APPENDIX A

Court of Criminal Appeals of Oklahoma.

STATE EX REL. Mark MATLOFF,
District Attorney, Petitioner

v.

The Honorable Jana WALLACE,
Associate District Judge, Respondent.

Case No. PR-2021-366

Filed August 12, 2021

OPINION

LEWIS, Judge:

¶1 The State of Oklahoma, by Mark Matloff, District Attorney of Pushmataha County, petitions this Court for the writ of prohibition to vacate the Respondent Judge Jana Wallace's April 12, 2021 order granting post-conviction relief. Judge Wallace's order vacated and dismissed the second degree murder conviction of Clifton Merrill Parish in Pushmataha County Case No. CF-2010-26. Because the Respondent's order is unauthorized by law and prohibition is a proper remedy, the writ is **GRANTED**.

FACTS

¶2 Clifton Parish was tried by jury and found guilty of second degree felony murder in March, 2012. The jury sentenced him to twenty-five years imprisonment. This Court affirmed the conviction on direct appeal in *Parish v. State*, No. F-2012-335 (Okl. Cr., March 6, 2014) (unpublished). Mr. Parish did not petition for rehearing, and did not petition the U.S. Supreme Court for *certiorari* within the allowed ninety-day time

period. On or about June 4, 2014, Mr. Parish's conviction became final.[1]

¶3 On August 17, 2020, Mr. Parish filed an application for post-conviction relief alleging that the State of Oklahoma lacked subject matter jurisdiction to try and sentence him for murder under the Supreme Court's decision in *McGirt v. Oklahoma*, —— U.S. ——–, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020). Judge Wallace held a hearing and found that Mr. Parish was an Indian and committed his crime within the Choctaw Reservation, the continued existence of which was recently recognized by this Court, following *McGirt*, in *Sizemore v. State*, 2021 OK CR 6, ¶ 16, 485 P.3d 867, 871.

¶4 Because the Choctaw Reservation is Indian Country, Judge Wallace found that the State lacked subject matter jurisdiction to try Parish for murder under the Major Crimes Act. 18 U.S.C. § 1153. Applying the familiar rule that defects in subject matter jurisdiction can never be waived, and can be raised at any time, Judge Wallace found Mr. Parish's conviction for second degree murder was void and ordered the charge dismissed.

¶5 Judge Wallace initially stayed enforcement of the order. The State then filed in this Court a verified request for a stay and petitioned for a writ of prohibition against enforcement of the order granting post-conviction relief. In *State ex rel. Matloff v. Wallace*, 2021 OK CR 15, —— P.3d ——–, this Court

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[1] *Teague v. Lane*, 489 U.S. 288, 295, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989) (defining a final conviction as one where judgment was rendered, the availability of appeal exhausted, and the time to petition for certiorari had elapsed).

stayed all proceedings and directed counsel for the interested parties to submit briefs on the following question:

> In light of *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *Edwards v. Vannoy* (No. 19-5807), 593 U.S. —— [141 S.Ct. 1547, 209 L.Ed.2d 651] (May 17, 2021), cases cited therein, and related authorities, should the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* be applied retroactively to void a state conviction that was final when *McGirt* and *Sizemore* were announced?

¶6 The parties and *amici curiae*[2] subsequently filed briefs on the question presented. For reasons more fully stated below, we hold today that *McGirt v. Oklahoma* announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction. The writ of prohibition is therefore **GRANTED** and the order granting post-conviction relief is **REVERSED**.

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[2] The Cherokee, Chickasaw, Choctaw, and Muscogee (Creek) Nations filed a joint brief as *amici curiae* in response to our invitation. The Acting Attorney General of Oklahoma, counsel from the Capital Habeas Unit of the Federal Public Defender's Office for the Western District of Oklahoma, and the Oklahoma Criminal Defense Lawyer's Association also submitted briefs as *amicus curiae*. We thank counsel for their scholarship and vigorous advocacy.

ANALYSIS

¶7 In state post-conviction proceedings, this Court has previously applied its own non-retroactivity doctrine—often drawing on, but independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus—to bar the application of new procedural rules to convictions that were final when the rule was announced. *See Ferrell v. State*, 1995

OK CR 54, ¶¶ 5-9, 902 P.2d 1113, 1114-15 (citing *Teague, supra*) (finding new rule governing admissibility of recorded interview was not retroactive on collateral review); *Baxter v. State*, 2010 OK CR 20, ¶ 11, 238 P.3d 934, 937 (noting our adoption of *Teague* non-retroactivity analysis for new rules in state post-conviction review); and *Burleson v. Saffle*, 278 F.3d 1136, 1141 n.5 (10th Cir. 2002) (noting incorporation "into state law the Supreme Court's *Teague* approach to analyzing whether a new rule of law should have retroactive effect," citing *Ferrell, supra*).

¶8 New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law. *See Carter v. State*, 2006 OK CR 42, ¶ 4, 147 P.3d 243, 244 (citing *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)) (applying new instructional rule of *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 to case tried before the rule was announced, but pending on direct review). But new rules generally do *not* apply retroactively to convictions that are final, with a few narrow exceptions. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1114-15; *Thomas v. State*, 1994 OK CR 85, ¶ 13, 888 P. 2d 522, 527 (decision requiring that prosecution file bill of particulars no later than

arraignment did not apply to convictions already final).

¶9 Following *Teague* and its progeny, we would apply a new *substantive* rule to final convictions if it placed certain primary (private) conduct beyond the power of the Legislature to punish, or categorically barred certain punishments for classes of persons because of their status (capital punishment of persons with insanity or intellectual disability, or juveniles, for example). *See, e.g., Pickens v. State*, 2003 OK CR 16, ¶¶ 8-9, 74 P.3d 601, 603 (retroactively applying *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) because *Atkins* barred capital punishment for persons with intellectual disability).

¶10 Under *Ferrell*, we also would retroactively apply a new "watershed" procedural rule that was essential to the accuracy of trial proceedings, but such a rule is unlikely ever to be announced. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1115; *see Beard v. Banks*, 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (identifying *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) as the paradigmatic watershed rule, and likely the only one ever announced by the Supreme Court); *Edwards v. Vannoy*, —— U.S. ——, 141 S. Ct. 1547, 1561, 209 L.Ed.2d 651 (2021) (acknowledging the "watershed" rule concept was moribund and would no longer be incorporated in *Teague* retroactivity analysis).

¶11 Like the Supreme Court, we have long adhered to the principle that the narrow purposes of collateral review, and the reliance, finality, and public safety interests in factually accurate convictions and just punishments, weigh strongly against the application of new procedural rules to convictions already final

when the rule is announced. Applying new procedural rules to final convictions, after a trial or guilty plea and appellate review according to then-existing procedures, invites burdensome litigation and potential reversals unrelated to accurate verdicts, undermining the deterrent effect of the criminal law. *Ferrell*, 1995 OK CR 54, ¶¶ 6-7, 902 P.2d at 1114-15.

¶12 Just as *Teague*'s doctrine of non-retroactivity "was an exercise of [the Supreme Court's] power to interpret the federal habeas statute," *Danforth v. Minnesota*, 552 U.S. 264, 278, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008), we have barred state post-conviction relief on new procedural rules as part of our independent authority to interpret the remedial scope of state post-conviction statutes. *Smith v. State*, 1994 OK CR 46, ¶ 3, 878 P.2d 375, 377-78 (declining to apply rule on flight instruction to conviction that was final six years earlier); *Thomas*, 1994 OK CR 85, ¶ 13, 888 P.2d at 527 (declining to apply rule on filing bill of particulars at arraignment to conviction that was final when rule was announced).

¶13 Before and after *McGirt*, this Court has treated Indian Country claims as presenting non-waivable challenges to criminal subject matter jurisdiction. *Bosse v. State*, 2021 OK CR 3, ¶¶ 20-21, 484 P.3d 286, 293-94; *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (both characterizing claim as subject matter jurisdictional challenge that may be raised at any time). After *McGirt* was decided, relying on this theory of non-waivability, this Court initially granted post-conviction relief and vacated several capital murder convictions, and at least one non-capital conviction (Jimcy McGirt's), that were final when *McGirt* was

announced. [3]

¶14 We acted in those post-conviction cases without our attention ever having been drawn to the potential non-retroactivity of *McGirt* in light of the Court of Appeals' opinion in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *cert. denied*, 519 U.S. 963, 117 S.Ct. 384, 136 L.Ed.2d 301 (1996) and cases discussed therein, which we find very persuasive in our analysis of the state law question today. *See also, e.g., Schlomann v. Moseley*, 457 F.2d 1223, 1227, 1230 (10th Cir. 1972) (finding Supreme Court's "newly announced jurisdictional rule" restricting courts-martial in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969) had made a "clear break with the past;" retroactive application to void final convictions was not compelled by jurisdictional nature of *O'Callahan*, and *O'Callahan* would not be applied retroactively to void court-martial conviction that was final when *O'Callahan* was decided).

¶15 After careful examination of the reasoning in *Cuch*, as well as the arguments of counsel and *amici curiae*, we reaffirm our recognition of the Cherokee, Choctaw, and Chickasaw Reservations[4] in those

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[3] *Bosse*, *supra*; *Cole v. State*, 2021 OK CR 10, —— P.3d ——, 2021 WL 1727054; *Ryder v. State*, 2021 OK CR 11, 489 P.3d 528, *Bench v. State*, 2021 OK CR 12, —— P.3d ——, 2021 WL 1836466. We later stayed the mandate in these capital post-conviction cases pending the State's petition for certiorari to the Supreme Court. We have also granted *McGirt*-based relief and vacated many convictions in appeals pending on direct review. *E.g., Hogner v. State*, 2021 OK CR 4, —— P.3d ——, 2021 WL 958412; *Spears v. State*, 2021 OK CR 7, 485 P.3d 873; *Sizemore v. State*, *supra*.

[4] We first recognized the Seminole Reservation in the post-*McGirt* direct appeal of *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250, and have no occasion to revisit that decision today.

earlier cases. However, exercising our independent state law authority to interpret the remedial scope of the state post-conviction statutes, we now hold that *McGirt* and our post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided. Any statements, holdings, or suggestions to the contrary in our previous cases are hereby overruled.

¶16 In *United States v. Cuch, supra*, the Tenth Circuit Court of Appeals held that the Supreme Court's Indian Country jurisdictional ruling in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) was not retroactive to convictions already final when *Hagen* was announced. In *Hagen*, the Supreme Court held that certain lands recognized as Indian Country by *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir.1985) (en banc) were not part of the Uintah Reservation; and that Utah, rather than the federal government, had subject matter jurisdiction over crimes committed in the area. *Cuch*, 79 F.3d at 988.

¶17 Cuch and Appawoo, defendants who pled guilty and were convicted of major crimes (sexual abuse and second degree murder respectively) in the federal courts of Utah, challenged their convictions in collateral motions to vacate pursuant to 28 U.S.C. § 2255. They argued the subject matter jurisdiction defect recognized in *Hagen* voided their federal convictions. *Cuch*, 79 F.3d at 989-90. The federal district court found *Hagen* was not retroactive to collateral attacks on final convictions under section 2255. *Id*. at 990. The Tenth Circuit affirmed.

¶18 The Court of Appeals noted that the Supreme Court had applied non-retroactivity principles to new rules that alter subject matter jurisdiction. *Id*. at 990

(citing *Gosa v. Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973)) (refusing to apply new jurisdictional limitation on military courts-martial retroactively to void final convictions). The policy of non-retroactivity was grounded in principles of finality of judgments and fundamental fairness: *Hagen* had been decided after the petitioners' convictions were final; it was not dictated by precedent; and the accuracy of the underlying convictions weighed against the disruption and costs of retroactivity. *Id*. at 991-92.

¶19 The Court of Appeals found non-retroactivity of the *Hagen* ruling upheld the principle of finality and foreclosed the harmful effects of retroactive application, including

> the prospect that the invalidation of a final conviction could well mean that the guilty will go unpunished due to the impracticability of charging and retrying the defendant after a long interval of time. Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Furthermore, retroactive application would surely visit substantial injustice and hardship upon those litigants who relied upon jurisdiction in the federal courts, particularly victims and witnesses who have relied on the

> judgments and the finality flowing therefrom. Retroactivity would also be unfair to law enforcement officials and prosecutors, not to mention the members of the public they represent, who relied in good faith on binding federal pronouncements to govern their prosecutorial decisions. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered.

79 F.3d at 991-92 (citing and quoting from *Gosa*, 413 U.S. at 685, 93 S.Ct. 2926, and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (internal citations, quotation marks, brackets, and ellipses omitted)).

¶20 The Court of Appeals found that no questions of innocence arose from the jurisdictional flaw in the petitioners' convictions. Their conduct was criminal under both state and federal law. The question resolved in *Hagen* was simply "*where* these Indian defendants should have been tried for committing major crimes." 79 F.3d at 992 (emphasis in original). The petitioners did not allege unfairness in the processes by which they were found guilty. *Id*.

¶21 The Court of Appeals reasoned that a jurisdictional ruling like *Hagen* raised no fundamental questions about the basic truth-finding functions of the courts that tried and sentenced the defendants. *Id*. The legal processes resulting in those convictions had "produced an accurate picture of the conduct underlying the movants' criminal charges and

provided adequate procedural safeguards for the accused." *Id*.

¶22 The Court of Appeals also noted that the chances of successful state prosecution were slim after so many years. "The evidence is stale and the witnesses are probably unavailable or their memories have dimmed." *Id*. at 993. The Court also considered the "violent and abusive nature" of the underlying convictions, and the burdens that immediate release of these prisoners would have on victims, many of whom were child victims of sexual abuse. *Id*.

¶23 The Court of Appeals distinguished two lines of Supreme Court holdings that retroactively invalidated final convictions. The first involved the conclusion that a court lacked authority to convict or punish a defendant in the first place. But in those cases, the bar to prosecution arose from a constitutional immunity against punishment for the conduct in *any* court, or prohibited a trial altogether. The defendants in *Cuch* could hardly claim immunity for acts of sexual abuse and murder. The only issue touched by *Hagen* was the federal court's exercise of jurisdiction. *Id*. at 993.

¶24 The second line of Supreme Court cases retroactively invalidating final convictions involved holdings that narrowed the scope of a penal statute defining elements of an offense, and thus invalidated convictions for acts that Congress had never criminalized. *Hagen*, on the other hand, had not narrowed the scope of *liability* for conduct under a statute, it had modified the extent of Indian Country jurisdiction, and thus altered the *forum* where crimes would be prosecuted. *Id*. at 994.

¶25 Finding neither of the exceptional circumstances that might warrant retroactive application of *Hagen's* jurisdictional ruling to final convictions, the Court of Appeals found "the circumstances surrounding these cases make prospective application of *Hagen* unquestionably appropriate in the present context." *Id*. Prior federal jurisdiction was well-established before *Hagen*; the convictions were factually accurate; the procedural safeguards and truth-finding functions of the courts were not impaired; and retroactive application would compromise both reliance and public safety interests that legitimately attached to prior proceedings.

¶26 We find *Cuch's* analysis and authorities persuasive as we consider the independent state law question of collateral non-retroactivity for *McGirt*. First, we conclude that *McGirt* announced a rule of criminal *procedure*, using prior case law, treaties, Acts of Congress, and the Major Crimes Act to recognize a long dormant (or many thought, non-existent) federal jurisdiction over major crimes committed by or against Indians in the Muscogee (Creek) Reservation. And like *Hagen* before it, "the [*McGirt*] decision effectively overruled the contrary conclusion reached in [the *Murphy*] case,[5] redefined the [Muscogee (Creek)] Reservation boundaries ... and conclusively settled the question." *Cuch*, 79 F.3d at 989.

¶27 *McGirt* did not "alter[ ] the range of conduct or the class of persons that the law punishes" for committing crimes. *Schriro v. Summerlin*, 542 U.S.

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[5] *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198 (denying post-conviction relief on claim that Muscogee (Creek) Reservation was Indian Country and jurisdiction of murder was federal under the Major Crimes Act).

348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). *McGirt* did not determine whether specific conduct is criminal, or whether a punishment for a class of persons is forbidden by their status. *McGirt's* recognition of an existing Muscogee (Creek) Reservation effectively decided *which sovereign* must prosecute major crimes committed by or against Indians within its boundaries, crimes which previously had been prosecuted in Oklahoma courts for more than a century. But this significant change to the extent of state and federal criminal jurisdiction affected "only the *manner of determining* the defendant's culpability." *Schriro*, 542 U.S. at 353, 124 S.Ct. 2519 (emphasis in original). For purposes of our state law retroactivity analysis, *McGirt's* holding therefore imposed only *procedural* changes, and is clearly a procedural ruling.

¶28 Second, the procedural rule announced in *McGirt* was new.[6] For purposes of retroactivity

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[6] *McGirt's* recognition of the entire historic expanse of the Muscogee (Creek) Nation as a reservation was undoubtedly new in the *temporal* sense. We take it as now well-established that "Oklahoma exercised jurisdiction over all of the lands of the former Five [ ] Tribes based on longstanding caselaw from statehood until the Tenth Circuit in *Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967 (10th Cir.1987) found a small tract of tribally-owned treaty land existed along the Arkansas River in Tulsa County, Oklahoma." *Murphy v. Sirmons*, 497 F. Supp.2d 1257, 1288-89 (E.D. Okla. 2007). Until *McGirt*, this Court, and Oklahoma law enforcement officials generally, declined to recognize the historic boundaries of *any* Five Tribes reservation, *as such*, as Indian Country. *See, e.g.*, 11 Okla. Op. Att'y. Gen. 345 (1979), available at 1979 WL 37653, at *8-9 (stating the Attorney General's opinion that "there is no 'Indian country' in said former 'Indian Territory' over which tribal and thus federal jurisdiction exists").

analysis, a case announces a new rule when it breaks new ground, imposes a new obligation on the state or federal government, or in other words, the result was not dictated by precedent when the defendant's conviction became final. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1114 (finding rule of inadmissibility of certain evidence broke new ground and was not dictated by precedent when defendant's conviction became final).

¶29 *McGirt* imposed new and different obligations on the state and federal governments. Oklahoma's new obligations included the reversal on direct appeal of at least some major crimes convictions prosecuted (without jurisdictional objections at the time, and apparently lawfully) in these newly recognized parts of Indian Country; and to abstain from some future arrests, investigations, and prosecutions for major crimes there. The federal government, in turn, was newly obligated under *McGirt* to accept its jurisdiction over the apprehension and prosecution of major crimes by or against Indians in a vastly expanded Indian Country.

¶30 *McGirt's* procedural rule also broke new legal ground in the sense that it was not dictated by, and indeed, arguably involved controversial innovations upon, Supreme Court precedent. For today's purposes, the holding in *McGirt* was dictated by precedent only if its essential conclusion, i.e., the continued existence of the Muscogee (Creek) Reservation, was "apparent to all reasonable jurists" when Mr. Parish's conviction became final in 2014. *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997).

¶31 In 2005, this Court had declined to recognize the claimed Muscogee (Creek) Reservation, and thus

denied the essential premise of the claim on its merits, in *Murphy v. State*, 2005 OK CR 25, ¶¶ 50-52, 124 P.3d at 1207-08. From then until the Tenth Circuit Court of Appeals' 2017 decision in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), no court that had addressed the issue, including the federal district court that initially denied Murphy's habeas claim, had embraced the possibility that the old boundaries of the Muscogee (Creek) Nation remained a reservation.[7]

¶32 With no disrespect to the views that later commanded a Supreme Court majority in *McGirt*, the dissenting opinion of Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Thomas, whom we take to be "reasonable jurists" in the required sense, certainly did *not* view the holding in *McGirt* as dictated by precedent even in 2020, much less in 2014.[8]

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[7] *McGirt*, 140 S.Ct. at 2497 (Roberts, C.J., dissenting). In *Murphy v. Sirmons*, 497 F.Supp.2d 1257, 1289-90 (E.D. Okla. 2007), the federal habeas court held thus:

> While the historical boundaries of once tribally owned land within Oklahoma may still be determinable today, there is no question, based on the history of the Creek Nation, that Indian reservations do not exist in Oklahoma. State laws have applied over the lands within the historical boundaries of the Creek nation for over a hundred years.

The federal district court found "no doubt the historic territory of the Creek Nation was disestablished as a part of the allotment process." *Id*., at 1290. The court concluded that our 2005 decision "refusing to find the crime occurred on an Indian 'reservation' [was] not 'contrary to nor an unreasonable application of Federal law as determined by the United States Supreme Court.' " *Id*.

[8] The mere existence of a dissent does not establish that a rule is new, but a 5-4 split among Justices on whether precedent dictated a holding is strong evidence of a novel departure from precedent. *Beard*, 542 U.S. at 414-15, 124 S.Ct. 2504 (finding that the four dissents in *Mills v. Maryland* [486 U.S. 367, 108 S.Ct. 1860, 100

Chief Justice Roberts's dissent raised a host of reasonable doubts about the majority's adherence to precedent,[9] arguing at length that it had divined the existence of a reservation only by departing from the governing standards for proof of Congress's intent to disestablish one, *McGirt*, 140 S.Ct. at 2489; and in many other ways besides,[10] "disregarding the 'well settled' approach required by our precedents." *Id*. at 2482 (Roberts, C.J., dissenting). The *McGirt* majority, of course, remains just that, but the Chief Justice's reasoned, precedent-based objections are additional proof that *McGirt's* holding was not "apparent to all reasonable jurists" when Mr. Parish's conviction became final in 2014.

¶33 Third, our independent exercise of authority to impose remedial constraints under state law on the collateral impact of *McGirt* and post-*McGirt* litigation is consistent with both the text of the opinion and the Supreme Court's apparent intent. As already demonstrated, *McGirt* is neither a substantive rule nor a watershed rule of criminal procedure. The Supreme Court itself has not declared that *McGirt* is retroactive to convictions already final when the ruling was announced.

¶34 *McGirt* was never intended to annul decades of

L.Ed.2d 384 (1988)] strongly indicated that the rule announced was not dictated by *Lockett v. Ohio* [438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)]).

[9] Principally *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), and *Nebraska v. Parker*, 577 U.S. 481, 136 S.Ct. 1072, 194 L.Ed.2d 152 (2016).

[10] See generally, *McGirt*, 140 S.Ct. at 2485-2489 (Roberts, C.J., dissenting).

final convictions for crimes that might never be prosecuted in federal court; to free scores of convicted prisoners before their sentences were served; or to allow major crimes committed by, or against, Indians to go unpunished. The Supreme Court's intent, as we understand it, was to fairly and conclusively determine the claimed existence and geographic extent of the reservation.

¶35 The Supreme Court predicted that *McGirt's* disruptive potential to unsettle convictions ultimately would be limited by "other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few," designed to "protect those who have reasonably labored under a mistaken understanding of the law." *McGirt*, 140 S.Ct. at 2481. The Court also well understood that collateral attacks on final state convictions based on *McGirt* would encounter "well-known state and federal limitations on post-conviction review in criminal proceedings." *Id*. at 2479. "[P]recisely because those doctrines exist," the Court said, it felt "free" to announce a momentous holding effectively recognizing a new jurisdiction and supplanting a longstanding previous one, "leaving questions about reliance interests for later proceedings crafted to account for them." *Id*. at 2481 (brackets and ellipses omitted).

¶36 Those questions are now properly before us and urgently demand our attention. Because *McGirt's* new jurisdictional holding was a clear break with the past, we have applied *McGirt* to reverse several convictions for major crimes pending on direct review, and not yet final, when *McGirt* was announced. The balance of competing interests is very different in a final conviction, and the reasons for non-retroactivity

of a new *jurisdictional* rule apply with particular force. Non-retroactivity of *McGirt* in state post-conviction proceedings can mitigate some of the negative consequences so aptly described in *Cuch*, striking a proper balance between the public safety, finality, and reliance interests in settled convictions against the competing interests of those tried and sentenced under the prior jurisdictional rule.

¶37 The State's reliance and public safety interests in the results of a guilty plea or trial on the merits, and appellate review according to then-existing rules, are always substantial. Though Oklahoma's jurisdiction over major crimes in the newly recognized reservations was limited in *McGirt* and our post-*McGirt* reservation rulings, the State's jurisdiction was hardly open to doubt for over a century and often went wholly unchallenged, as it did at Mr. Parish's trial in 2012.

¶38 We cannot and will not ignore the disruptive and costly consequences that retroactive application of *McGirt* would now have: the shattered expectations of so many crime victims that the ordeal of prosecution would assure punishment of the offender; the trauma, expense, and uncertainty awaiting victims and witnesses in federal re-trials; the outright release of many major crime offenders due to the impracticability of new prosecutions; and the incalculable loss to agencies and officers who have reasonably labored for decades to apprehend, prosecute, defend, and punish those convicted of major crimes; all owing to a longstanding and widespread, but ultimately mistaken, understanding of law.

¶39 By comparison, Mr. Parish's legitimate interests in post-conviction relief for this jurisdictional

error are minimal or non-existent. *McGirt* raises no serious questions about the truth-finding function of the state courts that tried Mr. Parish and so many others in latent contravention of the Major Crimes Act. The state court's faulty jurisdiction (unnoticed until many years later) did not affect the procedural protections Mr. Parish was afforded at trial. The trial produced an accurate picture of his criminal conduct; the conviction was affirmed on direct review; and the proceedings did not result in the wrongful conviction or punishment of an innocent person. A reversal of Mr. Parish's final conviction now undoubtedly would be a monumental victory for him, but it would not be justice.

¶40 Because we hold that *McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction, the order vacating Mr. Parish's murder conviction was unauthorized by state law. The State ordinarily may file a regular appeal from an adverse post-conviction order, but here, it promptly petitioned this Court for extraordinary relief and obtained a stay of proceedings. The time for filing a regular post-conviction appeal (twenty days from the challenged order) has since expired. Rule 5.2(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

¶41 The petitioner for a writ of prohibition must establish that a judicial officer has, or is about to, exercise unauthorized judicial power, causing injury for which there is no adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). There being no adequate remedy by appeal, the injury caused by the

unauthorized dismissal of this final conviction justifies the exercise of extraordinary jurisdiction. The writ of prohibition is **GRANTED**. The order granting post-conviction relief is **REVERSED**.

ROWLAND, P.J.: CONCURS

HUDSON, V.P.J.: SPECIALLY CONCURS

LUMPKIN, J.: SPECIALLY CONCURS

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCUR:

¶1 I commend Judge Lewis for his thorough discussion of the retroactivity principles governing this case. I write separately to summarize my understanding of today's holding. Today's ruling holds that *McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020) does not apply retroactively on collateral review to convictions that were final before *McGirt*. We apply on state law grounds the retroactivity principles from *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) in reaching this conclusion because the United States Supreme Court has not previously ruled on the retroactivity of *McGirt*. We hold that *McGirt* is a new rule of criminal procedure not dictated by precedent, that represents a clear break with past law and that imposes a new obligation on the State. The Supreme Court recently acknowledged there is no longer an exception in its *Teague* jurisprudence for watershed procedural rules to be applied retroactively and we incorporate this ruling in today's decision. *See Edwards v. Vannoy*, —— U.S. ——, 141 S. Ct. 1547, 1561, 209 L.Ed.2d 651 (2021). Today's decision is also based on *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996) which addressed a similar situation. We

overrule our previous decisions in which we have applied *McGirt* on post-conviction review. Today's decision, however, reaffirms our previous recognition of the existence of the various reservations in those cases.

¶2 Based on this understanding of our holding, I fully concur in today's decision. While this decision resolves one aspect of the post-*McGirt* jurisdictional puzzle, many challenges remain for which there are no easy answers. So far, Congress has missed the opportunity to implement a practical solution which, at this point, seems unlikely. It is now up to the leaders of the State of Oklahoma, the Tribes and the federal government to address the jurisdictional fallout from the *McGirt* decision. Only in this way, with all of these parties working together, can public safety be ensured across jurisdictional boundaries in the historic reservation lands of eastern Oklahoma. It will require this type of cooperation in the post-*McGirt* world to ensure that stability is restored to Oklahoma's criminal justice system.

LUMPKIN, JUDGE, SPECIALLY CONCURRING:

¶1 I compliment my colleague on a well-researched opinion which accurately sets out the decisions of the U.S. Supreme Court and the Tenth Circuit Court of Appeals regarding giving retroactive effect to Supreme Court decisions. I especially compliment him for recognizing the scholarly analysis of Chief Justice Roberts in the *McGirt* dissent which shows by established precedent that the *McGirt* majority was not fully analyzing and applying past precedent of the Court in its decision.

¶2 I join this opinion based on the precedent set by the United States Supreme Court and the Tenth Circuit Court of Appeals. In doing so I cannot divert from basic principles of stating the obvious. In recognizing that the federal precedents set forth in the opinion and this writing are binding on this Court, I cannot overlook the legal fact that each of them applied a policy relating to collateral attacks on judgments rendered by courts lacking jurisdiction to render those judgments. When those courts found the lower courts rendering the subject judgments had no jurisdiction to render them, the result of this finding should have been to render the judgments void. Rather than declaring those judgments void, the courts instead formulated a policy limiting the retroactive application of their decisions, thereby preserving from collateral attack final judgments preceding them.

¶3 Keeping the policy decisions reflected in those opinions in mind, I do diverge from the court in labeling the *McGirt* ruling as procedural. When the federal government pre-empts a field of law, the legal effect is to deprive states of their jurisdiction in that area of the law. If a court lacks jurisdiction to act then any rulings and judgments would appear to be void when rendered.[1] As the opinion notes, this Court since

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[1] I realize courts in the past have engaged in legal gymnastics to keep from voiding judgments rendered by a court without jurisdiction by finding that a court's judgment must be void on its face before it can be held void. *Springer v. Townsend*, 336 F.2d 397, 401 (10th Cir. 1964) (in deciding whether a probate decree was void, the Court stated "our scope of review is limited to determining whether a lack of jurisdiction in the approval proceeding affirmatively appears from the record."; "[a] judgment will not be held to be void on its face unless an inspection will affirmatively disclose that the court had no jurisdiction of the

statehood has recognized and honored federal jurisdiction as to Indian allotments and dependent Indian communities. Those areas are subject to federal jurisdiction and that jurisdiction is recognized by the federal government, the tribes and the State of Oklahoma. There was no question Oklahoma had jurisdiction over the rest of the state and this Court, as the court with exclusive jurisdiction in criminal cases, faithfully honored those jurisdictional claims.

¶4 Regardless, a 5-4 majority of the Supreme Court disregarded the precedent set out by Chief Justice Roberts in his dissent to *McGirt*, and for the first time in legal history determined the existence of a reservation in Oklahoma based on "magic words" rather than historical context.[2] In doing so, the

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person, no jurisdiction of the subject matter, or had no judicial power to render the particular judgment." *Clay v. Sun River Mining Co.*, 302 F.2d 599, 601 (10th Cir. 1962); "[a]s long as the supporting record does not reflect the district court's lack of authority, the district court order cannot be declared "void." Such an order is instead only "voidable." *Bumpus v. State*, 1996 OK CR 52, ¶ 7, 925 P.2d 1208, 1210; "[t]his Court has held in numerous cases that in order for a judgment to be void as provided in the Statute just quoted, it must be void on the face of the record, and that extrinsic evidence is not admissible to show judgment is void on the face of the record." *Scoufos v. Fuller*, 1954 OK 363, 280 P.2d 720, 723. However, logic and common sense dictate that if a court had no authority to act then any actions would be a nullity. Regardless, I apply the precedent cited in the opinion and specially concur.

[2] In *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), the Court enunciated several factors which must be considered in determining whether a reservation has been disestablished. Those factors are: the explicit language of Congress evincing intent to change boundaries; events surrounding the passage of surplus land acts which "reveal a widely-held, contemporaneous understanding that the affected

majority in *McGirt* declared this reservation has always been in existence, even after Oklahoma became a state. This operative wording in the opinion creates a legal conundrum in that *McGirt* states that legally Oklahoma never had jurisdiction on this newly identified Indian reservation. This holding creates a question as to every criminal judgment entered by a state court regarding its validity. If all courts involved in this issue held themselves to the legal effect of this holding then those judgments would be void.

¶5 However both the Supreme Court and the Tenth Circuit have shown us by their precedents that courts have an option other than the legal one in cases of this type and that is the application of legal policy. As set out in the opinion, each of those courts has applied policy regarding retroactive application of cases based on the chaos, confusion, harm to victims, *etc*., if retroactive application occurred. The *McGirt* decision is the *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), decision in reverse. In upholding the state court conviction, the Court held in *Hagen* that Congress had disestablished the Uintah reservation; therefore, the federal district court did not have jurisdiction to decide the subject case. In a later case involving the same land area, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), the Tenth Circuit found that although the federal district court lacked jurisdiction to try the subject cases, there was no need to vacate the judgments for lack of jurisdiction because of the harm it would cause and because those

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reservation would shrink as a result of the proposed legislation ..."; Congress's subsequent treatment of the subject areas; identity of who moved onto the affected land; and the subsequent demographic history of those lands. *Id*. at 470-72, 104 S.Ct. 1161.

defendants were given a fair trial and made no complaints regarding the fairness. Thus the court applied policy rather than the law which would have rendered the judgments void due to lack of subject matter jurisdiction.

¶6 The legal effect of the *McGirt* decision, finding Oklahoma lacked jurisdiction to try cases by or against Indians in Indian Country due to federal preemption through the Major Crimes Act, would be to declare the associated judgments void. However, we now adopt the federal policy and established precedent of selective retroactive application in these type of cases due to the ramifications retroactive application would have on the criminal justice system and victims. This is hard to explain in an objective legal context but provides a just and pragmatic resolution to the *McGirt* dilemma.

APPENDIX B

Court of Criminal Appeals of Oklahoma.

STATE EX REL. Mark MATLOFF,
District Attorney, Petitioner

v.

The Honorable Jana WALLACE
District Judge, Respondent.

Decided: 05/21/2021

ORDER GRANTING STAY OF PROCEEDINGS AND DIRECTING SUPPLEMENTAL BRIEFS

¶1 The State of Oklahoma, by Mark Matloff, District Attorney of Pushmataha County, petitions this Court for the writ of prohibition against enforcement of Judge Jana Wallace's April 13, 2021 order granting post-conviction relief, vacating and dismissing the second degree murder conviction of Clifton Merrill Parish in Pushmataha County Case No. CF-2010-26.

¶2 Parish was tried by jury and found guilty of second degree felony murder in March, 2012. The jury sentenced him to twenty-five years imprisonment. This Court affirmed the conviction on direct appeal in *Parish v. State*, No. F-2012-335 (Okl.Cr., March 6, 2014)(unpublished). Parish did not petition for rehearing, and apparently did not petition the United States Supreme Court for a writ of certiorari within the allowed ninety-day time period. On or about June 4, 2014, Parish's conviction became final.[1]

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[1] *Walker v. State*, 1997 OK CR 3, ¶ 3 n.7, 933 P.2d 327, 330 n.7 (citing *Teague v. Lane*, 489 U.S. 288, 295, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989))(defining a final conviction as one where

¶3 In August, 2020, Parish sought post-conviction relief, alleging that the State of Oklahoma lacked subject matter jurisdiction to try him for murder under the Supreme Court's decision in *McGirt v. Oklahoma*, —— U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). Judge Wallace held a hearing and found that Parish was an Indian and committed his crime within the Choctaw Reservation, the continued existence of which was recently recognized by this Court, applying *McGirt*, in *Sizemore v. State*, 2021 OK CR 6, ¶ 16, —— P.3d ——, ——.

¶4 Because the Choctaw Reservation is Indian Country, Judge Wallace found that the State lacked subject matter jurisdiction to try Parish for murder under the Major Crimes Act, 18 U.S.C. § 1153. Applying the familiar rule that defects in subject matter jurisdiction can never be waived, and can be raised at any time, Judge Wallace held that Parish's conviction for second degree murder was void and ordered the charge dismissed.

¶5 Judge Wallace initially stayed enforcement of the order until April 21, 2021, then effectively extended the stay by setting the matter for status conference on June 10, 2021. Petitioner Matloff filed in this Court a verified request for a stay of all trial court proceedings, which is hereby **GRANTED**. Pursuant to Rules 10.1(C)(2), (3), and (4), and 10.5(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), Petitioner Matloff is hereby directed to file with the Clerk of this Court a certified copy of the original record containing the documents previously

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judgment was rendered, the availability of appeal exhausted, and the time to petition for certiorari had elapsed).

designated, with an original or certified copy of the transcript of proceedings, if any.

¶6 Petitioner Mark Matloff and Attorney Debra K. Hampton, post-conviction counsel for party-in-interest Clifton Parish, are hereby directed within twenty days of this order to submit briefs of not more than twenty pages, addressing the following question:

> In light of *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *Edwards v. Vannoy* (No. 19--5807), 593 U.S. —— (May 17, 2021), cases cited therein, and related authorities, should the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* be applied retroactively to void a state conviction that was final when *McGirt* and *Sizemore* were announced?

¶7 Representatives of the Attorney General of Oklahoma and the Choctaw Nation are also invited to enter appearances and file briefs according to these guidelines. The Clerk is directed to immediately forward copies of this order to the following parties and counsel:

The Honorable Jana Wallace Associate District Judge 302 S.W. B Antlers, OK 74523	Debra K. Hampton Attorney at Law 3126 S. Blvd. #304 Edmond, OK 73103
Clifton Parish #473315 Mack Alford CC P.O. Box 220 Stringtown, OK 74569	Mike Hunter Attorney General 313 N.E. 21st St. Oklahoma, OK 73105

Mark Matloff District Attorney 204 S.W. 4th St. #6 Antlers, Oklahoma 74523

Jacob Keyes Choctaw Nation P.O. Box 1210 Durant, OK 74702

¶8 **IT IS SO ORDERED**.

/s/ DANA KUEHN, Presiding Judge

/s/ SCOTT ROWLAND, Vice Presiding Judge

/s/ GARY L. LUMPKIN, Judge

/s/ DAVID B. LEWIS, Judge

/s/ ROBERT L. HUDSON, Judge

APPENDIX C

IN THE DISTRICT COURT OF THE
SEVENTEENTH JUDICIAL DISTRICT
SITTING IN AND FOR PUSHMATAHA COUNTY,
OKLAHOMA

STATE OF OKLAHOMA,	)	FILED APRIL 13,
Plaintiff,	)	2021
VS.	)	
CLIFTON PARISH,	)	
Defendant.	)	

This matter came before the Court today on the Defendant's Application for Post Conviction relief, alleging he is a member of the Choctaw Nation and the crimes occurred within the historical boundaries of the Choctaw Nation reservation (Indian Country). If these two conditions are met the United States Supreme Court has held, this Court has no jurisdiction.

In the above entitled and numbered case an evidentiary was hearing was set, at which time, it was determined Clifton Parish is a member of a federally recognized American Indian tribe, he has some degree of Indian blood as evidenced by a CDIB card, a Choctaw Nation Tribal membership card and a letter from the Choctaw Nation, copies of which were filed by the defendant.

The District Attorney's office stipulates to the fact the events complained of in the charge occurred within the historical boundaries of the Choctaw Nation reservation.

Therefore, pursuant to an order by the Supreme Court of the United States of America, the state of

Oklahoma has no jurisdiction in this matter, the jurisdiction lies solely with the federal or tribal governments, the Application for Post Conviction relief is granted and the case is dismissed without cost. This order shall be stayed until April 21, 2021, due to the Oklahoma Court of Criminal Appeals did not make their mandate effective for 20 days from the date of the order. COURT CLERK TO MAIL COPIES TO THE ATTORNEYS OF RECORD AND ATTACH A CERTIFICATE OF MAILING HERETO. SO ORDERED THIS 7TH DAY OF APRIL 2021.

/s/ Jana Wallace
HONORABLE JANA WALLACE

CERTIFICATE OF MAILING

I, Casey Ranallo, Deputy Clerk, do certify that I did mail a copy of the foregoing instrument to:

DISTRICT ATTORNEY- ANTLERS

DEBRA HAMPTON
HAMPTON LAW
3126 S BLVD # 304
EDMOND, OK 73013

CLIFTON PARISH/ DOC # 473315
MACK ALFORD CORRECTIONAL CENTER
P.O. BOX 220 STRINTOWN, OK 74569

/s/ _____

Deputy Clerk

APPENDIX D

IN THE DISTRICT COURT OF THE
SEVENTEENTH JUDICIAL DISTRICT
SITTING IN AND FOR PUSHMATAHA COUNTY,
OKLAHOMA

STATE OF OKLAHOMA, Plaintiff,	)	
	)	CF-2010-25
VS.	)	
CLIFTON PARISH, Defendant.	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Now on this 7th day of April 2021, the Defendant's Application for Post Conviction Relief came before the Court. The Defendant, defendant counsel and the State were excused from appearing before the Court. The defendant filed his motion on August 17, 2020, and was set for status/hearing on this date due to the Court waiting on the Court of Criminal Appeals decisions regarding the Choctaw Nation. The State did not file an objection and/or answer to the application. Based on the facts presented to this Court in the defendant's Application and the stipulations by both parties, the Court finds as follows.

FINDING OF FACTS

1. The defendant was convicted of Murder in the Second Degree under 21 O.S. § 701.8 on April 12, 2012.
2. Defendant filed an Application for Post Conviction

Relief on August 17, 2020, the matter was not set until October 21, 2020, in order to give the State ample time to file an answer or objection. The matter was continued to November 18, 2020, and then to January 2021, at which time is was continued to April 7, 2021, waiting on the Court of Criminal Appeals case regarding the Choctaw Nation reservation.

3. The State and defendant stipulated to two facts; 1) the defendant has a degree of Indian blood and he is an enrolled member of the Choctaw Nation; 2) the crime happened within the historical boundaries of the Choctaw Nation.

4. The Indian Removal Act of 1830 authorized the President's representative to negotiate with the Choctaw Nation. The negotiations lead to an agreement for the Choctaw Nation to move west of the Mississippi River in a land exchange with the federal government. The government was to receive the ancestral land and the Choctaw Nation would move to the land reserved for them west of the Mississippi. Indian Removal Act of 1830.

5. The 1830 Treaty of Dancing Rabbit Creek granted to the 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 Nation ceding their lands east of the Mississippi. Article IV granted the Nation, "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." The boundaries of the land reserved for the Nation was described as; "Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary-line of the State of Arkansas crosses the said river, and running thence due south to Red River; thence up Red River to the point where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River; thence down said river to the place of beginning." 1830 Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333.

6. In 1837 Treaty of Doaksville entered between the Choctaws and Chickasaws made the provision of the 1830 Treaty of Dancing Rabbit applicable to the Chickasaw Nation and granted the Chickasaw Nation a district within the Choctaw Nation territory. 1837 Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573.

6. In 1855, Treaty of Washington modified the western boundary of the Chickasaw territory, but reaffirmed the 1830 and 1837 Treaties by explicitly asserting, "pursuant to the Indian Removal Act, the United States does hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes," reserving the land from sale, "without the consent of both tribes" and reaffirming the right to self-govern. 1855 Treaty of Washington with the Choctaw and Chickasaw, June 22 1855, 11 Stat. 611.

7. In 1866 the Choctaw Nation entered into a Treaty

which merely reaffirmed the Nation's right to self-govern, and confirmed the previous Treaties provisions, as well as once again reiterated peace with the United States after the Civil War. The Choctaw and Chickasaw Nations ceded the land west of the 98 degrees west longitude formerly known as the leased district to the Federal Government at this time for payment as set forth in the Treaty. 1866 Treaty of Washington with the Chickasaw and Choctaw, Apr. 28 1866, 14 Stat. 769.

8. The Choctaw Nation is a federally recognized Indian Tribe that exercises sovereign authority under a constitution approved by the Secretary of Interior. Choctaw Nation Constitution. The Nation has established and maintained a Court system, which both the Nation and the State of Oklahoma giving full faith and credit to each other's court judgments, in much the same way as any other State in the Union. *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994); Full Faith and Credit of Tribal Courts, Okla. State Cts. Network (April 18, 2019), Https://www.osen.net/applications/osen/DeliverDocument.asp?CiteID=458214.

9. No evidence was presented to this Court from the State and/or the Defendant that the treaties referenced above have ever been nullified or modified, nor was any evidence presented that the Federal Government has ever disestablished or diminished the lands reserved to the Choctaw Nation, with the exception of the 1866 treaty, which sold the west land.

CONCLUSIONS OF LAW

The Supreme Court found in *McGirt* congress did not specifically disestablish the Creek Nation reservation in eastern Oklahoma, therefore the land is still a reservation. The Oklahoma Court of Criminal Appeals has now found that the Choctaw Nation reservation has never been disestablished, therefore the land is still is still a reservation. If the land is still a reservation the Major Crimes Act (MCA) applies. The MCA requires any Indian who commits certain enumerated crimes in Indian country against another Indian or any other person is subject to the **exclusive** jurisdiction of the United States. 18 U.S.C. §§ 1151-1153. In the case at bar the State and defendant stipulated to the defendant's heritage (degree of Indian blood), as well as his Tribal membership in the Choctaw Nation. In addition, the parties stipulated to the fact the crime occurred within the historical boundaries of the Choctaw Nation. The State did not provide any evidence concerning the disestablishment of the Choctaw Nation reservation.

Congress established the Choctaw reservation by treaty in 1830 when it set aside land for the Choctaw Nation west of the Mississippi, in fee simple in exchange for the land the Tribe occupied east of the Mississippi. Article II of the 1830 treaty provides;

> The United States under a grant specially to be made by the President of the U.S. shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to insure to them while they shall exist as a nation and live on it, beginning near Fort Smith

> where the Arkansas boundary crosses the Arkansas River running thence to the source of the Canadian for; 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 same.

The boundaries of the land reserved for the Choctaw Nation was specifically set out in the treaty and was set aside for the Tribe, "as long they exist as a nation and live on it." Article II of 1830 Treaty.

The *McGirt* Court explained, the Indian Removal Act authorized the President's representatives to agree to such terms. In that Act Congress authorized the President "to assure the tribe . . . that the United States will forever secure and guaranty to them . . . the country so exchanged with them." Indian Removal Act of 1830, § 3, 4 Stat. 412. "[A]nd if they prefer it, the United States will cause a patent or grant to be made and executed to them for the same; Provided always, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same." *Id*.

Article IV of the 1830 Treaty guaranteed the Choctaw Nation "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." *Id*. These terms established the Choctaw Reservation, defined it's boundaries, and promised these lands to the Choctaw for as long as "they shall exist as nation and live on it." 1830 Treaty Art. II.

The Choctaw Nation parallels the analysis the Court applied in *McGirt*. In the 1830 Treaty, the government granted the land, "in fee simple to them and their descendants, to insure to them while they shall exist as a nation." By the 1837 Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573 (1837 Treaty), the Chickasaw Nation was granted a "district within the limits of [the Treaty Territory], on the following terms: It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held 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,) to be called the Chickasaw district of the Choctaw Nation." 1837 Treaty art. I.

In 1842, the land was conveyed fee patented title to the Treaty Territory to the Choctaw Nation (1842 Patent), reciting the terms of Article II of the 1830 Treaty in the patent and expressly reserving the Treaty Territory from sale without their consent, *Fleming v. McCurtain*, 215 U.S. 56, 58 (1909) (first quoting 1830 Treaty art. II; and then quoting 1842 Patent).

In the 1855 Treaty, "the boundaries of the Choctaw and Chickasaw country" were modified, and explicitly set forth as modified, Congress promised that "pursuant to an act of Congress approved May 28, 1830 [i.e., 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 the Chickasaw and Choctaw country was explicitly reserved from sale "without the consent of both tribes." *Id* art I. The 1855

Treaty also reaffirmed the existence of the Chickasaw district and modified its boundaries. *Id*. art. II. The 1855 Treaty further provided that "the remainder of the country held in common by the Choctaws and Chickasaws, shall constitute the Choctaw district." *Id*. art. V. The terms set out in the treaty reaffirmed the existence of the Choctaw Reservation, modified and explicitly restated its boundaries, and reaffirmed the Choctaw's rights of self-government.

The Choctaw Nation entered into the 1866 Treaty following the Civil War. The 1866 Treaty ended any remaining hostilities by providing that permanent peace and friendship are hereby established between the United States and said nations," and promising mutual amnesty. *Id* arts. I, V. The Nations also "cede[d] to the United States the territory west of the 98 degrees west longitude, known as the leased district," for a sum certain of three hundred thousand dollars, *Id*. art. III, which modified the western boundary of the Choctaw Reservation. In addition, the 1866 Treaty reaffirmed the Chickasaw and Choctaw Nations' rights of self-government, *Id*. art. VII, and all pre-existing Treaty rights of the Chickasaw and Choctaw Nations not inconsistent with the 1866 Treaty. *Id*. arts. X, XLV.

Applying the same reasoning employed by the *McGirt* Court, the Choctaw Nation's Treaties established the Choctaw Reservation: namely, by setting aside land for the Choctaw to exist as a nation, establishing its boundaries, providing for the land to be granted in fee and promising freedom from state interference and rights of self-government on the Reservation. These terms established the Choctaw Reservation and defined its boundaries, and as *McGirt*

makes clear, it makes no difference that the Choctaw Nation's Treaties did not use the word "reservation" to describe the Choctaw Reservation, as the Court "has found similar language in treaties from the same era sufficient to create a reservation." *Id*. (citing *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405 (1968) (grant of land "for a home, to be held as Indian lands are held," established a reservation)).

Indeed, in *Atlantic & Pacific R. R. v. Mingus*, the Supreme Court determined that the Indian Territory lands which had been granted to the Choctaw, Cherokee, and Creek under their treaties "were reserved lands, within the meaning of [the Act of July 27, 1866, ch. 278, § 2, 14 Stat. 292, 294 ("1866 Act")],. *Atlantic & P.R. Co*., 165 U.S. 413, 435 (1897) (quoting 1866 Act § 3). The Court concluded that the Indian Territory "stands in an entirely different relation to the United States from other territories, and that for most purposes it is to be considered as an independent country." *Id*. at 435-36. In sum, *Mingus* confirms that the Treaty Territory set aside under the 1830 Treaty and modified by the 1855 and 1866 Treaties is an Indian reservation under federal law. As the *McGirt* Court held with respect to the Creek Reservation, "under any definition, this was a reservation." 140 S. Ct. at 2462. In applying the *McGirt* decision to the facts of this case, this Court must reach the same conclusion concerning the Choctaw Nation as the Court did for the Muskogee Creek Nation.

As the Supreme Court made clear in *McGirt*, to determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *Id*. While Congress's "significant constitutional authority" over tribal relations includes

"the authority to breach its own promises and treaties," *Id*. (citing *Lone Wolf y. Hitchcock*, 187 U.S. 553, 566-68 (1903)), that authority "belongs to Congress alone," and the Supreme Court will not "lightly infer such a breach once Congress has established a reservation," *Id*. (citing *Solem v. Bartlett*, 465 U.S. 463 at 470, (1984)).

McGirt also makes clear that "[U]nder our Constitution, States have no authority to reduce federal reservations lying within their borders," *Id*. In addition, Congress only disestablishes a Reservation by enacting legislation that makes an "explicit reference to cession' or an 'unconditional commitment to compensate the Indian tribe for its opened land,' (alteration in original) (quoting Solem, 465 U.S. at 470), or that "direct[s] that tribal lands shall be 'restored to the public domain,' *Id*. (quoting Hagen v. Utah, 510 U.S. 399, 412 (1994)). "Likewise, Congress might speak of a reservation as being 'discontinued,' abolished,' or 'vacated.' *Id*. at 2463 (quoting *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973)).

This standard establishes that Congress has not extinguished the Choctaw Reservation, nor has Congress altered the boundaries of the Reservation, with the exception of the explicit modification set forth in Article I of the 1855 Treaty, and the explicit cession of land to the United States for a sum certain made by Article III of the 1866 Treaty, which modified the western boundary of the Reservation. It is clear from these specific instances, when Congress wants to diminish the land promised It knows how to specifically so state. Thus the lack of any language is further proof of Congress' intent not to diminish or disestablish the land reserved.

The history of negotiations continued on into the Allotment Era, however the Federal Government even though it intruded on the Nation's right of self-government throughout the remainder of the allotment and integration era, the intrusions never eliminated all of the Nation's interests in the Choctaw lands. In *McGirt* the Court rejected the argument that the intrusion into the Creek Nation's treaty rights eliminated the Creek lands. 140 S.Ct at 2466

In *McGirt*, the Court found that the Creek Nation has chosen to exercise the power of self-government, by, inter alia, ratifying a new constitution and reestablishing the jurisdiction of its courts. *Id*. at 2467. Today the Choctaw Nation exercises its sovereign authority over the Choctaw Reservation under a constitution approved by the Secretary of the Interior, see Choctaw Const. art. XX, under which its government is divided into Executive, Legislative, and Judicial Departments, V, § 1, and the powers of each Department are specifically defined, VI, VII (Executive), VIII, IX (Legislative), XII, XIII (Judicial).

https://www.choctawnation.com/sites/default/files/2020-02/FINAL%20Constitution_1983%20with%202020%20corrections%20and%20amendments%20%28v004%20PDF%29.pdf (last visited November 4, 2020)

Only Congress can erase the boundaries and disestablish a reservation granted by it. 140 S.Ct.at 2467. There was no evidence presented to this Court the Choctaw reservation was or has ever been, "restored to public domain", "discontinued, abolished or vacated". This Court finds Congress established a reservation in Oklahoma for the Choctaw Nation, those boundaries have never been erased, abolished or disestablished. Therefore, the crime occurred in Indian

Country as defined by 18 U.S.C. §1151 and falls under the exclusive jurisdiction of the federal government as set forth in §1153.

A Court has only the jurisdiction conferred to it by law. *Starr v. State*, 115 P. 356, 357 (Okl.Cr.1911). The power to hear a case is granted to the Court by statute or constitution, which is subject matter jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630 (2002). If the Court does not have subject matter jurisdiction the defect can never be forfeited or waived and requires correction no matter if it is raised in district court. *Louisville & Nashville R. Co. V. Mottley*, 211 U.S. 149 (1908); *United States v. Tony*, 637 F.3d 1153, 1158 (10th Cir. 2011); *Ex parte Merton*, 205 P.2d 340, 341-42 (Okla.Crim. 1949). The Oklahoma Court of Criminal Appeals stated in *Armstrong*, "Jurisdiction of the subject matter cannot be conferred by consent, nor can it be waived, and it may be raised at any time before or after trial, and even for the first time in the appellate court." *Armstrong v. State*, 248 P. 877, 878 (Okl.Cr (1926). It is clear from the cases, subject matter jurisdiction cannot be waived by the defendant. In addition, if this Court has no jurisdiction the case must be dismissed as the Court cannot act without the authority granted to it by Law.

THEREFORE, based on the above, this Court does not have subject matter jurisdiction of this particular case. Since this Court does not have subject matter jurisdiction the case must be dismissed. This order was stayed until April 21, 2021. COURT CLERK TO MAIL COPIES OF THIS FINDINGS OF FACTS AND CONCLUSIONS OF LAW TO THE ATTORNEYS OF RECORD AND ATTACH A CERTIFICATE OF MAILING HERETO.

SO ORDERED THIS 27TH DAY OF APRIL 2021.

/s/ Jana Wallace
HONORABLE JANA WALLACE

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE ex rel. MARK MATLOFF, DISTRICT ATTORNEY, Petitioner,	)	**NOT FOR PUBLICATION**
v.	)	Case No. PR-2021-366
THE HONORABLE JANA WALLACE, ASSOCIATE DISTRICT JUDGE, Respondent.	)	

ORDER DENYING MOTION FOR REHEARING, MOTION FOR RECONSIDERATION, AND REQUEST FOR STAY OF THE MANDATE

On August 17, 2021, Clifton Merrill Parish, by counsel Debra K. Hampton, tendered to the Clerk of this Court for filing a *Motion for Reconsideration and Request for Stay of the Mandate* from the Court's August 12, 2021 decision in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, __ P.3d __. Mr. Parish, as a real party in interest and post-conviction petitioner in the above cause, petitions the Court for rehearing and reconsideration on four specific grounds:

1. The Court should reconsider its determination because the petitioner was collaterally estopped from bringing a writ of prohibition because there was an adequate remedy pursuant to post-

conviction procedures act that was ignored by this Court and not mentioned one time in the opinion;

2. This Court overlooked Mr. Parish's arguments that U.S. v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) and clearly established law is controlling to the issue of retroactivity of subject matter jurisdiction claims;

3. This Court did not address the fact that a conviction could not become final because the state courts were not courts of competent jurisdiction;

4. Mr. Parish states this Court did not address Oklahoma's Enabling Act.

Due to the importance of the *Matloff* ruling to Mr. Parish and others similarly situated, Petitioner's tendered motion for rehearing and reconsideration is accepted for filing. The Clerk is hereby directed to file this motion in the official records of this cause. However, according to Rule 3.14(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), a petition for rehearing shall be filed only in regular appeals, as defined by Rule 1.2. Original proceedings are not regular appeals. Rule 10.6(D) further provides that a decision on an extraordinary writ is a final order, for which "[a] petition for rehearing is not allowed."

Mr. Parish's petition for rehearing is therefore **DENIED**. After our review of the reasons offered in Mr. Parish's motion for this Court to reconsider our ruling in *State ex rel. Matloff v. Wallace*, reconsideration is also **DENIED**. Finally, the Court's procedure governing the issuance of a mandate following a decision on appeal does not apply to original proceedings. *See* Rule 3.15(A). Mr. Parish's

request for a "stay of the mandate" pending a petition to the United States Supreme Court for a writ of certiorari is therefore **DENIED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 31st day of August, 2021.

/s/ Scott Rowland
SCOTT ROWLAND, Presiding Judge

/s/ Robert Hudson
ROBERT L. HUDSON, Vice Presiding Judge

/s/ Gary Lumpkin
GARY L. LUMPKIN, Judge

/s/ David Lewis
DAVID B. LEWIS, Judge

ATTEST:

/s/ John D. Hadden
Clerk

ATTEST:

/s/ John D. Hadden
Clerk

APPENDIX F

The Indian Commerce Clause provides:

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

The Supremacy Clause to the U.S. Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

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 22-1080 of Title 22 of the Oklahoma Code provides in relevant part:

> Any person who has been convicted of, or sentenced for, a crime and who claims:
>
> (a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;
>
> (b) that the court was without jurisdiction to impose sentence;
>
> (c) that the sentence exceeds the maximum authorized by law;

(d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.