APPENDIX

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APPENDIX A

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner

v.

STATE OF OKLAHOMA,
Respondent

Filed: March 11, 2021

OPINION GRANTING
POST-CONVICTION RELIEF

KUEHN, Presiding Judge.

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

¶2 On direct appeal, this Court upheld Petitioner's convictions and sentences.[1] Petitioner's first Application for Post-Conviction Relief in this Court was denied.[2] Petitioner filed this Successive Application for Post-Conviction Relief on February 20, 2019. The crux of Petitioner's Application lies in his jurisdictional challenge.

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

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[1] *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834, *reh'g granted and relief denied*, 2017 OK CR 19, 406 P.3d 26, *cert. denied*, 138 S. Ct. 1264 (2018).

[2] *Bosse v. State*, No. PCD-2013-360 (Okl. Cr. Dec.16, 2015) (not for publication).

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

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

¶5 *McGirt* itself concerns only the prosecution of crimes on the Muscogee Creek Reservation. However, its reasoning applies to every claim that the State lacks jurisdiction to prosecute a defendant under 18 U.S.C. §§ 1152, 1153. Of course, not every tribe will be found to have a reservation; nor will every reservation continue to the present. "Each tribe's treaties must be considered on their own terms. . . . " *McGirt*, 140 S. Ct. at 2479. The treaties concerning the Five Tribes which were resettled in Oklahoma in the mid-1800s (the Muscogee Creek, Cherokee, Chickasaw, Choctaw, and Seminole) have signifi-

cantly similar provisions; indeed, several of the same treaties applied to more than one of those tribes. It is in that context that we review Petitioner's claim.

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

Stipulations regarding victims' Indian status

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

District Court Findings of Fact

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

(1) The Indian Removal Act of 1830 authorized the federal government to negotiate with Native American tribes for their removal to territory west of the Mississippi River in exchange for the tribes'

ancestral lands. Indian Removal Act of 1830, § 3, 4 Stat. 411, 412.

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

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

Id. art. 2.

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

(4) Congress modified the western boundary of the Chickasaw Nation in the 1855 Treaty of Washington (1855 Treaty), pledging to "forever secure and

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

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

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

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

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

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

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

District Court Conclusions of Law

¶9 The District Court first found, and this Court agrees, that the absence of the word "reservation" in the 1855 and 1866 Treaties is not dispositive. *McGirt*, 140 S. Ct. at 2461. The court emphasized the language in the 1830 Treaty that granted the land "in fee simple to them and their descendants, to inure to them while they shall exist as a nation." 1830 Treaty, art. 2. The 1830 Treaty secured rights of self-government and jurisdiction over all persons and property with Treaty territory, promising that no state should interfere with the rights granted under the Treaty. *Id.* art. 4. That treaty applies to the Chickasaw Nation under the 1837 Treaty of Doaksville, which guaranteed the Chickasaw Nation the same privileges, rights of homeland ownership and occupancy granted the Choctaw Nation by the 1830 Treaty. 1837 Treaty, art. 1. In the 1855 Treaty, the United States promised to "forever secure and guarantee" specific lands to the Choctaw and Chickasaw Nations, and reaffirmed those tribes' rights to self-government and full jurisdiction over persons and property within their limits. 1855 Treaty arts. 1, 7. This was reaffirmed in the 1866 Treaty, by which the Chickasaw and Choctaw Nations agreed to cede defined lands to the United States for a sum certain. 1866 Treaty, art. 3. Thus, the District Court concluded, the treaty promises to the Chickasaw Nation were not gratuitous. *McGirt*, 140 S. Ct. at 2460.

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

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

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

The State's Arguments

¶13 After the evidentiary hearing, a supplemental brief was filed on behalf of the State of Oklahoma by the District Attorney for McClain County. The Attorney General and District Attorney ask this Court to find that the State of Oklahoma has concurrent jurisdiction with the

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

Blood Quantum

¶14 The District Attorney states that the District Judge avoided the issue of blood quantum when making her findings and conclusions.[3] He now requests that this Court require a specific blood quantum to meet the definition of Indian status to avoid a "jurisdictional loophole". In the Remand Order, and in the numerous similar Orders in which we remanded other cases for consideration of the jurisdictional question, this Court clearly set out the definition of Indian it expected lower courts to use. We directed the District Court to "determine whether (1) the victims had some Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government." This test, often referred to as the *Rogers*[4] test, is used in a majority of jurisdictions, including in cases cited by the District Attorney.

¶15 In stating this test we cited two cases from the Tenth Circuit, *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277,

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

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

1280-81 (10th Cir. 2001).[5] The references clearly state the test to be used in determining Indian status. *Prentiss* discusses the history, wide acceptance, and application of the *Rogers* test. The opinion notes that the first prong of the test may be proved by a variety of evidence, which may include a certificate of tribal enrollment which sets forth the person's degree of Indian blood, or a listing on a tribal roll which requires a certain degree of Indian blood. *Prentiss*, 273 F.3d at 1282-83. *Diaz* states that the Tenth Circuit uses a "totality-of-the-evidence approach," which may include proof of blood quantum, but only if a particular tribe requires it. *Diaz*, 679 F.3d at 1187.

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

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

that used in the comparable federal courts.[6] Consistency and economy of judicial resources compel us to adopt the same definition as that used by the Tenth Circuit.[7]

¶17 Without any foundation in law, the District Attorney speculates that, without a precise blood quantum requirement, a defendant might claim he is Indian in a state court—thus defeating state court jurisdiction—and yet be found not Indian in federal court, escaping criminal prosecution altogether. He cites no relevant or persuasive law to support this speculation. The District Attorney relies on a single case from the State of Washington, *State v. Dennis*, 840 P.2d 909 (Wash. App. 1992). Blood quantum was not an issue in that case and is not mentioned in the opinion. The defendant, a member of a Canadian tribe, was charged in state court with murdering his wife. In state court, defendant successfully argued that he was an Indian under the Major Crimes Act, Section 1153, and thus not subject to State jurisdiction. Of course, the federal district court found otherwise, since defendant was

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

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

not a member of a federally recognized tribe. *Id.*, 840 P.2d at 910. The State never appealed the initial dismissal in state district court. After federal charges were dismissed, the State of Washington attempted to reinstate the charges. The Washington Court of Appeals found that, given the State's failure to appeal the initial state court ruling, the State was precluded by statute from reinstating the case. *Id.* at 910-11. The appellate court specifically noted that the problem in this case was not the defendant's claim, but that the trial court made a mistake of law in concluding defendant was Indian under the Major Crimes Act. *Id.* If anything, this case underscores the utility and flexibility of the *Rogers* test, when correctly applied. It is clear that, using that test, jurisdiction always lay with the State of Washington.

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

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

Procedural Defenses

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

> Under the particular facts and circumstances of this case, and based on the pleadings in this case before the

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

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

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

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

P.3d 1198, 1200 (recognizing limited scope of post-conviction review, then addressing newly raised jurisdictional claim on the merits). In *Wackerly*, we also held the time limit on newly raised issues in Rule 9.7 did not apply to jurisdictional questions. *Wackerly*, 2010 OK CR 16, ¶ 4, 237 P.3d at 797.[9]

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

There is no concurrent jurisdiction.

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

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

pressly provide otherwise, Congress has preempted jurisdiction over these crimes in state courts. Indeed, this Court has held that federal law preempts state jurisdiction over crimes committed by or against an Indian in Indian Country. *Cravatt v. State*, 1992 OK CR 6, ¶ 20, 825 P.2d 277, 280. State courts retain jurisdiction over non-Indians who commit crimes against non-Indians in Indian Country. *Id.; Salem*, 463 U.S. at 465 n.2; *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946).

¶24 The State argues that, despite the clear language of both statute and case law, federal and state courts have concurrent jurisdiction over non-Indians under the General Crimes Act. The law does not support this argument. The Attorney General relies in part on *United States v. McBratney*, 104 U.S. 621 (1881) to support his argument. However, in *McBratney*, a non-Indian murdered another non-Indian within the boundaries of the Ute Reservation. The Supreme Court held that the federal government had no jurisdiction to prosecute a crime committed in Indian Country where neither the perpetrator nor the victim were Indian. *Id.*, 104 U.S. at 624. Nothing in that opinion supports a conclusion that, where federal jurisdiction exists by statute, states have concurrent jurisdiction as well. And the Supreme Court itself later refuted any such interpretation. In *Donnelly v. United States*, the Court held that *McBratney* did not apply to "offenses committed by or against Indians," which were subject to federal jurisdiction. *Donnelly*, 228 U.S. 243, 271-72 (1913). In the context of federal criminal jurisprudence and Indian Country, *Donnelly* reaffirmed Congress's preemption of state jurisdiction over crimes by or against Indians.[10] More recently, the Court has noted that where federal jurisdiction

[10] Respondent also misunderstands the discussion in *Ex parte Wilson*, 140 U.S. 575 (1891). There, the defendant and victim were non-

lies under Section 1153, it preempts state jurisdiction. *United States v. John*, 437 U.S. 634, 651 (1978); *see also Goforth v. State*, 1982 OK CR 48, ¶ 5, 644 P.2d 114, 115-16 (federal jurisdiction under §§ 1152, 1153 preempts state jurisdiction except as to crimes among non-Indians).

¶25 The General Crimes Act provides that federal jurisdiction may be changed by law. 18 U.S.C. § 1152. And Congress has done so, giving the State of Kansas criminal jurisdiction on Indian reservations in that state. The Kansas Act conferred jurisdiction on Kansas courts for offenses of state law committed by or against Indians on reservations in Kansas. 18 U.S.C. § 3243. The Supreme Court determined that this Act confers concurrent jurisdiction on State courts only to the extent that the State of Kansas may prosecute people for state law offenses that are also punishable as offenses under federal law; otherwise, the jurisdiction to prosecute federal crimes committed on Kansas reservations lies with the federal government. *Negonsott v. Samuels*, 507 U.S. 99, 105-106 (1993).

¶26 Congress also created the opportunity for six specific states to exercise jurisdiction over crimes committed in Indian Country by enacting Public Law 280. Act of Aug. 15, 1953, Pub. L. No. 67, Stat. 588, codified at 18 U.S.C. § 1162, 25 U.S.C. § 1321-26; 18 U.S.C. § 1162(a). In a separate provision, P.L. 280 created a framework for other states to assume jurisdiction over crimes committed

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Indian. The defendant argued that the federal government could not retain jurisdiction over crimes committed by and against Indians while allowing state jurisdiction over crimes involving non-Indians committed on a reservation; he claimed that either the federal government had sole and exclusive jurisdiction over every crime, or it had none at all. *Id.* at 577. The Court rejected this argument, noting that Congress had the power to grant and limit jurisdiction in federal courts. *Id.* at 578.

in Indian Country, with the consent of the affected tribe; the state and the federal government may have concurrent jurisdiction if the affected tribe requests it and with the consent of the Attorney General. 25 U.S.C. § 1321(a). Oklahoma has not exercised the options for criminal jurisdiction afforded by P.L. 280. *Cravatt*, ¶ 15, 825 P.2d at 279.

¶27 The Kansas Act and P.L. 280 would have been unnecessary if, as the State argues, state and federal governments already have concurrent jurisdiction over non-Indians who commit crimes in Indian Country. Rather, these Acts are examples of how Congress may implement the provision in Section 1152, allowing for an exception to federal jurisdiction. Congress has written no law similarly conferring jurisdiction on Oklahoma courts, or otherwise modifying the statutory provisions granting jurisdiction for prosecution of crimes in Indian Country to federal courts in Oklahoma. Respondent does not suggest it has.

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

Conclusion

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

DECISION

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

ROWLAND, Vice Presiding Judge, concurring in results:

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

A. The Test for Indian Status

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

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

and punish crimes within its borders. Adopting a test different from that used by federal courts risks this Court dismissing a case where the crime was committed in Indian country on the basis that a defendant is Indian and the federal court, under a different test, determining the defendant is not Indian and thus there is no federal jurisdiction.[1] That is the type of jurisdictional void this Court warned of in *Goforth v. State*, 1982 OK CR 48, 644 P.2d 114, where we interpreted Article 1, Section 3 of the Oklahoma Constitution to disclaim jurisdiction over Indian lands only when federal jurisdiction is apparent. "[W]here federal law does not purport to confer jurisdiction on the United States courts, the Oklahoma Constitution does not deprive Oklahoma courts from obtaining jurisdiction over the matter." *Id.* 1982 OK CR 48, 118, 644 P.2d at 116.

B. Subject Matter Jurisdiction

¶4 The other portion of today's majority opinion with which I do not agree is that the federal criminal statutes involved here deprive Oklahoma courts of subject matter jurisdiction. "Subject matter jurisdiction defines the court's authority to hear a given type of case." *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009). Our cases recognize three components to jurisdiction: "(1) jurisdiction over the subject matter—the subject matter in this connection was the criminal offense of murder, (2) jurisdiction over the person, and (3) the authority under law to pronounce the particular judgment and sentence herein rendered." *Petition of Dare*, 1962 OK CR 35, ¶5, 370 P.2d 846, 850-51. Like *Dare*, the subject matter in this case is a

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

murder prosecution. The subject matter jurisdiction of Oklahoma courts is established by Article 7 of our State Constitution and Title 20 of our statutes which grant general jurisdiction, including over murder cases, to our district trial courts. Basic rules of federalism dictate that Congress has no power to expand or diminish that jurisdiction except where Congress has created a federal cause of action and allowed state courts to assume jurisdiction. *See Simard v. Resolution Tr. Corp.*, 639 A.2d 540, 545 (D.C. 1994) (noting presumption of concurrent jurisdiction among federal and state courts is rebutted only by a clear expression by Congress vesting federal courts with exclusive jurisdiction). Were it otherwise, Congress could legislatively tinker with the authority of state courts to hear all type of state crimes or civil causes of action.

¶5 What Congress can do and has done is exercise its own territorial jurisdiction over Indians in Indian Country by virtue of its plenary power to regulate affairs with Indian tribes. "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Federal criminal authority over so-called "federal enclaves" is found at 18 U.S.C. § 7, which begins with the words, "The term especial maritime and **territorial jurisdiction** of the United States', as used in this title, includes. . . . " (emphasis added). The Indian Country Crimes Act, 18 U.S.C. § 1152, with exceptions, "extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country. . . . " *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993). Thus a plain reading of *Negonsott* in tandem with Section 7 makes clear that it is territorial jurisdiction, not subject matter jurisdiction, which is at issue. *See also United States v. Smith*, 925 F.3d 410, 415 (9th Cir.), *cert. denied*, 140 S. Ct. 407 (2019) (finding Indian Country is a federal enclave for purposes of 18

U.S.C. § 7). This is likely why none of the cases cited in the majority opinion hold that the state lacks subject matter jurisdiction over crimes by or against Indians in Indian Country. In *United States v. Langford*, 641 F.3d 1195, 1197 n.1 (10th Cir. 2011), the Tenth Circuit stated explicitly that the federal jurisdiction under these statutes is not subject matter jurisdiction:

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

(Emphasis added).

¶6 This is an important distinction, because as the majority makes clear, the lack of subject matter jurisdiction cannot be waived or forfeited and may be raised at any point in the litigation. Conversely, territorial jurisdiction may be subject to waiver. *See Application of Poston*, 1955 OK CR 39, ¶ 35, 281 P.2d 776, 785 (request for relief on ground that district court did not have territorial jurisdiction was denied; claim was deemed waived because it was not raised below). *See also State v. Randle*, 2002 WI App 116, ¶ 14, 252 Wis. 2d 743, 751, 647 N.W.2d 324, 329 (concluding territorial jurisdiction subject to waiver in some instances); *Porter v. Commonwealth*, 276 Va. 203, 229, 661 S.E.2d 415, 427 (Va. 2008) (territorial jurisdiction is waived if not properly and timely raised); *In re Teagan K.-O.*, 335 Conn. 745, 765 n. 22, 242 A.3d 59, 73 n. 22 (Conn. 2020) (territorial jurisdiction may be subject to waiver). *But see State v. Dudley*, 364 S.C. 578, 582, 614 S.E.2d 623, 625-26 (2005) ("Although territorial jurisdiction is not a component of subject matter jurisdiction, we hold that it

is a fundamental issue that may be raised by a party or by a court at any point in the proceeding. . . . The exercise of extraterritorial jurisdiction implicates the state's sovereignty, a question so elemental that we hold it cannot be waived by conduct or by consent." (Citation and footnote omitted.)).

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

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

LUMPKIN, Judge, concurring in results:

¶1 Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in

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[2] The *McGirt* opinion tacitly acknowledges potential procedural bars, noting the State of Oklahoma had "put aside whatever procedural defenses it might have." *McGirt*, 140 S. Ct. at 2460. Those defenses would not be relevant if subject matter jurisdiction, which is non-waivable, were concerned.

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

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

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

> I can hardly see where it (the IRA) could operate in a State like mine where the Indians are all scattered out among the whites

of the solid precedents the Court has established over the last 100 years or more.

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

¶4 My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the

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

John Collier, Commissioner of Indian Affairs, *Memorandum of Explanation* (regarding S. 2755), p. 145, hearing before the United States Senate Committee on Indian Affairs, February 27, 1934. Senator Morris Sheppard, D-Texas, also on the Senate Committee on Indian Affairs, stated in response to the Commissioner's speech that in Oklahoma, he did not think "we could look forward to building up huge reservations such as we have granted to the Indians in the past." *Id.* at 157. In 1940, in the Foreword to Felix S. Cohen, *Handbook of Federal Indian Law* (1942), Secretary of the Interior Harold Ickes wrote in support of the IRA, "[t]he continued application of the allotment laws, *under which Indian wards have lost more than two-thirds of their reservation lands*, while the costs of Federal administration of these lands have steadily mounted, must be terminated." (emphasis added).

dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.

LEWIS, Judge, specially concurring:

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

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

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

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

¶4 A lack of subject matter jurisdiction leaves a court without authority to adjudicate a matter. This Court has held that subject matter jurisdiction cannot be conferred by consent, nor can it be waived, and it may be raised at any time. *Armstrong v. State*, 1926 OK CR 259, 248 P. 877, 878; *Cravatt v. State*, 1992 OK CR 6, ¶ 7, 825 P.2d 277, 280; *Magnan v. State*, 2009 OK CR 16, ¶¶ 9 8612, 207 P.3d 397, 402 (holding that jurisdiction over major crimes in Indian Country is exclusively federal).

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

HUDSON, Judge, concurring in results:

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

¶2 I disagree, however, with the majority's adoption as binding precedent of the District Court's finding that Congress never disestablished the Chickasaw Reservation. Here, the State took no position below on whether the Chickasaw Nation has, or had, a reservation. The State's tactic of passivity has created a legal void in this Court's ability to adjudicate properly the facts underlying Petitioner's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. We should find no abuse of discretion based on the record evidence presented. But we should not establish as binding precedent that the Chickasaw Nation was never disestablished based on this record.

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

¶4 Finally, I write separately to note that *McGirt* resurrects an odd sort of Indian reservation. One where a vast network of cities and towns dominate the regional economy and provide modern cultural, social, educational and employment opportunities for all people on the reservation. Where the landscape is blanketed by modern

roads and highways. Where non-Indians own property (lots of it), run businesses and make up the vast majority of inhabitants. On its face, this reservation looks like any other slice of the American heartland—one dotted with large urban centers, small rural towns and suburbs all linked by a modern infrastructure that connects its inhabitants, regardless of race (or creed), and drives a surprisingly diverse economy. This is an impressive place—a modern marvel in some ways—where Indians and non-Indians have lived and worked together since at least statehood, over a century.

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

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

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

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

APPENDIX B

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: March 19, 2021

CORRECTION ORDER

The Opinion in this case, *Bosse v. State*, 2021 OK CR 3, contains a scrivener's error. The first sentence of paragraph 20 of the Opinion should read:

> Both the Attorney General and the District Attorney ask this Court to consider this case barred for a variety of procedural reasons: waiver under the successive capital post-conviction statute, 22 O.S. 2011, § 1089(D), and waiver of the jurisdictional challenge; failure to meet the sixty-day filing deadline to raise a previously unavailable legal or factual basis in subsequent post-conviction applications under Rule 9.7(G)(3), *Rules of*

the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2021); and the doctrine of laches.

IT IS SO ORDERED.

APPENDIX C

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: August 12, 2020

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 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, and/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)

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[1] *See, e.g., 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).

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.

APPENDIX D

DISTRICT COURT OF MCCLAIN COUNTY
STATE OF OKLAHOMA

No. CF-2010-213, PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: October 13, 2020

FINDING FACTS AND CONCLUSION OF LAW

Before: EDWARDS, District Judge.

This matter came on for hearing the 30th day of September, 2020 pursuant to the remand order of the Oklahoma Court of Criminal Appeals issued August 12, 2020. Petitioner appeared by and through Assistant Federal Public Defenders Michael Lieberman and Sarah Jernigan. Petitioner previously filed a written *Waiver of Right to Appear at Evidentiary Hearing* and this Court approved the same. Respondent appeared by and through Assistant Attorneys General Caroline Hunt and Jennifer Crabb, along with District Attorney Greg Mashburn and

First Assistant District Attorney Travis White. The Chickasaw Nation of Oklahoma appeared as *Amicus Curiae*, pursuant to the agreement of the parties, by and through counsel Debra Gee and Stephen Greetham. A record was taken by Certified Court Reporter Dawn Flick. The parties announced ready for hearing and Respondent asserted full compliance with Okla. Const. art. 2, § 34.

This matter was remanded to the District Court by the Oklahoma Court of Criminal Appeals to address only: (1) the status as Indians of Petitioner's victims; and (2) whether the crime occurred in Indian Country. This Court will address each of the issues separately.

I. The Status as Indians of Petitioner's Victims

The Oklahoma Court of Criminal Appeals (hereinafter referred to as "OCCA") remanded the above-entitled matter to this Court to determine, inter alia, the status as Indians of Petitioner's victims.[1] In making the determination, the OCCA further directed this Court to evaluate whether (1) the victims had some Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government.[2] In complying therewith, the Court undertakes the following analysis:

Findings of Fact

1. Katrina Griffin, Christian Griffin and Chasity Hammer were the named victims in the above-entitled matter.

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[1] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3.

[2] *Id.*

2. The parties stipulated that Katrina Griffin was an Indian for purposes of the General Crimes Act, 18 U.S.C. 1152.[3]

3. The parties stipulated that Christian Griffin had 23/256ths Indian blood quantum and was recognized as a Chickasaw Nation Citizen.[4]

4. The parties stipulated that Chasity Hammer had 23/256ths Indian blood quantum and was recognized as a Chickasaw Nation Citizen.[5]

Conclusions of Law

As set forth above, in assessing the status as Indians of Petitioner's victims, the OCCA ordered this Court to determine whether (1) the victims had some Indian blood and (2) were recognized as an Indian by a tribe or by the federal government.[6] With respect to victim Katrina Griffin, the parties stipulated that she was an Indian for purposes of the General Crimes Act; this Court adopts the parties stipulations and finds that Katrina Griffin was, in fact, an Indian victim.

With regard to victims Christian Griffin and Chasity Hammer, this Court must first consider whether they each had some Indian blood.[7] Respondent noted in the *State's Supplemental Proposed Findings of Fact and Conclusions of Law* that the term 'Indian' is not statutorily defined, but has been previously defined by different

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[3] Pet. Ex. 1, Stipulations (2)(a).

[4] Pet. Ex. 1, Stipulations (2)(b).

[5] Pet. Ex. 1, Stipulations (2)(c).

[6] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3.

[7] *Id.*

courts to require "a significant percentage of"[8], "sufficient"[9], "substantial"[10] or "some"[11] Indian blood. However, the OCCA was clear in its mandate when it ordered this Court to determine "whether the victims had *some* Indian blood."[12] This Court answers this inquiry in the affirmative.

The record before this Court is clear. The parties stipulated that both Christian Griffin and Chasity Hammer had 23/256th Indian blood quantum.[13] This Court adopts the parties' stipulations and, as a result, finds that Christian Griffin and Chasity Hammer both had "some Indian blood."

Likewise, this Court also finds that the second prong of the analysis, recognition as an Indian by a tribe or by the federal government, has been satisfied. Specifically, the parties stipulated that both of these victims were recognized as Chickasaw Nation citizens.[14] This stipulation is further supported by the memoranda of the Chickasaw Nation verifying the tribal enrollment of Christian Griffin and Chasity Hammer.[15] After adopting the stipulations of the parties and answering answered both questions in the

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[8] *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

[9] *United States v. LaBuff*, 658 F.3d 873, 874-75 (9th Cir. 2011).

[10] *Vialpando v. State*, 640 P.2d 77, 79-80 (Wyo. 1982).

[11] *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976).

[12] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3.

[13] Pet. Ex. 1, Stipulations 2(b) and 2(c).

[14] Pet. Ex. 1, Stipulations (2)(c).

[15] Pet. Ex. 1, Stipulations (2)(d).

affirmative, this Court finds that Christian Griffin and Chasity Hammer were, in fact, Indian victims.

WHEREFORE, this Court finds that Katrina Griffin, Christian Griffin and Chasity Hammer were Indian victims.[16]

II. Whether the Crime Occurred in Indian Country

The OCCA further remanded the above-entitled matter for this Court to determine whether the crime occurred in Indian Country.[17] In making the determination, the OCCA directed this Court to ascertain (1) whether Congress established a reservation for the Chickasaw Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation.[18] Therefore, the Court undertakes the following analysis:

Findings of Fact

1. The Indian Removal Act of 1830 authorized the President's representatives to negotiate with Native American tribes for their removal to federal territory west of the Mississippi River in exchange for their ancestral lands.[19]

2. Pursuant to the authority outlined in the Indian Removal Act of 1830, the 1830 Treaty of Dancing Rabbit Creek was entered. Specifically, in the 1830 Treaty of Dancing Rabbit Creek, the United States granted to the

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[16] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3; *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *Untied States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001).

[17] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3.

[18] *Id.* at 3-4.

[19] Indian Removal Act of 1830, Pet. Ex. 7.

Choctaw Nation certain lands "in fee simple to them and their descendants, to insure to them while they shall exist as a nation and live on it" in exchange for the Choctaw Nation ceding their lands east of the Mississippi River.[20] Article 4 granted the Choctaw people "the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State."[21] The land granted to the Choctaw Nation was described as: "beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork; if in the limited of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning."[22]

3. The 1837 Treaty of Doaksville granted the Chickasaw people a "district within the limits of [the 1830 Treaty of Dancing Rabbit Creek territory] to be held on the same terms that the Choctaws now hold it [. . .]."[23] The 1837 Treaty entered between the Choctaws and Chickasaws made the provisions of the 1830 Treaty of Dancing Rabbit Creek applicable to the Chickasaw Nation.[24]

4. In 1855, the Treaty of Washington reaffirmed the 1837 Treaty of Doaksville and modified the Western

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[20] 1830 Treaty of Dancing Rabbit Creek, Pet. Ex. 8, art. 2.

[21] *Id.* at Pet. Ex. 8, art. 4.

[22] *Id.*

[23] 1837 Treaty of Doaksville, Pet. Ex. 10, art. 1.

[24] *Id.*

boundary of the Chickasaw territory.[25] Congress explicitly asserted that "pursuant to [the Indian Removal Act], the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes" and reserved those lands from sale "without the consent of both tribes."[26] The 1855 Treaty further reaffirmed the Chickasaw Nation's right of self-government.[27]

5. Following the Civil War, the Chickasaw and Choctaw Nations entered into the 1866 Treaty, which did not alter the Chickasaw district but reiterated, once again, the Choctaw and Chickasaw Nations' rights to self-governance and reaffirmed the rights granted under the previous Treaties.[28]

6. The parties stipulated that Petitioner's crime occurred at 15734 212th St., Purcell, OK, and further stipulated that this "address is within the boundaries set forth in the 1855 and 1866 treaties between the Chickasaw Nation, the Choctaw Nation, and the United States."[29]

7. The property on which the crime occurred was originally transferred directly from the Choctaw and Chickasaw Nations in a Homestead Patent to George Roberts in 1905.[30] Title to the property can be traced directly to the Reservation granted to the Choctaw and Chickasaw Nations by the

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[25] 1855 Treaty of Washington, Pet. Ex. 12, art. 2.

[26] *Id.* at art. 1.

[27] *Id.* at art. 7.

[28] 1866 Treaty of Washington, Pet. Ex. 13, art. 10.

[29] Stipulations (1)(a).

[30] Tr. pg. 11, ln. 21-25.

United States and subsequently allotted to individuals, and was never owned by the State of Oklahoma.[31]

8. The Chickasaw nation is a federally recognized Indian tribe that exercised sovereign authority under a constitution approved by the Secretary of Interior.[32]

9. There is absolutely no evidence before the Court that these treaties have been formally nullified or modified in any way to reduce or cede the Chickasaw lands to the United States or to any other state or territory.

10. The parties further stipulated that "[i]f the Court determines that those treaties established a reservation, and if the court further concludes that Congress never explicitly erased those boundaries and disestablished that reservation, then the crime occurred within Indian Country as defined by 18 U.S.C. 1151(a).[33]

Conclusions of Law

First, the Court finds that a reservation was established for the Chickasaw Nation by the treaties discussed above. Title 18 U.S.C. 1151(a) defines "Indian Country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . " As noted by the United States Supreme Court in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2461, "early treaties did not refer to the Creek lands as a 'reservation'—perhaps because that word had not yet acquired such distinctive significance in federal Indian law. But we have found similar language in treaties from the same era sufficient to create a reservation." The Court in *McGirt* stated that the "most authoritative evidence of [a tribe's] relationship to the

[31] Pet. Ex. 2; Tr. pg. 13, ln. 10-16, pg. 14, ln. 14-19.

[32] Constitution of the Chickasaw Nation, Pet. Ex. 5.

[33] Pet. Ex. 1, Stipulations (1)(b).

land . . . lies in the treaties and statutes that promised the land to the Tribe in the first place."[34] It specifically noted that Creek treaties promised a "permanent home" that would be "forever set apart," and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state.[35] As such, the Supreme Court found that, "Under any definition, this was a [ ] reservation."[36] The Chickasaw Nation is subject to the same analysis.

In applying the reasoning the Supreme Court used in *McGirt* to the case at bar, this Court must reach the same conclusion. Specifically, in the 1830 Treaty of Dancing Rabbit Creek, the Choctaw Nation was granted the land in question "in fee simple to them and their descendants, to insure to them while they shall exist as a nation."[37] It secured the rights of self-government and jurisdiction over all persons and property within the Treaty Territory and promised that no state shall interfere with those rights.[38]

These rights applied equally to the Chickasaw Nation under the 1837 Treaty of Doaksville.[39] The Treaty of Doaksville secured to the Chickasaw Nation a "district within the limits of [the Treaty Territory]," and guaran-

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[34] *McGirt*, 140 S. Ct. at 2475-76.

[35] *Id.* at 2461-62.

[36] *Id.* at 2461.

[37] Pet. Ex. 8, art. 2.

[38] *Id.* at art. 4.

[39] Pet. Ex. 10.

teed them the same privileges, rights of homeland ownership and occupancy that the Choctaw held under the 1830 Treaty.[40]

In the 1855 Treaty of Washington, the Choctaw and Chickasaw governments were made independent of each other. The United States promised that it does "hereby *forever secure and guarantee the lands* embraced within the said limits, to the members of the Choctaw and Chickasaw tribes," and explicitly *reserved those lands from sale "without the consent of both tribes*."[41] It reaffirmed the tribes' rights of self-government, stating "the Choctaws and Chickasaws shall be *secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits . . .* "[42] The aforementioned treaty rights were once again reaffirmed in the 1866 Treaty of Washington, which was entered when the Chickasaw and Choctaw Nations agreed to cede certain defined lands to the United States for a sum of money.[43] Therefore, like the Creek treaty promises, the United States' treaty promises to the Chickasaw Nation were not made gratuitously.[44]

Applying the reasoning used by the United States Supreme Court in *McGirt*, the plain wording of the treaties demonstrate the Chickasaw lands were set aside for the Chickasaw people and their descendants and assured the right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of

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[40] *Id.* art. 1.

[41] Pet. Ex. 12, art. 1.

[42] *Id.* art. 7.

[43] Pet. Ex. 13, art. 2.

[44] *McGirt*, 140 S. Ct. at 2460.

any state.[45] It is, therefore, clear that Congress established a reservation for the Chickasaw Nation.

Upon finding that a reservation was established by Congress for the Chickasaw Nation, this Court must next determine whether Congress has erased those boundaries and disestablished the reservation.[46] As the Supreme Court made clear in *McGirt*, "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress."[47] The constitutional authority to breach a Treaty "belongs to Congress alone," and the Court will not lightly infer such a breach "once Congress has established a reservation."[48] "[On]ce a reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'"[49] While "[d]isestablishment has never required any particular form of words, it does require that Congress clearly express its intent to do so, [c]ommon[ly] with an] [e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests."[50]

The Petitioner and the State disagree where the burden to prove disestablishment should be placed. However, regardless which party bears the burden, no evidence was presented to the Court to establish that Congress explic-

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[45] *McGirt*, 140 S. Ct. at 2461-62.

[46] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3-4.

[47] *McGirt*, 140 S. Ct. at 2462.

[48] *Id.*

[49] *Id.* at 2469 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).

[50] *McGirt*, 140 S. Ct. at 2463 (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016)).

itly erased or disestablished the boundaries of the Chickasaw nation or that the State of Oklahoma has jurisdiction of this matter. No evidence was presented that the Chickasaw reservation was "restored to public domain,"[51] "discontinued, abolished or vacated."[52] Without, explicit evidence of a present and total surrender of all tribal interests, the Court cannot find the Chickasaw reservation was disestablished.[53]

This Court finds 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.

CONCLUSION

WHEREFORE, this Court finds that Katrina Griffin, Christian Griff and Chasity Hammer were Indians and that the crime for which Petitioner was convicted occurred in Indian Country for purposes of the General Crimes Act, 18 U.S.C. 1152.

IT IS HEREBY ORDERED!

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[51] *Id.* at 2462.

[52] *Mattz v. Arnett*, 412 U.S. 481, 504 (1973).

[53] *McGirt*, 140 S. Ct. at 2463.

APPENDIX E

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: March 31, 2021

ORDER STAYING ISSUANCE OF MANDATE

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

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

IT IS SO ORDERED.

APPENDIX F

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: April 7, 2021

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

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

As Respondent admits, this Court's Rule 5.5 prohibits this filing. Rule 5.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). Once this Court has rendered its decision in a post-conviction appeal that

decision shall constitute a final order. A petition for rehearing is not allowed, and we will not review such a request.[1] The Clerk of this Court is directed to return Respondent's documents, and to transmit a copy of this order to the District Court of McLain County, the Honorable Leah Edwards, District Judge; the Court Clerk of McLain County; counsel of record and Respondent.

IT IS SO ORDERED.

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

APPENDIX G

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: April 9, 2021

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

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

On April 8, 2021, Respondent filed an emergency motion to temporarily recall the mandate pending oral argument in this Court. Respondent's request to temporarily

recall the mandate pending oral argument in this Court is **GRANTED**. The Clerk of this Court is directed to transmit a copy of this order to the District Court of McLain County, the Honorable Leah Edwards, District Judge; the Court Clerk of McLain County; counsel of record, amicus curiae, and Respondent.

IT IS SO ORDERED.

APPENDIX H

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: April 15, 2021

ORDER STAYING ISSUANCE OF MANDATE

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

IT IS SO ORDERED.

HUDSON, J., concurring in part/dissenting in part

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

APPENDIX I

Section 1151 of Title 18 of the United States Code provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (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, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Section 1152 of Title 18 of the United States Code 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.

Section 1089(D) of Title 22 of the Oklahoma Statutes provides:

> 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 * * * .

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.