF-2010-213 with three counts (Counts l-3) of Murder in the First Degree (21 O.S. 2011, § 701.l(A)(1), and one count (Count 4) of Arson in the First Degree (21 O.S. 2011, § 1401(A)). (O.R. 30-31). On March 3, 2011, the State filed a Bill of Particulars, alleging four aggravating circumstances as to each of the three victims: (1) the murders were especially heinous, atrocious, or cruel (21 O.S. 2011, § 701.12(4)), (2) the defendant knowingly created a great risk of death to more than one person (21 O.S. 2011, § 701.12(2)), (3) at the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society (21 O.S. 2011, § 701.12(7)), and (4) the murders were committed for the purpose of avoiding or preventing a lawful

arrest or prosecution (21 O.S. 2011, § 701.12(5)). (O.R. 63).

On August 31, 2011, Mr. Bosse waived his right to a preliminary hearing. (O.R. 95).

On September 28, 2012, through November 2, 2012, Mr. Bosse was tried by a jury. Mr. Bosse was represented by Gary Henry, Mary Bruehl, and Bobby Lewis. The State of Oklahoma was represented by District Attorney Greg Mashburn, and Assistant District Attorneys Susan Caswell and Lori Puckett. The Honorable Greg Dixon, District Judge, presided over the proceedings.

On October 29, 2012, the jury found Mr. Bosse guilty of three counts of First-Degree Malice Aforethought Murder and one count of First Degree Arson. (O.R. 1011-1014; Tr. IX 108-09). The jury assessed punishment at thirty-five years imprisonment and a fine of $25,000 on the arson count. (O.R.1014; Tr. IX 109). At the conclusion of the capital sentencing phase, the jury found the existence of three aggravating circumstances on all three counts: (1) the murders were especially heinous, atrocious, or cruel, (2) during the commission of the murder, the defendant knowingly created a great risk of death to more than one person, and (3) the murders were committed for the purpose of avoiding or preventing a lawful arrest or prosecution. (O.R. 1090; Tr. XII 76-77). The jury assessed a sentence of death for all three counts. (O.R. 1093-95; Tr. XII 77).

On December 18, 2012, the trial court formally sentenced Mr. Bosse in accordance with the jury's verdict, with all sentences to run consecutively, beginning with Count 1. (O.R. 1117-20; Sent. Tr. 8-9).

Mr. Bosse appealed his convictions and sentences to this Court, where it was assigned Case No. D-2012-1128. The Brief-in-Chief was filed August 6, 2014. The Response Brief was filed December

23, 2014, and a Reply Brief was filed January 26, 2015. Oral argument was held on June 30, 2015. This Court affirmed the convictions and sentences on October 16, 2016. *Bosse v. State*, 360 P.3d 1203 (Okla. Crim. App. 2015). No 3.11 motion was filed on direct appeal, and no evidentiary hearing was held. The United States Supreme Court vacated and remanded this Court's ruling for further proceedings. *Bosse v. Oklahoma*, ___ U.S. ___, 137 S.Ct. 1 (2016). After further briefing, this Court again affirmed the convictions and sentences. *Bosse v. State*, 400 P.3d 834 (Okla. Crim. App. 2017), *cert denied* 138 S.Ct. 1264 (2018).

Mr. Bosse filed an Original Application for Post-Conviction Relief in this Court on August 3, 2015. That APCR was assigned Case No. PCD-2013-360. The State filed a response on November 11, 2015, and this Court issued an opinion denying relief on December 16, 2015.

In addition to this Second Application for Post-Conviction Relief, Bosse is also filing in the United States District Court for the Western District of Oklahoma a Petition for a Writ of Habeas Corpus. That case has been assigned Case No. CIV-18-204-R.

STATEMENT OF THE FACTS

This case involves the deaths of Katrina Griffin, 24, and her two children, Christian Griffin, 8, and Chasity Hammer, 6, who died in their trailer home in Dibble, Oklahoma, on July 23, 2010. Ms. Griffin and Christian died of multiple stab wounds. Chasity died of smoke inhalation and thermal injury caused when the trailer caught fire.

Ms. Griffin was a homebody and single mom, who had a seizure disorder and did not drive or work outside the home. She depended on her parents (who lived on the same property) and others for

support. Her children spent a lot of time at home, watching TV and movies. There were many TVs in the house. (Tr. I 35, 49, 50-53). Ms. Griffin was protective of her belongings and would put her initials, "KRG," on every movie she bought to avoid getting them mixed up if she traded them with anyone. (Tr. I 53). She also kept a list of people to whom she loaned movies. (Tr. I 56). According to her stepmother, Ginger Griffin, she recently was approved to receive disability for her seizure disorder. She received some back pay, which she used to buy new furniture, TVs, and a laptop. (Tr. I 54-55).

About two weeks before her death, Ms. Griffin met Bosse online. Bosse would come over to the trailer and they would play video games. He spent the night at the trailer a couple of times. (Tr. I 43). On July 17, 2010, Ms. Griffin's cousin, Heather Molloy, and Heather's boyfriend, Henry Price, visited Ms. Griffin's trailer to "hang out and have a good time." (Tr. II 88). Bosse was also there. Heather and Henry stayed until midnight or so, and Bosse remained behind. Everything seemed fine. (Tr. II 91).

On July 22, 2010, Ms. Griffin and Christian noticed some video games were missing. Ms. Griffin suspected Henry Price had stolen them. They called Ms. Griffin's step-mother to see if Christian had left some of them at her house, but she did not have them. (Tr. I 59). After calling Heather about the missing games, Katrina and Bosse went over to Heather's house to search for them. Heather and Henry did not answer the door so they returned home. (Tr. II 92-93). After they returned to the trailer, Ms. Griffin called a deputy sheriff, who came and took a report about the missing property. When the deputy came to the trailer, Bosse was there, wearing a t-shirt and blue jeans. The deputy, who did not notice Bosse acting suspicious or peculiar, left at about 12:30 a.m. on July 23, 2010. (Tr. II 102, 111).

Later that morning, Ms. Griffin's step-mother left for work at 7 a.m., passing her step-daughter's trailer on the way. She did not notice anything unusual, nor did she see Bosse's vehicle in the driveway. (Tr. I 63). Shortly before 9 a.m., Daryl Wesley Dobbs, who lived down the road from Ms. Griffin, was on his way to work when he noticed smoke coming out of the trailer. He called 9-1-1, then went up to the trailer to see if anyone was home. He banged on the doors and windows. (Tr. I 90-95).

Dibble Police Chief Walt Thompson arrived within five minutes of Dobbs, who he observed trying to hose down the roof. (Tr. I 107, 135). Chief Thompson helped Dobbs bang on the doors and windows. Mr. Dobbs opened the front door and smoke rolled out, forcing Dobbs back. (Tr. I 142). Within a minute or two of Mr. Dobbs opening the front door, flames appeared. (Tr. I 143).

Chief Thompson broke open a window and yelled inside to attempt to get a response. (Tr. I 136, 138; Tr. V 52-53). After Chief Thompson broke out the window, he put his head through it. Although there were no flames, he received a facial burn from the heat of the smoke. He did not hear any responses from that particular room. (Tr. I 140).

By the time the fire department arrived, approximately three to four minutes after Dobbs and Chief Thompson, they had been alerted to the possibility there were occupants inside. Two firemen entered the front door after suiting up. They went toward the right or the north end of the trailer, where the children's bedrooms were located. (Tr. I 99, 108, 118, 144, 146-47, 180). As they began to run out of oxygen, they exited the trailer. A second two-person fire fighter team entered the trailer, going to the left, through the living room, kitchen, laundry room then the master bedroom. (Tr. I148, 181-82).

They found two bodies, later determined to be Katrina and Christian Griffin in the master bedroom. The firefighters then had to leave because the room became too hot. (Tr. I 191; Tr. II 23, 29; Tr. IV 142).

Chasity's body was eventually found in the closet of the master bedroom under a pile of debris. (Tr. IV 130). She was burned with soot in her stomach and lungs.

The sheriff's department, with help from the State Fire Marshal and the OSBI, processed the scene. Authorities began searching for Bosse, as they were told by Ms. Griffin's family members that he and Ms. Griffin were dating. (Tr. I 160-62; Tr. II 123-24).

Bosse's mother saw him at the apartment they shared in Oklahoma City at about 6:00 a.m. on July 23. He left the apartment between 6:15 and 6:30 a.m. and went to Oklahoma City Community College (OCCC), where he logged onto computers at about 7:30 a.m. (Tr. II 151, 187-88; Tr. III 28).

Bosse also visited various Oklahoma City-area pawn shops, pawning items later determined to belong to Ms. Griffin. He pawned movies, movie collections, and TVs and VCRs belonging to Ms. Griffin. (Tr. II 128, 146, 167-68, 186, 193, 231, 268).

Bosse received a telephone call at approximately 2:30 p.m. from Detective Dan Huff of the McClain County Sheriff's Office asking him to come to their office. Bosse agreed and met at approximately 4:00 p.m. with Detectives Huff and David Tompkins, and OSBI Agent Bob Horn; the interview lasted 50 to 60 minutes and was audio and video recorded. (Tr. II 152, 154-57; State's Exhibit 301).

When Bosse arrived, the detectives noticed he had red knuckles, as if he had been punching

something. They also noticed blood on his tennis shoes and a scratch on his arm. (Tr. II 174, 203-206; Tr. III 31-32). He told detectives several things about his whereabouts earlier in the day that did not check out. Bosse asked if Ms. Griffin was OK, but did not mention pawning her possessions to the detectives. (Tr. II 210-11, 218; Tr. III 35-37).

Although Bosse refused to let detectives physically search his truck, he did agree to let them photograph what was inside. (Tr. II 170-72). They photographed several items of interest, including a laptop computer, several movies, and a Play Station. (Tr. II 232). Ms. Griffin's family later identified the items seen in the photographs as possessions of Ms. Griffin. They also identified receipts for the missing items. (Tr. I 70-73, 77-79; Tr. II 158, 170-72, 220-21, 224-29, 231-32; Tr. III 59-63).

The officers released Bosse, but two hours later, OSBI agents arrested him at the apartment he shared with his mother. When the agents arrived, Bosse was there, along with his mother and brother, Matthew Bosse. (Tr. III 116).

Bosse gave permission for authorities to search his truck, but the property previously photographed was gone, with the exception of some movies, which were found in his bedroom. (Tr. II 188-89; Tr. III 28-30). Agent Akers found Bosse's billfold in the truck. Inside the billfold, the agent found pawn tickets. When asked about the pawn tickets, Bosse appeared nervous, after which he was arrested. (Tr. II 191; Tr. III 40-44).

Several Oklahoma City-area pawn brokers confirmed Bosse pawned items identified as belonging to Ms. Griffin. (Tr. III 119-275). During a search of Bosse's apartment, agents found items taken from Ms. Griffin's trailer, as well as blood on his bathroom towels and by his laundry basket.

They also found a wadded-up bloody pair of jeans in the back corner of his closet. The jeans and Bosse's tennis shoes with blood spots were sent to the OSBI lab for DNA testing. The DNA tests linked Bosse to the victims. (Tr. VII 102-11). OSBI criminologists further linked Bosse to the crime via his fingerprints on items taken from Ms. Griffin's trailer. (Tr. IV 56-64).

Tests conducted by the Bureau of Alcohol, Firearms and Tobacco concluded the fire was set on the living room couch, where it flamed, then smoldered for several hours. (Tr. V 119-20, 142,147; VI Tr.180). An autopsy on the three bodies revealed Ms. Griffin had thermal burns to her entire body, as well as eight stab wounds. Her right hand had defensive wounds. (Tr. II 40; Tr. III 94-98; Tr. IV 156; Tr. V 78-81, 223, 229-30). Medical Examiner Inas Yacoub, who performed the autopsy on Ms. Griffin, testified "the sharp force trauma to the neck, because of the bleeding associated with it, including the bleeding inside the airway" was fatal. (Tr. V 226, 231-32). Dr. Yacoub testified Christian "died of multiple stab wounds." (Tr. VI 30). Dr. Yacoub opined Chasity died "from smoke inhalation and thermal injury." (Tr. VI 83).

Additional facts will be discussed as they relate to the various propositions of error.

PART D: PROPOSITIONS, ARGUMENTS, AND AUTHORITIES

PROPOSITION ONE

BECAUSE JURISDICTION FOR INDIAN COUNTRY CRIMES RESTS EXCLUSIVELY IN FEDERAL COURT, OKLAHOMA LACKED JURISDICTION TO PROSECUTE BOSSE, AND HIS CONVICTIONS ARE VOID *AB INITIO*.

The crimes charged in this case occurred in Indian Country – namely, within the boundaries of the Chickasaw Reservation. The victims were all members of the Chickasaw Tribe. And the crimes

were prosecuted by the State of Oklahoma even though "the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country." *Cravatt v. State*, 1992 OK CR 6 ¶ 15, 825 P.2d 277, 279 (citing *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 403). Jurisdiction to prosecute this case is exclusively federal. *The General Crimes Act*, 18 U.S.C. § 1152. *See also Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *cert granted sub nom Royal v. Murphy*, 138 S. Ct. 2026 (2018) (oral argument November 27, 2018). Mr. Bosse's convictions must be vacated for lack of subject-matter jurisdiction.

A. Questions About the Trial Court's Jurisdiction Can Be Raised at Any Time and Are Never Waived.

Questions regarding whether the trial court had subject matter jurisdiction are always ripe for resolution, and the issue can, therefore, be raised at any time, even if not preserved below. *See, e.g., Buis v. State*, 1990 OK CR 28 ¶ 4, 792 P.2d 427, 428-29 (vacating conviction for lack of subject matter jurisdiction of trial court although issue not raised until petition for rehearing); *Johnson v. State*, 1980 OK CR 45 ¶ 30, 611 P.2d 1137, 1145 ("There are, of course, some constitutional rights which are never finally waived. Lack of jurisdiction, for instance, can be raised at any time"). *See also Albrecht v. United States*, 273 U.S. 1, 8 (1927) ("a person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court").

This Court has applied this principle to consider jurisdictional issues raised for the first time in several Indian Country cases. *See, e.g., Magnan v. State*, 2009 OK CR 19 ¶¶ 9-10, 207 P.3d 397, 402 (remanding for evidentiary hearing on whether crime occurred in Indian Country where issue had not been raised below, and defendant pled guilty, waiving direct appeal, but raised jurisdiction question as

part of mandatory sentence review proceeding); *Murphy v. State*, 2005 OK CR 25 ¶¶ 6-11, 124 P.3d 1198, 1200-01 (remanding for evidentiary hearing where Indian Country issue not raised until second application for post-conviction relief); *Cravatt*, 825 P.2d at 278 (remanding for evidentiary hearing on Indian Country claim where issue was not raised until the day before oral argument).

B. Federal Law Provides for Exclusive Federal Jurisdiction over Murders Committed by or Against Indians in Indian Country.

All murders committed by or against Indians in "Indian Country" are subject to exclusive federal jurisdiction. If an Indian is either the victim or perpetrator of a murder in Indian Country, federal courts are the only courts with jurisdiction. *See United States Department of Justice Indian Country Criminal Jurisdiction Chart*, https://www.justice.gov/sites/default/files/usao-wdok/legacy/2014/03/25/Indian%20_Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf (last visited January 29, 2019). *See also* 18 U.S.C. § 1152 ("The General Crimes Act"); 18 U.S.C. § 1153 ("The Indian Major Crimes Act"). "Indian Country" is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. . . .

18 U.S.C. § 1151. Oklahoma has no jurisdiction over any crime committed by or against an Indian within Indian Country. *See Cravatt,* 825 P.2d at 279 (citing *Klindt*, 782 P.2d at 403). Therefore, the Court must determine: (1) If the victim or perpetrator was Indian; and (2) If the crime occurred in Indian Country.

C. The Victims Were Members of the Chickasaw Tribe.

The requirement of establishing the Indian status of the victims is easily satisfied in this case.

Katrina and Christian Griffin, and Chasity Hammer were all members of the Chickasaw Tribe.0

In order to establish Indian status under federal law, the person whose status is in issue must (1) have some degree of Indian blood; and (2) must be recognized as an Indian by some tribe or society of Indians or by the federal government. *See United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976) (citing *United States v. Rogers*, 45 U.S. (4 How.) 567, 11 L. Ed. 1105 (1846)). *See also Goforth*, 644 P.2d at 116.

Katrina Griffin, Christian Griffin, and Chasity Hammer all had some degree of Indian blood and were recognized by the Chickasaw Nation as Indians. Specifically, the Chickasaw Nation has certified that each of the 3 victims "possessed a CDIB [Certificate of Degree of Indian Blood] showing her/his degree of . . . Indian Blood" and that each "was recognized as a Chickasaw Nation Citizen." Att. 3 (Tribal Enrollment Verification for Katrina Griffin); Att. 4 (Tribal Enrollment Verification for Christian Joe Griffin); Att. 5 (Tribal Enrollment Verification for Chasity Renea Hammer). Accordingly, under the two-part test recognized in *Rogers*, *Dodge*, and *Goforth*, each of the three victims was an Indian.

D. This Crime, Which Occurred in McClain County, Oklahoma, Was Committed Within the Original Undiminished Boundaries of the Chickasaw Reservation, and Thus, Occurred in Indian Country.

As noted above, for purposes of determining jurisdiction, 18 U.S.C. § 1151(a) defines "Indian Country" as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.

The Chickasaw reservation encompasses all or parts of thirteen counties, including all of McClain County. *See* https://www.chickasaw.net/Our-Nation/Government/Geographic- Information.aspx (last visited January 31, 2019).

A thorough review of McClain County land records confirms the land where the offenses occurred was originally allotted directly from the Choctaw and Chickasaw Nations to Mary Roberts and George Roberts. *See* Att. 6 (Affidavit of Julie Gardner). Because the crimes occurred on land located within the boundaries of the Chickasaw Reservation, it occurred in Indian Country. Therefore, Oklahoma had no authority to prosecute Mr. Bosse in this case.

E. The 1866 Chickasaw Reservation Was Never Disestablished or Diminished by Congress.

Only Congress creates reservations, and only Congress can disestablish or diminish a reservation. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Allotment without more does not disestablish or diminish a reservation. *Matz v. Arnett*, 412 U.S. 481, 497 (1973) (explaining allotment can be "completely consistent with continued reservation status"). Courts do not lightly infer that Congress has exercised its power to disestablish or diminish a reservation. *DeCoteau v. Dist. Cty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 444 (1975). The "rule by which legal ambiguities are resolved to the benefit of the Indians" is applied to its "broadest possible scope" in disestablishment and diminishment cases. *Id.* at 447.

There is a presumption that an Indian reservation continues to exist until Congress acts clearly to disestablish or diminish it. *Solem v. Bartlett*, 465 U.S. 463 (1984) (successful federal habeas challenge to state jurisdiction over an attempted rape by member of the Cheyenne River Sioux Tribe).

In *Solem*, the Court held:

> The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

Id. at 470 (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)). Congressional intent to diminish a reservation "will not be lightly inferred," and Congress must "clearly evince an intent . . . to change . . . boundaries before diminishment will be found." *Solem*, 465 U.S. at 470 (ellipses in original). Absent evidence of such intent, courts "are bound . . . to rule that diminishment did not take place and that the old reservation boundaries survived." *Id.* at 472.

The framework to determine whether a reservation has been diminished or disestablished is well-settled. *Nebraska v. Parker*, ___ U.S. ___, 136 S. Ct. 1072, 1078 (2016). As with any question of statutory construction, that analysis begins with (1) the text of the statute itself, then (2) the history surrounding passage of the statute, and finally (3) the demographic history and treatment of the lands by the federal, state, and tribal governments. *Solem*, 465 U.S. at 471-72; *Parker*, 136 S. Ct. at 1078-79. In *Parker*, the Court said this third factor is the least probative of the three. *Id.* at 1079-82. Specifically, the Court noted:

> Our cases suggest that such evidence might "reinforc[e]" a finding of diminishment or non-diminishment based on the text. *Mattz*, 412 U.S., at 505, 93 S.Ct. 2245; *see also, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604–605, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) (invoking subsequent history to reject a petitioner's "strained" textual reading of a congressional Act). *But this Court has never relied solely on this third consideration to find diminishment.*

Parker, 136 S. Ct. at 1081 (emphasis added).

F. The Chickasaw Nation's Treaty History.

The original homeland of the Chickasaw people in America consisted of vast lands scattered across parts of southwestern Kentucky, western Tennessee, northern Mississippi, and northwestern Alabama. https://www.chickasaw.net/Our-Nation/History/Homelands.aspx (last visited January 31, 2019). For the first part of their history in Indian Territory, the Chickasaw shared territory with the Choctaw Nation. But in 1855, the Nations entered an agreement to split their shared territory.

In the Treaty of Doak's Stand, Oct. 18, 1820 ("1820 Treaty"), 7 Stat. 210, the Choctaw Nation exchanged "approximately half of its remaining Mississippi lands for a large tract of land in the Arkansas Territory and an even larger one further west," to which it was to remove until it became apparent that at least a portion of the Arkansas Territory lands was already occupied by settlers. *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 624 (1970).[3] That "made many of [the Choctaws] doubt that the United States would protect them in their new lands." *Id.* at 625.

To overcome some of those concerns, the Choctaws and the United States entered into the Treaty of Dancing Rabbit Creek, Sept. 30, 1830, 7 Stat. 333 ("1830 Treaty"). That treaty secured "a tract of country west of the Mississippi River" to the Choctaw Nation to "exist as a nation and live on it," *id.* art. 2, and the "jurisdiction and government" over "all the persons and property" within that

---

[3] The Choctaws ceded the Arkansas Territory lands granted to them in the 1820 Treaty back to the United States in the Treaty of January 20, 1825, 7 Stat. 234. In so doing, the 1825 Treaty used very clear cession language. Specifically, in Article 1 of the Treaty, "The Choctaw Nation do hereby cede to the United States all that portion of the land ceded to them by the second article of the Treaty of Doak Stand." Article 2 then provides, "In consideration of the cession aforesaid, the United States do hereby agree to pay the said Choctaw Nation the sum of six thousand dollars, annually, forever."

territory (the "Treaty Territory")." *Id.* art. 4. The 1830 Treaty "provide[s] for the [Nations'] sovereignty within Indian country." *Okla. Tax Comm'n*, 515 U.S. at 466.[4]

Then, in 1837, in the Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573, the Chickasaw Nation secured an undivided one-fourth interest to the Treaty Territory "on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws)." *Id. See also Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995); *Choctaw Nation*, 397 U.S. at 626.

Because the Treaty Territory was secured to the Nations by the 1830 Treaty, their right to those lands is protected by federal law. As the term "reservation" simply refers to lands reserved for a tribe over which Congress intended that primary jurisdiction be exercised by the federal and tribal governments, *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 974 (10th Cir 1987); *see United States v. McGowan,* 302 U.S. 535, 538-39; (1938); *United States v. Chavez,* 290 U.S. 357, 364 (1933), the Treaty Territory is a reservation, as Articles 2 and 4 of the 1830 Treaty make clear. Were that in doubt, it would be resolved by the rule "that treaties with the Indians must be interpreted as they would have understood them," and "any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation*, 397 U.S. at 631 (citations omitted); 1830 Treaty art. 18 (restating that rule).

At about this same time, Congress passed the Indian Removal Act, on May 28, 1830, which gave the President direct authority to negotiate removal treaties for the "Five Civilized Tribes" from

---

[4] The Nations' right to the reservation granted under the 1830 Treaty was reaffirmed in Article 1 of the 1855 Treaty of Washington ("1855 Treaty"), 11 Stat. 611.

their southeastern homelands to the Indian Territory.[5] https://www.britannica.com/topic/Indian-Removal-Act (last visited January 28, 2019). The Five Civilized Tribes consisted of the Choctaws, Chickasaws, Cherokees, Creeks/Muscogees, and Seminoles. *See* ch. 209, 27 Stat. 645 (March 3, 1893).

The Chickasaws were among the last tribes to remove to Indian Territory. Though they met with hardship and death during removal, they were spared some of the worst because they had negotiated for more control over their departure and were able to travel during more favorable seasons than people of the other tribes. Most Chickasaws removed to Indian Territory from 1837-1851. Chickasaws originally settled in their own district within Choctaw Territory pursuant to the Treaty of Doaksville. However, in 1856, the Chickasaw separated from the Choctaws and created their own constitution for their separate lands. https://www.chickasaw.net/Our-Nation/History/Removal.aspx (last visited January 31, 2019).

In 1855, in the Treaty of Washington, the Choctaws, Chickasaws, and the United States agreed to separate districts within the 1830 boundaries of the Treaty Territory for each Nation, thereby creating a Choctaw District and a Chickasaw District. *See* https://www.choctawnation.com/sites/default/files/2015/09/29/1855treaty_original.pdf (last visited January 31, 2019). Although the exterior boundaries of the reservation were in no way altered, the territory within those boundaries was divided between the Nations. Then, following the Civil War, the Nations entered

---

[5] With this Act, so began the "Trail of Tears" that led to the forced relocation of several Indian tribes from their ancestral land to the Indian Territory.

into the 1866 Treaty of Washington ("1866 Treaty"), Act of Apr. 28, 1866, 14 Stat. 769, in which the Nations "cede[d] to the United States the territory west of the [98th meridian]," *id.* art. 3, modifying only the Reservation's western boundary. But, other than the western portion ceded back to the United States, "[t]he United States reaffirm[ed] all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations" with regard to the remainder of the Nations' territory. *Id.* art. 10.

The borders of the Chickasaw (and Choctaw) Reservation have remained unaltered since this 1866 Treaty.

G. Application of the *Solem/Parker* Factors Demonstrates That the Chickasaw Reservation Has Not Been Diminished or Disestablished.

1. Step One – Statutory Text.

The first step in considering reservation disestablishment – the statutory text – is the "most important step" of the *Solem* framework. *Parker*, 136 S. Ct. at 1080. This step requires the examination of the text of the statute purportedly disestablishing or diminishing the reservation. The express statutory language is "[t]he most probative evidence of congressional intent." *Solem*, 465 U.S. at 470. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* When such language is combined with language committing Congress to compensate the tribe for its land with a fixed sum, Congress's intent to diminish a reservation is especially clear. *Id.* at 470-71. Restoration of the land to the public domain may also be an indicator of Congressional intent to disestablish or diminish a reservation. *Id.* at 475. *See also Parker*, 136 S. Ct. at 1079.

The Tenth Circuit recently reviewed, in detail, the federal policies and statutes from the allotment and post-allotment eras as they relate to the Five Tribes. *Murphy*, 875 F.3d at 939-48.[6] It did so to provide historical context. The circuit relied primarily on *Indian Country, U.S.A.* to review some of the more significant federal statutes affecting the Five Tribes Nations. In the end, the court identified no statutory text that acted to diminish or disestablish the Creek Reservation. The same is true of the Chickasaw Reservation.

Congress knows how to alter reservation boundaries when that is what it wants to do. These examples of text are hallmarks of disestablishment or diminishment demonstrating that Congress knows how to clearly reflect its intent to alter reservation boundaries:

- "[T]he Smith River reservation is hereby discontinued." Act of July 27, 1868, ch. 248, 15 Stat. 198, 221 (cited in *Mattz v. Arnett*, 412 U.S. 481, 504, n.22 (1973) an example of "clear language of express termination").

- The Colville reservation was "vacated and restored to the public domain." Act of July 1, 1892, ch. 140, § 1, 27 Stat. 62, 62-63 (cited in *Mattz*, 412 U.S. at 504, n. 22 (1973), as an example of "clear language of express termination"; and referenced in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962) as example of diminishment language).

- "[A]ll the unallotted lands within said [Unitah] reservation shall be restored to the public domain." Act of May 27, 1902, ch. 888, 32 Stat. 245, 263 (discussed in *Hagen v. Utah*, 510 U.S. 399, 412 (1994), which noted that "Congress considered Indian reservations as separate from the public domain").

- "[T]he reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished." Act of April 21, 1904, ch. 1409, 33 Stat. 189,

---

[6] In *Murphy*, the Tenth Circuit was specifically considering whether the Creek Reservation had been diminished or disestablished, but many of the statutes it reviewed for that purpose applied equally to the rest of the Five Tribes.

218 (cited as example of "clear language of express termination" in *Mattz*, 412 U.S. at 504, n.22).

- "Subject to the allotment of land . . . and for the considerations hereinafter mentioned . . . [the] Comanche, Kiowa, and Apache Indians hereby cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in" an identified tract in Indian Territory. Act of June 6, 1900, ch. 813, art. 1, 31 Stat. 672, 676-77 (discussed in *Tooisgah v. United States*, 186 F.2d 93, 97 (10th Cir. 1950), as example of language "disestablish[ing] the organized reservation").

- Indians "belonging on" the Shoshone or Wind River reservation "do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation." Act of March 3, 1905, ch. 1452, 33 Stat. 1016, 1016 (described in *Wyoming v. EPA*, 849 F.3d 861, 871 (10th Cir. 2017) as "express language of cession" notwithstanding the absence of the words "sell" or "convey").

Murphy, 875 F.3d at 948-49.

There are no statutes that use any of the hallmark language above that would demonstrate congressional intent to alter the Chickasaw Nation reservation's boundaries as they existed after the 1866 Treaty.[7] There are also no statutes providing for payment of a fixed sum to the Chickasaw Nation or restoring the Nation's reservation to the public domain. The Chickasaw reservation remains intact.

2. Step Two - Events Surrounding the Enactment of the Allotment Act.

"At step two of the *Solem* analysis, courts consider how pertinent legislation was understood to affect the reservation when it was enacted. Evidence of this contemporary understanding may include

---

[7] In *Murphy*, both in its briefing and during oral argument, the State conceded that it could not point to any statutory text clearly disestablishing the Creek Reservation. *Murphy*, 875 F.3d at 938-39, 948. Because most of the statutes relied upon by the State in *Murphy* applied to all of the Five Tribes, the same concession is expected here.

the negotiations between the tribe and the federal government, congressional floor debates, and committee reports about the relevant statutes." *Murphy*, 875 F.3d at 954 (citing *Solem*, 465 U.S. at 476-78). "When the statutory text at step one does not reveal that Congress has disestablished or diminished a reservation, such a finding requires 'unambiguous evidence' that 'unequivocally reveals' congressional intent." *Murphy*, 875 F.3d at 954 (citing *Parker*, 136 S. Ct. at 1080-81). *See also Solem*, 465 U.S. at 478 ("[I]n the absence of some clear statement of congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish [a reservation].").

The *Murphy* court examined all the "Step Two" evidence presented by both the State and Mr. Murphy (along with the Creek Nation), *Murphy*, 875 F.3d at 954-60, and found "there is no unequivocal evidence of a contemporaneous understanding that the legislation terminated or redrew the Creek Nation's borders at step two." *Id.* at 960. Because the majority of that evidence was applicable to all of the Five Tribes, the same result applies here.

For example, one such item of evidence of contemporary understanding is an Attorney General opinion from 1900. 23 U.S. Op. Atty. Gen. 214 (U.S.A.G.), 1900 WL 1001.

> Responding to an inquiry from the Secretary of the Interior about the presence of non-Indians in the Indian Territory, the Attorney General explained that the Tribes, even after passage of the Curtis Act, still had the power to exclude intruders and to set the terms upon which non-members could enter the Tribes lands. *See id.* at 215-18. The opinion said the Tribes could regulate activity within their borders because, although outsiders could purchase town lots, "the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation." *Id.* at 217. Tribal laws "requiring a permit to reside or carry on business in the Indian country" were still in effect. *Id.* Non-members grazing cattle or otherwise occupying Indian lands were "simply intruders" who "should be removed, unless they obtain such

permit and pay the required tax, or permit, or license fee." *Id.* at 219. The Attorney General concluded the Secretary of the Interior had

> the authority and duty . . . to remove all persons of the classes forbidden by treaty or law, who are there without Indian permit or license; to close all business which requires a permit or license and is being carried on there without one; and to remo[v]e all cattle being pastured on the public land without Indian permit or license, where such license or permit is required; and this is not intended as an enumeration or summary of all the powers or duties of your Department in this direction.

Id. at 220.

Murphy, 875 F.3d at 957-58. Indeed, in that opinion, the Attorney General notes, "So far as concerns the Choctaw and Chickasaw nations . . . this question was passed upon by my predecessor, Attorney-General [sic] Wayne MacVeagh, who held (17 Opin. 134) that such permit and license laws, with their tax, were valid and must be enforced." 23 U.S. Op. Atty. Gen. at 216.

The 1894 Dawes Commission Report to Congress "discussed the Commission's negotiations and explained the Tribes had refused to discuss changes 'in respect either to their form of government or the holdings of their domains.' Dep't of the Interior, H.R. Doc. No. 53-1, at LIX-LX (3d Sess. 1894). The Commission explained to Congress it had proposed allotment after 'abandon[ing] all idea of purchasing' tribal lands because '*the Indians would not, under any circumstances, agree to cede any portion of their lands to the Government.*' *Id.* at LVX." *Murphy*, 875 F.3d at 957 (emphasis added).

Similarly, in its 1900 report to Congress, the Dawes Commission again noted the impossibility of achieving cession from any of the Five Tribes:

> Had it been possible to secure from the Five Tribes a cession to the United States of the entire territory at a given price, the tribes to receive its equivalent in value, preferably

> a stipulated amount of the land thus ceded, equalizing values with cash, the duties of the commission would have been immeasurably simplified, and the Government would have been saved incalculable expense. . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment . . . it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment, no matter how simple its evolutions.

Dep't of the Interior, H.R. Doc. No. 56-5, at 9 (2d Sess. 1900). *See also Murphy*, 875 F.3d at 958.

There is not unequivocal evidence of a contemporary understanding that Congress intended for the Chickasaw Nation's reservation to be diminished or disestablished. Again, the territory remains intact.

3. Step Three – Events Subsequent to Enactment of the Allotment Act.

At step three, courts "consider . . . 'federal and local authorities' approaches to the lands in question and . . . the area's subsequent demographic history." *Id.* at 960. *See also Solem*, 465 U.S. at 471, 104 S. Ct. 1161; *Parker*, 136 S. Ct. at 1081 (considering tribal presence in contested territory). This step is the least probative of the three and will never support a finding of diminishment on its own. *Id.* Here, though, this step also weighs in favor of finding the 1866 boundaries of the reservation have been preserved.

The Chickasaw Nation exercises sovereignty under a constitution approved by the Secretary of the Interior. Chickasaw Const. arts. XII, XIII, *available at* https://chickasaw.net/ getattachment/Our-Nation/Government/Chickasaw-Constitution/ CN_Constituion_Amended2002.pdf.aspx?lang=en-US (last visited January 28, 2019). The Chickasaw Nation governs within the boundaries described in the 1855 and 1866 Treaties. Chickasaw Const. prmbl. Its citizenship is defined by the Constitution, *id.* art. I, and legislative authority is vested in a Tribal Council, elected from districts defined with reference

to the Treaty Territory boundaries, *id.* art. VI, §§ 1, 3. Adjudicatory authority is held by the Judicial Department. *Id.* arts. XII, XIII. The Tribal District Court has territorial jurisdiction over "all territory described as Indian Country within the meaning of Section 1151 of Title 18 of the United States Code over which the Chickasaw Nation has authority." Chickasaw Code tit. 5 § 5-201.3, *available at* https://code.chickasaw.net/Title-05.aspx (last visited January 28, 2019). And the Chickasaw Supreme Court has appellate jurisdiction "coextensive with the Chickasaw Nation." *Id.* Amend. V, § 4.

It is clear the Chickasaw Nation continues to exercise sovereign authority over their treaty-guaranteed reservation lands to this day. The Nation provides governmental services within its Treaty boundaries that benefit both Indians and non-Indians. It maintains a police department that protects public safety.[8] The Nation operates a hospital and health centers.[9] The Nation also provides various educational services, including childcare and early childhood programs;[10] family support services;[11] summer programs; Adult Education, High School Equivalency certification;[12] vocational rehabilitation

---

[8] *Lighthorse Police*, Chickasaw Nation, https://www.chickasaw.net/Our-Nation/Government/Lighthorse-Police.aspx (last visited January 28, 2019).

[9] *Chickasaw Nation Medical Center*, Chickasaw Nation, https://www.chickasaw.net/Our-Nation/Locations/Chickasaw-Nation-Medical-Center.aspx (last visited January 28, 2019).

[10] *Chickasaw Nation Early Childhood and Head Start Program*, Chickasaw Nation, https://www.chickasaw.net/Services/Chickasaw-Nation-Early-Childhood-and-Head-Start-Program.aspx (last visited January 28, 2019).

[11] *Chokka Chaffa' (One Family),* Chickasaw Nation, https://www.chickasaw.net/Services/Chokka-Chaffa%EA%9E%8C-(One-Family).aspx (last visited January 28, 2019).

[12] *Adult Learning Program*, Chickasaw Nation, https://www.chickasaw.net/Services/Adult-Learning-Program.aspx (last visited January 28, 2019).

programs;[13] a Chickasaw Language Revitalization Program;[14] and an Adolescent Treatment Center that offers a "multi-level program" for adolescents and their families.[15] The Nation provides direct services to public schools that operate within its boundaries.[16] The Nation also provides services for substance abuse recovery, family preservation, family violence prevention,[17] domestic violence shelters, and a group home for Indian children.[18]

The Chickasaw Nation drives the economy in south-central Oklahoma, operating travel stops.[19] It also owns and operates several hotels and casinos and a premium quality chocolate business. Its Chickasaw Nation Industries is wholly owned by the Chickasaw Nation and serves as a holding

---

[13] *Vocational Rehabilitation*, Chickasaw Nation, https://www.chickasaw.net/Services/Vocational-rehabilitation.aspx (last visited January 28, 2019).

[14] https://www.chickasaw.net/Services/Chickasaw-Language-revitalization-Program.aspx (last visited January 31, 2019).

[15] https://www.chickasaw.net/Services/Aalhakoffichi-(A-Place-For-Healing).aspx (last visited January 31, 2019).

[16] https://www.chickasaw.net/Services/Direct-Service-to-Public-Schools.aspx (last visited January 31, 2019).

[17] https://www.chickasaw.net/Services/Domestic-Violence-Services.aspx (last visited January 31, 2019); https://www.chickasaw.net/Services/Batterer's-Intervention-Services.aspx (last visited January 31, 2019); https://www.chickasaw.net/Services/Behavior-Health-Psychiatry.aspx (last visited January 31, 2019); https://www.chickasaw.net/Services/Behavioral-Health-Services.aspx (last visited January 31, 2019).

[18] *Chickasaw Children's Village*, Chickasaw Nation, https://www.chickasaw.net/Services/Chickasaw-Children's-Village.aspx (last visited January 28, 2019).

[19] https://www.chickasawtravelstop.com/daily-deals (last visited January 31, 2019).

company with over a dozen subsidiaries engaged in multiple lines of business.[20]

The Nation also exercises sovereign authority under federal statutes. For example, the Chickasaw Nation maintains a sex offender registry under the Adam Walsh Child Protection and Safety Act, 34 U.S.C. § 20912(a).[21] *See* Chickasaw Code tit. 17, ch. 2, art. A § 17-201.7, *available at* https://code.chickasaw.net/Title-17.aspx (last visited January 28, 2019). And the Nation receives Indian Child Welfare Act grants to operate Indian child and family service programs on or near their Indian country. 25 U.S.C. §§ 1931(a), 1903(10).

All of this, as with the other steps, demonstrate the Reservation remains intact.

H. Conclusion.

In *Indian Country U.S.A., Inc.*, 829 F.2d at 976, the Tenth Circuit recognized that Indian tribes retain sovereignty over both their members and their land, and tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States. Once Congress creates a Reservation, as it did in this case with the Chickasaw Nation in the 1830 Treaty, only Congress can extinguish or diminish that Reservation. And Congress can only do so through legislative action. Congress has never extinguished nor diminished the Chickasaw Reservation since the 1866 Treaty.

The crimes in this case were committed on that Reservation, and therefore in Indian Country. Under the General Crimes Act, 18 U.S.C. § 1152, only the federal court had jurisdiction to prosecute

---

[20] https://www.chickasaw.net/Our-Nation/Resources.aspx (last visited January 31, 2019).

[21] Indian tribes are "jurisdictions" under the Act, *see id.* § 20911(10)(H), if, like the Chickasaw Nation, they elect to maintain a sex offender registry, *id.* § 20929(a)(1)(A).

it. Bosse's prosecution in state court was therefore void *ab initio* for lack of jurisdiction. This Court should vacate his convictions and remand the case to the District Court for McClain County with instructions to dismiss for lack of jurisdiction or, at a minimum, remand for an evidentiary hearing.

PROPOSITION TWO

TRIAL COUNSEL WERE INEFFECTIVE BY FAILING TO ADEQUATELY INVESTIGATE BOSSE'S LIFE HISTORY, AND FAILING TO ADEQUATELY PREPARE WITNESSES, WHICH DEPRIVED HIM OF A FAIR AND RELIABLE SENTENCING. DIRECT-APPEAL AND POST-CONVICTION COUNSEL WERE EQUALLY INEFFECTIVE FOR FAILING TO RAISE THAT ISSUE. THESE FAILINGS ALL VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. Introduction.

Bosse's life can best be described as filled with dysfunction. He was raised in a family where dysfunction and abuse were rampant. Then, after being arrested, he was assigned a legal team also beset by dysfunction. His lawyers failed him at every step of the process – trial, direct appeal, and post-conviction – and left him with little chance of avoiding a death sentence in this emotionally-charged, sympathy-filled case. The Constitution demands better than what Bosse received.

The penalty phase of a capital trial is "a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). It ensures capital sentencing is "humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Bosse's penalty phase fell below these constitutional guarantees due to trial counsel's failures.

The United States Supreme Court has time and again dictated relief for defendants who have

fallen prey to ineffective assistance of counsel (IAC). In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court made clear that when counsel perform deficiently, resulting in prejudice to their clients, judicial relief is necessary. Despite the fact Bosse's case was a classic second-stage case, insofar as the evidence of guilt in the first stage was overwhelming, trial counsel failed to adequately investigate, present, and marshal compelling mitigating evidence, leading to a deficient second-stage presentation, which greatly prejudiced Bosse. *See* Att. 7, ¶ 6 (Affidavit of Joe Robertson) ("There is no logical reason why Bosse's case should have been treated as a first-stage case. The energy and focus in that case should have been on preparing the best second-stage case possible").

Counsel is aware of the presumption of reasonableness reviewing courts afford trial counsel's actions. *See Mayes v. Gibson*, 210 F.3d 1284, 1288 (10th Cir. 2000). Closer scrutiny applies, however, to performance during the penalty phase of a capital case. *See Littlejohn v. Trammell*, 704 F.3d 817, 859 (10th Cir. 2013). Courts are "compelled to insure the sentencing jury makes an individual decision while equipped with the 'fullest information possible concerning the defendant's life and characteristics,' and must scrutinize carefully any decision by counsel which deprives a capital defendant of all mitigation evidence." *Mayes*, 210 F.3d at 1288 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Here, the jury did not have the "fullest information possible" concerning Bosse's life. In fact, as set out below, the information the jury had was not only incomplete, it was inaccurate.

Even a defendant who has committed a brutal and horrific crime can be prejudiced by ineffective counsel. *See Williams v. Taylor,* 529 U.S. 362, 368 (2000) (finding prejudice even where petitioner "brutally assaulted an elderly woman"); *Rompilla v. Beard*, 545 U.S. 374, 397 (2005)

(Kennedy, J., dissenting) (characterizing crime as "brutal" where victim was stabbed sixteen times, beaten with a blunt object, gashed in the face with bottle shards, and set on fire); *Wiggins v. Smith*, 539 U.S. 510, 553 n.4 (2007) (Scalia, J., dissenting) (characterizing crime as "bizarre" where elderly victim was found drowned in her bathtub, missing her underwear, and sprayed with insecticide). While the crimes for which Bosse was convicted were brutal, the evidence presented here is quantitatively and qualitatively different than the mitigation case presented at trial. Bosse was prejudiced by that difference.

Because Oklahoma law requires a unanimous jury to impose the death penalty, *see* 21 O.S. § 701.11; *Castro v. Oklahoma*, 71 F.3d 1502, 1516 (10th Cir. 1995), Bosse need only demonstrate a reasonable probability at least one juror would have voted for a sentence less than death had the information discovered by subsequent counsel been presented at trial. *See Wiggins*, 539 U.S. at 537. Here, such reasonable probability exists.

B. This Claim Is Not Waived.

This claim was not and could not have been raised previously, and the facts presented herein are sufficient to establish by clear and convincing evidence that, absent counsel's ineffective performance, no reasonable jury would have sentenced Bosse to death. *See* 22 O.S. § 1089(D)(8) (2011). Further, the claim raised here is based on newly-discovered evidence in the form of recent witness interviews and a more fully-informed expert evaluation by Dr. Matthew John Fabian, all received in late January and February 2019. *See* Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*. The claim is that Bosse

was prejudiced by trial counsel's failures in their investigation and presentation of mitigation. It follows that both Bosse's direct-appeal lawyers and post-conviction lawyers were equally ineffective for failing to raise this meritorious claim. *See Pickens v. State*, 910 P.2d 1063, 1068 (Okla. Crim. App. 1996) (reviewing claim of post-conviction IAC); *Hale v. State*, 934 P.2d 1100, 1102 (Okla. Crim. App. 1997) (noting in a second post-conviction application, "[c]omplaints addressed to the performance of counsel during post-conviction, being raised now at the first available opportunity, will be addressed on the merits").

For purposes of establishing the claim is not defaulted, Bosse here focuses on two related actions that undermined his ability to bring this claim sooner. First, immediately prior to trial, counsel presented Bosse with a form to sign in which Bosse ostensibly is asked to choose his own trial strategy. (Attachment 8).[22] Second, at the close of the second-stage evidence, Gary Henry (lead trial counsel) engaged Bosse in an *ex parte* on-the-record colloquy in which he systematically, through a series of mostly leading questions, got Bosse to agree with him that counsel had done everything required of them and that Bosse was fully satisfied with all of the actions taken and decisions made by trial counsel during the course of their representation. (Tr. XII 154-60). These actions by Henry were highly improper, unethical, and fell well below the standard of care expected of capital-defense

---

[22] That counsel had not yet devised a trial strategy a mere 19 days before trial (when they had been representing Bosse for over 2 years) is an aspect of their ineffective assistance. It is addressed here only with regard to the effect it had on effectively foreclosing Bosse's opportunity to pursue this claim earlier.

counsel in Oklahoma. They served no legitimate purpose other than to attempt to shield Henry and the other trial counsel from potential exposure to IAC claims such as this. *See* Affidavit of David Autry, Attachment 9; Affidavit of Joe Robertson, Attachment 7, ¶ 8 ("This is not a colloquy a competent, effective capital-defense attorney would ever do with a client. . . . Had I known about this practice sooner, I would have immediately put a stop to it").

Despite being clearly improper, trial counsel's actions had their desired effect. Bosse's direct-appeal counsel have acknowledged the only reason they abandoned their plan to pursue an IAC claim was because of Henry's actions, not because of the merits of the claim. (Affidavit of Jamie Pybas, Attachment 10, ¶ 4; Affidavit of Michael Morehead, Attachment 11, ¶ 4). Moreover, both direct-appeal counsel note that Henry "admitted he took these measures because he had previously been accused of IAC and did not want that to happen again." (Pybas Affidavit at ¶ 3; Morehead Affidavit at ¶ 3).[23]

The United States Supreme Court has recognized that unprofessional conduct by an attorney can sometimes be an "extraordinary circumstance" that justifies excusing an otherwise applicable waiver rule. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). As stated by Justice Alito: "Common sense dictates that a litigant cannot be held constructively

---

[23] As for post-conviction counsel, the Original Application for Post-Conviction Relief (APCR) speaks for itself in demonstrating counsel's ineffectiveness. This Court concluded none of the claims brought in that application were appropriately brought in an APCR. *See* Opinion Denying Post-Conviction Relief, No. PCD-2013-360 (Dec. 16, 2015).

responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Id.* at 659 (Alito J., concurring). *See also Maples v. Thomas*, 565 U.S. 266 (2012) (finding cause for default where counsel had abandoned petitioner).

Here, Henry was "not operating as [Bosse's] agent in any meaningful sense of the word" when he, in an effort to protect himself against an IAC claim, led Bosse through a colloquy that subsequent counsel felt precluded them from even bringing the claim, which they otherwise would have pursued. In essence, Henry effectively abandoned Bosse with regard to Bosse's ability to bring claims otherwise available to him. *See* Autry Affidavit at ¶ 4 ("Counsel's most important professional obligation, especially when a client's life is on the line, is to protect the client's rights and to make as complete a record as possible to allow the client to pursue all available avenues of relief should the trial not end successfully. These lawyers did exactly the opposite of that, and at least on this issue, were actively working against their client's interests"); Robertson Affidavit at ¶ 8 ("In my opinion, this colloquy created a conflict of interests between Henry and Bosse and forced Bosse to reveal information that would otherwise be protected by the attorney-client privilege. It appears from this colloquy that Henry was concerned with protecting himself and, to do so, pressured a client into pursuing statements against the client's best interests").

Had Henry not actively worked against Bosse's interests in order to protect his own, direct-appeal counsel would have pursued an IAC claim. But because of Henry's unprofessional abandonment and his undermining of Bosse's interests, they felt prohibited

from raising such a claim, and therefore, did not even investigate it. Original post-conviction counsel also failed Bosse by failing to raise this issue.

Undersigned counsel just recently uncovered the full extent of the evidence necessary to bring this claim, and this claim is being brought in a timely fashion. This Court should consider the claim on the merits.

C. Factual Background for Claim.

1. Family Background.

Shaun Bosse was born in 1982 into a family full of dysfunction, sexual deviancy, and abuse that went back generations. His parents, Jack and Verna, married in 1971, and had their first son, Matt, in 1974. Att. 12, ¶ 3 (Affidavit of Verna Bosse). Jack was not home often, but when he was, he subjected Verna and Matt to various types of abuse, including yelling, physical and emotional violence, torturing and killing family pets, and withholding food. *Id.* at ¶¶ 5-9. Although Verna worked a full-time job, Jack would take her paycheck, give her a minimal allowance and control what food she could buy. She was often forced to rely on her parents for support to buy food and clothes for her children. Att. 12, ¶ 7. Verna finally worked up the courage to leave Jack when Shaun was three months old and Matt was eight years old.

Unfortunately, leaving Jack did not end the dysfunction – not even close. Verna and the boys lived in a rented home directly behind Verna's parents, Ruby and Vernon Darnell, in Blanchard, Oklahoma. Verna fell into a deep depression; all she did was work and sleep.

She did not have the energy or the will to take care of the home or the boys. Att.14, ¶ 2 (Affidavit of Jimmy Darnell); Att. 25, ¶ 18 (Affidavit of Valerie Barnett). The boys were forced to live in filth, with so many dirty dishes and food left in the kitchen that it filled with maggots and roaches. The house smelled so bad that other family members would not go there or let their children go there. Att, 14, ¶ 3; Att. 25, ¶ 19. The boys wore dirty, smelly clothes to school. Att. 25, ¶ 20. When it got too bad, Verna's mother, Ruby, and younger brother, Jimmy, would go over and clean the house. Att, 14, ¶ 3. Shaun's respite was to walk to his grandparent's house.

Unfortunately, Ruby and Vernon's home was no less dysfunctional. Ruby was a strong, outspoken woman who ran the family. And Vernon, a quiet man, was in reality a child molester and cross-dresser. Vernon had several police interactions for cross-dressing (which earned him a dishonorable discharge from the U.S. Army), indecent exposure and masturbating in public, and eventually improperly touching a young niece. Att. 12, ¶¶ 52-53. For that improper touching, Vernon was placed on probation and had to move out of the house for a period because he was prohibited from having contact with children. *Id.*, ¶ 57; Att. 15, ¶ 25 (Affidavit of Shaun Bosse). No matter where Shaun turned, deviancy and dysfunction were all around.

Shaun's brother, Matt, was an angry child, who grew into an angry and violent adult. He also had unlimited access to Shaun since Shaun's birth. Shaun can remember being abused by Matt – eight years his senior – beginning when he was about five years old. Att.

15, ¶ 6. From as early as Shaun can remember, Matt would tie Shaun's hands behind his back and bind his feet together so he could neither fight back nor run away. *Id.* Then Matt would beat him. Because Matt was in karate and quickly worked his way up to being a black belt, these were not ordinary beatings. And like their dad, Matt was also cruel to animals. Shaun remembers Matt hog-tying their husky, and leaving the dog that way for hours. When he was about five, Shaun once tried to help the dog, so Matt hog-tied Shaun the same way and left him there with the dog. *Id.*, ¶ 31. Given Verna's constant depression, she was not there to protect Shaun from Matt's abuse.

Shaun spent much of his childhood in fear of somehow triggering Matt with the smallest movements and sounds. He could not predict what would set Matt off; it might be chewing too loudly, or making a chair creak, or maybe rolling around too much when he slept. *Id.*, ¶ 7. But whatever the cause, once Matt was triggered, Shaun paid the price. The two brothers shared a room. Shaun remembers Matt would often threaten to kill him during the night, pointing a .22 rifle at Shaun's bed and telling him if he made a sound, Matt would shoot him. *Id.*, ¶ 9. Both Shaun and Verna remember numerous occasions when Shaun would come into her bedroom in the middle of the night begging to sleep with her. Att. 12, ¶ 21; Att. 15, ¶ 10. Matt also would pull Shaun's pants down, sometimes at home in front of friends, and sometimes in public. Att. 12, ¶ 21; Att. 15, ¶ 10.

Yet another source of trauma and unpredictability in Shaun's life was his relationship with his father, Jack. The boys were supposed to spend every other weekend with him.

Sometimes Jack would pick them up as planned, and sometimes he just wouldn't show up. When they did stay with Jack, they were exposed to his unconventional lifestyle; Jack was married to a woman, but also had a male lover, and the three of them lived together as a family. Att. 15, ¶¶ 18-19. Shaun witnessed Jack impose the same types of abuse on their step-mother that he had imposed on Verna. Shaun remembers frequent disappointment with his father. He also remembers at least one occasion of waking up in the middle of the night with his father's hand down Shaun's pants, rubbing his buttocks. *Id.*, ¶ 20.

When Shaun was around eight, Matt finally left the house and joined the Marines. Matt continued on his path of sadistic abuse with a series of wives and step-children. Att. 16 (Declaration of Heather Steakley); Att. 17 (Declaration of Melinda Harvey). Eventually, Matt spent time in prison for violently raping his first wife. Att. 16, ¶¶ 15-16. In the meantime, with Matt gone, Shaun's life turned into one of quiet isolation, spending most of his time playing video games. Eventually, he started playing baseball, and finally found something he was good at. And it got his mother and grandparents out of the house to come watch his games. Although he enjoyed playing baseball, and really excelled at it, he also developed a sense of obligation to keep playing because his family expected him to. Att. 15, ¶ 23.

After getting out of prison for rape, Matt moved back to Blanchard, and Shaun once again became the target of his violent abuse. But it wasn't just Shaun; the entire family lived

in fear of Matt. Att. 12, ¶ 28.[24] Matt would not hesitate to throw objects or yell at anybody over the slightest things. On one occasion, he even threw his grandmother, Ruby, to the floor. *Id.* at ¶ 38.

Not surprisingly, while in high school, Shaun started using drugs and alcohol as a coping mechanism. Att. 15, ¶ 23. He found it lessened his anxiety and helped him feel more comfortable interacting with other people.

2. Background of Legal Representation.

Unfortunately, Shaun's family was not the only dysfunctional group he had to deal with. His legal team from the Oklahoma Indigent Defense System that turned out to be just as dysfunctional (albeit in different ways).

The only constant in Bosse's representation was lead counsel Gary Henry. Until shortly before trial, Bosse's legal team consisted of Henry, Vicki Floyd (second chair), and Dale Anderson (investigator). With trial to begin on October 1, 2012, OIDS reorganized the division on February 2, 2012, terminating Floyd and transferring Anderson to a different division (taking him off Bosse's case). Chaos ensued, much to Bosse's detriment. Att. 13, ¶ 2. After February 2, 2012, only three attorneys remained in the entire division, Henry (who was now Division Chief), Mary Bruehl (who everybody in the division and upper

---

[24] Matt has threatened to kill, beaten and otherwise tormented Shaun, Verna, and countless others in the family. All remain in fear of Matt to this day. *See, e.g.,* Att. 15, ¶ 12; Att. 24, ¶¶ 26-28; Att. 12, ¶ 41; Att. 21, ¶ 13 (Expert Affidavit of Dr. Fabian). Matt's ex-wives, Heather and Melinda, are so scared of Matt, they do not even want him to know what state they live in.

management believed was not capable of performing the duties required of capital-defense counsel[25] because of her severe anxiety about appearing in court),[26] and Bobby Lewis (who was new to the division and had never tried a capital case). All three attorneys were assigned to every capital case in the division.

Prior to the February, 2012 shake-up, Floyd and Anderson recognized this as a "second-stage case," meaning all efforts should be devoted to developing mitigation for use in the second stage rather than trying to challenge guilt in the first stage. Att. 19, ¶ 3 (Affidavit of Vicki Floyd); Att. 20, ¶ 3 (Affidavit of Dale Anderson). Ms. Floyd and Mr. Anderson were onto something: This was a second-stage case and should have been treated as such.[27] As noted by Anderson, an investigator with OIDS for twenty years:

> In my opinion, Shaun's case was not a first-stage case and I focused my investigation on second stage. During the time I worked on his case, I saw lots of red flags for abuse, possibly sexual, and I believed most of Shaun's problems could have stemmed from his older brother Matthew Bosse. Had I stayed on Shaun's case, I would have continued to thoroughly investigate those areas to develop mitigation evidence.

---

[25] According to OIDS' Executive Director, Joe Robertson: "I had been told several times that [Ms. Bruehl] was not good in the courtroom and would become extremely nervous to the point of freezing up." Att. 7, ¶ 4. Indeed, Ms. Bruehl has acknowledged that right before trial started, she had to go to the emergency room due to symptoms of severe anxiety. Att. 18, ¶ 13 (Affidavit of Mary Bruehl). Bobby Lewis reports the same thing. Att. 13, ¶ 16.

[26] In fact, almost immediately after Bosse's trial, Ms. Bruehl was fired from OIDS "due to her inability to perform as a capital trial lawyer." Att. 7 ¶ 7.

[27] Bobby Lewis recognized this as well: "Given the overwhelming evidence connecting Shaun to the crime, more focus should have been on mitigation and preparing the mitigation experts. I know I did not focus on second stage." Att. 13, ¶ 13.

Id. Despite Anderson's informed view of the case, Henry noticed that Bosse had bad teeth during a meeting and immediately jumped to the conclusion that it was "meth mouth." *Id.* at ¶ 4. In reality, Bosse has genetically bad teeth, Att. 13, ¶ 29, and it was not "meth mouth." Nonetheless, that inaccurate conclusion was enough to cause Henry to ignore Anderson's plans for a more wide-ranging mitigation case and make methamphetamine use the centerpiece of his mitigation plans. Indeed, the defense team hired two experts to support Henry's erroneous conclusion of "meth mouth." They hired neuropharmacologist Jonathan Lipman and neuropsychologist Matthew John Fabian.[28] In the end, however, they did not use either, opting instead for a mitigation case devoid of expert explanation. Att. 10, ¶ 2; Att. 11, ¶ 2.

After the February 2012 shake-up, preparation for second stage stalled. For example, despite having evaluated Bosse in October, 2011, and January, 2012, Dr. Fabian heard nothing at all from the defense team until receiving a call from Henry in September, 2012 (less than a month before trial). Henry informed Fabian he needed to prepare a report, but Henry could not yet tell him what that report should focus on because the team had not yet determined what trial theory they were planning to pursue. Att. 22, ¶ 10 (Fact Affidavit of

---

[28] As set out in Att. 21 and discussed *infra*, when retained by the trial team, Dr. Fabian was asked to evaluate Bosse and draw conclusions about the effects heavy meth use had on his neuropsychological picture and cognitive functioning. He was not provided detailed information about the complex trauma suffered by Bosse, nor was he asked to offer any opinions about how such trauma impacted Bosse's neuropsychological development. This limitation, dictated by trial counsel, resulted in him drawing incomplete and inaccurate conclusions.

Dr. Fabian). Even at this late date, Fabian was not informed that Vicki Floyd, the only member of the team with whom he had previously interacted, was no longer employed at OIDS. He did not learn until immediately before his anticipated testimony that the lawyer now responsible for his testimony would be Ms. Bruehl. *Id.* at ¶ 11. Ultimately, Dr. Fabian did not testify (despite having left a conference early to fly to Oklahoma) because he would not agree to Henry's demands that he not testify to a certain issue and that he lie about not remembering the same if asked about it on cross-examination. *Id.* at ¶ 12.

Unfortunately, Dr. Fabian's experience with the defense team was not unique among defense witnesses. The lawyers did not in any way prepare witnesses before they testified. The only time the lawyers actually met any of the witnesses was while they were being escorted into the courtroom for their testimony. According to trial counsel Bobby Lewis, "None of the second-stage witnesses I dealt with were prepared prior to their testimony. The only time I met with them was immediately before they took the stand, and I did not prepare them beyond what was discussed in the hall prior to them testifying." Att. 13, ¶ 13.The witnesses have confirmed this as well. None of the witnesses knew what they would be asked or how their testimony was applicable to the case. Att. 12, ¶ 65; Att. 14, ¶ 10; Att. 23, ¶ 19 (Affidavit of Joey Darnell); Att. 24, ¶ 33. One particularly egregious example of this lack of preparation comes from Chad Mitchell: "The first time I met with defense counsel to discuss my testimony was right before I took the witness stand. They made me think I was their star witness. I had no idea what they were going to ask me." Att. 25, ¶ 10 (Affidavit

of Chad Mitchell).

The dysfunction of the defense team was on full display in their second-stage presentation. Consistent with Henry's erroneous belief Bosse had "meth mouth," the team set out to establish in second stage that Shaun had a severe addiction to meth. They called no expert witnesses; rather, they called a parade of family members and others who knew Shaun in different facets of his life. A total of eleven witnesses were asked about Shaun's use of drugs.[29] Of those eleven, the only witness who testified he ever saw Shaun use drugs was Chad Mitchell, his lifelong friend. That defense counsel viewed this meth evidence as critical to their case is corroborated by the fact Mitchell was told he was the star witness. But had counsel actually done what is required of them and talked to their witnesses with a view toward developing an accurate theory, they would have known those witnesses would not support Henry's "meth mouth" theory. The only other evidence the lawyers presented, through many of the same witnesses, was that Shaun was a good, quiet person who was very gentle with kids, and that nobody expected him to commit a crime like this.

The dysfunction of the defense team was not limited to their lack of investigation and preparation; they exhibited dysfunction on a personal level as well. First, their personal dislike of each other and inability to work together were so obvious even the client recognized it: "As far as my attorneys, they did not get along with each other. There was a

---

[29] These witnesses were Jeffrey Hirschler, Ricky Darnell, Jason Goines, Tony Hancock, Daryl Mitchell, Chad Mitchell, Jack Bosse, Joey Darnell, Jimmy Darnell, Glen Castle, and Matt Bosse.

lot of tension between Gary Henry and Mary Bruehl. They would have disagreements about witnesses or how to do the trial right in front of me. With all of this going on, I did not trust my attorneys, but they were the only attorneys I had." Att. 15, ¶ 3. *See also* Att. 18, ¶ 6.

As noted by the other lawyer on the team, Bobby Lewis, the entire Norman Capital Trial Division of OIDS was "was either in chaos or on the brink of it." Att. 13, ¶ 2. According to Lewis, the division was not concerned about providing effective representation; they simply wanted to make sure they did enough superficially to avoid IAC claims. *Id.* at ¶ 4 ("It was like there was a checklist for each case and they were just checking the boxes to ensure they were not found ineffective later, without giving much thought to what was substantively going on"). As for the other lawyer on the team, Mary Bruehl, she clearly was not up to the challenge of handling the case either:

> I recall that Mary had what seemed like anxiety trouble leading up to and during Shaun's trial. Although my memory is not as good as it was, I believe Mary was supposed to do the direct-examination of Shaun's father, Jack Bosse, but at the last minute, she said she couldn't do it. So, I did. I had never met Jack Bosse before and had to present him cold. As you can tell from reading the record, Jack was not an easy witness.

Id. at ¶ 16. *See also* att. 18, ¶ 13 (acknowledging Bruehl was not ready for trial and went to the hospital for anxiety right before it started).

Clearly, and unfortunately for Bosse, his trial team could not and did not work together to provide an adequate defense. Rather, they squabbled in front of him, failed to investigate and prepare witnesses, and paraded in a series of unprepared witnesses who served to undermine rather than advance the second-stage "meth mouth" theory.

Direct-appeal counsel also failed Bosse by not pursuing an IAC claim based on the egregious mishandling of the trial because they incorrectly assumed Henry's self-serving attempts at insulating himself from such a claim precluded them from bringing it. *See* Section B, *supra*. As for original post-conviction counsel, the paltry APCR speaks for itself. Counsel failed to raise any claims cognizable on post-conviction. *See* Opinion Denying Post-Conviction Relief, No. PCD-2013-360 (Dec. 16, 2015). These failures are perhaps best explained by the way counsel explained her role to Bosse during the only meeting they had: "After I was convicted and on death row, an attorney named Wyndi came to see me once about my post-conviction appeal. *She told me she was working alongside my direct-appeal lawyers*. I did not see her again. I never spoke to her on the phone and I don't really know what she did on my case." Att. 15, ¶ 5 (emphasis added). Clearly, post-conviction counsel merely saw herself as an extension of the direct-appeal team and did not fulfill her responsibility to provide Bosse with an independent post-conviction investigation.

D. At Every Stage Counsel Were Ineffective for Failing to Adequately Investigate Bosse's Full Background and Life History or Raise the Issue on Appeal.

In the early stages of the case, before the February, 2012 purge of the division, it appeared they were on the right track. Vicki Floyd recognized the case as a classic second-stage case and hired two experts (although at least one of the two - neuropharmacologist Jonathan Lipman - was unnecessary due to the inaccuracy of Henry's "meth mouth" theory). Att. 19, ¶ 3. And investigator Dale Anderson, who also knew this was not a first-stage case, recognized the numerous red flags pointing towards severe trauma and abuse suffered by

Bosse. Att. 20, ¶ 3. But once Floyd and Anderson were removed, all meaningful second-stage investigation and preparation ceased. Given it was obvious this was a second-stage case, counsel's failure to adequately prepare for that "constitutionally indispensable part of the process of inflicting the penalty of death," *Woodson,* 428 U.S. at 304, was inexcusable. Failing to adequately investigate and prepare for the most important part of the trial certainly prejudiced Bosse's right to a fair and accurate sentencing, violating his Sixth, Eighth, and Fourteenth Amendment rights.

1. Counsel's Failures Began Immediately and Continued Throughout the Entire Case.

From the outset, experienced capital counsel should have known, given the publicity and emotion surrounding this case, the State would likely seek death. The professional standards to guide capital counsel are set out in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, ("ABA Guidelines") *reprinted in* 31 Hofstra L. Rev. 913 (rev. ed. 2003). *See Wiggins,* 539 U.S. at 524; *Strickland*, 466 U.S. at 688; *Williams*, 529 U.S. at 396; *Rompilla*, 545 U.S. at 374; *Anderson v. Sirmons*, 476 F.3d 1131, 1142 (10th Cir. 2007). Under these Guidelines, "the mitigation investigation should begin as quickly as possible . . . ." *ABA Guidelines*, Guideline 10.7 comment., 31 Hofstra L. Rev. at 1023. The prompt retention of a mitigation expert is critical in conducting an adequate mitigation investigation, which the Supreme Court has recognized "should comprise efforts to uncover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539

U.S. at 524.

Despite these clear requirements, counsel did none of them until right before trial. And this failing went beyond this case; it was the culture of the Norman Capital Trial Division to not treat capital cases with the care they require. As acknowledged by Bobby Lewis: "Problems tended to arise when a case needed to be tried because, as a division, we were disorganized and flew by the seat of our pants. . . . [W]e did not have well-crafted strategies for the most part." Att. 13, ¶ 8. The division seemed more concerned with protecting against IAC claims than in actually providing effective representation.[30] *Id.* at ¶ 4. The Executive Director knew about these failings, but did nothing:

> As Executive Director, one concern I had about the Norman Capital Trial Division was that it did not have success in death penalty cases, and I felt like it was due to a failure to properly prepare mitigation cases. Although Gary Henry was promoted to be the new Division Chief, I had reservations about doing so because I was not sure he had the kind of grasp of mitigation needed in capital cases.

Att. 7, ¶ 3.

Despite knowing the obligations placed on defense counsel in death penalty cases, Bosse's attorneys failed to conduct a satisfactory investigation. They talked to witnesses, but because Henry had already settled on his inaccurate "meth mouth" theory, the investigation

---

[30] Lewis's "checklist" observation is borne out by the record in this case. Henry requested funds to hire a mitigation expert. And that request was approved. Att. 26 (Professional Services Justification Statement and Approval Notification). Of course, even this act of box-checking was not done until August 4, 2011, over a year after Henry was appointed to represent Bosse. *Id.* But having checked the required box, Henry then never actually hired a mitigation expert.

was stunted and not designed to discover accurate information. As a result, counsel failed to uncover the extent of the trauma and dysfunction in Bosse's life. This caused them to fail to provide accurate information to Dr. Fabian, which in turn caused Dr. Fabian to fail to include that trauma history in his evaluation and conclusions. Because Henry locked into his "meth mouth" theory before the case had been investigated, and failed to hire the mitigation expert he was approved to hire, the truth about Bosse's life was not discovered. The defense was left with their inaccurate and unpersuasive nice-guy meth-addict theory.

This case is quite similar to *Porter v. McCollum*, 558 U.S. 30 (2009), in which the Supreme Court concluded counsel provided ineffective assistance by failing to conduct an adequate mitigation investigation. In *Porter*, "[t]he sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son." *Id.* at 32. Counsel's approach here was essentially the same as in *Porter*: Counsel attempted to put on evidence of Bosse's drug use and talked about how quiet and gentle he was. The problem here, as it was in *Porter*, is that counsel failed to conduct an adequate mitigation investigation that would have allowed them to make a reasonable tactical decision as to what the best mitigation strategy would be.

The mere fact that counsel's investigation included interviewing several members of Bosse's family does not save it from being unreasonable. Even an investigation that appears thorough on the surface can be unreasonable if, under the circumstances of the case, it failed to follow logical leads or uncover meaningful mitigation evidence. The Supreme Court

found as much in:

> This is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts, including interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase. None of the sources proved particularly helpful.
>
> Rompilla's own contributions to any mitigation case were minimal. . . . There were times when Rompilla was even actively obstructive by sending counsel off on false leads.
>
> The lawyers also spoke with five members of Rompilla's family. . . and counsel testified that they developed a good relationship with the family.

Rompilla, 545 U.S. at 381. The Court even acknowledged that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Id.* at 383. Nonetheless, the Court found Rompilla's lawyers were ineffective because they failed to examine one of Rompilla's prior-conviction files even after they were on notice it would be used during the penalty phase. *Id.* at 383-84.

Counsel were similarly ineffective here. Although counsel's investigation might appear superficially reasonable, it clearly was not because they ignored obvious signs of Bosse's traumatic upbringing. The original investigator, Dale Anderson, recognized these red flags of trauma and abuse early and knew they were the building blocks for a good mitigation theory. Att. 20, ¶ 3. Despite Anderson's accurate perception of the real mitigation

theory in this case, that theory was never investigated or pursued.[31]

Nor should counsel be deemed effective for having hired experts. First, hiring experts was clearly just another box Henry needed to check off. Counsel's obligation is not satisfied simply by hiring an expert; counsel must also work with the expert to make sure the expert fits into the overall theory. That did not happen in this case, or apparently in the Norman Capital Trial Division in general: "Experts would be hired, but no one seemed to be paying any attention to what was being sent to the experts to review. There was no clear system in place for keeping track of what the experts even had in their possession. On more than one occasion this led to confusion in our office." Att.13, ¶ 4. Dr. Fabian confirms that the lawyers did not work with him in this case either:

- "My last evaluation of Bosse was on 01/06/2012. I did not hear from anybody on the trial team for about eight months, until Henry called me a few weeks before Bosse's trial commenced. He told me he might need me to testify at trial the following month [and] I would need to potentially prepare two forensic mental health reports . . . . [because] he had not decided what defense theory they were planning on pursuing." Att. 22, ¶ 10.

- "I eventually learned that Bosse's second chair attorney, Vicki Floyd, with whom I had the most contact, had been terminated from OIDS sometime around February of 2012. I was notified of this when I met with Mary Bruehl the day before my scheduled testimony. . . . I had very little communication from any of [Bosse's trial defense team]." *Id.* at ¶ 11.

- "During the mitigation trial phase, I was attending a . . . conference in St. Louis. I was told to be on call in case the defense wanted to call me . . . . Ms.

---

[31] As discussed, once current counsel followed those leads and uncovered the true extent of Bosse's traumatic life and presented the information to Dr. Fabian, Fabian conducted an accurate and more robust evaluation.

> Bruehl called me while I was in St. Louis and told me that they wanted me to testify at trial that week. I left the conference and flew from St. Louis to Oklahoma City. I met Ms. Bruehl at a restaurant to prepare for my testimony at approximately 9:00 p.m. the evening before my anticipated testimony. I had serious concerns about the limited trial preparation in this case." *Id.* at ¶ 12.

Fabian never testified. But counsel's decision not to call him was not a "tactical" one; rather, as explained by Dr. Fabian, the only reason Henry chose not to have him testify was because Fabian would not agree to Henry's demand that he commit perjury:

> [Gary] told me the only way he would allow me to testify would be if I agreed to not mention certain issues in my testimony. I asked Henry what would happen if I was asked specific questions on cross-examination. He told me I would have to "forget" about what I knew/believed. He was very clear that if I was not willing to "forget" about certain things . . . , he would not call me as a witness. I understood this to mean he wanted me to be dishonest . . . . I told him I was not comfortable with the situation, and he replied that he would not be calling me as a witness.

Id.

Despite the obvious failures of Bosse's trial attorneys' unreasonable mitigation investigation, direct-appeal counsel never pursued an IAC claim on that basis. They conducted no extra-record investigation and filed no 3.11 motion. As discussed in Section B *supra*, the only reason direct-appeal counsel did not pursue an IAC claim was because Henry unprofessionally and unethically manipulated the record in an effort to shield himself from such a claim. Appellate counsel wrongly believed Henry's actions "effectively insulated himself from any IAC claim." Att. 10, ¶ 4; Att. 11, ¶ 4. As further discussed in Section B, appellate counsel were incorrect in that conclusion and their decision to abandon a meritorious claim on that basis was unreasonable. In fact, appellate counsel should have

recognized that Henry's actions in themselves amounted to IAC. Att. 9, ¶ 5; Att. 7, ¶ 8. Appellate counsel performed deficiently in failing to recognize these issues and pursue them on appeal. Bosse was prejudiced because this claim had a reasonable probability of success. *Evitts v. Lucey*, 469 U.S. 387 (1985).

2. Bosse Was Prejudiced by Counsel's Inadequate Investigation.

All of these failures by counsel prejudiced Bosse and deprived him of a fair and reliable sentencing. Had counsel engaged in a reasonable mitigation investigation that allowed them to pursue a more persuasive mitigation theory, the jury would have heard about Bosse's history of complex trauma and, would have learned how that history affected Shaun's development and shaped his future behaviors.

The picture counsel painted of Shaun's life was woefully inadequate. A reasonable investigation would have provided the details that could have changed the opinion of at least one juror. For example, counsel missed a wealth of information about how Shaun's older brother, Matt, contributed to his trauma. Witnesses were available who would have educated the jury about Matt's cruel and violent tendencies. One such person was Matt's first wife, Heather Steakley. Att. 16. She was never contacted by Bosse's defense team, but would have been willing to testify. *Id.* at ¶ 30. If she had testified, the jury would have learned that Matt had cut her neck and shoulder with a knife, *Id.* at ¶ 5; hit her in the stomach while she was pregnant with his son and told her he hoped she lost the baby, *Id.* at ¶ 6; would "beat the hell

out of" her and then have sex with her, *Id.* at ¶ 8; "wanted to insert a baseball bat in [her] vagina," *Id.* at ¶ 9; "water-boarded" her in the bathtub and then put a (fortunately empty) gun in her mouth and pulled the trigger, *Id.* at ¶ 15; and raped her, for which he went to prison. *Id.* at ¶¶ 15-16. They also would have heard that Vernon (Shaun's grandfather) had molested Heather's son, Kyle. *Id.* at ¶ 21. Because of counsel's failure to investigate, however, the jury never heard any of this evidence about the true nature of Shaun's environment.

The jury also would have heard from Matt's second wife, Melinda Harvey, who also was never contacted by Shaun's trial (or appellate) team. She would have been willing to testify. Att. 17, ¶ 52. Had Melinda testified, the jury would have heard more about how cruel and sadistic Matt was, and how dysfunctional the family truly was. The jury would have learned Matt repeatedly threatened to kill Melinda and her daughter, Marissa, and dump their bodies in an oil field, *Id.* at ¶ 7; Matt is a very violent and angry person who could be set off by the slightest movement or comment, *Id.* at ¶ 9; Matt stabbed her in the hip while she was nursing their infant son, Zack, *Id.* at ¶ 11; Matt put a (thankfully unloaded) shotgun in her mouth and pulled the trigger, (*Id.* at ¶ 12; Matt had forced sex with her and raped her with objects, *Id.* at ¶¶ 14-15; Matt physically abused her daughter, Marissa, sometimes by holding her by her ankles and bashing her head against the floor, *Id.* at ¶¶ 17-22; and Matt killed every dog they ever owned. *Id.* at ¶ 28.[32] The jury also would have learned that in

[32] The testimony from Matt's ex-wives would have corroborated information about the same types of torture and abuse Matt inflicted upon Shaun as he was growing up.

addition to molesting Heather's son, Kyle, Vernon also molested Melinda's daughter, Marissa. *Id.* at ¶ 41.

The jury would have learned about the complex dysfunction surrounding Shaun had counsel conducted an adequate investigation. With this more detailed and accurate picture of Bosse's life, Dr. Fabian was able to conduct a more thorough evaluation, and reach more accurate conclusions than allowed at trial. These accurate conclusions would have been persuasive to the jury and helped them understand the forces that shaped Shaun's life and behaviors. Att. 21. Dr. Fabian affirms that at the time of trial, Bosse's counsel told him the primary issue was Shaun's drug use, and that he should focus his evaluation on that issue. *Id.* at ¶ 2. He goes on to note, now that he has been provided more complete and accurate information by federal habeas counsel, he realizes the original information was inaccurate and incomplete, which led him to inaccurate conclusions. *Id.* ¶ 3. Dr. Fabian now concludes (as would have been obvious at the time of trial if counsel had conducted a reasonable investigation): "The trauma I now know Shaun experienced as a child provides a more complete and accurate narrative that explains his cognitive deficits, his vulnerability to drug use, and his behavior during the time frame this crime occurred." *Id.*

With accurate and complete information, Dr. Fabian is now able to explain how Shaun's complex trauma would lead him to act impulsively, and cause him to have "exaggerated fear states, hyper arousal, and act[] out in excess to the perceived threat." *Id.* at ¶ 18. He can also explain how his testing demonstrates damage to the hippocampus region

of Shaun's brain, which would cause him to "[in]correctly interpret[] stressful and emotional environmental contexts." *Id.* at ¶ 19. Similarly, Dr. Fabian can now explain, due to the effect early complex trauma has on the amygdala and damage demonstrated to Shaun's prefrontal cortex, "individuals, such as Shaun, may exhibit fear, anxiety, and extreme distress even when faced with non-threatening stimuli due to exaggerated and misperceived stressors." *Id.* at ¶ 20.

In short, Dr. Fabian acknowledges that his initial conclusions were inaccurate because trial counsel presented him with inaccurate and incomplete information. Now armed with accurate and complete information, Dr. Fabian is able to persuasively explain how Shaun's history and upbringing, and the effects those things had on his developing brain, explain the crimes for which he has been convicted and puts them in a totally different light. Based on the lack of explanation at trial, the jury was left no theory other than the one offered by the prosecution – that Bosse intentionally and with premeditation killed Katrina and her children after stealing their property. With Dr. Fabian's thorough evaluation after receiving complete information about Shaun's background, however, it becomes at least equally plausible Shaun overreacted to what he inaccurately perceived as a threat, after Katrina confronted him about the stolen property. There is a reasonable probability such information would have convinced at least one juror a sentence less than death was appropriate in this case.

Evidence of childhood trauma and abuse frequently has been recognized as important

mitigating evidence. *See, e.g., Sears v. Upton*, 561 U.S. 945, 948 (2010) (recognizing mitigating value of emotional abuse by parents, who fought physically and got divorced, and sexual abuse by cousin); *Wiggins*, 539 U.S. at 516–17; *Williams*, 529 U.S. at 395; *see also, e.g., Hooks v. Workman*, 689 F.3d 1148, 1203 (10th Cir. 2012) (defendant's "premature birth, . . . abusive father, frequent moves, educational handicaps, and personal family tragedies" constituted "a life story worth telling"); *United States v. Barrett*, 797 F.3d 1207, 1229-30 (10th Cir. 2016) ("evidence of childhood abuse, neglect and instability can play a significant role in mitigation").

In essence, a reasonable investigation would have allowed counsel to connect the pieces of information they already had, and present them in a more complete, thorough, and persuasive way. But, because counsel engaged in an unreasonably stunted investigation, they were left with only the unpersuasive and unreasonably incomplete theory they presented.

This case is similar to what the Supreme Court said in *Porter*:

> Unlike the evidence presented during Porter's penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.

Porter, 558 U.S. at 33.

D. Conclusion.

> [N]ot all defendants who commit horrific crimes are sentenced to death. Some are spared by juries. The Constitution guarantees that possibility: It requires that a sentencing jury be able to fully and fairly evaluate "the characteristics of the person who committed the crime." *Gregg v. Georgia*, 428 U.S. 153,

> 197 (1976). That guarantee is a bedrock principle on which our system of capital punishment depends, and it is a guarantee that must be honored . . . .

Elmore v. Holbrook, 137 S. Ct. 3, 11 (2016) (Sotomayor, J., dissenting). Such guarantees must be honored especially for defendants like Bosse, whose life has been marked by extensive mitigating circumstances that might convince a juror to choose life over death. Only after hearing such facts can jurors properly make the weighty decision whether such person is entitled to mercy.

Bosse did not receive the effective assistance of counsel in the critical sentencing stage, or on appeal or post-conviction. As a result, this Court should vacate Bosse's death sentences and remand for a new sentencing hearing or, at a minimum, remand for an evidentiary hearing.

PROPOSITION THREE

THE CUMULATIVE EFFECT OF ERRORS DEPRIVED MR. BOSSE OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR CAPITAL SENTENCING UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Even if none of the previously discussed errors, viewed in isolation, necessitates reversal of Bosse's conviction and sentence, the combined effect of these errors deprived him of a fair sentencing and requires the sentence to be reversed. *Cargle v. Mullin*, 317 F.3d 1196, 1200 (10th Cir. 2003); *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990). Specifically, the cumulative effect of all of the errors and omissions at the trial and mitigation phases resulted in invalid death sentences. *See Darks v. Mullin*, 327 F.3d 1001, 1018 (10th Cir. 2003) (finding that when assessing cumulative error,

only first-stage errors are relevant to the conviction, but all errors are relevant to the ultimate sentence).

It is well recognized a reviewing court, presented with established errors at trial, must consider the cumulative impact of those errors in light of the totality of the evidence properly presented to the jury. *Gonzales v. McKune*, 247 F.3d 1066, 1077 (10th Cir. 2001) (vacated on grounds of exhaustion); *Rivera*, 900 F.2d at 1471. Non-errors do not count in a cumulative analysis; however, error plus whatever form of prejudice or harm is associated with that particular error obviously need not be established for a violation to count in cumulation. Where error plus prejudice is present in the case of an individual error, relief would be warranted for that error alone. *Cargle*, 317 F.3d at 1207. The Tenth Circuit has explained the "cumulative-error analysis merely aggregates all the errors . . . found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Hamilton v. Mullin*, 436 F.3d 1181, 1196 (10th Cir. 2006) (quoting *Workman v. Mullin*, 342 F.3d 1100, 1116 (10th Cir. 2003)). The cumulative error analysis applies to such legally diverse claims as ineffective-assistance and juror-misconduct claims. *Cargle*, 317 F.3d at 1206-07.

On direct appeal, this Court found three errors, but concluded they were harmless. Specifically, the Court found as error: (1) the prosecution's use of Bosse's refusal to consent to a search of his truck, *Bosse v. State*, 2017 OK CR 10 ¶ 40, 400 P.3d 834, 851; (2) the admission of two "profoundly disturbing and particularly perturbing" photographs of the charred remains of Chasity Hammer, *Id.* at ¶¶ 50-51, 400 P.3d at 853-54; and (3) the improper admission of sentence recommendations from victim impact witnesses, *Id.* at ¶ 63, 400 P.3d at 857. In this proceeding, Bosse

raises an IAC claim.[33] In the event the Court finds deficient performance but no prejudice, that error should also be included in the harmless error analysis along with the others.

If this Court finds none of the errors set forth in this Application, when considered individually, necessitates the granting of relief, the Court should find the cumulative effect of all the errors described herein, as well as those found in earlier stages of this case, deprived Mr. Bosse of his Constitutional right to a fair trial and reliable sentence. This Court should grant relief.

PRAYER FOR RELIEF

For the foregoing reasons, Mr. Bosse respectfully requests that the Court enter an order vacating his death sentences and remanding for a new sentencing. At a minimum, an evidentiary hearing should be ordered.

Respectfully submitted,

MICHAEL W. LIEBERMAN, OBA #32694
SARAH M. JERNIGAN, OBA #21243
Assistant Federal Public Defenders
Office of the Federal Public Defender - WDOK
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975; Fax (405) 609-5976
michael_lieberman@fd.org
sarah_jernigan@fd.org

Attorneys for Petitioner Shaun Michael Bosser

[33] In addition, Bosse also raises a claim that Oklahoma lacked jurisdiction to try him at all. That error, if found, would not be subject to harmless error review, and therefore, would not be included in a cumulative error analysis. If the State lacked jurisdiction, Bosse's conviction must be vacated.

VERIFICATION

State of Oklahoma)
) ss:
County of Oklahoma)

Michael W. Lieberman, being first duly sworn upon oath, states he signed the above pleading as attorney for Shaun Michael Bosse, and that the statements therein are true to the best of his knowledge, information, and belief.

MICHAEL W. LIEBERMAN, OBA #32694
SARAH M. JERNIGAN, OBA #21243
Assistant Federal Public Defenders
Office of the Federal Public Defender
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975; Fax (405) 609-5976
michael_lieberman@fd.org
sarah_jernigan@fd.org

Attorneys for Petitioner
Shaun Michael Bosse

Subscribed and sworn to before me this 20th day of February, 2019.

CATHY CONLEY NOTARY # 01009749 EXP. 06/11/21 PUBLIC STATE OF OKLAHOMA

Cathy Conley
Notary Public

Commission Number: 01009749
My commission expires: 6/11/21

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2019 a true and correct copy of the foregoing Successive Application for Post-Conviction Relief along with a separately bound Appendix of Exhibits were delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9 (B), Rules of the Court of Criminal Appeals.

Michael W. Lieberman

INDEX OF ATTACHMENTS
(Filed in Separately Bound Document)

Attachment	Document
1	Original Application for Post-Conviction Relief filed in PCD-2013-936
2	Order Finding Shaun Bosse Indigent
3	Tribal Enrollment Verification for Katrina Griffin
4	Tribal Enrollment Verification for Christian Griffin
5	Tribal Enrollment Verification for Chasity Hammer
6	Affidavit of Julie Gardner
7	Affidavit of Joe Robertson
8	Form Dated September 19, 2012, signed by Shaun Bosse
9	Affidavit of David Autry
10	Affidavit of Jamie Pybas
11	Affidavit of Michael Morehead
12	Affidavit of Verna Bosse
13	Affidavit of Bobby Lewis
14	Declaration of Jimmy Darnell
15	Affidavit of Shaun Bosse
16	Declaration of Heather Steakley
17	Declaration of Melinda Harvey
18	Affidavit of Mary Bruehl
19	Affidavit of Vicki Floyd
20	Affidavit of Dale Anderson
21	Expert Affidavit of Dr. John Matthew Fabian
22	Fact Affidavit of Dr. John Matthew Fabian

23	Affidavit of Joey Darnell
24	Affidavit of Valerie Barnett
25	Affidavit of Chad Mitchell
26	Professional Services Justification Statement and Approval

TAB 2

ORIGINAL

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.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 22 2019
JOHN D. HADDEN
CLERK

ORDER HOLDING CASE IN ABEYANCE AND DIRECTING ATTORNEY GENERAL TO PROVIDE STATUS UPDATE

Shaun Michael Bosse was tried by jury, convicted of Counts I-III, First Degree Murder, and Count IV, First Degree Arson, and sentenced to death (Counts I-III and thirty-five (35) years imprisonment and a fine of $25,000.00 (Count IV), in the District Court of McClain County, Case No. CR-2010-213. This Court upheld Petitioner's convictions and sentences in *Bosse v. State*, 2017 OK CR 10, 400 P.3d 434, *reh'g granted and relief denied,* 2017 OK CR 19, 406 P.3d 26, *cert. denied*, 138 S.Ct. 1264, 200 L.Ed.2d 421 (2018). This Court denied Petitioner's first Application for Post-Conviction Relief. *Bosse v. State*, No. PCD-2013-1128 (Okl.Cr. Oct.16, 2016) (not for publication).

Petitioner filed this Successive Application for Post-Conviction Relief on February 20, 2019. In Proposition I, he challenges the State's jurisdiction to prosecute his case. Pursuant to *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017) as well as the existing case law relied upon by the *Murphy* court, Petitioner argues that because the crime occurred within the historical boundaries of the Chickasaw Reservation, and because the victims were members of the Chickasaw Nation, the State of Oklahoma is deprived of jurisdiction in this matter. Petitioner has attached to his Successive Application documentary exhibits in support of this jurisdictional challenge.

The litigation in *Murphy v. Royal* is ongoing and not final. On May 21, 2018, the United States Supreme Court granted Oklahoma's request for certiorari review of *Murphy*, staying the matter until the Supreme Court's final disposition. *Royal v. Murphy*, __ U.S. __, 138 S.Ct. 2026, 201 L.Ed.2d 277 (2018). Until the matter in *Murphy* is settled, we find Petitioner's matter should be held in abeyance and the Oklahoma Attorney General should keep this Court informed of the status of the litigation.

THEREFORE IT IS THE ORDER OF THIS COURT that the present Application be held in abeyance until the decision in *Murphy*

v. Royal is final. The Oklahoma Attorney General is directed to notify this Court once the decision in *Murphy* is finally settled.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT **this** 22nd **day of** March **, 2019.**

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden

Clerk

TAB 3

ORIGINAL

No. PCD-2019-124

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

RESPONSE TO PETITIONER'S PROPOSITION I IN LIGHT OF THE SUPREME COURT'S DECISION IN *MCGIRT V. OKLAHOMA*, 140 S. Ct. 2452 (2020)

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

MITHUN MANSINGHANI, OBA #32453
SOLICITOR GENERAL

JENNIFER L. CRABB, OBA #20546
CAROLINE E.J. HUNT, OBA #32635
ASSISTANT ATTORNEYS GENERAL

313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR RESPONDENT

AUGUST 4, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

SECONDARY SOURCES

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

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

RESPONSE TO PETITIONER'S PROPOSITION I IN LIGHT OF THE SUPREME COURT'S DECISION IN *MCGIRT V. OKLAHOMA*, 140 S. Ct. 2452 (2020)

On July 9, 2020, the United States Supreme Court in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), held that, for purposes of the Major Crimes Act (18 U.S.C. § 1153), the Creek Nation's Reservation has not been disestablished. The Court also affirmed the Tenth Circuit's decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), for the reasons stated in *McGirt*. *Sharp v. Murphy*, 140 S. Ct. 2412 (2020). On July 16, 2020, this Court granted the State's request to file a response to Petitioner's claim, in Proposition I of this successive post-conviction application, that the State lacked jurisdiction in his case pursuant to 18 U.S.C. §§ 1151-1153. Successive Application for Post-Conviction Relief – Death Penalty (hereinafter, "App.") at 15-33. Specifically, Petitioner alleges that jurisdiction over his crimes rests exclusively in the federal courts because his victims were members of the Chickasaw Tribe and he murdered his victims within the undiminished boundaries of the original Chickasaw Reservation. App. at 17-32.

Pursuant to this Court's July 16, 2020, order, the State hereby files its Response to Petitioner's jurisdictional claim. Given the numerous cases before this Court and Oklahoma district courts potentially affected by *McGirt*, in this Response the State both seeks clarification

from this Court on a number of issues left unsettled by *McGirt* relevant to both this case and others, and offers affirmative arguments for the denial of relief in this case. In Part I, the State offers a brief procedural history of this case. In Parts II-V, the State addresses questions undecided by *McGirt*, including how Indian status is determined for Indian Country jurisdictional claims, which party bears the burden of proof as to such claims, whether the State has concurrent jurisdiction over crimes committed by non-Indians against Indians, and whether an evidentiary hearing is necessary where a reservation of any other Tribe besides the Creek's is involved. The State further takes the position that the State does have concurrent jurisdiction over crimes committed by non-Indians against Indians, such that trial court had jurisdiction in this case. Finally, in Part VI, the State urges this Court to procedurally bar Petitioner's jurisdictional claim and deny relief.

Before proceeding to Part I, an initial matter requires addressing. Although the State requests that Petitioner's claim be barred by this Court, the State respectfully urges this Court to also rule on the merits of the other arguments advanced by the State, thereby offering guidance for the numerous other cases affected by *McGirt*. Furthermore, the State asserts three procedural bars and respectfully asks that this Court rule on all three, as two of the asserted bars are specifically based on the capital post-conviction statute. In ruling on the third asserted bar—laches, a non-statutory bar applicable to capital and non-capital cases alike—this Court will again offer guidance for the many other cases impacted by *McGirt*.

I. Procedural History

Shaun Michael Bosse, hereinafter "Petitioner," was convicted by a jury for Counts 1-3: First Degree Malice Aforethought Murder, in violation of 21 O.S.Supp.2009, § 701.7(A); and Count 4: First Degree Arson, in violation of 21 O.S.2001, § 1401(A), in McClain County District Court, Case No. CF-2010-213, before the Honorable Greg Dixon, District Judge. The jury found

the existence of three aggravating circumstances for each murder count, namely: (1) during the commission of each murder, the defendant knowingly created a great risk of death to more than one person; (2) each murder was especially heinous, atrocious or cruel; and (3) each murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. The jury sentenced Petitioner to Count 1 (murder of Katrina Griffin): death; Count 2 (murder of C.G.): death; Count 3 (murder of C.H): death; Count 4 (arson): 35 years imprisonment and a $25,000.00 fine. On December 18, 2012, the trial court sentenced Petitioner in accordance with the jury's verdicts and ran the sentences for all four counts consecutively.

On October 16, 2015, this Court affirmed the judgment and sentence on direct appeal. *Bosse v. State*, 2015 OK CR 14, 360 P.3d 1203. The United States Supreme Court granted certiorari review and reversed, however, finding that certain victim impact testimony admitted in Petitioner's penalty phase violated the Eighth Amendment. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2-3 (2016). On remand, this Court again affirmed the judgment and sentence on May 25, 2017, finding the victim impact testimony in question was harmless beyond a reasonable doubt. *Bosse v. State*, 2017 OK CR 10, ¶¶ 56-63, 400 P.3d 834, 855-57, *adhered to on reh'g*, 2017 OK CR 19, 406 P.3d 26. This Court also denied Petitioner's first application for post-conviction relief. *Bosse v. State*, No. PCD-2013-360 (Okl. Cr. App. Dec. 16, 2015).

On February 20, 2019, Petitioner filed this successive application for post-conviction relief. On March 22, 2019, this Court abated Petitioner's post-conviction proceeding in light of the ongoing litigation in *Murphy*.[1] As previously noted, following the Supreme Court's decisions in

[1] Petitioner also has pending a federal petition for habeas corpus relief in *Bosse v. Royal*, Case No. 5:18-cv-00204-JD (W.D. Okla.), which raises his jurisdictional challenge and was also stayed based on *Murphy*.

Murphy and *McGirt*, this Court granted the State's request to file a Response to Petitioner's jurisdictional claim in Proposition I. On July 21, 2020, Petitioner tendered for filing Petitioner's Supplemental Brief Regarding Ground I of his Second Application for Post-Conviction Relief. On July 22, 2020, Petitioner tendered an Amended Supplemental Brief Regarding Ground I of his Second Application for Post-Conviction Relief ("Pet.'s Amended Supp. Br.").

II. Definition of "Indian"

In order to qualify as an "Indian" for purposes of invoking an exception to state jurisdiction, a defendant must prove two facts: 1) a significant percentage of Indian blood and 2) governmental recognition as an Indian. *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.[2] The first requirement can be shown by a Certificate of Degree of Indian Blood (CDIB) issued by the U.S. Bureau of Indian Affairs.

In order to satisfy the second requirement, the defendant or victim must be affiliated with a Tribe that is recognized by the federal government.[3] The Supreme Court has never ruled whether any evidence beyond enrollment, citizenship, or membership with a federally-recognized tribe can show this second element of Indian status for purposes of federal criminal law. *See Antelope*, 430 U.S. at 647 n.7 ("Since respondents are enrolled tribal members, we are not called on to decide whether nonenrolled Indians are subject to 18 U.S.C. § 1153, and we therefore intimate no views on the matter."). Other courts are in substantial conflict about the appropriate test, meaning that

---

[2] The State demonstrates in Part III, *infra*, that the defendant bears the burden to prove Indian status when raising a jurisdictional claim under the Major Crimes Act.

[3] *See United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977) ("members of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act"); *State v. Daniels*, 16 P.3d 650, 654 (Wash. Ct. App. 2001); *see also State v. Sebastian*, 701 A.2d 13, 24 n. 28 (Conn. 1997) ("most recent federal cases consider whether the tribe to which a defendant or victim claims membership or affiliation has been acknowledged by the federal government").

"case outcomes have not formed a consistent pattern," which has caused "commentators [to] criticize[] these inconsistencies, and urge[] adoption of a single, clearly articulated definition." *Cohen's Handbook of Federal Indian Law*, § 3.03[4]. In our view, proper respect for tribal sovereignty, constitutional considerations, and judicial economy all should mean that *only* those with Indian blood who are enrolled with a federally-recognized Indian tribe should be subject to the provisions of 18 U.S.C. §§ 1152-53. This is so for three reasons.

First, proper respect for tribal sovereignty means according deference to the Tribe's determination of who is—and who is not—a citizen of their sovereign. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) ("tribes retain power . . . to determine tribal membership"). "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community," so "the judiciary should not rush to ... intrude on these delicate matters." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 & n. 32 (1978).[4] And because in modern times tribes consistently "keep formal, written rolls," there is no need to resort to older "generalized" tests that focus on uncertain criteria like "retaining tribal relations." *Cohen's*, *supra*, at § 3.03[2]. In the end, "determining whether a specific individual racially belongs to a certain group is not within the province of the courts' expertise and should be left to the Indians or specific tribe. The tribe knows best whether an individual has Indian blood or has been living an Indian-lifestyle. . . . [L]eaving the decision to each particular tribe would allow them to exercise their sovereignty."[5]

---

[4] *See also United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978) ("unless limited by treaty or statute, a tribe has the power to determine tribe membership"); *Red Bird v. United States*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897).

[5] Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 AM. INDIAN L. REV. 177, 207 (2011).

Second, ensuring that only those with official political affiliations with the Tribe are accorded the special treatment of federal law avoids the constitutional pitfalls of giving the term "Indian" a racial definition that could run afoul of the Equal Protection Clause. *United States v. Bruce*, 394 F.3d 1215, 1233-34 (9th Cir. 2005) (Rymer, J., dissenting); Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 AM. INDIAN L. REV. 177, 207-08 (2011). Federal law treats Indians differently from others without engaging in race discrimination because such law treats "Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Morton v. Mancari*, 417 U.S. 535, 554 (1974). Thus, what is important to avoid constitutional prohibitions on race discrimination is treating Indians differently only because of their membership in the tribe. *See Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000) (statute treating Native Hawaiians differently based on race rather than membership in quasi-sovereign unconstitutional). Our proposed bright-line test also respects the individual's choice *not* to enroll in a tribe: such deliberate refusal to officially politically associate with the tribe should be respected, rather than transform the test of Indian status to one that impermissibly wades into racial categorization.

Third, creating a bright-line rule that focuses on tribal enrollment rather than a myriad of pliable factors will promote consistency and ease judicial administration of these new jurisdictional lines over the thousands of cases that are currently pending and will arise in years to come in what-is-now the most populous Indian reservation in the United States. *See* Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Multifactor tests that require fact-finding beyond tribal enrollment only breed confusion, force development of complex

jury instructions on Indian-status, and demand largely non-Indian judges and juries to adjudicate whether someone is "Indian enough" for immunity from state jurisdiction.[6]

> How might a court, presumably comprised of non-Indians, know what it means to live an Indian lifestyle? . . . Tribes have already established clear, definite membership requirements, which allows for both consistency and objectivity. There is no new information that would need to be gathered or created. When a court is presented with an individual claiming Indian status, it would simply have to defer to the tribe to determine whether that individual is a member.

Oakley, *supra*, at 207.

For these reasons, this Court should not adopt the fact-intensive inquiry created by other courts, which have relied on four factors, in declining order of significance:

> 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation[7] and participating in Indian social life.

See, e.g., *State v. Nobles*, 838 S.E.2d 373, 377-78 (S.C. 2020); *State v. Salazar*, 461 P.3d 946, 949 (N.M. 2020); *State v. Sebastian*, 701 A.2d 13, 24 (Conn. 1997). Unlike the first factor, the other three factors fail to defer to formal tribal determinations of citizenship and are so malleable that they inhibit efficient judicial administration of jurisdictional boundaries.

For example, focusing on federal assistance *outside* the Major Crimes Act is problematic because "[w]ho counts as an Indian for purposes of federal Indian law varies according to the legal

---

[6] *See* Troy A. Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1098 (2010) (A lack of clear definition for who is Indian "can result in court challenges causing confusion and delay when a victim or perpetrator initially appears to be a Native American for federal jurisdictional purposes, but is later determined to be a non-Indian or vice-versa. ... The variation in jury instructions on Indian status demonstrates the potential confusion of asking predominately non-tribal jurors to weigh any number of factors to determine whether the defendant is Indian.")

[7] In light of the vastness of the claimed reservations of the Five Tribes, and the fact that they have not been recognized as such for over 100 years, "living on a reservation" should carry no weight.

context. There is no universally applicable definition." *Cohen's*, *supra*, at § 3.03[1]; *see also id.* at § 3.03[4]. We cannot simply assume that when Congress classifies a person as an Indian for one purpose, it necessarily classifies that person as an Indian for other purposes, such as the criminal provisions of 18 U.S.C. §§ 1152-53. For example, "a member of a terminated tribe will be considered an Indian for the purposes of federal programs that are available to all Indians, including members of terminated tribes," but members of terminated tribes are not considered Indians for purposes of federal criminal law. *Id.* (citing *Antelope*, 430 U.S. at 646-47 n.7). That is why "the federal government increasingly associates being an Indian with being a tribal member according to tribal law." *Id.*

The third and fourth factors are even more problematic. Receiving benefits from the tribe does not help with determining Indian status because tribes, especially those in Oklahoma, offer services such as healthcare to Indians and non-Indians alike. And to the extent someone receives benefits from the Tribe, but is not afforded tribal membership or citizenship, that choice by the Tribe or individual should be respected. The fourth factor, focusing on social ties, both involves adjudication of complex facts and is perilous given the many non-Indians that participate in tribal communities. *Bruce*, 394 F.3d at 1234 (Rymer, J., dissenting) (citing *Duro v. Reina*, 495 U.S. 676, 695 (1990) ("Many non-Indians reside on reservations, and have close ties to tribes through marriage or long employment. Indeed, the population of non-Indians on reservations generally is greater than the population of all Indians.")). All these fact-intensive inquiries will ultimately yield to disparate and unequal determinations of Indian status, as well as unnecessary complexity.

In short, after showing Indian blood, a defendant can meet the second element of Indian status under §§ 1152 and 1153 only through official enrollment with the Tribe. While a tribal enrollment, membership, or citizenship card may be relevant evidence, confirmation should be

obtained from the tribal enrollment or citizenship office to determine properly that the state lacks jurisdiction.

Even if this Court allows looking to other factors to determine Indian status, tribal membership must remain the most important factor. *Lewis v. State*, 55 P.3d 875, 878 (Idaho 2002). The second factor is satisfied only if the individual has actually received benefits, and not merely by the fact that he may be eligible for such benefits. *Nobles*, 838 S.E.2d at 380. The third factor considers benefits beyond government assistance, such as hunting and fishing rights or employment for which only Indians are eligible. *Id.* at 380-81. Regarding the fourth factor,

> courts have determined that this factor weighs against a finding of Indian status under the IMCA [Indian Major Crimes Act] as to defendants who have never been involved in Indian cultural, community, or religious events; never participated in tribal politics; and have not placed any emphasis on their Indian heritage.

Id. at 381.

Finally, regardless of the test employed, the defendant must establish membership in or affiliation with a Tribe as of the time of the offense. *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015); *State v. Perank*, 858 P.2d 927, 932 (Utah 1992). Otherwise, a defendant (or—if this Court holds that the General Crimes Act confers exclusive jurisdiction on federal courts over non-Indian on Indian crimes—a surviving victim) could choose which sovereign has jurisdiction by simply obtaining (or renouncing) tribal membership. *Goforth*, 1982 OK CR 48, ¶ 7, 644 P.2d at 116 ("Absent such recognition, we cannot hold that the appellant is an Indian under federal law, since such a determination at this point would allow the appellant to assert Indian heritage only when necessary to evade a state criminal action.").

III. Burden of Proof

While "[f]ederal criminal jurisdiction is limited by federalism concerns; states retain primary criminal jurisdiction in our system." *United States v. Prentiss*, 206 F.3d 960, 967 (10th Cir. 2000). Thus, the general rule in state prosecutions—including in Oklahoma—is that a state is presumed to have jurisdiction over all crimes committed within its borders. *See* Okla. Const. Art. VII, § 7 ("The District Court[s of Oklahoma] shall have unlimited original jurisdiction of all justiciable matters . . . ."); *State v. L.J.M.*, 918 P.2d 898, 902 (Wash. 1996) (*en banc*); *State v. Verdugo*, 901 P.2d 1165, 1167 (Ariz. Ct. App. 1995); *State v. St. Francis*, 563 A.2d 249, 252 (Vt. 1989); *cf. Oregon v. Hill*, 373 P.3d 162, 173 (Or. Ct. App. 2016) (Indian country jurisdiction is an "exception" to state jurisdiction).

"The majority of other courts addressing this issue have held that a defendant bears the burden to show facts that would establish an exception to the state court's jurisdiction under the Indian Country Crimes Act." *Verdugo*, 901 P.2d at 1168; *see Nobles*, 838 S.E.2d at 375 (analyzing "whether defendant has sufficiently demonstrated that he qualifies as an 'Indian'"); *St. Francis*, 563 A.2d at 252 ("the majority of other states addressing this issue hold that the defendant bears the burden of proof"). This Court aligns with the majority. *See State v. Klindt*, 1989 OK CR 75, ¶ 5, 782 P.2d 401, 403 (rejecting the appellant's argument that "he has no affirmative duty to prove his status as an Indian"); *Goforth*, 1982 OK CR 48, ¶ 7, 644 P.2d at 116 (holding "the appellant failed to establish his status as an Indian under federal law" and denying relief because the "record [wa]s devoid" of any evidence he was an Indian).

The defendant bears this burden even on direct appeal. *See Klindt*, 1989 OK CR 75, ¶ 5, 782 P.2d at 403; *Goforth*, 1982 OK CR 48, ¶ 7, 644 P.2d at 116; *see also State v. Reels*, No. CR 96232040, 1998 WL 440832, *2 (Conn. July 27, 1998) (unpublished) (placing burden of proof on

defendant in motion to dismiss); *St. Francis*, 563 A.2d at 251 (placing burden of proof on defendant in interlocutory appeal); *New Mexico v. Begay*, 734 P.2d 278, 281 (N.M. Ct. App. 1987) (placing burden of proof on defendant in interlocutory appeal); *but see Hill*, 373 P.3d at 173 (burden shifts to state after defendant presents evidence of Indian country jurisdiction); *L.J.M.*, 918 P.2d at 902-03 (same); *State v. Smith*, 862 P.2d 1093, 1097 (Idaho Ct. App. 1993) (same).

In this case, Petitioner did not raise a jurisdictional claim until his second post-conviction application. At that point, Petitioner was challenging a presumptively valid judgment. *See Brecht v. Abrahamson*, 507 U.S. 619, 633-37 (1993) (recognizing that convictions are presumed correct after direct appeal, thus different standards apply on collateral review). In all proceedings after direct appeal, the burden of proving an exception to state jurisdiction belongs with the defendant. *See Stevens v. State*, 2018 OK CR 11, ¶ 26, 422 P.3d 741, 748 ("The petitioner in post-conviction proceedings has the burden of presenting sufficient evidence to rebut this presumption [of regularity in trial proceedings]."); *Tyler v. State*, No. PC-2019-647, slip op. at 2 (Okla. Crim. App. May 7, 2020) (holding, in case alleging Indian country jurisdiction, that "Petitioner has failed to establish entitlement to any relief in this post-conviction proceeding.") (unpublished and attached as Exhibit A); *Russell v. Cherokee Cty. Dist. Court*, 1968 OK CR 45, ¶ 5, 438 P.2d 293, 294 ("It is fundamental that where a . . . . post conviction appeal[] is filed, the burden is upon the petitioner to sustain the allegations of his petition, and that every presumption favors the regularity of the proceedings had in the trial court."); *see also Lewis v. State*, 55 P.3d 875, 877 (Idaho Ct. App. 2002) ("As an applicant for post-conviction relief, Lewis therefore had the burden of proving, by a preponderance of the evidence, the allegations [of Indian country jurisdiction] on which his application was based."); *Primeaux v. Leapley*, 502 N.W.2d 265, 270 (S.D. 1993) (holding state habeas petitioner failed to satisfy his burden of proving Indian country jurisdiction); *Verdugo*, 901

P.2d at 1169 (placing burden of proof on post-conviction petitioner); *cf. Eaves v. Champion*, 113 F.3d 1246, *1 (10th Cir. June 2, 1997) (unpublished) (holding, in an Indian country case arising out of Oklahoma, that "[w]here a state conviction is collaterally attacked in a habeas corpus proceeding under § 2254, the burden of proof is on the petitioner.").

The State recognizes that the Tenth Circuit has held that the State bears the burden of proving that an Indian reservation has been disestablished. *Murphy v. Royal*, 875 F.3d 896, 926-27 (10th Cir. 2017). However, this holding was based on a "'presumption' that an Indian reservation continues to exist until Congress acts to disestablish or diminish it[.]" *Id.* at 926. Pursuant to *Murphy*, the State should bear the burden with respect to the question of whether a Tribe that once had a reservation, still has a reservation. However, pursuant to the overwhelming authority set out above, Petitioner must prove that his victims were Indians and that the location of the murders fell within the boundaries of the purported reservation.

Here, assuming this Court does not bar Petitioner's jurisdictional claim, *see* Part VI, *infra*, and holds that the state lacks jurisdiction over non-Indians who victimize Indians, *see* Part IV, *infra*, it should hold that his evidence is insufficient on its face to carry his burden on this claim. As to the alleged Indian status of his victims, Petitioner includes memoranda from the Chickasaw Nation purporting to verify the victims' possession of CDIB cards and enrollment in the Tribe. App., Attachments 3-5. But he does not include an affidavit from a Tribal official confirming same. As to the location of the crimes, Petitioner includes only an affidavit from a Federal Public Defender's Office investigator, Julie Gardner, stating her belief that "the land in question is within the boundaries of the Chickasaw Nation Reservation." App., Attachment 6. However, Ms. Gardner does not provide any information suggesting that she is an expert appropriately qualified to examine the relevant maps and opine as to reservation boundaries. Furthermore, as a lay

witness, it appears her affidavit relies improperly on hearsay, as she references "the consensus of all the individuals I contacted." For all these reasons, Petitioner's evidence is insufficient to prove his jurisdictional claim.[8] If this Court rejects the State's procedural defenses and concurrent jurisdiction argument, *see infra* Parts IV and VI, and concludes that Petitioner's jurisdictional claim warrants consideration on the merits, then the State respectfully requests that this matter be remanded to the state district court for an evidentiary hearing for Petitioner to submit proper evidence in support of his claim.

IV. Concurrent Jurisdiction under the General Crimes Act

Petitioner argues that federal courts have exclusive jurisdiction over the murders he committed pursuant to 18 U.S.C. § 1152 ("General Crimes Act") because, although he is not an Indian, he claims his victims were Indians. Although Petitioner perpetuates a longstanding assumption about the scope of state jurisdiction, if *McGirt* makes one thing clear, longstanding assumptions cannot substitute for clear text. *See McGirt*, slip op. at 18-28, 35.[9] Petitioner concedes that the focus of *McGirt* is the text of Acts of Congress. Pet.'s Suppl. Br. at 4 (citing *McGirt*, slip op. at 7). Here, the text of the General Crimes Act—the only statute upon which petitioner relies—does nothing to preempt state jurisdiction.

The text of the General Crimes Act states:

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

[8] Nor does Petitioner's Amended Supplemental Brief offer any additional evidence in support of this claim.

[9] On Westlaw, the *McGirt* opinion includes no page numbers for either the Supreme Court Reporter or Westlaw's pagination. Accordingly, the State cites to page numbers in the slip opinion.

> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

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, it incorporates the body of laws which applies in places where the United States has exclusive jurisdiction into Indian country. As the Supreme 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 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); *United States v. White*, 508 F.2d 453, 454 (8th Cir. 1974). As *McGirt* said with respect to reservation status, *see* slip op. at 8, when Congress seeks to withdraw state jurisdiction, it knows how to do so. *See, e.g.*, 25 U.S.C. § 1911(a) (providing that tribes "shall have jurisdiction, exclusive as to any State, over any child custody proceeding involving an Indian child" on a reservation). Here, the text of the General Crimes Act does not so exclude state jurisdiction over crimes committed by non-Indians like those perpetrated by Petitioner.

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 Petitioner's crimes, nothing in the text of that law deprives the State of concurrent jurisdiction over the same

crimes. Under *McGirt*, the inquiry should end there. 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).

Petitioner also cites dicta from some of this Court's cases contemplating that the state lacks jurisdiction over non-Indians that victimize Indians, but those cases did not involve non-Indian defendants and did not analyze the question presented here, much less issue a binding holding on the matter. Pet.'s Suppl. Br. at 1 (citing *Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277; *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401). And as *McGirt* noted, such dicta cannot overcome the text of the statute. *McGirt*, slip op. at 27 n.14.[10]

To be sure, a handful of state courts have held that states lack jurisdiction over non-Indians who commit crimes in Indian country. *See, e.g.*, *State v. Larson*, 455 N.W.2d 600 (S.D. 1990); *State v. Flint*, 756 P.2d 324, 327 (Ariz. Ct. App. 1988), *cert. denied*, 492 U.S. 911 (1989); *State v. Greenwalt*, 663 P.2d 1178, 1182-83 (Mont. 1983); *State v. Kuntz*, 66 N.W.2d 531, 532 (N.D. 1954); *but see Greenwalt*, 633 P.2d at 1183-84 (Harrison, J., dissenting); *State v. Schaefer*, 781 P.2d 264 (Mont. 1989). But the reasoning of these decisions lacks merit.

First, these decisions rely on statements from the Supreme Court suggesting the state lacks jurisdiction over crimes such as this, but they admit this is mere dicta. *See Larson*, 455 N.W.2d at 601 (citing *Williams v. United States*, 327 U.S. 711, 714 (1946); *Washington v. Confederated*

[10] Similarly, although this Court once affirmed dismissal of the prosecution of several individuals, one of whom was not Indian, because the crime occurred on Indian country, *State v. Burnett*, 1983 OK CR 153, 671 P.2d 1165, that case did not discuss the jurisdictional issues raised here and was later overruled by *Klindt*, which held that "one's status as an Indian is a factor in determining jurisdiction," 1989 OK CR 75, ¶ 6, 782 P.2d 401, 403.

Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 470-71 (1979)); *Flint*, 756 P.2d at 325-26. Again, such dicta cannot substitute for the lack of clear statutory text. Indeed, the Supreme Court had earlier stated that by admission into the Union, a state on equal footing with other states "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).

This statement was in the context of a holding that, despite the General Crimes Act, jurisdiction over crimes between two non-Indians is within the exclusive jurisdiction of the *state*, and that the federal government lacks jurisdiction over such crimes. *Id.*; *see also Draper v. United States*, 164 U.S. 240 (1896). To be sure, these cases were later limited by *Donnelly v. United States*, 228 U.S. 243 (1913), but that case held only that the federal government had jurisdiction over crimes committed by a non-Indian against an Indian, not that such jurisdiction was exclusive or that the state lacked it. There is no reason to assume that, merely because the federal government has jurisdiction over a certain matter, such jurisdiction necessarily precludes concurrent state jurisdiction. Rather, in general, the state and federal governments "exercise concurrent sovereignty." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). Thus, "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." *Id.* (citing *United States v. Bank of New York & Tr. Co.*, 296 U.S. 463, 479 (1936) ("It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive."). Indeed, there is a "'deeply rooted presumption in favor of concurrent state court jurisdiction' over federal claims," and that presumption applies with even more force against arguments attempting to "strip[] state courts of

jurisdiction to hear their own *state* claims"—Congress does not "take such an extraordinary step by implication," and to do so Congress must be "[e]xplicit, unmistakable, and clear." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349-52 (2020) (citation omitted). That takes us back to the text of the General Crimes Act which, as explained, does not clearly preclude state jurisdiction over crimes committed by non-Indians against Indians.[11]

Second, some state courts suggest that states lack jurisdiction over crimes by non-Indians against Indians because of the federal government's general control over Indian affairs. *See Flint*, 756 P.2d at 325. But while this means states usually lack jurisdiction over Indians (*e.g.*, states lack jurisdiction over major crimes committed by Indians, *see McGirt*, slip op. at 33, 36), this general presumption says nothing about state jurisdiction over *non-Indians*, including those who commit crimes against Indians. After all, states presumptively have jurisdiction over non-Indians, including on reservations. *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").

States also have jurisdiction over non-Indians on Indian country even when they are interacting with Indians, so long as such jurisdiction would not "interfere with reservation self-government or impair a right granted or reserved by federal law"—neither of which is true of concurrent jurisdiction here. *Id.*; *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163

[11] *See also Claflin v. Houseman*, 93 U.S. 130, 134 (1876) (although federal bankruptcy courts can exercise jurisdiction over claims against the estate, that does not necessarily preclude concurrent state court jurisdiction over such claims); *Silas Mason Co. v. Tax Com'n of State of Washington*, 302 U.S. 186, 207 (1937) (upholding concurrent jurisdiction so long as the state's exercise of jurisdiction was "consistent with federal functions").

(1989) (upholding concurrent state and tribal jurisdiction to tax non-Indian oil & gas activities on Indian trust land). Thus, in the closest analogous civil context, the U.S. Supreme 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 of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148-49 (1984).[12]

To hold otherwise, and say that the state is presumptively preempted from all jurisdiction over non-Indians when interacting with Indians on reservations, would be absurd. For example, the federal government provides education, health care, and housing services to Indians on reservations. *See, e.g.*, 25 U.S.C. §§ 1601 *et seq.* But that exercise of federal authority in no way precludes the State from treating Indians at state-run hospitals, educating Indians in state schools, or providing housing to Indians who need it. Nor does it mean that the State lacks the ability to license and discipline non-Indian doctors who are treating Indians at private or state-run hospitals, or to do the same with teachers teaching Indians at state-run or private schools. By the same token, federal jurisdiction to protect Indians from non-Indian criminals like Petitioner does not divest the State from providing the same service of police protection and criminal justice to those Indian victims.

Arguments that states lack any authority over non-Indians interacting with Indians ultimately rely on outdated notions that on reservations Congress's purpose is "segregating [Indians] from the whites and others not of Indian blood." *Donnelly*, 228 U.S. at 272 (1913). But

[12] This can only be more true in the criminal context where it is the State, not the victim, that brings prosecution. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

Congress has long since moved away from the segregationist policies of the early Republic, and the Supreme Court has recognized the significance of that shift for presumptions about state jurisdiction on reservations, especially over non-Indians. *See Organized Vill. of Kake v. Egan*, 369 U.S. 60, 71-74 (1962). Thus, the Court has held:

> State sovereignty does not end at a reservation's border. Though tribes are often referred to as sovereign entities, it was long ago that the Court departed from Chief Justice Marshall's view that the laws of [a State] can have no force within reservation boundaries. Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State.

Nevada v. Hicks, 533 U.S. 353, 361-62 (2001) (internal citations, quotation marks, and footnote omitted; alteration adopted). For these reasons, nothing in the general policies of Indian law can overcome the clear text of the General Crimes Act, which is not exclusive of state jurisdiction, particularly where—as here—the defendant is not an Indian.

Third, courts have noted that some commentators support the idea that states lack jurisdiction over non-Indians who victimize tribal members. *See Larson*, 455 N.W.2d at 602; *Flint*, 756 P.2d at 327. Other commentators, however, recognize that there is no adequate justification for precluding state jurisdiction over crimes by non-Indian offenders against Indians because (1) "[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 (2) 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. U.S.*, 359 U.S. 187 (1959)). As *McGirt* makes clear, Felix Cohen isn't always right. Slip op. at 25-26.

Fourth, some courts have pointed to Public Law 280, *Flint*, 756 P.2d at 327-28, which allows "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—with courts implying that the states otherwise lack that jurisdiction over crimes committed "against Indians." 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 the U.S. Supreme Court from ruling that, even without Public Law 280, states generally have jurisdiction over civil actions with Indians as parties, that is, as plaintiffs. *See Three Affiliated Tribes*, 467 U.S. at 148-49. For this reason, mere implications from a later congressional enactment like Public Law 280 cannot overcome the clear text of the General Crimes Act, which does not preclude the exercise of state jurisdiction. *Cf. McGirt*, slip op. at 27 n.14.

Ultimately, state jurisdiction here 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. *Cf. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 888 (1986) ("tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country"). It minimizes the chances abusers and murderers of Indians will escape punishment and maximizes the protection from violence received by Native Americans. This is especially important because, as commentators have expressed in fear after *McGirt*, federal authorities frequently decline to prosecute crimes on their reservations.[13] While

[13] *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.

McGirt leaves Indians vulnerable under the exclusive federal jurisdiction of the Major Crimes Act, there is no reason to perpetuate that injustice by assuming without textual support exclusive federal jurisdiction over non-Indian on Indian crimes covered by the General Crimes Act. Nor is there 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 proves it will. To hold otherwise would amount to "disenfranchising" and "closing our Courts to a large number of citizens of Indian heritage who live on a reservation," thereby "denying protection from the criminal element of the state." *Greenwalt*, 663 P.2d at 1184 (Harrison, J., dissenting).

The text of the General Crimes Act controls, and its plain terms do not preclude the state's jurisdiction in this case. Such jurisdiction over non-Indians who victimize Indians does not interfere with the federal government's concurrent jurisdiction over such crimes, nor does it impinge on tribal sovereignty, but instead advances the interests of tribal members in receiving justice. And the contrary conclusion unjustifiably intrudes into state sovereignty. Even assuming the Chickasaw Reservation has not been diminished or disestablished, and that Petitioner can prove he committed the murders within said boundaries and that the victims were Indians, the State had jurisdiction to prosecute.

TIMES (July 19, 2020), https://www.nytimes.com/2020/07/19/opinion/mcgirt-native-reservation-implications.html.

V. *McGirt* Expressly Limited Its Holding to the Creek Reservation and Any Question as to a Chickasaw Reservation should be Remanded for Fuller Consideration.

As previously stated, Petitioner claims the State lacked jurisdiction in this case because his crimes occurred on the Chickasaw Reservation. App. at 18-32. *McGirt* expressly limited its analysis and holding to the Creek Reservation. *See McGirt*, slip op. at 37 ("Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek."). The Tenth Circuit said the same about *Murphy*. *See Comanche Nation of Oklahoma v. Zinke*, 754 F. App'x 768, 774 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2645 (2019) ("Our *Murphy* panel concluded the Creek Reservation remains extant, but it did not address the status of the Chickasaw Reservation at all.").[14]

That is not to say that *McGirt* does not inform the analysis of whether there also exists a Chickasaw reservation. But Petitioner's cursory analysis of *McGirt* in his supplemental brief is insufficient for this Court to rule on this significant issue. Thus, if this Court finds that relief is not barred by the issues raised in Parts IV and VI of this brief, the Court should remand to the district court to receive full argument and evidence on the treaties, statutes, and historical materials relevant to this question. The district court should have the first opportunity to address this issue in light of *McGirt*. This will also allow the Chickasaw Nation to weigh in on the matter if it so desires.

VI. Procedural Defenses

In deciding *McGirt*, the Supreme Court expressly invited this Court to apply procedural bars to the jurisdictional challenges that would proliferate in the wake of its decision:

[14] Clearly, Petitioner's claim that "there is nothing" in the *Murphy* and *McGirt* opinions "to suggest such cases apply only to the Creek Nation," Pet's Supp. Br. at 3, is patently incorrect.

> Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.[15]
>
> > [15] For example, Oklahoma appears to apply a general rule that "issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Logan v. State*, 2013 OKCR 2, ¶ 1, 293 P.3d 969, 973. . . .

McGirt, slip op. at 38. This Court should accept that invitation.

Here, a number of procedural bars apply to Petitioner's jurisdictional claim. Specifically, this Court should refuse to consider Petitioner's jurisdictional challenge because he did not raise it until his second post-conviction application, such that it is procedurally barred. Alternatively, this Court should find the claim to be time-barred. As a final alternative, this Court should refuse to consider the claim based on the doctrine of laches.

A. Bar on Successive Capital Post-Conviction Applications

Petitioner did not raise his present jurisdictional challenge until his second post-conviction application. He did not raise the claim in either his direct appeal or his first post-conviction application. *See generally Bosse v. State*, 2015 OK CR 14, 360 P.3d 1203; *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834; *Bosse v. State*, No. PCD-2013-360 (Okl. Cr. App. Dec. 16, 2015). Accordingly, this Court should find the claim to be waived.

It is axiomatic that Oklahoma law limits the grounds for relief that may be raised in a subsequent post-conviction application. *See, e.g.*, *Slaughter v. State*, 2005 OK CR 6, ¶ 20, 108 P.3d 1052, 1056; *Sellers v. State*, 1999 OK CR 6, ¶ 2, 973 P.2d 894, 895; *Duvall v. Ward*, 1998 OK CR 16, ¶ 2, 957 P.2d 1190, 1191. Section 1089 of Title 22 states:

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

> a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or
>
> b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and
>
> (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

22 O.S.2011, § 1089(D)(8).

Below, Respondent demonstrates that, first, Petitioner has made no showing that his jurisdictional claim falls within any of the above-quoted exceptions in § 1089(D)(8) that would allow its consideration in this successive post-conviction proceeding. Second, while Petitioner suggests—and this Court's cases at times has supported—that his claim need not meet the requirements of § 1089(D)(8) because it is a challenge to the trial court's subject matter jurisdiction, App at 16-17, this argument contravenes legislative intent and should be rejected by this Court.

i. Petitioner cannot meet the requirements of § 1089(D)(8) for a successive capital post-conviction application

Petitioner's jurisdictional claim is barred by § 1089(D)(8). To begin with, as to § 1089(D)(8)(a), Petitioner cannot show that the legal basis of this claim was previously unavailable. Section 1089 explains that "a legal basis of a claim is unavailable on or before a date described by this subsection if the legal basis":

> a. was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or
>
> b. is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

22 O.S.2011, § 1089(D)(9). Thus, there are two ways in which Petitioner can show a previously unavailable legal basis—he satisfies neither way.

Under § 1089(D)(9)(a), Petitioner could reasonably have formulated the legal basis for his jurisdictional claim years prior to either the Tenth Circuit's decision in *Murphy* or the Supreme Court's decision in *McGirt*. Specifically, at the time of his direct appeal and first post-conviction application, Petitioner could have raised this claim based on the Major Crimes Act and *Solem v. Bartlett*, 465 U.S. 463 (1984).[15] Both *Murphy* and *McGirt* concluded that the Creek Reservation had not been disestablished primarily based on application of *Solem* and an examination of statutes enacted in the late 1800s and early 1900s. *Murphy*, 875 F.3d at 937-54; *McGirt*, slip op. at 3-17. Petitioner, too, bases his jurisdictional claim on *Solem* and treaties and laws from the 1800s and early 1900s. App. at 21-32. Clearly, his claim was previously available. *See Walker v. State*, 1997 OK CR 3, ¶ 33, 933 P.2d 327, 338, *superseded by statute on other grounds*, 22 O.S.Supp.2004, § 1089(D)(4) (concluding that the legal basis for Walker's claim "was recognized by and could have reasonably been formulated from a final decision of this Court" in light of "the decades-old Oklahoma case and statutory law upholding the presumption of innocence instruction"); *Hatch v. State*, 1996 OK CR 37, ¶ 41, 924 P.2d 284, 293 (holding that claim based

[15] Indeed, Murphy himself raised his jurisdictional challenge based on the Major Crimes Act in 2004. *Murphy*, 2005 OK CR 25, ¶ 6, 124 P.3d at 1200.

on a case decided in 1982 was clearly available "at any time since 1982" and did not satisfy the exceptions in § 1089(D)(8)); *see also Dopp v. Martin*, 750 F. App'x 754, 757 (10th Cir. 2018) (unpublished) ("Nothing prevented Dopp from asserting in his first § 2254 application a claim that the Oklahoma state court lacked jurisdiction because the crime he committed occurred in Indian Country. The fact that he, unlike the prisoner in *Murphy*, did not identify that argument does not establish that he could not have done so.").[16]

Indeed, the Tenth Circuit and the Supreme Court both indicated that their decisions broke no new ground. The Tenth Circuit, in concluding that Murphy's jurisdictional claim was not *Teague*[17]-barred, held that any post-*Solem* cases it applied were mere "applications of the *Solem* framework." *Murphy*, 875 F.3d at 930 n. 36. In *McGirt*, the Supreme Court, in rejecting the State's reliance on allotment to show disestablishment, stated, "[W]e say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument." *McGirt*, slip op. at 10. Here, too, Petitioner spills considerable ink in an attempt to show that allotment did not diminish the Chickasaw Reservation, App. at 24-29—but, as shown by *McGirt*, the reasoning and authority on which he relies are nothing new. *See Walker*, 1997 OK CR 3, ¶ 37, 933 P.2d at 339 (reasoning that the legal basis of Walker's challenge to Oklahoma's "clear and convincing" burden of proof in competency proceedings was available even six years prior to *Cooper v. Oklahoma*, 517 U.S. 348 (1996), where "the Supreme Court in

[16] Even if Petitioner could not have raised this claim until after the Tenth Circuit's decision in *Murphy*, his post-conviction application is still untimely, as explained further below. *Murphy* was decided in August 2017, but Petitioner did not file this post-conviction application until February 20, 2019.

[17] *Teague v. Lane*, 489 U.S. 288, 299-301, 307 (1989) (holding that, subject to narrow exceptions, the application of new rules is barred on collateral review, while cases that merely apply a prior precedent do not state new rules).

Cooper explained at great length how years of case and statutory law supported and even dictated its holding").

Under § 1089(D)(9)(b), Petitioner's jurisdictional claim does not implicate any new, retroactive rule of constitutional law announced by the Supreme Court or this Court. "[A] case announces a 'new' rule when it 'breaks new ground or imposes a new obligation' or if its result 'was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *Walker*, 1997 OK CR 3, ¶ 38, 933 P.2d at 338 (quoting *Teague*, 489 U.S. at 301) (alteration adopted, emphasis supplied by *Teague*). A case does "not announce a new rule" when it is "merely an application of the principle that governed [an earlier] decision." *Teague*, 489 U.S. at 307. As already shown above, *McGirt* was a mere application of, and was dictated by, *Solem*.[18] Further, the decision did not break new ground or impose a new obligation on the State— even prior to this decision, under the relevant federal statutes, the State did not have jurisdiction to prosecute an Indian who committed a major crime in Indian Country. *McGirt* simply held that the original Creek Reservation was still Indian Country for purposes of these statutes. For all these reasons, *McGirt* did not announce a new rule, let alone a retroactive one. *See Walker*, 1997 OK CR 3, ¶¶ 34-38, 933 P.2d at 338-39 (concluding that Supreme Court cases did not announce new rules under *Teague* where one "simply reiterated and enforced long standing case law and statutory rules" and the other "simply applied well established constitutional principles to facts generated by a rather new state statute").

[18] And the Tenth Circuit's decision in *Murphy* was not a decision of the Supreme Court or this Court. To the extent that Petitioner relies on the Supreme Court's *Murphy* decision, such simply affirmed the Tenth Circuit's decision for the reasons stated in *McGirt*. *Murphy*, slip op. at 1. Thus, the Supreme Court's *Murphy* decision no more announced a new rule than did *McGirt*.

Nor can Petitioner meet the restrictions of § 1089(D)(8)(b). First, § 1089(D)(8)(b)(1) requires that the factual basis of Petitioner's jurisdictional claim have not been previously ascertainable through reasonable diligence. The factual bases for Petitioner's jurisdictional claim consist of the location of the murders and the alleged status of his victims as Indians—all facts that were known, or could have been determined through reasonable diligence—at the time of the crimes, let alone by the time of direct appeal and first post-conviction. For starters, based on the evidence in this case, the exact location of the murders has never been in question. *See Bosse*, 2017 OK CR 10, ¶ 15, 400 P.3d at 840-43 (summarizing the evidence). As to the victims' alleged status as Indians, Petitioner supplies memoranda on Chickasaw Nation letterhead from August 2018 purporting to verify the victims' Chickasaw Nation citizenship and possession of CDIB cards. App., Attachments 3-5. Although these memoranda were apparently obtained in 2018, Petitioner does not allege any "specific facts establishing that" these memoranda were not previously "ascertainable through the exercise of reasonable diligence," 22 O.S.2011, § 1089(D)(8)(b)(1), and in any event, it is clear the victims' alleged Indian status could have been verified years ago. The factual basis for Petitioner's jurisdictional claim was not previously unavailable. *See Smith v. State*, 2010 OK CR 24, ¶ 7, 245 P.3d 1233, 1236 (concluding that expert's report was not previously unavailable where, although it was dated after Smith's first post-conviction application, it was derived from information that was available at the time of trial and first post-conviction).

Second, in addition to satisfying § 1089(D)(8)(b)(1)—which he has not done—Petitioner must, but fails to, meet the requirements of § 1089(D)(8)(b)(2). Under the latter provision, he must demonstrate that "the facts underlying the claim . . . would be sufficient to establish . . . [that] no reasonable fact finder would have found [him] guilty of the underlying offense or would have

rendered the penalty of death." 22 O.S.2011, § 1089. This Court has indicated that this standard requires a showing of actual, factual innocence, and that a showing of legal innocence is insufficient. *See Braun v. State*, 1997 OK CR 26, ¶ 28 n. 15, 937 P.2d 505, 514 n. 15.[19] Petitioner's claim—that the State of Oklahoma lacked jurisdiction to try or sentence him to death—is at most a claim of legal innocence. *See Jones v. Warden*, 683 F. App'x 799, 801 (11th Cir. 2017) (unpublished) (state court prisoner's attempt to claim actual innocence to avoid time bar failed because his claim that the state court lacked jurisdiction was "at most, a claim of legal innocence, not factual innocence"); *Rashad v. Ives*, No. 2:10-CV-0771 KJN P, 2010 WL 1644576, at *2 (E.D. Cal. Apr. 20, 2010) (unpublished) (petitioner's claim that trial court lacked jurisdiction to try and sentence him was a claim of legal, not actual, innocence).

For all of the above reasons, Petitioner has not demonstrated that he can meet the provisions of either § 1089(D)(8)(a) or § 1089(D)(8)(b). Accordingly, his jurisdictional claim cannot be considered in this second post-conviction proceeding.

---

[19] *Braun* was discussing § 1089(C)(2), which requires that a claim raised in any post-conviction application, even a first application, "[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." 22. O.S.2011, § 1089(C)(2). However, despite the difference in wording between § 1089(C)(2) and § 1089(D)(8)(b)(2), it is clear that the latter provision still requires a showing of factual innocence of the crime or the death penalty. The language of § 1089(D)(8)(b)(2), enacted in 2006, mirrors the Supreme Court's well-established actual innocence standard. *Compare* 22 O.S.2011, § 1089(D)(8)(b)(2) (". . . no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death"), *with Schlup v. Delo*, 513 U.S. 298, 327 (1995) ("To satisfy the [actual innocence] gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."), *and Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) (a prisoner can claim to be "actually innocent" of the death penalty if he can show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."). And, as this Court recognized in *Braun*, the Supreme Court's standard "is applicable only to factual innocence" and is "not applicable to legal innocence." *Braun*, 1997 OK CR 26, ¶ 28 n. 15, 937 P.2d at 514 n. 15. Thus, in using language that mirrored the Supreme Court's standard, it is clear the Oklahoma Legislature intended for § 1089(D)(8)(b)(2) to require actual, not legal, innocence.

ii. Petitioner's challenge to jurisdiction should not allow him to escape the provisions of § 1089(D)(8)

Petitioner does not address how his jurisdictional claim potentially satisfies the requirements of § 1089(D)(8); rather, he contends that challenges to subject matter jurisdiction can "be raised at any time" under Oklahoma law. App. at 16. Although this argument finds some support in this Court's case law, this Court should clarify that, in light of the Oklahoma Legislature's intent in enacting § 1089, it will enforce the requirements of § 1089(D)(8) according to that statute's plain language, and find Petitioner's claim to be waived and barred.

In two different opinions, this Court has suggested that challenges to the trial court's jurisdiction are not subject to the restrictions in § 1089(D)(8) on the filing of successive capital post-conviction applications.[20] First, in *Murphy*, 2005 OK CR 25, ¶¶ 2, 6, 124 P.3d at 1199-1200, Murphy filed a second capital post-conviction application claiming, as Petitioner does here, that the State lacked jurisdiction over his crime because it occurred in Indian Country. This Court fully

---

[20] Petitioner relies on a number of other cases that are inapposite, as they involved jurisdictional claims that were raised *prior* to *second* post-conviction and thus were not subject to § 1089(D)(8). *See Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (direct appeal); *Cravatt v. State*, 1992 OK CR 6, ¶¶ 3-4, 825 P.2d 277, 278 (same); *Buis v. State*, 1990 OK CR 28, ¶ 1, 792 P.2d 427, 428 (same); *see also Johnson v. State*, 1980 OK CR 45, ¶ 30,, 611 P.2d 1137, 1145 (noting, *only in dicta*, that "[l]ack of jurisdiction, for instance, can be raised at any time"). Although Petitioner does not cite it, this Court also said in *Wallace v. State*, 1997 OK CR 18, ¶ 15, 935 P.2d 366, 372-73, that "issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal." However, *Wallace* was a *first* post-conviction application. *Wallace*, 1997 OK CR 18, ¶¶ 1-2, 935 P.2d at 368-69. Finally, to the extent that any of this Court's cases prior to the enactment of § 1089(D)(8) stated that jurisdiction challenges may be raised at any time, such do not control here as they were decided prior to the passing of that statute and its restrictive provisions.

To be clear, the State does *not* concede that belated jurisdictional claims should not be barred at early stages, such as on first post-conviction. *See, e.g.*, 22 O.S.2011, § 1089(C) (providing limitations on the claims that may be considered in first capital post-conviction applications). However, because Petitioner's claim here is on second post-conviction, the State limits its argument to the bars specific to that stage of litigation. In an appropriate case, the State will show that jurisdictional claims raised in first post-conviction applications should also be barred.

reviewed Petitioner's jurisdictional challenge on the merits but applied the restrictions of § 1089 to another claim raised by Petitioner, finding it to be waived. *Murphy*, 2005 OK CR 25, ¶¶ 6-54, 57-58, 124 P.3d at 1200-09.

Second, in *Wackerly v. State*, 2010 OK CR 16, ¶¶ 1, 3, 5, 237 P.3d 795, 796-97, Wackerly filed a second capital post-conviction application, arguing that the State lacked jurisdiction to prosecute him for the murder of which he was convicted because the crime occurred on land owned by the federal government. This Court noted that, "[o]rdinarily, this claim would be barred because the factual and legal bases upon which it is based were available and could have been presented in a timely original application." *Wackerly*, 2010 OK CR 16, ¶ 4, 237 P.3d at 797 (citing 22 O.S.Supp.2006, § 1089(D)(8)). This Court reasoned, however, "that 'issues of subject matter jurisdiction are never waived and can therefore be raised on collateral appeal.'" *Id.*, 2010 OK CR 16, ¶ 4, 237 P.3d at 797 (quoting *Wallace,* 1997 OK CR 18, ¶ 15, 935 P.2d at 372). Accordingly, this Court considered, but ultimately rejected, Wackerly's jurisdictional claim. *Id.*, 2010 OK CR 16, ¶¶ 4-10, 237 P.3d at 797-99.

Neither *Wackerly* nor *Murphy* appeared to consider whether this Court's general rule that challenges to subject matter jurisdiction can never be waived could be squared with the Oklahoma Legislature's express limitations on successive post-conviction applications in § 1089. Respectfully, an examination of that statute and its history shows that they cannot.

The Oklahoma Legislature's amendments to § 1089 to add the restrictions on successive capital post-conviction applications were effective on November 1, 1995. Importantly, this followed just months after Congress's enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which was effective on April 24, 1996. AEDPA, PL 104–132, April 24,

1996, 110 Stat 1214. In pertinent part, the AEDPA implemented strict requirements for the filing of second or successive federal habeas petitions challenging state court convictions:

> (b) LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.—Section 2244(b) of title 28, United States Code, is amended to read as follows:
>
> "(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> "(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> "(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> "(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> "(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. . . ."

AEDPA, PL 104–132, April 24, 1996, 110 Stat 1214. To this day, § 2244 contains these same limitations on the filing of successive habeas petitions. 28 U.S.C. § 2244(b)(2).

The Oklahoma Legislature's amendments to § 1089, enacted just months later, contain multiple similarities to Congress's changes to § 2244:

> SECTION 4. AMENDATORY 22 O.S. 1991, Section 1089, is amended to read as follows:
>
> . . .
>
> 8. If an original application for post-conviction relief is untimely or if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent or untimely original application unless the application contains sufficient specific facts establishing that the current claims and

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

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

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

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

For purposes of this subsection, a factual basis of a claim is unavailable on or before a date described by this subsection if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

CRIMINAL PROCEDURE—DEATH SENTENCE—EXECUTION OF JUDGMENT—POST-CONVICTION RELIEF, 1995 Okla. Sess. Law Serv. Ch. 256 (H.B. 1659) (WEST). Then, in 2004, the Oklahoma Legislature amended § 1089 again, conforming it even more closely to § 2244's restrictions on successive habeas petitions. Criminal Procedure—Stays of Executions and Capital Post-Conviction Relief, 2004 Okla. Sess. Law Serv. Ch. 164 (S.B. 1220) (WEST). The amended § 1089 was changed to read—and still reads to this day—such that it bars consideration of successive capital post-conviction applications unless:

> a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or
>
> b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and

> (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

Okla. Stat. Ann. tit. 22, § 1089 (West).

Thus, as finally amended, § 1089 provides essentially the same restrictions on capital post-conviction applications that apply to successive habeas petitions under the AEDPA. Both § 1089 and the AEDPA limit successive filings to two categories—those with certain previously unavailable legal grounds and those with certain previously unavailable factual grounds. Previously unavailable legal grounds exist only when the Supreme Court (or this Court, in the case of § 1089) announces a new rule of constitutional law with retroactive effect. *Compare* 22 O.S.2011, § 1089(D)(8)(a), (9)(b), *with* 28 U.S.C. § 2244(b)(2)(A).[21] Previously unavailable factual grounds exist only when the factual grounds could not have been earlier discovered through the exercise of reasonable diligence *and* the facts show actual innocence of the crime of conviction (or of the death penalty, in the case of § 1089). *Compare* 22 O.S.2011, § 1089(D)(8)(b)(1)-(2), *with* 28 U.S.C. § 2244(b)(2)(B)(i)-(ii). Based on the plain language of both statutes, neither statute provides an exception to its restrictions for challenges to the trial court's subject matter jurisdiction.

Indeed, the Tenth Circuit, in construing the AEDPA, has squarely rejected the argument that challenges to subject matter jurisdiction escape its restrictions on the filing of successive habeas petitions:

---

[21] Section 1089 has one other exception for a previously unavailable legal ground, discussed more below. *See* 22 O.S.2011, § 1089(D)(9)(a).

As a threshold matter, before addressing the statutory requirements for filing a second or successive habeas petition, Mr. Wackerly argues that the jurisdictional nature of his claim exempts it from the authorization requirements altogether. He insists that the omission of this claim from his first petition "does not preclude this Court from considering it, because jurisdiction is not waivable and may always be presented in habeas review." Mot. for Auth., Att. E at 29 (citing to *United States v. Bink*, 74 F.Supp. 603, 610 n. 18 (D.Or.1947)). We do not find the citation to a District of Oregon case from 1947, nearly fifty years before passage of the controlling provisions in § 2244(b), to be especially persuasive. Of course, we do agree that jurisdictional issues can be raised on collateral review. *See, e.g., United States v. Cook*, 997 F.2d 1312, 1320 (10th Cir. 1993). But that general proposition does not establish the further point critical to Mr. Wackerly's motion for authorization—that the failure to raise an available jurisdictional claim in a *first* habeas petition does not implicate the statutory constraints applicable to second or successive petitions. Neither the *Bink* case cited by Mr. Wackerly nor the *Cook* case involved a second or successive habeas petition, much less the treatment of such a petition under the relevant provisions added to § 2244 in 1996. And nothing in the unqualified language of those provisions suggests any exemption for jurisdictional claims.

Moreover, this court has previously addressed jurisdictional claims raised in second or successive § 2254 habeas petitions and § 2255 motions and held that they must satisfy the requirements for authorization in § 2244(b) and § 2255(h), respectively. In *Hatch v. Oklahoma*, another death penalty case, Mr. Hatch sought authorization to file a successive § 2254 habeas claim alleging that the information that charged him with felony murder was insufficient to confer subject matter jurisdiction on the state trial court. 92 F.3d 1012, 1014–15 (10th Cir.1996), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180 (10th Cir. 2001). We explained, however, that "lack of jurisdiction is not an [independently] authorized ground upon which a second or successive habeas petition may be filed under the 1996 Act." *Id.* at 1015; *see also In re Cline*, 531 F.3d 1249, 1253 (10th Cir. 2008) (concluding district court correctly treated jurisdictional attack on conviction as successive § 2255 motion). Because the jurisdictional claim did not meet the requirements in § 2244(b)(2), we denied authorization. *Hatch*, 92 F.3d at 1015, 1017; *see also Cline*, 531 F.3d at 1253 (denying authorization for jurisdictional claim in successive § 2255 motion where movant failed to demonstrate that the claim satisfied statutory requirements). Indeed, *Mr. Wackerly does not cite a single case holding that jurisdictional challenges to conviction are exempt from the categorical Congressional mandate that claims raised in second or successive habeas petitions must be authorized by a circuit court before they may proceed in district court.* Accordingly, we now consider whether Mr. Wackerly has met those requirements here.

In re Wackerly, No. 10-7062, 2010 WL 9531121, at *2 (10th Cir. Sept. 3, 2010) (unpublished) (emphasis added); *see also Hatch v. State of Okl.*, 92 F.3d 1012, 1014–15 (10th Cir. 1996) (*per curiam*), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180 (10th Cir. 2001) ("lack of jurisdiction is not an authorized ground upon which a second or successive habeas petition may be filed"); *In re Harrison*, No. 09-2245, 2009 WL 9139587, at *1 (10th Cir. Nov. 3, 2009) (unpublished) (denying authorization to file a second or successive § 2255 motion to vacate federal sentence claiming the district court lacked subject matter jurisdiction because the site of the crime was not Indian territory).

In the published case of *Prost v. Anderson*, 636 F.3d 578, 592 (10th Cir. 2011), the Tenth Circuit reaffirmed its reasoning in *In re Wackerly*. In *Probst*, a federal prisoner attempted to challenge his conviction based on a new Supreme Court case, *United States v. Santos*, 553 U.S. 507 (2008). *Prost*, 636 F.3d at 579. The prisoner conceded that *Santos* did not fit within the limitations for filing a successive motion to vacate a federal sentence under 28 U.S.C. § 2255(h) (requirements very similar to those in § 2244(b)(2)), but argued that "he should be excused from having failed to pursue a *Santos*-type argument in his initial § 2255 motion because *Santos*'s reading of the money laundering statute was erroneously foreclosed under Eighth Circuit law at the time he was convicted and sentenced." *Id.* at 590. The Tenth Circuit was unpersuaded: "Although Mr. Prost suggests there is something unusual about barring a claim that rests on a correct and previously foreclosed statutory interpretation, the fact is that *many* other provisions of AEDPA limit the ability of prisoners to reap the benefit of unforeseeable but helpful new legal developments." *Id.* at 591 (emphasis in original). The Tenth Circuit noted several examples, including jurisdictional challenges:

> [T]hough the writ of habeas corpus in its earliest form was largely a remedy against confinement imposed by a court lacking jurisdiction, *see McCleskey*, 499 U.S. at 478, 111 S.Ct. 1454, this court has barred a state prisoner convicted of murder and sentenced to death by the wrong sovereign from bringing a successive collateral attack to contest his conviction on this basis. *See In re Wackerly*, No. 10–7062, at 5 (10th Cir. Sept. 3, 2010). This is because, like a statutory claim of innocence, lack of jurisdiction is not one of the two authorized grounds upon which a successive § 2254 motion may be filed. *Id.*

Id. at 592.

In *Dopp*, as already mentioned, the Tenth Circuit applied *Prost* and *In re Cline* to a state habeas petitioner's attempt to file a successive habeas petition based on the Tenth Circuit's decision in *Murphy*. The petitioner claimed the "Ottawa County District Court lacked jurisdiction to enter judgment and sentence against him because he committed his crimes of conviction within 'Indian Country,' specifically within the boundaries of the Seneca-Cayuga Tribe reservation." *Dopp*, 750 F. App'x at 756 (quoting Dopp's habeas petition). The petitioner further contended that "his claim challenging the state trial court's jurisdiction is not second or successive because . . . a jurisdictional claim can be brought at any time and cannot be waived or forfeited." *Id.* The Tenth Circuit disagreed and concluded that the federal district court properly dismissed the habeas petition as an unauthorized second or successive petition: "Contrary to his assertion, Dopp's jurisdictional challenge is not exempt from authorization under § 2244(b). . . . [T]he jurisdictional nature of Dopp's claim does not exempt his § 2254 application from dismissal for lack of jurisdiction as a successive and unauthorized application." *Id.* at 756-57.

Likewise, numerous federal district courts have dismissed second or successive § 2254 petitions for failure to meet the requirements of § 2244 despite the inclusion of jurisdictional challenges. *See, e.g.*, *Cowan v. Crow*, No. 19-CV-0639-JED-FHM, 2019 WL 6528593, at *4 (N.D. Okla. Dec. 4, 2019); *Clark v. MacLaren*, No. 2:10-CV-10748, 2016 WL 4009750, at *3

(E.D. Mich. July 26, 2016) (unpublished); *Cross v. Bear*, No. CV-15-133-D, 2015 WL 13741902, at *5 (W.D. Okla. Oct. 19, 2015); *Johnson v. Cain*, No. CIV.A. 12-2056, 2013 WL 3422448, at *1-4 (E.D. La. July 8, 2013); *Palmer v. McKinney*, No. 907-CV-0360-DNH-GHL, 2007 WL 1827507, at *2-3 (N.D.N.Y. June 22, 2007); *Perez v. Quarterman*, No. CIV.A.H-07-0915, 2007 WL 963985, at *2-3 (S.D. Tex. Mar. 29, 2007); *Jones v. Pollard*, No. 06-C-0967, 2006 WL 3230032, at *1-2 (E.D. Wis. Nov. 6, 2006).

Here, Respondent respectfully urges this Court to reconsider its prior statements—in particular, in *Wackerly* and *Murphy*—that jurisdictional challenges escape the restrictions of § 1089(D)(8). As previously shown, § 1089(D)(8) is materially indistinguishable from § 2244(b)(2), and federal courts have repeatedly determined that jurisdictional claims are subject to § 2244(b)(2)'s restrictions. There is no reason to think that the Oklahoma Legislature intended § 1089 to be any less restrictive than § 2244 when it comes to jurisdictional challenges.[22] Further, as this Court recognized in *Walker* with regard to the Legislature's 1995 amendments,

> [t]he amendments to the capital post-conviction review statute reflect the legislature's intent to honor and preserve the legal principle of finality of judgment, and we will narrowly construe these amendments to effectuate that intent. Given the newly refined and limited review afforded capital post-conviction applicants, we must also emphasize the importance of the direct appeal as the mechanism for raising all potentially meritorious claims.

Walker, 1997 OK CR 3, ¶ 5, 933 P.2d at 331. Giving § 1089 its proper narrow construction, it is clear that the statute does not allow jurisdictional claims to escape its restrictions. A contrary

[22] In fact, the Oklahoma Legislature did provide an exception to the bar on successive capital post-conviction applications that has no parallel in § 2244: where the legal basis for a claim "was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state . . . ." 22 O.S.2011, § 1089(D)(9)(a). Thus, with that provision, the Legislature made clear its desire to carve out an exception beyond those provided in the AEDPA. Its failure to do so as to jurisdictional claims speaks volumes.

interpretation contravenes legislative intent. *Cf. Prost*, 636 F.3d at 589 ("The simple fact is that Congress decided that, unless subsection (h)'s requirements are met, finality concerns trump and the litigation must stop after a first collateral attack. Neither is this court free to reopen and replace Congress's judgment with our own.").

Beyond the plain language of § 1089, there are good policy reasons for not exempting jurisdictional challenges from its requirements. As this Court recognized in *Walker*, "'[o]ne of the law's very objects is the finality of its judgments.'" *Walker*, 1997 OK CR 3, ¶ 5 n. 16, 933 P.2d at 331 n. 16 (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)). *Prost* discussed society's interest in finality of criminal judgments at length:

> The principle of finality, the idea that at *some* point a criminal conviction reaches an end, a conclusion, a termination, "is essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *see also McCleskey v. Zant*, 499 U.S. 467, 491, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). In every case there comes a time for the litigation to stop, for a line to be drawn, and the parties encouraged to move forward rather than look back. "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude," the Supreme Court has explained, "implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of underlying substantive commands.... There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility." *McCleskey*, 499 U.S. at 492, 111 S.Ct. 1454 (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L.Rev. 441, 452–53 (1963)). Anxiety and immobility, of course, are accompanied by other social costs—to victims, their families, to future potential victims, to the government, and to the courts—that revisiting and retesting convictions five or ten years old—or (as here) even older—can involve.

Prost, 636 F.3d at 582–83; *see also Morales v. Jones*, 417 F. App'x 746, 749 (10th Cir. 2011) (unpublished) (recognizing that while lack of jurisdiction in the convicting court does raise a due process claim, "Morales makes no argument to differentiate this case from any other due process

violation," and concluding that such a claim could be time-barred "[a]s with any other habeas claim").

This case provides a stark illustration of the problems *Prost* predicted when the principle of finality is disregarded—*ten* years ago last month Petitioner murdered a mother and her two children, leaving behind a grieving family that still awaits justice. In the interests of finality, it is perfectly reasonable to conclude Petitioner's state court attacks on his convictions and death sentences at this juncture, even if doing so forecloses a jurisdictional challenge.

Finally, Petitioner would be hard-pressed to argue that there is anything unfair or controversial about barring a jurisdictional claim. For starters, Justice Thomas discussed with approval the bar referenced by this Court in *McGirt*, *i.e.*, McGirt's failure to raise his jurisdictional claim on direct appeal. *McGirt*, slip op. at 2-3 (Thomas, J., dissenting). Moreover, in the *Murphy* litigation before the Supreme Court, Murphy's Brief in Opposition to the State's Petition for Writ of Certiorari scoffed at the idea that numerous state court convictions would be open to attack if the Tenth Circuit's decision were permitted to stand. Among other things, Murphy asserted that "[s]tate courts . . . limit defendants from challenging long-final convictions. *See, e.g.*, Okla. Stat. tit. 22 § 1086 (requiring "sufficient reason" to consider successive petition) . . . ." Brief in Opposition at 33, *Terry Royal v. Patrick Dwayne Murphy*, Case No. 17-1107 (U.S. Supreme Court, April 29, 2018) (hereinafter, "*Murphy* Brief in Opposition") (available at https://www.supremecourt.gov/DocketPDF/17/17-1107/42807/20180409154638946_Murphy%20BIO%204-9-2018%201215pmA.pdf). This Court should accept that invitation and bar this claim here.

* * *

For all of these reasons, this Court should find Petitioner's jurisdictional challenge to be waived and barred by § 1089(D)(8).

B. Sixty-Day Deadline for Successive Capital Post-Conviction Applications

Alternatively, this Court should refuse to consider Petitioner's jurisdictional claim because it is untimely. This Court's Rules provide that "[n]o subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2011).

Here, the Chickasaw Nation memoranda submitted by Petitioner in support of his claim that his victims were Indians are all dated August 29, 2018. App., Attachments 3-5. However, Petitioner did not file the present post-conviction application until February 20, 2019. Furthermore, to the extent Petitioner bases his claim on the Tenth Circuit's decision in *Murphy*, that opinion was issued on August 8, 2017, and amended on November 9, 2017.[23] Clearly, Petitioner is time-barred under the sixty-day rule as to any new legal or factual bases he contends support his claims. This Court should refuse to consider his jurisdictional claim under Rule 9.7(G)(3).

Admittedly, this Court has previously declined to apply the sixty-day rule as to a jurisdictional claim. Again, in *Wackerly*, this Court observed that an "examination of the evidentiary materials submitted in support of Wackerly's application shows that the legal and factual bases of this claim were available much earlier than sixty days before the filing of the

[23] As shown above, *Murphy* did not provide a new legal basis for challenging jurisdiction.

instant application for post-conviction relief." *Wackerly*, 2010 OK CR 16, ¶ 4, 237 P.3d at 797. While this Court noted that, "[o]rdinarily, such an untimely filing would bar the current claim," "issues of subject matter jurisdiction are never waived and can therefore be raised on collateral appeal." *Id.* (citing Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2010)) (quotation marks omitted). As previously discussed, this Court then considered on the merits Wackerly's jurisdictional claim.

Respondent respectfully submits that this Court should enforce its sixty-day rule even as to jurisdictional claims. Again looking to the AEDPA for an analogous bar, federal courts have repeatedly imposed the statute of limitations for filing § 2254 habeas petitions or § 2255 motions to vacate to jurisdictional claims. *See, e.g.*, *Jones v. Warden*, 683 F. App'x 799, 801 (11th Cir. 2017) (unpublished) (affirming dismissal of § 2254 petition raising jurisdictional challenge as time-barred); *Morales*, 417 F. App'x at 749 (denying petitioner's argument that claims that the convicting court lacked subject matter jurisdiction could not be time barred); *United States v. Patrick*, 264 F. App'x 693, 694-96 (10th Cir. 2008) (unpublished) (declining to grant a certificate of appealability to review the district court's dismissal of prisoner's § 2255 petition—challenging the trial court's jurisdiction—as untimely); *Mcintosh v. Hunter*, No. CV 16-460-RAW-KEW, 2017 WL 3598514, at *3 (E.D. Okla. Aug. 21, 2017) (unpublished) ("The Tenth Circuit and district courts have held that jurisdictional claims are subject to ADEPA's time limit.").

Furthermore, the inequity of permitting Petitioner to sit on his jurisdictional claim for so long is pronounced in this case. At the Supreme Court's oral argument in *Murphy* in November 2018, counsel for Murphy claimed the State had exaggerated the number of state court convictions that were in jeopardy. Oral Argument Transcript at 45-47, *Mike Carpenter v. Patrick Dwayne Murphy*, Case No. 17-1107 (U.S. Supreme Court, Nov. 27, 2018) ("*Murphy* Argument

Transcript") (available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1107_q86b.pdf). Meanwhile, Petitioner here had already marshaled evidence in support of his jurisdictional challenge, including the verification of his victims' tribal membership as discussed above, and yet waited until February 2019 to initiate this action. This blatant flouting of this Court's rules, in order to downplay the effects of the Tenth Circuit's decision in *Murphy*, should not be rewarded with consideration of Petitioner's patently untimely claim.[24]

C. The Doctrine of Laches

As a final alternative, this Court should refuse to consider Petitioner's jurisdictional challenge based on the doctrine of laches. This Court has long held that, pursuant to the laches doctrine, "one cannot sit by and wait until lapse of time handicaps or makes impossible the determination of the truth of a matter, before asserting his rights." *Thomas v. State*, 1995 OK CR 47, ¶ 11, 903 P.2d 328, 331 (quotation marks omitted, alteration adopted) (collecting cases); *see also Berry v. Anderson*, 1972 OK CR 192, ¶ 4, 499 P.2d 959, 960 (barring claim based on laches even where it was "apparent" that the petitioner would be "would have been entitled to release" had he earlier brought his challenge); *Application of Smith*, 1959 OK CR 59, ¶ 10, 339 P.2d 796, 797-98 ("The right to relief . . . may be lost by laches, when the petition for habeas corpus is delayed for a period of time so long that the minds of the trial judge and court attendants become clouded by time and uncertainty as to what happened, or due to dislocation of witnesses, the grim hand of death and the loss of records the rights sought to be asserted have become mere matters of

[24] Petitioner cannot seriously claim he sat on his claim in reliance on *Wackerly*, as he does not even cite *Wackerly*, or any other case, in support of any argument that he is not subject to the sixty-day rule.

speculation, based upon faulty recollections, or figments of imagination, if not outright falsifications."). Furthermore, the laches doctrine applies to collateral attacks upon convictions, including by means of an application for post-conviction relief. *Thomas*, 1995 OK CR 47, ¶ 15, 903 P.2d at 332; *see also Paxton v. State*, 1995 OK CR 46, ¶ 8 903 P.2d 325, 327 ("We hold, therefore, that the doctrine of laches has been and continues to be applicable, in appropriate cases, to collateral attacks upon convictions, whether by means of an extraordinary writ, as in former times, or by means of an application for post-conviction relief."). "Thus, the doctrine of laches may prohibit the consideration of an application for post-conviction relief where a petitioner has forfeited that right through his own inaction." *Paxton*, 1995 OK CR 46, ¶ 8, 903 P.2d at 327.

This Court has "emphasize[d] that the applicability of the doctrine of laches necessarily turns on the facts of each particular case." *Id.* The question is whether the post-conviction applicant has provided "sufficient reason" for the delay in seeking post-conviction relief. *See id.*, 1995 OK CR 47, ¶ 16, 903 P.2d at 332 (holding that "Petitioner's contention that depression caused by incarceration for subsequent convictions have prevented him from seeking relief . . . for fifteen years is not sufficient reason to overcome the doctrine of laches"). Finally, this Court has refused to place a threshold burden upon the State to demonstrate actual prejudice before laches applies. *Id.*, 1995 OK CR 47, ¶ 14, 903 P.2d 328, 332.

Moreover, the *McGirt* Court, tacitly recognizing that its decision would open the floodgates to jurisdictional challenges, encouraged this Court to consider applying laches to such challenges:

> 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." *Ramos*, 590 U. S., at ——, 140 S.Ct., at 1047 (plurality opinion).

McGirt, slip op. at 41.

Although in a civil instead of criminal context, the Supreme Court has explained that the doctrine of laches is about not just one party's inaction, but the opposing party's detrimental reliance. In *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 202 (2005), the Supreme Court considered a claim by the Oneida Indian Nation of New York that the Tribe should not have to pay taxes on parcels of land that the Tribe had recently purchased on the free market but that were part of the Tribe's original reservation two hundred years prior. Previously, the Supreme Court had twice ruled favorably in litigation by the Tribe against local governments seeking damages for the taking of their ancestral lands. *See Oneida Indian Nation of N.Y. State v. Oneida Cty., New York*, 414 U.S. 661, 675 (1974); *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 240-50 (1985). In *City of Sherrill*, however, the Supreme Court refused to grant the Tribe the "disruptive," equitable remedy that it sought, in part, based on laches:

> The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's. And not until the 1990's did [the Tribe] acquire the properties in question and assert its unification theory to ground its demand for exemption of the parcels from local taxation. . . .
>
> The principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises. It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief.

City of Sherrill, 544 U.S. at 216-17.

Here, Petitioner committed these crimes in July 2010, *ten years ago* last month. Furthermore, as previously discussed, all of the facts underlying his jurisdictional claim—that is, his evidence that the Chickasaw Reservation has allegedly not been disestablished and that his

victims were allegedly Indians—were available to him at every prior stage of this criminal case, including at the time of the crimes and trial. Yet, Petitioner did not bring this jurisdictional claim until nearly nine years after his crimes. This Court has repeatedly found laches to bar collateral attacks in cases with delays similar in length to the present one. *See, e.g.*, *Thomas*, 1995 OK CR 47, ¶ 7, 903 P.2d at 332 (fifteen years); *Ex parte French*, 1952 OK CR 13, 240 P.2d 818 (almost fifteen years); *Ex parte Workman*, 1949 OK CR 68, 207 P.2d 361 (eight years).

Indeed, this Court has on multiple occasions applied laches to jurisdictional claims. In *Ex parte Wallace*, 81 Okla. Crim. 176, 178-79, 162 P.2d 205, 207 (1945), the defendant filed a state habeas petition three years after his guilty plea alleging that the federal court had exclusive jurisdiction over his crime because he and his rape victims were Comanche Indians and the crime occurred on a restricted allotment. Although this Court did not invoke the word "laches," it ultimately concluded that "at this late date" it would not consider the defendant's jurisdictional attack, noting in particular that the statute of limitations for any federal action against the defendant had lapsed.[25] *Ex parte Wallace*, 81 Okla. Crim. at 179, 188, 162 P.2d at 207, 211.

Similarly, in *Allen v. Raines*, 1961 OK CR 41, ¶¶ 6-8, 360 P.2d 949, 951, this Court applied laches to a state habeas petitioner's claim that he was not furnished counsel at the time of his guilty plea sixteen years prior. Importantly, at the time, this Court treated the denial of counsel as a jurisdictional issue. *See Allen*, 1961 OK CR 41, ¶ 6, 360 P.2d at 951 ("We have held that a trial

[25] Although there is no federal statute of limitations for murder, laches does not require that there be no possibility of a retrial. In this case, it is patently unfair that Petitioner sat on a potentially meritorious jurisdictional challenge for *nine* years. The State expended great resources at Petitioner's capital murder trial, and has continued to spend time and money defending what is now a presumptively valid judgment. *See Brecht*, 507 U.S. at 633-37 (recognizing that convictions are presumed correct after direct appeal). Further, Petitioner's belated claim has placed the victims' family members at risk of having to begin the painful process of trial and appeal all over again after ten years. The reasoning of *Wallace* applies, perhaps with even more force, in this case.

court may lose jurisdiction to pronounce judgment by failure to complete the court by appointing counsel to represent the accused where the accused has not effectively waived his constitutional right to the assistance of counsel."); *see also Application of Smith*, 1959 OK CR 59, ¶ ¶ 1, 10-14, 339 P.2d 796, 798-99 (barring based on laches jurisdictional claim of denial of counsel); *Ex parte Paul*, 93 Okla. Crim. 300, 301, 227 P.2d 422, 423 (1951) (same).[26]

As previously discussed, Petitioner not only waited nine years to raise his jurisdictional claim, he utterly flouted this Court's well-established procedural rules at every stage, failing to raise this claim at trial, on direct appeal, in his first post-conviction proceeding, or within sixty days of uncovering the facts underlying the claim. He has provided no reason whatsoever for his inaction, let alone "sufficient" reason. *Paxton*, 1995 OK CR 47, ¶ 16, 903 P.2d at 332. Petitioner, as a capital defendant who has been provided able counsel at every stage of these proceedings, has no excuse for failing to raise this claim for so many years.

Not only has Petitioner not provided a reason for his delay, but in the *Murphy* litigation, **Murphy's counsel—in part the same office that represents Petitioner here—agreed that the doctrine of laches should apply to belated jurisdictional claims.** Murphy's Brief in Opposition to the State's Petition for Writ of Certiorari stated:

> Similarly overstated is Oklahoma's assertion about the number of "state convictions [that] will be subject to collateral attack." Pet. 21. . . . State courts . . . limit defendants from challenging long-final convictions. *See, e.g.*, Okla. Stat. tit. 22 § 1086 (requiring "sufficient reason" to consider successive petition); *Paxton v. State*, 903 P.2d 325, 327 (Okla. Crim. App. 1995) ("laches" may "prohibit the consideration" of challenges to long-final convictions).

[26] This Court has on occasion not applied laches to delayed jurisdictional claims. *See, e.g., Ex parte Ray*, 87 Okla. Crim. 436, 441-44, 198 P.2d 756, 759-60 (1948) (considering on the merits claim of deprivation of counsel before denying based on laches delayed habeas petition); *Ex parte Motley*, 86 Okla. Crim. 401, 404-09, 193 P.2d 613, 615-17 (1948) (same). But this is not surprising, as laches is applied on a case-by-case basis. *See Paxton*, 1995 OK CR 46, ¶ 8, 903 P.2d at 327. The State will show that the facts of this case warrant application of laches.

Murphy Brief in Opposition at 33; *see also Murphy* Argument Transcript at 46 (counsel for Murphy noting that "the state has a laches doctrine"). The Creek Nation also urged the application of laches to bar untimely post-conviction claims in its briefing in *Murphy*. *See* Supplemental Brief for *Amicus Curiae* Muscogee (Creek) Nation in Support of Respondent at 12, *Mike Carpenter v. Patrick Dwayne Murphy*, Case No. 17-1107 (U.S. Supreme Court Dec. 28, 2018) (available at https://www.supremecourt.gov/DocketPDF/17/17-1107/77854/20181228130713523_17-1107%20Supplemental%20Brief%20of%20Amicus%20Curiae%20MUscogee%20Creek%20Nation.pdf). Again, this Court should accept this invitation to apply laches to belated jurisdictional claims.

The State is not required to show prejudice from Petitioner's inaction for laches to apply. *Paxton*, 1995 OK CR 47, ¶ 14, 903 P.2d at 332. In any event, given that this is a capital case, the prejudice to the State is obvious. As Justice Scalia recognized, death sentences are costly and time-consuming for the State to secure and defend, given "the proliferation of labyrinthine restrictions on capital punishment" over the foregoing decades. *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring). Here, as in other capital cases, the State has suffered prejudice in relying on Petitioner's inaction in bringing his jurisdictional claim. Until his second post-conviction action, Petitioner never questioned the trial court's jurisdiction; thus, the State has expended extraordinary time and resources in defending Petitioner's murder convictions and death sentences at every previous stage of this case under the belief that jurisdiction was uncontested. The victims' family members have been subjected to the trauma of a trial and numerous appeals, all while Petitioner silently sat on his jurisdictional challenge. Given the State's legitimate reliance on Petitioner's inaction and the undoubtedly "disruptive" application of *McGirt* he seeks, this Court should refuse to consider his belated jurisdictional challenge. *See City of Sherrill*, 544 U.S.

at 216-17; *cf. also McGirt*, slip op. at 31 ("[F]or 113 years, Oklahoma has asserted jurisdiction over the former Indian Territory on the understanding that it is not a reservation, without any objection by the Five Tribes until recently (or by McGirt for the first 20 years after his convictions)." (Roberts, C.J., dissenting)); *id.* at 34 ("[T]he Court's decision draws into question thousands of convictions obtained by the State for crimes involving Indian defendants or Indian victims across several decades." (Roberts, C.J., dissenting)).

It bears repeating that Petitioner knowingly sat on his jurisdictional claim for months before filing it in this Court, all while his counsel downplayed the effects of the Tenth Circuit's decision in the *Murphy* litigation before the Supreme Court. In *McGirt*, the majority ridiculed the "speculative" concern of "Oklahoma and the dissent" that "thousands of Native Americans like Mr. McGirt wait in the wings to challenge the jurisdictional basis of their state-court convictions." *McGirt*, slip op. at 38 (quotation marks omitted). And yet, that is exactly what happened in this case. At bottom, laches is an equitable doctrine. *See Sullivan v. Buckhorn Ranch P'ship*, 2005 OK 41, ¶ 32, 119 P.3d 192, 202 ("Laches is an equitable defense to stale claims. . . . Application of the doctrine is discretionary depending on the facts and circumstances of each case as justice requires."). Under these circumstances, it is grossly inequitable and unjust to reward Petitioner with consideration of his belated jurisdictional claim.

For all these reasons, this Court should find Petitioner's jurisdictional claim to be barred by laches.

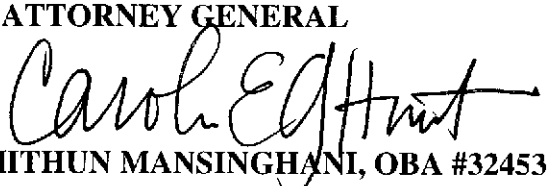
VII. Conclusion

Based on all of the above, although the State asserts multiple procedural bars, the State respectfully requests that this Court provide guidance for the numerous cases affected by *McGirt* by resolving the issues left unsettled by *McGirt* as implicated in this case. Specifically, this Court

should clarify how Indian status is to be proven (*see* Part II, *supra*), that the defendant has the burden of proving Indian status and that the location of his crime fell within the boundaries of the purported reservation (*see* Part III, *supra*), that this Court has concurrent jurisdiction under the General Crimes Act and that the trial court had jurisdiction in this case (*see* Part IV, *supra*), and that *McGirt* expressly limited its holding to the Creek Reservation and that this Court will not step in and expand that holding without remand to the district court (*see* Part V, *supra*). Further, the State respectfully asks that this Court procedurally bar Petitioner's jurisdictional claim and deny relief (*see* Part VI, *supra*). Alternatively, should this Court decide to reach the merits of Petitioner's jurisdictional claim—and hold that the State does not have concurrent jurisdiction—the State submits that a remand for an evidentiary hearing is necessary (*see* Parts III and V, *supra*).

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL



MITHUN MANSINGHANI, OBA #32453
SOLICITOR GENERAL
JENNIFER L. CRABB, OBA #20546
CAROLINE E.J. HUNT, OBA #32635
ASSISTANT ATTORNEYS GENERAL

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF MAILING

On this 4th day of August, 2020, a true and correct copy of the foregoing was mailed to:

Michael W. Lieberman
Sarah M. Jernigan
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102

CAROLINE E.J. HUNT

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

WILLIAM TYLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PC-2019-647**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER AFFIRMING DENIAL OF APPLICATION FOR POST-CONVICTION RELIEF

Petitioner has appealed to this Court from an order of the District Court of Craig County denying his application for post-conviction relief in District Court Case No. CRF-1992-102. The record reflects Petitioner was tried by a jury and convicted of First Degree Murder and sentenced to life imprisonment without the possibility of parole. Petitioner appealed and his conviction was affirmed but his sentence was modified by this Court to life imprisonment. *See Tyler v. State*, F-1993-1104 (Okl.Cr. July 11, 1995)(not for publication).

Petitioner has filed a previous application for post-conviction relief in this case that was denied by the district court and this Court

EXHIBIT A

on appeal. *See Tyler v. State*, PC-2017-111 (Okl.Cr. April 18, 2017)(not for publication).

The Honorable Joseph Gardner, Associate District Judge, denied Petitioner's current post-conviction application in an order filed with the trial court clerk on August 9, 2019. He noted that Petitioner appealed his conviction and that Petitioner had been denied relief in a previous application for post-conviction relief. Therefore, any issues previously raised were barred by res judicata, and issues which could have been raised, but were not, were waived. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. Judge Gardner denied Petitioner's Propositions 1, 2, 3, and 4, dealing with jurisdiction, as premature. Judge Gardner denied Petitioner's Propositions 5 and 6 as procedurally barred.

Petitioner has failed to establish entitlement to any relief in this post-conviction proceeding. *Russell v. Cherokee County District Court*, 1968 OK CR 45, ¶ 5, 438 P.2d 293, 294 (it is fundamental that where a post-conviction appeal is filed, the burden is upon the petitioner to sustain the allegations of his petition). Post-conviction review provides petitioners with very limited grounds upon which to base a collateral

attack on their judgments and sentences. *Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973. All issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review. 22 O.S.2011, § 1086; *Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973. Petitioner has not established any sufficient reason why his current grounds for relief were not previously raised. *Id.*

Except as related to his claims that the trial court lacked jurisdiction, consideration of Petitioner's claims for relief are procedurally barred. *Id.; Fowler v. State,* 1995 OK CR 29, ¶ 2, 896 P.2d 566, 569; *Walker v. State*, 1992 OK CR 10, ¶ 6, 826 P.2d 1002, 1004.

In his remaining propositions challenging jurisdiction, Petitioner tries to claim that his crime was committed in portions of Oklahoma located in Indian Country, prohibiting Oklahoma courts from exercising jurisdiction over his crime in Case No. CRF-1992-102. However, the prosecution of Petitioner's crime in that case was a justiciable matter, and thus he has not established that the trial court lacked jurisdiction. Okla. Const. Art. VII, § 7 (District Courts shall have unlimited original jurisdiction of all justiciable matters in Oklahoma). The issues raised in Petitioner's trial court application are addressed

in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017) and as a result are currently pending before the United States Supreme Court. *Murphy* is stayed pending the United States Supreme Court's final disposition of the petition for writ of certiorari. *Murphy v. Royal*, Nos. 07-7068 & 15-7041 (10th Cir. November 16, 2017). The United States Supreme Court has granted the petition for writ of certiorari. *Royal v. Murphy*, __ U.S. __, __ S.Ct. __, 2018 WL 747674 (Mem) (May 21, 2018).[1] Therefore, *Murphy* is not a final decision and Petitioner has cited no other authority that refutes the jurisdictional provisions of the Oklahoma Constitution.

Therefore, the order of the District Court of Craig County denying Petitioner's application for post-conviction relief in Case No. CRF-1992-102 should be, and is hereby, **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the MANDATE is ORDERED issued forthwith upon the filing of this decision with the Clerk of this Court.

IT IS SO ORDERED.

---

[1] *Murphy* was argued before the United States Supreme Court on November 27, 2018, and on June 27, 2019, the case was restored to the United States Supreme Court's calendar for reargument.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th day of May, 2020.

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden
Clerk

PA/F

TAB 4

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 REMANDING FOR EVIDENTIARY HEARING

Shaun Michael Bosse was tried by jury, convicted of Counts I-III, First Degree Murder, and Count IV, First Degree Arson, and sentenced to death (Counts I-III and thirty-five (35) years imprisonment and a fine of $25,000.00 (Count IV), in the District Court of McClain County, Case No. CR-2010-213. This Court upheld Petitioner's convictions and sentences in *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). This Court denied Petitioner's first Application for Post-Conviction Relief. *Bosse v. State*, No. PCD-2013-360 (Okl.Cr. Dec.16, 2015) (not for publication). Petitioner filed this Successive Application for Post-Conviction Relief on February 20, 2019. In

Proposition I, Petitioner challenges the State's jurisdiction to prosecute him.

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. 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).

Appellant's claim raises two separate questions: (a) the status of his victims as Indians, and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of McClain County, for an evidentiary hearing to be held within sixty (60) days from the date of this Order.

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Petitioner's presentation of *prima facie*

evidence as to the legal status as Indians of Petitioner's victims, and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

The hearing shall be transcribed, and the court reporter shall file an original and two (2) certified copies of the transcript within twenty (20) days after the hearing is completed. The District Court shall then make written findings of fact and conclusions of law, to be submitted to this Court within twenty (20) days after the filing of the transcripts in the District Court. The District Court shall address only the following issues.

First, the status as Indians of Appellant's victims. The District Court must determine whether (1) the victims had some Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government.[1]

Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Chickasaw Nation, and (2) if so, whether Congress specifically erased

[1] *See, eg., 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).

those boundaries and disestablished the reservation. In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps, an/or testimony.

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record, to the Clerk of this Court, and counsel for Appellant, within five (5) days after the District Court has filed its findings of fact and conclusions of law. Upon receipt thereof, the Clerk of this Court shall promptly deliver a copy of that record to the Attorney General. A supplemental brief, addressing only those issues pertinent to the evidentiary hearing and limited to twenty (20) pages in length, may be filed by either party within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed in this Court.

Provided however, in the event the parties agree as to what the evidence will show with regard to the questions presented, they may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. In this event, no hearing on the

questions presented is necessary. Transmission of the record regarding the matter, the District Court's findings of fact and conclusions of law and supplemental briefing shall occur as set forth above.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit copies of the following, with this Order, to the District Court of McClain County: Petitioner's Successive Application for Post-Conviction Relief filed February 20, 2019; and Respondent's Response to Petitioner's Proposition 1 in Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), filed August 4, 2020.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 12th day of August, 2020.

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

Clerk

TAB 5

ORIGINAL

No. PCD-2019-124

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

STATE'S SUPPLEMENTAL BRIEF FOLLOWING REMAND FOR EVIDENTIARY HEARING FROM MCCLAIN COUNTY DISTRICT COURT CASE NO. CF-2010-213

DISTRICT 21 DISTRICT ATTORNEY'S OFFICE
Greg Mashburn, OBA #17780
District Attorney
Travis White, OBA #19721
First Assistant District Attorney

MCCLAIN COUNTY COURTHOUSE
121 N. 2nd, Room 212
Purcell, Oklahoma 73080
(405) 527-6574
(405) 527-2362 (fax)

NOVEMBER 4, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,	
Petitioner,	
v.	**Case No.: CF-2010-213** **PCD-2019-124**
THE STATE OF OKLAHOMA,	
Respondent.	

STATE'S SUPPLEMENTAL BRIEF FOLLOWING REMAND FOR EVIDENTIARY HEARING

The State, by and through Greg Mashburn, District 21 District Attorney and Travis White, First Assistant District Attorney, presents herewith this Supplemental Brief Following Remand for Evidentiary Hearing, and respectfully requests that this Court consider the arguments herein in issuing its final decision on the petitioner Shaun Michael Bosse's jurisdictional claim under *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

STATEMENT OF THE CASE AND FACTS

On September 30, 2020, as directed by this Court, the district court held an evidentiary hearing on the petitioner's claim, raised in his second application for post-conviction relief, that jurisdiction over his capital crimes rests exclusively in the federal courts because his victims were members of the Chickasaw Tribe and he murdered them within the undiminished boundaries of the original Chickasaw Reservation (O.R. 92-93;

Tr.[1]). Ahead of the hearing, the parties submitted stipulations and documentation establishing that the victims were all members of the Chickasaw Nation and that they had the following quanta of Indian blood—Katrina Griffin: 23/128 (18%); C.G.: 23/256 (9%); and C.H.: 23/256 (9%) (O.R. 158, 160-62).[2] Following the evidentiary hearing, the representatives of the State presented separate proposed findings of fact and conclusions of law (O.R. 1038-1081). The Attorney General submitted proposed findings and conclusions that took no position on the Indian Country or Indian status issues (O.R. 1040, 1044). The District Attorney submitted proposed findings and conclusions that took no position on Indian Country, but that urged the district court to consider case law from other jurisdictions requiring a certain blood quantum, generally 1/8 (12.5%), for an individual to be considered Indian for purposes of federal criminal jurisdiction (O.R. 1047-1054). The District Attorney did "not advocate a particular blood quantum as a cut-off for satisfying the first prong" but requested that "[the district court]—and ultimately [this Court]—**make a judicial determination as to what blood quantum is required to satisfy the first prong**" to ensure consistency between the state and federal courts (O.R. O.R. 1049 n.4).

[1] "Tr." refers to the September 30, 2020 transcript of the petitioner's evidentiary hearing, filed in this Court on October 15, 2020.

[2] Given the applicable page limitation, this brief focuses the Statement section on the background relevant to the issues raised herein.

On October 13, 2020, the district court issued its Findings of Fact and Conclusions of Law (O.R. 1071-1080). As to Indian status, the district court acknowledged the District Attorney's blood quantum argument and the various definitions employed by other jurisdictions; "[h]owever, the OCCA was clear in its mandate when it ordered this Court to determine 'whether the victims had *some* Indian blood'" (O.R. 1073). Accordingly, based on the stipulated blood quanta of the victims, the district court found the victims had "some" Indian blood (O.R. 1073). The district court further found that the victims were enrolled members of the Chickasaw Tribe, and thus, with both Indian blood and recognition by a Tribe, all three victims were Indian for purposes of criminal jurisdiction (O.R. 1073-1074). Finally, the district court determined "that Congress established a reservation for the Chickasaw Nation, and Congress never specifically erased those boundaries and disestablished the reservation. Therefore, the crime occurred in Indian Country" (O.R. 1080).

Now before this Court, the District Attorney (hereinafter, "the State") files this brief to address only four issues. First, this Court must decide how to define the first prong of the Indian status test, that is, the requirement of Indian blood. Second, even assuming this Court accepts the district court's findings of fact and conclusions of law in full, the State respectfully re-urges the position from the Attorney General's pre-remand brief that the State possesses concurrent jurisdiction over crimes by non-Indians against Indians that occur in Indian Country. Third, the State respectfully asks this Court to

reconsider the Attorney General's previous position that the petitioner's jurisdictional claim is barred. Finally, should this Court disagree with all of these positions and grant relief on the petitioner's claim, the State asks that this Court stay its order for thirty days.

I. THIS COURT MUST DECIDE HOW TO DEFINE THE FIRST PRONG OF THE INDIAN STATUS TEST.

"The term 'Indian' is not statutorily defined, but courts have judicially explicated its meaning." *United State v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). In order to qualify as an "Indian" for purposes of invoking an exception to state jurisdiction, a defendant must prove two facts/prongs: 1) that he has some, or a significant percentage of, Indian blood and 2) tribal or governmental recognition as an Indian. Compare *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116 (requiring a "significant percentage" of Indian blood); with (O.R. 5 n.3 (requiring "some Indian blood" (citing *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) (en banc), overruled on other grounds by *United States v. Cotton*, 535 U.S. 625, 631 (2002))). The United States Supreme Court has established that a determination of "Indian" blood is a factor in determining Indian status. See *United States v. Rogers*, 45 U.S. 567, 571 (1846).[3] Thus, Indian status requires not just official recognition as Indian, but also Indian blood. *Diaz*, 679 F.3d at 1188.

[3] *Rogers* remains binding precedent. See *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (courts are bound by the Supreme Court's precedents "until [the Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality" (quotation marks omitted)); see also *Bruce*, 394 F.3d at 1225 (explaining, in response to the dissent's equal protection

"[T]here does not appear to be a universal standard specifying what percentage of Indian blood is sufficient to satisfy the first prong." *State v. George*, 422 P.3d 1142, 1145 (Idaho 2018). Different jurisdictions employ differing adjectives for the degree of Indian blood required—referring to "some" Indian blood, see, e.g., *Diaz*, 679 F.3d at 1187; *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976); "sufficient" Indian blood, see, e.g., *United States v. LaBuff*, 658 F.3d 873, 874-75 (9th Cir. 2011); "substantial" Indian blood, see, e.g., *Vialpando v. State*, 640 P.2d 77, 79-80 (Wyo. 1982); or "significant" Indian blood, see, e.g., *State v. Perank*, 858 P.2d 927, 932 (Utah 1992); *Goforth*, 1982 OK CR 48, ¶ 6, 644 P.2d at 116. Indeed, as noted above, this Court's precedent in *Goforth* required a "significant" degree of Indian blood, while the remand order referred to "some" blood.

Various courts analyzing the question of Indian status for purposes of determining criminal jurisdiction have held that the amount of Indian blood is relevant to whether the first prong is established. See, e.g., *United States v. Loera*, 952 F. Supp. 2d 862, 870 (D. Ariz. 2013) (finding that the defendant "barely" met the first prong where he "is 3/16th, or one and one-half eighths, Fort Mojave Indian by blood quantum"); *Bruce*, 394 F.3d at 1223 ("The generally accepted test for Indian status considers . . . the degree of Indian blood . . . ." (quotation marks omitted)); *Prentiss*, 273 F.3d at 1282-83 (applying the "some" blood test and holding that evidence that victims were members of Tesuque Pueblo was

---

concerns, that "until either Congress acts or the Supreme Court...revises" the test it suggested in *Rogers*, courts are "bound by the body of case law which holds that enrollment . . . is not dispositive of Indian status").

insufficient to show Indian status absent evidence of "any Indian blood"); *In re Garvais*, 402 F. Supp. 2d 1219, 1225 (E.D. Wash. 2004) (noting the habeas petitioner's "limited" blood quantum and "[c]umulating" the Indian blood from his mother and father to determine his "total Indian blood"); *Perank*, 858 P.2d at 933 (concluding that one-half Indian blood met first prong because "[p]ersons with less than one-half Indian blood have been held to have a significant degree of Indian blood"); *St. Cloud v. United States*, 702 F. Supp. 1456, 1460 (D.S.D. 1988) (comparing the defendant's blood quantum to the blood quanta of defendants found in other cases to be "Indian" to determine whether he had "some" Indian blood); *Vialpando*, 640 P.2d at 80 ("We hold that one-eighth Indian blood is not a 'substantial amount of Indian blood' to classify appellant as an Indian."); see also *United States v. Cruz*, 554 F.3d 840, 851 (9th Cir. 2009) (Kozinski, C.J., dissenting) (noting that the "defendant has the *requisite amount* of Indian blood" (emphasis added)); cf. also *United States v. Maggi*, 598 F.3d 1073, 1080-81 (9th Cir. 2010), overruled on other grounds by *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (en banc) (questioning, but not deciding, whether 1/64 Blackfeet blood was sufficient for first prong, where "Maggi has just one full-blooded Blackfeet ancestor in seven generations or, put another way, 1/64 Blackfeet blood corresponds to one great-great-great-great-great grand-parent who was

full-blooded Blackfeet, and sixty three great-great-great-great-great grandparents who had no Blackfeet blood").[4]

Courts have trended toward a minimum quantum of 1/8, or 12.5%, Indian blood. See, e.g., *George*, 422 P.3d at 1145 (first prong met where it was "undisputed that George has 22% Indian blood"); *United States v. Nowlin*, 555 F. App'x 820, 823 (10th Cir. 2014) (unpublished) (finding first prong satisfied by "31/128 Indian blood" (24 percent) and noting that "[t]he first prong is met when the defendant's 'parent, grandparent, or great-grandparent is clearly identified as an Indian'"[5] (quoting *Maggi*, 598 F.3d at 1077) (alteration adopted)); *Loera*, 952 F. Supp. 2d at 870 (finding that the defendant "barely" met the first prong where he "is 3/16th, or one and one-half eighths, Fort Mojave Indian by blood quantum"); *Cruz*, 554 F.3d at 845-46 ("Cruz concedes that he meets the first prong of the test since his blood quotient is twenty-two percent Blackfeet"); *State v. Reber*, 171 P.3d 406, 410 (Utah 2007) ("[W]e have found no case in which a court has held that 1/16th Indian blood, as claimed by defendants, qualifies as a 'significant degree of Indian blood.'"); *Bruce*, 394 F.3d at 1227 ("one-eighth Chippewa blood line" sufficient for first prong); *Perank*, 858 P.2d at 933 ("more than one-half Indian blood" sufficient for first

---

[4] *Zepeda* overruled *Maggi* only to the extent *Maggi* held that the defendant's blood quantum had to come from a "federally recognized tribe." *Zepeda*, 792 F.3d at 1106.

[5] An Indian great-grandparent would give a defendant a blood quantum of 1/8. Otherwise, the Tenth Circuit has given little indication where it would draw the line as to minimum blood quantum required for Indian status. This only strengthens the need for a clear test by Oklahoma state courts, however, as defendants charged in federal court in Oklahoma will look to the precedent of other jurisdictions in arguing that Indian status has not been shown.

prong); *United States v. Driver*, 755 F. Supp. 885, 888 & n. 6 (D.S.D. 1991) (finding "7/32 Indian" blood (21.9 percent) sufficient for first prong and concluding that the Eighth Circuit had indicated that one-eighth to one-fourth blood quantum was sufficient for purposes of 18 U.S.C. § 1153); *St. Cloud*, 702 F. Supp. at 1460 ("St. Cloud's 15/32 of Yankton Sioux blood [46.9 percent] is sufficient to satisfy the first requirement of having a degree of Indian blood."); *Goforth*, 1982 OK CR 48, ¶ 7, 644 P.2d at 116 (first prong satisfied with testimony that "appellant was slightly less than one-quarter Cherokee Indian"); *Makah Indian Tribe v. Clallam Cty.*, 440 P.2d 442, 444 (Wash. 1968) ("one-fourth Indian blood" sufficient to "legally qualify as a tribal Indian"); see also *Bruce*, 394 F.3d at 1223-24 (collecting cases where blood quantum was sufficiently large, all of which involved a quantum of 1/8th or more); Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 Am. Indian L. Rev. 177, 187 (2011) ("The state and federal cases collectively seem to indicate that a blood requirement of *more than* one-sixteenth (1/16) will be required to satisfy the first prong of the *Rogers* test." (emphasis added)); but see *State v. Nobles*, 818 S.E.2d 129, 136 (N.C. App. 2018) ("Here, the trial court found, and neither party disputes, that Rogers' first prong was satisfied because defendant has an Indian blood quantum of 11/256 or 4.29%."); *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) ("The parties agree that the first *Rogers* criterion is satisfied because

Stymiest has three thirty-seconds Indian blood.")[6]; *Vialpando*, 640 P.2d at 80 ("We hold that one-eighth Indian blood is not a 'substantial amount of Indian blood' to classify appellant as an Indian.").

In this case, the district court avoided this issue when raised by the District Attorney, treating the requirement of *some* Indian blood as *any* Indian blood (O.R. 1073). Indeed, the State recognizes that this issue presents a unique and challenging legal issue for the courts to resolve, particularly as it relates to a legal determination of whether there is a threshold requirement for Indian blood quantum when determining whether State or Federal criminal jurisdiction applies.

> [T]here appears to be something odd about a court of law in a diverse nation such as ours deciding whether a specific individual is or is not "an Indian." Yet, given the long and complex relationship between the government of the United States and the sovereign tribal nations within its borders, the criminal jurisdiction of the federal government often turns on precisely this question—whether a particular individual "counts" as an Indian—and it is this question that we address once again today.

Cruz, 554 F.3d at 842 (footnote omitted). As in *Cruz*, this is a question this Court must address, given the petitioner's *McGirt* claim and the numerous *McGirt* claims being raised by defendants across the State of Oklahoma, involving a large range of blood quanta.[7]

---

[6] As indicated above, in both *Nobles* and *Stymiest*, the court noted that the parties did not dispute that the first prong was met, such that the court was not actually called upon to decide the issue. Accordingly, it is unclear how each court would have held had it been so called upon.

[7] The concept of defining Indian status by blood quantum, as antiquated as it may seem, is not limited to judicially created tests. See, e.g., 25 U.S.C. § 5132 (excluding from eligibility for certain loans given to Indians any "individual of less than one-quarter degree of Indian blood"); *Morton v. Mancari*, 417 U.S. 535, 549 & n.23 (1974) (noting an Executive Order that allows a civil service

The district court's avoidance of the issue, and treatment of "some" as "any," is complicated by a number of issues. First, while the district court correctly recognized that the remand order directed the court to apply the "some" blood test, this Court's binding, published precedent in *Goforth* requires a "significant" percentage of Indian blood. This Court must decide which test controls. Second, as outlined above, even courts applying the requirement of "some" Indian blood nevertheless treat this test as containing a threshold amount. See, e.g., *Bruce*, 394 F.3d at 1223-24; *St. Cloud*, 702 F. Supp. at 1460; see also Oakley, *Defining Indian Status*, 35 Am. Indian L. Rev. at 187 (surveying state and federal courts that use varying adjectives for the Indian blood required and concluding that they "collectively seem to indicate that a blood requirement of more than one-sixteenth (1/16) will be required to satisfy the first prong of the *Rogers* test").

As an additional matter, unlike in state court where the State is presumed to have jurisdiction, in federal court, Indian status is an essential element that must be alleged in an indictment, submitted to the jury, and proven at trial by the government beyond a reasonable doubt. *Prentiss*, 206 F.3d at 974-80; see *United States v. Langford*, 641 F.3d 1195, 1196 (10th Cir. 2011) ("The Indian/non–Indian statuses of the victim and the defendant are essential elements of any crime charged under 18 U.S.C. § 1152" (quotation marks omitted, alteration adopted)). Thus, a state court's determination that an individual is

---

preference for "'positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to the providing of services to Indians when filled by the appointment of Indians who are one-fourth or more Indian blood'").

Indian, precluding state jurisdiction, must be made with an eye toward federal court and whether the government will be able to prove Indian status under the applicable law and to a jury beyond a reasonable doubt. In other words, to avoid this discussion of blood quantum would run the risk of a **jurisdictional *loophole***—a defendant could have his state court conviction vacated only later to successfully argue in federal criminal proceedings that he is not "Indian" due to a low blood quantum and thereby escape justice.

On that note, it is not clear in the law that a defendant who argues he is an Indian in state court would be estopped from arguing the opposite in federal court. Cf. *United States v. Green*, 886 F.3d 1300, 1304 (10th Cir. 2018) (generally litigants "cannot waive the argument that the district court lacks subject-matter jurisdiction"); *St. Cloud*, 702 F. Supp. at 1458 ("St. Cloud's plea of guilty to a federal offense does not waive a lack of subject matter jurisdiction."). In fact, the defendant did exactly that in *State v. Dennis*, 840 P.2d 909, 910 (Wash. App. Ct. 1992), obtaining dismissal of his state charges on the argument that he *was* an Indian for purposes of federal criminal jurisdiction and then obtaining dismissal of his federal charges on the argument that he *was not* an Indian within the meaning of the Major Crimes Act. As *Dennis* illustrates, if Oklahoma state courts do not apply a test on the first prong that substantially conforms with the test applied by federal courts, particularly in the Tenth Circuit, a jurisdictional loophole could result and criminals could escape justice entirely. This Court must prevent such a loophole.

In sum, the State does not advocate a particular blood quantum as a cut-off for satisfying the first prong. Nor does the State seek to define who is, or is not, Indian for any purpose other than criminal jurisdiction. Rather, to promote consistency with other courts and avoid a jurisdictional loophole, the State has surveyed the case law to guide this Court as to how other jurisdictions have defined the first prong and explained the risk of a jurisdictional loophole if this issue is not addressed. The State further respectfully urges this Court to decide the controlling standard for the first prong of the Indian status test, what, if any, threshold blood quantum is required for that standard, and whether the blood quanta at issue here are sufficient to satisfy that standard. As stipulated to by the parties, C.G. and C.H. each had 23/256 Indian blood quantum, or 9% (O.R. 158). Ms. Griffin had 23/128 Indian blood quantum, or 18% (O.R. 162).[8] Keeping in mind the law of other courts and the risk of a jurisdictional loophole described above, this Court must determine whether these blood quanta are sufficient to prove Indian status.

II. EVEN ASSUMING THIS CASE OCCURRED IN INDIAN COUNTRY, THE STATE HAS CONCURRENT JURISDICTION WITH THE FEDERAL GOVERNMENT OVER CRIMES BY NON-INDIANS AGAINST INDIANS IN INDIAN COUNTRY.

[8] As the petitioner received separate murder convictions and death sentences for each victim, Indian status—as well as the question of jurisdiction—must be determined individually as to each victim. For instance, if this Court finds the children were not Indian, the State indisputably had jurisdiction over the murders of non-Indians by a non-Indian, even on a reservation.

Assuming this Court determines that any or all of the victims were Indian, and agrees with the district court that the petitioner committed these murders within the boundaries of the Chickasaw Nation Reservation, the State nevertheless had jurisdiction in this case under the General Crimes Act.[9] In its remand order, this Court directed that, "[u]pon Petitioner's presentation of *prima facie* evidence as to the legal status as Indians of Petitioner's victims, and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction" (O.R. 2-3). The State will now meet that burden.

The State respectfully re-urges the arguments raised in the Attorney General's pre-remand brief for why the State possesses jurisdiction concurrent with the federal government under the General Crimes Act (O.R. 34-42). To summarize, the text of the General Crimes Act—the only statute upon which the petitioner relies—does nothing to preempt state jurisdiction:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

[9] The State's brief to the district court preserved this concurrent jurisdiction argument while acknowledging same was not within the scope of this Court's remand order (O.R. 1028 n.3).

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, it incorporates the body of laws which applies in places where the United States has exclusive jurisdiction into Indian country. See *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"). As *McGirt* said with respect to reservation status, see *McGirt*, 140 S. Ct. at 2462, when Congress seeks to withdraw state jurisdiction, it knows how to do so. See, e.g., 25 U.S.C. § 1911(a) (providing that tribes "shall have jurisdiction, exclusive as to any State, over any child custody proceeding involving an Indian child" on a reservation). Here, the text of the General Crimes Act does not so exclude state jurisdiction over crimes committed by non-Indians like those perpetrated by the petitioner. See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("unless [it] was the clear and manifest purpose of Congress," courts cannot find preemption of state police powers merely because Congress also provided for federal jurisdiction (citation omitted)).

A handful of state courts have held that states lack jurisdiction over non-Indians who commit crimes in Indian country. See, e.g., *State v. Larson*, 455 N.W.2d 600 (S.D.

1990); *State v. Flint*, 756 P.2d 324, 327 (Ariz. Ct. App. 1988), cert. denied, 492 U.S. 911 (1989); *State v. Greenwalt*, 663 P.2d 1178, 1182-83 (Mont. 1983); *State v. Kuntz*, 66 N.W.2d 531, 532 (N.D. 1954); *but see Greenwalt*, 633 P.2d at 1183-84 (Harrison, J., dissenting); *State v. Schaefer*, 781 P.2d 264 (Mont. 1989). But, for all of the reasons already provided by the State in its pre-remand brief (O.R. 36-41), the reasoning of these decisions lacks merit.

Ultimately, state jurisdiction here 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. Cf. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 888 (1986) ("tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country"). It minimizes the chances abusers and murderers of Indians will escape punishment and maximizes the protection from violence received by Native Americans. This is especially important because, as commentators have expressed in fear after *McGirt*, federal authorities frequently decline to prosecute crimes on their reservations.[10] While *McGirt* leaves Indians vulnerable under the exclusive federal jurisdiction of the Major Crimes Act, there is no reason to perpetuate that injustice by assuming without textual support

[10] *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.

exclusive federal jurisdiction over non-Indian on Indian crimes covered by the General Crimes Act. Nor is there reason to believe the State of Oklahoma will not vigorously defend the rights of Indian victims, as it has for a century. In fact, this very case proves it will. To hold otherwise would amount to "disenfranchising" and "closing our Courts to a large number of citizens of Indian heritage who live on a reservation," thereby "denying protection from the criminal element of the state." *Greenwalt*, 663 P.2d at 208-09 (Harrison, J., dissenting).

The text of the General Crimes Act controls, and its plain terms do not preclude the state's jurisdiction in this case. Such jurisdiction over non-Indians who victimize Indians does not interfere with the federal government's concurrent jurisdiction over such crimes, nor does it impinge on tribal sovereignty, but instead advances the interests of tribal members in receiving justice. And the contrary conclusion unjustifiably intrudes into state sovereignty. For the reasons above and in the State's pre-remand brief, even assuming the Chickasaw Reservation has not been diminished or disestablished, and that Petitioner's victims were Indians, the State had jurisdiction to prosecute.

III. THE STATE RESPECTFULLY URGES THIS COURT TO RECONSIDER ITS REJECTION OF THE STATE'S PROCEDURAL DEFENSES.

As previously shown by the State, the petitioner's jurisdictional claim is barred based on the limitations in 22 O.S.2011, § 1089(D)(8), on successive capital post-conviction applications; the 60-day rule in Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal*

Appeals, Title 22, Ch. 18, App (2011); and the doctrine of laches (O.R. 43-70).[11] This Court previously rejected these arguments, finding that the petitioner's jurisdictional claim "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)" (O.R. 4). The State respectfully urges this Court to reconsider that conclusion.

Jurisdictional claims such as the petitioner's were available long prior to *McGirt*. In **1962**, the Supreme Court reversed the judgment of the Washington Supreme Court affirming the conviction of an Indian on a reservation which the Washington Supreme Court had erroneously determined to be disestablished. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). This is just one of a number of cases in which the Supreme Court has considered such claims in the decades preceding *McGirt*. See e.g., *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 466 U.S. 463 (1984); see also *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (although not a criminal case, applying prior Supreme Court cases on reservation diminishment to the facts of a particular reservation).

This Court has also been called upon to determine whether a crime took place in Indian country many times in the history of the state. See, e.g., *Eaves v. State*, 1990 OK CR 42, ¶ 2, 795 P.2d 1060, 1061 (determining whether the crime took place within a dependent Indian community because the parties agreed there was no question as to a restricted

[11] The State's brief to the district court preserved these procedural arguments while acknowledging same were not within the scope of this Court's remand order (O.R. 1028 n.3).

allotment or reservation); *C.M.G. v State*, 1979 OK CR 39, ¶ 9, 594 P.2d 798, 801 (agreeing with the State that the land in question was not a reservation and thus, proceeding to determine whether it was a dependent Indian community). In **1963**, an inmate sought a writ of habeas corpus, alleging the crime was committed on an Indian reservation. *Ellis v. State*, 1963 OK CR 88, 386 P.2d 326. This Court held that the reservation was disestablished. *Id.*, 1963 OK CR 88, ¶¶ 18-24, 386 P.2d at 330-31. In **2005**, this Court declined to hold that the Creek Reservation—the subject of the Supreme Court's decisions in *McGirt* and *Murphy*—was intact because the federal courts had not addressed the question. *Murphy v. State*, 2005 OK CR 25, ¶¶ 47-52, 124 P.3d 1198, 1207-08.

The right to challenge a state court conviction based on an allegation that the crime occurred within the limits of an undiminished Indian reservation has been recognized for *decades* and Oklahoma inmates have invoked that right. There is simply no way it can be said that the petitioner's jurisdictional claim could not have been reasonably formulated prior to *McGirt* or that *McGirt* represented an intervening change in constitutional law. Indeed, the petitioner filed his post-conviction application **before** the Supreme Court's decision in *McGirt*. Thus, the jurisdictional claim was actually available before *McGirt*.

Indeed, in *McGirt*, the Supreme Court explained that its decision was dictated by precedent and was simply an application of that precedent to the Creek Reservation. *McGirt*, 140 S. Ct. at 2462-64, 2468-69; see also *Valdez v. State*, 2002 OK CR 20, ¶¶ 21-22, 46

P.3d 703, 709-10 (finding a claim not previously unavailable where other defendants in Oklahoma and across the county had raised similar claims); *Hatch v. State*, 1996 OK CR 37, ¶ 41, 924 P.2d 284, 293 (holding that claim based on a case decided in 1982 was clearly available "at any time since 1982" and did not satisfy the exceptions in § 1089(D)(8)); accord *Dopp v. Martin*, 750 F. App'x 754, 757 (10th Cir. 2018) (unpublished) ("Nothing prevented Dopp from asserting in his first § 2254 application a claim that the Oklahoma state court lacked jurisdiction because the crime he committed occurred in Indian Country. The fact that he, unlike the prisoner in *Murphy*, did not identify that argument does not establish that he could not have done so.").

The State recognizes that the Supreme Court's *McGirt* decision upset settled expectations within this state. *See McGirt*, 140 S. Ct. at 2480-81 (addressing the dissent's argument that the Court's decision upsets "'more than a century [of] settled understanding'") (quoting *McGirt*, 140 S. Ct. at 2502 (Roberts, C.J., dissenting) (alteration adopted)). However, a claim under the Major Crimes Act or General Crimes Act nonetheless could have reasonably been formulated before that decision and, in fact, was formulated by this petitioner and by the petitioner in *Murphy*. *McGirt* did not change the law, but merely applied it to the Creek Reservation and reached a conclusion inconsistent with what has been assumed about Oklahoma since statehood. Section 1089(D) contains no exception for unexpected <u>results</u>; only for <u>claims</u> that could not have been <u>formulated</u>.

Respectfully, for the reasons above, and the reasons in the State's pre-remand brief, the State urges this Court to reconsider its conclusion that the petitioner's jurisdictional claim was previously unavailable and find same to be barred.

IV. ANY ORDER GRANTING RELIEF SHOULD BE STAYED FOR THIRTY DAYS.

Should this Court reject the State's concurrent jurisdiction and procedural arguments and find the petitioner is entitled to relief based on the district court's findings, the State respectfully requests this Court stay any order reversing the convictions in this case for thirty days to allow the United States Attorney's Office for the Western District of Oklahoma to secure custody of the petitioner. Cf. 22 O.S.2011, § 846 (providing that "[i]f the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as it deems reasonable to await a warrant from the proper county for his arrest").

CONCLUSION

For all of the foregoing reasons, the State of Oklahoma, by and through the Office of the District Attorney, respectfully urges this Court to deny relief on the petitioner's jurisdictional claim. Alternatively, the State requests that any order granting relief be stayed for thirty days.

Respectfully Submitted,

GREG MASHBURN
District Attorney

Greg Mashburn, OBA #17780
District Attorney
Travis White, OBA #19721
First Assistant District Attorney
District 21 District Attorney's Office
McClain County Courthouse
121 N. 2nd, Room 212
Purcell, Oklahoma 73080
(405) 527-6574
(405) 527-2362 (fax)

Certificate of Mailing

I certify that on the date of filing, a true and correct copy of the foregoing was mailed to:

Michael Lieberman
Sarah Jernigan
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102

Travis White

TAB 6

No. PCD-2019-124

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

JENNIFER L. CRABB, OBA # 20546
ASSISTANT ATTORNEY GENERAL

313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR RESPONDENT

JANUARY 7, 2021

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

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

STATE'S SUPPLEMENTAL BRIEF REGARDING WHETHER *McGIRT* WAS PREVIOUSLY AVAILABLE FOR PURPOSES OF BARRING CLAIMS

Petitioner was sentenced to death for the murders of Katrina Griffin, her eight-year-old son C.G., and her six-year-old daughter C.H. *Bosse v. State*, 2017 OK CR 10, ¶ 3, 400 P.3d 834, 840. In his second post-conviction application, Petitioner claimed the State lacked jurisdiction because Ms. Griffin and her children were Indians and the crimes were committed within the historical boundaries of the Chickasaw Nation. 2/20/2019 Successive Application for Post-Conviction Relief. After the United States Supreme Court decided, in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), that the Creek Nation's Reservation was not disestablished for purposes of the Major Crimes Act (18 U.S.C. § 1153), the State filed a response brief in which it argued, *inter alia*, that Petitioner's claim was barred by 22 O.S.2011, § 1089(D)(8), Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App., and the doctrine of laches. 8/4/2020 Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) at 22-49.

Subsequently, this Court remanded Petitioner's case to the district court to determine whether Ms. Griffin and her children were Indians, and whether the crimes occurred on an Indian reservation. 8/12/2020 Order Remanding for Evidentiary Hearing ("Remand Order"). Without specifically addressing the State's arguments, this Court concluded that the claim was properly before the 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)." Remand Order at 2.

In its post-hearing brief, the State asked this Court to reconsider. 11/4/2020 State's Supplemental Brief Following Remand for Evidentiary Hearing from McClain County District Court Case No. CF-2010-213 at 16-20 ("State's First Supp. Br."). The State detailed the origins of Petitioner's claim and showed that the claim was available long before *McGirt* was decided. State's First Supp. Br. at 17-20. Indeed, Petitioner had filed the claim before *McGirt* was decided. State's First Supp. Br. at 18. As noted by the State, the Supreme Court relied on established law in *McGirt* and "sa[id] nothing new." State's First Supp. Br. at 18; *McGirt*, 140 S. Ct. at 2464. The Tenth Circuit agrees.

In *In re: David Brian Morgan*, the petitioner sought permission to file a second or successive federal habeas petition. *In re: David Brian Morgan*, Tenth Circuit No. 20-6123 (unpublished and attached as Exhibit A). Petitioner relied in part on a statute which permits successive habeas petitions which rely on "a new rule of constitutional law[.]" *Id.* at 2 (quoting 28 U.S.C. § 2244(b)(2)(A)). The

three-judge panel denied the motion. Regarding the application of 28 U.S.C. § 2244(b)(2)(A), the court held as follows:

> In *McGirt*, the Court noted that the "appeal rest[ed] on the federal Major Crimes Act" and that application of the statute hinged on whether the Creek Reservation remained "Indian country" under the MCA. *McGirt*, 140 S. Ct. at 2459. Based on decades-old decisions, including *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), and *Solem v. Bartlett*, 465 U.S. 463 (1984), the Court explained that "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt*, 140 S. Ct. at 2462. In other words, the Court cited well-established precedent and reviewed Congressional action to determine whether a federal statute applied. That hardly speaks of a "new rule of constitutional law," 28 U.S.C. § 2244(b)(2)(A).

Id. at 4 (alterations adopted).

The State recognizes that the Tenth Circuit's decision is not binding upon this Court. However, the Tenth Circuit was interpreting a statute that is very similar to the one at issue in this case. Section 1089 explains that the legal basis for a claim was previously unavailable if it "was not recognized by or could not have been reasonably formulated from a final decision of," in relevant part, the Supreme Court or this Court, or is based on "a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state." 22 O.S.2011, § 1089(D)(9). As Petitioner's *McGirt* claim was based on well-established precedent, it could have been reasonably formulated (and, in fact, <u>was formulated</u> before *McGirt*) and is not based on a new rule of constitutional law. The State respectfully requests that

this Court adopt the reasoning of the Tenth Circuit, and adhere to the plain language of section 1089(D)(8) which expressly prohibits this Court from considering claims that do not fall within its parameters. *See* 22 O.S.2011, § 1089(D)(8) ("if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent or untimely application unless . . . .") (emphasis added). Petitioner's claim is procedurally barred.

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL[1]

JENNIFER L. CRABB, OBA #20546
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 (FAX)
ATTORNEYS FOR APPELLEE

[1] An electronic signature is being used due to the current COVID-19 restrictions. A signed original can be provided to the Court upon request once restrictions are lifted

CERTIFICATE OF MAILING

On this 6th day of January, 2021, a true and correct copy of the foregoing was mailed to:

Michael W. Lieberman
Sarah M. Jernigan
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102

JENNIFER L. CRABB

FILED
United States Court of Appeals
Tenth Circuit

September 18, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

In re: DAVID BRIAN MORGAN,

Petitioner.

(D.C. N[illegible])
(W.D. Okla.)

ORDER

Before **BRISCOE**, **KELLY**, and **CARSON**, Circuit Judges.

David Brian Morgan, an Oklahoma prisoner proceeding pro se,[1] moves for authorization to file a second or successive habeas application under 28 U.S.C. § 2254. We deny the motion for authorization.

BACKGROUND

In 2011, Morgan pleaded guilty to charges of rape, molestation, kidnapping, and weapons possession. The district court sentenced him to life in prison. Three years later, he filed his first § 2254 habeas application. The district court dismissed the application as time-barred, and we denied a certificate of appealability. Morgan has continued to challenge his convictions in district court and this court, and we twice have denied him authorization to file a second or successive habeas application.

[1] Because Morgan is pro se, we liberally construe his filings but will not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

In his current motion, Morgan seeks authorization to file a § 2254 application claiming: (1) the state court lacked jurisdiction because his crimes "occurred within the boundaries of the Indian reservation of the Choctaw and Chickasaw Nations," Mot. at 17, and therefore are subject to exclusive federal jurisdiction under the Major Crimes Act (MCA), 18 U.S.C. § 1153(a); (2) he received ineffective assistance of counsel (IAC) because his attorney failed to raise such jurisdictional objections; and (3) an unidentified state statute provides that his sentence was deemed to have expired once he was transferred to a private prison.

DISCUSSION

Morgan's second or successive habeas application cannot proceed in the district court without first being authorized by this court. *See* 28 U.S.C. § 2244(b)(3). We therefore must determine whether his "application makes a prima facie showing that [it] satisfies the requirements of" subsection (b). *Id.* § 2244(b)(3)(C). In particular, we must dismiss any claim not raised in a prior application unless the claim: (1) "relies on a new rule of constitutional law" that the Supreme Court has "made retroactive to cases on collateral review," *id.* § 2244(b)(2)(A); or (2) relies on facts that could not have been discovered through due diligence and that establish the petitioner's innocence by clear and convincing evidence, *id.* § 2244(b)(2)(B). "If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application." *Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013) (internal quotation marks omitted).

Morgan seeks authorization to proceed under § 2244(b)(2)(A) and contends his jurisdictional and IAC claims rely on a new retroactive rule of constitutional law—specifically, the Supreme Court's recent decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and our decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), which the Supreme Court summarily affirmed in *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), for the reasons stated in *McGirt*.[2] In *Murphy*, we held that Congress had not disestablished the Creek Reservation in Oklahoma and that the state court therefore lacked jurisdiction over the petitioner, a Creek citizen, for a murder he committed on the Creek reservation. 875 F.3d at 904. In *McGirt*, the Supreme Court similarly concluded that the territory in Oklahoma reserved for the Creek Nation since the 19th century remains "'Indian country'" for purposes of exclusive federal jurisdiction over "'certain enumerated offenses'" committed "within 'the Indian country'" by an "'Indian.'" 140 S. Ct. at 2459 (quoting 18 U.S.C. § 1153(a)). Morgan's motion for authorization fails for several reasons.

First, Morgan has not shown his claim actually "relies on" *McGirt*. 28 U.S.C. § 2244(b)(2)(A). Although we do not consider the merits of a proposed second or successive application in applying § 2244(b)(2), *see Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (per curiam), neither is it sufficient to merely provide a citation to a new rule in the abstract. Instead, the movant must make a prima facie showing that the claim

[2] For his conclusory claim that his sentence expired once he was transferred to a private prison, Morgan relies on an unidentified "Oklahoma statute," Mot. at 9, and not a new rule of constitutional law under § 2244(b)(2)(A).

is based on the new rule. *See* 28 U.S.C. § 2244(b)(2)(A), (3)(C). And here, Morgan has not alleged that he is an Indian or that he committed his offenses in the Indian country addressed in *McGirt*, such that the MCA might apply.

Moreover, even if Morgan had adequately alleged reliance on *McGirt*, he has failed to establish that the decision presented a new rule of constitutional law. In *McGirt*, the Court noted that the "appeal rest[ed] on the federal Major Crimes Act" and that application of the statute hinged on whether the Creek Reservation remained "Indian country" under the MCA. *McGirt*, 140 S. Ct. at 2459. Based on decades-old decisions, including *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), and *Solem v. Bartlett*, 465 U.S. 463 (1984), the Court explained that "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt*, 140 S. Ct. at 2462. In other words, the Court cited well-established precedent and reviewed Congressional action to determine whether a federal statute applied. That hardly speaks of a "new rule of constitutional law," 28 U.S.C. § 2244(b)(2)(A).

Finally, even if *McGirt* did present a new rule of constitutional law, the Court did not explicitly make its decision retroactive. "[T]he only way [the Supreme Court] could make a rule retroactively applicable is through a holding to that effect." *Cannon v. Mullin*, 297 F.3d 989, 993 (10th Cir. 2002) (internal quotation marks omitted). It is not sufficient that lower courts have found the rule retroactive or that the rule might be retroactive based on "the general parameters of overarching retroactivity principles." *Id.* Because the Supreme Court has not held that *McGirt* is retroactive, Morgan cannot satisfy this requirement for authorization under § 2244(b)(2)(A).

CONCLUSION

Because Morgan has not satisfied the requirements for authorization in § 2244(b)(2), we deny his motion. The denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." *Id.* § 2244(b)(3)(E).

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

TAB 7

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

SHAUN MICHAEL BOSSE, ***Petitioner*,** ***-vs-*** **THE STATE OF OKLAHOMA,** ***Respondent.***	**Case No.: PCD-2019-124**

PETITIONER'S RESPONSE TO SUPPLEMENTAL BRIEF OF RESPONDENT

In the Supplemental Brief of Respondent tendered for filing on January 7, 2021, the State presents "an unpublished decision in which the United States Court of Appeals for the Tenth Circuit held that *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) did not announce a new rule of constitutional law." State's Motion to File Supplemental Brief at 1. However, the unpublished Tenth Circuit decision the State presents – *In re: David Brian Morgan*, No. 20-6123 (10th Cir. Sept. 18, 2020) – has no bearing on Mr. Bosse's case.

In *In re: Morgan*, the petitioner sought authorization to file a second or successive habeas application with various claims, including a claim that the state court lacked jurisdiction because his crimes occurred on an Indian reservation and were subject to exclusive federal jurisdiction under the Major Crimes Act. *In re: Morgan*, slip op. at 2. The Tenth Circuit explained that in determining whether to authorize the second or successive habeas application,

> we must dismiss any claim not raised in a prior application unless the claim: (1) "relies on a new rule of constitutional law" that the Supreme Court has "made retroactive to cases on collateral review," *id.* [28 U.S.C.] § 2244(b)(2)(A); or (2) relies on facts that could not have been discovered

> through due diligence and that establish the petitioner's innocence by clear and convincing evidence, *id.* § 2244(b)(2)(B).

Id. The Tenth Circuit explained that the petitioner argued his jurisdictional claim

> rel[ied] on a new retroactive rule of constitutional law – specifically, the Supreme Court's recent decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 2020), and our decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), which the Supreme Court summarily affirmed in *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), for the reasons stated in *McGirt*.

The court found that the petitioner "has failed to establish that the decision presented a new rule of constitutional law."[1] *Id.* at 4.

The State argues that while it "recognizes that the Tenth Circuit's decision is not binding upon this Court[,] . . . the Tenth Circuit was interpreting a statute that is very similar to the one at issue in this case[]" – that is, 22 O.S. § 1089. Although the State correctly indicates there is a section of § 1089 that is similar to § 2244(b)(2)(A), this is not the section of § 1089 that is relevant to Mr. Bosse's case.

Under 22 O.S. § 1089(D)(8), this Court may "consider the merits of or grant relief based on" an untimely or successive application for post-conviction relief if "the legal basis for the claim was [previously] unavailable." Section 1089(D)(9) explains:

> For purposes of this act, a legal basis of a claim is unavailable . . . if the legal basis:
>
> a. was not recognized or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or

[1] The Court found "even if *McGirt* did present a new rule of constitutional law, the Court did not explicitly make its decision retroactive." *In re: Morgan*, slip op. at 4.

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

As the State indicates, § 1089(D)(9)(b) ("section (b)") is similar to the statute applied in *In re: Morgan*, § 2244(b)(2)(A); both require "a new rule of constitutional law" that a court has made retroactive. However, Mr. Bosse's position is not that *McGirt* announced "a new rule of constitutional law that was given retroactive effect" and therefore his jurisdictional claim is properly before this court under section (b). Instead, Mr. Bosse's claim is properly before this court under § 1089(D)(9)(a) ("section (a)"); that is, the legal basis "was not recognized or could not have been reasonably formulated from a final decision."

This Court has already explicitly determined that Mr. Bosse's claim is properly before this Court under section (a). In its Order Remanding for Evidentiary Hearing (Aug. 12, 2020) ("Remand Order"), the Court found:

> 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).

Remand Order[2] at 2. Thus, this Court specifically cited section (a) in explaining why Mr. Bosse's claim was properly before the Court. It did not cite section (b) or otherwise suggest that *McGirt* announced a new rule of constitutional law made retroactive by a court.

[2] Prior to the remand, the State devoted twenty-seven pages of its response brief to procedural defense arguments. *See* Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) at 22-49 (Aug. 4, 2020). In its supplemental brief filed November 4, 2020, the State "respectfully urge[d] the Court to reconsider its rejection of the State's procedural defenses." State's Supplemental Brief Following Remand for Evidentiary Hearing from McClain County District Court Case No. CF-2010-213 at 16 (Nov. 4, 2020).

Mr. Bosse does not dispute the State's position or the Tenth Circuit's finding in *In re: Morgan* that *McGirt* did not announce a new rule of constitutional law made retroactive by the Supreme Court. Instead, *McGirt* clarified the framework for determining whether a reservation has been disestablished and, applying this framework, determined that the Creek reservation remained Indian Country for purposes of the Major Crimes Act. *See Oneida v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) ("We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation.").[3] Thus, as this Court has already found, *McGirt* recognized a new legal basis for Mr. Bosse's claim (pursuant to section (a)).[4] But that new legal basis is not a new rule

[3] The *McGirt* Court also held that the Major Crimes Act applied in Oklahoma "according to its usual terms," 140 S. Ct. 2452 at 2478, and that the potential for "transformative effects" was an insufficient justification to find the Creek Reservation was disestablished, *id.* at 2478-81 (brackets omitted).

[4] This Court's treatment of claims raised prior to the *McGirt* decision – in Mr. Bosse's case and others – supports its finding that the legal basis was previously unavailable. Mr. Bosse filed his Successive Application for Post-Conviction Relief while *Murphy* was pending in the Supreme Court. This Court ordered "that the present Application be held in abeyance until the decision in *Murphy v. Royal* is final." Order Holding Case in Abeyance and Directing Attorney General to Provide Status Update at 2-3 (Mar. 22, 2019). In other cases, this Court dismissed as premature Successive Applications for Post-Conviction Relief "[b]ecause neither *Murphy* nor *McGirt* is a final opinion." *See, e.g.,* Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance at 3-4, *Goode v. State*, No. PCD-2020-333 (Okla. Crim. App. June 9, 2020); Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance at 4, *Cole v. State*, No. PCD-2020-332 (Okla. Crim. App. May 29, 2020).

The State's recent argument in a separate case also supports this Court's finding that the legal basis was previously unavailable. In *Deerleader v. Crow*, No. 20-CV-172 (N.D.O.K. December 14, 2020), the petitioner, like Mr. Bosse, filed an application for post-conviction relief before the Supreme Court decided *Murphy* and *McGirt*. While the State insisted on federal habeas that "*McGirt* did not establish a new rule or right, and Indian Country claims were previously available," it also argued, "this significant change in Oklahoma's precedent warrants re-exhaustion of Petitioner's *Murphy* claim in the state courts post-*McGirt*." Brief in Support of Motion to Stay Federal Habeas Proceedings for Petitioner to Re-Exhaust His *Murphy* Claim in State Court in Light of the United States Supreme

of constitutional law (pursuant to section (b)), and neither Mr. Bosse nor this Court has ever claimed it is.

Even if this Court had not already found Mr. Bosse's claim properly before it, this Court has made clear that "some constitutional rights . . . are never finally waived. Lack of jurisdiction, for instance, can be raised at any time." *Johnson v. State*, 1980 OK CR 45, 611 P.2d 1137, 1145. In three capital cases in which Indian country jurisdictional issues were raised belatedly, this Court repeatedly confirmed such a fundamental jurisdictional issue can be raised at any time. *See Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277, 278 (deciding Indian country jurisdictional question though raised for first time on the day appellate oral argument was set); *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198, 1199 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue though raised for first time in successor post-conviction relief action); and *Magnan v. State*, 2009 OK CR 16, 207 P.3d 397, 402 (remanding for evidentiary hearing and deciding Indian

---

Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) at 2, 6 n.3, *Deerleader v. Crow*, No. 20-CV-172 (N.D.O.K. Aug. 24, 2020). The State explained:

> At the time the OCCA entertained Petitioner's post-conviction appeal and the *Murphy* claim as raised in Ground Four of his habeas petition, the *Murphy*/*McGirt* litigation was still pending. Due to the pending litigation, although the OCCA admittedly denied Petitioner's *Murphy* claim on its merits, **the claim was governed by the OCCA's previous ruling in *Murphy v. State*, where the OCCA held that the Creek Nation had been disestablished.** *See* 124 P.3d 1198, 1207-08 (2005). Although not directly cited below, **this holding was binding as a matter of state law on both the state district court and the OCCA unless and until it was overruled by the OCCA or the United States Supreme Court. Now that *McGirt* has been decided, and *Murphy v. State* has been expressly overruled**, the OCCA should be afforded a full and fair opportunity to address Petitioner's *Murphy* claim.

Id. at 8-9 (emphasis added).

country jurisdictional issue even though issue was not raised in the trial court where appellant pled guilty and waived his appeal). This Court's decisions permitting jurisdiction to be raised at any time rest on bedrock principles that have existed for nearly a century. *See Armstrong v. State*, 1926 OK CR 259, 35 Okla. Crim. 116, 118, 248 P. 877, 878.

The Supreme Court defines jurisdiction as "the courts' statutory and constitutional *power* to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002). *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Because subject matter jurisdiction involves a court's power to act, the Supreme Court concludes "it can never be forfeited or waived." *Cotton*, 535 U.S. at 630. Defects in jurisdiction cannot be overlooked by a court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U.S. 413, 421 (1911).

In *McGirt*, Oklahoma's Solicitor General acknowledged, "Oklahoma allows collateral challenges to subject-matter jurisdiction at any time." Brief of Respondent at 43, *McGirt*, 140 S. Ct. 2452 (2020) (No. 18-9526). The dissent explained, "[U]nder Oklahoma law, it appears that there may be little bar to state habeas relief because 'issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal.'" 140 S. Ct. at 2501 n.9 (Roberts, J., dissenting) (citing *Murphy*, 875 F.3d at 907 n.5 (quoting *Wallace v. State*, 1997 OK CR 18, 935 P.2d 366, 372)).

This Court has already decided Mr. Bosse's claim is properly before it. Even had the Court not already decided that question, the authority presented by the State would have no bearing on it.

Respectfully submitted,

MICHAEL W. LIEBERMAN, OBA #32694
SARAH M. JERNIGAN, OBA #21243
Assistant Federal Public Defenders
Office of the Federal Public Defender - WDOK
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975; Fax (405) 609-5976
michael_lieberman@fd.org
sarah_jernigan@fd.org
Attorneys for Petitioner Shaun Michael Bosse

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2021, a true and correct copy of the foregoing document was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9 (B), *Rules of the Court of Criminal Appeals*.

MICHAEL W. LIEBERMAN

TAB 8

2021 OK CR 11

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER,	)	**FOR PUBLICATION**
	)	
Petitioner,	)	
vs.	)	No. PCD-2020-613
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION GRANTING SECOND APPLICATION FOR POST-CONVICTION RELIEF

LUMPKIN, JUDGE:[1]

¶1 Petitioner James Chandler Ryder was convicted of two (2) counts of First Degree Murder (21 O.S.1991, § 701.7), Case No. CF-99-147, in the District Court of Pittsburg County. In Count I, Petitioner was sentenced to life imprisonment without parole. In Count II, the jury found the existence of two (2) aggravating circumstances

[1] As stated in my separate writing in *Bosse v. State*, 2021 OK CR 3, __ P.3d __ (Lumpkin, J., concurring in result), I am bound by my oath and adherence to the Federal-State relationship under the U.S. Constitution to apply the edict of the majority opinion in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). However, I continue to share the position of Chief Justice Roberts' dissent in *McGirt*, that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed.

and recommended the punishment of death. The trial court sentenced accordingly. This Court affirmed the judgment and sentence in *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856. Petitioner's first application for post-conviction relief was denied by this Court in *Ryder v. State*, (Okl.Cr.2004) opinion not for publication, Case No. PCD-2002-257. The United States Supreme Court denied *certiorari* in *Ryder v. Oklahoma*, 543 U.S. 886 (2004). On September 8, 2020, Petitioner filed this second and successive application for post-conviction relief.

¶2 Pursuant to 22 O.S.2011, § 1089(D)(8) "if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that the current claims and issues have not been and could not have been presented previously in a previously considered application filed under this section, because the factual or legal basis for the claim was unavailable."

¶3 For purposes of the Capital Post-Conviction Procedure Act, a legal basis of a claim is unavailable if: (1) it was not recognized by or could not have been reasonably formulated from a final decision of the

United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date; or (2) it is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date; or (2) it is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date. A factual basis of a claim is unavailable if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date. 22 O.S.2011, § 1089(D)(9).

¶4 In his sole proposition of error, Petitioner argues that pursuant to *McGirt v. Oklahoma*, ___ U.S. ___, 140 S.Ct. 2452 (2020), the State of Oklahoma did not have jurisdiction to prosecute, convict, and sentence him for the murders of Daisy and Sam Hallum, citizens of the Choctaw nation when such crimes occurred within the boundaries of the Choctaw Reservation.

¶5 Under the particular facts and circumstances of this case, and considering the pleadings before this Court, we find Petitioner's claim is properly before this Court as the claim could not have been

previously presented because the legal basis for the claim was unavailable. *Bosse v. State*, 2021 OK CR 3, __ P.3d __. ("*McGirt* provides a previously unavailable legal basis for [the jurisdictional] 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.2011, §§ 1089(D)(8)(a), 1089(D)(9)(a)." *Id.*, at ¶ 22, ___ P.3d at ___.

[2]

¶6 Petitioner's claim raises two separate questions: (a) the Indian status of the victims, and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore remanded this case to the District Court of Pittsburg County for an evidentiary hearing.

¶7 Recognizing the historical and specialized nature of this remand for evidentiary hearing, we requested the Attorney General and District Attorney work in coordination to effect uniformity and

---

[2] While the majority in *McGirt* alluded to the availability of procedural bars, Chief Justice Roberts correctly noted in his dissent at footnote 9 that subject matter jurisdiction is never waived under Oklahoma law. *McGirt*, 140 S. Ct. 2452, 2501 n.9 (2020) (Roberts, C.J., dissenting). *See Wallace v. State*, 1997 OK CR 18, ¶ 15, 935 P.2d 366, 372. While Art. 7 of the Oklahoma Constitution vests the district courts of Oklahoma with "unlimited original jurisdiction of all justiciable matters," the federal government has pre-empted the field as it relates to major crimes committed by or against Indians in Indian country.

completeness in the hearing process. Upon Petitioner's presentation of *prima facie* evidence as to the legal status of the victims as Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction. The District Court was ordered to determine whether the victims had some Indian blood and were recognized as Indian by a tribe or the federal government. The District Court was also directed to determine whether the crime occurred in Indian Country. The District Court was directed to follow the analysis set out in *McGirt* to determine (1) whether Congress established a reservation for the Choctaw Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In so doing, the District Court was ordered to consider any evidence the parties provided, including but not limited to treaties, statutes, maps, and/or testimony.

¶8 We also directed the District Court that in the event the parties agreed as to what the evidence would show with regard to the questions presented, the parties may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court.

The District Court was also ordered to file written findings of facts and conclusions of law with this Court.

¶9 An evidentiary hearing was timely held before the Honorable Tim Mills, Associate District Judge, and a *Court Order with Findings of Fact and Conclusion of Law in Accordance with Order Remanding for Evidentiary Hearing issued September 25, 2020* was timely filed with this Court. The record indicates that appearing before the District Court were attorneys from the offices of the Attorney General of Oklahoma, the Pittsburg County District Attorney, Federal Public Defender, and counsel for the Choctaw Nation.

¶10 In its Order to this Court, the District Court stated in pertinent part that the parties had entered into a stipulation that each of the victims, Daisy and Sam Hallum, "had 1/16th Indian blood quantum and was enrolled as a Choctaw Nation citizen at the time of the crimes." The District Court noted that "[t]he Choctaw Nation of Oklahoma/CDIB Tribal Membership certifications for Daisy and Sam Hallum" were attached to the stipulation and that the parties agree they should be admitted into the record of the case.

¶11 The District Court found, based upon treaties and documents provided to the court, that a reservation was established

by the federal government for the Choctaw Nation. The District Court further found "[n]o evidence was presented to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation or that the State of Oklahoma has jurisdiction in this matter . . . Therefore, the crimes occurred in Indian Country."

¶12 Both Petitioner and the State were given the opportunity to file response briefs addressing issues from the evidentiary hearing.[3] Petitioner argues in part that this Court should affirm the District Court's factual findings under an abuse of discretion standard. *See Young v. State,* 2000 OK CR 17, ¶ 109, 12 P.3d 20, 48 ("we afford the trial court's findings on factual issues great deference and will review its findings applying a deferential abuse of discretion standard"). In addition to referencing the stipulations as to the victims' Indian status

[3] The State additionally filed a *Motion to File Supplemental Brief* in which the State cites to an order from the Tenth Circuit Court of Appeals which denied a Petitioner's motion to file a second or successive habeas petition. We grant the State's request to file the supplemental brief but find its reasoning is not persuasive. In *In re: David Brian Morgan,* Tenth Circuit No. 20-6123 (unpublished, Sept. 18, 2020) the Court denied the order after examining its rule regarding the granting of these motions. The Court found that the petitioner failed to show his application actually relied upon *McGirt,* and even if it did, *McGirt* did not create a "new rule of constitutional law" that the Supreme Court "made retroactive to cases on collateral review," but simply interpreted acts of Congress in order to determine if a federal statute applied to a given situation. We find this analysis inapposite to the jurisdictional issue raised by Petitioner herein.

and the location of the crime as Indian country, Petitioner presents argument and authority, which was presented to the District Court, supporting the District Court's conclusion that the Choctaw reservation has not been disestablished. Petitioner asserts this Court should conclude that the State lacks subject matter jurisdiction over his case.

¶13 Petitioner also responds to an argument first presented by the State at the evidentiary hearing that under the General Crimes Act (18 U.S.C. § 1152), the State and the federal government have concurrent jurisdiction over crimes committed by a non-Indian defendant against an Indian victim. The State raised the argument with the intent to preserve the argument for appeal. Defense counsel objected to the preservation of the argument on grounds that the issue was not a part of this Court's remand order for evidentiary hearing. The issue of concurrent jurisdiction formed no part of the trial court's order.

¶14 In his response brief, Petitioner argues: 1) the issue of concurrent jurisdiction is not properly before this Court as the issue is beyond the scope of the supplemental briefing; 2) the issue is not properly before this Court as it is beyond the scope of this Court's order

on evidentiary hearing; and 3) the issue of concurrent jurisdiction between the State and federal governments fails on the merits.

¶15 We find Petitioner has read our Order remanding for an evidentiary hearing too narrowly. Our Order allowed the parties to address "issues pertinent to the evidentiary hearing" in the supplemental briefs. Pursuant to our Order, "[u]pon the Appellant's presentation of *prima facie* evidence as to the victim's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction." Here, the District Court found that the victims in this case were Indians and that the crimes occurred in Indian Country. The State now has the burden of showing it has subject matter jurisdiction. An argument of concurrent jurisdiction is relevant in potentially meeting that burden. As the State raised the issue of concurrent jurisdiction at the evidentiary hearing, although the issue seemingly played no part in the trial court's ruling, we find the issue is now properly before this Court for our consideration.

¶16 The State's argument hinges on its reading of the General Crimes Act which it claims confers federal jurisdiction over Petitioner's case, but does not explicitly deprive the State of concurrent

jurisdiction. The State acknowledges that courts in other states have held that states lack jurisdiction over non-Indians who commit crimes against Indians in Indian country, but argues the reasoning of those cases lacks merit. Relying on civil cases, the State asserts that states have jurisdiction over non-Indians on Indian Country even when they are interacting with Indians so long as the jurisdiction would not "interfere with reservation self-government or impair a right granted or reserved by federal law" citing *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation,* 502 U.S. 251, 257-58 (1992). The State argues that under the plain language of the General Crimes Act, state jurisdiction over non-Indians who victimize Indians does not interfere with the federal government's concurrent jurisdiction over such crimes.

¶17 In anticipation of the State's argument, Petitioner has filed a response rejecting the State's theory of concurrent jurisdiction. Petitioner asserts that under a well-defined federal statutory scheme and decisions by the United States Supreme Court, jurisdiction in Indian Country has historically been exercised by only tribal and federal courts, and states acquire jurisdiction only by express grants.

No statute has granted the State of Oklahoma criminal jurisdiction over crimes committed by or against Indians in Indian Country.

¶18 Petitioner has not claimed to be Indian. Therefore, the issue before us is state jurisdiction over non-Indians who victimize Indians in Indian Country. Having thoroughly reviewed both briefs and authority cited therein, we find the State does not have the concurrent jurisdiction to prosecute Petitioner.

¶19 Under the federal Major Crimes Act (MCA), "[a]ny Indian who commits" certain enumerated offenses "against the person or property of another Indian or any other person" "within Indian country" "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

¶20 Under the General Crimes Act (GCA), 18 U.S.C. § 1152, federal courts have jurisdiction over a broader range of crimes committed by or against Indians in Indian Country. Section 1152 specifically provides:

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

> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

¶21 In *McGirt*, the Supreme Court ruled that federal criminal jurisdiction under both the MCA and the GCA is exclusive of state jurisdiction. 140 S.Ct. at 2479. The Supreme Court stated:

> But the MCA applies only to certain crimes committed in Indian country by Indian defendants. A neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country. See 18 U.S.C. § 1152. States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. See *McBratney*, 104 S.Ct. at 624.

Id. (internal citation omitted).

¶22 In *United States v. McBratney*, 104 U.S. 621, 624 (1881), the Supreme Court held that federal jurisdiction over crimes committed in Indian Country does not extend to crimes committed by non-Indians against non-Indians. [4]

---

[4] In *McBratney*, the question before the Supreme Court was "whether the [federal court] had jurisdiction of the crime of murder committed by a white man upon a white man" on a reservation in Colorado. 104 U.S. at 624. The Supreme Court said that "[w]henever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive

¶23 "[C]riminal offenses by or against Indians have been subject only to federal or tribal laws . . . except where Congress in the exercise of its plenary and exclusive power over Indian affairs has 'expressly provided that State laws shall apply.'" *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979)(internal citation omitted).

¶24 "[S]tate criminal jurisdiction in Indian country is limited to crimes committed 'by non-Indians against non-Indians ... and victimless crimes by non-Indians'". *Ross v. Neff*, 905 F.2d 1349, 1353 (10th Cir. 1990) (quoting *Solem v. Bartlett*, 465 U.S. 463, 465 n. 2 (1984)).

¶25 This Court recognized in *State v. Klindt*, 1989 OK CR 75, ¶ 3, 782 P.2d 401, 402 that "[j]urisdiction over Indian Country has been given to either the states or the federal government through statutes." This Court went on to explain why the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.

---

jurisdiction over that reservation, it has done so by express words." 104 U.S. at 623-624. The Supreme Court found that by its admission into the Union by Congress, no exceptions had been made for the State of Colorado.

> The Act of August 15, 1953, Pub.L. No. 83–280, 67 Stat. 588 (1953) provided the states permission to assume criminal and civil jurisdiction over any "Indian Country" within the borders of the state. Under this public law, Oklahoma could have, without the consent of the affected Indians, assumed jurisdiction over any Indian Country in the state by constitutional amendment. Because of Title IV of the Civil Rights Act of 1968, 25 U.S.C. §§ 1321–1326 (1970), however, the consent of the affected Indians is now required before a State is permitted to assume criminal and civil jurisdiction over "Indian Country." See 25 U.S.C. §§ 1321(a) and 1322(a) (1970); . . . The State of Oklahoma has never acted pursuant to Public Law 83–280 or Title IV of the Civil Rights Act to assume jurisdiction over the "Indian Country" within its borders. . . . Accordingly, the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.

1989 OK CR 75, ¶ 3, 782 P.2d at 402-403 (internal citations omitted).

¶26 In *Cravatt v. State*, 1992 OK CR 6, ¶ 16, 825 P.2d 277, 279-280, this Court again recognized that the State of Oklahoma has never acted pursuant to Public Law 83-280, stating, "the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country".

¶27 The fact that Petitioner is not Indian does not exempt him from the above cited law. The cases make clear, that absent an express exception by Congress for state jurisdiction over crimes by or against Indians in Indian Country, federal law applies. *See Donnelly v. United*

States, 228 U.S. 243, 272 (1913) (predecessor to GCA applies "with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying [Indian land]")[5]; *United States v. Prentiss,* 273 F.3d 1277, 1278 (10th Cir. 2001) ("18 U.S.C. § 1152 establishes federal jurisdiction over 'interracial' crimes, those in which the defendant is an Indian and the victim is a non-Indian, or vice-versa").[6]

¶28 Applying the above principles to the present case, the State of Oklahoma does not have jurisdiction concurrent with the federal government to prosecute Petitioner. *See Bosse,* 2021 OK CR 3, ¶¶ 23-28, ___ P.3d at ___ (rejecting concurrent jurisdiction argument).

¶29 Turning to the District Court's Order on evidentiary hearing, we find the court's conclusions that the victims in this case were Indian and specifically members of the Choctaw Nation; that the crimes occurred in Indian Country as a reservation was established by

---

[5] In *Donnelly,* the Supreme Court specifically considered the question of whether "the killing of an Indian by a person not of Indian blood, when committed upon an Indian reservation within the limits of a State, cognizable in the Federal courts?" *Id.* at 269.

[6] In *Prentiss,* the Tenth Circuit considered whether the government's failure to allege the Indian/non-Indian statuses of the victim and the defendant contributed to the jury's verdict. *Id.* at 1283.

the federal government for the Choctaw Nation; and that no evidence was presented to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation, as set out in *McGirt,* are supported by the record of the evidentiary hearing. Reviewing the District Court's conclusion that the State of Oklahoma did not have jurisdiction in this case for an abuse of discretion, we find no abuse of the court's discretion. *See State v. Delso,* 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194. After thorough consideration of the entire record before us on appeal we find that under the law and the evidence relief is warranted. Petitioner has met his burden of establishing the status of his victims as Indian on the date of the crime. We also find the District Court appropriately applied *McGirt* to determine that Congress did establish a Choctaw Reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Choctaw Nation or that the State of Oklahoma had jurisdiction in this matter. We find the State of Oklahoma did not have jurisdiction to prosecute Petitioner in this matter. The Judgments and Sentences in this case are hereby reversed and the case remanded to the District Court of Pittsburg County with instructions to dismiss the case.

DECISION

¶30 The **JUDGMENTS and SENTENCES are REVERSED AND REMANDED with instructions to Dismiss.** The **MANDATE** is not to be issued **until twenty (20)** days from the delivery and filing of this decision.[7]

AN APPEAL FROM THE DISTRICT COURT OF PITTSBURG COUNTY
THE HONORABLE TIM MILLS, ASSOCIATE DISTRICT JUDGE

APPEARANCES BEFORE THE DISTRICT COURT

MEGHAN LeFRANCOIS
MICHAEL W. LIEBERMAN
ASST. FEDERAL PUBLIC DEFENDERS, WESTERN DISTRICT OF OKLAHOMA
215 A. McGEE, STE. 707
OKLA. CITY, OK 73102
COUNSEL FOR DEFENDANT

CHUCK SULLIVAN
DISTRICT ATTORNEY
109 E. CARL ALBERT PRKWY
McALESTER, OK 74501

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA
JULIE PITTMAN
CAROLINE HUNT
ASST. ATTORNEYS GENERAL
313 N.E. 21ST ST.

APPEARANCES ON APPEAL

MEGHAN LeFRANCOIS
MICHAEL W. LIEBERMAN
ASST. FEDERAL PUBLIC DEFENDERS, WESTERN DISTRICT OF OKLAHOMA
215 DEAN A. McGEE, STE. 707
OKLA. CITY, OK 73102
COUNSEL FOR PETITIONER

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA
JULIE PITTMAN
ASST. ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

[7] By withholding the issuance of the mandate for 20 days, the State's request for time to determine further prosecution is rendered moot.

OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

JACOB KEYES
P.O. BOX 1210
DURANT, OK
COUNSEL FOR THE CHOCTAW NATION

OPINION BY: LUMPKIN, J.
KUEHN, P.J..: Concur in Results
ROWLAND, V.P.J.: Specially Concur
LEWIS, J.: Specially Concur
HUDSON, J.: Specially Concur

KUEHN, PRESIDING JUDGE, CONCURRING IN RESULT:

¶1 I agree with the Majority that the State of Oklahoma had no jurisdiction to try Petitioner, and his case must be dismissed. This Court recently found that the Choctaw Reservation was not disestablished, and is Indian Country. *Sizemore v. State*, 2021 OK CR 6, ¶¶ 15-16. Oklahoma does not have jurisdiction to prosecute crimes committed against Indians in Indian Country. *Bosse v. State*, 2021 OK CR 3, ¶ 5; 18 U.S.C. § 1152. Furthermore, this Court has determined that the State does not have concurrent jurisdiction over crimes committed by or against Indians in Indian Country. *Bosse*, 2021 OK CR 3, ¶ 28. Because these issues have already been decided, I find the Majority's discussion of both reservation status and concurrent jurisdiction superfluous dicta. I recognize with regret the painful effect this decision will have on the victims' family.

ROWLAND, VICE PRESIDING JUDGE, SPECIALLY CONCURRING:

¶1 I agree with the majority that the U.S. Supreme Court's decision in *McGirt v. Oklahoma,* 591 U.S.___, 140 S.Ct. 2452 (2020), unfortunately, requires dismissing these two murder convictions, one of which resulted in a sentence of death. I write separately to make clear that although footnote 2 quotes Chief Justice Roberts' mention of subject matter jurisdiction, that is not what is implicated here. As I set forth in my separate writing to *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___, the federal Major Crimes Act does not, indeed cannot, divest Oklahoma courts of subject matter jurisdiction granted by the Oklahoma Constitution and statutes enacted pursuant thereto. This federal criminal statute, based upon the plenary power of Congress to regulate affairs with Indian tribes, is instead an exercise of federal territorial jurisdiction which preempts the authority of Oklahoma state courts under these circumstances.

LEWIS, JUDGE, SPECIALLY CONCURRING:

¶1 Pursuant to my special writings in *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___ and *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___, I specially concur. Following the precedent of *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), Oklahoma has no jurisdiction over persons who commit crimes against Indians in Indian Country. This crime occurred within the historical boundaries of the Choctaw Nation Reservation and that Reservation has not been expressly disestablished by the United States Congress. Additionally, the crime occurred against Indian victims, thus the jurisdiction is governed by the Major Crimes Act found in the United States Code.

¶2 Oklahoma, therefore, has no jurisdiction, concurrent or otherwise, over the petitioner in this case. Thus, I concur that this case must be reversed and remanded with instructions to dismiss. Jurisdiction is in the hands of the United States Government.

HUDSON, J., SPECIALLY CONCURRING:

¶1 Today's decision applies *McGirt v. Oklahoma*, 140 U.S. 2452 (2020) to the facts of this case and dismisses two first degree murder convictions, one that resulted in a death sentence, from the District Court of Pittsburg County. I fully concur in 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 Choctaw Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Petitioner. Instead, Petitioner must be prosecuted in federal court. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶2 I also join Judge Rowland's observation in his special writing that the Major Crimes Act does not affect the State of Oklahoma's subject matter jurisdiction in criminal cases but, rather, involves the exercise of federal criminal jurisdiction to effectively preempt the exercise of similar state authority. Further, I maintain my previously expressed views on the significance of *McGirt*, its far-reaching impact on the criminal justice system in Oklahoma and the need for a practical solution by Congress. *See Bosse*, 2021 OK CR 3, __P.3d__ (Hudson, J., Concur in Results); *Hogner v. State*, 2021 OK CR 4,

__P.3d__ (Hudson, J., Specially Concurs); and *Krafft v. State*, No. F-2018-340 (Okl.Cr., Feb. 25, 2021) (Hudson, J., Specially Concurs) (unpublished).