**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. II OF II
## Appendices F through Q
## (Pet. App. 188 through Pet. App. 347)

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**APPENDIX TO**
**PETITION FOR WRIT OF CERTIORARI**

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

**(Appendices F through Appendix Q)**

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

| | | |
|---|---|---|
| SHAUN MICHAEL BOSSE, | ) | |
| | ) | NOT FOR PUBLICATION |
| Petitioner, | ) | |
| vs. | ) | No. PCD-2019-124 |
| | ) | |
| THE STATE OF OKLAHOMA, | ) | |
| | ) | |
| Respondent. | ) | |

**ORDER REMANDING FOR EVIDENTIARY HEARING**

Shaun Michael Bosse was tried by jury, convicted of Counts I-III, First Degree Murder, and Count IV, First Degree Arson, and sentenced to death (Counts I-III and thirty-five (35) years imprisonment and a fine of $25,000.00 (Count IV), in the District Court of McClain County, Case No. CR-2010-213. This Court upheld Petitioner's convictions and sentences in *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834, *reh'g granted and relief denied,* 2017 OK CR 19, 406 P.3d 26, *cert. denied*, 138 S.Ct. 1264 (2018). This Court denied Petitioner's first Application for Post-Conviction Relief. *Bosse v. State*, No. PCD-2013-360 (Okl.Cr. Dec.16, 2015) (not for publication). Petitioner filed this Successive Application for Post-Conviction Relief on February 20, 2019. In

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

In Proposition I Petitioner claims the District Court lacked jurisdiction to try him. Petitioner argues that his victims were citizens of the Chickasaw Nation, and the crime occurred within the boundaries of the Chickasaw Nation. Under the particular facts and circumstances of this case, and based on the pleadings in this case before the Court, we find that Petitioner's claim is properly before this court. The issue could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020).

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

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

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

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

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

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

[1] *See, eg., United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001).

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

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

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

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

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

**IT IS SO ORDERED.**

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

**DAVID B. LEWIS, Presiding Judge**

**DANA KUEHN, Vice Presiding Judge**

**GARY L. LUMPKIN, Judge**

**ROBERT L. HUDSON, Judge**

**SCOTT ROWLAND, Judge**

ATTEST:

**Clerk**

**IN THE DISTRICT COURT OF McCLAIN COUNTY**
**STATE OF OKLAHOMA**

| | | |
|---|---|---|
| **STATE OF OKLAHOMA,** | ) | |
| | ) | |
| **Plaintiff (Respondent),** | ) | |
| | ) | **McClain County Case No.: CF-2010-213** |
| **vs.** | ) | |
| | ) | **(Court of Criminal Appeals: PCD-2019-124)** |
| **SHAUN MICHAEL BOSSE,** | ) | |
| | ) | |
| **Defendant (Petitioner).** | ) | |

# PETITIONER'S REMANDED HEARING BRIEF APPLYING *McGIRT* ANALYSIS TO CHICKASAW NATION RESERVATION

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September 23, 2020

**IN THE DISTRICT COURT OF McCLAIN COUNTY**
**STATE OF OKLAHOMA**

| | | |
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September 23, 2020

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**IN THE DISTRICT COURT OF McCLAIN COUNTY**
**STATE OF OKLAHOMA**

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| **SHAUN MICHAEL BOSSE,** | ) | |
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| **Defendant (Petitioner).** | ) | |

**PETITIONER'S REMANDED HEARING BRIEF**
**APPLYING *McGIRT* ANALYSIS TO CHICKASAW NATION RESERVATION**

**COMES NOW** Petitioner, Shaun Michael Bosse, by and through undersigned counsel, to address the two separate questions this Court must answer in this "historical and specialized" remanded hearing scheduled for September 30, 2020. By using the analysis as set out in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and as directed in the August 12, 2020 Oklahoma Court of Criminal Appeals (OCCA) Order Remanding for Evidentiary Hearing, this Court should conclude Katrina Griffin, Christian Griffin, and Chasity Hammer all were Indians and the crime occurred in Indian Country.

## I. INTRODUCTION

The direct holding in *McGirt* is elegantly simple. The Government promised the Muscogee (Creek) Nation (MCN) a Reservation in present-day Oklahoma. Only Congress can break such a promise, and it can do so only by using explicit language that provides for the '"present and total surrender of all tribal interests' in the affected lands." *McGirt*, 140 S. Ct. at 2464. Congress never used "anything like" such language. *Id.* Therefore, the MCN Reservation is intact, and Oklahoma had no criminal jurisdiction over Mr. McGirt, a Seminole, whose crimes occurred within the boundaries of the MCN Reservation. *McGirt* also adjusted the analysis for courts to apply in determining whether any given Reservation has been diminished or disestablished by Congress.

*See Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) ("We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a Reservation"). This Court has been expressly directed by OCCA to apply the analysis in *McGirt* to the jurisdictional claim here.

## II. OKLAHOMA HAS NO CRIMINAL JURISDICTION OVER CRIMES COMMITTED BY OR AGAINST INDIANS IN INDIAN COUNTRY

Petitioner recognizes this Court need not analyze the basic principles of federal jurisdiction (and the lack of state jurisdiction) over crimes committed in Indian Country within Oklahoma to answer the questions OCCA directed it to answer in this hearing. Because *McGirt* controls Reservation status **and** federal criminal jurisdiction, however, Petitioner offers a brief description of those basic principles to place the questions in context.

OCCA recognized more than thirty years ago that Oklahoma failed to assume criminal and civil jurisdiction when it had the opportunity to do so under Public Law 280 before that law was amended to require tribal consent, 25 U.S.C. § 1321, and that Oklahoma "does not have jurisdiction over crimes committed by or against an Indian in Indian Country." *See Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) (*citing State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989)).[1]

The jurisdictional parameters of criminal jurisdiction in Indian Country are clearly defined by federal law. First, under the Major Crimes Act (MCA),[2] federal courts have exclusive

[1] OCCA overruled *Ex Parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936), which wrongly held Oklahoma had jurisdiction to convict and sentence a full-blood Choctaw for the murder of another full-blood Choctaw on a restricted Choctaw allotment. *See Klindt*, 782 P.2d at 403.

[2] The MCA provides: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter… [and] robbery…

jurisdiction over prosecutions for certain enumerated crimes committed by Indians in Indian Country. *See McGirt,* 140 S. Ct. at 2459. Second, Oklahoma lacks jurisdiction over prosecutions of crimes committed by or against Indians in Indian Country within Oklahoma under the General Crimes Act (GCA);[3] such crimes are subject to federal or tribal jurisdiction. *McGirt*, 140 S. Ct. at 2478. The GCA expressly protects the jurisdiction of tribal courts over prosecutions of "a broader range of crimes by or against Indians in Indian Country." *Id*. at 2479. *See United States v. Prentiss*, 273 F.3d 1277, 1278 (10th Cir. 2001) (noting that GCA "establishes federal jurisdiction over 'interracial' crimes, those in which the defendant is an Indian and the victim is a non-Indian, or vice-versa"). Third, Oklahoma has jurisdiction over all offenses committed by non-Indians against non-Indians in Indian Country; but state jurisdiction extends no further. *McGirt*, S. Ct. at 2460 (*citing United States v. McBratney*, 104 U.S. 621, 624 (1882)). *See also* Indian Country Criminal Jurisdiction Chart: justice.gov/usao-wdok/page/file/1300046/download (last visited 09/22/2020).

In *McGirt*, the Court definitively laid to rest Oklahoma's position that the MCA and the GCA do not apply in Oklahoma. Oklahoma's claim to a special exemption from the MCA for the former Indian Territory, where Chickasaw lands are located, was said to be "one more error in historical practice." *McGirt*, 140 S. Ct. at 2471. Oklahoma's use of "statutory artifacts" to argue it

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within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

[3] The GCA provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152.

was granted criminal jurisdiction in Indian Country, even if the MCN Reservation was intact, was a "twist" even the *McGirt* dissenters were unwilling to accept. *Id*. at 2476.

If this Court concludes that Katrina Griffin, Christian Griffin, and Chasity Hammer were Indians and the crime occurred within the boundaries of the Chickasaw Nation Reservation, Oklahoma never had jurisdiction over Mr. Bosse, which means his convictions were void *ab initio*. And the Court really cannot help but reach that conclusion given the stipulations reached between the parties. Specifically, the parties have stipulated that Katrina Griffin was an Indian, and that Christian and Chasity had some Indian blood and were citizens of the Chickasaw Nation. That is all that is required for the Court to find they were Indian. Moreover, the parties have also stipulated that the crime occurred "within the boundaries [of the Chickasaw Nation] set forth in the 1855 and 1866 Treaties…" *See* Attachment (Stipulation of the Parties). As explained below, that stipulation provides the Court with all it needs to conclude the crimes occurred in Indian Country. Jurisdiction here rests exclusively with federal and tribal courts.

## III. KATRINA GRIFFIN, CHRISTIAN GRIFFIN, AND CHASITY HAMMER WERE INDIAN

OCCA instructs in its remand order that the test for Indian status comes from *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012) and *United States v. Prentiss*, 273 F.3d 1277, 1279 (10th Cir. 2001). *See* Remand Order at 3 n.1. Under that test, this Court should be satisfied the victims had "some Indian blood," and were "recognized as an Indian by a tribe or by the federal government." *Diaz*, 679 F.3d at 1187. Although the Tenth Circuit has approved a "totality-of-the-evidence approach to determining Indian status," when a person "has an Indian tribal certificate that includes the degree of Indian blood" the test is easily met. *Id*. *See also United States v. Lossiah*, 537 F.2d 1250, 1251 (4th Cir. 1976) (finding tribal enrollment certificate showing defendant possessed some Indian blood was "adequate proof").

The test for Indian status is satisfied here for all three victims. Katrina Griffin, Christian Griffin, and Chasity Hammer are all registered citizens of the Chickasaw Nation. *See* Attachment at 3-5 (Chickasaw Nation Tribal Enrollment Verifications for Chasity Hammer, Christian Griffin, and Katrina Griffin, showing degree of Indian blood for each).

## IV. THE CRIME OCCURRED IN INDIAN COUNTRY

### A. Introduction

The Chickasaw Nation is a federally recognized Indian tribe. *See Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs,* 85 Fed. Reg. 5462, 5465 (Jan. 30, 2020). As such, the Nation exercises sovereign authority under a constitution approved by the Secretary of the Interior. It is one of five tribes that are often treated as a group for purposes of federal legislation (Cherokee, Muscogee (Creek), Choctaw, Chickasaw, and Seminole Nations, historically referred to as the "Five Civilized Tribes" or "Five Tribes").

The boundaries of the Chickasaw Reservation, within which the Nation presently governs, are set forth in Article 2 of the 1855 Treaty of Washington with the Chickasaw and Choctaw, June 22, 1855, 11 Stat. 611 ("1855 Treaty"), which provides:

> [B]eginning on the north bank of Red River, at the mouth of Island Bayou, where it empties into Red River, about twenty-six miles on a straight line, below the mouth of False Wachitta; thence running a northwesterly course along the main channel of said bayou, to the junction of the three prongs of said bayou, nearest the dividing ridge between Wachitta and Low Blue Rivers, as laid down on Capt. R. L. Hunter's map; thence northerly along the eastern prong of Island Bayou to its source; thence due north to the Canadian River; thence west along the main Canadian to the ninety-eighth degree of west longitude; thence south to Red River; and thence down Red River to the beginning: Provided, however, if the line running due north, from the eastern source of Island Bayou, to the main Canadian, shall not include Allen's or Wa-pa-nacka Academy, within the Chickasaw district, then, an offset shall be made from said line, so as to leave said academy two miles within the Chickasaw district, north, west and south from the lines of boundary.

1855 Treaty art. 2; *see also* Chickasaw Const. pmbl. (quoting 1855 Treaty art. 2 with alterations).

The Chickasaw Reservation was established, and its boundaries were initially defined, by the 1837 Treaty of Doaksville, arts. 1, 2, Jan. 17, 1837, 11 Stat. 573 ("1837 Treaty"), which made applicable to the Chickasaw Nation provisions of the Treaty of Dancing Rabbit Creek, art. 2, Sept. 27, 1830, 7 Stat. 333 ("1830 Treaty"), which was made with the Choctaw Nation. The existence of the Chickasaw Reservation was then reaffirmed, and its boundaries modified and explicitly defined above in the 1855 Treaty art. 2. By the 1866 Treaty of Washington with the Chickasaw and Choctaw, Apr. 28, 1866, 14 Stat. 769 ("1866 Treaty"), the Nations "cede[d] to the United States the territory west of the 98° west longitude, known as the leased district," 1866 Treaty art. 3. That limited cession modified only the far western boundary of the entire Treaty Territory, but did not in any way alter the western boundary of the Chickasaw Reservation. The 1855 Treaty established the western boundary of the Chickasaw Reservation as the "ninety-eighth degree of west longitude." 1855 Treaty art. 2. Thus, the 1866 Treaty ceded only lands that were not part of the Chickasaw Reservation to begin with and otherwise reaffirmed the Chickasaw and Choctaw Nations' rights under prior Treaties. *See* 1866 Treaty arts. 10, 45.

Because Congress has never explicitly erased the Chickasaw Reservation boundaries or disestablished the Reservation, the Reservation continues to exist and all land within the Reservation is therefore "Indian Country" under federal law, 18 U.S.C. § 1151(a) (defining "Indian Country" to include "all land within the limits of any Indian Reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the Reservation.").

**B. The Crime Occurred in Indian Country**

The State and Petitioner have stipulated Mr. Bosse's crime occurred at 15734 212th Street, Purcell, Oklahoma. That address is "within the boundaries set forth in the 1855 and 1866 treaties

between the Chickasaw Nation, the Choctaw Nation, and the United States." *See* Attachment at 1-2 (Stipulations of the Parties). The State, however, is leaving it up to this court to determine whether this particular site constitutes the Chickasaw Nation's current "Reservation," and thus, Indian Country as defined by 18 U.S.C. § 1151(a). It is a Reservation, as clearly shown in the language of the treaties cited above, which will be introduced at the evidentiary hearing in this matter for this Court's review.

Under the remand order, Petitioner need only make a prima facie case that the crime occurred on the Chickasaw Reservation, which is "Indian Country" as defined by §1151(a). OCCA (following Black's Law Dictionary's lead) has defined a "prima facie case" to suffice "until contradicted and overcome by other evidence." *Hill v. State*, 672 P.2d 308, 310 (Okla. Crim. App. 1983); *see also Malone v. Royal,* No. CIV-13-1115-D, 2016 WL 6956646, at *15 (W.D. Okla. Nov. 28, 2016) (holding a prima facie case is a "low threshold" to meet). Petitioner meets the low threshold and more. The Chickasaw Nation's Reservation is intact, and over a century of history proves it.

To decide whether the Creek Reservation continues to exist, the Supreme Court in *McGirt* applied the settled rule that "once a Reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'" *Id*. at 2469 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). In applying that rule, the "only 'step' proper for a court of law" is to interpret the relevant statutes and to "follow the[ir] original meaning." *Id.* at 2468. "There is no need to consult extra-textual sources when the meaning of a statute's terms is clear," which is determined by applying "normal interpretive rules." *Id.* at 2469-70. Accordingly, the second and third "steps" the State of Oklahoma ("State") urged in *McGirt* were necessary to determine whether a Reservation had been disestablished—namely, consideration of historical events and demographics, respectively--are

not properly part of the analysis, and neither "can suffice to disestablish or diminish Reservations." *Id.* at 2469. The settled rule is that "once a Reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'" *Id.* (*quoting Solem*, 465 U.S. at 470; *citing South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)).

Applying that rule, the *McGirt* Court held that a Reservation was established for the Creek Nation by its Treaties with the United States. The Creek Reservation was not extinguished when Congress enacted legislation to allot the Reservation, nor was it extinguished by restrictions on the Creek Nation's rights of self-government that Congress enacted as part of a plan that some anticipated would lead to the dissolution of the tribal government. *McGirt*, 140 S. Ct. at 2460-67. Instead of dissolving the tribal government, Congress ultimately decided to continue the existence of the Creek Nation and its government "in full force and effect for all purposes authorized by law," Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137, 148 ("Five Tribes Act"), and in 1936 Congress restored to the Creek Nation the sovereignty that it had earlier withdrawn, which the Creek exercises today. *McGirt*, 140 S. Ct. at 2466-67.

When this Court considers the Chickasaw Nation's Treaties following the framework set forth in *McGirt*, the inescapable conclusion is that Congress established a Reservation for the Chickasaw Nation. And as in *McGirt*, when the Allotment Era legislation and related statutes are considered, they unquestionably show Congress has not extinguished the Chickasaw Reservation or its boundaries, and that all lands within its boundaries are therefore Indian Country under 18 U.S.C. § 1151(a).

### C. Creation of the Treaty Territory and the Chickasaw Reservation Within that Territory

By way of very brief background, the early histories of the Chickasaw and the Choctaw Nations are tied together. Congress initially created a Treaty Territory west of the Mississippi for

the Choctaw Nation. Then, Congress reached agreements with the two Nations that gave the Chickasaw Nation rights to a portion of the Treaty Territory. Eventually, the two Nations were split, with each receiving its own Reservation. The discussion below explains that history.

As the *McGirt* Court did, this Court should "[s]tart with what should be *obvious*:" Congress established a Reservation for the Chickasaw. *McGirt*, 140 S. Ct. at 2460. To be sure, the early treaties, like the early treaties of the Creeks, did not refer to the Chickasaw lands as a '"Reservation'– perhaps because that word had not yet acquired such distinctive significance in federal Indian law." *Id.* at 2461. But the Supreme Court does not insist "on any particular form of words" when it comes to establishing a Reservation. *Id*. at 2475. Like the Creek, the Chickasaws were promised a permanent home, assured the right of self-government on those homelands, and promised the lands "would lie outside both the legal jurisdiction and geographic boundaries of any State. *Under any definition, this was a Reservation*." *Id.* at 2462 (emphasis added).

Oklahoma's position on whether a Reservation ever existed is a mercurial one. Before the Tenth Circuit, Oklahoma admitted the Creek had a Reservation. *See Murphy v. Royal*, 875 F.3d 896, 954 (2017) (citing Appellee's brief and noting "the State 'does not dispute that the Reservation was intact in 1900'"). Then, in an effort "to turn the tables in a completely different way," Oklahoma said in the Supreme Court the Creek never received a Reservation. *McGirt*, 140 S. Ct. at 2474. Oklahoma even admitted the entire point of this "bold feat of reclassification" was to "avoid *Solem's* rule that only Congress may disestablish a Reservation." *Id*. According to Oklahoma, the reason the Creek lands were not a Reservation was because the Creek, as had the Chickasaw, insisted on having the additional protection of the land patent with fee title. *McGirt* rejected Oklahoma's belated reclassification and the reason for it, saying that "[h]olding that the

Creek never had a Reservation would require us to stand willfully blind before a host of federal statutes." *Id.* at 2474.[4]

In the 1830 Treaty of Dancing Rabbit Creek, 7 Stat. 333, the United States granted the Choctaw Nation "a tract of country west of the Mississippi River, in fee simple *to them and their descendants, to insure to them while they shall exist as a nation and live on it.*" *Id.* at art. 2 (emphasis added). The 1830 Treaty also explicitly defined the boundaries of the Treaty Territory, *id.*, guaranteed the "jurisdiction and government" over "all the persons and property" within that Treaty Territory, *id.* at art. 4, and promised "that *no part of the land granted them shall ever be embraced in any Territory or State*." *Id.* (emphasis added). It, thereby, undoubtedly established a Reservation for the Choctaw within the Treaty Territory.

Then, in the 1837 Treaty of Doaksville, 11 Stat. 573, the United States established the Chickasaw Reservation within the Treaty Territory that had originally been granted to the Choctaw Nation in the 1830 Treaty. The 1837 Treaty secured to the Chickasaw Nation a "district within the limits of [the Treaty Territory]," and guaranteed them the same rights of homeland ownership and occupancy that the Choctaw held under the 1830 Treaty. 1837 Treaty art. 1. It, thereby, established a Reservation for the Chickasaw within the Treaty Territory. The 1837 Treaty also secured to the Chickasaw Nation "equal representation in [the Choctaw] general council," and "all

[4] It is unknown whether Oklahoma will now march out new reasons or theories to say the Chickasaw never had a reservation. The State's unwillingness to use the word "reservation" in its stipulation might suggest that possibility even though Oklahoma Attorney General Mike Hunter publicly acknowledged *McGirt* applies with equal force to all Five Tribes. ("The opinion directly relates to the Muscogee Creek; We think it applies to the other four tribes eventually.") *See* https://www.newson6.com/story/5f09c526c1a44923d073166a/the-hot-seat:-attorney-general-mike-hunter-addresses-mcgirt-v-oklahoma-ruling at 1:04. (KOTV Tulsa News on 6, July 11, 2020)(last visited 9/22/2020). Of course, in light of the overwhelming evidence that language in the relevant treaties created reservations, Attorney General Hunter was quite correct in recognizing *McGirt* would apply to all Five Tribes.

the rights and privileges" of the Choctaw Nation under the 1830 Treaty. 1837 Treaty art. 1; *see also Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995) (recognizing that art. 1 of the 1837 Treaty applied the 1830 Treaty to the Chickasaw Nation).

Next, in the 1855 Treaty of Washington, 11 Stat. 611, the United States reaffirmed the rights of the Chickasaw and Choctaw Nations' to the Treaty Territory and the Chickasaw Nation's rights to the Chickasaw district within that Territory. That Treaty modified the boundaries of the Chickasaw district in relation to the boundaries of the Choctaw Nation. *Id.* arts. 1, 2.[5] The 1855 Treaty further provided that "[t]he remainder of the country held in common by the Choctaws and Chickasaws, shall constitute the Choctaw district." *Id.* art. 3. Notably (and dispositively for purposes of *McGirt*'s analysis), the 1855 Treaty recited that "the United States do hereby *forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors*…." *Id.* art. 1 (emphasis added). By setting aside land permanently and for the exclusive and perpetual use of the Chickasaw (and Choctaw) Nation, this language clearly and unquestionably reinforced the existence of a Reservation.

After the Civil War, the Choctaw and Chickasaw, as had the Creek, relinquished some of their land to the United States. That cession was accomplished in the 1866 Treaty of Washington,

[5] By the 1854 Treaty of Doaksville, Nov. 4, 1854, 10 Stat. 1116 ("1854 Treaty"), the boundaries of the Chickasaw district as set forth in Article 1 of the 1837 Treaty were redefined to resolve a dispute over the boundaries between the Chickasaw and Choctaw Nations. 1854 Treaty pmbl. art. 1. Those boundaries were then recited in Article 2 of the 1855 Treaty, with one further modification. In the 1854 Treaty, the western boundary of the Chickasaw district had been established as "the one hundredth degree of west longitude," which ran from a point on the "main Canadian [River]" "south to Red River." *Id.* art. 1. In the 1855 Treaty, the western boundary was made "the ninety-eighth degree of west longitude," which ran from a point "along the main Canadian" to "thence south to Red River." *Id.* art. 2. That modification reflected the agreement of "the Choctaws and Chickasaws [t]o hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude…" *Id.* art. 9.

14 Stat. 769. In that Treaty, the Nations "cede[d] to the United States the territory west of the 98[th meridian]." *Id.* art. 3. This cession modified only the western boundary of the entire Treaty Territory and had no effect at all on the Chickasaw Reservation boundaries. 1855 Treaty art. 2. In addition, by the 1866 Treaty, the United States expressly "reaffirm[ed] *all obligations arising out of treaty stipulations* or acts of legislation with regard to the Choctaw and Chickasaw [N]ations, entered into prior to" the Civil War, *id.* art. 10 (emphasis added). Thus, as the *McGirt* Court held with respect to the Creek Reservation, "[u]nder any definition, th[e] Chickasaw district] was a Reservation." 140 S. Ct. at 2462.

### D. The Chickasaw Reservation Created by the 1855 and 1866 Treaties Has Never Been Diminished or Disestablished

There is a presumption that the Chickasaw Nation Reservation continues to exist until Congress acts to disestablish it. *Solem*, 465 U.S. at 470. It is further clear that Mr. Bosse bears no burden to show that the Reservation has *not* been disestablished. The Tenth Circuit made this point quite clear:

> What the OCCA did say in its analysis contradicted *Solem*. Instead of heeding *Solem*'s "presumption" that an Indian Reservation continues to exist until Congress acts to disestablish or diminish it, *see* 465 U.S. at 481, 104 S. Ct. 1161, the OCCA flipped the presumption by requiring evidence that the Creek Reservation had not been disestablished—that it "still exists today," 124 P.3d at 1207. In other words, *the OCCA improperly required Mr. Murphy to show the Creek Reservation had not been disestablished instead of requiring the State to show that it had been.*

*Murphy*, 875 F.3d at 926 (emphasis added). But the Tenth Circuit did not blame the legal error only on OCCA, it pointed out the State was just as much as fault:

> The State, repeating the OCCA's mistake in reversing the presumption against disestablishment, argues Mr. Murphy "failed to present evidence that Congress did not intend disestablishment." Appellee. Br. At 48. But under *Solem,* that is not the test. *Solem* and every case applying it presume that a Reservation continues to exist unless Congress has legislated otherwise. As demonstrated above, the OCCA not only ignored but also reversed this presumption. So does the State. We will not make the same mistake here.

*Id.* at 927-28. Mr. Bosse has demonstrated by more than prima facie evidence that a Reservation was established and the crime occurred in Indian Country. The burden now shifts to the State to prove it has subject matter jurisdiction. Because the reasoning and analysis of *McGirt* clearly supports the ultimate conclusion that Congress never disestablished the Chickasaw Reservation, Mr. Bosse will briefly address the disestablishment issue.

Courts do not lightly infer Congress has exercised its power to disestablish a Reservation. *McGirt*, 140 S. Ct. at 2463 (*citing Solem*, 465 U.S. at 470). Once a Reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S. Ct. at 2469 (*citing Solem*, 465 U.S. at 470). Congressional intent to disestablish a Reservation "must be clear and plain." *Id*., (*citing South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)). Moreover, Congress must clearly express its intent to disestablish, commonly by "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt*, 140 S. Ct. at 2463 (*citing Nebraska v. Parker*, 577 U.S. 481, __, 136 S. Ct. 1072, 1079 (2016)).

A Reservation disestablishment analysis is controlled by the statutory text that allegedly resulted in Reservation disestablishment. The only "step" proper for a court of law is "to ascertain and follow the original meaning of the law" before it. *McGirt*, 140 S. Ct. at 2468. Disestablishment has never required any particular form of words. *McGirt*, 140 S. Ct. at 2463 (*citing Hagen v. Utah*, 510 U.S 399, 411 (1994)). A statute disestablishing a Reservation may provide an "[e]xplicit reference to cession" or an "unconditional commitment…to compensate the Indian tribe for its opened land." *McGirt*, 140 S. Ct. at 2485 (*citing Solem*, 465 U.S. at 470). It also may direct that tribal lands be "restored to the public domain," *McGirt*, 140 S. Ct. at 2462 (*citing Hagen*, 510 U.S. at 412), or state that a Reservation is "'discontinued,' 'abolished,' or 'vacated.'" *McGirt*, 140 S. Ct. at 2463 (*citing Mattz v. Arnett*, 412 U.S. 481, 504, n. 22 (1973)); *see also DeCoteau v. District*

*County Court for Tenth Judicial Dist.*, 420 U.S. 425, 439–440, n. 22 (1975). However, Congress's language must be explicit. To disestablish a Reservation Congress must use language expressing the present and total surrender of all tribal interests.

Oklahoma can point to no statute where Congress specifically erased the Chickasaw Nation boundaries and disestablished the Chickasaw Nation Reservation. Oklahoma's previous attempts to find disestablishment from the context of eight statutes failed. *Murphy*, 875 F.3d at 939 (questioning whether "the overall thrust of eight different laws deserves to be called a step-one argument"). And of those eight statutes, only the Creek Allotment Act was unique to the Creek; all others apply equally to the Chickasaw. *Id*. The Chickasaw Allotment Acts contained no language of disestablishment.

There is no ambiguous language in any of the relevant allotment-era statutes applicable to the Creek Nation and Chickasaw Nation that could plausibly be read as an Act of disestablishment. *McGirt*, 140 S. Ct. at 2468. As *McGirt* makes clear, "Congress does not disestablish by allowing transfer of individual plots, whether to Native Americans or others." Thus, even if "Congress may have passed allotment laws to create conditions for disestablishment" equating "allotment with disestablishment would confuse the first step of a march with arrival at its destination." *Id*. at 2465.

Congress knows what language to use to diminish or disestablish Reservations. It used such language across the country, and it used it specifically to obtain Chickasaw territory in the Southeast. *Murphy*, 875 F.3d at 948 ("The absence of such language is notable because Congress is fully capable of stating its intention to disestablish or diminish a Reservation"). "If Congress wishes to break the promise of a Reservation, it must say so." *Id*. at 2462. There are simply no statutes containing any hallmark language altering the Chickasaw Reservation boundaries as they existed after the 1855 and 1866 Treaties. As the Supreme Court found missing with regard to the

Creek, what is missing in this case is "a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected land." *Id.* at 2464.

Under the Atoka Agreement, Act of June 28, 1898, ch. 517, § 29, 30 Stat. 495 ("Atoka Agreement"), and the Act of July 1, 1902, 32 Stat. 641 ("1902 Act"), the Chickasaw and Choctaw allotted their lands to their members, reserved other lands, including lands for the capitol of each Nation, and sold the remaining lands to provide funds to equalize the allotments to Tribal members. Neither Act altered or extinguished the boundaries of the Treaty Territory or of the Chickasaw and Choctaw Reservations within it.

And just as the Allotment Era legislation did not abrogate the Creek Nation's rights of self-government, it did not abrogate the Chickasaw Nation's rights of self-government. To be sure, in limited respects, that legislation restricted the exercise of certain sovereign rights by the Chickasaw and Choctaw Nations. But when Congress enacted the Five Tribes Act, it decided to continue the Five Tribes' governments in effect "for all purposes authorized by law," which for the Chickasaw Nation then included the exercise of Treaty rights within the borders of the Chickasaw Reservation, as the Supreme Court held in *Morris v. Hitchcock*, 194 U.S. 384 (1904).

Further, Oklahoma's claim that the congressional attacks on tribal self-governance disestablishes Reservations was soundly rejected by the Tenth Circuit and the Supreme Court. *Murphy*, 875 F.3d at 939 ("The State's attempts to shift the inquiry into questions of title and governance are unavailing"); *McGirt*, 140 S. Ct. at 2466 ("But Congress never withdrew its recognition of tribal government, and none of these adjustments would have made any sense if Congress thought it had already completed the job").

Chickasaw Reservation boundaries as established by treaty, and as defined in the Chickasaw Constitution, have not been disestablished. *See* Chickasaw Constitution, preamble,

*available at* https://www.chickasaw.net/getattachment/Our-Nation/Government/Chickasaw-Constitution/CN_Constituion_Amended2002.pdf.aspx?lang=en-US (last visited 9/23/20). By applying the decision in *McGirt* to the Chickasaw, this Court must find that the Chickasaw Nation Reservation is Indian Country under 18 U.S.C. § 1151(a).

## V. CONCLUSION

Therefore, upon consideration of the facts outlined above, after applying the analysis as set out in *McGirt,* and as directed in OCCA Order Remanding for Evidentiary Hearing, this Court should conclude Katrina Griffin, Christian Griffin, and Chasity Hammer were Indians and the crime occurred in Indian Country. The State of Oklahoma had no jurisdiction to try Bosse for these crimes, and his convictions must, therefore, be vacated and the charges dismissed.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of September, 2020, a true and correct copy of the foregoing *Petitioner's Remanded Hearing Brief Applying McGirt Analysis to Chickasaw Reservation* was served via email and U.S. Mail upon:

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MICHAEL W. LIEBERMAN

# ATTACHMENT

- *Stipulations of the Parties*
- *Chickasaw Nation Tribal Enrollment Verification of Chasity Hammer*
- *Chickasaw Nation Tribal Enrollment Verification of Christian Griffin*
- *Chickasaw Nation Tribal Enrollment Verification of Katrina Griffin*

**SHAUN MICHAEL BOSSE,**

***Petitioner,***

***-vs-***

**THE STATE OF OKLAHOMA,**

***Respondent.***

**McClain County District Court**
**Case No. CF-2010-00213**

**Court of Criminal Appeals**
**Case No. PCD-2019-124**

## STIPULATIONS

In response to the questions this Court has been directed to answer by the Court of Criminal Appeals, the parties have reached the following stipulations:

1. As to the location of the crime, the parties hereby stipulate and agree as follows:

   a. The crime in this case occurred at 15734 212th Street, Purcell, OK, 73080. That address is within the boundaries set forth in the 1855 and 1866 treaties between the Chickasaw Nation, the Choctaw Nation, and the United States.

   b. If the Court determines that those treaties established a reservation, and if the court further concludes that Congress never explicitly erased those boundaries and disestablished that reservation, then the crime occurred within Indian Country as defined by 18 U.S.C. § 1151(a).

2. As to the status of the victims, the parties hereby stipulate and agree as follows:

   a. Katrina Griffin was an Indian for purposes of the General Crimes Act, 18 U.S.C. § 1152.

   b. Christian Griffin had 23/256ths Indian blood quantum and was recognized as a Chickasaw Nation Citizen.

   c. Chasity Hammer had 23/256ths Indian blood quantum and was recognized as a Chickasaw Nation Citizen.

   d. The Chickasaw Nation Tribal Enrollment Verification forms for Katrina, Christian and Charity are attached to this stipulation and the parties agree they should be admitted into the record of this case.

Respectfully submitted,

Michael W. Lieberman
Sarah M. Jernigan
COUNSEL FOR PETITIONER

for Jennifer Crabb
Caroline E.J. Hunt
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the Chickasaw Nation
TRIBAL GOVERNMENT SERVICES
2015 Lonnie Abbott Boulevard | ADA, OK 74820 | (580) 436-7250

*Bill Anoatubby*
Governor
*Jefferson Keel*
Lt. Governor

*** **MEMORANDUM** ***

**To:** **Whom It May Concern**

**From:** **Director of Tribal Government Services**

**Date:** **8/29/2018**

**Subject:** **Tribal Enrollment Verification**

This is to verify that Chasity Renea Hammer DOB: 06/20/2004 possessed a CDIB showing her degree of 23/256 Chickasaw / Choc / M Choc Indian Blood until her death on 07/23/2010 and was recognized as a Chickasaw Nation Citizen, #60360.

If you have any questions please contact Tribal Government Services at 580-436-7250 or by email at CDIB@chickasaw.net.

the Chickasaw Nation
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*Bill Anoatubby*
Governor
*Jefferson Keel*
Lt. Governor

*** **MEMORANDUM** ***

**To:** **Whom It May Concern**

**From:** **Director of Tribal Government Services**

**Date:** **8/29/2018**

**Subject:** **Tribal Enrollment Verification**

This is to verify that Christian Joe Griffin DOB: 01/27/2002 possessed a CDIB showing his degree of 23/256 Chickasaw / M Choc / Choc Indian Blood until his death on 07/23/2010 and was recognized as a Chickasaw Nation Citizen, #49714.

If you have any questions please contact Tribal Government Services at 580-436-7250 or by email at CDIB@chickasaw.net.

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*Bill Anoatubby*
Governor
*Jefferson Keel*
Lt. Governor

***** MEMORANDUM *****

**To:** **Whom It May Concern**

**From:** **Director of Tribal Government Services**

**Date:** **8/29/2018**

**Subject:** **Tribal Enrollment Verification**

This is to verify that Katrina Griffin DOB: 10/27/1985 possessed a CDIB showing her degree of 23/128 Chickasaw / M Choc / Choc Indian Blood until her death on 07/23/2010 and was recognized as a Chickasaw Nation Citizen, #36614.

If you have any questions please contact Tribal Government Services at 580-436-7250 or by email at CDIB@chickasaw.net.

**IN THE DISTRICT COURT OF MCCLAIN COUNTY**
**STATE OF OKLAHOMA**

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

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing the 30th day of September, 2020 pursuant to the remand order of the Oklahoma Court of Criminal Appeals issued August 12, 2020. Petitioner appeared by and through Assistant Federal Public Defenders Michael Lieberman and Sarah Jernigan. Petitioner previously filed a written *Waiver of Right to Appear at Evidentiary Hearing* and this Court approved the same. Respondent appeared by and through Assistant Attorneys General Caroline Hunt and Jennifer Crabb, along with District Attorney Greg Mashburn and First Assistant District Attorney Travis White. The Chickasaw Nation of Oklahoma appeared as *Amicus Curiae,* pursuant to the agreement of the parties, by and through counsel Debra Gee and Stephen Greetham. A record was taken by Certified Court Reporter Dawn Flick. The parties announced ready for hearing and Respondent asserted full compliance with Okla. Const. art. 2, § 34.

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

## I. The Status as Indians of Petitioner's Victims

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

Findings of Fact

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

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

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

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

Conclusions of Law

As set forth above, in assessing the status as Indians of Petitioner's victims, the OCCA ordered this Court to determine whether (1) the victims had some Indian blood and (2) were recognized as an Indian by a tribe or by the federal government.[6] With respect to victim Katrina

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[1] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3.
[2] *Id.*
[3] Pet. Ex. 1, Stipulations (2)(a).
[4] Pet. Ex. 1, Stipulations (2)(b).
[5] Pet. Ex. 1, Stipulations (2)(c).
[6] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3.

Griffin, the parties stipulated that she was an Indian for purposes of the General Crimes Act; this Court adopts the parties stipulations and finds that Katrina Griffin was, in fact, an Indian victim.

With regard to victims Christian Griffin and Chasity Hammer, this Court must first consider whether they each had some Indian blood.[7] Respondent noted in the *State's Supplemental Proposed Findings of Fact and Conclusions of Law* that the term 'Indian' is not statutorily defined, but has been previously defined by different courts to require "a significant percentage of"[8], "sufficient"[9], "substantial"[10] or "some"[11] Indian blood. However, the OCCA was clear in its mandate when it ordered this Court to determine "whether the victims had *some* Indian blood."[12] This Court answers this inquiry in the affirmative.

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

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

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[7] *Id.*
[8] *Goforth v. State,* 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.
[9] *United States v. LaBuff*, 658 F.3d 873, 874-75 (9th Cir. 2011).
[10] *Vialpando v. State*, 640 P.2d 77, 79-80 (Wyo. 1982).
[11] *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976).
[12] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3.
[13] Pet. Ex. 1, Stipulations 2(b) and 2(c).
[14] Pet. Ex. 1, Stipulations (2)(c).
[15] Pet. Ex. 1, Stipulations (2)(d).

parties and answering answered both questions in the affirmative, this Court finds that Christian Griffin and Chasity Hammer were, in fact, Indian victims.

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

## II. Whether the Crime Occurred in Indian Country

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

Findings of Fact

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

2. Pursuant to the authority outlined in the Indian Removal Act of 1830, the 1830 Treaty of Dancing Rabbit Creek was entered. Specifically, in the 1830 Treaty of Dancing Rabbit Creek, the United States granted to the Choctaw Nation certain lands "in fee simple to them and their descendants, to insure to them while they shall exist as a nation and live on it" in exchange for the

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[16] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3; *United States v. Diaz,* 679 F.3d 1183, 1187 (10th Cir. 2012); *Untied States v. Prentiss,* 273 F.3d 1277, 1280-81 (10th Cir. 2001).
[17] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3.
[18] *Id.* at 3-4.
[19] Indian Removal Act of 1830, Pet. Ex 7.

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

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

4. In 1855, the Treaty of Washington reaffirmed the 1837 Treaty of Doaksville and modified the Western boundary of the Chickasaw territory.[25] Congress explicitly asserted that "pursuant to [the Indian Removal Act], the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes" and

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[20] 1830 Treaty of Dancing Rabbit Creek, Pet. Ex. 8, art.2.
[21] *Id.* at Pet Ex. 8, art 4.
[22] *Id.*
[23] 1837 Treaty of Doaksville, Pet. Ex. 10, art. 1.
[24] *Id.*
[25] 1855 Treaty of Washington, Pet. Ex. 12 at art. 2.

reserved those lands from sale "without the consent of both tribes."[26] The 1855 Treaty further reaffirmed the Chickasaw Nation's right of self-government.[27]

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

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

7. The property on which the crime occurred was originally transferred directly from the Choctaw and Chickasaw Nations in a Homestead Patent to George Roberts in 1905.[30] Title to the property can be traced directly to the Reservation granted to the Choctaw and Chickasaw Nations by the United States and subsequently allotted to individuals, and was never owned by the State of Oklahoma.[31]

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

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

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[26] *Id.* at art. 1.
[27] *Id.* at art. 7.
[28] 1866 Treaty of Washington, Pet. Ex. 13. art. 10.
[29] Stipulations (1)(a).
[30] Tr. pg. 11 ln. 21-25.
[31] Pet. Ex. 2; Tr. pg. 13, ln. 10-16, pg. 14, ln. 14-19.
[32] Constitution of the Chickasaw Nation, Pet. Ex. 5.

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

Conclusions of Law

First, the Court finds that a reservation was established for the Chickasaw Nation by the treaties discussed above. Title 18 U.S.C. 1151(a) defines "Indian Country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government..." As noted by the United States Supreme Court in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2461, "early treaties did not refer to the Creek lands as a 'reservation'—perhaps because that word had not yet acquired such distinctive significance in federal Indian law. But we have found similar language in treaties from the same era sufficient to create a reservation." The Court in *McGirt* stated that the "most authoritative evidence of [a tribe's] relationship to the land...lies in the treaties and statutes that promised the land to the Tribe in the first place." [34] It specifically noted that Creek treaties promised a "permanent home" that would be "forever set apart," and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state.[35] As such, the Supreme Court found that, "Under any definition, this was a [ ] reservation."[36] The Chickasaw Nation is subject to the same analysis.

In applying the reasoning the Supreme Court used in *McGirt* to the case at bar, this Court must reach the same conclusion. Specifically, in the 1830 Treaty of Dancing Rabbit Creek, the

[33] Pet. Ex. 1, Stipulations (1)(b).
[34] *McGirt*, 140 S.Ct. at 2475-76.
[35] *Id.* at 2461-62.
[36] *Id.* at 2461.

Choctaw Nation was granted the land in question "in fee simple to them and their descendants, to insure to them while they shall exist as a nation."[37] It secured the rights of self-government and jurisdiction over all persons and property within the Treaty Territory and promised that no state shall interfere with those rights.[38]

These rights applied equally to the Chickasaw Nation under the 1837 Treaty of Doaksville.[39] The Treaty of Doaksville secured to the Chickasaw Nation a "district within the limits of [the Treaty Territory]," and guaranteed them the same privileges, rights of homeland ownership and occupancy that the Choctaw held under the 1830 Treaty.[40]

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

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[37] Pet. Ex. 8, art 2.
[38] *Id.* at art. 4.
[39] Pet. Ex. 10.
[40] *Id.* art. 1.
[41] Pet. Ex. 12, art. 1.
[42] *Id.* art. 7
[43] Pet. Ex. 13, art. 2.
[44] *McGirt*, 140 S. Ct. at 2460.

Applying the reasoning used by the United States Supreme Court in *McGirt*, the plain wording of the treaties demonstrate the Chickasaw lands were set aside for the Chickasaw people and their descendants and assured the right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state.[45] It is, therefore, clear that Congress established a reservation for the Chickasaw Nation.

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

The Petitioner and the State disagree where the burden to prove disestablishment should be placed. However, regardless which party bears the burden, no evidence was presented to the Court to establish that Congress explicitly erased or disestablished the boundaries of the Chickasaw nation or that the State of Oklahoma has jurisdiction of this matter. No evidence was

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[45] *McGirt*, 140 S.Ct. at 2461-62.
[46] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3-4.
[47] *McGirt*, 140 S.Ct. at 2462.
[48] *Id.*
[49] *Id.* at 2469 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).
[50] *McGirt*, 140 S. Ct. at 2463 (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016)).

presented that the Chickasaw reservation was "restored to public domain,"[51] "discontinued, abolished or vacated."[52] Without, explicit evidence of a present and total surrender of all tribal interests, the Court cannot find the Chickasaw reservation was disestablished.[53]

This Court finds that Congress established a reservation for the Chickasaw Nation, and Congress never specifically erased those boundaries and disestablished the reservation. Therefore, the crime occurred in Indian Country.

## CONCLUSION

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

**IT IS HEREBY ORDERED!**

LEAH EDWARDS,
District Judge

[51] *Id.* at 2462.
[52] *Mattz v. Arnett*, 412 U.S. 481, 504, (1973).
[53] *McGirt*, 140 S.Ct. at 2463.

**Certificate of Mailing**

I, Susan Peters, bailiff for Judge Leah Edwards, do hereby certify that on the 13 day of October, 2020, I emailed or mailed, postage prepaid, a true and correct copy of the foregoing Order to the following:

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IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

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CLERK

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

SHAUN MICHAEL BOSSE,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

Case No. PCD-2019-124

# PETITIONER'S POST-HEARING BRIEF REGARDING PROPOSITION I OF HIS SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF

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November 4, 2020

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

| | |
|---|---|
| **SHAUN MICHAEL BOSSE,**<br>**Petitioner,**<br>**-vs-**<br>**THE STATE OF OKLAHOMA,**<br>**Respondent.** | **Case No. PCD-2019-124** |

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November 4, 2020

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**(Chronological Order)**

Petitioner, Shaun Michael Bosse, by and through undersigned counsel, submits this post-hearing brief "addressing only those issues pertinent to the evidentiary hearing" ordered by this Court August 12, 2020. *See* Order Remanding for Evidentiary Hearing ("Remand Order").[1]

## BACKGROUND

Petitioner filed a Successive Application for Post-Conviction Relief ("APCR") on February 20, 2019. As relevant here, Proposition I of that APCR challenges the State's jurisdiction to prosecute him. More specifically, in Proposition I, Petitioner asserts exclusive jurisdiction rests with the federal courts because the victims were citizens of the Chickasaw Nation and the crimes occurred within the boundaries of the Chickasaw Nation Reservation. Because the authority upon which Petitioner's claim rested had not yet become final, this Court *sua sponte* held the matter in abeyance pending the final decision of the Supreme Court in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom Sharp v. Murphy*, 140 S. Ct. 2412 (July 9, 2020) (mem). On the same day it handed down the *Murphy* ruling, the Supreme Court also decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). In both cases, the Supreme Court acted to reverse rulings of this Court, concluding Congress never disestablished the Creek Reservation. The crimes in both cases occurred in Indian Country, thus depriving the Oklahoma courts of jurisdiction. After allowing the State an opportunity to respond to Petitioner's jurisdictional claim in Proposition I, this Court

[1] Pursuant to this Court's Remand Order, post-hearing briefs of no more than 20 pages are to be filed simultaneously within 20 days of the filing in this Court of the District Court's findings of fact and conclusions of law and must address "only those issues pertinent to the evidentiary hearing." Remand Order at 4. Because counsel for Respondent addressed issues in the District Court that were beyond the scope of the Remand Order, counsel for Petitioner anticipates Respondent may raise the same non-pertinent issues in its supplemental brief in this Court. Petitioner will address those issues briefly here, but counsel for Petitioner reserves the right to seek to have Respondent's brief stricken or, in the alternative, for leave to file a reply to address any non-pertinent issues raised by Respondent.

remanded this case to the District Court for McClain County for an evidentiary hearing to determine two questions. Specifically, this Court directed that:

> The District Court shall address *only the following issues*:
>
> First, the status as Indians of Appellant's victims. The District Court must determine whether (1) the victims had some Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government.
>
> Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Chickasaw Nation and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps and/or testimony.

Remand Order at 3-4 (emphasis added).

The District Court held the evidentiary hearing September 30, 2020, and has issued its Findings of Fact and Conclusions of Law as directed by this Court. The matter is therefore now ripe for this Court to decide whether the State had jurisdiction over Petitioner's crimes. The State never had jurisdiction to prosecute Petitioner.

**STIPULATIONS**

Prior to the remanded evidentiary hearing, the parties reached the following stipulations:

1. As to the location of the crime, the parties hereby stipulate and agree as follows:
   a. The crime in this case occurred at 15734 212th Street, Purcell, OK, 73080. That address is within the boundaries set forth in the 1855 and 1866 treaties between the Chickasaw Nation, the Choctaw Nation, and the United States.
   b. If the Court determines that those treaties established a reservation, and if the court further concludes that Congress never explicitly erased those boundaries and disestablished that reservation, then the crime occurred within Indian Country as defined by 18 U.S.C. § 1151(a).

2. As to the status of the victims, the parties hereby stipulate and agree as follows:

   a. Katrina Griffin was an Indian for purposes of the General Crimes Act, 18 U.S.C. § 1152.

   b. Christian Griffin had 23/256ths Indian blood quantum and was recognized as a Chickasaw Nation Citizen.

   c. Chasity Hammer had 23/256ths Indian blood quantum and was recognized as a Chickasaw Nation Citizen.

   d. The Chickasaw Nation Tribal Enrollment Verification forms for Katrina, Christian and Charity are attached to this stipulation and the parties agree they should be admitted into the record of this case.

Stipulation of the Parties, filed September 14, 2020; *see also* Petitioner's Exhibits (Pet. Ex.) 1, 1(a)-1(c).

**EVIDENCE PRESENTED AT HEARING**

At the evidentiary hearing, Petitioner presented testimony from Attorney Jereme Cowan, who specializes in oil and gas law. Tr. at 9. Mr. Cowan established that title to the land on which the crimes occurred can be traced directly back to the land held by the Choctaw and Chickasaw Nations. Tr. at 11-14; Pet. Ex. 2(a)-2(c). Moreover, while chaining title to the property, Mr. Cowan confirmed that at no time did the State of Oklahoma ever own or exercise sovereign rights over that property. Tr. at 14. The State did not refute or respond to any of the evidence presented by Mr. Cowan.

Petitioner also presented various treaties, statutes, maps and other official documents. *See* Pet. Ex. 3-15. The State did not refute or respond to any of the documentary evidence presented by Petitioner. In fact, the State did not present any evidence at the hearing and made no argument regarding any of the questions upon which this Court remanded for a hearing. Tr. at 16 ("the State does not have any witnesses to present, and we will rely on the briefs that have been provided to the Court...."); State's Brief on Remand for Evidentiary Hearing ("State Remand Brief") at 10

("As to Indian Country, the State takes no position on whether the Chickasaw Nation has, or had, a reservation").

Based on this evidentiary record, the District Court concluded that each of the victims were Indians, that Congress did create a reservation for the Chickasaw Nation, and that Congress never erased the reservation boundaries and disestablished that reservation. *See generally* Findings of Fact and Conclusions of Law, filed October 13, 2020. Petitioner does not expect the State to challenge any of these findings or conclusions in this Court. In the event the State does attempt to challenge the findings or conclusions, any such challenge would be waived given the State failed to address the issues in any way in the District Court. *See Bane v. Anderson, Bryant & Co.*, 1989 OK 140, 786 P.2d 1230, 1236 ("Parties will not be permitted to raise issues before this court which were not raised in the trial court"), citing *Sharp v. Henry,* 298 P.2d 1058 (Okla.1956); *Helfinstine v. Martin,* 561 P.2d 951 (Okla.1977).

Before turning to the "issues pertinent to the evidentiary hearing," Remand Order at 4, Petitioner will briefly respond to some of the non-pertinent issues he anticipates the State may raise in this Court.

**PROCEDURAL DEFENSES**[2]

The State has taken the position, both before this Court and in the District Court on remand, that Petitioner's jurisdictional claim should be procedurally barred. *See* Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452

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[2] In addition to urging the Court to disregard any non-pertinent issues raised by the State in its post-remand briefing, Petitioner also urges the Court to treat them all as waived for the State's failure to fully develop those claims below. The State correctly recognized the issues it is now expected to make in this Court were beyond the scope of the Court's Remand Order, so it presented no evidence or meaningful argument on any of the issues. Having failed to adequately raise its procedural bar, burden of proof, blood quantum, and concurrent jurisdiction arguments below, the State has waived them and should not be permitted to raise them here. Bane, 786 P.2d at 1236.

(2020), filed August 4, 2020 ("State's Pre-Remand Brief") at 22-49 (asserting numerous procedural defenses); State Remand Brief at 10 n.3 (preserving procedural defenses and concurrent jurisdiction arguments for review in this Court).

Not only did the State's arguments lack any merit when made initially, but this Court has already properly rejected those arguments. As noted, the State devoted 27 pages of its Pre-Remand Brief to its procedural bar arguments. After reviewing all of the State's arguments, this Court correctly rejected the State's position:

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

Remand Order at 2 (emphasis added). *Compare Goode v. State*, PCD-2020-530, Order Remanding for Evidentiary Hearing at 3 (August 23, 2020) ("We find that the issues raised are issues which fall under the parameters of section 1089(D), and this issue is properly before this Court") *with Goode v. State*, PCD-2020-333, Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Case in Abeyance at 4 (June 9, 2020) (dismissing successive post-conviction application as premature "[b]ecause neither *Murphy* nor *McGirt* is a final opinion").

Petitioner's jurisdictional claim is properly before this Court, and any attempt by the State to argue otherwise should be rejected.

**BURDEN OF PROOF**

The State asserted in its Pre-Remand Brief in this Court (at 10-13) and in its Remand Brief in the District Court (at 12-16) that Petitioner bears the burden of proof, not only as to whether

Congress ever created a reservation for the Chickasaw Nation, but also as to whether Congress ever disestablished any such reservation. The State is wrong.[3]

The State's error regarding the burden of proof stems from its apparent misunderstanding of what an evidentiary presumption is. There is a presumption that once a reservation is established it continues to exist until Congress acts to disestablish it. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Petitioner bears no burden to show that the reservation has *not* been disestablished. The Tenth Circuit made this point quite clear:

> What the OCCA did say in its analysis contradicted *Solem*. Instead of heeding *Solem*'s "presumption" that an Indian reservation continues to exist until Congress acts to disestablish or diminish it, *see* 465 U.S. at 481, the OCCA flipped the presumption by requiring evidence that the Creek Reservation had not been disestablished—that it "still exists today," 124 P.3d at 1207. In other words, *the OCCA improperly required Mr. Murphy to show the Creek Reservation had not been disestablished instead of requiring the State to show that it had been.*

*Murphy*, 875 F.3d at 926 (emphasis added).[4] But the Tenth Circuit did not blame the legal error only on the OCCA; it pointed out the State was just as much as fault:

> The State, repeating the OCCA's mistake in reversing the presumption against disestablishment, argues Mr. Murphy "failed to present evidence that Congress did not intend disestablishment." Aplee. Br. at 48 (emphasis added). But under *Solem*, that is not the test. *Solem* and every case applying it presume that a reservation continues to exist unless Congress has legislated otherwise. As

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[3] Petitioner clearly proved that Congress created a Chickasaw reservation and that Congress has never taken steps to disestablish that reservation. Because the State offered no evidence in response to Petitioner's evidence on these questions, "the Court cannot find the Chickasaw reservation was disestablished." Findings of Fact and Conclusions of Law at 10. Petitioner addresses the State's argument because the issue is likely to come up in other Indian Country cases this Court will be called upon to decide.

[4] The State attempts to escape its burden of proof by asserting that Murphy is not binding because this Court is not bound by decisions of the Tenth Circuit. The State ignores that the presumption that a reservation continues to exist is not a creation of the Tenth Circuit; rather, it is clear and controlling Supreme Court law as set forth in Solem and reaffirmed throughout the Supreme Court's other disestablishment cases. *See, e.g.*, Bates v. Clark, 95 U.S. 204, 209 (1877) (noting Indian Country remains Indian Country "in the absence of any different provision by treaty or by act of Congress"); United States v. Celestine, 215 U.S. 278, 285 (1909) (holding "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress"). So, while this Court may not be bound by the Tenth Circuit's rulings, it is beyond question that this Court is required to follow what the Supreme Court says. See Bosse v. Oklahoma, 137 S. Ct. 1 (2016).

> demonstrated above, the OCCA not only ignored but also reversed this presumption. So does the State. We will not make the same mistake here.

*Id.* at 927-28. This Court should not accept the State's invitation to make the same mistake again.

**BLOOD QUANTUM**

Throughout the pendency of this case, as well as numerous other remanded *McGirt* evidentiary hearings, the State has taken varying positions on this question. Because Petitioner does not know what the State's current position will be on this issue, he addresses it briefly.

Because the term "Indian" is not defined in statutes addressing criminal jurisdiction in Indian Country, courts have adopted a two-part test to determine whether a person is Indian for purposes of federal law. *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss,* 273 F.3d 1277, 1279 (10th Cir. 2001). Under that test, to be considered "Indian," a person must (1) have "some Indian blood" and (2) be "recognized as an Indian by a tribe or by the federal government." *Diaz*, 679 F.3d at 1187; *Prentiss*, 273 F.3d at 1280. This test applies whether it is the status of the defendant or victim that is at issue. *Diaz*, 679 F.3d at 1187.

In its Remand Order, this Court clearly set forth the inquiry the District Court was to undertake by stating, "First, the status as Indians of Appellant's victims. The District Court must determine whether (1) the victims had *some* Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government." Remand Order at 3 (emphasis added) (citing *Diaz*, 679 F.3d at 1187; *Prentiss*, 273 F.3d at 1280-81).

At the remanded hearing, the State urged the court to ignore the clear language of what this Court had ordered. Specifically, despite that the Remand Order clearly directed the District Court to determine if the victims had "some Indian blood," the State nonetheless urged the District Court to require a showing of a "significant percentage of Indian blood." State Remand Brief at 11 (citing

*Goforth v. State*, 1982 OK CR 48 ¶ 6, 644 P.2d 114, 116). Beyond including the word "significant" in its description of what the court was required to find, the State made no effort to define how much blood is enough to satisfy its proposed standard.

As with the procedural bar issue discussed above, the State laid out its arguments for why the standard should be "significant percentage" as opposed to "some blood" in its Pre-Remand Brief in this Court. State's Pre-Remand Brief at 4. Having that argument before it and giving it due consideration, this Court chose not to adopt the State's proposed "significant percentage" requirement, and instead required that Petitioner demonstrate the victims had "some Indian blood." Remand Order at 3. Moreover, there are several persuasive arguments for why the test should be "some Indian blood" as opposed to "significant percentage." In fact, the State identified many of those reasons in its Pre-Remand Brief in this Court.[5]

"*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." State Pre-Remand Brief at 5, citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) ("tribes retain power...to determine tribal membership"). If a tribe is satisfied that a certain quantum of Indian blood is sufficient to afford someone citizenship in the tribe, that choice should be respected.

Second, focusing the inquiry more on tribal membership and less on how much Indian blood someone has before deciding what laws apply to them "avoids the constitutional pitfalls of giving the term 'Indian' a racial definition that could run afoul of the Equal Protection Clause."

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[5] The State made these arguments in connection to its position regarding the second step in the "Indian status" test—namely, recognition by a tribe—but the same arguments advanced by the State in that context are even more persuasive in this one.

State's Pre-Remand Brief at 6, citing *United States v. Bruce*, 394 F.3d 1215, 1233-34 (9th Cir. 2005) (Rymer, J., dissenting). The Constitution permits the government to enact laws treating Indians differently precisely because Indians are treated "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." State's Pre-Remand Brief at 6, citing *Morton v. Mancari*, 417 U.S. 535, 554 (1974). As the State emphasized: "[W]hat is important to avoid constitutional prohibitions on race discrimination is treating Indians differently only because of their membership in the tribe." State's Remand Brief at 6, citing *Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000) (finding unconstitutional a statute treating native Hawaiians differently based on race rather than membership in a quasi-sovereign).

Finally, the two-part test discussed above traces its origins to *United States v. Rogers*, 45 U.S. 567 (1846). There, the Supreme Court was considering the case of a non-Indian who killed another non-Indian on an Indian reservation. The defendant sought to defeat the court's jurisdiction by claiming he had renounced his United States citizenship and had been adopted by the Cherokee Tribe. He had no Indian blood at all. In rejecting his argument that he should be considered an Indian, the Supreme Court reached the unremarkable conclusion that a person with absolutely no Indian blood cannot qualify as an Indian for purposes of determining where jurisdiction over crimes committed by that person should lie. *Id.* at 571-73. Thus, from *Rogers* comes the long-standing requirement that a person claiming Indian status must at least have *some* Indian blood. The State's attempt to impose a higher burden to establish one's Indian status is contrary to federal law and should be rejected.

Congress recently rejected the notion that any minimum blood quantum is required to be entitled to the benefits that come along with citizenship in one of the Five Tribes. *See* Stigler Act Amendments of 2018, P.L. 115–399 (extending restrictions on alienation of property for any

citizen of the Five Tribes "of whatever degree of Indian blood"). *See also* Statement of Rep. Tom Cole upon passage of the Stigler Act Amendments, *available at* https://cole.house.gov/media center/press-releases/cole-and-mullin-praise-final-passage-stigler-act-amendments (last visited 11/3/20) ("Without question and especially in Oklahoma, Native American heritage is something to be celebrated. But that special heritage must also be protected, preserved and passed on. Land ownership is part of that unique inheritance for many tribal citizens and their descendants, and over the years, the Stigler Act has unfortunately diminished that rightful inheritance *due to an unfair blood quantum requirement*") (emphasis added).

**CONCURRENT JURISDICTION UNDER THE GENERAL CRIMES ACT**

Finally, in its last-ditch effort to save this case from being dismissed for lack of jurisdiction, the State will likely argue that it shares concurrent jurisdiction with the Federal government under the General Crimes Act, 18 U.S.C. § 1152. *See* State's Pre-Remand Brief at 13-21. The State is wrong for several reasons.

By way of background, the jurisdictional parameters of criminal jurisdiction in Indian Country are clearly defined by federal law. First, under the Major Crimes Act (MCA),[6] federal courts have exclusive jurisdiction over prosecutions for certain enumerated crimes committed by Indians in Indian Country. *See McGirt,* 140 S. Ct. at 2459. Second, Oklahoma lacks jurisdiction over prosecutions of crimes defined by federal law committed by or against Indians in Indian Country under the General Crimes Act (GCA);[7] such crimes are subject to federal or tribal

[6] The MCA provides: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter... [and] robbery... within the Indian Country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

[7] The GCA provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except

jurisdiction. *McGirt*, 140 S. Ct. at 2478. The GCA expressly protects tribal courts' jurisdiction over prosecutions of "a broader range of crimes by or against Indians in Indian Country." *Id.* at 2479. *See United States v. Prentiss*, 273 F.3d 1277, 1278 (10th Cir. 2001) (noting that GCA "establishes federal jurisdiction over 'interracial' crimes, those in which the defendant is an Indian and the victim is a non-Indian, or vice-versa"). Third, Oklahoma has jurisdiction over all offenses committed by non-Indians against non-Indians in Indian Country, but it extends no further. *McGirt* at 2460, citing *United States v. McBratney*, 104 U.S. 621, 624 (1882). *See also* Indian Country Criminal Jurisdiction Chart: justice.gov/usao-wdok/page/file/1300046/download (last visited 11/03/20) (also in the record as Pet. Ex. 6).

*McGirt* laid to rest Oklahoma's flawed position that the MCA and the GCA do not apply in Oklahoma. Oklahoma's claim to a special exemption from the MCA for the eastern half of Oklahoma was said to be "one more error in historical practice." *McGirt*, 140 S. Ct. at 2471. Oklahoma's use of "statutory artifacts" to argue it was granted criminal jurisdiction in Indian Country was a "twist" even the *McGirt* dissenters declined to join. *Id.* at 2476.

The State continues to use a backwards theory – that there must be an express retention of federal jurisdiction or an express withdrawal of state jurisdiction – when in fact, jurisdiction in Indian Country has historically been exercised only by tribal and federal courts, and states acquire such jurisdiction only by express grants. It is not necessary for a federal statute to "withdraw" jurisdiction from the State in Indian Country. The State does not acquire jurisdiction in Indian

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the District of Columbia, shall extend to the Indian Country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian Country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152.

Country unless a federal statute provides it. Once again—as it did with the burden of proof issue—the State is taking a straight-forward rule regarding Indian Country jurisdiction and turning it on its head.

States may acquire criminal jurisdiction over crimes by or against Indians in Indian Country only if expressly granted by Congress. Congress has granted such jurisdiction in a few statutes applicable to certain states, including Public Law 280, which was originally enacted in 1953.[8] Public Law 280 demonstrates that states may obtain jurisdiction over crimes by or against Indians in Indian Country only by express Congressional *grants* to the states of such jurisdiction. Using wording quite different from the GCA and MCA, section 1162, entitled "State jurisdiction over offenses committed by or against Indians in the Indian Country," expressly granted to certain identified states "*jurisdiction* over offenses *committed by or against Indians*" in Indian Country, and provided that state criminal laws "shall have the same force and effect within such Indian Country as they have elsewhere within the State ..." 18 U.S.C. § 1162(a). Public Law 280 further provided that the MCA and GCA "shall not be applicable within the areas of Indian Country listed in subsection (a). . .as areas *over which the several States [shall] have exclusive jurisdiction.*" 18 U.S.C. § 1162(c) (emphasis added). It authorized application of the MCA and GCA to the listed states only upon tribal request and consent of the Attorney General, and expressly provides that such "jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments." 18 U.S.C. § 1162(c) and (d).

When Congress enacted Public Law 280, Oklahoma declined to exercise the option of voluntarily assuming complete civil and criminal jurisdiction over Indian Country within its

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[8] Act of Aug. 15, 1953, Pub. L. No. 67, Stat. 588, codified at 18 U.S.C. § 1162, 25 U.S.C. § 1321-26.

boundaries. Public Law 280 was amended in 1968 to require tribal consent to acquire such jurisdiction.[9] 18 U.S.C. § 1321. Public Law 280 provides federal consent to "any State *not having jurisdiction* over criminal offenses committed by or against Indians" in Indian Country within the state, if the tribe consents, "to the same extent that such State has jurisdiction over any such offense committed *elsewhere* within the State," and provides that such state criminal laws "shall have the same force and effect within such Indian Country or part thereof as they have elsewhere within that State." 25 U.S.C. § 1321(a)(1) (emphasis added). It provides that, at the request of the tribe and with consent of the Attorney General, "the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of title 18 within the Indian Country of the Indian tribe." 25 U.S.C. § 1321(a)(2). In other words, states wishing to exercise criminal jurisdiction over crimes by or against Indians in Indian Country under Public Law 280, as amended in 1968, may only do so if a tribe consents to state assumption of such jurisdiction; and concurrent federal jurisdiction under the GCA and MCA may be exercised only if the tribe requests it and the Attorney General consents.

Oklahoma has never requested tribal consent to state assumption of jurisdiction under Public Law 280, and Oklahoma tribes have not issued such consent. This Court recognized more than thirty years ago that Oklahoma failed to assume criminal and civil jurisdiction under Public Law 280 before it was amended to require tribal consent, 25 U.S.C. § 1321, and that Oklahoma "does not have jurisdiction over crimes committed by or against an Indian in Indian Country." *See*

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[9] Act of Apr. 11, 1968, 82 Stat. 80, codified 25 U.S.C. §§ 1321-26.

*Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) (citing *State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989)).[10]

This Court recognized federal preemption of State criminal jurisdiction for crimes involving Indians in Indian Country when it found that "[a]lthough §§ 1152 and 1153 provide a broad assertion of federal jurisdiction over crimes committed upon Indian lands, the *preemption of state jurisdiction* is not total." *Goforth v. State,* 1982 OK CR 48,15, 644 P.2d 114, 115-16 (emphasis added). Indeed, the United States Supreme Court has expressly stated that federal jurisdiction in these matters preempts state jurisdiction:

> Mississippi appears to concede, Brief for Appellee in No. 77-575, p. 44, that if § 1153 provides a basis for the prosecution of Smith John for the offense charged, the State has no similar jurisdiction. This concession, based on the assumption that § 1153 ordinarily is *pre-emptive* of state jurisdiction when it applies, seems to us to be correct.

*United States v. John,* 437 U.S. 634, 651 (1978) (emphasis added).

In addition to 18 U.S.C. § 1162, Congress has on other occasions passed legislation specifically granting states jurisdiction over crimes in Indian Country. In *Negonsott v. Samuels*, 507 U.S. 99 (1993), the Supreme Court noted:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations. Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. § 3243).

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[10] This Court overruled *Ex Parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936), which wrongly held Oklahoma had jurisdiction to convict and sentence a full-blood Choctaw for the murder of another full-blood Choctaw on a restricted Choctaw allotment. *See Klindt*, 782 P.2d at 403.

> Passed in 1940, the Kansas Act was followed in short order by virtually identical statutes granting to North Dakota and Iowa, respectively, jurisdiction to prosecute offenses committed by or against Indians on certain Indian reservations within their borders. See Act of May 31, 1946, ch. 279, 60 Stat. 229; Act of June 30, 1948, ch. 759, 62 Stat. 1161.

*Id.* at 103-04. The fact Congress had to pass legislation to *grant* jurisdiction to states over crimes committed by *or against* Indians in Indian Country is all the proof necessary to overcome the State's assertion of concurrent jurisdiction under the General Crimes Act.

The State's confusion is particularly apparent in its attempt to rely on scattered phrases in caselaw concerning tribal and state *civil* jurisdiction over non-Indians in Indian Country to interpret the very specific federal statutes governing federal criminal jurisdiction there. The State, with no legal analysis or support, uses these phrases to suggest a "presumption" of state criminal jurisdiction and some new rule of statutory construction that would include consideration of the impact of state criminal jurisdiction in Indian Country on tribal self-government. State's Pre-Remand Brief at 17-18, citing *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (involving an Indian's *tribal court civil* suit against state game wardens for alleged civil rights violations and tort in executing a search warrant on a reservation related to alleged off-reservation state law crimes); *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257–58 (1992) (involving county ad valorem tax on reservation land owned in fee by a tribe or tribal citizens); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (upholding state severance tax on non-Indian production of oil and gas on a reservation, when production was also subject to a tribal severance tax); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148-49 (1984) (involving a *civil suit* for negligence and breach of contract filed by a tribe in state court against a corporation); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 71-74

(1962) (involving enforcement of state anti-fish trap conservation law against member of an Alaska tribe that had no reservation).

The State also cites and provides random quotes from a few civil cases in an attempt to support its weak arguments that "there is no reason to assume" that federal jurisdiction "necessarily precludes concurrent state jurisdiction," and that the GCA "does not clearly preclude state jurisdiction over crimes committed by non-Indians against Indians." State's Pre-Remand Brief at 16. None of the cases cited by Oklahoma address criminal jurisdiction or involve Indians or Indian Country. *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349-52 (2020) (state court suit related to federal environmental laws); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (state law claims concerning warning label requirements for prescription drug); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (state court civil personal injury action); *Silas Mason Co. v. Tax Com'n of State of Washington*, 302 U.S. 186, 207 (1937) (state income tax on receipts by contractors with the United States for dam construction work); *United States v. Bank of New York & Tr. Co.*, 296 U.S. 463, 479 (1936) (state court suits for accounting and delivery filed by the United States, seeking to recover funds held by a bank); and *Claflin v. Houseman*, 93 U.S. 130, 134 (1876) (creditor's state court claim against a debtor subject to federal bankruptcy proceeding). These cases are all irrelevant to interpretation of the GCA and Indian law principles grounded in the United States' special legal relationship with tribes.

**THE STATE NEVER HAD JURISDICTION TO CHARGE PETITIONER**

Based on the clear record developed at the evidentiary hearing, there is no legitimate question as to whether the State of Oklahoma had jurisdiction to charge, try and sentence Petitioner for a crime against Indians in Indian Country. The answer is clearly "no."

**Indian Status of the Victims**

All three victims were Indian as that term is defined for purposes of federal jurisdiction. They all had "some Indian blood" and each was recognized as a citizen of the Chickasaw Nation, which is a federally recognized Tribe. *See* Findings of Fact and Conclusions of Law at 2-4.

**Indian Country**

There is likewise no legitimate question as to whether the crimes occurred in Indian Country. As discussed briefly below and set out in more detail in the District Court's detailed findings of fact and conclusions of law, a series of treaties between the Choctaw Nation, the Chickasaw Nation, and the United States between 1830 and 1866 unquestionably created a reservation for the Chickasaw Nation. Further, having created such reservation, Congress has never disestablished it. Because it is undisputed that the crimes occurred within the boundaries of that reservation, the State lacked jurisdiction.

Pursuant to the authority outlined in the Indian Removal Act of 1830 (Pet. Ex. 7), in the 1830 Treaty of Dancing Rabbit Creek between the United States and the Choctaw Nation the United States granted to the Choctaw Nation certain lands "in fee simple to them and their descendants, to insure to them while they shall exist as a nation and live on it" in exchange for the Choctaw Nation ceding their lands east of the Mississippi River. Pet. Ex. 8, art. 2. Article 4 granted the Choctaw people "the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State." The land granted to the Choctaw Nation was described as: "beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork; if in the limited of

the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning."

Then, in 1837, the Treaty of Doaksville granted the Chickasaw people a "district within the limits of [the 1830 Treaty of Dancing Rabbit Creek territory] to be held on the same terms that the Choctaws now hold it." Pet. Ex. 10. The 1837 Treaty entered between the Choctaws and Chickasaws made the provisions of the 1830 Treaty of Dancing Rabbit Creek applicable to the Chickasaw Nation.

In 1855, the Treaty of Washington reaffirmed the 1837 Treaty of Doaksville and modified the Western boundary of the Chickasaw territory. Pet. Ex. 12. Congress explicitly asserted that "pursuant to [the Indian Removal Act], the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes" and reserved those lands from sale "without the consent of both tribes." *Id.* at art. 1. The 1855 Treaty further reaffirmed the Chickasaw Nation's right of self-government. *Id.* at art. 2.

Finally, following the Civil War, the Chickasaw and Choctaw Nations entered into the 1866 Treaty of Washington with the United States. Pet. Ex. 13. That treaty did not alter the Chickasaw district but reiterated the Choctaw and Chickasaw Nations' rights to self-governance and reaffirmed the rights granted under the previous treaties.

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

at 2461. The Court further stated that the "most authoritative evidence of [a tribe's] relationship to the land. . . lies in the treaties and statutes that promised the land to the Tribe in the first place," *id.* at 2475-76, and specifically noted that Creek treaties promised a "permanent home" that would be "forever set apart," and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. *Id.* at 2461-62. As such, the Supreme Court found that, "[u]nder any definition, this was a [ ] reservation." *Id.* at 2461.

Applying *McGirt* to the case at bar leads to the same conclusion. Under any definition, the treaties discussed above created a reservation for the Chickasaw Nation. Specifically, in the 1830 Treaty of Dancing Rabbit Creek, the Choctaw Nation was granted the land in question "*in fee simple to them and their descendants*, to insure to them while they shall exist as a nation." It secured the rights of self-government and jurisdiction over all persons and property within the Treaty Territory and promised that no state shall interfere with those rights.

These rights applied equally to the Chickasaw Nation under the 1837 Treaty of Doaksville. The Treaty of Doaksville secured to the Chickasaw Nation a "district within the limits of [the Treaty Territory]," and guaranteed them the same privileges, rights of homeland ownership and occupancy that the Choctaw held under the 1830 Treaty.

In the 1855 Treaty of Washington, the Choctaw and Chickasaw governments were made independent of each other. The United States promised that it does "hereby *forever secure and guarantee the lands* embraced within the said limits, to the members of the Choctaw and Chickasaw tribes," and explicitly reserved those lands from sale *"without the consent of both tribes."* It reaffirmed the tribes' rights of self-government, stating "the Choctaws and Chickasaws shall be *secured in the unrestricted right of self-government and full jurisdiction over persons and property within their respective limits*." These treaty rights were once again reaffirmed in the 1866

Treaty of Washington, which was entered when the Chickasaw and Choctaw Nations agreed to cede certain defined lands to the United States for a sum of money. Therefore, like the Creek treaty promises, the United States' treaty promises to the Chickasaw Nation were not made gratuitously.

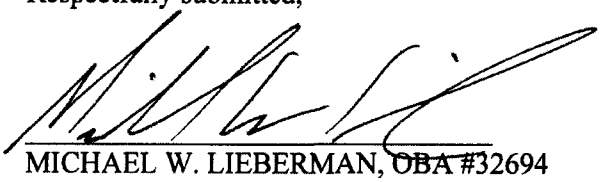
Applying the reasoning from *McGirt*, the plain wording of the treaties demonstrates the Chickasaw lands were set aside for the Chickasaw people and their descendants and assured the right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. Congress established a reservation for the Chickasaw Nation.

Having created a reservation for the Chickasaw Nation, Congress has never diminished or disestablished that reservation. As discussed above, Petitioner and the State disagree over which party has the burden on the question of disestablishment. Regardless of how the Court resolves that dispute, there is nothing in the record before this Court (because nothing exists) that would show the Chickasaw Reservation has been disestablished.

**CONCLUSION**

This Court remanded to the District Court of McClain County for an evidentiary hearing to resolve two questions: (1) whether the victims in this case were "Indian," and (2) whether the crimes occurred in Indian Country. The answers to both of those questions overwhelmingly is "yes." Because the State of Oklahoma does not have jurisdiction over crimes committed by or against Indians in Indian Country, the State lacked jurisdiction to charge Petitioner in this case. The Court should grant Petitioner's application for post-conviction relief, and remand to the District Court with instructions to vacate Petitioner's judgment and sentence in CF-10-213.

Respectfully submitted,



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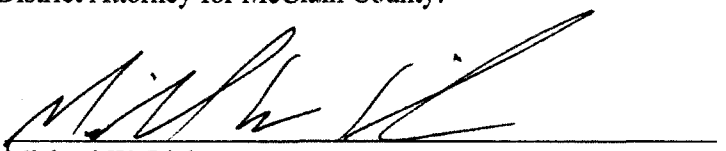
**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of November, 2020 a true and correct copy of the foregoing document was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9 (B), Rules of the Court of Criminal Appeals, and was mailed, first-class postage prepaid, to the Office of the District Attorney for McClain County.



Michael W. Lieberman

ORIGINAL


No. PCD-2019-124

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA



SHAUN MICHAEL BOSSE,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

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

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NOVEMBER 4, 2020

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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

**STATE'S SUPPLEMENTAL BRIEF FOLLOWING REMAND FOR EVIDENTIARY HEARING**

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

## STATEMENT OF THE CASE AND FACTS

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

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

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

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

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

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

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

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

"The term 'Indian' is not statutorily defined, but courts have judicially explicated its meaning." *United State v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). In order to qualify as an "Indian" for purposes of invoking an exception to state jurisdiction, a defendant must prove two facts/prongs: 1) that he has some, or a significant percentage of, Indian blood and 2) tribal or governmental recognition as an Indian. Compare *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116 (requiring a "significant percentage" of Indian blood); with (O.R. 5 n.3 (requiring "some Indian blood" (citing *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001) (en banc), overruled on other grounds by *United States v. Cotton*, 535 U.S. 625, 631 (2002))). The United States Supreme Court has established that a determination of "Indian" blood is a factor in determining Indian status. See *United States v. Rogers*, 45 U.S. 567, 571 (1846).[3] Thus, Indian status requires not just official recognition as Indian, but also Indian blood. *Diaz*, 679 F.3d at 1188.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 U.S.C. § 1152. Although the statute refers to the "exclusive jurisdiction of the United States," it does not confer exclusive jurisdiction on the United States. Rather, it incorporates the body of laws which applies in places where the United States has exclusive jurisdiction into Indian country. See *Ex parte Wilson*, 140 U.S. 575, 578 (1891) (under the General Crimes Act "the jurisdiction of the United States courts was not sole and exclusive over all offenses committed within the limits of an Indian reservation" because "[t]he words 'sole and exclusive,' in [the General Crimes Act] do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it"). As *McGirt* said with respect to reservation status, see *McGirt*, 140 S. Ct. at 2462, when Congress seeks to withdraw state jurisdiction, it knows how to do so. See, e.g., 25 U.S.C. § 1911(a) (providing that tribes "shall have jurisdiction, exclusive as to any State, over any child custody proceeding involving an Indian child" on a reservation). Here, the text of the General Crimes Act does not so exclude state jurisdiction over crimes committed by non-Indians like those perpetrated by the petitioner. See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("unless [it] was the clear and manifest purpose of Congress," courts cannot find preemption of state police powers merely because Congress also provided for federal jurisdiction (citation omitted)).

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

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

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

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

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

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

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

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

*Appeals*, Title 22, Ch. 18, App (2011); and the doctrine of laches (O.R. 43-70).[11] This Court previously rejected these arguments, finding that the petitioner's jurisdictional claim "could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)" (O.R. 4). The State respectfully urges this Court to reconsider that conclusion.

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

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

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

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

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

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

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

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

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

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

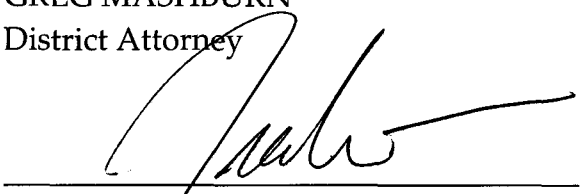
Should this Court reject the State's concurrent jurisdiction and procedural arguments and find the petitioner is entitled to relief based on the district court's findings, the State respectfully requests this Court stay any order reversing the convictions in this case for thirty days to allow the United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

## CONCLUSION

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

Respectfully Submitted,

GREG MASHBURN
District Attorney



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**Certificate of Mailing**

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

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Travis White

No. PCD-2019-124

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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SHAUN MICHAEL BOSSE,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

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# SUPPLEMENTAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT


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JANUARY 7, 2021

## TABLE OF AUTHORITIES

### CASES



### STATUTES



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

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

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

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

Subsequently, this Court remanded Petitioner's case to the district court to determine whether Ms. Griffin and her children were Indians, and whether the crimes occurred on an Indian reservation. 8/12/2020 Order Remanding for Evidentiary Hearing ("Remand Order"). Without specifically addressing the State's arguments, this Court concluded that the claim was properly before the Court: "The issue could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020)." Remand Order at 2.

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

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

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

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

*Id.* at 4 (alterations adopted).

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

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

Respectfully submitted,

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

**CERTIFICATE OF MAILING**

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

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

JENNIFER L. CRABB

FILED
United States Court of Appeals
Tenth Circuit

September 18, 2020

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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| | |
|---|---|
| In re: DAVID BRIAN MORGAN,<br><br>Petitioner. | No. 20-6123<br>(D.C. No. 5:19-CV-00929-R)<br>(W.D. Okla.) |

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**ORDER**

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

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

**BACKGROUND**

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

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

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

**DISCUSSION**

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

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

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

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

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

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

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

## CONCLUSION

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

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA



**SHAUN MICHAEL BOSSE,**

**Petitioner,**

**v.**

**THE STATE OF OKLAHOMA,**

**Respondent.**

**No. PCD-2019-124**

**MOTION TO RECALL THE MANDATE**
**FOR GOOD CAUSE SHOWN BASED ON CERTIORARI PETITION**

COMES NOW, the State of Oklahoma, by and through Attorney General Mike Hunter, and pursuant to Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), files this motion to recall the mandate for good cause shown based on the filing of a certiorari petition by the State. As this Court has denied the State's Motion for Leave to File Petition for Rehearing, the State can confirm it will be filing a Petition for Writ of Certiorari in the United States Supreme Court. Accordingly, the State seeks a recall of the mandate on that ground, and asks that it be stayed until the Supreme Court either denies certiorari or renders a decision on the merits. Pursuant to Rule 3.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), the State has filed a brief in support of this Motion that is being filed simultaneously herewith that more fully explains and supports the State's position.

WHEREFORE, for the reasons contained within the State's brief in support, the State respectfully requests this Court recall the mandate and stay it for the pendency of the State's Certiorari Petition.

Respectfully submitted,

**MIKE HUNTER**
**ATTORNEY GENERAL**

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

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Oklahoma City, OK 73105
(405) 521-3921
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**ATTORNEYS FOR APPELLEE**

**CERTIFICATE OF MAILING**

On this 7th day of April, 2021, a true and correct copy of the foregoing was mailed to:

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

CAROLINE E.J. HUNT

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

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

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

**PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO RECALL THE MANDATE**

Respondent has moved this Court to recall the mandate in the above-titled action, citing its intent to seek certiorari review in the United States Supreme Court. *Brief in Support of Motion to Recall the Mandate* at 1. In so moving, Respondent states "it has identified two compelling issues to raise in its certiorari petition" and that "weighty interests compel" the recall. *Id.* at 2. Respondent goes on to list its reasons for why these supposed issues are compelling and asserts that "the impact of *McGirt* on this State is tremendous, with crime victims largely bearing the costs." *Id.* at 4.

Pursuant Rule 3.15(B) of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), a "mandate shall not be recalled, nor stayed pending an appeal to any other court." The only exception to this is if the majority of the Court believes good cause has been shown. *Id.* Respondent has proffered no cause past its intent to file a petition for writ of certiorari to the United States Supreme Court. *See Respondent's Motion to Recall the Mandate for Good Cause Shown Based on Certiorari Petition.* The filing of a cert petition is commonplace, and as such, hardly qualifies as good cause. Indeed, Rule 3.15(B), itself, contemplates an appeal to other courts will not

be cause enough to recall the mandate, directing that "[t]he mandate shall not be recalled, nor stayed pending an appeal to any other court."

The whole of this Court has already clarified for Respondent that the Court's decision is final.[1] *See Order Denying Motion for Leave to File Petition for Rehearing*. One side will not be fully satisfied with a particular outcome in any case. Hence, proper avenues for appeal are provided. So, while Respondent is permitted to bring its petition for certiorari before the Supreme Court, Respondent is not allowed to usurp this Court's rules as Respondent again seeks to do. *See Motion for Leave to File Petition for Rehearing* and corresponding *Order* denying the same. Nor is Respondent convincing in stating that a standard intent to appeal is "good cause shown" for recalling this Court's mandate. Indeed, all certiorari questions are presented because of the belief they are meritorious.

WHEREFORE, having shown no good cause, Petitioner's respectfully asks that this Court deny Respondent's Motion to Recall the Mandate.

Respectfully submitted,

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[1]Respondent asserts "If nothing else, prosecutors and law enforcement need certainty regarding the state of the law post-*McGirt*." *Brief in Support* at 5. The Supreme Court has already spoken, and this Court has reaffirmed the Supreme Court's stance. Certainty has been provided.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of April, 2021, a true and correct copy of the foregoing document was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9 (B), Rules of the Court of Criminal Appeals and was mailed first-class postage prepaid to the Attorneys for Amicus Curiae Chickasaw Nation.

Emma V. Rolls

ORIGINAL



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

| | | |
|---|---|---|
| SHAUN MICHAEL BOSSE, | ) | NOT FOR PUBLICATION |
| Petitioner, | ) | |
| vs. | ) | No. PCD-2019-124 |
| THE STATE OF OKLAHOMA, | ) | |
| Respondent. | ) | |

**ORDER STAYING ISSUANCE OF MANDATE**

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

**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 15th day of April, 2021.

**DANA KUEHN, Presiding Judge**

Scott Rowland

**SCOTT ROWLAND, Vice Presiding Judge**

**GARY L. LUMPKIN, Judge**

**DAVID B. LEWIS, Judge**

Robert L. Hudson CIP/DIP writing attached.

**ROBERT L. HUDSON, Judge**

ATTEST:

John D. Hadden

Clerk

**HUDSON, J., : CONCURRING IN PART/DISSENTING IN PART**

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

2021 WL 3578089
Court of Criminal Appeals of Oklahoma.

STATE EX REL. Mark MATLOFF,
District Attorney, Petitioner
v.
The Honorable Jana WALLACE,
Associate District Judge, Respondent.

Case No. PR-2021-366
|
FILED AUGUST 12, 2021

**Synopsis**

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

**Holdings:** The Court of Criminal Appeals, Lewis, J., held that:

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

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

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

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

Petition granted; order granting postconviction relief reversed.

Hudson, J., filed a specially concurring opinion.

Lumpkin, J., filed a specially concurring opinion.

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

West Headnotes (7)

**[1] Criminal Law**

New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law.

**[2] Criminal Law**

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

**[3] Criminal Law**

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

**[4] Criminal Law**

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

**[5] Criminal Law**

  

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

**[6] Criminal Law**

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

**[7] Criminal Law**

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

## OPINION

LEWIS, JUDGE:

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

## FACTS

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

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

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

¶5 Judge Wallace initially stayed enforcement of the order. The State then filed in this Court a verified request for a stay and petitioned for a writ of prohibition against enforcement of the order granting post-conviction relief. In *State ex rel. Matloff v. Wallace*, 2021 OK CR 15, —— P.3d ——, this Court stayed all proceedings and directed counsel for the interested parties to submit briefs on the following question:

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

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

## ANALYSIS

¶7 In state post-conviction proceedings, this Court has previously applied its own non-retroactivity doctrine—often drawing on, but independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus—to bar the application of new procedural rules to convictions that were final when the rule was announced. *See Ferrell v. State*, 1995 OK CR 54, ¶¶ 5-9, 902 P.2d 1113, 1114-15 (citing *Teague, supra*) (finding new rule governing admissibility of recorded interview was not retroactive on collateral review); *Baxter v. State*, 2010 OK CR 20, ¶ 11, 238 P.3d 934, 937 (noting our adoption of *Teague* non-retroactivity analysis for new rules in state post-conviction review); and *Burleson v. Saffle*, 278 F.3d 1136, 1141 n.5 (10th Cir. 2002) (noting incorporation "into state law the Supreme Court's *Teague* approach to analyzing whether a new rule of law should have retroactive effect," citing *Ferrell, supra*).

**[1]** **[2]** ¶8 New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law. *See Carter v. State*, 2006 OK CR 42, ¶ 4, 147 P.3d 243, 244 (citing *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)) (applying new instructional rule of *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 to case tried before the rule was announced, but pending on direct review). But new rules generally do *not* apply retroactively to convictions that are final, with a few narrow exceptions. *Ferrell,* 1995 OK CR 54, ¶ 7, 902 P.2d at 1114-15; *Thomas v. State*, 1994 OK CR 85, ¶ 13, 888 P. 2d 522, 527 (decision requiring that prosecution file bill of particulars no later than arraignment did not apply to convictions already final).

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

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

***3** ¶11 Like the Supreme Court, we have long adhered to the principle that the narrow purposes of collateral review, and the reliance, finality, and public safety interests in factually accurate convictions and just punishments, weigh strongly against the application of new procedural rules to convictions already final when the rule is announced. Applying new procedural rules to final convictions, after a trial or guilty plea and appellate review according to then-existing

procedures, invites burdensome litigation and potential reversals unrelated to accurate verdicts, undermining the deterrent effect of the criminal law. *Ferrell*, 1995 OK CR 54, ¶¶ 6-7, 902 P.2d at 1114-15.

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

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

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

**[3]** ¶15 After careful examination of the reasoning in *Cuch*, as well as the arguments of counsel and *amici curiae*, we reaffirm our recognition of the Cherokee, Choctaw, and Chickasaw Reservations [4] in those earlier cases. However, exercising our independent state law authority to interpret the remedial scope of the state post-conviction statutes, we now hold that *McGirt* and our post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided. Any statements, holdings, or suggestions to the contrary in our previous cases are hereby overruled.

***4** ¶16 In *United States v. Cuch, supra*, the Tenth Circuit Court of Appeals held that the Supreme Court's Indian Country jurisdictional ruling in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) was not retroactive to convictions already final when *Hagen* was announced. In *Hagen*, the Supreme Court held that certain lands recognized as Indian Country by *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir.1985) (en banc) were not part of the Uintah Reservation; and that Utah, rather than the federal government, had subject matter jurisdiction over crimes committed in the area. *Cuch*, 79 F.3d at 988.

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

¶18 The Court of Appeals noted that the Supreme Court had applied non-retroactivity principles to new rules that alter subject matter jurisdiction. *Id.* at 990 (citing *Gosa v. Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973)) (refusing to apply new jurisdictional limitation on military courts-martial retroactively to void final convictions). The policy of non-retroactivity was grounded in principles of finality of judgments and fundamental fairness: *Hagen* had been decided after the petitioners' convictions were final; it was not dictated by precedent; and the accuracy of the underlying convictions weighed against the disruption and costs of retroactivity. *Id.* at 991-92.

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

> the prospect that the invalidation of a final conviction could well mean that the guilty will go unpunished due to the impracticability of charging and retrying the defendant after a long interval of time. Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Furthermore, retroactive application would surely visit substantial injustice and hardship upon those litigants who relied upon jurisdiction in the federal courts, particularly victims and witnesses who have relied on the judgments and the finality flowing therefrom. Retroactivity would also be unfair to law enforcement officials and prosecutors, not to mention the members of the public they represent, who relied in good faith on binding federal pronouncements to govern their prosecutorial decisions. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered.

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

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

***5** ¶21 The Court of Appeals reasoned that a jurisdictional ruling like *Hagen* raised no fundamental questions about the basic truth-finding functions of the courts that tried and sentenced the defendants. *Id.* The legal processes resulting in those convictions had "produced an accurate picture of the conduct underlying the movants' criminal charges and provided adequate procedural safeguards for the accused." *Id.*

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

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

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

¶25 Finding neither of the exceptional circumstances that might warrant retroactive application of *Hagen's* jurisdictional ruling to final convictions, the Court of Appeals found "the circumstances surrounding these cases make prospective application of *Hagen* unquestionably appropriate in the present context." *Id.* Prior federal jurisdiction was well-established before *Hagen*; the convictions were factually accurate; the procedural safeguards and truth-

finding functions of the courts were not impaired; and retroactive application would compromise both reliance and public safety interests that legitimately attached to prior proceedings.

**[4]** ¶26 We find *Cuch*'s analysis and authorities persuasive as we consider the independent state law question of collateral non-retroactivity for *McGirt*. First, we conclude that *McGirt* announced a rule of criminal *procedure*, using prior case law, treaties, Acts of Congress, and the Major Crimes Act to recognize a long dormant (or many thought, non-existent) federal jurisdiction over major crimes committed by or against Indians in the Muscogee (Creek) Reservation. And like *Hagen* before it, "the [*McGirt*] decision effectively overruled the contrary conclusion reached in [the *Murphy*] case,[5] redefined the [Muscogee (Creek)] Reservation boundaries ... and conclusively settled the question." *Cuch,* 79 F.3d at 989.

***6** ¶27 *McGirt* did not "alter[ ] the range of conduct or the class of persons that the law punishes" for committing crimes. *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). *McGirt* did not determine whether specific conduct is criminal, or whether a punishment for a class of persons is forbidden by their status. *McGirt's* recognition of an existing Muscogee (Creek) Reservation effectively decided *which sovereign* must prosecute major crimes committed by or against Indians within its boundaries, crimes which previously had been prosecuted in Oklahoma courts for more than a century. But this significant change to the extent of state and federal criminal jurisdiction affected "only the *manner of determining* the defendant's culpability." *Schriro,* 542 U.S. at 353, 124 S.Ct. 2519 (emphasis in original). For purposes of our state law retroactivity analysis, *McGirt's* holding therefore imposed only *procedural* changes, and is clearly a procedural ruling.

**[5]** **[6]** ¶28 Second, the procedural rule announced in *McGirt* was new.[6] For purposes of retroactivity analysis, a case announces a new rule when it breaks new ground, imposes a new obligation on the state or federal government, or in other words, the result was not dictated by precedent when the defendant's conviction became final. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1114 (finding rule of inadmissibility of certain evidence broke new ground and was not dictated by precedent when defendant's conviction became final).

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

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

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

***7** ¶32 With no disrespect to the views that later commanded a Supreme Court majority in *McGirt*, the dissenting opinion of Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Thomas, whom we take to be "reasonable jurists" in the required sense, certainly did *not* view the holding in *McGirt* as dictated by precedent even in 2020, much less in 2014.[8] Chief Justice Roberts's dissent raised a host of reasonable doubts about the majority's adherence to precedent,[9] arguing at length that it had divined the existence of a reservation only by departing from the governing standards for proof of Congress's intent to disestablish one, *McGirt,* 140 S.Ct. at 2489; and in many other ways besides,[10] "disregarding the 'well settled' approach required by our precedents." *Id.* at 2482 (Roberts, C.J., dissenting). The *McGirt* majority, of course, remains just that, but the Chief Justice's reasoned,

precedent-based objections are additional proof that *McGirt's* holding was not "apparent to all reasonable jurists" when Mr. Parish's conviction became final in 2014.

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

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

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

¶36 Those questions are now properly before us and urgently demand our attention. Because *McGirt's* new jurisdictional holding was a clear break with the past, we have applied *McGirt* to reverse several convictions for major crimes pending on direct review, and not yet final, when *McGirt* was announced. The balance of competing interests is very different in a final conviction, and the reasons for non-retroactivity of a new *jurisdictional* rule apply with particular force. Non-retroactivity of *McGirt* in state post-conviction proceedings can mitigate some of the negative consequences so aptly described in *Cuch*, striking a proper balance between the public safety, finality, and reliance interests in settled convictions against the competing interests of those tried and sentenced under the prior jurisdictional rule.

***8** ¶37 The State's reliance and public safety interests in the results of a guilty plea or trial on the merits, and appellate review according to then-existing rules, are always substantial. Though Oklahoma's jurisdiction over major crimes in the newly recognized reservations was limited in *McGirt* and our post-*McGirt* reservation rulings, the State's jurisdiction was hardly open to doubt for over a century and often went wholly unchallenged, as it did at Mr. Parish's trial in 2012.

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

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

**[7]** ¶40 Because we hold that *McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction, the order vacating Mr. Parish's murder conviction was unauthorized by state law. The State ordinarily may file a regular appeal from an adverse post-

conviction order, but here, it promptly petitioned this Court for extraordinary relief and obtained a stay of proceedings. The time for filing a regular post-conviction appeal (twenty days from the challenged order) has since expired. Rule 5.2(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

¶41 The petitioner for a writ of prohibition must establish that a judicial officer has, or is about to, exercise unauthorized judicial power, causing injury for which there is no adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). There being no adequate remedy by appeal, the injury caused by the unauthorized dismissal of this final conviction justifies the exercise of extraordinary jurisdiction. The writ of prohibition is **GRANTED**. The order granting post-conviction relief is **REVERSED**.

ROWLAND, P.J.: CONCURS

HUDSON, V.P.J.: SPECIALLY CONCURS

LUMPKIN, J.: SPECIALLY CONCURS

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCUR:

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

***9** ¶2 Based on this understanding of our holding, I fully concur in today's decision. While this decision resolves one aspect of the post-*McGirt* jurisdictional puzzle, many challenges remain for which there are no easy answers. So far, Congress has missed the opportunity to implement a practical solution which, at this point, seems unlikely. It is now up to the leaders of the State of Oklahoma, the Tribes and the federal government to address the jurisdictional fallout from the *McGirt* decision. Only in this way, with all of these parties working together, can public safety be ensured across jurisdictional boundaries in the historic reservation lands of eastern Oklahoma. It will require this type of cooperation in the post-*McGirt* world to ensure that stability is restored to Oklahoma's criminal justice system.

LUMPKIN, JUDGE, SPECIALLY CONCURRING:

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

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

¶3 Keeping the policy decisions reflected in those opinions in mind, I do diverge from the court in labeling the *McGirt* ruling as procedural. When the federal government pre-empts a field of law, the legal effect is to deprive states of their jurisdiction

in that area of the law. If a court lacks jurisdiction to act then any rulings and judgments would appear to be void when rendered. [1] As the opinion notes, this Court since statehood has recognized and honored federal jurisdiction as to Indian allotments and dependent Indian communities. Those areas are subject to federal jurisdiction and that jurisdiction is recognized by the federal government, the tribes and the State of Oklahoma. There was no question Oklahoma had jurisdiction over the rest of the state and this Court, as the court with exclusive jurisdiction in criminal cases, faithfully honored those jurisdictional claims.

***10** ¶4 Regardless, a 5-4 majority of the Supreme Court disregarded the precedent set out by Chief Justice Roberts in his dissent to *McGirt*, and for the first time in legal history determined the existence of a reservation in Oklahoma based on "magic words" rather than historical context. [2] In doing so, the majority in *McGirt* declared this reservation has always been in existence, even after Oklahoma became a state. This operative wording in the opinion creates a legal conundrum in that *McGirt* states that legally Oklahoma never had jurisdiction on this newly identified Indian reservation. This holding creates a question as to every criminal judgment entered by a state court regarding its validity. If all courts involved in this issue held themselves to the legal effect of this holding then those judgments would be void.

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

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

**All Citations**

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

## Footnotes

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

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

3 *Bosse*, *supra*; *Cole v. State*, 2021 OK CR 10, —— P.3d ——, 2021 WL 1727054; *Ryder v. State*, 2021 OK CR 11, 489 P.3d 528, *Bench v. State*, 2021 OK CR 12, —— P.3d ——, 2021 WL 1836466. We later stayed the mandate in these capital post-conviction cases pending the State's petition for certiorari to the Supreme

Court. We have also granted *McGirt*-based relief and vacated many convictions in appeals pending on direct review. *E.g., Hogner v. State*, 2021 OK CR 4, —— P.3d ——, 2021 WL 958412; *Spears v. State*, 2021 OK CR 7, 485 P.3d 873; *Sizemore v. State*, *supra*.

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

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

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

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

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

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

8 The mere existence of a dissent does not establish that a rule is new, but a 5-4 split among Justices on whether precedent dictated a holding is strong evidence of a novel departure from precedent. *Beard*, 542 U.S. at 414-15, 124 S.Ct. 2504 (finding that the four dissents in *Mills v. Maryland* [486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)] strongly indicated that the rule announced was not dictated by *Lockett v. Ohio* [438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)]).

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

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

1 I realize courts in the past have engaged in legal gymnastics to keep from voiding judgments rendered by a court without jurisdiction by finding that a court's judgment must be void on its face before it can be held void. *Springer v. Townsend*, 336 F.2d 397, 401 (10th Cir. 1964) (in deciding whether a probate decree was void, the Court stated "our scope of review is limited to determining whether a lack of jurisdiction in the approval proceeding affirmatively appears from the record."; "[a] judgment will not be held to be void on its face unless an inspection will affirmatively disclose that the court had no jurisdiction of the person, no jurisdiction of the subject matter, or had no judicial power to render the particular judgment." *Clay v. Sun River Mining Co.*, 302 F.2d 599, 601 (10th Cir. 1962); "[a]s long as the supporting record does not reflect the district court's lack of authority, the district court order cannot be declared "void." Such an order is instead only "voidable." *Bumpus v. State*, 1996 OK CR 52, ¶ 7, 925 P.2d 1208, 1210; "[t]his Court has held in numerous cases that in order for a judgment to be void as provided in the Statute just quoted, it must be void on the face of the record, and that extrinsic evidence is not admissible to show judgment is void on the face of the record." *Scoufos v. Fuller*, 1954 OK 363, 280 P.2d 720, 723. However, logic and common sense dictate that if a court

had no authority to act then any actions would be a nullity. Regardless, I apply the precedent cited in the opinion and specially concur.

2 In *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), the Court enunciated several factors which must be considered in determining whether a reservation has been disestablished. Those factors are: the explicit language of Congress evincing intent to change boundaries; events surrounding the passage of surplus land acts which "reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation ..."; Congress's subsequent treatment of the subject areas; identity of who moved onto the affected land; and the subsequent demographic history of those lands. *Id*. at 470-72, 104 S.Ct. 1161.

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

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IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
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JOHN D. HADDEN
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| **STATE ex rel. MARK MATLOFF, DISTRICT ATTORNEY,**<br><br>***Petitioner,***<br><br>***-vs-***<br><br>**THE HONORABLE JANA WALLACE, DISTRICT JUDGE,**<br><br>***Respondent.*** | **Case No. PR-2021-366** |

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

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June 24, 2021

Subject To Acceptance Or Rejection By the Court
Of Criminal Appeals Of the State Of Oklahoma.
This Instrument is Accepted As Tendered For
Filing This 24th Day Of June 2021
COURT CLERK
COURT OF CRIMINAL APPEALS
BY Cynde Hannebaum
DEPUTY CLERK

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**OF THE STATE OF OKLAHOMA**

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| **STATE ex rel. MARK MATLOFF, DISTRICT ATTORNEY,** | ) | |
| **Petitioner,** | ) | |
| **v.** | ) | **Case No. PR-2021-366** |
| **THE HONORABLE JANA WALLACE, DISTRICT JUDGE,** | ) | |
| **Respondent.** | ) | |

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

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

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

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

that was final when *McGirt* was announced.[1]

## ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

*Id.* at 930 n.36.

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

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

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

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

*United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996) also shows *McGirt* did not announce a new constitutional rule of criminal procedure. *Cuch* addressed the retroactive applicability of *Hagen v. Utah*, 510 U.S. 399 (1994), which held the state of Utah had jurisdiction to prosecute Mr. Hagen because Congress had diminished the Uintah Reservation in the early 1900s. *Cuch*, 79 F.3d at 989. In reaching its decision in *Hagen*, the Supreme Court "effectively overruled the contrary conclusion reached in its [*Utah v.*] *Ute Indian Tribe* [, 479 U.S. 994 (1986] case." Reasoning the *Hagen* decision "was not dictated by precedent existing at [that] time," *Cuch* concluded *Hagen*'s "holding should not provide the basis for a collateral attack." *Cuch*, 79 F.3d at 991.[3] Unlike *Hagen*, *McGirt* did not "effectively overrule" any existing precedent of the Supreme Court to conclude the Creek Reservation had not been disestablished. Instead, *McGirt* faithfully applied existing precedent while simultaneously clarifying the *Solem* analysis. *McGirt*, 140 S. Ct. at 2464-65, 2468-69.[4]

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

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

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

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

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

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

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

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[5]The cases discussed below involve application of Okla. Stat. tit. 22, § 1089, the capital post-conviction statute. Specifically, § 1089(D)(8) permits subsequent applications for post-conviction relief when the legal basis for the claim was unavailable. Under § 1089(D)(9)(a)-(b), a legal basis for a claim is unavailable if the legal basis:

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

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

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

Following district court remand proceedings in Mr. Bosse's case, the State doubled down on its argument that, as *McGirt* did not present a new ground for relief, the claim should be procedurally barred as untimely. *See* State's Supplemental Br. Following Remand For Evidentiary Hr'g at 17-19, *Bosse v. State* (Nov. 4, 2020) (hereinafter "*Bosse* Post-Hearing Brief"). The State listed a number of decisions on the reservation disestablishment issue from the Supreme Court and this Court to demonstrate "[j]urisdictional claims such as the petitioner's were available long prior to *McGirt*." *Bosse* Post-Hearing Brief at 17-18.[6]

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

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

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

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[7]While this Court rejected the State's argument that waiver should apply to Mr. Bosse's *McGirt* claim because he could not satisfy the § 1089(D)(9)(b) exception, it simultaneously emphasized why Mr. Bosse satisfied the § 1089(D)(9)(a) exception: "[A]lthough similar claims may have been raised in the past in other cases, the primacy of State jurisdiction was considered settled and those claims had not been expected to prevail. The legal basis for this claim was unavailable under Section 1089(D)." *Bosse*, 2021 OK CR 3, ¶20 n.8, 484 P.3d at 293 n.8.

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

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

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

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

*Id.* at 8-9.

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

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

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

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

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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

The Honorable Jana Wallace
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EMMA V. ROLLS

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

| | |
|---|---|
| SHAUN MICHAEL BOSSE,<br>*Petitioner*,<br>*-vs-*<br>THE STATE OF OKLAHOMA,<br>*Respondent.* | Case No. PCD-2019-124 |

## MOTION TO STAY PROCEEDINGS

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

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

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

Emma V. Rolls

## DECLARATION OF DEBRA K. HAMPTON

**STATE OF OKLAHOMA** )
) **ss.**
**COUNTY OF OKLAHOMA** )

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

1. I am an attorney licensed to practice in Oklahoma and am in good standing with the Oklahoma Bar Association.

2. I represented Clifton Parish in Oklahoma Court of Criminal Appeals (OCCA) Case No. PR-2021-366, *State ex rel. Mark Matloff, District Attorney v. The Honorable Jana Wallace, Associate District Judge*. The OCCA issued an opinion in this case on August 12, 2021, granting the State's Petition for a Writ of Prohibition, thereby overruling Mr. Parish's previous Order Granting Post-Conviction Relief. *Matloff v. Wallace*, 2021 OK CR 21, _ P.3d _. Mr. Parish is a registered member of the Choctaw Nation whose crime occurred within the boundaries of the Choctaw Reservation, relief on *McGirt v. Oklahoma* issue. In its opinion, the OCCA overruled its recent decision in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, and decades of precedent stating that subject matter jurisdiction cannot be waived.

3. I intend to appeal the OCCA's decision in *Matloff v. Wallace* to the United States Supreme Court in a Petition for Writ of Certiorari. I have engaged the services of Michael R. Dreeben and Kendall Turner from the O'Melvey & Myers law firm in Washington D.C. who are experienced Supreme Court practitioners, to represent Mr. Parish.

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

Debra K Hampton

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**IN THE OKLAHOMA COURT OF CRIMINAL APPEALS**

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

# BRIEF OF PETITIONER IN SUPPORT OF MOTION TO STAY PROCEEDINGS

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September 2, 2021

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IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

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| ***Petitioner,*** | |
| ***-vs-*** | Case No. PCD-2019-124 |
| **THE STATE OF OKLAHOMA,** | |
| ***Respondent.*** | |

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

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

**I. Procedural History.**

On February 20, 2019, Mr. Bosse filed a Successive Application for Post-Conviction Relief

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

(APCR). Proposition I of that APCR challenged the State's jurisdiction to prosecute him. More specifically, Mr. Bosse asserted exclusive jurisdiction rests with the federal courts because the victims were citizens of the Chickasaw Nation and the crimes occurred within the boundaries of the Chickasaw Nation Reservation. Because the authority on which Mr. Bosse's claim rested had not yet become final, this Court *sua sponte* held the matter in abeyance pending final decision of the Supreme Court in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (July 9, 2020) (mem). On the same day, the Supreme Court also decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). In both cases the Supreme Court reversed rulings of this Court, concluding Congress never disestablished the Creek Reservation. The crimes in *Murphy* and *McGirt* occurred in Indian Country, thus depriving the Oklahoma courts of jurisdiction.

This Court remanded this case to the District Court for McClain County for an evidentiary hearing. After the hearing, the district court concluded Mr. Bosse had established 1) the victims had some Indian blood; 2) the victims were recognized as Indian by a tribe or by the federal government; 3) Congress established a reservation for the Chickasaw Nation; and 4) Congress never disestablished the Chickasaw Nation. *See Bosse v. State*, McClain Co. Case No. CF-2010-213, Findings of Fact and Conclusions of Law (McClain Co. Dist. Ct. Oct. 13, 2020).

After extensive briefing by both parties,[2] on March 11, 2021, this Court held "Petitioner's

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[2]In this case, the State *never* argued *McGirt* announced a new rule that could not be retroactively applied in this case. In fact, the State vigorously and repeatedly argued *McGirt* did *not* announce a new rule. *See* Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in *McGirt* at 25-27 (Aug. 4, 2020); State's Supplemental Brief Following Remand for Evidentiary Hearing at 17-19 (Nov. 4, 2020); State's Motion to File Supplemental Brief at 1 (Jan. 7, 2021). Under this Court's rules and precedent, the State has waived and/or forfeited any argument *McGirt* announced a new rule that cannot be applied retroactively. *See, e.g.,* Rule 3.5(C)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019) ("Failure to present (continued...)

victims were Indian, and this crime was committed in Indian Country. The federal government, not the State of Oklahoma, has jurisdiction to prosecute Petitioner." *Bosse v. State*, 2021 OK CR 3, ¶ 29, 484 P.3d 286, 295. This Court reversed and remanded the case to the District Court of McClain County with instructions to dismiss. *Id.* at ¶ 30.

On April 7, 2021, Clerk of the Court, John D. Hadden, issued the mandate of this Court's March 11, 2021 Opinion Granting Post-Conviction Relief. On the same day the mandate issued, the State filed a Motion to Recall the Mandate based on its intention to seek certiorari review of the Opinion Granting Post-Conviction Relief. After two rounds of briefing and oral argument, on April 15, 2021, this Court issued an Order Staying the Mandate. Over four months later on August 31, 2021, and without any intervening filings by either party in this action, this Court entered an Order Vacating Previous Order and Judgment Granting Post-Conviction Relief and Withdrawing Opinion From Publication. This Court premised its decision to vacate the previous order and judgment on *Matloff*.[3]

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[2](...continued)
relevant authority in compliance with [the Court's] requirements will result in the issue being forfeited on appeal"); *Gilbert v. State*, 1998 OK CR 17, 955 P.2d 727, 732 & n.3.

[3]In *Matloff*, this Court held *McGirt* "announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction." *Matloff*, at ¶ 6. This Court further stated, "We acted in [*Bosse* and other] post-conviction cases without our attention ever having been drawn to the potential non-retroactivity of *McGirt* in light of the . . . opinion in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996)." *Matloff*, at ¶ 14. Relevant to the waiver argument raised in footnote 2, *supra*, the State failed to draw the Court's attention to *Cuch*, which was issued almost 25 years ago. This failure is curious in light of the State's argument in this case that "[j]urisdictional claims such as the petitioner's were available long prior to *McGirt*." *See* State's Supplemental Brief Following Remand at 17-19 (Nov. 4, 2020). One of the citations the State included to support this statement was *Hagen v. Utah*, 510 U.S. 399 (1994), the decision the Tenth Circuit held non-retroactive in *Cuch*. 79 F.3d at 991.

## II. A Stay of the Proceedings Is Warranted.

Mr. Bosse recognizes this Court's decision in *Matloff*.[4] However, as Ms. Hampton's declaration proves, *see* Exhibit A, the precise issue that premised this Court's Order Vacating Previous Order and Judgment in Mr. Bosse's case will be litigated before the Supreme Court. As the history of this case demonstrates, requests for stays pending Supreme Court litigation of potentially dispositive[5] issues are appropriate requests worthy of being granted. This Court's practice in other cases also supports Mr. Bosse's request for a stay of these proceedings. *See, e.g., Ryder v. State*, PCD-2020-613, Order Staying Issuance of Mandate Indefinitely (Okla. Crim. App. May 28, 2021); *Bench v. State*, PCD-2015-698, Order Staying Issuance of Mandate Indefinitely (Okla. Crim. App.

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

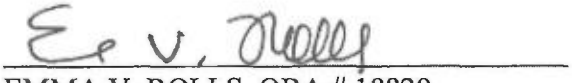
[5]To be clear, Mr. Bosse is *not* conceding that *Matloff* is dispositve in his case. As demonstrated above, the State has waived any argument that *McGirt* is a new rule of criminal procedure. Further, this Court has emphasized, "In the interests of efficiency and finality, our judicial system employs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

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

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

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

Respectfully submitted,



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## CERTIFICATE OF SERVICE

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

Emma V. Rolls

## DECLARATION OF DEBRA K. HAMPTON

**STATE OF OKLAHOMA** )
) **ss.**
**COUNTY OF OKLAHOMA** )

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

1. I am an attorney licensed to practice in Oklahoma and am in good standing with the Oklahoma Bar Association.

2. I represented Clifton Parish in Oklahoma Court of Criminal Appeals (OCCA) Case No. PR-2021-366, *State ex rel. Mark Matloff, District Attorney v. The Honorable Jana Wallace, Associate District Judge*. The OCCA issued an opinion in this case on August 12, 2021, granting the State's Petition for a Writ of Prohibition, thereby overruling Mr. Parish's previous Order Granting Post-Conviction Relief. *Matloff v. Wallace*, 2021 OK CR 21, _ P.3d _. Mr. Parish is a registered member of the Choctaw Nation whose crime occurred within the boundaries of the Choctaw Reservation, relief on *McGirt v. Oklahoma* issue. In its opinion, the OCCA overruled its recent decision in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, and decades of precedent stating that subject matter jurisdiction cannot be waived.

3. I intend to appeal the OCCA's decision in *Matloff v. Wallace* to the United States Supreme Court in a Petition for Writ of Certiorari. I have engaged the services of Michael R. Dreeben and Kendall Turner from the O'Melvey & Myers law firm in Washington D.C. who are experienced Supreme Court practitioners, to represent Mr. Parish.

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

Debra K Hampton

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