

Capital Case

Case No. _____

**In the
Supreme Court of the United States**

JAMES CHANDLER RYDER, by and through
Next Friend, SUE RYDER,
Petitioner,
v.
THE STATE OF OKLAHOMA,
Respondent

On Petition for a Writ of Certiorari to the
Oklahoma Court of Criminal Appeals

**APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
VOL. II of II
Appendices I through V
(Pet. App. 140 through Pet. App. 288)**

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ORIGINAL



No. PCD-2020-613

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

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SUPPLEMENTAL BRIEF OF RESPONDENT AFTER REMAND

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER,)	
)	
Petitioner,)	
)	
v.)	Case No. PCD-2020-613
)	
THE STATE OF OKLAHOMA,)	
)	
Respondent.)	

SUPPLEMENTAL BRIEF OF RESPONDENT AFTER REMAND

James Chandler Ryder, hereinafter the Petitioner, was convicted of two counts of First Degree Murder in Pittsburg County District Court Case No. CF-1999-147. *Ryder v. State*, 2004 OK CR 2, ¶¶ 1-2, 83 P.3d 856, 860. In accordance with the jury's recommendations, the Honorable Thomas M. Bartheld, Associate District Judge, sentenced the Petitioner to death for the murder of Daisy Hallum and to life without the possibility of parole for the murder of Sam Hallum. *Id.*

On July 9, 2020, the United States Supreme Court held in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020), that the Creek Nation's Reservation had not been disestablished. On the same day, and for the reasons stated in *McGirt*, the Court also affirmed the Tenth Circuit's decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). *Sharp v. Murphy*, 140 S. Ct. 2412 (2020).

On September 8, 2020, the Petitioner filed with this Court a successive application for post-conviction relief in Case No. PCD-2020-613 (Successive Application for Post-Conviction Relief).¹ In his sole Proposition, the Petitioner claimed the District Court of Pittsburg County did

¹ Before filing a successive post-conviction application, Petitioner was denied direct appeal relief by this Court in *Ryder*, 2004 OK CR 2, 83 P.3d 856, *cert denied.*, *Ryder v. Oklahoma*, 543 U.S. 886 (2004). Petitioner's request for post-conviction relief and an evidentiary hearing was denied by this Court in an unpublished decision. *See Ryder v. State*, PCD-2002-257, slip op. (Okla. Crim. App. Mar. 18, 2004) (unpublished). Petitioner was then denied habeas relief in federal court. *James Chandler Ryder v. Anita Trammell*, Case No. CIV-05-24-JHP-KEW (E.D. Okla. Oct. 11, 2013), *aff'd*, *Ryder ex. rel. Ryder v. Warrior*, 810 F.3d 724 (10th Cir. 2016), *cert denied.*, *Ryder v. Royal*, Case No. 16-5970 (U.S. Nov. 28, 2016).

not have jurisdiction to try him, arguing the murders he committed were against citizens of the Choctaw Nation, and that the murders occurred within the boundaries of the alleged Choctaw Nation Reservation (Successive Application for Post-Conviction Relief at iv-viii, 1-30).

On September 25, 2020, this Court remanded this case for an evidentiary hearing (“Order”), and directed the district court to hold a hearing to determine (1) “the victims’ status as an Indian”; and (2) “whether the crime occurred in Indian Country” (Order at 3). This Court advised that the parties could “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” (Order at 4).

I. Evidentiary Hearing and Subsequent Findings of Fact and Conclusion of Law

On October 14, 2020, counsel for the Petitioner and the Respondent appeared before the Honorable Tim Mills, Associate District Judge of Pittsburg County (O.R.110; Tr. 2).² The Choctaw Nation appeared as Amicus through Mr. Jacob Keyes (O.R. 110; Tr. 2). At the hearing, the parties presented the court with an Agreed Stipulation (O.R. 110-111; Tr. 9; Ex. 1). On October 28, 2020, the district court issued its Order on remand (O.R. 110-120).

The parties stipulated that Daisy Hallum had 1/16th Indian blood, Sam Hallum had 1/32nd Indian blood, and both victims were members of the Choctaw Nation on the date of the crimes (O.R. 111; Ex. 1). The parties further stipulated that the legal description where the crimes occurred “was within the boundaries set forth in the 1855 and 1866 treaties between the Choctaw Nation, the Chickasaw Nation, and the United States” (O.R. 116; Ex. 1).

As to the Indian status issue, the district court found, based on the stipulations of the parties,

² “O.R.” refers to the 120-page Original Record filed in this Court on November 2, 2020, “Tr.” refers to the transcript of the October 14, 2020, hearing held in the district court, and “Ex” Refers to the exhibits admitted at the October 14, 2020, hearing.

that Daisy and Sam Hallum “had some Indian blood,” and “were recognized as Indian by a tribe or the federal government” (O.R. 112). As to the Indian Country issue, the district court applied *McGirt* and found “a reservation was established for the Choctaw Nation by the treaties described above” (O.R. 117). The district court further found “[n]o evidence was presented to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation or that the State of Oklahoma has jurisdiction in this matter.” (O.R. 119). As a result, the district court concluded “the crimes occurred in Indian Country” (O.R. 119).

At the evidentiary hearing, the Respondent preserved its position that the State of Oklahoma should have concurrent jurisdiction over crimes committed by non-Indian defendants against Indian victims in Indian Country and that this matter was waived as Petitioner failed to raise it before his successive post-conviction application (Tr. 14-15). Granted, this Court directed the district court to answer only the two (2) aforementioned questions regarding Indian status and Indian Country (Order at 3). Thus, the district court understandably did not address the State’s concurrent jurisdiction and waiver argument in its subsequent Order (O.R. 110-119). Now, however, this Court has allowed the Petitioner and the Respondent to file supplemental briefs covering “those issues pertinent to the evidentiary hearing” (Order at 4).

II. Concurrent Jurisdiction

Concurrent jurisdiction is certainly pertinent to the evidentiary hearing, as “[u]pon Petitioner’s presentation of *prima facie* evidence as to the victim’s legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction” (Order at 2). As described above, the district court found that Daisy and Sam Hallum were Indians and that this crime occurred in Indian Country. The Respondent must now be permitted to meet its burden of showing it nevertheless had subject matter jurisdiction in this

case through concurrent jurisdiction. Thus, the Respondent respectfully asks this Court to consider—based upon the unanticipated result of *McGirt* and the sheer magnitude of *McGirt*'s impact—the following argument and hold that the State has concurrent jurisdiction in this case.

The Petitioner's jurisdictional claim hinges on his belief that federal courts have exclusive jurisdiction over his crimes pursuant to 18 U.S.C. § 1152 ("General Crimes Act") because, although he is not an Indian, his victims were Indian. As this Court is aware, although there exists a longstanding assumption about the scope of state jurisdiction, if *McGirt* makes one thing clear, longstanding assumptions cannot substitute for clear text. *See McGirt*, 140 S. Ct. at 2462-63, 2468-74. Here, the text of the General Crimes Act does nothing to preempt state jurisdiction:

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

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

18 U.S.C. § 1152. Although the statute refers to the "exclusive jurisdiction of the United States," it does not confer exclusive jurisdiction on the United States. Rather, it incorporates the body of laws which applies in places where the United States has exclusive jurisdiction into Indian Country. As the Supreme Court has already held, the phrase "within the sole and exclusive jurisdiction of the United States" specifies what law applies (*i.e.* the law that applies to federal enclaves that are within the exclusive jurisdiction of the United States), not that the federal government's jurisdiction is exclusive. *Ex parte Wilson*, 140 U.S. 575, 578 (1891) (under the General Crimes Act "the jurisdiction of the United States courts was not sole and exclusive over all offenses committed within the limits of an Indian reservation" because "[t]he words 'sole and

exclusive,’ in [the General Crimes Act] do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it”); *see also* *Donnelly v. United States*, 228 U.S. 243, 268 (1913); *United States v. White*, 508 F.2d 453, 454 (8th Cir. 1974). As *McGirt* said with respect to reservation status, *see McGirt*, 140 S. Ct. at 2462, when Congress seeks to withdraw state jurisdiction, it knows how to do so. *See, e.g.*, 25 U.S.C. § 1911(a) (providing that tribes “shall have jurisdiction, exclusive as to any State, over any child custody proceeding involving an Indian child” on a reservation). Here, the text of the General Crimes Act does not so exclude state jurisdiction over crimes committed by non-Indians like that perpetrated by the Petitioner.

Thus, under the principles firmly established by *McGirt*—where the analysis begins and ends with the text—while the General Crimes Act confers federal jurisdiction over the Petitioner’s crime, nothing in the text of that law deprives the State of concurrent jurisdiction over the same crime. Under *McGirt*, the inquiry should stop here. This is especially true as there exists a strong presumption against preemption of state law, so “unless that was the clear and manifest purpose of Congress,” courts cannot find preemption of state police powers merely because Congress also provided for federal jurisdiction. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted).

Although this Court has sometimes indicated in dicta that the State lacks jurisdiction over non-Indians who victimize Indians, those cases did not involve non-Indian defendants and did not analyze the question presented here, much less issue a binding holding on the matter. *See Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277; *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401. And as *McGirt* noted, such dicta cannot overcome the text of the statute. *McGirt*, 140 S. Ct. at 2473 n.14.³

³ Similarly, although this Court once affirmed dismissal of the prosecution of several individuals, one of whom was not Indian, because the crime occurred on Indian Country, *State v. Burnett*, 1983 OK CR 153, 671 P.2d 1165, that case did not discuss the jurisdictional issues raised here and was later overruled by

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

First, these decisions rely on statements from the Supreme Court suggesting that states lack jurisdiction over crimes such as this, but they admit this is mere dicta. *See Larson*, 455 N.W.2d at 601 (citing *Williams v. United States*, 327 U.S. 711, 714 (1946); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979)); *Flint*, 756 P.2d at 325-26. Again, such dicta cannot substitute for the lack of clear statutory text. Indeed, the Supreme Court had earlier stated that by admission into the Union, a state on equal footing with other states “has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, . . . and that [a] reservation is no longer within the sole and exclusive jurisdiction of the United States,” unless Congress expressly provides otherwise. *United States v. McBratney*, 104 U.S. 621, 623-24 (1881).

This statement was in the context of a holding that, despite the General Crimes Act, jurisdiction over crimes between two non-Indians is within the exclusive jurisdiction of the *state*, and that the federal government lacks jurisdiction over such crimes. *Id.*; *see also Draper v. United States*, 164 U.S. 240 (1896). To be sure, these cases were later limited by *Donnelly v. United States*, 228 U.S. 243 (1913), but that case held only that the federal government had jurisdiction over crimes committed by a non-Indian against an Indian, not that such jurisdiction was exclusive

Klindt, which held that “one’s status as an Indian is a factor in determining jurisdiction.” *Klindt*, 1989 OK CR 75, ¶ 6, 782 P.2d at 403.

or that the state lacked it. There is no reason to assume that, merely because the federal government has jurisdiction over a certain matter, such jurisdiction necessarily precludes concurrent state jurisdiction. Rather, in general, the state and federal governments “exercise concurrent sovereignty.” *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). Thus, “the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.” *Id.* (citing *United States v. Bank of New York & Tr. Co.*, 296 U.S. 463, 479 (1936) (“It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive.”)). Indeed, there is a “‘deeply rooted presumption in favor of concurrent state court jurisdiction’ over federal claims,” and that presumption applies with even more force against arguments attempting to “strip[] state courts of jurisdiction to hear their own *state* claims”—Congress does not “take such an extraordinary step by implication,” and to do so Congress must be “[e]xplicit, unmistakable, and clear.” *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349-52 (2020) (citation omitted). That takes us back to the text of the General Crimes Act which, as explained above, does not clearly preclude state jurisdiction over crimes committed by non-Indians against Indians in Indian Country.⁴

Second, some state courts suggest that states lack jurisdiction over crimes by non-Indians against Indians because of the federal government’s general control over Indian affairs. *See Flint*, 756 P.2d at 325. But while this means states usually lack jurisdiction over Indians (*e.g.*, states lack jurisdiction over major crimes committed by Indians, *see McGirt*, 140 S. Ct. at 2459), this general presumption says nothing about state jurisdiction over *non-Indians*, including those who commit

⁴ *See also Claflin v. Houseman*, 93 U.S. 130, 134 (1876) (although federal bankruptcy courts can exercise jurisdiction over claims against the estate, that does not necessarily preclude concurrent state court jurisdiction over such claims); *Silas Mason Co. v. Tax Comm’n of State of Washington*, 302 U.S. 186, 207 (1937) (upholding concurrent jurisdiction so long as the state’s exercise of jurisdiction was “consistent with federal functions”).

crimes against Indians. After all, states presumptively have jurisdiction over non-Indians, including on reservations. *See, e.g., Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257–58 (1992) (noting “the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands”).

States also have jurisdiction over non-Indians on Indian Country even when they are interacting with Indians, so long as such jurisdiction would not “interfere with reservation self-government or impair a right granted or reserved by federal law”—neither of which is true of concurrent jurisdiction here. *Id.*; *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (upholding concurrent state and tribal jurisdiction to tax non-Indian oil and gas activities on Indian trust land). Thus, in the closest analogous civil context, the Supreme Court “repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country,” because “tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country.” *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g, P.C.*, 467 U.S. 138, 148-49 (1984).⁵

To hold otherwise, and say that the State is presumptively preempted from all jurisdiction over non-Indians when interacting with Indians on reservations, would be absurd. For example, the federal government provides education, health care, and housing services to Indians on reservations. *See, e.g.,* 25 U.S.C. §§ 1601 *et seq.* But that exercise of federal authority does not preclude the State from treating Indians at state-run hospitals, educating Indians in state schools, or providing housing to Indians who need it. Nor does it mean that the State lacks the ability to

⁵ This can only be truer in the criminal context where it is the State, not the victim, that brings prosecution. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

license and discipline non-Indian doctors who are treating Indians at private or state-run hospitals. By the same token, federal jurisdiction to protect Indians from non-Indian criminals like the Petitioner does not divest the State from providing the same service of police protection and criminal justice to Indian victims.

Arguments that states lack any authority over non-Indians interacting with Indians ultimately rely on outdated notions that on reservations Congress's purpose is "segregating [Indians] from the whites and others not of Indian blood." *Donnelly*, 228 U.S. at 272. But Congress has long since moved away from the segregationist policies of the early Republic, and the Supreme Court has recognized the significance of that shift for presumptions about state jurisdiction on reservations, especially over non-Indians. See *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 71-74 (1962). Thus, the Court has held:

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

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

Third, courts have noted that some commentators support the idea that states lack jurisdiction over non-Indians who victimize tribal members. See *Larson*, 455 N.W.2d at 602; *Flint*, 756 P.2d at 327. Other commentators, however, recognize that there is no adequate justification for precluding state jurisdiction over crimes by non-Indian offenders against Indians because (1) "[n]o tribal interest appears implicated by state prosecution of non-Indians for Indian country

crimes, since tribes lack criminal jurisdiction over non-Indians,” and (2) no federal interest is impaired because “state prosecution of a non-Indian does not bar a subsequent federal prosecution of the same person for the same conduct.” AM. INDIAN LAW DESKBOOK § 4:9 (citing, *inter alia*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Abbate v. United States*, 359 U.S. 187 (1959)). As *McGirt* makes clear, Felix Cohen is not always right. *McGirt*, 140 S. Ct. at 2463.

Fourth, some courts have pointed to Public Law 280, *Flint*, 756 P.2d at 327-28, which allows “any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume” such jurisdiction “with the consent of the Indian tribe,” 25 U.S.C. § 1321—with courts implying that the states otherwise lack that jurisdiction over crimes committed “against Indians.” But Public Law 280 has nearly the same language with respect to *civil* jurisdiction, allowing “any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe,” such civil jurisdiction. 25 U.S.C. § 1322. And yet, as noted above, this language has *not* precluded the Supreme Court from ruling that, even without Public Law 280, states generally have jurisdiction over civil actions with Indians as parties, that is, as plaintiffs. *See Three Affiliated Tribes*, 467 U.S. at 148-49. For this reason, mere implications from a later congressional enactment like Public Law 280 cannot overcome the clear text of the General Crimes Act, which does not preclude the exercise of state jurisdiction. *Cf. McGirt*, 140 S. Ct. at 2473 n.14.

Ultimately, state jurisdiction here furthers both federal and tribal interests by providing additional assurance that tribal members who are victims of crime will receive justice, either from the federal government, state government, or both. *Cf. Three Affiliated Tribes*, 467 U.S. at 888 (“tribal autonomy and self-government are not impeded when a State allows an Indian to enter its

court to seek relief against a non-Indian concerning a claim arising in Indian country”). It minimizes the chances abusers and murderers of Indians will escape punishment and maximizes the protection from violence received by Native Americans. This is especially important because, as commentators have expressed in fear after *McGirt*, federal authorities frequently decline to prosecute crimes on their reservations.⁶ While *McGirt* leaves Indians vulnerable under the exclusive federal jurisdiction of the Major Crimes Act, there is no reason to perpetuate that injustice by assuming without textual support exclusive federal jurisdiction over non-Indian on Indian crimes covered by the General Crimes Act. Nor is there reason to believe the State of Oklahoma will not vigorously defend the rights of Indian victims, as it has for a century. See *Oklahoma Tax Comm’n v. United States*, 319 U.S. 598, 608–09 (1943) (“Oklahoma supplies [Indians] and their children schools, roads, courts, police protection and all the other benefits of an ordered society.”). In fact, this very case proves it will. To hold otherwise would amount to “disenfranchising” and “closing our Courts to a large number of citizens of Indian heritage who live on a reservation,” thereby “denying protection from the criminal element of the state.” *Greenwalt*, 663 P.2d at 208-09 (Harrison, J., dissenting).

Thus, the Respondent emphasizes that the *text* of the General Crimes Act controls, and its plain terms do not preclude the State’s jurisdiction in this case. Such jurisdiction over non-Indians who victimize Indians does not interfere with the federal government’s concurrent jurisdiction over such crimes, nor does it impinge on tribal sovereignty, but instead advances the interests of tribal members in receiving justice. And the contrary conclusion unjustifiably intrudes into state

⁶ See, e.g., David Heska Wanbli Weiden, *This 19th-Century Law Helps Shape Criminal Justice in Indian Country And that’s a problem — especially for Native American women, and especially in ape cases*, N.Y. TIMES (July 19, 2020), <https://www.nytimes.com/2020/07/19/opinion/mcgirt-native-reservation-implications.html>.

sovereignty. Therefore, even assuming the existence of a Choctaw Reservation,⁷ as the district court has now found, the State asserts that it had jurisdiction—concurrent jurisdiction—to prosecute the Petitioner for the murders of Daisy and Sam Hallum.

III. Procedural Defenses

In deciding *McGirt*, the Supreme Court expressly invited this Court to apply procedural bars to the jurisdictional challenges that would proliferate in the wake of its decision. *McGirt*, 140 S. Ct. at 2479, n. 15. This Court should accept that invitation as there are two procedural bars that apply to the Petitioner’s jurisdictional claim. First, this Court should refuse to consider the Petitioner’s jurisdictional challenge because he did not raise it until his second post-conviction application, such that it is procedurally barred. Second, this Court should refuse to consider the jurisdictional claim based on the doctrine of laches.

A. Bar on Successive Capital Post-Conviction Applications

Petitioner did not raise his jurisdictional claim in either his direct appeal or his first post-conviction application but first raised the claim in his second post-conviction application. *See generally Ryder*, 2004 OK CR 2, 83 P.3d 856; *Ryder*, No. PCD-2002-257. Section 1089 of Title 22 provides exceptions for filing an untimely claim; however, Petitioner has made no showing that his jurisdictional claim falls within any of the exceptions that would allow its consideration in this successive post-conviction proceeding. 22 O.S.2011, § 1089(D)(8). Accordingly, this Court should find the claim waived.

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

Under § 1089(D)(8)(a), Petitioner cannot show that the legal basis of this claim was previously unavailable. *See* 22 O.S.2011, § 1089(D)(8)(a) (providing that a subsequently

⁷ The State takes no position as to the existence, or absence, of a Choctaw Reservation.

application is not untimely if “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”).⁸ Section 1089(D)(9) further explains that “a legal basis of a claim is unavailable on or before a date described by this subsection if the legal basis . . . was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court . . . ,” or “is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court” 22 O.S.2011, § 1089(D)(9)(a)-(b). Thus, there are two ways in which Petitioner can show a previously unavailable legal basis—he satisfies neither way.

Under § 1089(D)(9)(a), Petitioner could reasonably have formulated the legal basis for his jurisdictional claim years prior to either the Tenth Circuit’s decision in *Murphy* or the Supreme Court’s decision in *McGirt*. Specifically, at the time of his direct appeal and first post-conviction application, Petitioner could have raised this claim based on the Major Crimes Act and *Solem v. Bartlett*, 465 U.S. 463 (1984).⁹ Both *Murphy* and *McGirt* concluded that the Creek Reservation had not been disestablished primarily based on application of *Solem* and an examination of statutes enacted in the late 1800s and early 1900s. *McGirt*, 140 S. Ct. at 2460-2475; *Murphy*, 875 F.3d at 937-54. Petitioner, too, bases his jurisdictional claim on *McGirt*, an application of *Solem*, and treaties and laws from the 1700s and 1800s. App. at 11-30. Clearly, his claim was previously available. See *Walker v. State*, 1997 OK CR 3, ¶ 33, 933 P.2d 327, 338, *superseded by statute on other grounds*, 22 O.S.Supp.2004, § 1089(D)(4) (concluding that the legal basis for Walker’s claim

⁸ Respondent recognizes, and discusses below, this Court’s recent contrary conclusion in an unpublished order that a jurisdictional claim under *Murphy/McGirt* was not previously available.

⁹ Indeed, *Murphy* himself raised his jurisdictional challenge based on the Major Crimes Act in 2004. *Murphy v. State*, 2005 OK CR 25, ¶ 6, 124 P.3d 1198, 1200.

“was recognized by and could have reasonably been formulated from a final decision of this Court” in light of “the decades-old Oklahoma case and statutory law upholding the presumption of innocence instruction”).

In addition, under § 1089(D)(9)(b), Petitioner’s jurisdictional claim does not implicate any new, retroactive rule of constitutional law announced by the Supreme Court or this Court. “[A] case announces a ‘new’ rule when it ‘breaks new ground or imposes a new obligation’ or if its result ‘was not *dictated* by precedent existing at the time the defendant’s conviction became final.” *Walker*, 1997 OK CR 3, ¶ 38, 933 P.2d at 338 (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989) (alteration adopted, emphasis supplied by *Teague*)). A case does “not announce a new rule” when it is “merely an application of the principle that governed [an earlier] decision.” *Teague*, 489 U.S. at 307. As already shown above, *McGirt* was a mere application of, and was dictated by, *Solem*.¹⁰ Further, the decision did not break new ground or impose a new obligation on the State—even prior to this decision, under the relevant federal statutes, the State did not have jurisdiction to prosecute an Indian who committed a major crime in Indian Country. *McGirt* simply held that the original Creek Reservation was still Indian Country for purposes of these statutes. For all these reasons, *McGirt* did not announce a new rule, let alone a retroactive one. *See Walker*, 1997 OK CR 3, ¶¶ 34-38, 933 P.2d at 338-39 (concluding that Supreme Court cases did not announce new rules under *Teague* where one “simply reiterated and enforced long standing case law and statutory rules” and the other “simply applied well established constitutional principles to facts generated by a rather new state statute”).

¹⁰ And the Tenth Circuit’s decision in *Murphy* was not a decision of the Supreme Court or this Court. To the extent that Petitioner relies on the Supreme Court’s *Murphy* decision, such simply affirmed the Tenth Circuit’s decision for the reasons stated in *McGirt*. *Murphy*, 140 S. Ct. at 2412. Thus, the Supreme Court’s *Murphy* decision no more announced a new rule than did *McGirt*.

Nor can Petitioner meet the restrictions of § 1089(D)(8)(b). First, § 1089(D)(8)(b)(1) requires that the factual basis of Petitioner's jurisdictional claim have not been previously ascertainable through reasonable diligence. The factual bases for Petitioner's jurisdictional claim consist of the location of the murders and the alleged status of his victims as Indians—all facts that were known, or could have been determined through reasonable diligence—at the time of the crimes, let alone by the time of direct appeal and first post-conviction. For starters, based on the evidence in this case, the exact location of the murders has never been in question. *See Ryder*, 2004 OK CR 2, ¶¶ 2-13, 83 P.3d at 860-62 (summarizing the evidence). As to the victims' alleged status as Indians, Petitioner supplies memoranda on Choctaw Nation letterhead from August 7, 2020 purporting to verify the victims' Choctaw Nation citizenship and possession of CDIB cards. App., Attachments 7-8. Although these memoranda were apparently obtained in 2020, Petitioner does not allege any "specific facts establishing that" these memoranda were not previously "ascertainable through the exercise of reasonable diligence," 22 O.S.2011, § 1089(D)(8)(b)(1), and in any event, it is clear the victims' alleged Indian status could have been verified years ago. The factual basis for Petitioner's jurisdictional claim was not previously unavailable. *See Smith v. State*, 2010 OK CR 24, ¶ 7, 245 P.3d 1233, 1236 (concluding that expert's report was not previously unavailable where, although it was dated after Smith's first post-conviction application, it was derived from information that was available at the time of trial and first post-conviction).

Second, in addition to satisfying § 1089(D)(8)(b)(1)—which he has not done—the Petitioner must, but fails to, meet the requirements of § 1089(D)(8)(b)(2). Under the latter provision, he must demonstrate that "the facts underlying the claim . . . would be sufficient to establish . . . [that] no reasonable fact finder would have found [him] guilty of the underlying offense or would have rendered the penalty of death." 22 O.S.2011, § 1089. This Court has

indicated that this standard requires a showing of actual, factual innocence, and that a showing of legal innocence is insufficient. *See Braun v. State*, 1997 OK CR 26, ¶ 28 n. 15, 937 P.2d 505, 514 n. 15.¹¹ The Petitioner’s claim—that the State of Oklahoma lacked jurisdiction to try or sentence him to death—is at most a claim of legal innocence. *See Jones v. Warden*, 683 F. App’x 799, 801 (11th Cir. 2017) (unpublished) (state court prisoner’s attempt to claim actual innocence to avoid time bar failed because his claim that the state court lacked jurisdiction was “at most, a claim of legal innocence, not factual innocence”). Accordingly, the Petitioner has not demonstrated that he can satisfy § 1089(D)(8)(a) or § 1089(D)(8)(b), and his jurisdictional claim cannot be considered.

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

Not only does Petitioner allege that his jurisdictional claim satisfies the requirements of § 1089(D)(9), he further contends that challenges to subject matter jurisdiction can “be raised at any time” under Oklahoma law. App. at 2. Although this argument finds some support in this Court’s decisions in *Murphy*, 2005 OK CR 25, ¶¶ 2, 6, 124 P.3d at 1199-1200, and *Wackerly v. State*, 2010 OK CR 16, ¶¶ 1, 3, 5, 237 P.3d 795, 796-97, this Court should clarify that, in light of

¹¹ *Braun* was discussing § 1089(C)(2), which requires that a claim raised in any post-conviction application, even a first application, “[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.” 22 O.S.2011, § 1089(C)(2). However, despite the difference in wording between § 1089(C)(2) and § 1089(D)(8)(b)(2), it is clear that the latter provision still requires a showing of factual innocence of the crime or the death penalty. The language of § 1089(D)(8)(b)(2), enacted in 2006, mirrors the Supreme Court’s well-established actual innocence standard. *Compare* 22 O.S.2011, § 1089(D)(8)(b)(2) (“... no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death”), *with Schlup v. Delo*, 513 U.S. 298, 327 (1995) (“To satisfy the [actual innocence] gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.”), *and Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) (a prisoner can claim to be “actually innocent” of the death penalty if he can show “by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.”). And, as this Court recognized in *Braun*, the Supreme Court’s standard “is applicable only to factual innocence” and is “not applicable to legal innocence.” *Braun*, 1997 OK CR 26, ¶ 28 n. 15, 937 P.2d at 514 n. 15. Thus, in using language that mirrored the Supreme Court’s standard, it is clear the Oklahoma Legislature intended for § 1089(D)(8)(b)(2) to require actual, not legal, innocence.

the Oklahoma Legislature's intent in enacting § 1089, it will enforce the requirements of § 1089(D)(8) according to that statute's plain language, and find Petitioner's claim to be waived and barred. In particular, § 1089(D)(8) is materially indistinguishable from 28 U.S.C. § 2244(b)(2), and federal courts have repeatedly determined that jurisdictional claims are subject to § 2244(b)(2)'s restrictions. There is no reason to think that the Oklahoma Legislature intended § 1089 to be any less restrictive than § 2244 when it comes to jurisdictional challenges.¹² Giving § 1089 its proper narrow construction, it is clear that the statute does not allow jurisdictional claims to escape its restrictions. A contrary interpretation contravenes legislative intent. *Cf. Prost v. Anderson*, 636 F.3d 578, 589 (10th Cir. 2011) ("The simple fact is that Congress decided that, unless subsection (h)'s requirements are met, finality concerns trump and the litigation must stop after a first collateral attack. Neither is this court free to reopen and replace Congress's judgment with our own.").

Beyond the plain language of § 1089, there are good policy reasons for not exempting jurisdictional challenges from its requirements. As this Court recognized in *Walker*, "[o]ne of the law's very objects is the finality of its judgments." *Walker*, 1997 OK CR 3, ¶ 5 n. 16, 933 P.2d at 331 n. 16 (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)). Therefore, this Court should find Petitioner's jurisdictional challenge to be waived and barred by § 1089(D)(8).

B. Laches

Alternatively, this Court should refuse to consider Petitioner's jurisdictional challenge

¹² In fact, the Oklahoma Legislature did provide an exception to the bar on successive capital post-conviction applications that has no parallel in § 2244: where the legal basis for a claim "was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state . . ." 22 O.S.2011, § 1089(D)(9)(a). Thus, with that provision, the Legislature made clear its desire to carve out an exception beyond those provided in the AEDPA. Its failure to do so as to jurisdictional claims speaks volumes.

based on the doctrine of laches. Indeed, the *McGirt* Court, tacitly recognizing that its decision would open the floodgates to jurisdictional challenges, encouraged this Court to consider applying laches to such challenges. *McGirt*, 140 S. Ct. at 2481. Here, Petitioner committed these crimes in April 1999, *twenty-one years ago*. Furthermore, as previously discussed, all of the facts underlying his jurisdictional claim—that is, his evidence that the Choctaw Nation Reservation has allegedly not been disestablished and that his victims were allegedly Indians—were available to him at every prior stage of this criminal case, including at the time of the crimes and trial. Yet, Petitioner did not bring this jurisdictional claim until twenty-one years after his crimes. This Court has repeatedly found laches to bar collateral attacks in cases with delays similar in length to the present one. *See, e.g., Thomas v. State*, 1995 OK CR 47, ¶ 7, 903 P.2d 328, 332 (fifteen years); *Ex parte French*, 1952 OK CR 13, 240 P.2d 818 (almost fifteen years); *Ex parte Workman*, 1949 OK CR 68, 207 P.2d 361 (eight years). Under these circumstances, it is grossly inequitable and unjust to reward Petitioner with consideration of his belated jurisdictional claim. Therefore, this Court should find the Petitioner’s jurisdictional claim to be barred by laches.

IV. August 12, 2020, Order in *Bosse v. State*, No. PCD-2019-124

Lastly, the Respondent recognizes this Court’s recent order in *Bosse v. State*, No. PCD-2019-124, order at 2 (Okl. Cr. Aug. 12, 2020) (unpublished attached as Exhibit A), which, referring to a jurisdictional claim like that raised by Petitioner, determined that “[t]he issue could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).” However, the *Bosse* order is unpublished and not binding. *See* Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2019) (“In all instances, an unpublished decision is not binding on this Court.”).

Moreover, the Respondent respectfully submits that this Court's order in *Bosse* is in error. Jurisdictional claims such as Petitioner's were available long prior to *McGirt*. The Major Crimes Act was enacted in 1885. See <https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153>. In 1962, the Supreme Court reversed the judgment of the Washington Supreme Court affirming the conviction of an Indian on a reservation which the Washington Supreme Court had erroneously determined to be disestablished. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). This is just one of a number of cases in which the Supreme Court has considered such claims in the decades preceding *McGirt*. See e.g., *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); see also *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (although not a criminal case, applying prior Supreme Court cases on reservation diminishment to the facts of a particular reservation).

In addition, this Court has been called upon to determine whether a crime took place in Indian country many times in the history of the state. See, e.g., *Eaves v. State*, 1990 OK CR 42, ¶ 2, 795 P.2d 1060, 1061 (determining whether the crime took place within a dependent Indian community because the parties agreed there was no question as to a restricted allotment or reservation); *C.M.G. v. State*, 1979 OK CR 39, ¶ 9, 594 P.2d 798, 801 (agreeing with the State that the land in question was not a reservation and thus, proceeding to determine whether it was a dependent Indian community). In 1963, an inmate sought a writ of habeas corpus, alleging the crime was committed on an Indian reservation. *Ellis v. State*, 1963 OK CR 88, 386 P.2d 326. This Court held that the reservation was disestablished. *Id.*, 1963 OK CR 88, ¶¶ 18-24, 386 P.2d at 330-31. Therefore, the legal basis for a post-conviction applicant's challenge to jurisdiction based on an argument that a crime occurred on an Indian reservation could have been formulated as early as 1885 and was recognized by the Supreme Court as early as 1962, and by this Court in 1963.

Moreover, as also shown above, *McGirt* is not a new rule of constitutional law.


In addition, the Respondent respectfully submits that this Court's contrary conclusion violates the plain language of § 1089(D)(9), legislative intent, and its own precedent. Based on the plain language of § 1089, claims that could have been raised on direct appeal, but were not, are barred, and the statute provides no exception to claims based on subject matter jurisdiction. Further, as this Court recognized after the Legislature amended the capital post-conviction review procedures, the changes "reflect the legislature's intent to honor and preserve the legal principle of finality of judgment, and we will narrowly construe these amendment to effectuate that intent." *Walker*, 1997 OK CR 3, ¶ 5, 933 P.2d at 331 (internal footnote omitted). As such, this Court should find that Petitioner's jurisdictional claim is barred by § 1089 as the unpublished order in *Bosse* contradicts published decisions by this Court and the plain language of § 1089(d).

V. Conclusion

For the reasons discussed, the Respondent asks that this Court find it has concurrent jurisdiction under the General Crimes Act and that the trial court had jurisdiction in this case. Alternatively, the Respondent asserts two procedural bars which bar review of Petitioner's claim. Should this Court find, however, the Petitioner is entitled to relief based on the district court's findings, the Respondent respectfully requests this Court stay any order reversing the convictions in this case for thirty days to allow the United States Attorney's Office for the Eastern District of Oklahoma to secure custody of the defendant. *Cf.* 22 O.S.2011, § 846 (providing that "[i]f the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as it deems reasonable to await a warrant from the proper county for his arrest").

Respectfully submitted,

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to **JULIE PITTMAN**

No. PCD-2020-613

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER,

Petitioner,

-VS-

THE STATE OF OKLAHOMA,

Respondent.

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

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JANUARY 22, 2021

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claimed the District Court of Pittsburg County did not have jurisdiction to try him, arguing the murders he committed were against citizens of the Choctaw Nation, and that the murders occurred within the boundaries of the alleged Choctaw Nation Reservation (Successive Application for Post-Conviction Relief at iv-viii, 1-30). On September 25, 2020, this Court remanded this case for an evidentiary hearing (“Order”), and directed the district court to hold a hearing to determine (1) “the victims’ status as an Indian”; and (2) “whether the crime occurred in Indian Country” (Order at 3).

In its post-hearing brief, the State encouraged this Court to accept the Supreme Court’s express invitation in *McGirt* to apply procedural bars to the jurisdictional challenges that would proliferate in the wake of its decision. *McGirt*, 140 S. Ct. at 2479, n. 15. The State first asked this Court to refuse to consider the Petitioner’s jurisdictional challenge because he did not raise it until his second post-conviction application such that it is procedurally barred. State’s Supp. Br. at 12-17. The State then asked this Court to refuse to consider the jurisdictional claim based on the doctrine of laches. State’s Supp. Br. at 17-18. In support of these arguments, the State detailed the origins of Petitioner’s claim and showed that the claim was available long before *McGirt* was decided. State’s Supp. Br. 13-15, 17-18. The State also noted how the Supreme Court relied on established law as *McGirt* was a mere application of, and was dictated

Petitioner was then denied habeas relief in federal court. *James Chandler Ryder v. Anita Trammell*, Case No. CIV-05-24-JHP-KEW (E.D. Okla. Oct. 11, 2013), *aff’d*, *Ryder ex. rel. Ryder v. Warrior*, 810 F.3d 724 (10th Cir. 2016), *cert denied.*, *Ryder v. Royal*, Case No. 16-5970 (U.S. Nov. 28, 2016).

by, *Solem*. State's Supp. Br. at 13-14. See also *McGirt*, 140 S. Ct. at 2464 (acknowledging that the *McGirt* decision "say[s] nothing new"). The Tenth Circuit agrees.

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

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

Id. at 4 (alterations adopted).²

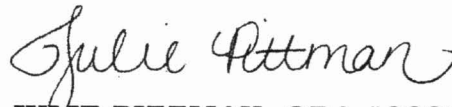
² *In re: Morgan* was decided on September 18, 2020, admittedly prior to the filing of the State's first supplemental brief. However, Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), does not require that newly proffered authority also be newly decided. In any event, Respondent did not learn of *In re: Morgan*'s existence until recently, well after the filing of its first supplemental brief. The Tenth Circuit does not provide its unpublished orders for inclusion on legal databases such as Westlaw, so Respondent learned of *In re: Morgan* only serendipitously after it

The State recognizes that the Tenth Circuit's decision is not binding upon this Court. However, the Tenth Circuit was interpreting a statute *that is very similar to the one at issue in this case*. Section 1089 explains that the legal basis for a claim was previously unavailable if it "was not recognized by or could not have been reasonably formulated from a final decision of," in relevant part, the Supreme Court or this Court, or is based on "a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state." 22 O.S.2011, § 1089(D)(9). As Petitioner's *McGirt* claim was based on well-established precedent, it could have been reasonably formulated before *McGirt* and is not based on a new rule of constitutional law. The State respectfully requests that this Court adopt the reasoning of the Tenth Circuit, and adhere to the plain language of section 1089(D)(8) which expressly prohibits this Court from considering claims that do not fall within its parameters. *See* 22 O.S.2011, § 1089(D)(8) ("if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent or untimely application unless") (emphasis added). Petitioner's claim is procedurally barred.

was cited by a federal district court in denying relief in a habeas case in which counsel for Respondent here represented the Warden.

Respectfully submitted,

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CERTIFICATE OF MAILING

On this 22nd day of January, 2021, a true and correct copy of the foregoing was mailed to:

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JULIE PITTMAN

³ An electronic signature is being used due to the current COVID-19 restrictions. A signed original can be provided to the Court upon request once restrictions are lifted.

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 18, 2020

**Christopher M. Wolpert
Clerk of Court**

In re: DAVID BRIAN MORGAN,

Petitioner.

No. 20-6123
(D.C. No. 5:19-CV-00929-R)
(W.D. Okla.)

ORDER

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

David Brian Morgan, an Oklahoma prisoner proceeding pro se,¹ moves for authorization to file a second or successive habeas application under 28 U.S.C.

§ 2254. We deny the motion for authorization.

BACKGROUND

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

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

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

DISCUSSION

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

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

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

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

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

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

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

CONCLUSION

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

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 29 2021

JOHN D. HADDEN
CLERK

JAMES CHANDLER RYDER, through
Next Friend, Sue Ryder,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

*Successive Post-Conviction Case No.: PCD-
2020-613*

PETITIONER'S RESPONSE TO STATE'S SUPPLEMENTAL BRIEF

In the State's Supplemental Brief Regarding Whether *McGirt* Was Previously Available for Purposes of Barring Claims tendered for filing on January 22, 2021, the State presents "an unpublished decision in which the United States Court of Appeals for the Tenth Circuit held that *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) did not announce a new rule of constitutional law." State's Motion to File Supplemental Brief at 1. However, the unpublished Tenth Circuit decision the State presents – *In re: David Brian Morgan*, No. 20-6123 (10th Cir. Sept. 18, 2020) – has no bearing on Mr. Ryder's case.

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

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

2244(b)(2)(B).

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

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

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

The State argues that while it “recognizes that the Tenth Circuit’s decision is not binding upon this Court[,] . . . the Tenth Circuit was interpreting a statute that is very similar to the one at issue in this case[.]” – that is, 22 O.S. § 1089. State’s Supplemental Brief Regarding Whether *McGirt* Was Previously Available for Purposes of Barring Claims at 4. Although the State correctly indicates there is a section of § 1089 that is similar to § 2244(b)(2)(A), this is not the section of § 1089 that is relevant to Mr. Ryder’s case.

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

For purposes of this act, a legal basis of a claim is unavailable . . . if the legal basis:

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

As the State indicates, § 1089(D)(9)(b) (“section (b)”) is similar to the statute applied in *In re*:

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

Morgan, § 2244(b)(2)(A); both require “a new rule of constitutional law” that a court has made retroactive. However, Mr. Ryder’s position is not that *McGirt* announced “a new rule of constitutional law that was given retroactive effect” and therefore his jurisdictional claim is properly before this court under section (b). Instead, Mr. Ryder’s claim is properly before this court under § 1089(D)(9)(a) (“section (a)”); that is, the legal basis “was not recognized or could not have been reasonably formulated from a final decision.”

This Court has already concluded as much. In its post-hearing supplemental brief, the State acknowledged, “[T]he Respondent recognizes this Court’s recent order in *Bosse v. State*, No. PCD-2019-124, order at 2 . . . which, referring to a jurisdictional claim like that raised by Petitioner, determined that ‘[t]he issue could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).’”² Supplemental Brief of Respondent After Remand at 18. The State is correct; in *Bosse*, the Court determined that Mr. Bosse’s claim – included in his Successive Application for Post-Conviction Relief – was properly before this Court under section (a). In its Order Remanding for Evidentiary Hearing at 2, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Aug. 12, 2020), the Court found, “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).”³ Thus, this Court

² The State argued that “the *Bosse* order is unpublished and not binding” and that it was “in error.” Supplemental Brief of Respondent After Remand at 18 (citation omitted).

³ In *Bosse*, prior to the remand, the State devoted twenty-seven pages of its response brief to procedural defense arguments. See Response to Petitioner’s Proposition I in Light of the Supreme Court’s Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) at 22-49, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Aug. 4, 2020). In its post-hearing supplemental brief in *Bosse*, the State “respectfully urge[d] the Court to reconsider its rejection of the State’s procedural defenses.” State’s Supplemental Brief Following Remand for Evidentiary Hearing from McClain County District Court Case No. CF-2010-213 at 16, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Nov. 4, 2020).

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

Consistent with the Court's *Bosse* finding, in Mr. Ryder's Successive Application for Post-Conviction Relief, he argued:

Under § 1089(D)(9), the legal basis for raising this claim in a successor application was unavailable until *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (*McGirt*) and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (*Murphy*) became final. . . . Before the issuance of the mandates, Mr. Ryder's claim "was not recognized by or could not have been reasonably formulated from a *final* decision of the United States Supreme Court [or the Tenth Circuit Court of Appeals]." Okla. Stat. tit. 22 § 1089(D) (emphasis added). With the legal basis now available, this Court should decide the federal claim on the merits, vacate Mr. Ryder's convictions and sentences, and dismiss the charges.

Successive Application for Post-Conviction Relief at 2. Mr. Ryder explained, "This Court has confirmed that the legal basis for such a jurisdictional claim was not available until *McGirt* and *Murphy* were final. See Order Remanding for Evidentiary Hearing, *Bosse v. State*, No. PCD-2019-124 (Aug. 12, 2020)." Successive Application for Post-Conviction Relief at 2 n.9. See also Petitioner's Post-Hearing Supplemental Brief in Support of Successive Application for Post-Conviction Relief at 19-20. Thus, Mr. Ryder's argument has been – and remains – that his Successive Application for Post-Conviction Relief is properly before this court under section (a).

Mr. Ryder does not dispute the State's position or the Tenth Circuit's finding in *In re: Morgan* that *McGirt* did not announce a new rule of constitutional law made retroactive by the Supreme Court. Instead, *McGirt* clarified the framework for determining whether a reservation has been disestablished and, applying this framework, determined that the Creek reservation remained Indian Country for purposes of the Major Crimes Act. See *Oneida v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) ("We read *McGirt* as adjusting the *Solem* framework to place a greater focus

on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation.”⁴ Thus, as this Court found in *Bosse*, *McGirt* recognized a new legal basis for Mr. Ryder’s claim (pursuant to section (a)).⁵ But neither Mr. Ryder nor this Court has ever claimed that new legal basis⁶ is a new rule of constitutional law (pursuant to section

⁴ The *McGirt* Court also held that the Major Crimes Act applied in Oklahoma “according to its usual terms,” 140 S. Ct. 2452 at 2478, and that the potential for “transformative effects” was an insufficient justification to find the Creek Reservation was disestablished, *id.* at 2478-81 (brackets omitted).

⁵ This Court’s treatment of claims raised prior to the *McGirt* decision – in Mr. Bosse’s case and others – supports its finding that the legal basis was previously unavailable. Mr. Bosse filed his Successive Application for Post-Conviction Relief while *Murphy* was pending in the Supreme Court. This Court ordered “that the present Application be held in abeyance until the decision in *Murphy v. Royal* is final.” Order Holding Case in Abeyance and Directing Attorney General to Provide Status Update at 2-3, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Mar. 22, 2019). In other cases, this Court dismissed as premature Successive Applications for Post-Conviction Relief “[b]ecause neither *Murphy* nor *McGirt* is a final opinion.” Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance at 3-4, *Goode v. State*, No. PCD-2020-333 (Okla. Crim. App. June 9, 2020); Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance at 4, *Cole v. State*, No. PCD-2020-332 (Okla. Crim. App. May 29, 2020).

The State’s recent argument in a separate case also supports this Court’s finding that the legal basis was previously unavailable. In *Deerleader v. Crow*, No. 20-CV-172 (N.D.O.K. December 14, 2020), the petitioner filed an application for post-conviction relief before the Supreme Court decided *Murphy* and *McGirt*. While the State insisted on federal habeas that “*McGirt* did not establish a new rule or right, and Indian Country claims were previously available,” it also argued, “this significant change in Oklahoma’s precedent warrants re-exhaustion of Petitioner’s *Murphy* claim in the state courts post-*McGirt*.” Brief in Support of Motion to Stay Federal Habeas Proceedings for Petitioner to Re-Exhaust His *Murphy* Claim in State Court in Light of the United States Supreme Court’s Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) at 2, 6 n.3, *Deerleader v. Crow*, No. 20-CV-172 (N.D.O.K. Aug. 24, 2020). The State explained:

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

Id. at 8-9 (emphasis added).

⁶ The State claims *McGirt* “acknowledge[ed] that the *McGirt* decision ‘say[s] nothing new.’” State’s Supplemental Brief Regarding Whether *McGirt* Was Previously Available for Purposes of Barring Claims

(b)).

Even if this Court had not already found a claim like Mr. Ryder's to be properly before it, this Court has made clear that "some constitutional rights . . . are never finally waived. Lack of jurisdiction, for instance, can be raised at any time." *Johnson v. State*, 1980 OK CR 45, 611 P.2d 1137, 1145. In three capital cases in which Indian country jurisdictional issues were raised belatedly, this Court repeatedly confirmed such a fundamental jurisdictional issue can be raised at any time. *See Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277, 278 (deciding Indian country jurisdictional question though raised for first time on the day appellate oral argument was set); *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198, 1199 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue though raised for first time in successor post-conviction relief action); and *Magnan v. State*, 2009 OK CR 16, 207 P.3d 397, 402 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue even though issue was not raised in the trial court where appellant pled guilty and waived his appeal). This Court's decisions permitting jurisdiction to be raised at any time rest on bedrock principles that have existed for nearly a century. *See Armstrong v. State*, 1926 OK CR 259, 35 Okla. Crim. 116, 118, 248 P. 877, 878.

The Supreme Court defines jurisdiction as "the courts' statutory and constitutional *power* to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002). *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Because subject matter jurisdiction involves a court's power to act, the Supreme Court concludes "it can never be forfeited or waived." *Cotton*,

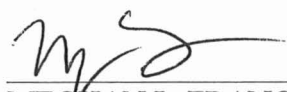
at 3 (quoting *McGirt*, 140 S. Ct. at 2464). However, the Court's statement that the Court "say[s] nothing new" referred only to its rejection of one of the State's arguments. Specifically, the Court explained that its determination that "the Creek Reservation survived allotment" was not new: "[B]ecause there exists no . . . law terminating what remained, the Creek Reservation survived allotment. In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument." *Id.*

535 U.S. at 630. Defects in jurisdiction cannot be overlooked by a court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U.S. 413, 421 (1911).

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

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

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2021 a true and correct copy of the foregoing document was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9 (B), Rules of the Court of Criminal Appeals.



Meghan LeFrancois

485 P.3d 867

Court of Criminal Appeals of Oklahoma.

Devin Warren SIZEMORE, Appellant,

v.

The STATE of Oklahoma, Appellee.

Case No. F-2018-1140

|

FILED APRIL 1, 2021

Synopsis

Background: Defendant, who was enrolled member of Choctaw Nation, was convicted in the District Court, Pittsburg County, Timothy E. Mills, J., of first degree murder and battery/assault and battery on a police officer. Defendant appealed. During pendency of appeal, the Court of Criminal Appeals remanded for an evidentiary hearing. On remand, the District Court, Mills, J., entered findings of fact and conclusions of law relevant to determining whether area of land where offenses occurred was “Indian country” under federal criminal jurisdiction statutes.

[Holding:] The Court of Criminal Appeals, Rowland, V.P.J., held that State of Oklahoma did not have jurisdiction to prosecute defendant.

Vacated and remanded with instructions.

Lumpkin, J., filed opinion concurring in result.

Lewis, J., filed specially concurring opinion.

Hudson, J., filed opinion concurring in result.

Procedural Posture(s): Appellate Review.

West Headnotes (4)

[1] Indians 🔑 **What is Indian country in general**

Land upon which defendant, who was enrolled member of Choctaw Nation, allegedly committed first degree murder and battery/assault and battery on a police officer constituted “Indian country” under federal statutes providing

for federal criminal jurisdiction in “Indian country”; Congress established a Choctaw Reservation through treaties, and subsequent treaties that redefined geographical boundaries of reservation did not show Congressional intent to erase original boundaries or terminate existence of reservation. (Per opinion of Rowland, V.P.J., with one judge concurring, two judges concurring in result, and one judge specially concurring.) 18 U.S.C.A. §§ 1152, 1153; 21 Okla. Stat. Ann. §§ 649, 701.7.

2 Cases that cite this headnote

[2] Indians 🔑 **Reservations or Grants to Indian Nations or Tribes**

To determine whether a Native American tribe continues to hold a reservation, there is only one place a court may look: the Acts of Congress. (Per opinion of Rowland, V.P.J., with one judge concurring, two judges concurring in result, and one judge specially concurring.)

[3] Indians 🔑 **Disestablishment and termination**

Disestablishment of a Native American reservation does not require any particular form of words, but it does require that Congress clearly express its intent to do so, commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests. (Per opinion of Rowland, V.P.J., with one judge concurring, two judges concurring in result, and one judge specially concurring.)

[4] Indians 🔑 **Authority over and regulation of tribes in general**

Indians 🔑 **Alteration or abrogation in general**
Congress, and Congress alone, has the power to abrogate treaties with Native American tribes establishing reservations, and the Court of Criminal Appeals will not lightly infer such a breach once Congress has established a reservation. (Per opinion of Rowland, V.P.J., with one judge concurring, two judges

concurring in result, and one judge specially concurring.)

AN APPEAL FROM THE DISTRICT COURT OF PITTSBURG COUNTY; THE HONORABLE TIMOTHY E. MILLS, ASSOCIATE DISTRICT JUDGE

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OPINION

ROWLAND, VICE PRESIDING JUDGE:

*868 ¶1 This appeal turns on whether Appellant Devin Warren Sizemore is an Indian as defined by federal law, and whether he committed murder and assault and battery upon a police officer within Indian country as that term is defined by federal law. Because the answer to both questions is yes, federal law grants exclusive criminal jurisdiction to the federal government on the murder charge at the very least and possibly the assault charge as well. Regardless, the State of Oklahoma was without jurisdiction to prosecute him.

1. Factual Background

¶2 In July of 2016, police in Krebs, Oklahoma were contacted by Sizemore's family members, worried about his and his twenty-one month old daughter's safety. Some fifteen hours after this call to police, officers searching for the pair heard screaming from a local pond and discovered Sizemore there. Upon seeing the police, he fled into the water and officers encountered him near what appeared to be a small body floating face down. Attempts to subdue him resulted in a fight both in and out of the water, but the officers eventually took him into custody. His young daughter was pulled from the water but did not survive; she had drowned.

¶3 Sizemore was tried by jury in the District Court of Pittsburg County, Case No. CF-2016-593, and convicted of First Degree Murder (Count 1), in violation of 21 O.S.Supp.2012, § 701.7 and Battery/Assault and Battery on a Police Officer (Count 2), in violation of 21 O.S.Supp.2015, § 649. In accordance with the jury's verdict, the Honorable Tim Mills, Associate District Judge, sentenced Sizemore to life imprisonment without the possibility of parole on Count 1 and five years imprisonment on Count 2, with the sentences to be served concurrently.

¶4 In this direct appeal, Sizemore alleges the following errors:

- (1) The State of Oklahoma lacked jurisdiction to prosecute him because he is an “Indian” and the crime occurred in “Indian Country”;
- (2) He received ineffective assistance of trial counsel;
- (3) The evidence was insufficient to prove all elements of First Degree Murder beyond a reasonable doubt;
- (4) The district court erred in admitting his recorded interrogation;
- (5) The district court erred by denying his motion to quash his arrest; and
- (6) An accumulation of error deprived him of a fair trial.

¶5 Because, as noted above, we find relief is required on Sizemore's jurisdictional challenge *869 in Proposition 1, his other claims are moot.

2. The Legal Background

A. The Major Crimes Act

¶6 [Title 18 Section 1153 of the United States Code](#), known as the Major Crimes Act, grants exclusive federal jurisdiction to prosecute certain enumerated offenses committed by Indians within Indian country. It reads in relevant part as follows:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses,

within the exclusive jurisdiction of the United States.

[18 U.S.C. § 1153\(a\) \(2013\)](#).

¶7 Count 1, the murder charge, fits squarely within the Major Crimes Act and its exclusive federal jurisdiction, but whether Count 2 is among these enumerated crimes is much less clear. It may constitute a “felony assault under section 113”, but that is not something we must decide today. If the assault on a police officer is not covered by [Section 1153](#), it is subject to the Act's sister statute, [18 U.S.C. § 1152 \(1948\)](#), which applies to other offenses and provides for federal or tribal jurisdiction. In either event, the State of Oklahoma was without jurisdiction to prosecute such an assault by an Indian within Indian country. See [State v. Klindt](#), 1989 OK CR 75, ¶ 3, 782 P.2d 401, 403 (“[T]he State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.”)

B. *McGirt v. Oklahoma*

¶8 Nothing we have said thus far is in any way new, as these federal statutes asserting federal criminal jurisdiction in Indian country are more than one hundred years old. What has recently changed is the definition of Indian country, within the borders of Oklahoma, for purposes of these statutes. In [McGirt v. Oklahoma](#), 591 U.S. —, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), the Supreme Court held that land set aside for the Muscogee-Creek Nation in the 1800's was intended by Congress to be an Indian reservation, and that this reservation exists today for purposes of federal criminal law because Congress has never explicitly disestablished it. Although the case now before us involves the lands of the Choctaw Nation, we find *McGirt's* reasoning controlling.

3. Two Questions Upon Remand

A. Sizemore's Status as Indian

¶9 After *McGirt* was decided, this Court, on August 19, 2020, remanded this case to the District Court of Pittsburgh County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Sizemore's status as an Indian; and (b) whether the crime

occurred in Indian Country, namely within the boundaries of the Choctaw Nation Reservation. Our Order provided that, if the parties agreed as to what the evidence would show with regard to the questions presented, the parties could enter into a written stipulation setting forth those facts, and no hearing would be necessary. On October 14, 2020, the parties stipulated to the first of these requirements, agreeing that (1) Sizemore has some Indian blood; (2) he was an enrolled member of the Choctaw Nation on the date of the charged offenses; and (3) the Choctaw Nation is a federally recognized tribe. Judge Mills accepted this stipulation and found that on the date of the charged crimes, Sizemore was an Indian for purposes of federal law. We adopt the district court's findings and conclusion.

B. Whether Crimes Were Committed in Indian Country

1. Congress Established a Choctaw Reservation in the 1800s

[1] ¶10 As to the second question on remand, whether the crimes were committed *870 in Indian country, the stipulation of the parties was less dispositive. They acknowledged only that the charged crimes occurred within the historical geographic area of the Choctaw Nation as designated by various treaties. The stipulation went on to state that the crimes occurred in Indian country “only if 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.”

¶11 In a thorough and well-reasoned order, Judge Mills examined the 19th century treaties between the Choctaw Nation and the United States of America. He concluded that the land set aside for the Choctaw Nation, beginning with the Treaty of Dancing Rabbit Creek in 1830, as reaffirmed and modified by the Treaty of Washington in 1855, and further modified by the post-civil war Treaty of Washington in 1866, established a Choctaw Reservation.

¶12 This finding is consistent with *McGirt*, where the majority found it “obvious” that a similar course of dealing between Congress and the Creeks had created a reservation, even though that term had not always been used to refer to the lands set aside for them, “perhaps because that word had not yet acquired such distinctive significance in federal Indian law.” *McGirt*, 140 S.Ct. at 2461. Following the

reasoning in *McGirt*, Judge Mills ruled that through its treaties with the Choctaw Nation, Congress established a Choctaw Reservation in the 1800's.

2. Congress Has Never Disestablished the Choctaw Reservation

[2] [3] ¶13 “To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.” *McGirt*, 140 S.Ct. at 2462. No particular words or verbiage are required, but there must be a clear expression of congressional intent to terminate the reservation.

History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an “[e]xplicit reference to cession” or an “unconditional commitment ... to compensate the Indian tribe for its opened land.” *Ibid*. Other times, Congress has directed that tribal lands shall be “‘restored to the public domain.’” *Hagen v. Utah*, 510 U.S. 399, 412, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (emphasis deleted). Likewise, Congress might speak of a reservation as being “‘discontinued,’” “‘abolished,’” or “‘vacated.’” *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). Disestablishment has “never required any particular form of words,” *Hagen*, 510 U.S., at 411, 114 S.Ct. 958. But 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.” *Nebraska v. Parker*, 577 U. S. 481, 488, 136 S.Ct. 1072, 1079, 194 L.Ed.2d 152 (2016).

Id., 140 S.Ct. at 2462-63.

[4] ¶14 The record before the district court in this case, similar to that in *McGirt*, shows Congress, through treaties, removed the Choctaw people from one area of the United States to another where they were promised certain lands. Subsequent treaties redefined the geographical boundaries of those lands, but nothing in any of those documents showed a congressional intent to erase the boundaries of the Reservation and terminate its existence.¹ Congress, and Congress alone, has the power to abrogate those treaties, and “this Court [will not] lightly infer such a breach once Congress has established a reservation.” *McGirt*, 140 S.Ct. at 2462 (citing *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443, (1984)).

¶15 Noting that the State of Oklahoma presented no evidence to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation, and citing language from *McGirt* noting that allotment of individual plots of land within this area do not equate to disestablishment, Judge Mills *871 found that the Choctaw Reservation remains in existence. This finding is supported by the record.

¶16 We hold that for purposes of federal criminal law, the land upon which the parties agree Sizemore allegedly committed these crimes is within the Choctaw Reservation and is thus Indian country. The ruling in *McGirt* governs this case and requires us to find the District Court of Pittsburgh County did not have jurisdiction to prosecute Sizemore. Accordingly, we grant Proposition 1.

DECISION

¶17 The Judgment and Sentence of the district court is **VACATED** and this matter 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 **ORDERED** to issue in twenty (20) days from the delivery and filing of this decision.

[KUEHN, P.J.](#): Concur

[LUMPKIN, J.](#): Concur in Results

[LEWIS, J.](#): Specially Concur

[HUDSON, J.](#): Concur in Results

[LUMPKIN, JUDGE](#): CONCURRING IN RESULTS:

¶1 Bound by my oath and the Federal-State relationships dictated by the [U.S. Constitution](#), I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, — U.S. —, 140 S. Ct. 2452, 207 L.Ed.2d 985 (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's 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 *872 rather than a continuation of the solid precedents the Court has established over the last 100 years or more.

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

¶4 My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had 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 Based on my special writings in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286 and *Hogner v. State*, 2021 OK CR 4,

— P.3d —, I specially concur. Following the precedent of *McGirt v. Oklahoma*, — U.S. —, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), Oklahoma has no 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. This crime occurred within the historical boundaries of the Choctaw Nation Reservation and that Reservation has not been expressly disestablished by the United States Congress. Additionally, Appellant is an Indian, thus the jurisdiction is governed by the Major Crimes Act found in the United States Code.

¶2 Oklahoma, therefore, has no jurisdiction, concurrent or otherwise, over Appellant in this case. Thus, I concur that this case must be reversed and remanded with instructions to dismiss. Jurisdiction is in the hands of the United States Government.

HUDSON, J., CONCUR IN RESULTS:

¶1 Today's decision applies *McGirt v. Oklahoma*, — U.S. —, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020) to the facts of this case and dismisses convictions from Pittsburg County for first degree murder and assault and battery on a police officer. I concur in the results of the majority's opinion based on the stipulations below concerning the Indian status of Appellant and the location of this crime within the historic boundaries of the Choctaw Reservation. Under *McGirt*, the State cannot prosecute Appellant because of his Indian status and the occurrence of this murder 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 that Congress never disestablished the Choctaw Reservation. Here, the State took no position below on whether the Choctaw 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 Appellant'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 Choctaw Nation was never disestablished based on this record.

¶3 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 *873 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.

¶4 *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.

¶5 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. Crime victims and their family members in a myriad of 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.

¶6 *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 that come before this Court where non-Indian defendants are challenging their state convictions using *McGirt* because *their victims* were Indian.

¶7 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 Appellant'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.

All Citations

485 P.3d 867, 2021 OK CR 6

Footnotes

¹ The State presented no evidence or argument on whether a reservation was ever established or disestablished for the Choctaw Nation.

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

I can hardly see where it (the IRA) could operate in a State like mine where the Indians are all scattered out among the whites and **they have no reservation**, and they could not get them into a community without you would go and buy land and put them on it. Then they would be surrounded very likely with thickly populated white sections 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).

Case. No. PCD-2020-613

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 29 2021

JOHN D. HADDEN
CLERK

**BRIEF IN SUPPORT OF MOTION TO STAY THE MANDATE
FOR GOOD CAUSE PENDING CERTIORARI REVIEW**

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APRIL 29, 2021

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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

No. PCD-2020-613

**BRIEF IN SUPPORT OF MOTION TO STAY THE MANDATE
FOR GOOD CAUSE PENDING CERTIORARI REVIEW**

COMES NOW, the State of Oklahoma, by and through Attorney General Mike Hunter, and in support of its Motion to Stay the Mandate for Good Cause Pending Certiorari Review, filed pursuant to Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), files this brief in support pursuant to Rule 3.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Petitioner is a non-Indian who murdered Sam and Daisy Hallum, members of the Choctaw Nation. This Court has reversed Petitioner's convictions for first degree murder. The State asks this Court to stay the mandate and preserve those convictions to give the United States Supreme Court the opportunity to determine whether the State properly exercised jurisdiction over Petitioner's capital crimes and/or whether federal law prohibits the barring of Petitioner's jurisdictional claim.

A. Background

Petitioner was convicted of murdering Sam and Daisy Hallum and sentenced to death in Pittsburg County District Court Case No. CF-1999-147.

In his second post-conviction application, filed approximately twenty-one years after the murders, Petitioner argued that the State lacked jurisdiction because Sam and Daisy Hallum were Indian, and the crime was committed within the Choctaw Nation Reservation. 9/8/2020 Successive Application for Post-Conviction Relief. This Court remanded the case to the district court for an evidentiary hearing. 9/25/2020 Order Remanding for Evidentiary Hearing. The district court determined that Sam and Daisy Hallum were Indian and that the crime was within the Choctaw Nation Reservation. 11/9/2020 Court Order with Findings of Fact and Conclusions of Law in Accordance with Order Remanding for Evidentiary Hearing Issued September 25, 2020 at 2-10. The State filed a supplemental brief asserting concurrent jurisdiction over the non-Indian Petitioner, and arguing that the claim should be considered both waived—pursuant to 22 O.S. § 1089(D)—and barred by the doctrine of laches. 11/23/2020 Supplemental Brief of Respondent after Remand.

In *Bosse v. State*, 2021 OK CR 3, ¶¶ 23-28, ___ P.3d ___, this Court held that Oklahoma lacks jurisdiction to prosecute non-Indians who victimize Indians in Indian Country. That decision was based on the General Crimes Act, 18 U.S.C. § 1152, the plain text of which does not strip state courts of their presumptive jurisdiction over crimes committed within their borders. This Court also held that federal law prevents it from applying doctrines such as waiver and laches to Indian Country jurisdictional claims like that raised by Petitioner. *Bosse*, 2021 OK CR 3, ¶¶ 20-22.

Following *Bosse*, this Court reversed Petitioner's convictions based on *Bosse's* rejection of the State's assertion of concurrent jurisdiction and procedural arguments. 4/29/2021 Opinion. This Court ordered the mandate to issue twenty days after its opinion. 4/29/2021 Opinion at 17. The State respectfully asks this Court for a further stay of the mandate, until the Supreme Court denies certiorari in *Bosse* and this case, or makes a ruling on the merits.

B. Good Cause Justifies Stay of the Mandate

Rule 3.15(B) provides for a recall or stay of the mandate where "good cause" is "shown." Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Here, the State shows good cause for staying the mandate in this case: (1) this Court has stayed the mandate in *Bosse* for 45 days, having necessarily found good cause; (2) the State has filed an application in the Supreme Court to further stay the mandate in *Bosse* pending that Court's review of *Bosse*; (3) the arguments the State will present in the *Bosse* certiorari petition, which plainly merit the Supreme Court's review; and (4) the State will also be filing a petition for writ of certiorari in this case. Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

First, upon the State's request, and after hearing oral argument, this Court stayed the mandate in *Bosse* for an additional 45 days, until May 30, 2021. The basis for the State's request was its intent to file a petition for writ of certiorari in the Supreme Court. Thus, although this Court's Order in *Bosse* is summary, this Court must have determined that the State's pursuit of Supreme Court review constitutes good cause. See Rule 3.15(B), *Rules of the Oklahoma Court of*

Criminal Appeals, Title 22, Ch. 18, App. (2011) (“The mandate *shall not* be recalled, nor stayed pending an appeal to any other court, . . . unless a majority of the Court, for good cause shown, recalls or stays the mandate.”) (emphasis added); see also *Post v. State*, 1986 OK CR 52, ¶ 6, 717 P.2d 1151, 1152 (indicating that the State’s identification of a colorable certiorari-worthy issue justified a stay of the mandate pending certiorari review).

Second, on April 26, 2021, the Supreme Court docketed the State’s application to further stay the mandate in *Bosse*. On April 27, 2021, Justice Gorsuch—Circuit Justice for the Tenth Circuit—requested a response from Mr. Bosse, which is due on May 7. Thus, based on the arguments in that application justifying further stay of the mandate pursuant to SUP. CT. R. 23, 28 U.S.C. § 2101(f), and *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers), the State expects that the mandate in *Bosse* will remain stayed until the Supreme Court declines to review the case, or renders a decision on the merits.

Third, the State’s assertion of concurrent jurisdiction, and procedural arguments, provide very compelling reasons for certiorari review, and it is likely the Supreme Court will grant certiorari. See SUP. CT. R. 10 (“[a] petition for a writ of certiorari will be granted only for compelling reasons”). As for concurrent jurisdiction, the impact of *McGirt* on this State is tremendous, with crime victims largely bearing the costs. See *Bosse*, 2021 OK CR 3, ¶¶ 6, 8, (Hudson, J., concurring in results) (noting “the growing number of cases . . . where non-Indian defendants are challenging their state convictions using *McGirt* because *their victims* were Indian” (emphasis in original)); see also *McGirt v. Oklahoma*,

140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting) (“Across this vast area, the State’s ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma.”).

For example, of the 93 cases this Court has remanded for evidentiary hearings since *McGirt*, 20—or 21%—involve non-Indian defendants who claim their victims were Indian.¹ If this percentage is representative of the state as a whole, such that approximately 21% of *McGirt*-related claims in this state will involve non-Indian defendants, there are likely thousands of convictions at stake.

Not only are there vital interests at stake, but the State’s question presented will fall squarely within the universe of cases the Supreme Court is likely to hear. One “compelling reason” the Supreme Court considers in deciding whether to grant certiorari is whether “a state court . . . has decided an important question of federal law that has not been, but should be, settled by [the Supreme Court].” SUP. CT. R. 10(c).

Although the Supreme Court has stated, in dicta, that state jurisdiction in Indian Country is limited to crimes between non-Indians, it has never sought to apply the plain text of the General Crimes Act to a crime committed in Indian Country by a non-Indian. See *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984). In light of the Court’s focus on plain statutory language in *McGirt*, and the

¹ Since oral argument on the motion to stay the mandate in *Bosse*, wherein this Court inquired as to this statistic, the State has calculated this percentage based on the spreadsheet it maintains on this Court’s remanded *McGirt* cases.

absence of any such language in the General Crimes Act withdrawing jurisdiction from states over non-Indian offenders, there is a substantial likelihood the Supreme Court will—at the very least—conclude the State’s question presented warrants review. *See Post*, 1986 OK CR 52, ¶ 6, 717 P.2d at 1152 (holding that, although “the petition for rehearing should be denied,” “[b]ecause the Supreme Court has not addressed this precise issue, we agree that the mandate should be stayed” so that the State “may lodge a petition for writ of certiorari with the United States Supreme Court”); *Murphy v. Royal*, No. 07-7068 & No. 15-7041, Order (Nov. 16, 2017) (staying mandate “until the deadline passes for filing a certiorari petition in the Supreme Court” or if the court “receives notice the respondent has filed a petition the stay will continue until the Supreme Court’s final disposition”).

In addition, this Court’s holding that Indian Country jurisdictional claims “may – indeed, must – be raised at any time”, *Bosse*, 2021 OK CR 3, ¶ 22, has consequences at least as grave as the denial of concurrent jurisdiction. Oklahoma’s state district courts have hundreds of pending post-conviction applications raising claims that the State lacks jurisdiction under 18 U.S.C. §§ 1151-53. The Wagoner County District Attorney’s Office has provided the undersigned with data on its more than 200 Indian Country jurisdictional claims, including both pending prosecutions and post-conviction applications. By the State’s estimate, more than 1,890,000 people live in counties that have now been found to be wholly or nearly entirely within a reservation. *See McGirt*, 140 S. Ct. 2452; *Grayson v. State*, 2021 OK CR 8, ___ P.3d ___ (Seminole);

Sizemore v. State, 2021 OK CR 6, ___ P.3d ___ (Choctaw); *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___ (Cherokee); *Bosse*, 2021 OK CR 3 (Chickasaw).

If Wagoner County's rate of post-conviction Indian Country jurisdictional claims is predictive—approximately 50 filings (as of April 23, 2021) for a population of around 80,000, or approximately 0.06%—then overall there are nearly 1,200 pending post-conviction applications raising Indian Country jurisdictional claims in the referenced counties.² While the applicants in those cases may have otherwise valid claims under *McGirt*, they are not entitled to relief. See 22 O.S.2011, §§ 1086, 1089 (providing that, with limited exceptions, all challenges to a conviction must be raised at the first available opportunity in both capital and non-capital cases); *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973 (“issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review”).

This Court's decision in *Bosse* conflicts with *McGirt*, and with decisions from two United States courts of appeals. See *McGirt*, 140 S. Ct. at 2464, 2479 & n.15, 2481 (inviting courts to apply procedural doctrines to lessen the impact of its decision, and acknowledging that, in finding allotment did not disestablish the Creek Reservation, it was saying “nothing new”); *United States v. Tony*, 637 F.3d 1153, 1157–60 (10th Cir. 2011) (holding that Indian Country jurisdictional claim does not implicate subject matter jurisdiction and can be waived); *United States v. Pemberton*, 405 F.3d 656, 659 (8th Cir. 2005); *United States v. White*

² These numbers have been updated since the State's motions to stay in *Bosse*, as post-conviction applications continue to be filed.

Horse, 316 F.3d 769, 772 (8th Cir. 2003); *United States v. Prentiss*, 256 F.3d 971, 981-82 (10th Cir. 2001) (en banc), *overruled on other grounds by Cotton*, 535 U.S. at 631; *see also Welch v. United States*, No. 2:05CR8, 2008 WL 4981352, at *2 n. 2 (W.D.N.C. Nov. 19, 2008) (unpublished). The Supreme Court is likely to grant the State's certiorari petition. *See* SUP. CT. R. 10(b), (c) (among the "compelling reasons" the Supreme Court considers in deciding whether to grant certiorari are whether "a state court of last resort has decided an important question of federal law in a way that conflicts with the decision of . . . a United States court of appeals", and whether "a state court . . . has decided an important question of federal law . . . in a way that conflicts with relevant decisions of th[e] Supreme] Court").

As a final matter, Petitioner would be hard-pressed to argue any prejudice from a further stay of the mandate. *See Tiger v. State*, 1995 OK CR 59, ¶ 5, 907 P.2d 1075, 1076 (refusing to recall the mandate where the recall would "prejudice the Petitioner"). The claim on which this Court has granted relief is not one of actual innocence, for instance, entitling Petitioner to immediate, permanent release from prison. Rather, upon information and belief, the United States District Court for the Eastern District of Oklahoma will file charges against, and seek custody of, Appellant if this motion to stay the mandate is denied.

This fact not only dispels any notion of prejudice to Petitioner; it also establishes a significant likelihood that the State will be prejudiced if the mandate is not stayed. A transfer of custody will likely trigger the Interstate

Agreement on Detainers' so-called anti-shuttling provision, thereby preventing the federal government from returning Petitioner to state custody without risking dismissal of its case with prejudice. 18 U.S.C.A. App. 2 § 2 Art. IV(e). The State is further concerned that, if Respondent is convicted in federal court such that the Agreement is no longer implicated, there may be difficulties re-obtaining physical custody of Petitioner for purposes of defending against any additional legal challenges he might pursue, and for carrying out the death sentence when such becomes appropriate. See *Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality op.) (recognizing "the State's legitimate interest in carrying out a sentence of death in a timely manner").


A stay in this case is necessary to prevent the vacatur of Petitioner's convictions unless and until the Supreme Court has, assuming it grants certiorari review, rendered a final decision on the State's assertion of concurrent jurisdiction and procedural bars. Judicial economy and the interests of justice counsel in favor of the State's request. Moreover, the State has shown good cause in light of its compelling case for Supreme Court review.

CONCLUSION

WHEREFORE, the State respectfully requests this Court stay the mandate through the pendency of the State's certiorari petition, and possible merits review by the Supreme Court.

Respectfully submitted,

**MIKE HUNTER
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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF MAILING

On this 29th day of April, 2021, a true and correct copy of the foregoing was mailed to:

Meghan LeFrancois
Michael Lieberman
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102


JENNIFER L. CRABB

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

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAMES CHANDLER RYDER, through
Next Friend, Sue Ryder,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

MAY 3 2021

JOHN D. HADDEN
CLERK

*Successive Post-Conviction
Case No.: PCD-2020-613*

**PETITIONER'S RESPONSE TO STATE'S MOTION TO STAY THE MANDATE FOR
GOOD CAUSE PENDING CERTIORARI REVIEW**

Respondent has moved this Court to stay the mandate in the above-titled action, citing its intent to seek certiorari review in the United States Supreme Court in *Bosse v. State*, 2021 OK CR 3, __ P.3d __. Mr. Ryder does not oppose a stay of the mandate until June 1, 2021, consistent with this Court's grant of a 45-day stay in *Bosse*. Mr. Ryder objects to any additional stay by this Court beyond June 1, 2021. Following June 1, 2021, this Court should proceed in accordance with the course taken by the Supreme Court in *Bosse*.¹

¹ The State's Application to Stay Mandate of the Oklahoma Court of Criminal Appeals Pending Review on Certiorari in *Bosse* is currently pending before the Supreme Court, with a response by Mr. Bosse due May 7, 2021 at 3:00 p.m. *Oklahoma v. Bosse* (No. 20A161).

Respectfully submitted,



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COUNSEL FOR JAMES CHANDLER RYDER

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2021 a true and correct copy of the foregoing document was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9 (B), Rules of the Court of Criminal Appeals.



Meghan LeFrancois

ORIGINAL**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

BENJAMIN ROBERT COLE, Sr.

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

))))))

No. PCD-2020-529

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

MAY 12 2021

**JOHN D. HADDEN
CLERK**

JAMES CHANDLER RYDER,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

))))))

No. PCD-2020-613

ORDER STAYING ISSUANCE OF MANDATE

On April 29, 2021, Respondent filed with this Court motions to recall the mandate in each of the above cited capital post-conviction appeals. Counsel for each Petitioner have filed responses indicating they have no objection to staying the mandate until June 1, 2021.

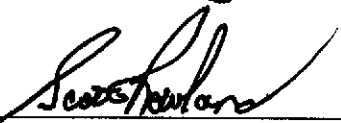
Respondents request is **GRANTED**. The Court hereby stays the issuance of the mandate in each of the above cited cases until June 1, 2021. Mandate will automatically issue on June 1, 2021.


IT IS SO ORDERED.


WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

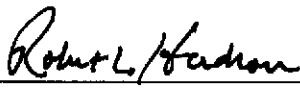
12 day of May, 2021.


DANA KUEHN, Presiding Judge

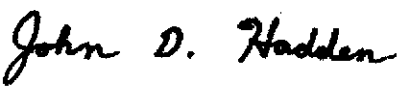

SCOTT ROWLAND, Vice Presiding Judge


GARY L. LUMPKIN, Judge


DAVID B. LEWIS, Judge


ROBERT L. HUDSON, Judge

ATTEST:


Clerk

(ORDER LIST: 593 U.S.)

WEDNESDAY, MAY 26, 2021

ORDER IN PENDING CASE

20A161 OKLAHOMA V. BOSSE, SHAUN M.

The application to stay the mandate of the Court of Criminal Appeals of Oklahoma, case No. PCD-2019-124, presented to Justice Gorsuch and by him referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

ORIGINAL



Case. No. PCD-2020-613

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

FILED

**IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

MAY 26 2021

**JOHN D. HADDEN
CLERK**

JAMES CHANDLER RYDER,

Petitioner,

-VS-

THE STATE OF OKLAHOMA,

Respondent.

**BRIEF IN SUPPORT OF MOTION TO FURTHER STAY THE MANDATE IN
LIGHT OF THE UNITED STATES SUPREME COURT'S ORDER
STAYING THE MANDATE IN OKLAHOMA V. BOSSE**

**MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA**

**CAROLINE E.J. HUNT, OBA #32635
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ATTORNEYS FOR RESPONDENT

MAY 26, 2021

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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

No. PCD-2020-613

**BRIEF IN SUPPORT OF MOTION TO FURTHER STAY THE MANDATE IN
LIGHT OF THE UNITED STATES SUPREME COURT'S ORDER
STAYING THE MANDATE IN OKLAHOMA V. BOSSE**

COMES NOW, the State of Oklahoma, by and through Attorney General Mike Hunter, and in support of its Motion to Further Stay the Mandate in Light of the United States Supreme Court's Order Staying the Mandate in *Oklahoma v. Bosse*, filed pursuant to Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), files this brief in support pursuant to Rule 3.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). Petitioner's case involves the same two issues being litigated in *Oklahoma v. Bosse* before the Supreme Court, and the State plans to seek certiorari review in this case as it is doing in *Bosse*. Accordingly, the State previously moved this Court for a stay in the instant case, and Petitioner agreed to a stay until June 1, 2021, and stated that, "[f]ollowing June 1, 2021, this Court should proceed in accordance with the course taken by the Supreme Court in *Bosse*." This Court entered an order staying the mandate until June 1, 2021, consistent with the stay it had granted in *Bosse*. The State also filed a protective application at the U.S. Supreme Court for a stay in this case based on the same

reasons offered in *Bosse*, but informed the Supreme Court that if that “Court grants a stay in *Bosse*, applicant will seek a further stay from the OCCA in this case to align with this Court’s stay in *Bosse*.” Application to Stay Mandate to the Oklahoma Court of Criminal Appeals Pending Review on Certiorari, *Oklahoma v. Ryder*, Case No. 20A168, filed 5/21/2021. The State now respectfully requests that, in light of the Supreme Court’s order in *Bosse* and the identical issues the State will raise in this case in seeking certiorari review, this Court further stay the mandate in this case until the Supreme Court either denies certiorari review or issues an opinion in this case.

A. Background

Petitioner is a non-Indian who murdered Sam and Daisy Hallum, members of the Choctaw Nation. Petitioner was convicted of murdering the Hallums and sentenced to death in Pittsburg County District Court Case No. CF-1999-147. In his second post-conviction application, filed approximately twenty-one years after the murders, Petitioner argued that the State lacked jurisdiction because Sam and Daisy were Indian, and the crimes were committed within the Choctaw Nation Reservation. 9/8/2020 Successive Application for Post-Conviction Relief. This Court remanded the case to the district court for an evidentiary hearing. 9/25/2020 Order Remanding for Evidentiary Hearing. The district court determined that Sam and Daisy Hallum were Indian and that the crime was within the Choctaw Nation Reservation. 11/9/2020 Court Order with Findings of Fact and Conclusions of Law in Accordance with Order Remanding for Evidentiary Hearing Issued September 25, 2020 at 2-10. The State filed a

supplemental brief asserting concurrent jurisdiction over the non-Indian Petitioner, and arguing that the claim should be considered both waived—pursuant to 22 O.S. § 1089(D)—and barred by the doctrine of laches.

11/23/2020 Supplemental Brief of Respondent after Remand.

In *Bosse v. State*, 2021 OK CR 3, ¶¶ 20-28, 484 P.3d 286, 293-95, this Court held that Oklahoma lacked jurisdiction to prosecute Mr. Bosse, rejected the State's procedural defenses, and reversed the convictions. Following *Bosse*, this Court reversed Petitioner's conviction based on *Bosse's* rejection of the State's assertion of concurrent jurisdiction and procedural defenses. *Ryder v. State*, 2021 OK CR 11, ¶¶ 5, 28, ___ P.3d ___, ___. This Court ordered the mandate to issue twenty days after its opinion. *Ryder*, 2021 OK CR 11, ¶ 30.

The State then requested this Court to further stay its mandate pending the filing of a petition for writ of certiorari, consistent with its earlier limited stay in *Bosse*. Petitioner did not oppose a stay "until June 1, 2021, consistent with this Court's grant of a 45-day stay in *Bosse*." 5/3/2021 Petitioner's Response to State's Motion to Stay the Mandate for Good Cause Pending Certiorari Review. Petitioner further stated that, "[f]ollowing June 1, 2021, this Court should proceed in accordance with the course taken by the Supreme Court in *Bosse*." *Id.* This Court entered an order staying its mandate until June 1, 2021. 5/12/2021 Order Staying Issuance of the Mandate. The State then filed an application at the U.S. Supreme Court for a further stay in this case to preserve its ability to grant a stay in this case if it grants a stay in *Bosse*, but informed the Supreme Court that, time permitting, "[i]n the event [the Supreme] Court

grants a stay in *Bosse*, applicant will seek a further stay from [the OCCA].” Application to Stay Mandate to the Oklahoma Court of Criminal Appeals Pending Review on Certiorari, *Oklahoma v. Ryder*, Case No. 20A168, filed 5/21/2021.

On May 26, 2021, the Supreme Court entered the following order on the State’s stay application in *Oklahoma v. Bosse*:

The application to stay the mandate of the Court of Criminal Appeals of Oklahoma, case No. PCD-2019-124, presented to Justice Gorsuch and by him referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

Order in Pending Case, *Oklahoma v. Bosse*, Case No. 20A161 (May 26, 2021) (attached as Exhibit A). Because the Supreme Court has granted a stay in *Bosse* with sufficient time for this Court to grant a further stay in this case, the State now respectfully moves for a further stay of the mandate in this case as it stated to the Supreme Court it would.

B. Good Cause Justifies Stay of the Mandate

Rule 3.15(B) provides for a recall or stay of the mandate where “good cause” is “shown.” Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). Here, the State shows good cause for staying the mandate in this case: (1) this case involves the same issues as *Bosse*, and the Supreme Court has already determined that those issues in *Bosse* warranted a stay due to the reasonable probability of a grant of certiorari review and ultimate

reversal, as well as the likelihood of irreparable harm to the State absent a stay; and (2) Petitioner previously agreed that this Court should follow the course taken by the Supreme Court in *Bosse*.

First, this case involves the same issues as *Bosse*—it is a capital case reversed on successive post-conviction review, over the State’s arguments that it possessed jurisdiction, concurrent with the federal government, over the non-Indian defendant and that the claim was waived and barred. In granting the State’s requested stay in *Bosse* pending certiorari review, the Supreme Court has already confirmed that these issues are likely to garner certiorari review and reversal and, assuming a stay is not granted, result in irreparable harm to the State. Specifically, the Supreme Court will not grant a stay of a lower court’s mandate pending the Supreme Court’s review unless: (1) there is a reasonable probability that four members of this Court will be of the opinion that the issues are sufficiently meritorious to warrant a grant of certiorari, as well as a significant possibility of reversal of the lower court’s decision, and (2) it is likely that irreparable harm will result from issuance of the mandate. *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers). Thus, given the identical issues at play in this case, including the potential of irreparable harm, good cause is shown for a stay here.

Second, Petitioner has already agreed that, “[f]ollowing June 1, 2021, this Court should proceed in accordance with the course taken by the Supreme Court in *Bosse*.” 5/3/2021 Petitioner’s Response to State’s Motion to Stay the Mandate for Good Cause Pending Certiorari Review. This Court has previously found

good cause to stay the mandate where both parties were in agreement, as this Court initially stayed the mandate until June 1, 2021, based, at least on part, on the fact that "Counsel for each Petitioner have filed responses indicating they have no objection to staying the mandate until June 1, 2021."¹ 5/12/2021 Order Staying Issuance of the Mandate. Given Petitioner's agreement this Court should follow the course taken by the Supreme Court in *Bosse*, and the Supreme Court's order entered today in *Bosse*, this Court should find good cause here to stay the mandate pending certiorari review.

CONCLUSION

WHEREFORE, the State respectfully requests this Court stay the mandate through the pendency of the State's certiorari petition, and possible merits review by the Supreme Court.

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL



CAROLINE E.J. HUNT, OBA #32635
ASSISTANT ATTORNEY GENERAL

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Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 (FAX)

¹ This Court entered a combined order staying the mandate in both this case and *Cole v. State*, Case No. PCD-2020-529.

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF MAILING

On this 26th day of May, 2021, a true and correct copy of the foregoing was mailed to:

Meghan LeFrancois
Michael Lieberman
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102


CAROLINE E.J. HUNT

(ORDER LIST: 593 U.S.)

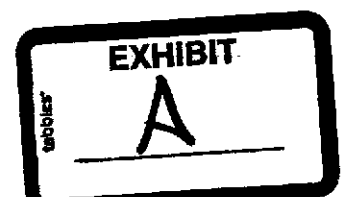
WEDNESDAY, MAY 26, 2021

ORDER IN PENDING CASE

20A161 OKLAHOMA V. BOSSE, SHAUN M.

The application to stay the mandate of the Court of Criminal Appeals of Oklahoma, case No. PCD-2019-124, presented to Justice Gorsuch and by him referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.



ORIGINAL



IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE, SR.)
 Petitioner,)
vs.)
)
THE STATE OF OKLAHOMA,)
 Respondent,)

No. PCD-2020-529

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 28 2021

JOHN D. HADDEN
CLERK

JAMES CHANDLER RYDER,)
 Petitioner,)
)
vs.)
)
THE STATE OF OKLAHOMA,)
 Respondent,)

No. PCD-2020-613

MILES STERLING BENCH,)
 Petitioner,)
)
vs.)
)
THE STATE OF OKLAHOMA,)
 Respondent,)

No. PCD-2015-698

ORDER STAYING ISSUANCE OF MANDATES INDEFINITELY


On May 26, 2021, Respondent State of Oklahoma filed with this Court motions to further stay the mandate in light of the United States Supreme Court's order staying the mandate in *Oklahoma v. Bosse*, Case No. 20A161. The mandates in *Cole v. State* and *Ryder v. State*, cited above, are due to automatically issue on June 1, 2021. The mandate in *Bench v. State*, cited above, is due to automatically issue on July 12, 2021.

Pursuant to the United States Supreme Court granting the stay in *Oklahoma v. Bosse*, and in light of this Court's request for further briefing in *State ex rel. Matloff v. Wallace*, Case. No. PR-2021-366, the mandates in the above cited cases are hereby stayed indefinitely.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

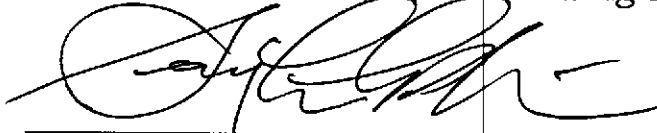
28 day of May, 2021.



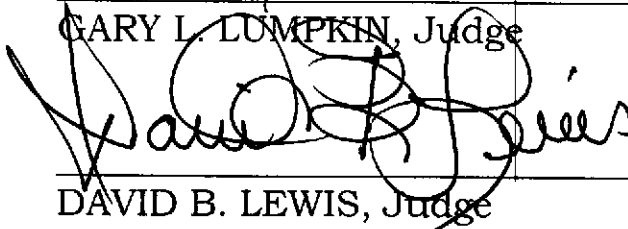
DANA KUEHN, Presiding Judge



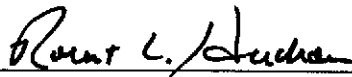
SCOTT ROWLAND, Vice Presiding Judge



GARY L. LUMPKIN, Judge

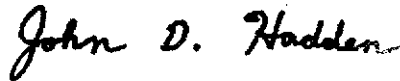


DAVID B. LEWIS, Judge



ROBERT L. HUDSON, Judge

ATTEST:



Clerk

2021 WL 3578089
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

Synopsis

Background: State petitioned for a writ of prohibition, seeking to vacate a post-conviction order by the District Court, Pushmataha County, [Jana Kay Wallace, J.](#), that vacated and dismissed defendant's second degree murder conviction, which was committed in the Choctaw Reservation, in light of Supreme Court's decision in *McGirt v. Oklahoma*, U.S. 140 S.Ct. 2452.

Holdings: The Court of Criminal Appeals, [Lewis, J.](#), held that:

[1] rule in *McGirt v. Oklahoma* did not apply retroactively to convictions that were final at the time it was decided, overruling *Bosse v. State*, 484 P.3d 286, *Cole v. State*, 492 P.3d 11, *Ryder v. State*, 489 P.3d 528, and *Bench v. State*, 492 P.3d 19;

[2] rule announced in *McGirt* was procedural;

[3] rule announced in *McGirt* was new; and

[4] trial court judge could not apply rule in *McGirt* retroactively.

Petition granted; order granting postconviction relief reversed.

[Hudson, J.](#), filed a specially concurring opinion.

[Lumpkin, J.](#), filed a specially concurring opinion.

Procedural Posture(s): Appellate Review; Post-Conviction Review; Petition for Writ of Prohibition.

West Headnotes (7)

[1] Criminal Law 🔑

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.

[2] Criminal Law 🔑

New rules of criminal procedure generally do not apply retroactively to convictions that are final, with a few narrow exceptions.

[3] Criminal Law 🔑

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, did not apply retroactively to void a conviction that was final when *McGirt* was decided; overruling *Bosse v. State*, 484 P.3d 286, *Cole v. State*, 492 P.3d 11, *Ryder v. State*, 489 P.3d 528, and *Bench v. State*, 492 P.3d 19. 18 U.S.C.A. § 1153.

[4] Criminal Law 🔑

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, was only a procedural change in the law, and thus, did not constitute a substantive or watershed rule that would permit retroactive collateral attacks. 18 U.S.C.A. § 1153.

[5] Criminal Law 🔑

For purposes of retroactivity analysis, a case announces a “new rule” when it breaks new ground, imposes new obligation on the state or federal government, or in other words, result was not dictated by precedent when defendant's conviction became final.

[6] Criminal Law 🔑

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, was new, and thus, did not apply retroactively to convictions that were final at the time it was decided, since the rule imposed new and different obligations on the state and federal government, and rule also broke new legal ground in the sense that it was not dictated by Supreme Court precedent. 18 U.S.C.A. § 1153.

[7] Criminal Law 🔑

Trial court judge could not retroactively apply rule in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, to defendant's petition for post-conviction relief, and thus, issuance of a writ of prohibition to vacate trial court's order vacating and dismissing defendant's final second degree murder conviction was warranted, since trial court judge was unauthorized take such action under state law. 18 U.S.C.A. § 1153.

OPINION

LEWIS, JUDGE:

*1 ¶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 (Okla. 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 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?

*2 ¶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**.

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*).

[1] [2] ¶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).

*3 ¶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 (Jimmy 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).

[3] ¶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 Reservations⁴ in those 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.

*4 ¶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.*

*5 ¶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.

[4] ¶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.

*6 ¶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. 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.

[5] [6] ¶28 Second, the procedural rule announced in *McGirt* was new.⁶ For purposes of retroactivity 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

*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 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 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.

*8 ¶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.

[7] ¶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.

*9 ¶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 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.

*10 ¶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 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 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.

All Citations

--- P.3d ----, 2021 WL 3578089, 2021 OK CR 21

Footnotes

- 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).
- 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.
- 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.

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).

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. Simmons*, 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”).

7 *McGirt*, 140 S.Ct. at 2497 (Roberts, C.J., dissenting). In *Murphy v. Simmons*, 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 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).

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 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 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.

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

STATE ex rel. MARK MATLOFF,
DISTRICT ATTORNEY,

Petitioner,

-vs-

THE HONORABLE JANA WALLACE,
DISTRICT JUDGE,

Respondent.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL - 2 2021

JOHN D. HADDEN
CLERK

Case No. PR-2021-366

**AMICUS CURIAE BRIEF OF THE CAPITAL HABEAS UNIT OF THE
FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF
OKLAHOMA IN SUPPORT OF RESPONDENT**

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June 24, 2021

Subject To Acceptance Or Rejection By the Court
Of Criminal Appeals Of the State Of Oklahoma.

This Instrument is Accepted As Tendered For
Filing This 24th Day Of June 2021

COURT CLERK

COURT OF CRIMINAL APPEALS

BY Cynde Hannebaum
DEPUTY CLERK

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

STATE ex rel. MARK MATLOFF,)
DISTRICT ATTORNEY,)

Petitioner,)

v.)

THE HONORABLE JANA WALLACE,)
DISTRICT JUDGE,)

Respondent.)

Case No. PR-2021-366

**AMICUS CURIAE BRIEF OF THE CAPITAL HABEAS UNIT OF THE FEDERAL
PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF OKLAHOMA IN
SUPPORT OF RESPONDENT**

On May 21, 2021, this Court ordered Petitioner Mark Matloff and Attorney Debra K. Hampton, post-conviction counsel for party-in-interest Clifton Parish, to submit briefs 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?

Amicus curiae, the Capital Habeas Unit of the Federal Public Defender for the Western District of Oklahoma (“CHU-FPD”), appears solely to establish that Respondent, Associate District Judge Jana Wallace, correctly applied *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), in *State v. Parish*, to conclude the Choctaw Nation Reservation has not been disestablished. *State v. Parish*, Pushmataha County Case No. CF-2010-26, Order (Apr. 13, 2021). Respondent was correct in finding the State of Oklahoma lacked subject matter jurisdiction to try Parish for murder under the Major Crimes Act, 18 U.S.C. § 1153, because *McGirt* can be applied retroactively to void a state conviction

that was final when *McGirt* was announced.¹

ARGUMENT

I. *McGIRT* IS RETROACTIVELY APPLICABLE TO VOID A STATE CONVICTION THAT WAS FINAL WHEN *McGIRT* WAS ANNOUNCED.

The recent recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* should be applied retroactively to void a state conviction that was final when those decisions were announced. Based on an accurate interpretation of the rules governing retroactivity, the State of Oklahoma has repeatedly argued *McGirt* did *not* announce a new constitutional rule of criminal procedure. *See infra* Section B. As a result, under this Court's jurisprudence, there is no bar to its retroactive application to cases on collateral review.

Teague v. Lane, 489 U.S. 288 (1989), *overruled in part by Edwards v. Vannoy*, 593 U.S. ___, 141 S. Ct. 1547 (2021), remains the bedrock Supreme Court decision on the mandated retroactivity of new, substantive rules of federal constitutional law. *Teague* was concerned with the rules for the relatively small category of new decisions that state courts *must* apply retroactively.

[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague's* conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. This holding is limited to *Teague's* first exception for substantive rules [].

Montgomery v. Louisiana, 577 U.S. 190, 200 (2016). As with any constitutional rule, beyond this carve-out of mandatory protection, states are free to govern as they see fit. *See, e.g., State v.*

¹In *Sizemore v. State*, 2021 OK CR 6, this Court, applying *McGirt* on state direct appeal, held Congress has never disestablished the Choctaw Reservation. *Id.* at ¶¶ 13-16. The principles supporting the retroactive applicability of *McGirt*, discussed *infra*, apply with equal force to *Sizemore*.

Santiago, 492 P.2d 657, 665 (Haw. 1971) (“Nothing prevents our constitutional drafters from fashioning greater protections for criminal defendants than those given by the United States Constitution.”). States can choose whether to give any new state or federal rule retroactive effect. The highest criminal courts of many states have issued their own retroactivity laws. Such laws are not implicated by *Teague* except where, as *Montgomery* explained, “constitutional commands” are at issue. See, e.g., *Witt v. State*, 387 So.2d 922, 926 (Fla. 1980) (announcing “essential considerations” for whether new decision has retroactive state effect); *Phillips v. State*, 299 So.3d 1013, 1021-22 (Fla. 2020) (analyzing whether Supreme Court intellectual disability ruling requires retroactive effect under either *Witt* or *Teague*). See also *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113 (1995) (this Court’s application of *Teague*, see *infra* Section A). Under any principle or law of retroactivity, *McGirt* did not announce a new rule and has no place within this analytical framework.

A. The Principles of *Teague* and Its Progeny, as Well as *McGirt* Itself, Establish *McGirt* Did Not Announce a New Rule; Thus, *McGirt* Retroactively Applies to Cases with Final Convictions on State Collateral Review.

The retroactivity of the Supreme Court’s criminal procedure decisions to cases on collateral review depends on whether such decisions announce a new rule. *Teague*, 489 U.S. at 301. When the Supreme Court announces a new constitutional rule of criminal procedure, a person whose conviction is already final may not benefit from that decision in a habeas proceeding. *Chaidez v. United States*, 568 U.S. 342, 347 (2013). “[A] case announces a new rule,” *Teague* explained, “when it breaks new ground or imposes a new obligation” on the government.² See also *Walker v. State*,

²*Teague* included two exceptions: “[W]atershed rules of criminal procedure” and rules placing “conduct beyond the power of the [government] to proscribe.” *Teague*, 489 U.S. at 311-12. *Edwards v. Vannoy* explicitly overruled *Teague*’s watershed rule exception. 593 U.S. ___, 141 S. Ct.

1997 OK CR 3, ¶38, 933 P.2d 327, 338. “*Teague* also made clear that a case does *not* ‘announce a new rule, [when] it [is] merely an application of the principle that governed’ a prior decision to a different set of facts.” *Chaidez*, 568 U.S. at 347-48 (quoting *Teague*, 489 U.S. at 307). “‘Where the beginning point’” of the Court’s analysis is a rule of “‘general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.’” *Chaidez*, 568 U.S. at 348 (quoting *Wright v. West*, 505 U.S. 277, 309 (1992)). The most obvious example of a decision announcing a new rule is a decision that overrules an earlier case. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). If the rule is not new, a petitioner may “avail herself of the decision on collateral review.” *Chaidez*, 568 U.S. at 347.

In *McGirt and Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff’d sub nom, Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (*per curiam*), the Supreme Court and the Tenth Circuit Court of Appeals made clear neither case broke new ground sufficient to trigger a *Teague* bar. In *Murphy*, the Tenth Circuit held Congress has not disestablished the Creek Reservation. 875 F.3d at 937. The court dispelled any notion this holding was subject to a *Teague* bar:

Mr. Murphy has no need for *Teague*’s exceptions because he does not seek the benefit of a rule that falls within *Teague*’s retroactivity bar. The post-2003 cases we discuss in our *de novo* analysis are applications of the *Solem* [*v. Bartlett*, 465 U.S. 463 (1984)] framework.

Id. at 930 n.36.

Likewise, the Supreme Court was equally clear *McGirt* did not announce a new constitutional rule of criminal procedure when it held Congress has not disestablished the Creek Reservation.

1547, 1560 (2021) (holding the “watershed exception is moribund”).

Applying *Solem* and other precedent, *McGirt* did nothing more than clarify the framework for determining whether a reservation has been disestablished and, applying this framework, determined the Creek Reservation remained Indian country for purposes of the Major Crimes Act. *See Oneida v. Village of Hobart*, 968 F.3d 664, 668 (7th Cir. 2020) (“We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation.”).

The recent Supreme Court case *Edwards v. Vannoy* further supports the position *McGirt* did not announce a new rule thereby making the *Teague* framework irrelevant. In *Edwards*, the Supreme Court determined *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), which held a state jury must be unanimous to convict a criminal defendant of a serious offense, announced a new constitutional rule of criminal procedure and did not apply retroactively on federal collateral review. *Edwards*, 141 S. Ct. at 1555. In concluding *Ramos* announced a new rule, the Court in *Edwards* reasoned *Ramos*’s jury-unanimity requirement was not dictated by precedent and many courts had interpreted a prior decision, *Apodaca v. Oregon*, 406 U.S. 404 (1972), to permit non-unanimous jury verdicts in state criminal trials. *Edwards*, 141 S. Ct. at 1556. Contrary to *Ramos*, which the *Edwards* Court found was not dictated by precedent, *id.* at 1555-56, *McGirt* simply clarified the existing *Solem* framework to determine the Creek Reservation had not been disestablished. *See Oneida*, 968 F.3d at 668. Further, in concluding the Creek Reservation remained Indian country, *McGirt* did not renounce Supreme Court precedent as in *Ramos*. *See Edwards*, 141 S. Ct. at 1556 (“By renouncing *Apodaca* and expressly requiring unanimous jury verdicts in state criminal trials, *Ramos* plainly announced a new rule for purposes of this Court’s retroactivity doctrine.”).

United States v. Cuch, 79 F.3d 987 (10th Cir. 1996) also shows *McGirt* did not announce a new constitutional rule of criminal procedure. *Cuch* addressed the retroactive applicability of *Hagen v. Utah*, 510 U.S. 399 (1994), which held the state of Utah had jurisdiction to prosecute Mr. Hagen because Congress had diminished the Uintah Reservation in the early 1900s. *Cuch*, 79 F.3d at 989. In reaching its decision in *Hagen*, the Supreme Court “effectively overruled the contrary conclusion reached in its [*Utah v.*] *Ute Indian Tribe* [, 479 U.S. 994 (1986)] case.” Reasoning the *Hagen* decision “was not dictated by precedent existing at [that] time,” *Cuch* concluded *Hagen*’s “holding should not provide the basis for a collateral attack.” *Cuch*, 79 F.3d at 991.³ Unlike *Hagen*, *McGirt* did not “effectively overrule” any existing precedent of the Supreme Court to conclude the Creek Reservation had not been disestablished. Instead, *McGirt* faithfully applied existing precedent while simultaneously clarifying the *Solem* analysis. *McGirt*, 140 S. Ct. at 2464-65, 2468-69.⁴

While *Teague* and its progeny can only act to bar federal collateral review, in the state context, “[t]his Court has cited with approval [*Teague*’s] precepts” in “determining exactly when a decision constitutes a change in the law.” *Ferrell v. State*, 1995 OK CR 54, ¶5, 902 P.2d 1113, 1114.

³*Cuch* also recognized “The Supreme Court can and does limit the retroactive application of subject matter jurisdiction rulings.” *Cuch*, 79 F.3d at 990. Nevertheless, the Tenth Circuit’s analysis of the retroactive application of subject matter jurisdiction rulings still turned on whether such rulings announce new rules. *Id.* at 990-91 (applying *Teague* framework). Post-*Teague*, the Supreme Court has never found that a subject matter jurisdictional ruling falls within the ambit of a constitutional rule of criminal procedure. See also *Murphy*, 875 F.3d at 929 n.36 (noting if a case is not “new,” there is no need to determine whether a rule resulting therefrom qualifies as “constitutional” or “procedural” under *Teague*).

⁴Further, in *Hagen* the defendant’s conviction was not final. The Supreme Court granted certiorari review from the Utah Supreme Court’s reinstatement of the defendant’s conviction after the Utah Court of Appeals reversed the trial court’s denial of defendant’s motion to withdraw his guilty plea on the ground the state court lacked jurisdiction. 510 U.S. at 408-09. In contrast, in *McGirt* and *Murphy* the Supreme Court granted certiorari review and relief, despite both cases involving final convictions on collateral review.

Under *Ferrell*, as under *Teague*, any attempt to prevent *McGirt* from taking retroactive effect fails at the threshold. *McGirt* did not announce the new rule of law necessary to render such analysis applicable. In *Ferrell*, this Court found the state law at issue “was not dictated by existing precedent” and therefore announced a new rule. 902 P.2d at 1114. As the State has continuously argued, *McGirt* was dictated by precedent and did not break new ground. *See McGirt*, 140 S. Ct. at 2464; *see infra* Section B. *Ferrell* demonstrates that *McGirt* did not announce a new constitutional rule of criminal procedure. It subsequently cannot be held non-retroactive under this line of precedent.

B. The State Has Repeatedly and Consistently Asserted *McGirt* Is Not New for the Purposes of *Teague*.

In a series of briefings spanning several cases, the State has repeatedly urged this Court to find state prisoners’ *McGirt* claims waived. Often citing *Teague* for the proposition, the State has forcefully argued *McGirt* does not, and cannot, represent “new law.” Any attempt to now advance the opposite position should not be countenanced.

Soon after *McGirt* was handed down, the State began lodging what it clearly viewed as one of its central procedural defenses against collateral *McGirt* relief: such claims did not arise under new law and therefore had been waived under state statute.⁵ *See* Resp. to Pet’r’s Proposition I in

⁵The cases discussed below involve application of Okla. Stat. tit. 22, § 1089, the capital post-conviction statute. Specifically, § 1089(D)(8) permits subsequent applications for post-conviction relief when the legal basis for the claim was unavailable. Under § 1089(D)(9)(a)-(b), a legal basis for a claim is unavailable 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 of the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

Although § 1089 does not apply to non-capital cases, the State’s repeated argument that *McGirt* did not announce a new rule is relevant here.

Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) at 25-27, *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, No. PCD-2019-124 (Aug. 4, 2020) (hereinafter "*Bosse* Response"). The State sought to ground this argument in the language and reasoning of *McGirt* itself, where the Court characterized its opinion as "say[ing] nothing new" and traced the long line of treaties and cases it had applied to reject disestablishment. Similarly, the State pointed to *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), as a decision recognizing that it "broke no new ground." *Bosse* Response at 26. The State noted the Tenth Circuit had found the petitioner's claim "not *Teague*-barred," as it was not new, but rather, an application of prior case law. *Bosse* Response at 26, citing *Murphy*, 875 F.3d at 930 n.36. The State described the pertinent holding of *Teague* as distinguishing between new rules, which are subject to a collateral review bar, and those applying a prior precedent, which are by definition not new. *Bosse* Response at 26 n.17.

Following district court remand proceedings in Mr. Bosse's case, the State doubled down on its argument that, as *McGirt* did not present a new ground for relief, the claim should be procedurally barred as untimely. See State's Supplemental Br. Following Remand For Evidentiary Hr'g at 17-19, *Bosse v. State* (Nov. 4, 2020) (hereinafter "*Bosse* Post-Hearing Brief"). The State listed a number of decisions on the reservation disestablishment issue from the Supreme Court and this Court to demonstrate "[j]urisdictional claims such as the petitioner's were available long prior to *McGirt*." *Bosse* Post-Hearing Brief at 17-18.⁶

The State went on to invoke *Teague*, and this Court's reliance on *Teague* in discussing when

⁶One of the citations the State included among the "number of cases in which the Supreme Court has considered such claims in the decades preceding *McGirt*," *Hagen v. Utah*, 510 U.S. 399 (1994), was the decision the Tenth Circuit held non-retroactive in *Cuch*, as discussed *supra*, Section A. *Cuch* based this holding on its conclusion that *Hagen* "was not dictated by precedent existing at [that] time." 79 F.3d at 991 (quoting *Teague*).

a case should be viewed as announcing a new rule in *Walker v. State*, 1997 OK CR 3, ¶38, 933 P.2d 327, 338, in post-remand briefs before this Court in several cases. In addition to arguing that *McGirt* claims could have been formulated previously and therefore do not meet the Okla. Stat. tit. 22, § 1089(D)(9)(a) exception, the briefing uniformly relied on *Teague* and *Walker* to argue that *McGirt* was not the new constitutional law needed to satisfy § 1089(D)(9)(b). See Supplemental Br. of Resp't After Remand at 13-14, *Ryder v. State*, 2021 OK CR 11, No. PCD-2020-613, 2021 WL 1727017 (Nov. 23, 2020); Supplemental Br. of Resp't After Remand at 16-18, *Cole v. State*, 2021 OK CR 10, No. PCD-2020-529 (Dec. 8, 2020); Supplemental Br. of Resp't After Remand at 7-8, *Goode v. State*, No. PCD-2020-530 (Dec. 22, 2020). This Court has granted relief in several of these cases under § 1089(D)(9)(a) with such arguments already before it. In granting post-conviction relief to Mr. Bosse, the Court noted the State had argued “that waiver should apply because there is really nothing new about the claim.” *Bosse*, 2021 OK CR 3, ¶20 n.8, 484 P.3d at 293 n.8.⁷

⁷While this Court rejected the State’s argument that waiver should apply to Mr. Bosse’s *McGirt* claim because he could not satisfy the § 1089(D)(9)(b) exception, it simultaneously emphasized why Mr. Bosse satisfied the § 1089(D)(9)(a) exception: “[A]lthough 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).” *Bosse*, 2021 OK CR 3, ¶20 n.8, 484 P.3d at 293 n.8.

The State’s argument in a separate case also supports this Court’s finding the legal basis for *McGirt* claims was previously unavailable. In *Deerleader v. Crow*, No. 20-CV-172 (N.D. Okla. Dec. 14, 2020), the petitioner filed an application for post-conviction relief before the Supreme Court decided *Murphy* and *McGirt*. While the State insisted on federal habeas that “*McGirt* did not establish a new rule or right, and Indian Country claims were previously available,” it also argued, “this significant change in Oklahoma’s precedent warrants re-exhaustion of Petitioner’s *Murphy* claim in the state courts post-*McGirt*.” Brief in Support of Motion to Stay Federal Habeas Proceedings for Petitioner to Re-Exhaust His *Murphy* Claim in State Court in Light of the United States Supreme Court’s Decision in *McGirt* at 2, 6 n.3, *Deerleader v. Crow*, No. 20-CV-172 (N.D. Okla. Aug. 24, 2020). The State explained:

At the time the OCCA entertained Petitioner’s post-conviction appeal and the *Murphy* claim as raised in Ground Four of his habeas petition, the *Murphy/McGirt* litigation was still pending. Due to the pending litigation, although the OCCA

In each of the above cases, the State also attempted to file additional supplemental briefs bringing *In re: David Brian Morgan*, No. 20-6123 (10th Cir. Sept. 18, 2020) to this Court's attention. See State's Supplemental Br. Regarding Whether *McGirt* Was Previously Available for Purposes of Barring Claims, *Bosse v. State* (Jan. 7, 2021) (hereinafter "*Bosse* Supplemental Brief"); *Cole v. State* (Jan. 21, 2021); *Goode v. State* (Jan. 22, 2021); *Ryder v. State* (Jan. 22, 2021). Pointing to the Tenth Circuit's refusal to allow a *McGirt* claim raised in a second or successive federal habeas petition under 28 U.S.C. § 2244(b)(2)(A), an Anti-Terrorism and Effective Death Penalty Act (AEDPA) provision requiring such petitions be based on a new and explicitly retroactive rule of constitutional law, the State analogized that state collateral relief should therefore be out of *McGirt* petitioners' reach. Quoting *Morgan*'s conclusion that *McGirt* "hardly speaks of a 'new rule of constitutional law,'" the State asserted the Tenth Circuit agreed with *McGirt*'s language of "say[ing] nothing new." See, e.g., *Bosse* Supplemental Brief at 2-3. This Court denied the State permission to raise the "not relevant" authority in *Goode v. State*, see Order Den. Mot. to File Supplemental Br. at 2 (Feb. 2, 2021), and in *Ryder*, it found the analysis "inapposite to the jurisdictional issue," noting that the Tenth Circuit's ruling was premised on its finding that *McGirt* did not create new law, but

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

Id. at 8-9.

Hence, this Court was correct to find the legal basis of the claim was unavailable in *Bosse* under § 1089(D)(9)(a). In this case, the *Teague* bar has no application. These conclusions are consistent with each other.

rather, “simply interpreted acts of Congress in order to determine if a federal statute applied to a given situation,” *Ryder v. State*, 2021 OK CR 11, ¶12 n.3.

The State has continued to rely on *Morgan* in arguing *McGirt* is not new law in subsequent filings, including as recently as weeks prior to the instant Petition for Writ of Prohibition. *See* Supplemental Br. of Resp’t After Remand, *Pitts v. State*, No. PC-2020-885, 2021 WL 2006104 at *7, *7 n.4 (Okla. Crim. App. Apr. 6, 2021) (in arguing *McGirt* claims were previously available, calling issue “settled by *Morgan*” under either § 1089(D)(9) exception ground). The current attempt to cite *Morgan* for the proposition that *McGirt* is not retroactive—ignoring the threshold language in both the *Teague* and AEDPA contexts applying the retroactivity question only to *new* rules, as it logically must be—is inherently inconsistent and incorrect. *See* Pet. for Writ of Prohibition, Designation of R., and Req. for Continued Stay Pending Decision at 2, *State ex. rel. Matloff v. the Honorable Jana Wallace*, 2021 OK CR 15, 2021 WL 2069659, No. PR-2021-366 (Apr. 27, 2021).

The State has argued at every opportunity that *McGirt* is not a new rule of constitutional law. It has spent the better part of the past year trying to convince this Court that § 1089(D)(9) should bar successive petitioners’ *McGirt* claims, based in part on such claims not being new under *Teague* principles. Any attempt to now rely on *Teague* and its progeny to argue that *McGirt* is a new constitutional law is disingenuous. Based on the State’s extensive past briefing on the question, all parties should now be in agreement that *McGirt* did not announce a new constitutional rule. The *Teague* retroactivity framework, which applies only to new rules, therefore by definition has no bearing.

CONCLUSION

Because *McGirt* did not announce a new constitutional rule of criminal procedure, petitioners with final convictions may avail themselves of the decision on state collateral review.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June 2021, a true and correct copy of this filing was mailed to each of the following:

The Honorable Jana Wallace
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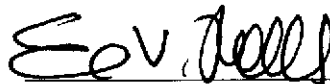
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No. PCD-2020-613

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

**NOTICE OF DECISION IN STATE EX REL. MATLOFF V. WALLACE, 2021 OK
CR 21, ___ P.3d ___, AND REQUEST TO MODIFY THIS COURT'S PRIOR
OPINION IN THIS CASE GRANTING POST-CONVICTION RELIEF, OR
ALTERNATIVELY REQUEST TO CONTINUE STAY**

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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER,)	
)	
Petitioner,)	
)	
v.)	No. PCD-2020-613
)	
THE STATE OF OKLAHOMA,)	
)	
Respondent.)	

NOTICE OF DECISION IN STATE EX REL. MATLOFF V. WALLACE, 2021 OK CR 21, ___ P.3d ___, AND REQUEST TO MODIFY THIS COURT'S PRIOR OPINION IN THIS CASE GRANTING POST-CONVICTION RELIEF, OR ALTERNATIVELY REQUEST TO CONTINUE STAY

COMES NOW, the State of Oklahoma, by and through Attorney General John M. O'Connor, and hereby provides notice to this Court of *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___. After granting post-conviction relief in this case based on a claim under *McGirt v. Oklahoma*, 140 S. Ct. 2452, (2020), this Court indefinitely stayed the mandate based, *inter alia*, on the briefing ordered in *Wallace*. Then, in *Wallace*, this Court held that, as a matter of state law, post-conviction claims based on *McGirt* are barred in cases in which the conviction became final on direct review before July 9, 2020—the day *McGirt* was decided. *Wallace*, 2021 OK CR 21, ¶ 15. For the reasons below, the State respectfully asks that this Court exercise its inherent power to modify an opinion in light of intervening authority,¹ modify its decision in this case, and deny

¹ As shown below, this is *not* a petition for rehearing. Rather, this Court possesses the inherent power to modify its decisions, irrespective of the rehearing power, and the State asks this Court to exercise that power here.

Petitioner both retroactive application of *McGirt* and post-conviction relief. Alternatively, the State asks that this Court continue the stay in this case pending resolution of the certiorari petition in *Oklahoma v. Bosse*, Case No. 21-186, and the certiorari petition the State will file in this case if the Court declines to modify its decision to deny Petitioner post-conviction relief.

I. BACKGROUND

Daisy and Sam Hallum hired Petitioner to take care of their home when they were away. *Ryder v. State*, 2004 OK CR 2, ¶ 2, 83 P.3d 856, 860. Petitioner was acquiring supplies for his plan to go to the Yukon, and he stored them at the Hallum's residence. *Id.* After the Hallums returned, a dispute arose over the property. *Id.*, 2004 OK CR 2, ¶¶ 2-4, 83 P.3d at 860-61. On April 8, 1999, Petitioner beat seventy-year-old Daisy Hallum to death, and shot her son, Sam Hallum, multiples times. *Id.*, 2004 OK CR 2, ¶ 12, 83 P.3d at 862.

Petitioner was convicted by a jury of two counts Murder in the First Degree in Case No. CF-1999-147 in the District Court of Pittsburg County. The jury found the existence of two aggravating circumstances as to Daisy Hallum's murder: (1) Petitioner created a great risk of death to more than one person; and (2) there is a probability he will commit additional acts of violence which would constitute a continuing threat to society. The jury sentenced Petitioner to death for this murder, and to life without parole for Sam Hallum's murder. The district court imposed judgment and sentence in accordance with the jury's verdict. This Court affirmed the judgment and sentence on direct appeal. *Ryder*, 2004 OK CR

2, ¶ 99, 83 P.3d at 879, *cert. denied Ryder v. Oklahoma*, 543 U.S. 886 (2004). Petitioner's conviction became final on October 4, 2004, when the United States Supreme Court denied certiorari review of this Court's direct appeal opinion. *See Wallace*, 2021 OK CR 21, ¶ 2 n. 1.

On September 8, 2020, Petitioner filed the instant application for post-conviction relief ("P.C. App."). For the first time, Petitioner raised a claim that the State lacked prosecutorial authority in his case because, although he is not Indian, Daisy and Sam Hallum were, and his crimes occurred within the boundaries of the alleged Choctaw Nation Reservation (P.C. App. at 4-30).

On July 9, 2020, the Supreme Court held in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020), that the Creek Nation's Reservation had not been disestablished for purposes of 18 U.S.C. § 1153.

In light of *McGirt*, this Court remanded Petitioner's post-conviction proceedings for an evidentiary hearing on his prosecutorial authority claim. Ultimately, the district court found that Daisy and Sam Hallum were Indian and that, based on *McGirt*, "the crimes occurred in Indian Country." 10/28/2020 Court Order with Findings of Fact and Conclusions of Law in Accordance with Order Remanding for Evidentiary Hearing Issued September 25, 2020 at 2-10.²

² The State strongly disagrees with *McGirt's* conclusion that the Creek Reservation was not disestablished and has asked the Supreme Court to grant certiorari review in *Oklahoma v. Bosse*, Case No. 21-186, and overturn *McGirt*. As Chief Justice Roberts explained in his dissent, longstanding precedent on the disestablishment of Indian reservations required the Court to consider "the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there." *McGirt*, 140 S. Ct. at 2485. But those precedents were

On March 11, 2021, this Court decided *Bosse v. State*, holding that *McGirt* claims “can never be waived or forfeited” and that “the limitations of post-conviction or subsequent post-conviction statutes do not apply to [*McGirt* claims].” *Bosse v. State*, 2021 OK CR 3, ¶ 21, 484 P.3d 286, 293-94. *Bosse* rejected the “variety of procedural” defenses raised by the State and applied *McGirt* to the defendant’s already final convictions. See *Bosse*, 2021 OK CR 3, ¶¶ 20-22 & nn. 8-9, 484 P.3d at 294.

On April 29, 2021, in this case, this Court granted post-conviction relief, holding based on *Bosse* that “[s]ubject-matter jurisdiction may—indeed, must—be raised at any time,” “[n]o procedural bar applies,” and that the State lacks “jurisdiction” over crimes committed by non-Indians against Indians in Indian Country. *Ryder v. State*, 2021 OK CR 11, ¶ 5, 18-28, 489 P.3d 528, 530, 532-34. This Court’s opinion rested on the implicit assumption that *McGirt* applies retroactively to final convictions.

“not followed by the Court.” *Id.*; see also *Bosse v. State*, 2021 OK CR 3, ¶ 1, 484 P.3d 286, 298 (Lumpkin, J., concurring in results) (“[T]he [*McGirt*] Majority . . . totally failed to follow the Court’s own precedents”). Instead, the Court reasoned that “extratextual sources” may be considered in the disestablishment inquiry “only” to “clear up” statutory ambiguity. *McGirt*, 140 S. Ct. at 2469 (majority opinion). Consideration of history is necessary, however, precisely because it is unclear whether Congress’s alienation of Indian lands at the turn of the century changed the status of the land. See *id.* at 2488 (Roberts, C.J., dissenting). Under the correct framework prescribed by the Supreme Court’s pre-*McGirt* precedent, it is clear that Congress disestablished the reservations of the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Tribes in Oklahoma. In any event, as shown below, Petitioner here is not entitled to retroactive application of *McGirt*.

On that same date, the State moved this Court to stay its mandate for good cause pending certiorari review in *Bosse* and this case. On May 12, 2021, this Court granted a limited stay until June 1, 2021.

On May 21, 2021, this Court ordered briefing, in *State ex rel. Matloff v. Wallace*, on whether *McGirt* should be applied retroactively to void a conviction that was final before it was announced. *State ex rel. Matloff v. Wallace*, 2021 OK CR 15, ¶ 6, ___ P.3d ___, ___.

Meanwhile, in the *Bosse* certiorari litigation, on May 26, 2021, the Supreme Court granted the State's stay application pending certiorari review. Order in Pending Case, *Oklahoma v. Bosse*, Case No. 20A161 (May 26, 2021).

In this case, on May 28, 2021, this Court stayed the mandate “indefinitely” “[p]ursuant to the United States Supreme Court granting the stay in *Oklahoma v. Bosse*, and in light of this Court’s request for further briefing in *State ex rel. Matloff v. Wallace*, Case No. PR-2021-366.”³

On August 12, 2021, this Court issued its decision in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___. In a change from its earlier applications of *McGirt* to convictions that were final when *McGirt* was decided, *Wallace* held that, as a matter of state law, post-conviction claims based on *McGirt* are not permitted in cases in which the conviction became final on direct review before July 9, 2020—the day *McGirt* was decided. *Wallace*, 2021 OK CR 21, ¶ 15. This

³ Pursuant to this Court’s order staying the mandate, the district court has not entered any order dismissing the charges or vacating Petitioner’s murder convictions and death sentence.

Court spoke in mandatory terms: “[E]xercising 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 [the additional] reservations **shall not** apply retroactively to void a conviction that was final when *McGirt* was decided.” *Id.* (emphasis added). Indeed, this Court held that the district court’s reversal in *Wallace* was an “unauthorized dismissal” which “justifie[d] the exercise of extraordinary jurisdiction.” *Id.*, 2021 OK CR 21, ¶ 41. This Court further repudiated its earlier cases, including the present one, to the extent they assumed that *McGirt* had retroactive effect. *Id.*

**II. IN LIGHT OF THE INTERVENING DECISION IN WALLACE,
THIS COURT SHOULD EXERCISE ITS INHERENT AUTHORITY
TO MODIFY THE DECISION IN THIS CASE**

As an initial matter, to be clear, this Notice and Request to Modify is **not** an unauthorized petition for rehearing. See Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021) (“A petition for rehearing may be filed only in regular appeals, as defined by Rule 1.2.”); Rule 5.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021) (in post-conviction appeals, “[a] petition for rehearing is not allowed”). Indeed, the State does not invoke the rehearing rules or the grounds that justify rehearing under the rules, nor does it call upon this Court’s rehearing power. See Rule 3.14(B)(1)-(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021) (“[s]ome question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court” or “[t]he decision is in conflict with an

express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument”⁴).

Rather, the State requests that this Court exercise its inherent power, irrespective of its rehearing power, to modify its prior decisions. As shown by this Court’s rules and past practice, this Court possesses the inherent power to stay and/or recall its mandate and modify its prior decisions. See, e.g., Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021); *Logan v. State*, 2013 OK CR 2, 293 P.3d 969 (issuing corrected post-conviction opinion nearly seven weeks after original opinion); *Frazier v. State*, 2002 OK CR 33, 59 P.3d 512 (issuing corrected post-conviction opinion nearly four months after original opinion). Indeed, “[t]he power of an appellate court to recall its mandate, if the circumstances warrant it, is recognized both in federal courts and state courts across the country.” *Robbins v. State*, 114 S.W.3d 217, 221 (Ark. 2003); cf. also *Calderon v. Thompson*, 523 U.S. 538, 549 (1998) (“[T]he courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion.”)⁵; *Dye v. Kansas State Supreme Ct.*, 48 F.3d 487, 488-91 (10th Cir. 1995) (rejecting habeas petitioner’s procedural due process challenge based on state court’s recall of mandate

⁴ Obviously the State could not have failed to call this Court’s attention to *Wallace*, as same had not been decided—and indeed this Court’s briefing order had not even been entered—at the time of this Court’s decision here.

⁵ The State submits that a state court’s power to recall its mandate and modify its decision must be at least as extensive as a federal appellate court’s power to do the same, absent some rule or statute to the contrary.

reversing petitioner's convictions and subsequent decision reinstating his convictions).

In *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. State of Utah*, 114 F.3d 1513, 1521-22 (10th Cir. 1997), for instance, the Tenth Circuit recognized an appellate court's "authority to recall or modify a mandate after the time for rehearing has passed":

In this circuit, as in all circuits that have addressed the issue, an appellate court has power to set aside *at any time* a mandate that was procured by fraud or act to prevent an injustice, or to preserve the integrity of the judicial process. Although the rule is stated in broad terms, the appellate courts have emphasized that the power to recall or modify a mandate is limited and should be exercised only in extraordinary circumstances.

Ute Indian Tribe, 114 F.3d at 1522 (emphasis added, citations and quotation marks omitted). In *Ute Indian Tribe*, the Tenth Circuit recalled the mandate in its earlier decision *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1093 (10th Cir. 1985) (*en banc*)—in which the Tenth Circuit had held that the Uintah Valley Reservation had not been disestablished—in light of the Supreme Court's contrary decision in *Hagen v. Utah*, 510 U.S. 399, 421-22 (1994), holding that the reservation had been diminished. The Tenth Circuit concluded, "in light of the extraordinary circumstances presented": "modification of our earlier judgment is appropriate, not merely because the two decisions are incongruent, but because of the effect of the incongruency on the interests of uniformity and

the integrity of our system of judicial decisionmaking.” *Ute Indian Tribe*, 114 F.3d at 1527.⁶

This Court has not hesitated to overturn the erroneous grant of post-conviction relief and reinstate improperly vacated criminal convictions and sentences. *See, e.g., Wallace*, 2021 OK CR 21, ¶¶ 6, 40-41; *Powell v. Dist. Ct. of Seventh Jud. Dist.*, 1970 OK CR 67, ¶ 9, 473 P.2d 254, 257. In *Application of Anderson*, 1990 OK CR 82, ¶ 5, 803 P.2d 1160, 1163, this Court, after finding the district court improperly modified the defendant’s sentence based on the erroneous conclusion that indeterminate sentences are impermissible, “reinstate[d] said sentence and direct[ed] the District Court to recommit [the defendant] thereon.” In general, the reinstatement of an improperly vacated conviction and sentence does not offend any rights of the defendant. *See United States v. Silvers*, 90 F.3d 95, 99 (4th Cir. 1996) (generally, reinstating a vacated conviction does not violate double jeopardy, as “reinstatement [does] not subject the defendant to a new trial or multiple punishments”); *Dye*, 48 F.3d at 488-91 (rejecting habeas petitioner’s procedural due process challenge based on state court’s recall of mandate reversing petitioner’s convictions and subsequent decision reinstating his convictions).

⁶ In *Wallace*, this Court—while reaching and basing its decision on independent state law grounds—considered with favor the Tenth Circuit’s handling of the shifting jurisdictional understandings regarding the Uintah Valley territory in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996). Here, too, this Court should consider with favor *Ute Indian Tribe* (1997) and its modification of the Tenth Circuit’s earlier judgment in light of the extraordinary circumstances presented, including a change in law.

Based on the foregoing, it is clear that this Court has the power and authority to reconsider and modify its decision in this case and issue a new opinion denying Petitioner post-conviction relief. Indeed, in staying the mandate based in part on *Wallace*, this Court has already implicitly recognized this authority, found good cause for staying the mandate, and contemplated modifying its decision in light of its decision on the retroactivity of *McGirt*.

Respectfully, this Court should now exercise that authority. As this Court explained in *Wallace*, declining retroactive application of *McGirt* “can mitigate some of the negative consequences” of that unexpected “jurisdictional”⁷ rule and further “public safety, finality, and reliance interests in settled convictions,” *Wallace*, 2021 OK CR 21, ¶ 36:

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

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

⁷ As argued in the *Bosse* litigation, the State does not agree that where the State lacks prosecutorial authority in Indian Country, the state court is thereby deprived of subject matter jurisdiction. See, e.g., *United States v. Tony*, 637 F.3d 1153, 1157-60 (10th Cir. 2011) (defendant waived claim that government failed to plead and prove that crime occurred in Indian Country because “[t]he Indian Country nexus . . . is not jurisdictional in the sense that it affects a court’s subject matter jurisdiction”). In any event, regardless of whether the rule in *McGirt* is “jurisdictional,” it is clear under *Wallace* that it does not apply retroactively under state law.

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.

Id., 2021 OK CR 21, ¶¶ 38-39. “By comparison,” this Court reasoned, a defendant’s “legitimate interests in post-conviction relief for . . . jurisdictional error [under *McGirt*] are minimal or non-existent.” *Id.*, 2021 OK CR 21, ¶ 40. A “state court’s faulty jurisdiction (unnoticed until many years later),” did not affect “the truth-finding function of the state court[]” or “the procedural protections [a defendant was] afforded at trial.” *Id.*

Even assuming this Court’s power to modify its prior decisions should be exercised only in “extraordinary circumstances,” *Ute Indian Tribe*, 114 F.3d at 1527, that standard is met. The costs of the retroactive application of *McGirt* are arguably at their apex in a case such as this one. Petitioner murdered two people and was sentenced to death for one of those murders. As Justice Scalia recognized, death sentences are costly and time-consuming for the State to secure and defend, given “the proliferation of labyrinthine restrictions on capital punishment” over the foregoing decades. *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring). Here, as in other capital cases, the State expended extraordinary time and resources in securing and defending Petitioner’s murder convictions and death sentence at every previous stage of this case under the universally held understanding that the State’s prosecutorial

authority was uncontested. In the twenty-three years since Petitioner murdered Daisy and Sam Hallum, their family has been subjected to the trauma of his trial and the appeals that have followed.

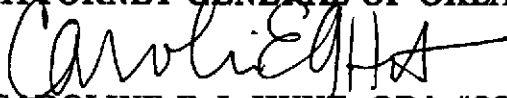
Meanwhile, Petitioner can claim no legitimate interest in the retroactive application of *McGirt*. Like the defendant in *Wallace*, Clifton Parish, the criminal conduct of Petitioner here was accurately established by his trial, “the conviction was affirmed on direct review,” and “the proceedings did not result in the wrongful conviction or punishment of an innocent person.” *Id.*, 2021 OK CR 21, ¶ 40. As this Court poignantly observed, “A reversal of Mr. Parish’s final conviction now undoubtedly would be a monumental victory for him, but **it would not be justice.**” *Id.* (emphasis added). In this case, allowing the retroactive application of *McGirt* to Petitioner to stand would be unjust and provide him an entirely unfair windfall based merely on the fact that this Court’s opinion was entered prior to its decision on retroactivity in *Wallace*. *Cf. Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993) (refusing to find prejudice from “counsel’s failure to make an objection in a state criminal sentencing proceeding—an objection that would have been supported by a decision which subsequently was overruled— . . . [because] [t]o hold otherwise would grant criminal defendants a windfall to which they are not entitled”). For all these reasons, this Court should modify its earlier decision; deny relief on Petitioner’s *McGirt* claim; and not allow Petitioner to escape the death penalty for these horrible murders.

III. CONCLUSION

As then-Presiding Judge Kuehn has recognized, *McGirt* has had “painful” and “unsettling” consequences for the victims of crimes and their families, as well for the communities where crimes occurred. *Bench v. State*, 2021 OK CR 12, ¶¶ 2-3, ___ P.3d ___ (Kuehn, P.J., concurring in result). She continued, “If it were possible to avoid these consequences through my legal analysis, I would.” *Id.* In light of *Wallace*, this Court now can avoid those consequences in this case, through the non-retroactivity of *McGirt*. For the above reasons, the State respectfully requests that this Court modify its decision in this case in light of *Wallace*, decline retroactive application of *McGirt* to Petitioner, and deny him post-conviction relief. Alternatively, the State asks that this Court continue the stay in this case pending resolution of the certiorari petition in *Oklahoma v. Bosse*, Case No. 21-186, and the certiorari petition the State will file in this case if the Court declines to modify its decision to deny Petitioner post-conviction relief.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF MAILING

On this 26th day of August, 2021, a true and correct copy of the foregoing was mailed to:

Meghan LeFrancois
Office of the Federal Public Defender
Western District of Oklahoma
Capital Habeas Unit
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102



CAROLINE E.J. HUNT

SEP 2 2021

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER, by and
Through Next Friend, Sue Ryder,

Petitioner,

-VS-

THE STATE OF OKLAHOMA,

Respondent.

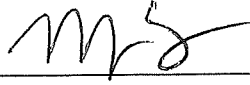
Case No. PCD-2020-613

MOTION TO STAY PROCEEDINGS

Mr. Ryder, by and through his next friend, Sue Ryder, and by and through undersigned counsel, moves to stay his post-conviction action due to anticipated Supreme Court litigation in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21. See Exhibit A (declaration from Debra Hampton, attorney for Clifton Parish, party-in-interest in *Matloff*). Mr. Ryder's post-conviction action should be stayed because this Court has indicated it will decide his case based on an issue that will be litigated in *Matloff* before the Supreme Court: whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) is retroactively applicable to void a state conviction that was final when *McGirt* was announced. Accordingly, because the ensuing litigation in *Matloff* affects Mr. Ryder's case, this Court should stay these proceedings immediately to conserve judicial resources. Pursuant to Rule 3.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), undersigned counsel has simultaneously filed a brief in support of this motion.

For the reasons stated in Mr. Ryder's brief in support, he requests this Court stay his post-conviction action.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2021, a true and correct copy of the foregoing document was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant to Rule 1.9 (B), Rules of the Court of Criminal Appeals.



Meghan LeFrancois

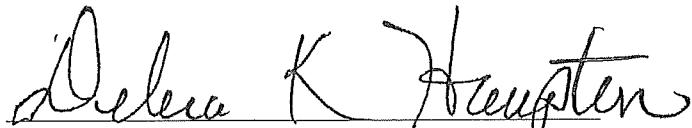
DECLARATION OF DEBRA K. HAMPTON

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

I, Debra K. Hampton, of lawful age, being first duly sworn, on oath state:

1. I am an attorney licensed to practice in Oklahoma and am in good standing with the Oklahoma Bar Association.
2. I represented Clifton Parish in Oklahoma Court of Criminal Appeals (OCCA) Case No. PR-2021-366, *State ex rel. Mark Matloff, District Attorney v. The Honorable Jana Wallace, Associate District Judge*. The OCCA issued an opinion in this case on August 12, 2021, granting the State's Petition for a Writ of Prohibition, thereby overruling Mr. Parish's previous Order Granting Post-Conviction Relief. *Matloff v. Wallace*, 2021 OK CR 21, __P.3d __. Mr. Parish is a registered member of the Choctaw Nation whose crime occurred within the boundaries of the Choctaw Reservation, relief on *McGirt v. Oklahoma* issue. In its opinion, the OCCA overruled its recent decision in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, and decades of precedent stating that subject matter jurisdiction cannot be waived.
3. I intend to appeal the OCCA's decision in *Matloff v. Wallace* to the United States Supreme Court in a Petition for Writ of Certiorari. I have engaged the services of Michael R. Dreeben and Kendall Turner from the O'Melvey & Myers law firm in Washington D.C. who are experienced Supreme Court practitioners, to represent Mr. Parish.

Pursuant to Oklahoma Statutes, Title 12, Section 426, I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct. Executed on September 1, 2021, at Edmond, Oklahoma.



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SEP 2 2021

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER, by and
Through Next Friend, Sue Ryder,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

Post-Conviction Case No.:
PCD-2020- 613

**BRIEF OF PETITIONER IN SUPPORT OF
MOTION TO STAY PROCEEDINGS**

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September 2, 2021

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IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER, by and
Through Next Friend, Sue Ryder,

Petitioner,

-VS-

THE STATE OF OKLAHOMA,

Respondent.

Case No. PCD-2020-613

BRIEF OF PETITIONER IN SUPPORT OF
MOTION TO STAY PROCEEDINGS

Petitioner, James Chandler Ryder, by and through his next friend, Sue Ryder, and through undersigned counsel, provides this brief in support of his Motion to Stay Proceedings. Mr. Ryder's post-conviction action should be stayed because this Court has indicated it will decide his case based on an issue that will be litigated in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21 before the Supreme Court:¹ whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) is retroactively applicable to void a state conviction that was final when *McGirt* was announced. Accordingly, because the ensuing litigation in *Matloff* affects Mr. Ryder's case, this Court should stay these proceedings immediately to conserve judicial resources. In support, Mr. Ryder states the following:

I. Procedural History.

¹Debra Hampton, counsel for Clifton Parish, party-in-interest in *Matloff* "intend[s] to appeal the Oklahoma Court of Criminal Appeals decision in *Matloff v. Wallace* to the United States Supreme Court in a petition for writ of certiorari." She has "engaged the services of Michael R. Dreeben and Kendall Turner from the O'Melveny & Myers law firm in Washington[,], D.C., who are experienced Supreme Court practitioners, to represent Mr. Parish." *See* Exhibit A.

On September 8, 2020, Mr. Ryder filed a Successive Application for Post-Conviction Relief challenging the State's jurisdiction to prosecute him under *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) and *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (July 9, 2020) (mem).² Mr. Ryder asserted exclusive jurisdiction rests with the federal courts because the victims were citizens of the Choctaw Nation and the crimes occurred within the boundaries of the Choctaw Nation Reservation.

This Court remanded this case to the District Court for Pittsburg County for an evidentiary hearing. After the hearing, the district court concluded Mr. Ryder had established the victims were Indian and the crimes for which Mr. Ryder was convicted occurred in Indian Country. *See* Court Order with Findings of Fact and Conclusions of Law in Accordance with Order Remanding for Evidentiary Hearing Issued September 25, 2020, *State v. Ryder*, No. CF-1999-147 (Pittsburg Co. Dist. Ct. Nov. 9, 2020).

On April 29, 2021, after supplemental briefing by both parties,³ this Court held:

After thorough consideration of the entire record before us on appeal we find that

²In *McGirt* and *Murphy*, the Supreme Court reversed rulings of this Court, concluding Congress never disestablished the Creek Reservation. The crimes in *Murphy* and *McGirt* occurred in Indian Country, thus depriving the Oklahoma courts of jurisdiction.

³In this case, the State never argued *McGirt* announced a new rule that could not be retroactively applied in this case. In fact, the State vigorously and repeatedly argued *McGirt* did *not* announce a new rule. *See* Supplemental Brief of Respondent After Remand at 13-14, *Ryder v. State*, No. PCD-2020-613 (Okla. Crim. App. Nov. 23, 2020); State's Supplemental Brief Regarding Whether *McGirt* Was Previously Available for Purposes of Barring Claims, *Ryder v. State*, No. PCD-2020-613 (Okla. Crim. App. Jan. 22, 2021). Under this Court's rules and precedent, the State has waived and/or forfeited any argument *McGirt* announced a new rule that cannot be applied retroactively. *See, e.g.,* Rule 3.5(C)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019) ("Failure to present relevant authority in compliance with [the Court's] requirements will result in the issue being forfeited on appeal"); *Gilbert v. State*, 1998 OK CR 17, 955 P.2d 727, 732 & n.3.

under the law and the evidence relief is warranted. Petitioner has met his burden of establishing the status of his victims as Indian on the date of the crime. We also find the District Court appropriately applied *McGirt* to determine that Congress did establish a Choctaw Reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Choctaw Nation or that the State of Oklahoma had jurisdiction in this matter. We find the State of Oklahoma did not have jurisdiction to prosecute Petitioner in this matter.

Ryder v. State, 2021 OK CR11, ¶ 29, 489 P.3d 528, 534. This Court reversed and remanded the case to the District Court of Pittsburg County with instructions to dismiss. *Id.* at ¶ 30.

On April 29, 2021, the State filed a Motion to Stay the Mandate for Good Cause Pending Certiorari Review “to give the United States Supreme Court the opportunity to determine whether the State may prosecute non-Indian offenders, such as Petitioner, who commit crimes against Indians in Indian Country” and “to determine whether Indian Country jurisdictional claims, like that raised by Petitioner, may be waived or otherwise barred from review.” Motion to Stay the Mandate for Good Cause Pending Certiorari Review, *Ryder v. State*, No. PCD-2020-613 (Okla. Crim. App. Apr. 29, 2021). Mr. Ryder did not oppose a stay of the mandate until June 1, 2021. Petitioner’s Response to State’s Motion to Stay the Mandate for Good Cause Pending Certiorari Review, *Ryder v. State*, No. PCD-2020-613 (Okla. Crim. App. May 3, 2021). This Court stayed the issuance of the mandate until June 1, 2021. Order Staying Issuance of Mandate, *Ryder v. State*, No. PCD-2020-613 (Okla. Crim. May 12, 2021). On May 27, 2021, the State moved to further stay the mandate “in light of the United States Supreme Court’s order . . . staying the mandate in *Oklahoma v. Bosse*, Case No. 20A161.” Motion to Further Stay the Mandate in Light of the United States Supreme Court’s Order Staying the Mandate in *Oklahoma v. Bosse*, *Ryder v. State*, No. PCD-2020-613 (Okla. Crim. App. May 27, 2021). The next day, the Court issued an Order Staying Issuance of Mandates Indefinitely in Mr. Ryder’s case and two other post-conviction cases, “[p]ursuant to the United States Supreme Court

granting the stay in *Oklahoma v. Bosse*, and in light of this Court’s request for further briefing in *State ex. Rel. Matloff v. Wallace*, Case No. PR-2021-366.” Order Staying Issuance of Mandates Indefinitely, *Ryder v. State*, No. PCD-2020-529 (Okla. Crim. App. May 28, 2021).

On August 26, 2021, the State notified this Court of this Court’s decision in *Matloff* and requested a modification of the Court’s prior opinion in Mr. Ryder’s case, or alternatively requested to “continue the stay in this case pending resolution of the certiorari petition in *Oklahoma v. Bosse*, Case No. 21-186, and the certiorari petition the State will file in this case if the Court declines to modify its decision to deny Petitioner post-conviction relief.” Notice of Decision in *State ex. rel. Matloff v. Wallace*, 2021 OK CR 21, __ P.3d __, and Request to Modify This Court’s Prior Opinion in this Case Granting Post-Conviction Relief, or Alternatively Request to Continue Stay at 13, *Ryder v. State*, No. PCD-2020-613 (Okla. Crim. App. Aug. 26, 2021). On August 31, 2021, this Court entered an Order Vacating Previous Order and Judgment Granting Post-Conviction Relief and Withdrawing Opinion from Publication. This Court premised its decision to vacate the previous order and judgment on *Matloff*.⁴ The Court explained it “will issue a separate order addressing Petitioner’s claims for post-conviction relief at a later time.” Order Vacating Previous Order and

⁴In *Matloff*, this Court held *McGirt* “announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction.” *Matloff* at ¶ 6. This Court further stated, “We acted in [*Ryder* and other] post-conviction cases without our attention ever having been drawn to the potential non-retroactivity of *McGirt* in light of the . . . opinion in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996).” *Matloff*, at ¶ 14. Relevant to the waiver argument raised in footnote 2, *supra*, the State failed to draw the Court’s attention to *Cuch*, which was issued almost 25 years ago. This failure is curious in light of the State’s argument in this case that “[j]urisdictional claims such as Petitioner’s were available long prior to *McGirt*.” See Supplemental Brief of Respondent After Remand at 19, *Ryder v. State*, No. PCD-2020-613 (Okla. Crim. App. Nov. 23, 2020). One of the citations the State included to support this statement was *Hagen v. Utah*, 510 U.S. 399 (1994), the decision the Tenth Circuit held non-retroactive in *Cuch*. 79 F.3d at 991.

Judgment Granting Post-Conviction Relief and Withdrawing Opinion from Publication at 1, *Ryder v. State*, No. PCD-2020-613 (Okla. Crim. App. Aug. 31, 2021).

II. A Stay of the Proceedings Is Warranted.

Mr. Ryder recognizes this Court's decision in *Matloff*.⁵ However, as Ms. Hampton's declaration proves, *see* Exhibit A, the precise issue that premised this Court's Order Vacating Previous Order and Judgment in Mr. Ryder's case will be litigated before the Supreme Court. As the history of this case demonstrates, requests for stays pending Supreme Court litigation of potentially dispositive⁶ issues are appropriate requests worthy of being granted. This Court's practice in other cases also supports Mr. Ryder's request for a stay of these proceedings. *See, e.g.*, Order Staying Issuance of Mandate, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Apr. 15, 2021) (recalling

⁵For the reasons set forth in the *Amicus Curiae* Brief of the Capital Habeas Unit of the Federal Public Defender for the Western District of Oklahoma in Support of Respondent, filed by undersigned counsel on June 24, 2021, in *State ex rel. Matloff v. Wallace*, Case No. PR-2021-366, Mr. Ryder maintains this Court incorrectly decided *McGirt* is a new rule of criminal procedure that cannot be retroactively applied to cases with final convictions.

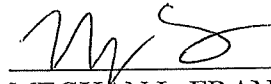
⁶To be clear, Mr. Ryder is *not* conceding that *Matloff* is dispositive in his case. As demonstrated above, the State has waived any argument that *McGirt* is a new rule of criminal procedure. Further, this Court has emphasized, "In the interests of efficiency and finality, our judicial system employs various doctrines to ensure that issues are not endlessly re-litigated. *Smith v. State*, 2013 OK CR 14, 306 P.3d 557, 564. These include the "law of the case" doctrine, res judicata, and collateral estoppel. *Id.* at 564-65. Under the law of the case doctrine, once a court decides an issue, the same issue may not be re-litigated in subsequent proceedings in the same case. *Ute Indian Tribe of the Uintah & Ouray Rsr. v. Utah*, 114 F.3d 1513, 1520 (10th Cir. 1997). *See also Hanson v. State*, 2009 OK CR 13, 206 P.3d 1020, 1027-28. "The doctrine of res judicata, or claim preclusion, bars the re-litigation of claims once they have been finally adjudicated." *Smith*, 306 P.3d at 564. "Under the principles of res judicata . . . a final judgment on the merits of an action precludes the parties from re-litigating not only the adjudicated claim, but also any theories or issues that were *actually decided*, or could have been decided in that action." *Loyd v. Michelin North America, Inc.*, 2016 OK 46, 371 P.3d 488, 493. Finally, the "doctrine of collateral estoppel, or issue preclusion, holds that when an ultimate issue has been determined by a valid and final judgment, it cannot be re-litigated by the parties in some future lawsuit." *Smith*, 306 P.3d at 564 (citations omitted).

mandate pending the State's certiorari appeal to the Supreme Court); Order Staying Issuance of Mandate Indefinitely, *Bench v. State*, No. PCD-2015-698 (Okla. Crim. App. May 28, 2021); Order Staying Issuance of Mandate Indefinitely, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. May 28, 2021); Order Staying Issuance of Mandate Indefinitely, *Castro-Huerta v. State*, No. F-2017-1203 (Okla. Crim. App. June 2, 2021); Order Staying Issuance of Mandate Indefinitely, *McDaniel v. State*, No. F-2017-357 (Okla. Crim. App. June 2, 2021); Order Granting Appellee's Motion to Stay Briefing Schedule, *Leathers v. State*, No. F-2019-962 (Okla. Crim. App. Nov. 13, 2020) (granting stay of briefing schedule until this Court determined whether Cherokee Nation had been disestablished).

Further, there is no federal statute of limitations on first-degree murder. *See United States v. Gallaher*, 624 F.3d 934 (9th Cir. 2010) (holding first-degree murder is a capital offense for which there is no statute of limitations under 18 U.S.C. § 3281 - even for a defendant charged with murder in Indian Country who may not be eligible for the death penalty). Accordingly, the requested stay will not impact the ability of the federal government to prosecute Mr. Ryder should he be granted post-conviction relief in this case.

For the foregoing reasons, this Court should stay this post-conviction action as a result of the ensuing Supreme Court litigation in *Matloff*. The instant motion is made in good faith and not for the purpose of delay.

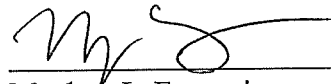
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2021, a true and correct copy of the foregoing document was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant to Rule 1.9 (B), Rules of the Court of Criminal Appeals.



Meghan LeFrancois

DECLARATION OF DEBRA K. HAMPTON

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

I, Debra K. Hampton, of lawful age, being first duly sworn, on oath state:

1. I am an attorney licensed to practice in Oklahoma and am in good standing with the Oklahoma Bar Association.
2. I represented Clifton Parish in Oklahoma Court of Criminal Appeals (OCCA) Case No. PR-2021-366, *State ex rel. Mark Matloff, District Attorney v. The Honorable Jana Wallace, Associate District Judge*. The OCCA issued an opinion in this case on August 12, 2021, granting the State's Petition for a Writ of Prohibition, thereby overruling Mr. Parish's previous Order Granting Post-Conviction Relief. *Matloff v. Wallace*, 2021 OK CR 21, _ P.3d _ . Mr. Parish is a registered member of the Choctaw Nation whose crime occurred within the boundaries of the Choctaw Reservation, relief on *McGirt v. Oklahoma* issue. In its opinion, the OCCA overruled its recent decision in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, and decades of precedent stating that subject matter jurisdiction cannot be waived.
3. I intend to appeal the OCCA's decision in *Matloff v. Wallace* to the United States Supreme Court in a Petition for Writ of Certiorari. I have engaged the services of Michael R. Dreeben and Kendall Turner from the O'Melvey & Myers law firm in Washington D.C. who are experienced Supreme Court practitioners, to represent Mr. Parish.

Pursuant to Oklahoma Statutes, Title 12, Section 426, I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct. Executed on September 1, 2021, at Edmond, Oklahoma.



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