Capital Case

Case No. _____

In the
Supreme Court of the United States

SHAUN MICHAEL BOSSE,
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. I OF II Appendices A through E (Pet. App. 1 through Pet. App. 187)

EMMA V. ROLLS, OBA # 18820*
KATRINA CONRAD-LEGLER, OBA #16953
Assistant Federal Public Defenders
Office of the Federal Public Defender
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
405-609-5975 (phone)
405-609-5976 (fax)
Emma_Rolls@fd.org
Katrina_Legler@fd.org

ATTORNEYS FOR PETITIONER,
SHAUN MICHAEL BOSSE

* Counsel of Record

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

VOLUME I OF II **Page Nos.**.

(Appendices A through E)

2021 WL 4704316
Court of Criminal Appeals of Oklahoma.

Shaun Michael BOSSE, Petitioner,
v.
The STATE of Oklahoma, Respondent.

Case No. PCD-2019-124
|
FILED OCTOBER 7, 2021

Attorneys and Law Firms

APPEARANCES BY COUNSEL

MICHAEL W. LIEBERMAN, SARAH JERNIGAN, EMMA ROLLS, ASST. FEDERAL DEFENDERS, 215 DEAN A. MCGEE, STE. 707, OKLAHOMA CITY, OK 73102, ATTORNEYS FOR PETITIONER

STEPHEN GREETHAM, DEBRA GEE, 4001 N. LINCOLN BLVD., OKLAHOMA CITY, OK 73105, FRANK S. HOLLEMAN, DOUGLAS B.L. ENDRESON, 1425 K STREET, NW, SUITE 600, WASHINGTON, DC 20005, ATTORNEYS FOR AMICUS CHICKASAW NATION

MIKE HUNTER, ATTORNEY GENERAL, MITHUN MANSINGHANI, SOLICITOR GENERAL, JENNIFER CRABB, CAROLINE E. J. HUNT, ASST. ATTORNEYS GENERAL, 313 N.E. 21ST STREET, OKLAHOMA CITY, OK 73105, ATTORNEYS FOR RESPONDENT

OPINION

LEWIS, JUDGE:

***1** ¶1 Shaun Michael Bosse was tried by jury and convicted of three counts of first degree murder and one count of first degree arson in the District Court of McClain County, Case No. CF-2010-213. The jury sentenced to him to death for each murder and thirty-five years imprisonment and a $25,000.00 fine for arson. The Honorable Greg Dixon, District Judge, pronounced judgment and sentence accordingly. On direct appeal, this Court affirmed Mr. Bosse's convictions and sentences. *Bosse v. State,* 2015 OK CR 14, 360 P.3d 1203. The Court also denied an original application for post-conviction relief. *Bosse v. State,* No. PCD-2013-360 (Okl.Cr., Dec.16, 2015) (unpublished).

¶2 The United States Supreme Court vacated the judgment on direct appeal and remanded for further consideration of the death sentences in light of *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) and *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). *Bosse v. Oklahoma,* —— U.S. ——, 137 S.Ct. 1, 196 L.Ed.2d 1 (2016). After further consideration, this Court again affirmed. *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834.

¶3 Mr. Bosse's convictions and sentences became final on March 5, 2018, when the Supreme Court denied his petition for certiorari to review that decision. *Bosse v. Oklahoma,* —— U.S. ——, 138 S.Ct. 1264, 200 L.Ed.2d 421 (2018). Mr. Bosse filed this second application for post-conviction relief on February 20, 2019, arguing three grounds for relief:

1. Because jurisdiction for Indian Country crimes rests exclusively in federal court, Oklahoma lacked jurisdiction to prosecute Mr. Bosse, and his convictions are void ab initio;

2. Trial counsel were ineffective by failing to adequately investigate Bosse's life history, and failing to adequately prepare witnesses, which deprived him of a fair and reliable sentencing. Direct appeal and post-conviction counsel were equally ineffective for failing to raise that issue. These failings all violated the Sixth, Eighth, and Fourteenth Amendments.

3. The cumulative effect of errors deprived Mr. Bosse of his constitutional rights to due process and a fair capital sentencing under the Sixth, Eighth, and Fourteenth Amendments.

¶4 We have said many times that the post-conviction procedure is not intended to provide a second appeal. *Carter v. State,* 1997 OK CR 22, ¶ 2, 936 P.2d 342, 343. The statutes governing our review of second or successive capital post-conviction applications provide even fewer grounds to collaterally attack a judgment and sentence than the narrow grounds permitted in an original post-conviction proceeding. *Sanchez v. State*, 2017 OK CR 22, ¶ 6, 406 P.3d 27, 29.

¶5 This Court "may not consider the merits of or grant relief" on a second or successive capital post-conviction application unless the claims "have not been and could not have been presented" in a previous application, either because the legal basis was unavailable; or because the factual basis was unavailable, and that factual basis, "if proven and viewed in light of the evidence as a whole," would establish "clear

and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." 22 O.S.2011, § 1089(D)(8)(a), (b)(1) and (2).

***2** ¶6 A successive application must be filed within sixty days from the date the previously unavailable legal or factual basis is announced or discovered. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). On review of the application, this Court must determine: (1) whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist; (2) whether the claims were or could have been raised in earlier proceedings; and (3) whether relief may be granted. § 1089(D)(4).

¶7 Mr. Bosse's first ground for relief, alleging a defect of state criminal jurisdiction because these crimes were committed against Indians in Indian Country, involved potentially controverted and unresolved factual issues. This Court remanded to the District Court of McClain County for an evidentiary hearing on the status of Mr. Bosse's victims as Indians; and whether, applying the Supreme Court's intervening decision in *McGirt v. Oklahoma,* —— U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), the Chickasaw Reservation had been disestablished by Congress, and thus, whether the crimes occurred in Indian Country.

¶8 After hearing evidence, the District Court entered undisputed findings of fact and conclusions of law determining that Mr. Bosse's victims were Chickasaw Indians; and that the crimes were committed in Indian Country, because the Chickasaw Reservation was never disestablised by Congress.

¶9 This Court accepted these determinations. We further concluded that Mr. Bosse's Indian Country claim was cognizable in this second post-conviction proceeding. The legal basis was unavailable at the time of his direct appeal and prior post-conviction application, because no final decision of an Oklahoma or federal appellate court had recognized any of the Five Tribes' historic reservations as Indian Country prior to *McGirt* in 2020. *See* § 1089(D)(8)(a). [1] We therefore initially granted post-conviction relief, reversing the convictions and remanding with instructions to dismiss in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286.

¶10 At the State's request, this Court stayed the mandate on April 15, 2021, and the Supreme Court subsequently stayed the issuance of mandate on May 26, 2021. On August 6, 2021, the State of Oklahoma filed a petition for a writ of certiorari seeking review of this Court's opinion granting Mr. Bosse post-conviction relief with the Supreme Court. *Oklahoma v. Bosse*, No. 21-186.

¶11 However, on August 12, 2021, this Court, in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, —— P.3d ——, held that *McGirt's* holding, and its impact on state criminal jurisdiction in a vastly expanded Indian Country, was a procedural change of law that would not apply retroactively to convictions already final when *McGirt* was announced. Based on *Matloff*, on August 31, 2021, this Court set aside its earlier order pending further consideration of Mr. Bosse's successive post-conviction claims. *Bosse v. State*, 2021 OK CR 23, —— P.3d ——. [2] We now turn again to Mr. Bosse's grounds for relief.

***3** ¶12 With respect to Mr. Bosse's first ground for relief, we again affirm the trial court's undisputed determinations that Mr. Bosse's victims were Indians, and that the crimes occurred within the historic boundaries of the Chickasaw Reservation. Applying the Supreme Court's analysis in *McGirt*, we also affirm the trial court's legal conclusion that the Chickasaw Reservation was never disestablished by Congress, and the lands within its historic boundaries are Indian Country. 18 U.S.C. § 1151 ("Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government").

¶13 However, no post-conviction relief should be granted on Mr. Bosse's first ground for relief. Mr. Bosse's convictions and sentences were final in 2018, long before the Supreme Court decided *McGirt* in July, 2020. What we said in *Matloff* applies with even greater force here:

> [Mr. Bosse'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. Bosse] 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. [Bosse] 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. [Bosse's] final conviction now undoubtedly would be a monumental victory for him, but it would not be justice.

Matloff, 2021 OK CR 21, ¶ 9, —— P.3d ——, ——.

¶14 Following the state law analysis set forth in *Matloff* in interpreting the remedial scope of the post-conviction statutes, we decline to apply *McGirt* and our post-*McGirt* reservation rulings retroactively to void Mr. Bosse's final convictions. Mr. Bosse's first ground for post-conviction relief is denied.

¶15 In his second ground for relief, Mr. Bosse alleges that all of his prior counsel were ineffective, and requests an evidentiary hearing to further develop his claim. He first alleges that a "dysfunctional" trio of trial attorneys failed to conduct reasonable mitigation investigation,[3] adequately prepare witnesses, and utilize mitigation experts. He also argues that trial counsel acted contrary to his interests to avoid future ineffectiveness claims. Mr. Bosse maintains that as a result of their deficient performance, he suffered prejudice in the form of an unreliable sentencing trial that resulted in his sentences of death.

¶16 Our cognizance of this claim turns initially on whether it has not and could not have been presented in his earlier post-conviction application because the factual basis was unavailable. § 1089(D)(8)(b)(1). A claim is factually unavailable in the sense required here when the facts were "not ascertainable through the exercise of reasonable diligence" on or before the filing of a previous application. *Id*. If the factual basis of the claim was unavailable, the applicant must also show that the error resulted in a miscarriage of justice,[4] that is, either a wrongful conviction or sentence. The proven facts, viewed in light of the evidence as a whole, must "establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." § 1089(D)(8)(b)(2) Stating these two requirements in the conjunctive "and," the statute procedurally bars review or relief unless the applicant satisfies *both* factual requisites.[5]

***4** ¶17 Mr. Bosse's trial counsel ineffectiveness claim could have been raised in earlier proceedings. The factual basis—including the proffered testimony of lay and expert witnesses about mitigating aspects of Mr. Bosse's life history; trial counsel's allegedly unethical countermeasures to avoid an ineffectiveness claim; and the evidence of their failure to reasonably investigate or prepare—could have been ascertained with reasonable diligence and presented in his previous post-conviction application, or even on direct appeal. This challenge to trial counsel's effectiveness on the factual basis now asserted is procedurally barred. *Sanchez*, 2017 OK CR 22, ¶ 8, 406 P.3d at 29.

¶18 The related argument that appellate counsel mishandled *this* viable claim[6] of ineffective trial counsel—due to their allegedly erroneous opinions about the effect of Mr. Bosse's on-the-record admission that he was satisfied with trial counsel—also involves a factual basis that was ascertainable with reasonable diligence at the time of the earlier post-conviction application. Appellate counsel made their decision to forego an ineffectiveness claim (on factual grounds like those now asserted) before the direct appeal brief was filed in August, 2014. The facts concerning that decision were ascertainable with reasonable diligence before or at the time the first post-conviction application was filed almost a year later in August, 2015. This ground for relief is also procedurally barred. *Id*.

¶19 Mr. Bosse finally argues that original post-conviction counsel was deficient for omitting the current claim that appellate counsel was deficient for omitting the current claim that trial counsel was deficient.[7] The only additional fact involved is that post-conviction counsel filed the previous application. This claim depends entirely on the same factual basis as the others, which could have been ascertained with reasonable diligence on or before the earlier post-conviction application. This ground for relief is also procedurally barred. *Id*.

¶20 The foregoing conclusions are sufficient to preclude further review on Mr. Bosse's second ground for relief. However, we also conclude from this record that the facts presented, if proven, when viewed in the light of the evidence as a whole, do not establish clear and convincing evidence that, but for counsel's alleged errors, no reasonable fact finder

would have rendered the penalty of death.[8] Mr. Bosse's motion requesting an evidentiary hearing to further develop his new factual claims, and his second ground for post-conviction relief, are therefore denied.

¶21 In his third ground for relief, Mr. Bosse seeks post-conviction relief based on cumulative error. As we have said previously, we do not review or consider errors raised or decided in previous proceedings in a successive post-conviction application. *Coddington v. State*, 2011 OK CR 21, ¶ 22, 259 P.3d 833, 840. The third ground for post-conviction relief is denied.

DECISION

***5** ¶22 The motion for evidentiary hearing and second application for post-conviction relief are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ROWLAND, P.J.: Concur

HUDSON, V.P.J.: Concur

LUMPKIN, J.: Concur

All Citations

--- P.3d ----, 2021 WL 4704316, 2021 OK CR 30

Footnotes

1 *See also McGirt*, 140 S.Ct. at 2460 (noting this Court's rejection of the claimed Muscogee (Creek) Reservation, the Tenth Circuit's opposite conclusion in *Murphy v. Royal,* 875 F.3d 896 (10th Cir. 2017), and the Supreme Court's grant of certiorari to settle the question).

2 The State subsequently dismissed its petition for certiorari in *Oklahoma v. Bosse* as moot. Bosse has since moved to stay further proceedings in this case pending the Supreme Court's consideration of a certiorari petition to review this Court's decision in *Matloff*. The motion to stay is **DENIED**.

3 Bosse presents with his application a series of affidavits from witnesses to his family history, stating that from an early age Bosse was subjected to ongoing physical (some of it sexual) and mental abuse and neglect from his parents and a grandfather, and cruelty and beatings from his brother; and that he developed a drug problem and mental health problems as a result of these adverse experiences.

4 This latter requirement is similar to the Supreme Court's "miscarriage of justice" exception allowing limited review of successive, abusive, or procedurally defaulted claims in federal habeas corpus. *See Sawyer v. Whitley,* 505 U.S. 333, 336, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) (finding successive habeas challenge to death sentence can obtain otherwise barred relief by showing a miscarriage of justice, i.e., "by clear and convincing evidence that, but for a constitutional error, no reasonable juror" would have found the petitioner eligible for the death penalty); *Schlup v. Delo,* 513 U.S. 298, 326-27, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)(finding successive habeas ineffectiveness and *Brady* claims were cognizable upon showing that the error more likely than not resulted in miscarriage of justice by the conviction of a factually innocent person).

5 Because Mr. Bosse requests an evidentiary hearing on this claim, we also consider whether the application and exhibits contain sufficient information to establish by "clear and convincing evidence" the materials are "likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

6 Appellate counsel *did* raise two other claims of ineffectiveness against trial counsel, challenging their failure to object to a medical examiner's testimony and improper closing argument. *See Bosse v. State*, 2015 OK CR 14, ¶ 84, 360 P.3d at 1234.

7 Bosse's first post-conviction application initially *alleged* both trial and appellate counsel's ineffectiveness, but the actual claim presented argued only trial counsel's ineffectiveness for failing to interview a particular witness, and "offer[ed] no factual claim or argument directed at appellate counsel ...." *See Bosse v. State*, No. PCD-2013-360, at 2 (Okl.Cr., Dec. 16, 2015) (unpublished).

8 Mr. Bosse concedes that his guilt in this triple homicide and arson is overwhelming, so there is no issue whether the alleged errors of his prior counsel resulted in wrongful convictions.

2021 OK CR 23

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

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

ORDER VACATING PREVIOUS ORDER AND JUDGMENT GRANTING POST-CONVICTION RELIEF AND WITHDRAWING OPINION FROM PUBLICATION

¶1 Based on the Court's decision in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___, the previous order and judgment granting post-conviction relief in this case are hereby **VACATED** and **SET ASIDE.** The issuance of the mandate in this case was previously stayed by this Court on April 15, 2021, and no mandate has issued. The opinion in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286 is **WITHDRAWN**. The Court will issue a separate order addressing Petitioner's claims for post-conviction relief at a later time.

¶2 **IT IS SO ORDERED.**

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

Scott Rowland

SCOTT ROWLAND, Presiding Judge

Robert L Hudson

ROBERT L. HUDSON, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

ATTEST:

John D. Hadden

Clerk

ORIGINAL

2021 OK CR 3

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

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

OPINION GRANTING POST-CONVICTION RELIEF

KUEHN, PRESIDING JUDGE:

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

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

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

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

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

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

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

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

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

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

Stipulations regarding victims' Indian status

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

District Court Findings of Fact

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

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

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

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

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

Id. art. 2.

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

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

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

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

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

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

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

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

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

District Court Conclusions of Law

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

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

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

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

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

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

The State's Arguments

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

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

Blood Quantum

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Procedural Defenses

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

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

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

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

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

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

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

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

There is no concurrent jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

DECISION

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

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

ATTORNEYS ON APPEAL

MICHAEL W. LEIBERMAN
SARAH M. JERNIGAN
ASST. FEDERAL PUBLIC DEFENDERS
WESTERN DISTRICT OF OKLAHOMA
215 DEAN A. MCGEE, SUITE 707
OKLAHOMA CITY, OK 73102
COUNSEL FOR PETITIONER

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA
MITHUN MANSINGHANI
SOLICITOR GENERAL OF OKLAHOMA
JENNIFER L. CRABB
CAROLINE E.J. HUNT
ASST. ATTORNEYS GENERAL
313 NE 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR RESPONDENT

STEPHEN GREETHAM
DEBRA GEE
4001 N. LINCOLN BLVD.
OKLAHOMA CITY, OK 73105
FRANK S. HOLLEMAN
DOUGLAS B.L. ENDRESON
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K STREET, NW, SUITE 600
WASHINGTON, DC 2005
ATTORNEYS FOR AMICUS CURIAE
CHICKASAW NATION

OPINION BY KUEHN, P.J.

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

ROWLAND, VICE PRESIDING JUDGE, CONCURRING IN RESULTS:

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

A. The Test for Indian Status

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

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

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

B. Subject Matter Jurisdiction

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

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

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

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

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

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

(Emphasis added).

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

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

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

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

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

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

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

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

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

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

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

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

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

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

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

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

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

LEWIS, JUDGE, CONCURRING IN RESULTS:

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

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

as the boundaries of the Muscogee (Creek) Nation Reservation. The District Court below conducted a thorough analysis and concluded that the reservation was not disestablished. I agree with this conclusion.[1]

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

[1] The Opinion indicates that there is some "legal void" because the State acquiesced to the District Court's findings, thus we are limited to review for abuse of discretion. Where there is arbitrary or unreasonable action by a District Court, this Court has the power to intervene. We cannot because there simply is no evidence that Congress disestablished the Chickasaw Nation Reservation by clearly expressed intent as required by *McGirt*. *McGirt*, 140 S.Ct. at 2463; *see Nebraska v. Parker*, 136 S.Ct. 1072, 1079 (2016).

federal government has exclusive jurisdiction over those cases. 18 U.S.C. § 1153(a).

¶4 A lack of subject matter jurisdiction leaves a court without authority to adjudicate a matter. This Court has held that subject matter jurisdiction cannot be conferred by consent, nor can it be waived, and it may be raised at any time. *Armstrong v. State*, 1926 OK CR 259, 248 P. 877, 878; *Cravatt v. State*, 1992 OK CR 6, ¶ 7, 825 P.2d 277, 280; *Magnan v. State*, 2009 OK CR 16, ¶¶ 9 & 12, 207 P.3d 397, 402 (holding that jurisdiction over major crimes in Indian Country is exclusively federal).

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

HUDSON, J., CONCURRING IN RESULTS:

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

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

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

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

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

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

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

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

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

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

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

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

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF

- DEATH PENALTY -

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

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

PART A: PROCEDURAL HISTORY

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

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

2. Formal sentencing occurred on December 18, 2012.

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

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

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

I. Capital Offense Information

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

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

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

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

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

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

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

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

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

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

The following mitigating factors were provided to the jury:

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

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

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

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

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

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

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

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

i. Mr. Bosse is thirty years old.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. The sentences imposed were determined by the jury.

II. Non-Capital Offense Information

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

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

12. The sentence imposed was recommended by the jury.

III. Case Information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART B: GROUNDS FOR RELIEF

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

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

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

22. The propositions raised herein are:

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

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

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

PART C: FACTS

CITATIONS TO THE RECORD

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART D: PROPOSITIONS, ARGUMENTS, AND AUTHORITIES

PROPOSITION ONE

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

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

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

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

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

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

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

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

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

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

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

C. The Victims Were Members of the Chickasaw Tribe.

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

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

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

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

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

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

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

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

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

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

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

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

In *Solem*, the Court held:

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

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

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

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

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

F. The Chickasaw Nation's Treaty History.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Step One – Statutory Text.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 220.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

H. Conclusion.

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

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

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

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

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

PROPOSITION TWO

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

A. Introduction.

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

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

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

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

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

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

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

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

B. This Claim Is Not Waived.

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Factual Background for Claim.

1. Family Background.

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Background of Legal Representation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of Chad Mitchell).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

U.S. at 524.

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

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

Att. 7, ¶ 3.

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

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

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

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

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

found as much in:

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

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

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

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

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

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

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

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

---

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Porter, 558 U.S. at 33.

D. Conclusion.

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

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

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

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

PROPOSITION THREE

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

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

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

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

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

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

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

PRAYER FOR RELIEF

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

Respectfully submitted,

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

Attorneys for Petitioner Shaun Michael Bosser

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

VERIFICATION

State of Oklahoma)
) ss:
County of Oklahoma)

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

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

Attorneys for Petitioner
Shaun Michael Bosse

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

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

Cathy Conley
Notary Public

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

CERTIFICATE OF SERVICE

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

Michael W. Lieberman

INDEX OF ATTACHMENTS
(Filed in Separately Bound Document)

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

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

ORIGINAL

No. PCD-2019-124

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

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

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

MITHUN MANSINGHANI, OBA #32453
SOLICITOR GENERAL

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

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

ATTORNEYS FOR RESPONDENT

AUGUST 4, 2020

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

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

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

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

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

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

I. Procedural History

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

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

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

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

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

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

II. Definition of "Indian"

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

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

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

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

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

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

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

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

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

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

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

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

Oakley, *supra*, at 207.

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 381.

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

III. Burden of Proof

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

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

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

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

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

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

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

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

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

IV. Concurrent Jurisdiction under the General Crimes Act

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

The text of the General Crimes Act states:

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

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

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

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

18 U.S.C. § 1152. Although the statute refers to the "exclusive jurisdiction of the United States," it does not confer exclusive jurisdiction on the United States. Rather, it incorporates the body of laws which applies in places where the United States has exclusive jurisdiction into Indian country. As the Supreme Court has already held, the phrase "within the sole and exclusive jurisdiction of the United States" specifies what law applies (*i.e.* the law that applies to federal enclaves that are within the exclusive jurisdiction of the United States), not that the federal government's jurisdiction is exclusive. *Ex parte Wilson*, 140 U.S. 575, 578 (1891) (under the General Crimes Act "the jurisdiction of the United States courts was not sole and exclusive over all offenses committed within the limits of an Indian reservation" because "[t]he words 'sole and exclusive,' in [the General Crimes Act] do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it"); *see also Donnelly v. United States*, 228 U.S. 243, 268 (1913); *United States v. White*, 508 F.2d 453, 454 (8th Cir. 1974). As *McGirt* said with respect to reservation status, *see* slip op. at 8, when Congress seeks to withdraw state jurisdiction, it knows how to do so. *See, e.g.*, 25 U.S.C. § 1911(a) (providing that tribes "shall have jurisdiction, exclusive as to any State, over any child custody proceeding involving an Indian child" on a reservation). Here, the text of the General Crimes Act does not so exclude state jurisdiction over crimes committed by non-Indians like those perpetrated by Petitioner.

Thus, under the principles firmly established by *McGirt*—where the analysis begins and ends with the text—while the General Crimes Act confers federal jurisdiction over Petitioner's crimes, nothing in the text of that law deprives the State of concurrent jurisdiction over the same

crimes. Under *McGirt*, the inquiry should end there. This is especially true because there exists a strong presumption against preemption of state law, so "unless that was the clear and manifest purpose of Congress," courts cannot find preemption of state police powers merely because Congress also provided for federal jurisdiction. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted).

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

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

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

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

Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 470-71 (1979)); *Flint*, 756 P.2d at 325-26. Again, such dicta cannot substitute for the lack of clear statutory text. Indeed, the Supreme Court had earlier stated that by admission into the Union, a state on equal footing with other states "has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, . . . and that [a] reservation is no longer within the sole and exclusive jurisdiction of the United States," unless Congress expressly provides otherwise. *United States v. McBratney*, 104 U.S. 621, 623-24 (1881).

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

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

Second, some state courts suggest that states lack jurisdiction over crimes by non-Indians against Indians because of the federal government's general control over Indian affairs. *See Flint*, 756 P.2d at 325. But while this means states usually lack jurisdiction over Indians (*e.g.*, states lack jurisdiction over major crimes committed by Indians, *see McGirt*, slip op. at 33, 36), this general presumption says nothing about state jurisdiction over *non-Indians*, including those who commit crimes against Indians. After all, states presumptively have jurisdiction over non-Indians, including on reservations. *See, e.g.*, *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257–58 (1992) (noting "the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands").

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

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

(1989) (upholding concurrent state and tribal jurisdiction to tax non-Indian oil & gas activities on Indian trust land). Thus, in the closest analogous civil context, the U.S. Supreme Court "repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country," because "tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148-49 (1984).[12]

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

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

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

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

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

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

Third, courts have noted that some commentators support the idea that states lack jurisdiction over non-Indians who victimize tribal members. *See Larson*, 455 N.W.2d at 602; *Flint*, 756 P.2d at 327. Other commentators, however, recognize that there is no adequate justification for precluding state jurisdiction over crimes by non-Indian offenders against Indians because (1) "[n]o tribal interest appears implicated by state prosecution of non-Indians for Indian country crimes, since tribes lack criminal jurisdiction over non-Indians," and (2) no federal interest is impaired because "state prosecution of a non-Indian does not bar a subsequent federal prosecution of the same person for the same conduct." AM. INDIAN LAW DESKBOOK § 4:9 (citing, *inter alia*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Abbate v. U.S.*, 359 U.S. 187 (1959)). As *McGirt* makes clear, Felix Cohen isn't always right. Slip op. at 25-26.

Fourth, some courts have pointed to Public Law 280, *Flint*, 756 P.2d at 327-28, which allows "any State not having jurisdiction over criminal offenses committed by or against Indians

in the areas of Indian country situated within such State to assume" such jurisdiction "with the consent of the Indian tribe," 25 U.S.C. § 1321—with courts implying that the states otherwise lack that jurisdiction over crimes committed "against Indians." But Public Law 280 has nearly the same language with respect to *civil* jurisdiction, allowing "any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe," such civil jurisdiction. 25 U.S.C. § 1322. And yet, as noted above, this language has *not* precluded the U.S. Supreme Court from ruling that, even without Public Law 280, states generally have jurisdiction over civil actions with Indians as parties, that is, as plaintiffs. *See Three Affiliated Tribes*, 467 U.S. at 148-49. For this reason, mere implications from a later congressional enactment like Public Law 280 cannot overcome the clear text of the General Crimes Act, which does not preclude the exercise of state jurisdiction. *Cf. McGirt*, slip op. at 27 n.14.

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

[13] *See, e.g.*, David Heska Wanbli Weiden, *This 19th-Century Law Helps Shape Criminal Justice in Indian Country And that's a problem — especially for Native American women, and especially in rape cases*, N.Y.

McGirt leaves Indians vulnerable under the exclusive federal jurisdiction of the Major Crimes Act, there is no reason to perpetuate that injustice by assuming without textual support exclusive federal jurisdiction over non-Indian on Indian crimes covered by the General Crimes Act. Nor is there reason to believe the State of Oklahoma will not vigorously defend the rights of Indian victims, as it has for a century. *See Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 608–09 (1943) ("Oklahoma supplies [Indians] and their children schools, roads, courts, police protection and all the other benefits of an ordered society."). In fact, this very case proves it will. To hold otherwise would amount to "disenfranchising" and "closing our Courts to a large number of citizens of Indian heritage who live on a reservation," thereby "denying protection from the criminal element of the state." *Greenwalt*, 663 P.2d at 1184 (Harrison, J., dissenting).

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

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

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

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

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

VI. Procedural Defenses

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

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

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

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

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

A. Bar on Successive Capital Post-Conviction Applications

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

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

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

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

22 O.S.2011, § 1089(D)(8).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 592.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

C. The Doctrine of Laches

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

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

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

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

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

> Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are "fre[e] to say what we know to be true . . . today, while leaving questions about . . . reliance interest[s] for later

> proceedings crafted to account for them." *Ramos*, 590 U. S., at ——, 140 S.Ct., at 1047 (plurality opinion).

McGirt, slip op. at 41.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Conclusion

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

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

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL

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

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

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF MAILING

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

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

CAROLINE E.J. HUNT

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

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

ORDER AFFIRMING DENIAL OF APPLICATION FOR POST-CONVICTION RELIEF

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

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

EXHIBIT A

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

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

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

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden
Clerk

PA/F