Capital Case

Case No. ________________________________

In the
Supreme Court of the United States

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

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
VOL. I of II
Appendices A through I
(Pet. App. 1 through Pet. App. 155)

THOMAS D. HIRD, OBA # 13580*
EMMA V. ROLLS, OBA #18820
KATRINA CONRAD-LEGLER, OBA # 16953
Assistant Federal Public Defenders
Office of the Federal Public Defender
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
405-609-5975 (phone)
405-609-5976 (fax)
Tom_Hird@fd.org
Emma_Rolls@fd.org
Katrina_Legler@fd.org

ATTORNEYS FOR PETITIONER,
BENJAMIN ROBERT COLE, SR.
* Counsel of Record

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

VOL. I of II
(Appendices A - I)

APPENDIX A . . . . Pet. App. 1 - 2
Opinion Denying Post-Conviction Relief and Denying Motion to Stay Proceedings, Oklahoma Court of Criminal Appeals (OCCA) Opinion, *Cole v. State*, 2021 WL 4704035

APPENDIX B . . . . Pet. App. 3
Order Vacating Previous Order and Judgment Granting Post-Conviction Relief and Withdrawing Opinion From Publication, *Cole v. State*, 495 P.3d 670 (Okla. Crim. App. 2021)

APPENDIX C . . . . Pet. App. 4 - 27
Withdrawn Opinion Granting Relief, formerly available at *Cole v. State*, 492 P.3d 11 (Okla. Crim. App. 2021)(withdrawn), Opinion Granting Post-Conviction Relief (Okla. Crim. App. April 29, 2021)

APPENDIX D . . . . Pet. App. 28 - 32
Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance, *Cole v. State*, No. PCD-2020-332 (Okla. Crim. App. May 29, 2020)

APPENDIX E . . . . Pet. App. 33 - 71
Successive Application for Post-Conviction Relief, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Aug. 12, 2020)

APPENDIX F . . . . Pet. App. 72 - 76
Order Remanding for Evidentiary Hearing, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. Aug. 24, 2020)

APPENDIX G . . . . Pet. App. 77 - 119
Petitioner's Remanded Hearing Brief Applying *McGirt* Analysis to Cherokee Nation Reservation, *State v. Cole*, No. CF-2002-597 (Rogers Cnty. Dist. Ct. Sept. 21, 2020)

APPENDIX H . . . . Pet. App. 120 - 126
Order on Remand, *State v. Cole*, No. CF-2002-597 (Rogers Cnty. Dist. Ct. Nov. 12, 2020)

APPENDIX I . . . . Pet. App. 127 - 155
Petitioner's Post-Hearing Supplemental Brief in Support of Successive Application for Post-Conviction Relief, No. PCD-2020-529 (Okla. Crim. App. Dec. 7, 2020)

2021 WL 4704035
Court of Criminal Appeals of Oklahoma.

Benjamin Robert COLE, Sr., Petitioner,
v.
The STATE of Oklahoma, Respondent.

No. PCD-2020-529
|
FILED OCTOBER 7, 2021
|
As Corrected October 8, 2021

Attorneys and Law Firms

APPEARANCES AT EVIDENTIARY HEARING

MICHAEL W. LIEBERMAN, THOMAS D. HIRD, ASST. FEDERAL PUBLIC DEFENDERS, 215 DEAN A. MCGEE AVE., #707, OKLAHOMA CITY, OK 73102, COUNSEL FOR PETITIONER

MATTHEW J. BALLARD, DISTRICT ATTORNEY, 210 W. DELAWARE, STE. 202, VINITA, OK 74301, COUNSEL FOR RESPONDENT

MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, RANDALL YOUNG, JULIE PITTMAN, ASST. ATTORNEYS GENERAL, 313 N.E. 21 ST ST., OKLAHOMA CITY, OK 73015, COUNSEL FOR RESPONDENT

SARA HILL, CHRISSI NIMMO, CHEROKEE NATION, OFFICE OF THE ATTORNEY GENERAL, P.O. BOX 1533, TAHLEQUAH, OK 74465, COUNSEL FOR THE CHEROKEE NATION

APPEARANCES ON APPEAL

MICHAEL W. LIEBERMAN, THOMAS D. HIRD, ASST. FEDERAL PUBLIC, DEFENDERS, 215 DEAN A. MCGEE AVE., #707, OKLAHOMA CITY, OK 73102, COUNSEL FOR PETITIONER

MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, RANDALL YOUNG, ASST. ATTORNEY GENERAL, 313 N.E. 21 ST ST., OKLAHOMA CITY, OK 73105, COUNSEL FOR RESPONDENT

OPINION DENYING POST-CONVICTION RELIEF AND DENYING MOTION TO STAY PROCEEDINGS

LUMPKIN, JUDGE:

***1** ¶1 Benjamin Robert Cole, Sr. was tried by jury and convicted of First Degree Murder in the District Court of Rogers County, Case No. CF-2002-597. In accordance with the jury's recommendation the Honorable J. Dwayne Steidley sentenced Petitioner to death. Petitioner appealed his conviction and sentence in Case No. D-2004-1260, and this Court denied relief. *Cole v. State*, 2007 OK CR 27, 164 P.3d 1089. Petitioner previously sought post-conviction relief and was denied the same by this Court. *See Cole v. State*, Case No. PCD-2005-23 (Okl.Cr. Jan. 24, 2008)(unpublished) and *Cole v. State*, Case No. PCD-2020-332 (Okl.Cr. May 29, 2020)(unpublished). For the third time, Petitioner seeks post-conviction relief from this conviction and sentence.

¶2 The Capital Post-Conviction Procedure Act, 22 O.S.2011, § 1089(D)(8) provides for the filing of successive post-conviction applications. The statutes governing our review of second or successive capital post-conviction applications provide even fewer grounds to collaterally attack a judgment and sentence than the narrow grounds permitted in an original post-conviction proceeding. *Sanchez v. State*, 2017 OK CR 22, ¶ 6, 406 P.3d 27, 29.

¶3 In his sole proposition, Petitioner claims the District Court of Rogers County lacked jurisdiction to try him. Petitioner argues that his daughter, B.C., had some quantum of Cherokee blood and her murder occurred within the boundaries of the Cherokee Nation. He relies upon *McGirt v. Oklahoma*, 591 U.S. ––––, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), in support of his claim.

¶4 Although this Court initially granted Petitioner relief based upon this proposition after an evidentiary hearing in district court, [1] we subsequently decided *State ex rel. Mark Matloff, District Attorney v. The Honorable Jana Wallace, Associate District Judge*, 2021 OK CR 21, ––– P.3d ––––, and denied retroactive application of *McGirt* to cases on collateral review. Thereafter, prior to issuance of the mandate, the order granting post-conviction relief was withdrawn in this case. [2]

WESTLAW © 2021 Thomson Reuters. No claim to original U.S. Government Works.

¶5 In *Matloff*, we began our consideration of the retroactivity issue by finding, "*McGirt* announced a rule of criminal procedure ... 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." *Id.*, at ¶ 26. This rule affected only the method of deciding a criminal defendant's culpability, therefore, it was a procedural ruling. *Id.*, at ¶ 27. We further found that the *McGirt* rule was new because it broke new ground, imposed new obligations on both the state and the federal governments and the result was not required by precedent existing when the conviction at issue in *Matloff* was final. *Id.*, at ¶ 28.

¶6 In reaching our decision on the non-retroactivity of *McGirt*, this Court held that our authority under state law to constrain the collateral impact of *McGirt* and its progeny "is consistent with both the text of the opinion and the Supreme Court's apparent intent ... The Supreme Court itself has not declared that *McGirt* is retroactive to convictions already final when the ruling was announced." *Id.*, at ¶ 33. Ultimately, we held in *Matloff* that "*McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction ..." *Id.*, at ¶ 40.

***2** ¶7 Applying *Matloff* to the instant case, we find Petitioner's claim in this successive post-conviction proceeding warrants no relief.

DECISION

¶8 Petitioner's Application for Post-Conviction Relief and Motion for Stay of Proceedings are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ROWLAND, P.J.: Concur

HUDSON, V.P.J.: Concur

LEWIS, J.: Concur

All Citations

--- P.3d ----, 2021 WL 4704035, 2021 OK CR 28

Footnotes

1 *Cole v. State*, 2021 OK CR 10, 492 P.3d 11.

2 *Cole v. State*, 2021 OK CR 26, —— P.3d ——.

End of Document © 2021 Thomson Reuters. No claim to original U.S. Government Works.

495 P.3d 670 (Mem)
Court of Criminal Appeals of Oklahoma.

Benjamin Robert COLE, Sr., Petitioner,
v.
The STATE of Oklahoma, Respondent.

Case No. PCD-2020-529
|
FILED AUGUST 31, 2021

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

¶1 Based on the Court's decision in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ––– P.3d ––––, the previous order and judgment granting post-conviction relief in this case are hereby **VACATED** and **SET ASIDE.** The issuance of the mandate in this case was previously stayed by this Court on May 28, 2021, and no mandate has issued. The opinion in *Cole v. State*, 2021 OK CR 10 is **WITHDRAWN**. The Court will issue a separate order addressing Petitioner's claims for post-conviction relief at a later time.

¶2 **IT IS SO ORDERED.**

/s/ SCOTT ROWLAND, Presiding Judge

/s/ ROBERT L. HUDSON, Vice Presiding Judge

/s/ GARY L. LUMPKIN, Judge

/s/ DAVID B. LEWIS, Judge

All Citations

495 P.3d 670 (Mem), 2021 OK CR 26

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 29 2021
JOHN D. HADDEN
CLERK

2021 OK CR 10
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE, SR.,	)	**FOR PUBLICATION**
	)	
Petitioner,	)	
vs.	)	No. PCD-2020-529
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION GRANTING POST-CONVICTION RELIEF

LUMPKIN, JUDGE:[1]

¶1 Benjamin Robert Cole, Sr., was tried by jury and convicted of First Degree Murder in the District Court of Rogers County, Case No. CF-2002-597. In accordance with the jury's recommendation the Honorable J. Dwayne Steidley sentenced Petitioner to death. Petitioner appealed his conviction and sentence in Case No. D-2004-1260, but this Court denied relief. *Cole v. State*, 2007 OK CR 27, 164 P.3d 1089.

---

[1] As stated in my separate writing in *Bosse v. State*, 2021 OK CR 3, __P.3d __, (Lumpkin, J., concurring in result), I am bound by my oath and adherence to the Federal-State relationship under the U.S. Constitution to apply the edict of the majority opinion in *McGirt v. Oklahoma*, 591 U.S. __, 140 S. Ct. 2452 (2020). However, I continue to share the position of Chief Justice Roberts' dissent in *McGirt*, that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed.

Petitioner previously sought post-conviction relief and was denied the same by this Court. *See Cole v. State*, Case No. PCD-2005-23 (Okl.Cr. Jan. 24, 2008) (unpublished) and *Cole v. State*, Case No. PCD-2020-332 (Okl.Cr. May 29, 2020) (unpublished). For the third time, Petitioner seeks post-conviction relief from this conviction and sentence, challenging the jurisdiction of Rogers County to try him for his infant daughter's heinous murder.

¶2 In his sole proposition, Petitioner claims the District Court of Rogers County lacked jurisdiction to try him. Appellant argues that his daughter, B.C., had some quantum of Cherokee blood and her murder occurred within the boundaries of the Cherokee Nation.

¶3 Pursuant to *McGirt v. Oklahoma*, 591 U.S. __, 140 S. Ct. 2452 (2020), Appellant's claim raises two separate questions: (a) the victim's Indian status and (b) whether the crime occurred in Indian Country. Because these issues require fact-finding, we remanded this case to the District Court of Rogers County for an evidentiary hearing.

¶4 Recognizing the historical and specialized nature of this remand for evidentiary hearing, we requested 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 victim's legal status as an Indian and as to the location of the crime in Indian Country, the burden would shift to the State to prove it has subject matter jurisdiction. The District Court was ordered to: determine whether the victim has some Indian blood and is recognized as an Indian by a tribe or the federal government and to determine whether the crime occurred in Indian Country. The District Court was directed to follow the analysis set out in *McGirt* to find (1) whether Congress established a reservation for the Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In so doing, the District Court was directed to consider any evidence the parties provided, including but not limited to treaties, statutes, maps, and/or testimony.

¶5 We also directed the District Court that in the event the parties agreed as to what the evidence would show with regard to the questions presented, the parties could enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. The District Court was also ordered to file written findings of facts and conclusions of law with this Court.

¶6 The Honorable Kassie N. McCoy, Associate District Judge, held an evidentiary hearing in this case, and an Order on Remand from that hearing was timely filed with this Court. The record indicates that appearing before the District Court were attorneys from the office of the Attorney General of Oklahoma, the Rogers County District Attorney's Office, the Federal Public Defender's Office for the Western District of Oklahoma, and the office of the Attorney General of the Cherokee Nation.

¶7 In its Order on Remand, regarding whether the crime occurred in Indian country, the Order states that the State of Oklahoma and Petitioner stipulated that the crime occurred "within the geographic area set out in the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612." The Order also states that "the State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation."

¶8 The District Court's Order on Remand further states that the State of Oklahoma and Petitioner "stipulated to B.C.'s Indian status by

virtue of her tribal membership[2] and proof of blood quantum." Further, "[b]ased upon the stipulations provided, the Court specifically finds B.C. (1) had some Indian blood and (2) was recognized as an Indian by a tribe or the federal government."

¶9 In determining whether Congress established a reservation for the Cherokee Nation, the District Court found:

1. The Cherokee Nation is a federally recognized Indian tribe. 84 C.F.R. § 1200 (2019).

2. The current boundaries of the Cherokee Nation encompass lands in a fourteen-county area within the borders of the State of Oklahoma, including all of Adair, Cherokee, Craig, Nowata, Sequoyah, and Washington Counties, and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Tulsa and Wagoner Counties.

3. The Cherokee Nation's treaties are to be considered on their own terms, in determining reservation status. *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020).

4. In *McGirt* the United States Supreme Court 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. *McGirt,* 140 S. Ct. at 2451-62. As such, the Supreme Court found that "Under any definition, this was a [Creek] reservation." *Id.,* 140 S. Ct. at 2461.

---

[2] The record reflects that B.C.'s application for enrollment in the Cherokee Nation was pending at the time Petitioner murdered her on December 20, 2002 and was approved on June 23, 2003.

5. The Cherokee treaties were negotiated and finalized during the same period of time as the Creek treaties, contained similar provisions that promised a permanent home that would be forever set apart, and assured a right to self-government on lands that lie outside both the legal jurisdiction and geographic boundaries of any state.

6. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokee on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14 1833, 7 Stat. 414.

7. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of the new Cherokee lands, and provided that a patent would issue as soon as reasonably practical. Art. 1, 7 Stat. 414.

8. The 1835 Cherokee treaty was ratified two years later "with a view to re-unite their people in one body and to secure to them a permanent home for themselves and their posterity," in what became known as Indian Territory, "without the territorial limits of the state sovereignties," and "where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be consonant with their views, habits and condition." Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 and *Holden v. Joy,* 84 U.S. 211, 237-38 (1872).

9. Like the Creek treaty promises, the United States' treaty promises to the Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S. Ct at 2460. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts 1, 7 Stat. 478. In return the United States agreed to convey to the Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." Art 2, 7 Stat. 478.

10. The 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation of the new lands in Indian territory as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government . . . within their own country," so as long as they were consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Arts. 1, 5, 8, 19, 7 Stat. 478.

11. On December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new lands in Indian Territory. *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 297 (1902). The title was held by the Cherokee Nation "for the common use and equal benefit of all the members." *Hitchcock,* 187 U.S. at 307*; see also Cherokee Nation v. JourneyCake,* 155 U.S. 196, 207 (1894). Fee title is not inherently incompatible with reservation status, and establishment of a reservation does not require a "particular form of words." *McGirt,* 140 S. Ct. at 2475, citing *Masey v. Wright,* 54 S.W. 807, 810 (Indian Ter. 1900) and *Minnesota v. Hitchcock,* 185 U.S. 373, 390 (1902).

12. The 1846 Cherokee treaty required federal issuance of a deed to the Cherokee Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the Neutral Lands) and the "outlet west." Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871.

13. The 1866 Cherokee treaty resulted in Cherokee cessions of lands in Kansas and the Cherokee Outlet and required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments by two commissioners, one of whom shall be designated by the Cherokee national council." Treaty with the Cherokee, July 19, 1866, art. 21, 14 Stat. 799.

14. The 1866 Cherokee treaty "re-affirmed and declared to be in full force" all previous treaty provisions "not inconsistent with the provisions of" the 1866 treaty and provided that nothing in the 1866 treaty "shall be constructed as an acknowledgment by the United States or as relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. Art 31, 14 Stat. 799.

15. Under *McGirt* 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." *McGirt*, 140 S. Ct. at 2476.

¶10 The District Court found that "[a]s a result of the treaty provisions referenced above and related federal statutes . . . Congress did establish a Cherokee Reservation as required under the analysis set out in *McGirt*."

¶11 Further, regarding whether Congress specifically erased the boundaries or disestablished the Cherokee Reservation, the District Court found:

1. The current boundaries of the Cherokee Nation are as established in Indian Territory in the 1833 and 1835 Cherokee treaties, diminished only by two express cessions.

2. First the 1866 treaty expressly ceded the Nation's patented lands in Kansas, consisting of a two and one half mile wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. art. 17,14 Stat. 799

3. Second the 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the are known as the Cherokee Outlet); and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and the jurisdiction over all said country . . . until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." art. 16, 14 Stat. 799.

4. The Cherokee Outlet cession was finalized by an 1891 agreement and ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, Ch. 209, § 10, 27, Stat. 612, 640-43.

5. The 1891 Agreement provided that the Cherokee nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and the Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (*i.e.*, the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 106-107 (1906).

6. The 1893 statute that ratified the 1891 Agreement required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. 27 Stat. 612, 640-43; *United States v. Cherokee Nation*, 202 U.S. at 112.

7. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement. No evidence was presented that any other cession has occurred since that time.

8. The original 1839 Cherokee Constitution established boundaries as described in the 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may made necessary" by the 1866 treaty. 1839 Cherokee Constitution, art. 1, § 1, reprinted in Volume 1 of West's Cherokee Nation Code Annotated (1993 ed.).

9. Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution was ratified by Cherokee citizens in 2003 and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." 1999 Cherokee Constitution, art. 2.

¶12 The District Court also noted that the State "also made clear that the State of Oklahoma takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Reservation" and that "[n]o evidence or argument was presented by the State specifically regarding disestablishment or boundary erasure of the Cherokee Reservation."

¶13 The District Court concluded its order by stating, "no evidence was presented to this Court to establish Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma has jurisdiction in this matter. As a result, the

Court finds that B.C. was an Indian and that the crime occurred in Indian Country."

¶14 Both Petitioner and the State[3] filed response briefs addressing issues from the evidentiary hearing. Petitioner argues that the State "presented no evidence and did not challenge any of [the District Court's] findings. This Court should adopt the uncontested findings and conclusions of the District Court, and hold the State lacks subject-matter jurisdiction over Mr. Cole's case."

¶15 In its supplemental brief, the State acknowledges the District Court accepted the parties' stipulations as set forth above based on documentation showing B.C.'s quantum of Indian blood and her posthumous enrollment as a member of the Cherokee Nation. The State also acknowledges the District Court applied *McGirt* and found Congress did establish a Cherokee Reservation and that "it remained intact." Ultimately, the State acknowledges the District Court's conclusion that "B.C. was an Indian and that the crime occurred in Indian Country."

---

[3] We deny Petitioner's Motion to Strike Supplemental Brief of Respondent after Remand and grant Respondent's Motion to Substitute Supplemental Brief. The Clerk is directed to file Respondent's tendered Substitute Supplemental Brief.

¶16 The State argues this Court should find concurrent jurisdiction between it and the federal government or that Petitioner's claim is procedurally barred. This Court addressed both of those arguments recently in *Bosse v. State*, 2021 OK CR 3, __ P.3d __. With regard to concurrent jurisdiction, after finding no support for the argument in the law, the Court held, "[a]bsent any law, compact, or treaty allowing for jurisdiction in state, federal or tribal courts, federal and tribal governments have jurisdiction over crimes committed by or against Indians in Indian Country." *Id.*, 2021 OK CR 3, ¶ 28, __ P.3d at __. The Court also found no merit in the State's procedural bar argument, holding, "*McGirt* provides a previously unavailable legal basis for [the jurisdictional] claim. Subject-matter jurisdiction may-indeed, must-be raised at any time. No procedural bar applies, and this issue is properly before us." *Id.*, 2021 OK CR 3, ¶ 22, __ P.3d at __, citing 22 O.S.[2011], §§ 1089(D)(8)(a), 1089(D)(9)(a).

¶17 The State requests that should this Court find Petitioner is entitled to relief based on the District Court's findings, this Court should stay any order reversing the conviction for thirty (30) days so the United States Attorney's Office for the Northern District of Oklahoma can secure custody of Petitioner.

¶18 After thorough consideration of this proposition and the entire record before us, including the original post-conviction record, transcripts of the evidentiary hearing, and briefs of the parties, we find that under the law and the evidence relief is warranted. While the State stipulated to B.C.'s status as an Indian, the State took no position and presented no argument regarding the existence of the Cherokee Reservation and whether it has been disestablished. This acquiescence has created a legal void in this Court's ability to adjudicate properly the facts underlying Petitioner's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

¶19 Based upon the record before us, the District Court's Order is supported by the evidence presented at the evidentiary hearing. We therefore find Petitioner has met his burden of establishing B.C.'s status as an Indian, having 1/16 Cherokee blood quantum and being a posthumously enrolled member of the Cherokee Nation. We also find the District Court appropriately applied *McGirt* to determine that

Congress did establish a Cherokee Reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma had jurisdiction in this matter.

¶20 Petitioner's victim, his infant daughter, B.C., was Indian and this despicable crime occurred in Indian Country. The State of Oklahoma did not have jurisdiction to prosecute Petitioner. Petitioner's sole proposition is granted.

DECISION

¶21 The Judgment and Sentence of the District Court of Rogers County is **REVERSED** and the case is **REMANDED** with instructions to **DISMISS.** The **MANDATE** is **STAYED** for twenty (20) days from the delivery and filing of this decision.[4]

AN APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY
THE HONORABLE KASSIE N. MCCOY, ASSOCIATE
DISTRICT JUDGE

APPEARANCES AT EVIDENTIARY HEARING

MICHAEL W. LIEBERMAN
THOMAS D. HIRD
ASST. FEDERAL PUBLIC
DEFENDERS
215 DEAN A. MCGEE AVE., #707

APPEARANCES ON APPEAL

MICHAEL W. LIEBERMAN
THOMAS D. HIRD
ASST. FEDERAL PUBLIC
DEFENDERS
215 DEAN A. MCGEE AVE., #707
OKLAHOMA CITY, OK 73102

---

[4] By withholding the issuance of the mandate for 20 days, the State's request for time to determine further prosecution is rendered moot.

OKLAHOMA CITY, OK 73102
COUNSEL FOR PETITIONER

COUNSEL FOR PETITIONER

MATTHEW J. BALLARD
DISTRICT ATTORNEY
210 W. DELAWARE, STE. 202
VINITA, OK 74301
COUNSEL FOR RESPONDENT

MIKE HUNTER
ATTORNEY GENERAL OF
OKLAHOMA
RANDALL YOUNG
JULIE PITTMAN
ASST. ATTORNEYS GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73015
COUNSEL FOR RESPONDENT

SARA HILL
CHRISSI NIMMO
CHEROKEE NATION, OFFICE OF
THE ATTORNEY GENERAL
P.O. BOX 1533
TAHLEQUAH, OK 74465
COUNSEL FOR THE CHEROKEE
NATION

MIKE HUNTER
ATTORNEY GENERAL
OF OKLAHOMA
RANDALL YOUNG
ASST. ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR RESPONDENT

OPINION BY: LUMPKIN, J.
KUEHN, P.J..: Concur in Results
ROWLAND, V.P.J.: Specially Concur
LEWIS, J.: Concur in Results
HUDSON, J.: Specially Concur

KUEHN, PRESIDING JUDGE, CONCURRING IN RESULT:

¶1 I agree with the Majority that the State of Oklahoma had no jurisdiction to try Petitioner, and his case must be dismissed. This Court recently found that the Cherokee Reservation was not disestablished, and is Indian Country. *Spears v. State*, 2021 OK CR 7, ¶¶ 15-16. Oklahoma does not have jurisdiction to prosecute crimes committed by or against Indians in Indian Country. *Bosse v. State*, 2021 OK CR 3, ¶ 28; 18 U.S.C. §§ 1152, 1153. Because the issue of reservation status has already been decided, I find the Majority's lengthy discussion of it superfluous dicta. I recognize with regret the painful effect of this decision on the victim's family. I note that the Majority's inclusion of a blood quantum is inappropriate and unnecessary. This Court, like the Tenth Circuit, requires only a finding of *some* Indian blood to determine Indian status, and has explicitly rejected a specific blood quantum requirement. *Bosse*, 2021 OK CR 3, ¶ 19.

¶2 At the evidentiary hearing, the State took no position on reservation status. I cannot agree with the Majority's characterization of this as "acquiescence." In the Order remanding the case for an

evidentiary hearing, this Court left open the possibility that the parties would enter into stipulations of fact or law. The parties did so here. In addition to those stipulations, the State chose to take no position on the establishment or disestablishment of the reservation at issue. I believe that decision reflected an available legal strategy, given the clear ruling in *McGirt* and the treaty law surrounding the Cherokee Reservation.[1] While this Court might prefer that the State acknowledge the *McGirt* ruling and its clear implications, the State's adoption of this wait-and-see strategy is not legally unsound.

¶3 Nor do I agree that the State's position created a "legal void". In any adversarial proceeding, a party may choose to present evidence and give argument. Petitioner provided the trial court with maps, treaties, and statutes relevant to the jurisdictional issue. The State chose not to augment or contest this law and evidence. That was a responsible choice, and one entirely consistent with effective representation. There was a full record below and a full record on appeal. The trial court's findings and conclusions clearly set forth the

---

[1] This position is also entirely consistent with the State's position in civil Indian Child Welfare Act proceedings. On September 1, 2020, the Oklahoma Department of Human Services, on behalf of the State, entered into an Intergovernmental Agreement Between the State of Oklahoma and the Cherokee Nation Regarding Jurisdiction Over Indian Children Within the Nation's Reservation (filed, Oklahoma Secretary of State, Sept. 1, 2020). Throughout the Agreement the State explicitly recognizes the continued existence of the Cherokee Reservation.

details of the evidence it used to make its decisions. The Majority may wish that more, or different, evidence had been presented. That does not leave a void in the record.

ROWLAND, VICE PRESIDING JUDGE, SPECIALLY CONCURRING:

¶1 I agree with the majority that the U.S. Supreme Court's decision in *McGirt v. Oklahoma,* 591 U.S.___, 140 S.Ct. 2452 (2020), unfortunately, requires dismissing this murder conviction which resulted in a sentence of death. I write separately to set forth my position on two issues.

¶2 As to the first of these, I do not join in the view that the position the State has taken leaves a legal void or negatively affects the standard of review by which we are to judge this case. The State has agreed that the victim, B.C., is an Indian for purposes of federal criminal law, and that the crime here took place on lands within the historical boundaries of the Cherokee Nation. The State took no position as to whether those lands ever have or still do constitute a reservation, and offered no evidence or argument to rebut Cole's claim that a Cherokee Reservation remains intact today. Clearly, the State is aware that the reasoning of *McGirt*, involving the Muscogee Creek Reservation, likely applies to the Cherokee lands as well. The Court, in *McGirt,* found the existence of a Muscogee Creek Reservation in a large part of eastern Oklahoma, even though neither the tribe, local governmental units in that part of the state, nor the

State of Oklahoma, had ever behaved since statehood as though they believed a reservation still existed. It seems to me the State is consistent in its long-held position, effectively standing mute and leaving it to the district court to expand *McGirt* to the Cherokee lands. This is a reasonable position to take and one that litigants in criminal cases take from time to time.

¶3 Nor do I find that the State's position negatively affects our standard of review or ability to decide this case. Had the State taken the position that no Cherokee Reservation exists today, and had the district court nonetheless ruled against the State, we would still have that ruling in the district court's order to adjudicate.

¶4 The second issue I wish to address is that of subject matter jurisdiction. Today's Opinion Granting Post Conviction Relief makes reference to subject matter jurisdiction because that is the language we used to remand this case for findings of fact and law. As I set out in detail in my separate writing to *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___, (Rowland, V.P.J., concurring in results), in fact Indian Country criminal jurisdiction does not implicate subject matter jurisdiction. The Major Crimes Act does not, indeed cannot, divest Oklahoma courts of subject matter jurisdiction granted by the

Oklahoma Constitution and statutes enacted pursuant thereto. This federal criminal statute, based upon the plenary power of Congress to regulate affairs with Indian tribes, is instead an exercise of federal territorial jurisdiction which preempts the authority of Oklahoma state courts under these circumstances.

¶5 Because I concur with the legal reasoning contained in this Opinion, and with its outcome, I concur specially with the majority.

LEWIS, JUDGE, CONCURRING IN RESULTS:

¶1 Pursuant to my special writings in *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___ and *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___, I concur in results. Following the precedent of *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), Oklahoma has no jurisdiction over persons who commit crimes against Indians in Indian Country. This crime occurred within the historical boundaries of the Cherokee Nation Reservation and that Reservation has not been expressly disestablished by the United States Congress. Additionally, the crime occurred against an Indian victim, thus the jurisdiction is governed by the Major Crimes Act found in the United States Code.

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

HUDSON, J., SPECIALLY CONCURRING:

¶1 Today's decision applies *McGirt v. Oklahoma*, 140 U.S. 2452 (2020) to the facts of this case and dismisses a first degree murder conviction that resulted in a death sentence from the District Court of Rogers County. I fully concur in the majority's opinion based on the stipulations below concerning the Indian status of the victim and the location of this crime within the historic boundaries of the Cherokee Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Petitioner. Instead, Petitioner must be prosecuted in federal court. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶2 I also join Judge Rowland's observation in his special writing that the Major Crimes Act does not affect the State of Oklahoma's subject matter jurisdiction in criminal cases but, rather, involves the exercise of federal criminal jurisdiction to effectively preempt the exercise of similar state authority. Further, I maintain my previously expressed views on the significance of *McGirt*, its far-reaching impact on the criminal justice system in Oklahoma and the need for a practical solution by Congress. *See Bosse*, 2021 OK CR 3, __P.3d__ (Hudson, J., Concur in Results); *Hogner v. State*, 2021 OK CR 4,

__P.3d__ (Hudson, J., Specially Concurs); and *Krafft v. State*, No. F-2018-340 (Okl.Cr., Feb. 25, 2021) (Hudson, J., Specially Concurs) (unpublished).

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 29 2020

JOHN D. HADDEN
CLERK

BENJAMIN ROBERT COLE, SR., by and through his next friend, Robert S. Jackson,	)	
Petitioner,	)	
v.	)	**No. PCD-2020-332**
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

ORDER DISMISSING SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF AND DENYING MOTION TO HOLD SUCCESSIVE APPLICATION IN ABEYANCE

Petitioner has filed with this Court a Successive Application for Post-Conviction Relief. The record reflects Petitioner was tried by jury in the District Court of Rogers County and convicted of First Degree Child Abuse Murder (21 O.S.Supp.2001, § 701.7(C)), for the December 20, 2002, murder of his nine-month-old daughter, Brianna Cole. The jury found the existence of two aggravating circumstances: (1) that Petitioner had been previously convicted of a felony involving the use or threat of violence to the person; and (2) that the murder was especially heinous, atrocious, or cruel. *Cole v. State,*

2007 OK CR 27, ¶¶ 1-2, 164 P.3d 1089, 1092. The trial court sentenced Petitioner to death in accordance with the jury's recommendation. Petitioner appealed his conviction and sentence to this Court, but we denied relief. *Id.*, 2007 OK CR 27, ¶ 66, 164 P.3d at 1102. He sought *certiorari* review to the United States Supreme Court but the Supreme Court denied his petition. *Cole v. Oklahoma*, 553 U.S. 1055 (2008). We denied Petitioner's application for post-conviction relief. *Cole v. State*, PCD-2005-23, unpub. disp. (Okla. Crim. Jan. 24, 2008). Petitioner also sought collateral relief in federal court, but received none.[1] Petitioner also filed a Petition for Writs of Mandamus and/or Prohibition in the District Court of Pittsburg County Case Number No. CV-2015-58 and received an evidentiary hearing on the issue of his sanity. This Court denied Petitioner's Petition for Writs of Mandamus and/or Prohibition. *Cole v. Trammell*, 2015 OK CR 13, 358 P.3d 932.

---

[1] *Cole v. Workman*, 2011 WL 3862143 (N.D. Okla. Sept. 1, 2011); *Cole v. Trammell*, 755 F.3d 1142 (10th Cir. 2014). The Supreme Court denied *certiorari* in *Cole v. Trammell*, 571 U.S. ___, 135 S. Ct. 224 (2014).

The Capital Post-Conviction Procedure Act, specifically, 22 O.S.2011, § 1089(D)(8), provides as follows regarding successive post-conviction applications:

> 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 application unless the application contains sufficient specific facts establishing that the current claims and issues have not been and could not have been presented previously in a previously considered application filed under this section, because the factual or legal basis for the claim was unavailable.

The Act additionally provides a legal basis of 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 by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

22 O.S.2011, § 1089(D)(9).

Petitioner, a non-Indian, now claims the State of Oklahoma lacked jurisdiction to prosecute, convict and sentence him for the murder of his Indian daughter which occurred in Indian Country. He

relies upon the Tenth Circuit's opinion in *Murphy v. Royal,* 875 F.3d 896 (10th Cir. 2017). The Court held that Oklahoma lacked jurisdiction to prosecute Murphy, an Indian, for a crime which occurred in Indian country. *Id.* at 966. Petitioner acknowledges that opinion is not final as the case is pending before the United States Supreme Court.[2] He further seeks to rely upon another case pending and recently argued before the Supreme Court, *McGirt v. Oklahoma,* Supreme Court Case No. 18-9526.

Because neither *Murphy* nor *McGirt* is a final opinion, Petitioner's successive post-conviction application seeking relief based upon those cases is premature and this successive post-conviction application is **DISMISSED**. His motion to hold this successive post-conviction application in abeyance is therefore **DENIED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 29th day of May, 2020.

DAVID B. LEWIS, Presiding Judge

[2] *Carpenter v. Murphy,* Supreme Court Case No. 17-1107.

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST: John D. Hadden

Clerk

ORIGINAL

PCD 2020 529

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

BENJAMIN ROBERT COLE, SR, ***Petitioner,*** ***-vs-*** **THE STATE OF OKLAHOMA,** ***Respondent.***	***Rogers County District Court*** ***Case No.: CF-2002-597*** ***Court of Criminal Appeals*** ***Direct Appeal Case No.: D-2004-1260*** ***Court of Criminal Appeals Original*** ***Post-Conviction Case No.: PCD-2005-23*** ***Successive Post-Conviction*** ***Case No.: PCD-2020-332*** ***Successive Post-Conviction Case No.:***

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG 12 2020
JOHN D. HADDEN
CLERK

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF
- DEATH PENALTY -

PART A: PROCEDURAL HISTORY

Petitioner, Benjamin Robert Cole, Sr., through undersigned counsel, submits his successive application for post-conviction relief pursuant section 1089 of Title 22. This is the third application for post-conviction relief to be filed.[1]

The sentence from which relief is sought is: Death Sentence

1. a. Court in which sentence was rendered: Rogers County District Court

   b. Case Number: CF-2002-597

2. Date of Sentence: December 8, 2004

[1] Pursuant to Rule 9.7(A)(3)(d), attached hereto is a copy of Mr. Cole's initial application in case no.: PCD-2005-23. *See* Appendix ("App.") at 48, Attachment ("Att.") 12. Mr. Cole remains indigent. *See* App. at 85, Att. 13 (trial court's finding of indigency); App. at 90, Att. 14 (order appointing appellate counsel); and App. at 97, Att. 15 (federal court's finding of indigency). Mr. Cole is represented in this matter by undersigned counsel, Michael W. Lieberman, Thomas D. Hird, and Patti Palmer Ghezzi, appearing with permission of the federal district court in *Cole v. Sharp*, Case No.: 08-CV-0328-CVE-PJC, Dkt. 57.

3. Terms of Sentence: Mr. Cole received a sentence of death for one count of first degree murder.

4. Name of Presiding Judge: Honorable J. Dwayne Steidley

5. Is Petitioner currently in custody? Yes (X) No ( )

Where? Oklahoma State Penitentiary

Does Petitioner have criminal matters pending in other courts? Yes ( ) No (X)

Does Petitioner have sentences (capital or non-capital) to be served in other states/jurisdictions? Yes ( ) No (X)

I. CAPITAL OFFENSE INFORMATION

6. Petitioner was convicted of the following crime, for which a sentence of death was imposed:

   a. Murder in the First Degree in violation of 21 O.S. 2011, § 701.7

Aggravating factors alleged:

a. The murder was especially heinous, atrocious, or cruel; and

b. That Cole had been convicted previously of a felony involving the use or threat of violence to the person; and

c. The existence of a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Aggravating factors found:

a. The murder was especially heinous, atrocious, or cruel; and

b. That Cole had been convicted previously of a felony involving the use or threat of violence to the person.

Mitigating factors listed in jury instructions:

a. That Cole was sexually molested as a child;

b. That Cole has brain damage;

c. That Cole confessed to the crime;

d. That Cole has expressed remorse;

e. That Cole has intermittent explosive personality disorder;

f. That Cole has a personality disorder not otherwise specified;

g. That Cole is an alcoholic;

h. That Cole's life has value to his family;

i. That Cole is devoutly religious;

j. That Cole is unlikely to be violent in a prison setting, or outside of a domestic relationship;

k. That Cole does well in a structured prison setting.

Victim impact testimony was not presented at the trial.

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

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

9. The sentence imposed was recommended by the jury.

II. NON-CAPITAL OFFENSE INFORMATION

10. Mr. Cole was neither charged nor convicted of any other offenses.

III. CASE INFORMATION

11. Trial Counsel:

James Bowen and G. Lynn Burch
Capital Trial Division - Tulsa
Oklahoma Indigent Defense System
610 S. Hiawatha
Sapulpa, Oklahoma 74066

12. OIDS Capital Trial Division was appointed by the court.

13. The conviction and sentence were appealed to the Oklahoma Court of Criminal Appeals.

Date Brief In Chief filed: January 23, 2006
Date Response filed: May 24, 2006
Date Reply Brief filed: July 10, 2006
Date of Oral Argument (if set): December 19, 2006
Date of Petition for Rehearing (if appeal has been decided): July 31, 2007 (denied)

The case was not remanded for an evidentiary hearing.

14. Appellate Counsel:

James Hankins
Hankins Law Office
119 N. Robinson, Suite 320
Oklahoma City, OK 73102

15. Was an opinion written by the appellate court? Yes (X) No ( )

If "yes," give citations if published: *Cole v. State*, 2007 OK CR 27, 164 P.3d 1089

16. Was further review sought? Yes (X) No ( )

Cole v. State, Case No.: PCD-2005-23, Opinion Denying Application for Post-Conviction Relief (Jan. 24, 2008) (unpub).

Cole v. Oklahoma, 553 U.S. 1055 (2008) (certiorari denied).

Cole v. Workman, Case No.: 08-CV-0328, 2011 WL 3862143 (N.D. Okla. Sept. 1, 2011) (unpub) (denying federal habeas corpus relief).

Cole v. Trammell, 755 F.3d 1142 (10th Cir. 2014) (denying federal habeas corpus relief).

Cole v. Trammell, 574 U.S. 891 (2014) (certiorari denied).

Cole v. State, Case No.: PCD-2020-332, Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance (May 29, 2020).

PART B: GROUNDS FOR RELIEF

17. Has a Motion for Discovery been filed with this application? Yes ( ) No (X)

18. Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No ( )

19. Have other motions been filed with this application or prior to the filing of this application? Yes ( ) No (X)

20. List Propositions raised (list all sub-propositions):

PROPOSITION

***McGirt v. Oklahoma* Confirms Oklahoma Did Not Have Jurisdiction to Prosecute, Convict, and Sentence Mr. Cole for a Murder that Occurred Within the Boundaries of the Cherokee Nation Reservation.**

A. Preliminary Matters.

1. **The Legal Basis for Mr. Cole's Jurisdictional Claim Was Unavailable Until *McGirt* and *Murphy* Became Final.**

2. **Subject-Matter Jurisdiction Can Be Raised at Any Time.**

B. *McGirt* Controls Reservation Status and Federal Criminal Jurisdiction.

1. **Certain Crimes in Indian Country in Oklahoma Are Subject to Federal Jurisdiction Under the Major Crimes Act and the General Crimes Act.**

2. **Indian Country Includes Restricted and Trust Allotments, Tribal Trust Lands, and All Fee Lands Within Cherokee Reservation Boundaries.**

C. The Cherokee Reservation Was Established by Treaty, and its Boundaries have been Altered Only by Express Cessions in 1866 and 1891.

1. **The Creek Reservation Was Established by Treaty.**

2. **The Cherokee Treaties Contain the Same or Similar Provisions as the Creek Treaties.**

3. **Special Terminology Is Not Required to Establish a Reservation, and Tribal Fee Ownership Is Not Inconsistent with Reservation Status.**

4. **The Cherokee Reservation Has Been Diminished Only by Express Cessions of Portions of the Reservation in Its 1866 Treaty and Its 1891 Agreement.**

D. Congress has Not Disestablished the Cherokee Reservation.

1. **Only Congress Can Disestablish a Reservation by Explicit Language for the Present and Total Surrender of All Tribal Interests in the Affected Lands.**

2. **The Allotment of Cherokee Land Did Not Disestablish the Cherokee Reservation.**

3. **Allotment Era Statutes Intruding on Cherokee Nation's Right to Self-Governance Did Not Disestablish the Reservation.**

4. **The Events Surrounding the Enactment of Cherokee Allotment Legislation and Later Demographic Evidence Cannot, and Did Not, Result in Reservation Disestablishment.**

PART C: FACTS

Petitioner's request for post-conviction relief raises the sole issue of whether the State of Oklahoma ("Oklahoma" or "State"), had jurisdiction to prosecute, convict, and sentence Mr. Cole to death for the murder of B.C., a citizen of the Cherokee Nation, when her murder occurred within the boundaries of the Cherokee reservation – boundaries that have not been disestablished by Congress. Facts that relate to the offense have limited value regarding the jurisdictional issue and will only be addressed briefly.

FACTS RELATING TO THE OFFENSE[2]

On December 20, 2002, Benjamin Robert Cole, Sr. killed his infant daughter, B.C., by forcefully grabbing her legs and flipping her over backwards. Tr. Vol. VI at 153-160; St. Exs. 2, 5. Realizing B.C. was in distress, the parents tried cardio-pulmonary resuscitation (CPR) and called 9-1-1. Tr. Vol. VI at 136. B.C. was transported by ambulance to the Claremore Indian Hospital in Claremore, Oklahoma, where she died from a spinal fracture with an aortic laceration. Tr. Vol. VI at 73, 116.

[2] References to the trial record will be the preliminary hearing transcript ("Prel. Hrg. Tr."), trial transcript by volume ("Tr. Vol.__"), and state's exhibits ("St. Ex.__"). Additional supporting documents are cited to as attachments ("Att."), provided in the separately bound and sequentially numbered appendix ("App.").

FACTS RELATING TO THE CHEROKEE NATION AND INDIAN COUNTRY JURISDICTION

Cherokee Nation is a federally recognized Indian tribe. 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 Cherokee Reservation boundaries encompass lands in a fourteen-county area, including all of Adair, Cherokee, Craig, Nowata, and Washington Counties; and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Sequoyah, Tulsa, and Wagoner Counties, within the borders of the State of Oklahoma.[3] The Nation's government, headquartered in Tahlequah, Oklahoma, consists of executive, legislative, and judicial branches, including an active district and appellate court.[4] The Cherokee Nation provides law enforcement through its Marshal Service, and maintains cross-deputation agreements with state, county, and city law enforcement agencies to ensure protection of citizens and non-citizens.[5]

Cherokee Nation maintains a significant and continuous presence in the Cherokee Reservation. There are approximately 139,000 Cherokee citizens residing within the reservation. The Nation provides extensive services to communities throughout the reservation, including,

---

[3] The following interactive link can be used to determine if a specific address is located on the Cherokee Reservation: http://geodata.cherokee.org/CherokeeNation/ (user directions are displayed on the upper-right corner of the screen; ensure Adobe Flash Player version 11.1.0 or greater is installed) (last visited August 3, 2020).

[4] *See* "*Rising Together, 2018 Annual Report to the Cherokee People*" (FY 2018 Rep.) and "*Popular Annual Financial Report for FY 2019, Cherokee Nation*" (FY 2019 Rep.), available at https://www.cherokee.org/media/lufhr5rp/fy2018-annual-report-_final-online.pdf; https://www.cherokee.org/media/gaahnswb/pafr-fy19-final-v-2.pdf (last visited August 3, 2020).

[5] *See* Appendix ("App.") at 1, Attachment ("Att.") 1 (Cherokee Nation Cross-Deputization Agreements (1992-2019)).

among others: health and medical centers, a veteran's center, employment, housing, bus transit, waterlines, sewers, water treatment, bridge and road construction, parks, food distribution, child support services, child welfare, a youth shelter, victim's services, donations to public schools and local fire departments, and charitable contributions. The Nation's activities, including its business operations, resulted in a statewide $2.17 billion favorable economic impact in 2019.[6]

The homicide of B.C. occurred in a home located at 320 S. Moore Avenue, Claremore, Oklahoma. Prel. Hrg Tr. at 8; Tr. VI at 11, 68, 136. The home is located on fee land within the Cherokee Nation Reservation. *See* App. at 102, Att. 16 (Cherokee Nation Real Estate Services Memo). Both B.C. and her mother are Cherokee citizens. *See* App. at 104, Att. 17 (Cherokee Nation Verification of CDIB/Tribal Citizenship – B.C.); and App. at 106, Att. 18 (Cherokee Nation Verification of CDIB/Tribal Citizenship – Susan Young). Mr. Cole is non-Indian.

Historical facts are also relevant in determining whether Oklahoma had jurisdiction to prosecute, convict, and sentence Mr. Cole for a crime that occurred against an Indian on the Cherokee Reservation. The historical facts are discussed below in Part D and documented in the attachments, which are incorporated herein by reference. *See* App. 1-107, Atts. 1-18.

[6] *See* FY 2018 Rep. and FY 2019 Rep., *supra* n.4; *see also* App. at 4, Att. 2 (Cherokee Nation Service Area Maps).

PART D: ARGUMENTS AND AUTHORITIES

PROPOSITION

***McGirt v. Oklahoma* Confirms Oklahoma Did Not Have Jurisdiction to Prosecute, Convict, and Sentence Mr. Cole for the Murder that Occurred Within the Boundaries of the Cherokee Nation Reservation.**

A. Preliminary Matters.

1. The Legal Basis for Mr. Cole's Jurisdictional Claim Was Unavailable Until *McGirt* and *Murphy* Became Final.

Mr. Cole recognizes Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, and Okla. Stat. tit. 22 § 1089(D) typically apply to the filing and review of subsequent applications for post-conviction relief in capital cases. Indeed, this Court recently dismissed Mr. Cole's application which raised the constitutional question raised here – does Oklahoma have subject-matter jurisdiction to prosecute Mr. Cole and sentence him to death? This Court concluded Mr. Cole's claim was "premature" because *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) *(McGirt)* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (*Murphy*) were not final decisions. *Cole v. State,* PCD-2020-332, Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance (May 29, 2020). The Supreme Court has issued mandates in both cases and *Murphy* and *McGirt* are now final decisions.

Under § 1089(D)(9), the legal basis for raising this claim in a successor application was unavailable until the mandates issued according to this Court's rules. In dismissing Mr. Cole's recent application as premature, this Court acknowledged the legal basis for the claim "was not recognized by or could not have been reasonably formulated from a *final* decision of the United States Supreme Court [or the Tenth Circuit Court of Appeals]." Okla. Stat. tit. 22 § 1089(D) (emphasis added). Now that the legal basis is available, this Court should decide the federal claim

on the merits, vacate Mr. Cole's conviction and sentence, and dismiss the charges. By faithfully applying *McGirt* and *Murphy*, this Court must conclude the Cherokee Nation Reservation is intact and Oklahoma had no jurisdiction to try, convict, and sentence Mr. Cole to death.

2. Subject-Matter Jurisdiction Can Be Raised at Any Time.

Even if successive post-conviction applications were not allowed in this unique situation, subject-matter jurisdiction is a fundamental issue that can be raised at any time. And, Oklahoma does not have subject-matter jurisdiction under the General Crimes Act (GCA) over the crime that arose within the Cherokee Nation Reservation.

"[L]ack of jurisdiction" is a constitutional right which is "never finally waived." *Johnson v. State*, 1980 OK CR 45, ¶ 30, 611 P.2d 1137, 1145. In three capital cases in which Indian country jurisdictional issues were raised belatedly, this Court repeatedly confirmed such a fundamental jurisdictional issue can be raised at any time. *See Cravatt v. State*, 1992 OK CR 6 at ¶ 3, 825 P.2d 277, 278 (deciding Indian country jurisdictional question though raised for first time on the day appellate oral argument was set); *Murphy v. State*, 2005 OK CR 25, ¶ 2, 124 P.2d 1198 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue though raised for first time in successor post-conviction relief action); and *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue even though issue was not raised in the trial court where appellant pled guilty and waived his appeal). This Court's decisions permitting jurisdiction to be raised at any time rest on bedrock principles which have existed for nearly a century. *See Armstrong v. State*, 1926 OK CR 259, 35 Okla. Crim. 116, 118, 248 P. 877, 878.

Such respect for jurisdictional claims is proper. The Supreme Court defines jurisdiction as "the courts' statutory and constitutional *power* to adjudicate the case." *United States v. Cotton*,

535 U.S. 625, 630 (2002). *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Because subject-matter jurisdiction involves a court's power to act, the Supreme Court concludes "it can never be forfeited or waived." *Cotton*, 535 U.S. at 630. Consequently, defects in subject-matter jurisdiction require correction regardless of when the issue is raised. This concept is so grounded in law that defects in jurisdiction cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U.S. 413, 421 (1911). Likewise, the Tenth Circuit in *Murphy v. Royal,* 875 F.3d 896, 907 n.5 (10th Cir. 2017) recognized issues of subject-matter jurisdiction in Oklahoma are "never waived" and can "be raised on a collateral appeal." Similarly, Oklahoma's Solicitor General acknowledges "Oklahoma allows collateral challenges to subject-matter jurisdiction *at any time*." *McGirt v. Oklahoma,* Supreme Court Case No.: 18-9526 (Mar 13, 2020), Brief of Respondent at 43 (emphasis added).[7]

Consideration of the merits of Mr. Cole's claim is appropriate.

B. *McGirt* Controls Reservation Status and Federal Criminal Jurisdiction.

As recognized by this Court more than thirty years ago, 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 Oklahoma "does not have jurisdiction over crimes committed by

---

[7] Petitioner is aware Oklahoma now unapologetically retreats from this statement when it no longer serves its purpose. *See Bosse v. State*, PCD-2019-124, Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), Aug. 4, 2020 (Response). Without fully acknowledging Oklahoma's century-long precedent that an issue of subject-matter jurisdiction is never waived and can be raised on collateral appeal, the State now speculates that in *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198 and *Wackerly v. State*, 2010 OK CR 16, 237 P.3d 795, this Court did not "consider" whether its long-standing precedent "squared" with the post-conviction procedures which had existed for over a decade when this Court considered Mr. Murphy and Mr. Wackerly's jurisdictional claims on the merits. Response at 31.

or against an Indian in Indian Country." *See Cravatt*, 825 P.2d at 279 (*citing State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 403). This Court determined in *Klindt* that trust allotments within the boundaries of the Cherokee Nation constitute Indian country as defined by 18 U.S.C. § 1151(c), but it has not addressed whether all lands within the boundaries of the Cherokee Nation constitute Indian country as defined by § 1151(a) (Indian reservation). The United States Supreme Court likewise had not addressed reservation status as to any of the Five Tribes, until July 9, 2020, when it decided *McGirt v. Oklahoma*, 140 S. Ct. at 2463-81 (2020). In *McGirt*, the Court ruled that the Muscogee (Creek) Reservation was established by treaty; Congress never disestablished the reservation; all land, including fee land, within the reservation is Indian country under 18 U.S.C. § 1151(a); federal statutes concerning the Five Tribes near the time of statehood did not grant jurisdiction to Oklahoma over crimes committed by Indians on the reservation; the Major Crimes Act, 18 U.S.C. § 1153 (MCA), applies to certain listed crimes committed by Indians on the reservation; and Oklahoma had no jurisdiction to prosecute a Seminole citizen for crimes committed on fee lands within the reservation under the MCA. *Id.*

On the same date that the Supreme Court issued the *McGirt* decision, it affirmed the Tenth Circuit's ruling in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), aff'd, *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (*Murphy*), determining that Oklahoma had no jurisdiction over the murder of an Indian by another Indian on the Creek Reservation under the MCA. On July 9, 2020, the Supreme Court also remanded four cases pending certiorari in the Supreme Court involving other reservations in Oklahoma, in light of *McGirt*.[8]

---

[8] *See Bentley v. Oklahoma*, OCCA No.: C-2016-699, U.S. Sup. Ct. No.: 19-5417, Judgment Vacated and Case Remanded, July 9, 2020 (Citizen Band Potawatomi reservation); *Johnson v. Oklahoma*, OCCA No.: PC-2018-343, U.S. Sup. Ct. No.: 18-6098, Judgment Vacated and Case

1. **Certain Crimes in Indian Country in Oklahoma Are Subject to Federal Jurisdiction Under the Major Crimes Act and the General Crimes Act.**

Although the applicability of federal and state criminal laws in the exercise of federal or state jurisdiction in Indian country nationwide is fairly complex, the jurisdictional parameters are clearly defined by federal law as amended from time to time. First, under the MCA, federal courts have exclusive jurisdiction, as to Oklahoma, over prosecutions for certain listed qualifying crimes committed by Indians against Indians or non-Indians in Indian country. *See McGirt*, 140 S. Ct. at 2459-60, 2470-71, 2477-78. Second, Oklahoma lacks jurisdiction over prosecutions of crimes, such as Mr. Cole's, that are committed against an Indian in Indian country under the General Crimes Act (also known as Indian Country Crimes Act), 18 U.S.C. § 1152 (GCA)[9]; such crimes are subject to federal or tribal jurisdiction. *McGirt*, 140 S. Ct. at 2478 ("But Oklahoma doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over Creek lands. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma."). Third, Oklahoma has criminal jurisdiction over all offenses committed by non-Indians against non-Indians in Indian

Remanded, July 9, 2020 (Seminole Reservation); *Terry v. Oklahoma*, OCCA No.: PC-2018-1076, U.S. Sup. Ct. No.: 18-8801, Judgment Vacated and Case Remanded, July 9, 2020 (Quapaw/Modoc/Ottawa Reservations); and *Davis v. Oklahoma*, OCCA No.: PC-2019-451, U.S. Sup. Ct. No.: 19-6428 Judgment Vacated and Case Remanded, July 9, 2020 (Choctaw Reservation).

[9] 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.

country. *Id.*, *citing United States v. McBratney*, 104 U.S. 621, 624 (1881); *see also United States v. Langford,* 641 F.3d 1195 (10th Cir. 2011) (holding state possesses exclusive criminal jurisdiction over non-Indians who commit victimless crimes in Indian country). *See* App. at 11, Att. 3 (Indian Country Criminal Jurisdictional Chart).

The *McGirt* decision laid to rest Oklahoma's position that the MCA and the GCA do not apply in Oklahoma. The Court noted that even the dissent declined "to join Oklahoma in its latest twist." *See McGirt*, 140 S. Ct. at 2476. The Court found no validity to Oklahoma's argument that the MCA was rendered inapplicable by three statutes: the Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 (granting federal courts in Indian Territory[10] "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense"); the Act of June 28, 1898, ch. 517, § 28, 30 Stat. 495, 504-505 (Curtis Act) (abolishing Creek Nation courts and transferring pending criminal cases to federal courts in Indian Territory); and the Oklahoma Enabling Act, Act of June 16, 1906, ch.3335, 34 Stat. 267, as amended by the Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286) (concerning transfer of cases upon statehood).[11] *McGirt,* 140 S. Ct. 2477. The Court noted that Oklahoma was formed

[10] Federal courts in the bordering states of Arkansas and Texas, and later in Muskogee, Indian Territory, were originally authorized to exercise federal jurisdiction in Indian Territory, subject to changes over time. *See* Act of Jan. 31, 1877, ch. 41, 19 Stat. 230 (Arkansas); Act of Jan. 6, 1883, ch. 13, § 3, 22 Stat. 400 (Texas); Act of Mar. 1, 1889, ch. 333, §§ 1, 5, 25 Stat. 783 (Muskogee, Indian Territory); Act of May 2, 1890 ch. 182 §§ 29-44, 26 Stat. 81 (Indian Territory); Act of Mar. 1, 1895, ch. 145, §§ 9, 13, 28 Stat. 693 (repealing laws conferring jurisdiction on the federal courts in Arkansas, Kansas, and Texas over offenses committed in Indian Territory, and authorizing the federal court in Indian Territory to exercise such jurisdiction, including jurisdiction over "all offenses against the laws of the United States.").

[11] The Enabling Act required transfer to the new federal courts of prosecutions of "all crimes and offenses" committed within Indian Territory "which, had they been committed within a State, would have been cognizable in the Federal courts." § 16, 34 Stat. 267, 276, as amended by § 1, 34 Stat. 1286. It required transfer of prosecutions not arising under federal law to the new state courts. §20, 34 Stat. 267, 277, as amended by §3, 34 Stat. 1286.

from Oklahoma Territory in the west and Indian Territory in the east,[12] and that criminal prosecutions in Indian Territory were split between tribal and federal courts, *citing* Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81, 94.[13] *McGirt,* 140 S. Ct. 2476. The Court held that Congress "abolished that [Creek tribal/federal court split] scheme" with the 1897 act, but "[w]hen Oklahoma won statehood in 1907, the MCA applied immediately according to its plain terms." *Id.* The Enabling Act sent federal-law cases to federal court in Oklahoma, and crimes arising under the federal MCA "belonged in federal court from day one, wherever they arose within the new state." *Id.* at 2478. Crimes arising under the federal GCA, which "applies to a broader range of crimes by or against Indians in Indian country," *Id.* at 2479, likewise applied immediately upon statehood, and are not subject to state jurisdiction. Mr. Cole's crime arises under the GCA.

2. Indian Country Includes Restricted and Trust Allotments, Tribal Trust Lands, and All Fee Lands Within Cherokee Reservation Boundaries.

The Cherokee Reservation includes individual restricted and trust Cherokee allotments[14] that constitute Indian country under 18 U.S.C. § 1151(c) for purposes of application of the MCA and GCA ("all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same"). *See United States v. Ramsey*, 271 U.S. 467, 469, 472

[12] No territorial government was ever created in the reduced Indian Territory, and it remained directly subject to tribal and federal governance until statehood. *See* App. at 17, Att. 5 (Map of Indian Territory); and App. at 19, Att. 6 (Map of Oklahoma and Indian Territories).

[13] *See Talton v. Mayes*, 163 U.S. 376, 381 (1896) (finding that Cherokee Nation had exclusive jurisdiction over an 1892 Cherokee murder in Cherokee Nation under its treaties and the 1890 Act). The 1897 act "broadened the jurisdiction of the federal courts, thus divesting the Creek tribal courts of their exclusive jurisdiction over cases involving only Creeks." *See Indian Country, U.S.A., Inc. v. Okla. ex rel. Oklahoma Tax Com'n*, 829 F.2d 967, 978 (10th Cir. 1987) *cert. denied*, 487 U.S. 1218 (1988) (emphasis added).

[14] Restricted Cherokee allotments are subject to federal statutory requirements for conveyances and encumbrances. *See infra*, n.25.

(1926) (GCA applies to murder of Indian by non-Indian on restricted Osage allotment); *United States v. Sands*, 968 F.2d 1058, 1061-62 (10th Cir. 1992) *cert. denied*, 506 U.S. 1056 (1993) (MCA applies to murder of Indian by Indian on restricted Creek allotment, and allotment era statutes "did not abrogate the federal government's authority and responsibility, nor allow jurisdiction by the State of Oklahoma" over those allotments); *Klindt*, 782 P.2d at 403 (no state jurisdiction over assault with dangerous weapon by or against Indian on Cherokee trust allotment).

The Cherokee Reservation also includes tribal lands held in trust by the United States and unallotted tribal lands that constitute Indian country under 18 U.S.C. § 1151(a) for jurisdictional purposes ("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"). *See United States v. John*, 437 U.S. 634, 649 (1978) (Mississippi Choctaw tribal trust land); *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990) (Cherokee tribal trust land); *Indian Country, U.S.A. Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) (unallotted Creek land).

Oklahoma has no jurisdiction over crimes covered by the MCA or the GCA,[15] even when committed on individual fee land within the Cherokee Reservation. A reservation includes all land within its boundaries, even if owned in fee by non-Indians. "[W]hen Congress has once established a reservation, *all tracts included within it* remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909) (emphasis added). "[The

[15] Petitioner cannot present here a counter to Oklahoma's newly-minted idea that despite Oklahoma never having been granted jurisdiction over Indian crimes on reservations through PL-280, or any statute it relied on in *McGirt* to argue it possessed criminal jurisdiction over Indian crimes in Oklahoma, it has concurrent jurisdiction with the federal government over crimes committed against Indians by non-Indians. *See Bosse* Response at 13-21. Petitioner will reply to that argument if the State persists in raising it.

Supreme Court] long ago rejected the notion that the purchase of lands by non-Indians is inconsistent with reservation status." *McGirt*, 140 S. Ct. at 2464 n.3, *citing Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58 (1962). "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *McGirt*, 140 S. Ct. at 2468, *citing Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

C. The Cherokee Reservation Was Established by Treaty, and its Boundaries Have Been Altered Only by Express Cessions in 1866 and 1891.

1. The Creek Reservation Was Established by Treaty.

In *McGirt,* the Court discussed Creek treaties in detail, before concluding that they established the Creek Reservation. The Court noted that the 1832 and 1833 Creek removal treaties "solemnly guarantied" the land; established boundary lines to secure "a country and permanent home;" stated the United States' desire for Creek removal west of the Mississippi River; included Creek Nation's express cession of their lands in the East; confirmed the treaty obligation of the parties upon ratification; required issuance of a patent, in fee simple, to Creek Nation for the new land, which was formally issued in 1852; and guaranteed Creek rights "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them." *McGirt*, 140 S. Ct. at 2461, *citing* Treaty with the Creeks, arts. I, XII, XIV, XV, Mar. 24, 1832, 7 Stat. 366-68, and Treaty with the Creeks, preamble, arts. III, IV, IX, Feb. 14, 1833, 7 Stat. 417, 419.

The Court further noted that the 1856 Creek treaty promised that no portion of the reservation "shall ever be embraced or included within, or annexed to, any Territory or State;" and secured to the Creeks "the unrestricted right of self-government," with "full jurisdiction" over

enrolled citizens and their property. *McGirt*, 140 S. Ct. at 2461, *citing* Treaty with Creeks and Seminoles, arts. IV, XV, Aug. 7, 1856, 11 Stat. 699, 700, 704.

The Court recognized that although the 1866 post-civil war Creek treaty reduced the size of the Creek Reservation, it restated a commitment that the remaining land would "be forever set apart as a home for said Creek Nation," referred to as the "reduced Creek reservation." *McGirt*, 140 S. Ct. at 2461, *citing* Treaty between the United States and the Creek Nation of Indians, arts. III and IX, June 14, 1866, 14 Stat. 785, 786, 788.

The Court stressed in *McGirt* that the Creek treaties promised a "permanent home" that would be "forever set apart," and the Creek were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. The Court concluded that "[u]nder any definition, this was a reservation." *McGirt*, 140 S. Ct. at 2461-62.

2. The Cherokee Treaties Contain the Same or Similar Provisions as Creek Treaties.

"Each tribe's treaties must be considered on their own terms," in determining reservation status. *Id.* at 2479. The approval of Creek and Cherokee treaties during the same period of time, and the similarity of Creek treaties described in *McGirt* and Cherokee treaties, conclusively demonstrate that the Cherokee Reservation was established by treaty.

Cherokee Nation was originally located in what are now the states of Georgia, Alabama, Tennessee, South Carolina, North Carolina, and Kentucky. Wilkins, Thurman, *Cherokee Tragedy: The Ridge Family and the Decimation of a People* 22, 91, 209, 254 (rev. 2d ed. 1986) (*Cherokee Tragedy*). Like the Creeks, the Cherokees exchanged lands in the Southeast for new lands in Indian Territory in the 1830s under pressure of the national removal policy. The Indian Removal Act of 1830, Act of May 28, 1830, ch. 148, 4 Stat. 411, which implemented this policy, authorized the President to divide public domain lands into defined "districts" for tribes removing west of the

Mississippi River. *Id.* at § 1. It also provided that the United States would "forever secure and guaranty" such lands to the removed tribes, "and if they prefer it . . . the United States will cause a patent . . . to be made and executed to them for the same[.]" *Id.* at § 3.

In 1831 and 1832, the Supreme Court issued two seminal decisions in cases involving Cherokee Nation resistance to Georgia citizens' trespasses on Cherokee lands. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), the Supreme Court held that Cherokee Nation was a "domestic dependent nation." The following year, the Supreme Court held that Indian tribes were "'distinct political communities, having territorial boundaries, within which their authority is exclusive . . . which is not only acknowledged, but guarantied by the United States,' a power dependent on and subject to no state authority." *McGirt*, 140 S. Ct. at 2477, *citing Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). Despite these decisions, President Jackson persisted in efforts to remove Cherokee citizens from Georgia.

The Cherokee Reservation in Indian Territory was finally established by 1833 and 1835 treaties. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokees on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of those lands, and provided that "a patent" would issue as soon as reasonably practical. *Id.* at art. 1. It confirmed the treaty obligation of the parties upon ratification. *Id.* at art. 7.

However, there were internal disputes within Cherokee Nation, and the 1833 treaty failed to achieve removal of the majority of Cherokee citizens. Two Cherokee groups represented divisive viewpoints of what was best for the Cherokee people. The group led by John Ross, who represented a majority of Cherokee citizens, opposed removal. The other group, led by John Ridge,

supported removal, fearing that tribal citizens would quickly lose their lands if conveyed to them individually in the southeastern states. *Cherokee Tragedy* at 266-68.

Almost three years after the 1833 treaty, members of the Ridge group signed the treaty at New Echota. Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478. Containing language similar to wording in the 1832 and 1833 Creek treaties, the 1835 Cherokee treaty was ratified "with a view to re-unite their people in one body and to secure to them a *permanent home* for themselves and their posterity," in what became known as Indian Territory, "*without the territorial limits of the state sovereignties*, and "*where they could establish and enjoy a government of their* choice, and perpetuate such a state of society as might be consonant with their views, habits and condition." *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872) (emphasis added).

Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." *Id.* at art. 2. Like Creek treaties the 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government . . . within their own country," so long as consistent with the Constitution and laws enacted by Congress regulating

trade with Indians; and provided that it would be "obligatory on the contracting parties" after ratification by the Senate and the President. *Id.* at arts. 1, 5, 8; art. 19, 7 Stat. 478.

As of January 1838, approximately 2,200 Cherokees had removed to Indian Territory, and around 14,757 remained in the east. *See The Western Cherokee Indians v. United States*, 27 Ct. Cl. 1, 3, 1800 WL 1779 (1891). That spring, the army rounded up most of the remaining Cherokees who had refused to remove within the time allotted. "They were seized as they worked in their farms and fields . . . They remained in captivity for months while hundreds died from inadequate and unaccustomed rations. The debilitation of others contributed to deaths during the removal march." Rogin, Michael Paul, *Fathers & Children: Andrew Jackson and the Subjugation of the American Indian* 241 (1991).

After removal, on December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new reservation. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The patent recited the United States' treaty commitments to convey these lands to the Nation. *Id.* at 307. The title was held by Cherokee Nation "for the common use and equal benefit of all the members." *Id.* at 307; *see also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894). A few years later, an 1846 treaty between Cherokee Nation and the United States also required federal issuance of a deed to the Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the "Neutral Lands") and the "outlet west." Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871.

Like Creek Nation, Cherokee Nation negotiated a treaty with the United States after the Civil War. Treaty with the Cherokee, July 19, 1866, art. 4, 14 Stat. 799. The 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet), Treaty with the Cherokee, *id.* at art. 16, and

required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country . . . until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." It also expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. ("The Cherokee Nation hereby cedes . . . to the United States, the tract of land in the State of Kansas which was sold to the Cherokees . . . and also that strip of the land ceded to the nation . . . which is included in the State of Kansas, and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said State"). *Id.* at art. 17. None of the other provisions of the 1866 treaty affected Cherokee Nation's remaining reservation lands. Instead, the treaty required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council." *Id.* at art. 21.

The 1866 treaty recognized the Nation's control of its reservation, by expressly providing: "*Whenever the Cherokee national council shall request it*, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States." *Id.* at art. 20 (emphasis added). It also guaranteed "to the people of the Cherokee Nation the quiet and peaceable possession of their country," and promised federal protection against "intrusion from all unauthorized citizens of the United States" and removal of persons not "lawfully residing or sojourning" in Cherokee Nation. *Id.* at arts. 26, 27. It "*re-affirmed and declared to be in full force*" all previous treaty provisions "not inconsistent with the provisions of" the 1866 treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims

or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. *Id.* at art. 31 (emphasis added).

Like Creek treaties, the Cherokee treaties involved exchange of tribal homelands in the East for a new homeland in Indian Territory, deeded to the Nation, and included the promise of a permanent home and the assurance of the right to self-government outside the jurisdiction of a state. These treaties established the Cherokee Reservation.

3. Special Terminology Is Not Required to Establish a Reservation, and Tribal Fee Ownership Is Not Inconsistent with Reservation Status.

In *McGirt*, the Court rejected Oklahoma's argument that Creek treaties did not establish a reservation and instead created a dependent Indian community, as defined by 18 U.S.C. § 1151(b) ("all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state"). *McGirt*, 140 S. Ct. at 2475-76. The "entire point" of this reclassification attempt was "to avoid *Solem's* rule that only Congress may disestablish a reservation."[16] *Id.* at 2474. The Court was not persuaded by Oklahoma's argument that a reservation was not created due to tribal fee ownership of the lands, and the absence of the words "reserved from sale" in the Creek treaties. *Id.* The Creek land was reserved from sale in the "very real sense" and that the United States could not give the tribal lands to others or appropriate them to its own purposes, without engaging in "an act of confiscation." *Id.* at 2475, *citing United States v. Creek Nation*, 295 U.S. 103, 110 (1935). Additionally, fee title is not inherently incompatible with reservation status, and that the establishment of a reservation does not require a "particular form of words." *McGirt*, at 2475,

[16] Neither the United States nor the dissent made any arguments supporting Oklahoma's novel dependent Indian community theory. *McGirt*, 140 S.Ct. at 2474.

citing Maxey v. Wright, 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock,* 185 U.S. 373, 390 (1902).

The "most authoritative evidence of [a tribe's] relationship to the land" does not lie in scattered references to "stray language from a statute that does not control here, a piece of congressional testimony there, and the scattered opinions of agency officials everywhere in between." *McGirt,* 140 S. Ct. at 2475. "[I]t lies in the treaties and statutes that promised the land to the Tribe in the first place." *Id.* at 2476. As previously noted, the 1830 Indian Removal Act promised issuance of fee patents upon removal of tribes affected by its implementation, which were granted to Creek Nation and Cherokee Nation. The treaties for both tribes contain extensive evidence of their relationships with their respective lands in Indian Territory. The Cherokee Reservation was established by treaty, just as Creek treaties established the Creek Reservation. As with Creek Nation, later federal statutes also recognized the existence of the Cherokee Reservation as a distinct geographic area.[17]

[17] *See* Act of June 21, 1906, ch. 3504, 34 Stat. 325, 342-43 (drawing recording districts in the Indian Territory, including district 27, with boundaries along the northern and western "boundary line[s] of the Cherokee Nation," and district 28, described as "lying within the boundaries of the Cherokee Nation"); § 6, 34 Stat. 277 ("the third district for the House of Representatives must (with the exception of that part of recording district numbered twelve, which is in the Cherokee and Creek nations) comprise all the territory now constituting the Cherokee, Creek, and Seminole nations and the Indian reservations lying northeast of the Cherokee Nation, within said State"); Act of June 30, 1913, ch. 4, § 18, 38 Stat. 77, 95 ("common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations"); and the Oklahoma Indian Welfare Act, Act of June 26, 1936, ch. 831, 49 Stat. 1967, codified at 25 U.S.C. §§ 5201-5210 (authorizing Secretary of the Interior to acquire land "within or without existing Indian reservations" in Oklahoma).

4. The Cherokee Reservation Has Been Diminished Only by Express Cessions of Portions of the Reservation in Its 1866 Treaty and Its 1891 Agreement.

The current boundaries of Cherokee Nation are as established in Indian Territory in the 1833 and 1835 treaties, diminished only by the express cessions in the 1866 treaty described in Part D, Section C of this brief, and by an 1891 agreement ratified by Congress in 1893 Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43 (1891 Agreement). The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906).[18] The 1893 ratification statute required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. *Id.* at 112. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time.

The original 1839 Cherokee Constitution established the boundaries as described in its 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject

[18] *See* App. at 14, Att. 4 (Map, Goins and Goble, "Historical Atlas of Oklahoma" at 61 (4th Ed. 2006), showing the Cherokee Outlet ceded by the 1891 Agreement, as well as the Kansas lands, known as the Neutral Lands, and the Cherokee Strip ceded by the 1866 Treaty.

to such modification as may be made necessary" by the 1866 treaty.[19] Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." 1999 Cherokee Constitution, art. 2.

D. Congress Has Not Disestablished the Cherokee Reservation.

1. Only Congress Can Disestablish a Reservation by Explicit Language for the Present and Total Surrender of All Tribal Interests in the Affected Lands.

Congress has not disestablished the Cherokee Reservation as it existed following the last express Cherokee cession in the 1891 Agreement ratified in 1893. All land within reservation boundaries, including fee land, remains Indian country under 18 U.S.C. § 1151(a). Courts do not lightly infer that Congress has exercised its power to disestablish a reservation. *McGirt*, 140 S. Ct. at 2462, *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 2468, *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). 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).

[19] 1839 constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, *reprinted* in Volume I of West's Cherokee Nation Code Annotated (1993 ed.).

A reservation disestablishment analysis focuses on 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. *Id.* 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 2462*, citing Solem*, 465 U.S. at 470. It 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).

2. Allotment of Cherokee Land Did Not Disestablish the Cherokee Reservation.

The General Allotment Act, which authorized allotment of the lands of most tribes nationwide, was expressly inapplicable to the Five Tribes. Act of Feb. 8, 1887, ch. 119, § 8, 24 Stat. 38. In 1893, in the same statute ratifying the 1891 Agreement, Congress established the Dawes Commission to negotiate agreements with the Five Tribes for "the extinguishment of the national or tribal title to any lands" in Indian Territory "either by cession," by allotment or by such other method as agreed upon. § 16, 27 Stat. 612, 645–646.[20] The Commission reported in 1894 that the Creek Nation "would not, under any circumstances, agree to cede any portion of their

[20] As previously noted, Congress clearly knew how to diminish reservations when it enacted the 1893 Act, which also ratified the 1891 Agreement, in which Cherokee Nation agreed to "cede" Cherokee Outlet lands to the United States in exchange for payment.

lands." *McGirt*, 140 S. Ct. at 2463.[21] The Cherokee Nation resisted allotment for almost a decade longer, but finally ratified an agreement in 1902. Act of July 1, 1902, ch. 1375, 32 Stat. 716 (Cherokee Agreement). Like the Creek Allotment Agreement, Act of Mar. 1, 1901, ch. 676, 31 Stat. 861 (Creek Agreement) the Cherokee Agreement contained no cessions of land to the United States, and did not disestablish the Cherokee Reservation, which also "survived allotment." *See McGirt*, 140 S. Ct. at 2464.[22] Where Congress contemplates, but fails to enact, legislation containing express disestablishment language, the statute represents "a clear retreat from previous congressional attempts to vacate the . . . Reservation in express terms [.]" *DeCoteau*, 420 U.S. at 448.

The central purpose of the 1902 Cherokee Agreement, like that of the Creek Agreement, was to facilitate transfer of title from the Nation of "allottable lands" (defined in § 5, 32 Stat. 716, as "all the lands of the Cherokee tribe" not reserved from allotment)[23] to tribal citizens individually.

---

[21] Although *McGirt* referenced only Creek Nation in this statement, the 1894 report reflects that each of the Five Tribes refused to cede tribal lands to the United States. App. at 21, Att. 7 (Ann. Rept. of the Comm. Five Civ. Tribes of 1894, 1895, and 1896 at 14 (1897). This refusal is also reflected in the Commission's 1900 annual report: "*Had it been possible to secure from the Five Tribes a cession to the United States of the entire territory at a given price*, . . . the duties of the commission would have been immeasurably simplified . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty . . . *it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment*, no matter how simple its evolutions." App. at 32, Att. 9 (Seventh Ann. Rept. of the Comm. Five Civ. Tribes at 9 (1900) (emphasis added).

[22] Even the dissent did not "purport to find any of the hallmarks of diminishment in the Creek Allotment Agreement." *McGirt*, 140 S.Ct. at 2465 n.5.

[23] Lands reserved from allotment included schools, colleges, and town sites "in Cherokee Nation," cemeteries, church grounds, an orphan home, the Nation's capital grounds, its national jail site, and its newspaper office site. §§ 24, 49, 32 Stat. at 719-20, 724; *see also* Creek Agreement, § 24, 31 Stat. at 868-69.

With exceptions for certain pre-existing town sites and other special matters, the Cherokee Agreement established procedures for conveying allotments to individual citizens who could not sell, transfer, or otherwise encumber their allotments for a number of years (5 years for any portion, 21 years for the designated "homestead" portion). §§ 9-17, 32 Stat. at 717; *see also McGirt*, 140 S. Ct. at 2463, *citing* Creek Agreement, §§ 3, 7, 31 Stat. 861, at 862-64.

The restricted status of the allotments reflects the Nation's understanding that allotments would not be acquired by non-Indians, would remain in the ownership of tribal citizens, and would be subject to federal protection. Tribal citizens were given deeds that conveyed to them "all the right, title, and interest" of the Cherokee Nation. § 58, 32 Stat. at 725; *see also McGirt*, 140 S. Ct. at 2463, *citing* Creek Agreement, § 23, 31 Stat. at 867-68. As of 1910, 98.3% of the lands of Cherokee Nation (4,348,766 acres out of 4,420,068 acres) had been allotted to tribal citizens, and an additional 21,000 acres were reserved for town sites, schools, churches, and other uses.[24] Only 50,301 acres scattered throughout the nation remained unallotted in 1910–approximately one percent of the nation's reservation area. *Id.* Later federal statutes, which generally continued restrictions on disposition of allotments, contributed to the loss of individual Indian ownership of allotments over time, based on a variety of factors.[25]

[24] App. at 43, Att. 11 (Ann. Rept. of the Comm. Five Civ. Tribes at 169, 176 (1910)).

[25] *See McGirt*, 140 S.Ct. at 2463, *citing* Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312; *see also* Act of Apr. 26, 1906, ch. 1876, §§ 19, 20, 34 Stat. 137 (Five Tribes Act); Act of Aug. 4, 1947, ch. 458, 61 Stat. 731; Act of Aug. 11, 1955, ch. 786, 69 Stat. 666; Act of Dec. 31, 2018, Pub. L. No. 115-399, 132 Stat. 5331; *see "Fatally Flawed:" State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform,"* Vollmann, Tim, and Blackwell, M. Sharon, 25 Tulsa Law Journal 1 (1989). Congress has also recognized Cherokee Nation's reversionary interest in restricted lands. *See* Act of May 7, 1970, Pub. L. No. 91-240, 84 Stat. 203 (requiring escheat to Cherokee Nation, as the tribe from which title to the restricted interest derived, to be held in trust for the Nation).

"Missing in all this, however, is a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands" required for disestablishment. *McGirt*, 140 S. Ct. at 2464. Allotment alone does not disestablish a reservation. *Id.*, *citing Mattz*, 412 U.S. at 496-97 (explaining that Congress's expressed policy during the allotment era "was to continue the reservation system," and that allotment can be "completely consistent with continued reservation status"); and *Seymour*, 364 U.S. at 356-58 (allotment act "did no more than open the way for non-Indian settlers to own land on the reservation").

3. Allotment Era Statutes Intruding on Cherokee Nation's Right to Self-Governance Did Not Disestablish the Reservation.

Statutory intrusions during the allotment era were "serious blows" to the promised right to Creek self-governance, but did not prove disestablishment. *McGirt*, 140 S. Ct. at 2466. This conclusion is mandated with respect to the Cherokee Reservation as well, in light of the applicability of relevant statutes to both the Creek and Cherokee Nations, and similarities in the Cherokee and Creek Agreements.

The Act of June 28, 1898, ch. 517, 30 Stat. 495 (Curtis Act), provided "for forced allotment and termination of tribal land ownership without tribal consent unless the tribe agreed to allotment." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988)). "[P]erhaps in an effort to pressure the Tribe to the negotiating table," the Curtis Act included provisions for termination of tribal courts. *McGirt*, 140 S. Ct. at 2465, *citing* § 28, 30 Stat. 495, 504–505. A few years later, the 1901 Creek Allotment Act expressly recognized the continued applicability of the Curtis Act abolishment of Creek courts, by providing that it did not "revive" Creek courts.[26]

[26] The Creek Agreement provided that nothing in that agreement "shall be construed to revive or reestablish the Creek courts which have been abolished" by former laws. 31 Stat. at 873, ¶ 47. The

Nevertheless, the Curtis Act's abolishment of Creek courts did not result in reservation disestablishment. *McGirt,* 140 S. Ct. at 2465-66. Although *McGirt* eliminates a need to determine whether Cherokee courts were abolished (and Cherokee Nation requests no determination on that question),[27] there are ample grounds for the conclusion that the Cherokee Agreement, unlike the Creek Agreement, superseded the Curtis Act's abolishment of Cherokee courts. While earlier unratified versions of the Cherokee Agreement contained provisions like those in the Creek Agreement expressly validating the Curtis Act's abolishment of tribal courts, the final version, ratified in 1902, did not.[28] Instead, section 73 of the Cherokee Agreement recognized that treaty

---

1936 OIWA, 25 U.S.C. § 5209, impliedly repealed this limitation on Creek courts. *Muscogee (Creek) Nation v. Hodel,* 851 F.2d at 1446-47.

[27] The Cherokee Nation and Creek Nation operated their court systems years before the Department of the Interior's 1992 establishment of Courts of Indian Offenses in eastern Oklahoma for those tribes that had not yet developed tribal courts. "Law and Order on Indian Reservations," 57 Fed. Reg. 3270-01 (Jan. 28, 1992), and continue to do so.

[28] Unratified agreements that predate the Cherokee Agreement demonstrate that Cherokees ensured that tribal court abolishment was not included in the final Agreement. The unratified January 14, 1899 version stated that the Cherokee "consents" to "extinguishment of Cherokee courts, as provided in section 28 of the [1898 Curtis Act]." App. at 26, Att. 8 (Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899), Appendix No. 2, § 71 at 49, 57). The unratified April 9, 1900 version provided that nothing in the agreement "shall be construed to revive or reestablish the Cherokee courts abolished by said last mentioned act of Congress [the 1898 Curtis Act]." App. at 32, Att. 9 (Seventh Ann. Rept. of the Comm. Five Civ. Tribes at 13 (1900), Appendix No. 1, § 80 at 37, 45); *see also* Act of Mar. 1, 1901, ch. 675, pmbl. and § 72, 31 Stat. 848, 859 (version of Cherokee allotment agreement approved by Congress but rejected by Cherokee voters). The Five Tribes Commission's early efforts to conclude an agreement with Cherokee Nation were futile, "owing to the disinclination of the Cherokee commissioners to accede to such propositions as the Government had to offer." App. at 26, Att. 8 (Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899 at 9-10). The tribal court provisions in the unratified agreements were eliminated from the Cherokee Agreement as finally ratified. The Commission's discussion of the final agreement, before tribal citizen ratification, reflects that allotment was the "paramount aim" of the agreement, App. at 40, Att. 10 (Ninth Ann. Rept. of the Comm. Five Civ. Tribes at 11 (1902)), not erosion of Cherokee government.

provisions not inconsistent with the Agreement remained in force.[29] § 73, 32 Stat. at 727. Treaty protections included the 1866 Treaty's provision that Cherokee courts would "retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." Art. 13, 14 Stat. 799. It is also noteworthy in considering the effects of the Curtis Act that it recognized the continuation of the Cherokee Reservation boundaries by referencing a "permanent settlement in the Cherokee Nation" and "lands in the Cherokee Nation." §§ 21, 25, 30 Stat. at 502, 504.

Another "serious blow" to Creek governmental authority was a provision in the Creek Agreement that conditioned the validity of Creek ordinances "affecting the lands of the Tribe, or of individuals after allotment, or the moneys or other property of the Tribe, or of the citizens" thereof, on approval by the President. *McGirt*, 140 S. Ct. at 2466, *citing* § 42, 31 Stat. at 872. There is no similar limitation on Cherokee legislative authority in the Cherokee Agreement. Even if there had been, such provision did not result in reservation disestablishment, in light of the absence of any of the hallmarks for disestablishment in the Cherokee Agreement, such as cession and compensation. *See McGirt*, 140 S. Ct. at 2465 n.5.

Like the Creek Agreement, § 46, 31 Stat. 872, the Cherokee Agreement provided that tribal government would not continue beyond March 4, 1906. § 63, 32 Stat. at 725. Before that date, Congress approved a Joint Resolution continuing Five Tribes governments "in full force and effect" until distribution of tribal property or proceeds thereof to tribal citizens. Act of Mar. 2, 1906, 34 Stat. 822. The following month, Congress enacted the Five Tribes Act, which expressly

---

[29] Treaty protections also included the Nation's 1835 treaty entitlement "to a Delegate in the House of Representatives when Congress may provide for the same." Art. 7, 7 Stat. 478.

continued the governments of all of the Five Tribes "in full force and effect for all purposes authorized by law, until otherwise provided by law." *McGirt,* 140 S. Ct. at 2466, *citing* § 28, 34 Stat. at 148. The Five Tribes Act included a few incursions on Five Tribes' autonomy. It authorized the President to remove and replace their principal chiefs, instructed the Secretary of the Interior to assume control of tribal schools, and limited the number of tribal council meetings to no more than 30 days annually. *McGirt,* 140 S. Ct at 2466, *citing* §§ 6, 10, 28, 34 Stat. 139–140, 148. The Five Tribes Act also addressed the handling of the Five Tribes' funds, land, and legal liabilities in the event of dissolution. *McGirt,* 140 S. Ct at 2466, *citing* §§ 11, 27, 34 Stat. at 141, 148.

"Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land." *McGirt,* 140 S. Ct. at 2466. Instead, Congress left the Five Tribes "with significant sovereign functions over the lands in question." *Id.* For example, Creek Nation retained the power to collect taxes; to operate schools; and to legislate through tribal ordinances (subject to Presidential approval of certain ordinances as required by the Creek Agreement, § 42, 31 Stat. 872). *Id., citing* §§ 39, 40, 42, 31 Stat. at 871–872. Like the Creek Agreement, the Cherokee Agreement also recognized continuing tribal government authority. As previously noted, it did not require Presidential approval of any ordinance, did not abolish tribal courts, and confirmed treaty rights. § 73, 32 Stat. at 727. It also required that the Secretary operate schools under rules "in accordance with Cherokee laws;" required that funds for operating tribal schools be appropriated by the Cherokee National Council; and required the Secretary's collection of a grazing tax for the benefit of Cherokee Nation. §§ 32, 34, 72, 32 Stat. at 721. "Congress never

withdrew its recognition of the tribal government, and none of its [later] adjustments[30] would have made any sense if Congress thought it had already completed that job." *McGirt*, 140 S. Ct. at 2466.

Instead, Congress changed course in a shift in policy from assimilation to tribal self-governance. *See McGirt*, 140 S. Ct. at 2467. The 1934 Indian Reorganization Act (IRA) officially ended the allotment era for all tribes. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101, *et seq.*)[31] In 1936, OIWA included a section reorganizing tribal authority to adopt constitutions and corporate charters, and repealed all acts or parts of acts inconsistent with the OIWA. 25 U.S.C. §§ 5203, 5209. Cherokee Nation's government, like those of other tribes, was strengthened later by the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975. Act of January 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203 *(codified* at 25 U.S.C. §§ 5301, *et seq.*). The ISDEAA enables Cherokee Nation to utilize federal funds in accordance with multi-year funding agreements after government-to-government negotiations with the Department of the Interior. Congress, for the most part, has treated the Five Tribes in a manner consistent with its treatment of tribes across the country.

[30] "Adjustments" included the 1908 requirement that Five Tribes officials turn over all "tribal properties" to the Secretary of the Interior, § 13, 35 Stat. 316; a law seeking Creek National Council's release of certain money claims against the United States, Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805; and a law authorizing Creek Nation to file suit in the federal Court of Claims for "any and all legal and equitable claims arising under or growing out of any [Creek] treaty or agreement." Act of May 24, 1924, ch. 181, 43 Stat. 139. *See McGirt*, 140 S.Ct. at 2466. The Act of Mar. 19, 1924, ch. 70, 43 Stat. 27, similarly authorized Cherokee Nation to file suit in the federal Court of Claims for the same type of claims against the United States.

[31] The IRA excluded Oklahoma tribes from applicability of five IRA sections, 25 U.S.C. § 5118, but all other IRA sections applied to Oklahoma tribes, including provisions ending allotment.

Notwithstanding the shift in federal policy, the Five Tribes spent the better part of the twentieth century battling the consequences of the "bureaucratic imperialism" of the Bureau of Indian Affairs (BIA), which promoted the erroneous belief that the Five Tribes possessed only limited governmental authority. *Harjo v. Kleppe,* 420 F. Supp. 1110, 1130 (D.D.C.1976), *aff'd sub nom. Harjo v. Andrus,* 581 F.2d 949 (D.C. Cir. 1978) (finding that the evidence "clearly reveals a pattern of action on the part of" the BIA "designed to prevent any tribal resistance to the Department's methods of administering those Indian affairs delegated to it by Congress," as manifested in "deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by § 28 of the [Five Tribes] Act."). This treatment, which impeded the Tribes' ability to fully function as governments for decades, cannot overcome lack of statutory text demonstrating disestablishment. *See Parker*, 136 S. Ct. at 1082.

4. The Events Surrounding the Enactment of Cherokee Allotment Legislation and Later Demographic Evidence Cannot, and Did Not, Result in Reservation Disestablishment.

There is no ambiguous language in any of the relevant allotment-era statutes applicable to Creek Nation and Cherokee Nation, including their separate allotment agreements, "that could plausibly be read as an Act of disestablishment." *McGirt*, 140 S. Ct. at 2468. Events contemporaneous with the enactment of relevant statutes, and even later events and demographics, are not alone enough to prove disestablishment. *Id.* A court may not favor contemporaneous or later practices *instead of* the laws Congress passed. *Id.* There is "no need to consult extratextual sources when the meaning of a statute's terms is clear," and "extratextual sources [may not] overcome those terms." *Id.* at 2469. The only role that extratextual sources can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning. *Id.*

The "perils of substituting stories for statutes" were demonstrated by the "stories" that Oklahoma claimed resulted in disestablishment in *McGirt*. *Id.* at 2470. Oklahoma's long-historical practice of asserting jurisdiction over Indians in state court, even for serious crimes on reservations, is "a meaningless guide for determining what counted as Indian country." *Id.* at 2471. Historical statements by tribal officials and others supporting an idea that "everyone" in the late nineteenth and twentieth centuries believed the reservation system and Creek Nation would be disbanded, without shedding light on any "disputed and ambiguous statutory direction," were merely prophesies that were not self-fulfilling. *Id.* at 2472. Finally, the "speedy and persistent movement of white settlers" onto Five Tribes land throughout the late nineteenth and early twentieth centuries is not helpful in discerning statutory meaning. *Id.* at 2473. It is possible that some settlers had a good faith belief that Five Tribes lands no longer constituted a reservation, but others may not have cared whether the reservations still existed or even paused to think about the question. *Id.* Others may have been motivated by the discovery of oil in the region during the allotment period, as reflected by Oklahoma court "sham competency and guardianship proceedings that divested" tribal citizens of oil rich allotments. *Id.* Reliance on the "practical advantages of ignoring the written law" would be "the rule of the strong, not the rule of law." *Id.*

CONCLUSION

Congress had no difficulties using clear language to diminish reservation boundaries in the 1866 treaty and the 1891 Agreement provisions for the Cherokee Nation's cessions of land in Indian Territory in exchange for money and promises. There are no other statutes containing any hallmark language altering the Cherokee Reservation boundaries as they existed after the 1891 Agreement's cession of the Cherokee Outlet. Clear language of disestablishment was available to Congress when it enacted laws specifically applicable to the Five Tribes as a group and to

INDEX OF ATTACHMENTS
(FILED IN SEPERATELY BOUND APPENDIX)

Appendix Page	Attachment Number	Document
001	1	Cherokee Nation Cross-Deputization Agreements List (1992-2019)
004	2	Cherokee Nation Boundaries and Service Area Maps
011	3	Indian Country Criminal Jurisdictional Chart
014	4	Cherokee Cessions Map, Goins and Goble, "*Historical Atlas of Oklahoma*"
017	5	Map of Indian Territory
019	6	Map of Oklahoma and Indian Territories
021	7	Ann. Rept. of the Comm. Five Civ. Tribes of 1894, 1895, and 1896 (1897)
026	8	Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899) (Excerpts)
032	9	Seventh Ann. Rept. of the Comm. Five Civ. Tribes (1900) (Excerpts)
040	10	Ninth Ann. Rept. of the Comm. Five Civ. Tribes (1902) (Excerpts)
043	11	Ann. Rept. of the Comm. Five Civ. Tribes (1910) (Excerpts)
048	12	Application for Post-Conviction Relief PCD-2005-23
085	13	Trial Court's Order: Finding of Indigency
090	14	Order Determining Indigency for Appellate Counsel
097	15	Federal Court's Order: Finding of Indigency
102	16	Cherokee Nation Real Estate Services Memo
104	17	Cherokee Nation Verification of CDIB/Tribal Citizenship – B.C.
106	18	Cherokee Nation Verification of CDIB/Tribal Citizenship – Susan Young

Cherokee Nation individually, but it did not use it. The Cherokee Reservation boundaries as established by treaty and as defined in the Cherokee Constitution have not been disestablished. Oklahoma has no jurisdiction over crimes, such as Mr. Cole's, that are covered by the GCA and were committed on the reservation.

Respectfully Submitted,

MICHAEL W. LIEBERMAN, OBA #32694
THOMAS D. HIRD, OBA #13580
PATTI PALMER GHEZZI, OBA #6875
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975
Michael_Lieberman@fd.org
Tom_Hird@fd.org
Patti_Palmer_Ghezzi@fd.org
COUNSEL FOR BENJAMIN ROBERT COLE, SR.

VERIFICATION

State of Oklahoma)
) ss:
County of Oklahoma)

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

MICHAEL W. LIEBERMAN

Subscribed and sworn to before me this 12 day of August, 2020.

ANGELA BEERY NOTARY # 14011145 EXP. 12/15/22 PUBLIC STATE OF OKLAHOMA

Notary Public

Commission Number: ______________

My commission expires: ______________

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of August, 2020, a true and correct copy of the foregoing Successive Application for Post-Conviction Relief, along with a separately bound Appendix of Attachments were delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9(B), Rules of the Court of Criminal Appeals.

MICHAEL W. LIEBERMAN

ORIGINAL

1046936544

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG 24 2020
JOHN D. HADDEN
CLERK

BENJAMIN ROBERT COLE, SR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PCD-2020-529**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER REMANDING FOR EVIDENTIARY HEARING

Benjamin Robert Cole, Sr., was tried by jury and convicted of First Degree Murder in the District Court of Rogers County, Case No. CF-2002-597. In accordance with the jury's recommendation the Honorable J. Dwayne Steidley sentenced Petitioner to death. Petitioner seeks post-conviction relief from this conviction and sentence.

In his sole proposition, Petitioner claims the District Court lacked jurisdiction to try him. Petitioner argues that while he is not Indian, his victim, B.C., was a citizen of the Cherokee Nation and the crimes occurred within the boundaries of the Cherokee Nation.

Pursuant to *McGirt v. Oklahoma*, No. 18-9526 (U.S. July 9, 2020), Petitioner's claim raises two separate questions: (a) the Indian status of B.C. and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Rogers 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 victim's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

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 of B.C. as an Indian. The District Court must determine whether (1) B.C. had some Indian blood, and (2) was recognized as an Indian by a tribe or 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 Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony.

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record, to the Clerk of this Court, and counsel for Petitioner, 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

---

[1] *See Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116. *See also United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.2d 1277, 1280-81 (10th Cir. 2001).

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 Rogers County: Petitioner's Successive Application for Post-conviction Relief filed August 12, 2020.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 24th 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:

John D. Hadden

Clerk

FILED IN THE DISTRICT COURT
ROGERS COUNTY OKLAHOMA

SEP 21 2020

CATHI EDWARDS, COURT CLERK

DEPUTY

IN THE DISTRICT COURT OF ROGERS COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,
Plaintiff,
vs.
BENJAMIN ROBERT COLE, SR.,
Defendant.

Rogers County Case No.: CF-2002-597

Court of Criminal Appeals: PCD-2020-529

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

Michael W. Lieberman, OBA No. 32694
Thomas D. Hird, OBA No. 13580
Patti Palmer Ghezzi, OBA No. 6875
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975

Counsel for Benjamin Robert Cole, Sr.

September 21, 2020

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. OKLAHOMA HAS NO CRIMINAL JURISDICTION OVER CRIMES COMMITTED BY OR AGAINST INDIANS IN INDIAN COUNTRY 2

III. B.C. WAS INDIAN 4

IV. THE CRIME OCCURRED IN INDIAN COUNTRY 6

A. Introduction 6

B. The Crime Occurred in Indian Country 7

C. A Reservation Was Established for the Cherokee Nation 7

D. Congress Has Not Specifically Erased Cherokee Nation Boundaries or Disestablished the Reservation 13

V. CONCLUSION 16

CERTIFICATE OF SERVICE 17

INDEX OF ATTACHMENTS

ATTACHMENT 1: Cherokee Nation Verification of CDIB/Tribal Citizenship of B.C.

ATTACHMENT 2: Cherokee Nation Verification of CDIB/Tribal Citizenship of Susan Young

ATTACHMENT 3: Stipulations of the Parties

ATTACHMENT 4: Cherokee Nation Citizenship Application Records

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Cherokee Nation v. Georgia,
30 U.S. 1 (1831) 8

Cherokee Nation v. Hitchcock,
187 U.S. 294 (1902) 11

Cherokee Nation v. Journeycake,
155 U.S. 196 (1894) 11

DeCoteau v. District County Court for Tenth Judicial Dist.,
420 U.S. 425 14

Hagen v. Utah,
510 U.S 399 (1994) 14

Holden v. Joy,
84 U.S. 211 (1872) 9

Mattz v. Arnett,
412 U.S. 481 (1973) 14

McGirt v. Oklahoma,
140 S.Ct. 2452 (2020) .... Passim

Nebraska v. Parker,
577 U.S. 481 (2016) 14

Solem v. Bartlett,
465 U.S. 463 (1984) 13, 14

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329 (1998) 14

United States v. Cherokee Nation,
202 U.S. 101 (1906) 12

United States v. McBratney,
104 U.S. 621 (1882) 3

Worcester v. Georgia,
31 U.S. 515 (1832) 8

FEDERAL CIRCUIT COURT CASES

Murphy v. Royal,
875 F.3d 896 (10th Cir. 2017) 10, 13, 15, 16

Oneida Nation v. Village of Hobart,
968 F.3d 664 (7th Cir. 2020) 1

United States v. Diaz,
679 F.3d 1183 (10th Cir. 2012) 4

United States v. Lossiah,
537 F.2d 1250 (4th Cir. 1976) 4

United States v. Prentiss,
273 F.3d 1277 (10th Cir. 2001) 3, 4

FEDERAL DISTRICT COURT CASES

Malone v. Royal,
2016 WL 6956646 (W.D. Okla. Nov. 28, 2016) 7

United States v. Flores,
2018 WL 6528475 (W.D.N.C. Dec. 12, 2018) 6

STATE COURT CASES

Cravatt v. State,
825 P.2d 277 (Okla. Crim. App. 1992) 2

Ex Parte Nowabbi,
61 P.2d 1139 (Okla. Crim. App. 1936) 2

Hill v. State,
672 P.2d 308 (Okla. Crim. App. 1983) 7

State v. Klindt,
782 P.2d 401 (Okla. Crim. App. 1989) 2

STATUTES

18 U.S.C. § 1151(a) 7, 13, 16

18 U.S.C. § 1152 3

18 U.S.C. § 1153(a) 2

25 U.S.C. § 1321 (Public Law 280)..2

25 U.S.C. § 1903 (4)..5

Act of Mar. 3, 1893, ch. 209, Stat. 612..12

TREATIES

Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414. ....9, 10

Treaty with the Cherokee, Aug. 6, 1846, 9 Stat. 871..11

Treaty with the Cherokee, July 19, 1866, 14 Stat. 799..11, 12

OTHER CHEROKEE NATION

1999 Cherokee Constitution 13

OTHER TREATISES, ARTICLES AND FEDERAL REGISTER NOTICE

1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment,
reprinted in Volume I of West's Cherokee Nation Code Annotated (1993 ed.)..............13

Goins, Charles Robert, and Goble, Danney,
"Historical Atlas of Oklahoma" (4th Ed. 2006)..12

Rogin, Michael Paul, *Fathers & Children: Andrew Jackson and the Subjugation of the American Indian* 241 (1991)..11

Wilkins, Thurman, *Cherokee Tragedy: The Ridge Family and the Decimation of a People.* (rev. 2d ed. 1986) (*Cherokee Tragedy*) 8

IN THE DISTRICT COURT OF ROGERS COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
Plaintiff,	)	
	)	**Rogers County Case No.: CF-2002-597**
vs.	)	
	)	**Court of Criminal Appeals: PCD-2020-529**
BENJAMIN ROBERT COLE, SR.,	)	
Defendant.	)	

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

COMES NOW Petitioner, Benjamin Robert Cole, Sr., 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 28, 2020. By using the analysis as set out in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), and as directed in the August 24, 2020 Oklahoma Court of Criminal Appeals (OCCA) Order Remanding for Evidentiary Hearing, this Court will conclude B.C. was Indian 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 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; Oklahoma has no criminal jurisdiction over Mr. McGirt, a Seminole, whose crimes occurred within the boundaries of the MCN reservation. *McGirt* also established 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 specifically directed by the 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 it has been charged to answer in this hearing. Because *McGirt* controls reservation status **and** federal criminal jurisdiction, Petitioner offers a brief description of those basic principles to place the questions in context.

The OCCA 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 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 jurisdiction, as to Oklahoma, over prosecutions for certain enumerated crimes committed by

---

[1] The 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… 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).

Indians against Indians or non-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 within Oklahoma under the General Crimes Act (GCA) (also known as the "Indian Country Crimes Act" (ICCA));[3] such crimes are subject to federal or tribal 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 09/16/2020).

McGirt 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 eastern half of Oklahoma where Cherokee lands can be found 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

[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.

granted criminal jurisdiction in Indian country, even if the MCN reservation was intact, was a "twist" even the *McGirt* dissenters declined to join. *Id.* at 2476.

If this Court concludes that B.C. was Indian and the crime occurred within the boundaries of the intact Cherokee Nation reservation, Oklahoma has no jurisdiction over Mr. Cole. Rather, jurisdiction rests with the federal courts.

III. B.C. WAS INDIAN

The OCCA instructs in its remand order that the test for whether B.C. was Indian 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). Under that test, this Court must be satisfied B.C. had "some Indian blood" and was "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").[4]

---

[4] Counsel suspects the State will argue that in order to meet the test for Indian status, some minimal quantum of Indian blood is required. That argument is rejected by case law, as exemplified by *Prentiss*, *Diaz*, and *Lossiah*. The spirit of this judicial rejection of a minimum blood quantum can also be seen in recent congressional rejection of 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 September 18, 2020) ("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).

The test for Indian status is satisfied here. B.C. is a registered citizen of the Cherokee Nation, holding Cherokee registry #C0251568 and had 1/16 Cherokee Indian blood according to Bureau of Indian Affairs (BIA) guidelines. *See* Attachment ("Att.") 1 (Cherokee Nation Verification of CDIB/Tribal Citizenship of B.C.).

Oklahoma acknowledges that B.C.'s application for citizenship was made before her death but not approved until after her death. First, there is nothing in the Cherokee Constitution or Cherokee Code that prevents the posthumous registration as a Cherokee citizen. Second, B.C.'s application for citizenship was made by her mother, Susan Young, a registered Cherokee citizen who certified her own degree of Indian blood as 1/8 Cherokee. *See* Att. 2 (Cherokee Nation Verification of CDIB/Tribal Citizenship of Susan Young) and Att. 3 (Stipulation of the Parties) (agreeing that "[a]n application for B.C.'s enrollment with the Cherokee Nation was filed on August 28, 2002. That application was pending at the time of her death on December 20, 2002, and was subsequently approved on June 23, 2003").

Though the term "Indian" is not statutorily defined in the context of federal criminal jurisdiction, reference to the Indian Child Welfare Act (ICWA) provides some guidance in situations involving children such as B.C. B.C. was an Indian child for purposes of the ICWA when she was born because she was eligible for membership in the Cherokee Nation and was the biological child of Susan Young, who was a Cherokee citizen. 25 U.S.C. § 1903 (4). The timing of B.C.'s application for citizenship does not provide a proper basis for denying her Indian status. Att. 4 (Cherokee Nation Citizenship Application Records). Third, even under the Tenth Circuit's "totality-of-the-evidence" approach, B.C. was Indian. In addition to her tribal certification as a Cherokee citizen, the evidence will show:

1) B.C. had some Indian blood through her mother who certified her own degree of Indian blood through the BIA as 1/8 Cherokee;

2) B.C. was born at the Claremore Indian Health Service (IHS) Hospital, a hospital whose provision of health services are reserved for American Indians except in limited circumstances. *See* https://www.ihs.gov/IHM/pc/part-2/p2c1/#2-1.1 (last visited 9/16/2020).

3) B.C.'s birth records at the Claremore Indian Hospital recognize her as Cherokee;

4) B.C. was recognized as Cherokee by the Oklahoma Department of Human Services; and,

5) B.C. lived on the Cherokee Reservation with her parents, where she may have received additional tribal services.

Additionally, Oklahoma's strained interpretation of the Indian status of a child victim has been quickly dispatched when raised by a non-Indian defendant challenging federal jurisdiction by claiming the minor victim was not an enrolled tribal member at the time of the crime, and thus not an Indian for purposes of the GCA. *See United States v. Flores,* 2018 WL 6528475 (W.D.N.C., 2018) (holding federal government was not required to prove that minor victim was an enrolled member of a tribe at the time of the offense where she was enrolled a year after the crimes).

IV. THE CRIME OCCURRED IN INDIAN COUNTRY

A. Introduction.

Cherokee Nation is a federally recognized Indian tribe. 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 Cherokee Reservation boundaries encompass lands in a fourteen-county area, including all of Adair, Cherokee, Craig, Nowata, and Washington Counties and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Sequoyah, Tulsa, and Wagoner Counties, within the borders of the State of Oklahoma.

The OCCA has not addressed whether all lands within the boundaries of the Cherokee Nation constitute Indian country as defined by § 1151(a) ("all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). The United States Supreme Court likewise had not addressed reservation status as to any of the Five Tribes until it decided *McGirt*. *McGirt*, 140 S.Ct at 2463-81.

B. The Crime Occurred in Indian Country.

The State and Petitioner have stipulated that Mr. Cole's crime occurred at 320 S. Moore Avenue, Claremore, Oklahoma. This address is within "the geographic area set out in the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612," as stipulated by the parties. *See* Att. 3. The State, however, is leaving it up to this court to determine whether this particular site constitutes the Cherokee Nation's current "reservation," and thus Indian country as defined by 18 U.S.C. § 1151(a). It is.[5]

C. A Reservation Was Established for the Cherokee Nation.

Under the remand order, Petitioner need only make a prima facie case that the crime occurred on the Cherokee Reservation, which is "Indian country" as defined by §1151 (a). The OCCA (following Black's Law Dictionary's lead) has defined "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

---

[5] The following interactive link can be used to determine if a specific address is located on the Cherokee Reservation: http://geodata.cherokee.org/CherokeeNation/ (last visited 09/16/2020).

threshold and more. The Cherokee Nation's Reservation is intact and over a century of history proves it.

For the Cherokee, as for the Creek, there was a promise "[o]n the far end of the Trail of Tears." *McGirt*, 140 S.Ct. at 2459. Cherokee Nation was originally located in what are now the states of Georgia, Alabama, Tennessee, South Carolina, North Carolina, and Kentucky. Wilkins, Thurman, *Cherokee Tragedy: The Ridge Family and the Decimation of a People*. 22, 91, 209, 254 (rev. 2d ed. 1986) (*Cherokee Tragedy*). Like the Creeks, the Cherokees exchanged lands in the Southeast for new lands in Indian Territory under pressure of the national removal policy. The Indian Removal Act of 1830, Act of May 28, 1830, ch. 148, 4 Stat. 411, authorized the President to divide public domain lands into defined "districts" for tribes removing west of the Mississippi River. *Id.* at § 1. It provided that the United States would "forever secure and guaranty" such lands to the removed tribes, "and if they prefer it...the United States will cause a patent...to be made and executed to them for the same[.]" *Id.* at § 3.

The history of Cherokee Nation's resistance to the intrusion of Georgia citizens into their territory in the Southeast, their successes before the United States Supreme Court in 1831 and 1832 gaining recognition as a "domestic dependent nation" with exclusive authority over its territorial boundaries, and the failure of those legal successes to deter President Jackson from his persistent efforts to remove Cherokee citizens from Georgia, is more fully set out in Mr. Cole's Application for Post-Conviction Relief, which has been filed and is incorporated by reference. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *McGirt*, 140 S.Ct. at 2477, citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). Similarly, the divisiveness that arose between two groups of Cherokee citizens over removal is more fully discussed there. This history provides important context to understand the negotiations that led to the establishment of the Cherokee

Nation reservation in the West and why Cherokee Nation bargained for specific promises that were meant to provide the Cherokee greater protection and to prevent any future incursions into their territory and authority.

The Cherokee Reservation in Indian Territory was finally established by 1833 and 1835 treaties. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokees on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of those lands, and provided that "a patent" would issue as soon as reasonably practical. *Id.* at art. 1. It confirmed the treaty obligation of the parties upon ratification. *Id.* at art. 7.

The 1833 treaty failed to achieve removal of the majority of Cherokee citizens. In 1835 another treaty was signed. New Echota Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478. This treaty was ratified to secure to the Cherokee "a *permanent home* for themselves and their posterity," in what became known as Indian Territory, "*without the territorial limits of the state sovereignties*," and "*where they could establish and enjoy a government of their* choice, and perpetuate such a state of society as might be consonant with their views, habits and condition." *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872) (emphasis added).

Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S.Ct. at 2460. The Cherokee "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return, the United States agreed to convey by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." *Id.* at art. 2. The 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation as a cession; required Cherokee removal to the new lands; covenanted that none of the new

lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government...within their own country." *Id.* at arts. 1, 5, 8; art. 19, 7 Stat. 478.

This Court should "[s]tart with what should be *obvious*" as the *McGirt* Court did: Congress established a reservation for the Cherokee. *McGirt*, 140 S.Ct. at 2460. These early treaties, like the early treaties of the Creeks, did not refer to the Cherokee 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 Cherokee 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 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 Cherokee, 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.[6]

The Cherokee received the additional protection they bargained for when President Van Buren executed a fee patent to the Cherokee Nation for its reservation in 1838. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The patent recited the United States' treaty commitments to convey the land to the Nation and provided title in the Cherokee Nation "for the common use and equal benefit of all the members." *Id.* at 307. *See also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894).

By the end of 1838 most of the remaining Cherokees had been forcibly removed, suffering many deaths "during the removal march." Rogin, Michael Paul, *Fathers & Children: Andrew Jackson and the Subjugation of the American Indian* 241 (1991). *See* Cherokee Nation Amicus Brief for Cherokee history during the removal period.

An 1846 treaty between Cherokee Nation and the United States also required federal issuance of a deed to the Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the "Neutral Lands") and the "outlet west." Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871. The treaty did not disestablish Cherokee Nation reservation boundaries.

Like Creek Nation, Cherokee Nation negotiated a treaty with the United States after the Civil War. Treaty with the Cherokee, July 19, 1866, art. 4, 14 Stat. 799. The 1866 treaty altered

---

[6] It is unknown whether Oklahoma will now march out new reasons or theories to say the Cherokee 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 9/18/2020).

boundaries of Cherokee Nation reservation but reaffirmed its existence and provided Cherokee Nation would "retain the right of possession of and jurisdiction" over all of remaining country. It guaranteed "to the people of the Cherokee Nation the quiet and peaceable possession of their country," and promised federal protection against "intrusion from all unauthorized citizens of the United States" and removal of persons not "lawfully residing or sojourning" in Cherokee Nation. *Id.* at arts. 26, 27. It *"re-affirmed and declared to be in full force"* all previous treaty provisions "not inconsistent with the provisions of" the 1866 treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. *Id.* at art. 31 (emphasis added).

The current boundaries of Cherokee Nation are as established in the 1833 and 1835 treaties, diminished only by the express cessions in the 1866 treaty, and by an 1891 agreement ratified by Congress in 1893 (1891 Agreement).[7] Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43.

---

[7] The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906). *See* Goins, Charles Robert, and Goble, Danney, "Historical Atlas of Oklahoma" (4th Ed. 2006) at 61, (showing the Cherokee Outlet ceded by the 1891 Agreement, as well as the Kansas lands, known as the Neutral Lands, and the Cherokee Strip ceded by the 1866 Treaty). The 1893 ratification statute required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. *Id.* at 112. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time. The fact that the United States thought it necessary for Cherokee Nation to cede any land in the 1891 Treaty is proof in itself that a reservation existed.

The original 1839 Cherokee Constitution established the boundaries as described in its 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries "subject to such modification as may be made necessary" by the 1866 treaty.[8] Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." 1999 Cherokee Constitution, art. 2.

Mr. Cole's crime occurred within the boundaries of Cherokee Nation reservation that was established as described above. The reservation is "Indian country" under 18 U.S.C. § 1151(a) and this Court should so find.

D. Congress Has Not Specifically Erased Cherokee Nation Boundaries or Disestablished the Reservation.

There is a presumption that the Cherokee Nation Reservation continues to exist until Congress acts to disestablish it. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). It is further clear that Mr. Cole bears no burden to show that the reservation has *not* been disestablished. *Murphy*, 875 F.3d at 926 (holding the OCCA improperly required Mr. Murphy to show the Creek reservation had *not* been disestablished). Mr. Cole has demonstrated by more than prima facie evidence that a reservation was established and the crime thus 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 Cherokee reservation, Mr. Cole will briefly address the disestablishment issue.

---

[8] 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, *reprinted in* Volume I of West's Cherokee Nation Code Annotated (1993 ed.).

Courts do not lightly infer that 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 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 Cherokee Nation boundaries and disestablished the Cherokee Nation reservation. Oklahoma's attempt 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 Cherokee. *Id.* The Cherokee Allotment Act contained no language of disestablishment.

There is no ambiguous language in any of the relevant allotment-era statutes applicable to the Creek Nation and Cherokee 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 Cherokee 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 Cherokee Reservation boundaries as they existed after the 1891 Agreement cession of the Cherokee Outlet. As with the Creek, what is missing is "a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected land." *Id.* at 2464.

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").

Cherokee Reservation boundaries as established by treaty and as defined in the Cherokee Constitution have not been disestablished. By applying the decision in *McGirt* to the Cherokee, this Court must find that the Cherokee 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 the OCCA Order Remanding for Evidentiary Hearing, this Court must conclude B.C. was Indian and the crime occurred in Indian country.

Respectfully Submitted,

MICHAEL W. LIEBERMAN, OBA #32694
THOMAS D. HIRD, OBA #13580
PATTI PALMER GHEZZI, OBA #6875
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975
Michael_Lieberman@fd.org
Tom_Hird@fd.org
Patti_Palmer_Ghezzi@fd.org
COUNSEL FOR BENJAMIN ROBERT COLE, SR.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2020, a true and correct copy of the foregoing *Petitioner's Remanded Hearing Brief Applying McGirt Analysis to Cherokee Nation Reservation* was served via U.S. Mail:

Office of the Oklahoma Attorney General
Jennifer Crabb, Assistant Attorney General
Caroline Hunt, Assistant Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105

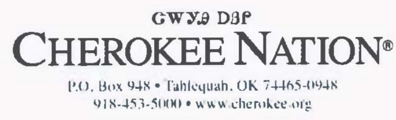
And by Hand-Delivery:

Rogers County District Attorney's Office
Matt Ballard, District Attorney
200 S. Lynn Riggs Blvd.
Claremore, OK 74017

MICHAEL W. LIEBERMAN

ATTACHMENT NO. 1

Cherokee Nation Verification
of CDIB/Tribal Citizenship - B.C.



Office of the Chief

Chuck Hoskin Jr.
Principal Chief

Bryan Warner
Deputy Principal Chief

February 25, 2020 .

VERIFICATION OF CDIB/TRIBAL CITIZENSHIP

To Whom It May Concern:

This is to verify that BRIANNA VICTORIA COLE, DOB: 03/27/2002 is a registered Citizen of the Cherokee Nation, holding Cherokee registry # C0251568.

She has also certified her degree of Indian Blood according to the Bureau of Indian Affairs Guidelines as 1/16 Cherokee.

If you have any questions, please email Derrick-Vann@cherokee.org or contact me at (918) 453-5941.

Sincerely,

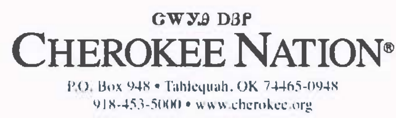
Derrick Vann

Derrick Vann, Associate Tribal Registrar
Cherokee Nation Tribal Registration

This Letter does not reflect a finding of eligibility under 25 U.S.C. § 1901 et seq., the federal Indian Child Welfare Act. According to 25 U.S.C. § 1912 a., legal notice of any involuntary custody proceeding must be submitted to the Cherokee Nation, Indian Child Welfare, P.O. Box 948, Tahlequah OK 74465. ICW will make a determination of eligibility and/or involvement once legal notice has been received. If you have any questions please contact the Cherokee Nation Indian Child Welfare Unit at (918) 458-6900.

ATTACHMENT NO. 2

Cherokee Nation Verification
of CDIB/Tribal Citizenship - Susan Young



Office of the Chief

Chuck Hoskin Jr.
Principal Chief

Bryan Warner
Deputy Principal Chief

February 25, 2020 .

VERIFICATION OF CDIB/TRIBAL CITIZENSHIP

To Whom It May Concern:

This is to verify that SUSAN GAIL YOUNG, DOB: ██████ is a registered Citizen of the Cherokee Nation, holding Cherokee registry # C055877.

She has also certified her degree of Indian Blood according to the Bureau of Indian Affairs Guidelines as 1/8 Cherokee.

If you have any questions, please email Derrick-Vann@cherokee.org or contact me at (918) 453-5941.

Sincerely,

Derrick Vann

Derrick Vann, Associate Tribal Registrar
Cherokee Nation Tribal Registration

This Letter does not reflect a finding of eligibility under 25 U.S.C. § 1901 et seq., the federal Indian Child Welfare Act. According to 25 U.S.C. § 1912 a., legal notice of any involuntary custody proceeding must be submitted to the Cherokee Nation, Indian Child Welfare, P.O. Box 948, Tahlequah OK 74465. ICW will make a determination of eligibility and/or involvement once legal notice has been received. If you have any questions please contact the Cherokee Nation Indian Child Welfare Unit at (918) 458-6900.

ATTACHMENT NO. 3

Stipulations of the Parties

BENJAMIN ROBERT COLE, SR.,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

Rogers County District Court
Case No. CF-2002-00597

Court of Criminal Appeals
Case No. PCD-2020-529

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 320 S Moore Ave, Claremore, OK. This address is within the geographic area set out in the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612.

   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 victim, the parties hereby stipulate and agree as follows:

   a. An application for B.C.'s enrollment with the Cherokee Nation was filed on August 28, 2002. That application was pending at the time of her death on December 20, 2002, and was subsequently approved on June 23, 2003.

   b. B.C. had 1/16 Cherokee blood quantum.

   c. The Cherokee Nation is a federally recognized tribe.

Respectfully submitted,

Michael W. Lieberman
Tom Hird
COUNSEL FOR PETITIONER

Jennifer Crabb
Caroline E.J. Hunt
Julie Pittman
Ashley Willis

Matt Ballard
Rogers County District Attorney
COUNSEL FOR RESPONDENT

ATTACHMENT NO. 4

Cherokee Nation Citizenship Application Records

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
CERTIFICATE OF DEGREE OF INDIAN BLOOD
EASTERN OKLAHOMA REGIONAL OFFICE

June 3, 2003

This is to certify that according to the records of this office and pursuant to the provisions of Section 2, Act of August 4, 1947 (61 Stat. 732)
B C is proven to be 1/16
Degree Cherokee Indian Blood, and whose date of birth is 03/27/2002

	NAME	TRIBE	NUMBER	DEGREE
FATHER:				
MOTHER:	Susan Gail Young	Cherokee	NE	1/8
PATERNAL GRANDFATHER :				
PAT.GR. GRAND FATHER :				
Pat.Gr.Gr. GFather :				
Pat.Gr.Gr. GMother :				
Pat.Gr.Gr.Gr. GFather:				
Pat.Gr.Gr.Gr. GMother:				
PAT.GR. GRAND MOTHER :				
Pat.Gr.Gr. GFather :				
Pat.Gr.Gr. GMother :				
Pat.Gr.Gr.Gr. GFather:				
Pat.Gr.Gr.Gr. GMother:				
PATERNAL GRANDMOTHER :				
PAT.GR. GRAND FATHER :				
Pat.Gr.Gr. GFather :				
Gr.Gr. GMother :				
Pat.Gr.Gr.Gr. GFather:				
Pat.Gr.Gr.Gr. GMother:				
PAT.GR. GRAND MOTHER :				
Pat.Gr.Gr. GFather :				
Pat.Gr.Gr. GMother :				
Pat.Gr.Gr.Gr. GFather:				
Pat.Gr.Gr.Gr. GMother:				
MATERNAL GRANDFATHER :	James Arthur Young	Cherokee	NE	1/4
MAT.GR. GRAND FATHER :				
Mat.Gr.Gr. GFather :				
Mat.Gr.Gr. GMother :				
Mat.Gr.Gr.Gr. GFather:				
Mat.Gr.Gr.Gr. GMother:				
MAT.GR. GRAND MOTHER :	Viola Terrell	Cherokee	16086	1/2
Mat.Gr.Gr. GFather :				
Mat.Gr.Gr. GMother :				
Mat.Gr.Gr.Gr. GFather:				
Mat.Gr.Gr.Gr. GMother:				
MATERNAL GRANDMOTHER :				
MAT.GR. GRAND FATHER :				
Mat.Gr.Gr. GFather :				
Mat.Gr.Gr. GMother :				
Mat.Gr.Gr.Gr. GFather:				
Mat.Gr.Gr.Gr. GMother:				
MAT.GR. GRAND MOTHER :				
Mat.Gr.Gr. GFather :				
Ma Gr.Gr. GMother :				
M r.Gr.Gr. GFather:				
Mat.Gr.Gr.Gr. GMother:				

Verification must be completed on reverse side,

Lela J. Ummutukee
ISSUING OFFICER AGENCY:

ANY ALTERATION OF THE ABOVE CERTIFICATION AUTOMATICALLY RENDERS IT NULL AND VOID.

Certificate of Live Birth, State of Oklahoma, for B[redacted] [redacted] C[redacted], born 3/27/2002, shows her parents to be Susan Gail Young.

Standard Certificate of Live Birth, State of Texas, for Susan Gail Young, born [redacted], shows her parents to be James Arthur Young and Dovie Irene Kelley

Standard Certificate of Live Birth, State of Oklahoma, for James Arthur Young, born [redacted], shows his parents to be Scott Young and Ola Terrell.

Identity Affidavit, signed by James Arthur Young, verifies that Viola Terrell and Ola Terrell are one and the same person.

1962 Per Capita Payment for Viola Terrell, Cherokee #16086, shows her married name to be Viola Young.

Enrollment Census Card #6726, for Viola Terrell, Cherokee #16086, shows her parents to be William Terrell and Elizabeth Lillard. This record also shows she is listed as Cherokee by blood.

cs/cs

CHEROKEE NATION
REGISTRATION DEPARTMENT
P.O. BOX 948
TAHLEQUAH, OK 74465

140819

APPLICATION FOR CERTIFICATE OF DEGREE OF INDIAN BLOOD

Complete the application in INK. List the name(s) of your ancestor(s), the tribe, the correct roll number(s) from the FINAL ROLLS OF CITIZENS AND FREEDMEN OF THE FIVE CIVILIZED TRIBES. Cherokee Nation (Dawes Commission Roll Book) for the ancestor(s) listed with a blood degree and to whom you are tracing; and any CDIB reference. Applications submitted without roll number or CDIB information will be returned to you. Use Ancestry Chart to assist you in filling out this form. PROCESSING TIME IS APPROXIMATELY FOUR TO EIGHT WEEKS!

APPLICANT INFORMATION:

1. B
   Name at Birth and Current Name

1a. Mailing Address

1b. March 27, 2002
   Date of Birth

1c. Claremore Indian Hospital Claremore, OK 74017
   Place of Birth

1d. Social Security Number

PLEASE NOTE: If the ancestor has a CDIB, provide a copy of the ancestor(s) CDIB, only answer the questions to the CDIB ancestor(s), and skip to Question No. 8.

ANCESTRY INFORMATION:

No.	Name	Tribe	Roll #/CDIB	Living or Date of Death
2.	Name of Father	Tribe	Roll #/CDIB	Living or Date of Death
3.	Susan Gail Young Name of Mother (Maiden Name)	Cherokee Tribe	155; 2/19/86 Roll #/CDIB	Living or Date of Death
4.	Father's Father (Grandfather)	Tribe	Roll #/CDIB	Living or Date of Death
4a.	Father of #4 (#8 from chart)	Tribe	Roll #/CDIB	Living or Date of Death
4b.	Mother of #4 (#9 from chart)	Tribe	Roll #/CDIB	Living or Date of Death
5.	Father's Mother (Grandmother)	Tribe	Roll #/CDIB	Living or Date of Death
5a.	Father of #5 (#10 from chart)	Tribe	Roll #/CDIB	Living or Date of Death
5b.	Mother of #5 (#11 from chart)	Tribe	Roll #/CDIB	Living or Date of Death
6.	Mother's Father (Grandfather)	Tribe	Roll #/CDIB	Living or Date of Death
6a.	Father of #6 (#12 from chart)	Tribe	Roll #/CDIB	Living or Date of Death
6b.	Mother of #6 (#13 from chart)	Tribe	Roll #/CDIB	Living or Date of Death
7.	Mother's Mother (Grandmother)	Tribe	Roll #/CDIB	Living or Date of Death
7a.	Father of #7 (#14 from chart)	Tribe	Roll #/CDIB	Living or Date of Death AUG 28 2002
7b.	Mother of #7 (#15 from chart)	Tribe	Roll #/CDIB	Living or Date of Death

(8) Does the applicant have a ☐ "Standard" or a ☐ "Delayed" **STATE CERTIFIED, FULL IMAGE/PHOTOCOPY OF BIRTH RECORD?** Submit with application. **NO XEROX COPIES.**

(9) Do the applicant's parents have CDIB's? ☐ YES or ☐ NO. If YES, submit a copy of the CDIB card. If NO, submit "Standard" or "Delayed" **STATE CERTIFIED, FULL IMAGE/PHOTOCOPY OF BIRTH OR DEATH RECORD. NO XEROX COPIES.**

(10) PLEASE provide the names of other family members who are tracing back to the same ancestor(s) (such as brothers or sisters). **THIS REFERENCE CAN BE HELPFUL IF THE CDIB WAS ISSUED WITHIN THE PAST FIVE (5) YEARS.** Give name and date CDIB was issued **OR** provide a copy of the CDIB:

____

(11) Is applicant adopted? ☐ YES ☒ NO If so, submit adoption papers. Without these, application will be returned.

ALL INFORMATION WILL REMAIN CONFIDENTIAL

(12) Is applicant **under Divorce ordered custody**, or **any other court order**? If so, submit legal papers. Without these, application will be returned.

☐ YES or ☒ NO

STATEMENTS OR ENTRIES GENERALLY Whoever, in any matter within the jurisdiction of any department or agency of the united States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c 645, 62 Stat. 749.

AUTHORIZATION FOR RELEASE OF INFORMATION

Print

I, Susan Young, AUTHORIZE THE RELEASE OF INFORMATION REQUESTED BY THE REGISTRATION DEPARTMENT OF THE CHEROKEE NATION. THE REQUESTED INFORMATION SHALL BE USED SOLELY IN THE ADMINISTRATION OF REGISTRATION RELATED PROGRAMS. COLLATERALS THAT MAY BE CONTACTED INCLUDE, BUT ARE NOT LIMITED TO: PROGRAMS AND SERVICES OF THE CHEROKEE NATION, BUREAU OF INDIAN AFFAIRS, INDIAN HEALTH SERVICE, SCHOOL AUTHORITIES, LOCAL, STATE, AND FEDERAL AGENCIES, AND PRIVATE INDIVIDUALS.

Sign Susan Young
Signature of person making this application

Witness if signed with an "X"

The above signature is by:
[ ] Person himself/herself
[X] Next-of-kin mother (Relationship) X
[ ] Authorized Agent

X 8-28-02
DATE OF THIS APPLICATION

PLEASE NOTE: THE APPLICATION PROCESS TAKES APPROXIMATELY FOUR TO EIGHT WEEKS

REG FORM-C1(3/91)

CERTIFICATE OF LIVE BIRTH

STATE OF OKLAHOMA-DEPARTMENT OF HEALTH 02-010808

0055000000382- 1 STATE FILE NO. 135-

1. CHILD'S NAME (First, Middle, Last)	2. DATE OF BIRTH (Month, Day, Year)	3. TIME OF BIRTH
B[redacted] [redacted] C[redacted]	March 27, 2002	10:31 AM

4. SEX	5. CITY, TOWN, OR LOCATION OF BIRTH	6. COUNTY OF BIRTH
Female	Claremore	Rogers

7. PLACE OF BIRTH	8. FACILITY NAME (If not institution, give street and number)
Hospital	PHS Indian Hospital

9. I certify that the child was born alive at the place and time on the date stated. Signature *Carolyn Henson*	10. DATE SIGNED 4-1-02	11. ATTENDANT'S NAME AND TITLE (If other than certifier) (Type/Print) Name Andino,Raul Title M.D.

12. CERTIFIER'S NAME AND TITLE (Type/Print)	13. ATTENDANT'S MAILING ADDRESS
Name Carolyn Henson	Street and Number or Rural Route 101 South Moore Avenue
Title Medical Records Technician	City or Town Claremore
14. DATE RECEIVED BY LOCAL REGISTRAR APR 0 5 2002	State Oklahoma 74017-0000

15a. STATE REGISTRAR'S SIGNATURE	15b. DATE FILED BY STATE REGISTRAR (Month, Day, Year)
John C. Burks	APR 0 5 2002

16a. MOTHER'S NAME (First, Middle, Last)
Susan Gail Young

16b. MAIDEN SURNAME	17. DATE OF BIRTH (Month, Day, Year)	18. BIRTHPLACE (State or Foreign Country)
Young	[redacted]	Texas

19a. RESIDENCE - STATE	19b. COUNTY	19c. CITY, TOWN, OR LOCATION	19d. STREET AND NUMBER
Oklahoma	Rogers	Claremore	[redacted]

19e. INSIDE CITY LIMITS?	20. MOTHER'S MAILING ADDRESS (If same as residence, enter Zip Code only)
Yes	74017-0000

21. FATHER'S NAME (First, Middle, Last)	22. DATE OF BIRTH (Month, Day, Year)	23. BIRTHPLACE (State or Foreign Country)

24. Permission given to provide Social Security Administration with the necessary information to issue a Social Security Number.
Yes Initials *SGY*

25. I certify that the personal information provided on this certificate is correct to the best of my knowledge and belief.
Signature of Parent *Susan Gail Young*

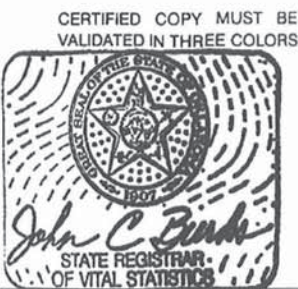
THIS LINE FOR USE OF STATE REGISTRAR	DATE CORRECTIONS MADE	ITEMS CORRECTED	AUTHOR'TY	CLERK

State Department of Health

State of Oklahoma

OKLAHOMA CITY, OKLAHOMA 73

CERTIFIED COPY MUST BE VALIDATED IN THREE COLORS



I hereby certify the foregoing to be a true and correct copy, original of which is on file in this office. In testimony whereof, I have hereunto subscribed my name and caused the official seal to be affixed, at Oklahoma City, Oklahoma, this date.

May 9, 2002

CHEROKEE NATION
REGISTRATION DEPARTMENT
P.O. BOX 948
TAHLEQUAH, OKLAHOMA 74465

APPLICATION FOR MEMBERSHIP IN THE CHEROKEE NATION

(PLEASE PRINT IN INK)

C[redacted] | B[redacted] | [redacted] | —
LAST NAME | FIRST | MIDDLE | MAIDEN

DATE OF BIRTH: 03 /27 /02 (MO. DAY YEAR) ☐ MALE ☒ FEMALE [redacted] SOCIAL SECURITY NUMBER

P.O. Box 394 — Claremore, OK 74018
MAILING ADDRESS (NUMBER, STREET, ROUTE, BOX) CITY STATE ZIP

Are you a registered member of any other Tribe? ☐ YES ☒ NO Tribe: —

Have you registered as a member of the Cherokee Nation before? ☐ YES ☒ NO
When?______ Registration Number?______

Please attach a "COPY" of the Certificate of Degree of Indian Blood (CDIB) Card to the application. ***NO MEMBERSHIP CARD WILL BE ISSUED UNTIL CERTIFICATION IS AVAILABLE FROM THE BIA.***

Check the county where you reside:

☐ Adair	☐ Muskogee
☐ Cherokee	☐ Nowata
☐ Craig	☐ Ottawa
☐ Delaware	☒ Rogers
☐ Mayes	☐ Sequoyah
☐ McIntosh	☐ Tulsa

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
EASTERN OKLAHOMA REGIONAL OFC.
Certificate of Degree of Indian Blood

This is to certify that B[redacted] C[redacted] ...oma
born 03/27/2002 is 1 / 16 degree Indian blood of the Cherokee Tribe.
06/03/2003 [signature]
Date Issuing Officer

8-28-02
Date of Signature

[signature] Susan Young
Signature of Applicant (IN INK)

DO NOT WRITE BELOW THIS LINE

CHEROKEE REGISTRY NUMBER	C0251568

☒ APPROVED ☐ DISAPPROVED

REASON: ______

REG FORM-M1(3/91)

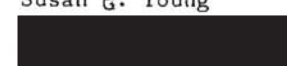
[signature] Registrar — JUN 2 3 2003 Date

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Tahlequah Agency
P.O. Box 825
Tahlequah, Oklahoma 74465

CHEROKEE NATION

Susan G. Young



CERTIFICATE OF DEGREE OF INDIAN BLOOD

2-19-86

This is to certify that according to the records of this office and pursuant to the provisions of Section 2, Act of August 4, 1947 (61 Stat. 732) Susan Gail Young is proven to be 1/8 Degree Cherokee Indian Blood, and whose date of birth is [redacted].

	Name	Tribe	Roll Number	Degree of Indian Blood
Father:	James Arthur Young	Cherokee	NE	1/4
Mother:				
Paternal Grandfather:				
Gr. Pat. Grandfather:				
Gr. Pat. Grandmother:				
Paternal Grandmother:	Viola Terrell	Cherokee	16086	1/2
Gr. Pat. Grandfather:				
Gr. Pat. Grandmother:				
Maternal Grandfather:				
Gr. Mat. Grandfather:				
Gr. Mat. Grandmother:				
Maternal Grandmother:				
Gr. Mat. Grandfather:				
Gr. Mat. Grandmother:				

VERIFICATION:

Standard Certificate of Live Birth, State of Texas, for Susan Gail Young, born [redacted], shows her parents to be James Arthur Young and Dovie Irene Kelley.

Standard Certificate of Live Birth, State of Oklahoma, for James Arthur Young, born [redacted], shows his parents to be Scott Young and Ola Terrell.

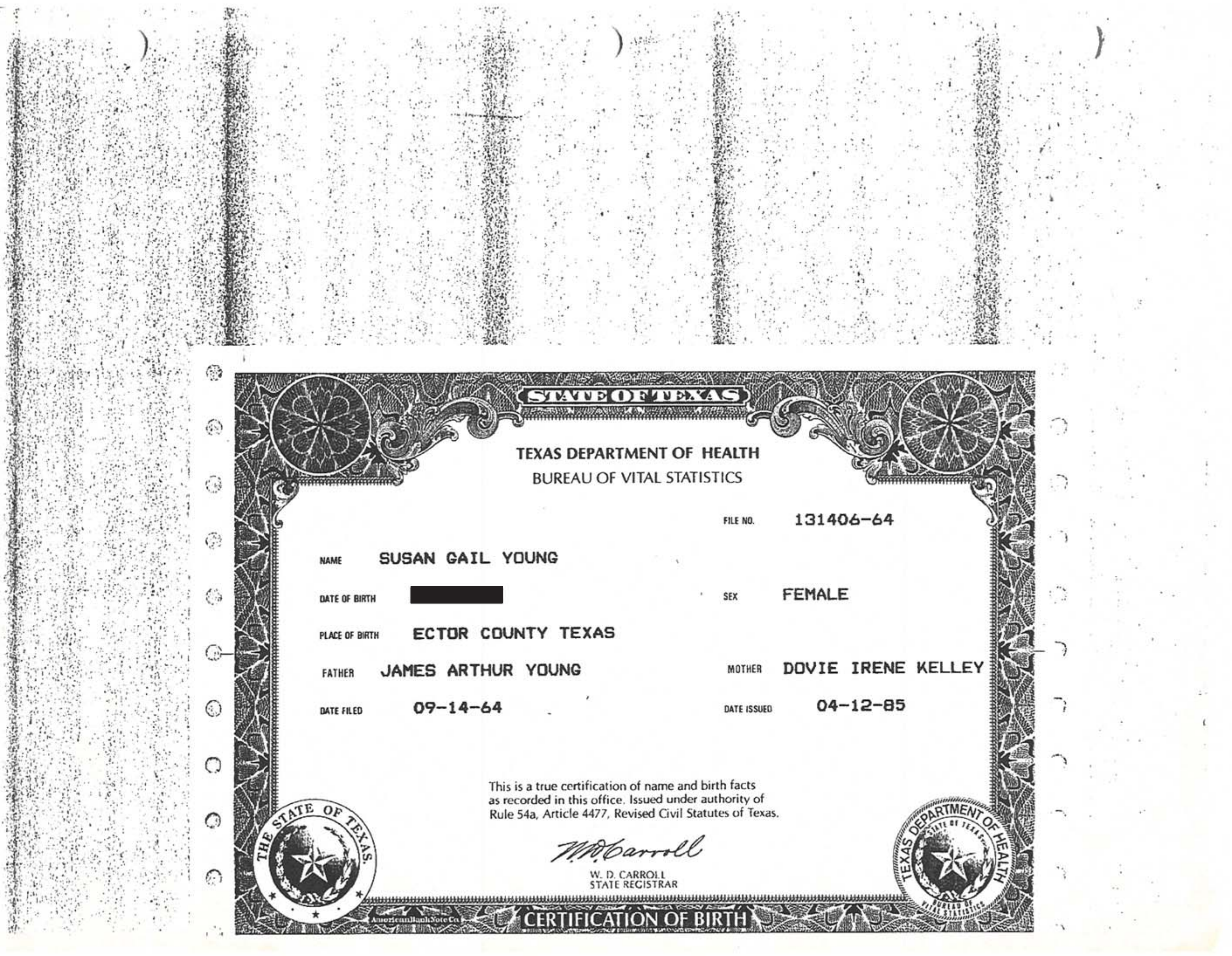
Identity Affidavit, signed by James Arthur Young, verifies that Viola Terrell and Ola Terrell are one and the same person.

1962 Per Capita Payment for Viola Terrell, Cherokee #16086, shows her married name to be Viola Young.

bp

Certifying Officer

ANY ALTERATION OF THE ABOVE CERTIFICATION AUTOMATICALLY RENDERS IT NULL AND VOID.



STATE OF TEXAS

TEXAS DEPARTMENT OF HEALTH

BUREAU OF VITAL STATISTICS

		FILE NO.	131406-64
NAME	SUSAN GAIL YOUNG		
DATE OF BIRTH	[redacted]	SEX	FEMALE
PLACE OF BIRTH	ECTOR COUNTY TEXAS		
FATHER	JAMES ARTHUR YOUNG	MOTHER	DOVIE IRENE KELLEY
DATE FILED	09-14-64	DATE ISSUED	04-12-85

This is a true certification of name and birth facts as recorded in this office. Issued under authority of Rule 54a, Article 4477, Revised Civil Statutes of Texas.

W. D. Carroll

W. D. CARROLL
STATE REGISTRAR

THE STATE OF TEXAS.

TEXAS DEPARTMENT OF HEALTH

CERTIFICATION OF BIRTH

CHEROKEE REGISTRATION
P.O. BOX 948
TAHLEQUAH, OKLAHOMA 74465

APPLICATION FOR MEMBERSHIP IN THE CHEROKEE TRIBE OF OKLAHOMA

Young,	Susan	Gail		Female	[redacted]
Last Name	First	Middle	Maiden	Male/Female	Mo/Day/Year Date of Birth

[redacted]

Mailing Address (Number, Street, Route, Box) City State Zip Code

Are you a registered member of any other Tribe? Yes___ No ✓ Tribe________

Have you registered to vote with this office before? Yes___ No ✓
When?______________ Registration Number?____________

Please attach a Certificate of Degree of Indian Blood from the Bureau of Indian Affairs Office. NO MEMBERSHIP CARD WILL BE ISSUED UNTIL CERTIFICATION IS AVAILABLE FROM THE BIA.

Check the county where you will vote:

/_/ Adair	/_/ Muskogee	/_/ Sequoyah
/✓/ Cherokee	/_/ McIntosh	/_/ Tulsa
/_/ Craig	/_/ Nowata	/_/ Wagoner
/_/ Delaware	/_/ Ottawa	/_/ Washington
/_/ Mayes	/_/ Rogers	/_/ By Absentee Ballot

December 24 1985
Date of Signature

Susan Gail Young
Signature of Applicant

DO NOT WRITE BELOW THIS LINE

Cherokee Registry Number C055877

/X/Approved

/_/Disapproved

Reason:

Date: 6-17-86

Registration Clerk: Lu

CODED

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
TAHLEQUAH AGENCY

Certificate of Degree of Indian Blood

This is to certify that Susan Gail Young

born [redacted] is 1/8 degree Indian blood

of the Cherokee Tribe

2/19/86
Date

[signature]
Issuing Officer

REGISTRATION DEPARTMENT
POST OFFICE BOX 948
TAHLEQUAH, OKLAHOMA 74465
APPLICATION FOR CERTIFICATE OF DEGREE OF INDIAN BLOOD

No.				
1.	Susan G. Young Name of Applicant	2.	[redacted] Home Address	
3.	[redacted] Date of Birth	4.	Odessa, Texas Place of Birth	
5.	J. Arthur Young Name of Father	Tribe	Roll Number	Living Living or Deceased
6.	Name of Mother	Tribe	Roll Number	Living or Deceased
7.	Paternal Grandfather	Tribe	Roll Number	Living or Deceased
7a.	Paternal Gr. Grandfather	Tribe	Roll Number	Living or Deceased
7b.	Paternal Gr. Grandmother	Tribe	Roll Number	Living or Deceased
8.	Viola (Terrell) Young Paternal Grandmother	Cherokee Tribe	16086 Roll Number	Deceased Living or Deceased
8a.	Paternal Gr. Grandfather	Tribe	Roll Number	Living or Deceased
8b.	Paternal Gr. Grandmother	Tribe	Roll Number	Living or Deceased
9.	Maternal Grandfather	Tribe	Roll Number	Living or Deceased
9a.	Maternal Gr. Grandfather	Tribe	Roll Number	Living or Deceased
9b.	Maternal Gr. Grandmother	Tribe	Roll Number	Living or Deceased
10.	Maternal Grandmother	Tribe	Roll Number	Living or Deceased
10a.	Maternal Gr. Grandfather	Tribe	Roll Number	Living or Deceased
10b.	Maternal Gr. Grandmother	Tribe	Roll Number	Living or Deceased

11. Does the applicant have a "certified" Standard Birth Certificate? Yes (✓) No ( ) If so, submit with application.

11a. Does the applicant have a "certified" Delayed Birth Certificate? Yes ( ) No (✓) If so, submit with application, however, additional information will be required such as a Final Decree relative to probate proceedings and the like. Also affidavits of personal knowledge. You will be advised in person or by mail as to what supplemental documentary evidence will be required.

12. Do applicant's parents have "certified" Standard Birth Certificates? Yes ( ) No (✓) If so, submit with application.

13. Have there been probate proceedings for a parent or grandparent? Yes ( ) No (✓) If so, submit copy of Final Decree with application.

14. Have you or an immediate member of your family ever applied for and received a Certificate of Degree of Indian Blood from this office? Yes ( ) No (✓) If so, give name and date certificate was issued: __________

15. Is applicant adopted? Yes ( ) No (✓) If so, submit adoption papers.

16. Social security number: [redacted]

RECEIVED
DEC 24 1985
CHEROKEE REGISTRATION OFFICE

8/9/64

CHEROKEE NATION
REGISTRATION DEPARTMENT
P.O. BOX 948
TAHLEQUAH, OK 74465
INTAKE CONTACT SHEET
MEMBERSHIP CHANGE PROCESS

ENTERED MAY 3 1 1995

DATE: MAY 2 6 1995

TYPE OF CONTACT:
NAME CHANGE ___ ADDRESS CHANGE ✓ DUPLICATE CARD ___ INDIAN PREFERENCE ___

Young / Susan / Gail
LAST NAME / FIRST / MIDDLE / MAIDEN

[redacted] MO/DAY/YEAR DATE OF BIRTH — [redacted] PHONE NUMBER — C0 0055877 REGISTRATION NUMBER

COMPUTER/INFO CK'D BY

PREVIOUS ADDRESS:

[redacted]
MAILING ADDRESS (NUMBER, STREET, ROUTE, BOX) CITY STATE ZIP

CURRENT ADDRESS:

[redacted]
MAILING ADDRESS (NUMBER, STREET, ROUTE, BOX) CITY STATE ZIP

NAME CHANGE:

(WAS): —— (NOW): ——

NAME AND RELATIONSHIP OF PERSON REPORTING CHANGE:

Is the applicant legally represented such as, court appointed guardian or under court ordered custody such as divorce custody? ☐ YES or ☐ NO
If so, submit legal papers with this form.

Susan G. Young
SIGNATURE OF REQUESTING PERSON

This signature is by:
(X) Person himself/herself
( ) Person making request ____
( ) Authorized Agent (Relationship)

REPORT OF CONTACT:

SHIPPED MAY 3 1 1995

REG FORM M2(2/95)

INTAKE CLERK

Attachment 4
Page 11 of 13

CHEROKEE NATION
REGISTRATION DEPARTMENT
PO BOX 948
TAHLEQUAH, OK 74465

DATE: 8-28-02

ADULTS: MUST SIGN OWN FORM IN "INK" AND PROVIDE A COPY OF IDENTIFICATION

MINORS: PARENT/AUTHORIZED AGENT/CUSTODIAL PARENT MAY REQUEST. ID REQUIRED

AUG 29 2002

DUP CDIB: ______ DUP MEM: ______ ADD CHG: X RT IPL: ______ OTHER: ______ AMENDMENT: ______

Young,	Susan	Gail	—
LAST NAME	FIRST	MIDDLE	MAIDEN

[redacted]	C055877	[redacted]	[redacted]
DATE OF BIRTH	REGISTRY NUMBER	TELEPHONE NUMBER	SOCIAL SECURITY

ADDRESS: [redacted] (NUMBER, STREET, RT, BOX) [redacted] CITY STATE ZIP

NAME CHANGE: — WAS — NOW

NAME AND RELATIONSHIP OF PERSON REPORTING CHANGE

Is the applicant legally represented, such as court appointed guardian, or under court ordered custody, such as divorce custody? YES: ______ NO: X

If so, submit legal document with this form.

Susan Young
SIGNATURE OF PERSON REQUESTING

(X) PERSON HIMSELF/HERSELF
( ) PERSON MAKING REQUEST: ______
( ) AUTHORIZED AGENT Relationship

FURTHER EXPLANATION: *ATTACH A COPY OF AN ID THAT VERIFIES YOUR SIGNATURE*

THIS WILL BE USED FOR A SIGNATURE COMPARISON ONLY.

AUG 30 2002

REG FORM C10(2/96 rev.11/00) INTAKE CLERK: ______

FILED IN THE DISTRICT COURT
ROGERS COUNTY OKLAHOMA
NOV 12 2020
CATHI EDWARDS, COURT CLERK
DEPUTY

IN THE DISTRICT COURT IN AND FOR ROGERS COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, **Plaintiff (Respondent),**	)	
	)	**Rogers County Case No.: CF-2002-597**
vs.	)	
	)	**(Court of Criminal Appeals: PCD-2020-529)**
BENJAMIN ROBERT COLE, SR., **Defendant (Petitioner).**	)	

ORDER ON REMAND

This matter came on for hearing before the Court on September 28, 2020, in accordance with the remand order of the Oklahoma Court of Criminal Appeals issued on August 24, 2020. The State appeared by and through Assistant Attorneys General Julie Pittman and Randall Young, and District Attorney Matt Ballard. Defendant appeared by and through Assistant Federal Public Defenders Michael W. Lieberman and Thomas D. Hird. The Court makes its findings based upon the stipulations and evidence presented by the parties, review of the pleadings and attachments in this Court and the Oklahoma Court of Criminal Appeals, and the briefs and argument of counsel.

In the August 24, 2020, Order Remanding for Evidentiary Hearing, the Oklahoma Court of Criminal Appeals directed this Court as follows:

> The District Court shall address only the following issues:
>
> First, the status of B.C. as an Indian. The District Court must determine whether (1) B.C. had some Indian blood, and (2) was recognized as an Indian by a tribe or the federal government.
>
> Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt* [*v. Oklahoma*, 140 S. Ct. 2452 (2020)], determining (1) whether Congress established a reservation for the Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation.

Order Remanding for Evidentiary Hearing at 2-3.

Prior to the hearing, the parties stipulated as follows:

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

a. The crime in this case occurred at 320 S Moore Ave, Claremore, OK. This address is within the geographic area set out in the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612.

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 victim, the parties hereby stipulate and agree as follows:

a. An application for B.C.'s enrollment with the Cherokee Nation was filed on August 28, 2002. That application was pending at the time of her death on December 20, 2002, and was subsequently approved on June 23, 2003.

b. B.C. had 1/16 Cherokee blood quantum.

c. The Cherokee Nation is a federally recognized tribe.

Stipulations filed September 21, 2020.

I. B.C.'s Status as an Indian.

The State of Oklahoma and Defendant/Petitioner have stipulated to B.C.'s Indian status by virtue of her tribal membership and proof of blood quantum. Based upon the stipulations provided, the Court specifically finds B.C. (1) had some Indian blood, and (2) was recognized as an Indian by a tribe or the federal government.

II. Whether the Crime Occurred in Indian Country.

The State of Oklahoma and Defendant/Petitioner stipulated that the crime occurred within the historical boundaries of the Cherokee Nation. The State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation.

In regard to whether Congress established a reservation for the Cherokee Nation, the Court finds as follows:

1. Cherokee Nation is a federally recognized Indian tribe. 84 C.F.R. § 1200 (2019).
2. The current boundaries of Cherokee Nation encompass lands in a fourteen-county area within the borders of the State of Oklahoma (Oklahoma), including all of Adair, Cherokee, Craig, Nowata, Sequoyah, and Washington Counties, and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Tulsa, and Wagoner Counties.
3. The Cherokee Nation's treaties must be considered on their own terms, in determining reservation status. *McGirt*, 140 S. Ct. at 2479.
4. In *McGirt*, the United States Supreme Court 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. *McGirt*, 140 S.Ct. at 2461-62. As such, the Supreme Court found that, "Under any definition, this was a [Creek] reservation." *Id.* at 2461.
5. The Cherokee treaties were negotiated and finalized during the same period as the Creek treaties, contained similar provisions that 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.
6. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokees on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414.
7. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of the new Cherokee lands, and provided that a patent would issue as soon as reasonably practical. Art. 1, 7 Stat. 414.
8. The 1835 Cherokee treaty was ratified two years later "with a view to re-unite their people in one body and to secure to them a permanent home for themselves and their posterity," in what became known as Indian Territory, "without the territorial limits of the state sovereignties," and "where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be consonant with their views, habits and condition." Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 and *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872).
9. Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." Art. 2, 7 Stat. 478.

10. The 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation of the new lands in Indian Territory as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government...within their own country," so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Arts. 1, 5, 8, 19, 7 Stat. 478.

11. On December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new lands in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The title was held by Cherokee Nation "for the common use and equal benefit of all the members." *Cherokee Nation v. Hitchcock*, 187 U.S. at 307; *See also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894). Fee title is not inherently incompatible with reservation status, and establishment of a reservation does not require a "particular form of words." *McGirt*, 140 S. Ct. at 2475 (citing *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)).

12. The 1846 Cherokee treaty required federal issuance of a deed to the Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the Neutral Lands") and the "outlet west." Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871.

13. The 1866 treaty resulted in Cherokee cessions of lands in Kansas and the Cherokee Outlet and required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council." Treaty with the Cherokee, July 19, 1866, art. 21, 14 Stat. 799.

14. The 1866 Cherokee treaty "re-affirmed and declared to be in full force" all previous treaty provisions "not inconsistent with the provisions of" the 1866 treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. Art. 31, 14 Stat. 799.

15. Under *McGirt*, 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." *McGirt*, 140 S. Ct. at 2475-76.

As a result of the treaty provisions referenced above and related federal statutes, this Court hereby finds Congress did establish a Cherokee reservation as required under the analysis set out in *McGirt*.

In regard to whether Congress specifically erased the boundaries or disestablished the Cherokee Reservation, the Court finds as follows:

1. The current boundaries of Cherokee Nation are as established in Indian Territory in the 1833 and 1835 Cherokee treaties, diminished only by two express cessions.
2. First, the 1866 treaty expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. Art. 17, 14 Stat. 799.
3. Second, the 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet); and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country...until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." Art. 16, 14 Stat. 799.
4. The Cherokee Outlet cession was finalized by an 1891 agreement ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43.
5. The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906).
6. The 1893 statute that ratified the 1891 Agreement required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. 27 Stat. 612, 640-43; *United States v. Cherokee Nation*, 202 U.S. at 112.
7. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time.
8. The original 1839 Cherokee Constitution established the boundaries as described in the 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may be made necessary" by the 1866 treaty. 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, reprinted in Volume I of West's Cherokee Nation Code Annotated (1993 ed.).
9. Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." 1999 Cherokee Constitution, art. 2.

The State has argued the burden of proof regarding whether Congress specifically erased the boundaries or disestablished the reservation rests solely with Defendant/Petitioner. The State also made clear that the State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation. No evidence or argument was presented by the State specifically regarding disestablishment or boundary erasure of the Cherokee Reservation. The Order Remanding for Evidentiary Hearing states, "Upon Petitioner's presentation of *prima facie* evidence as to the victim's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction." Order Remanding for Evidentiary Hearing at 2.

On this point, *McGirt* provides that once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S. Ct. at 2468. Reading the order of remand together with *McGirt*, regardless of where the burden of production is placed, no evidence was presented to this Court to establish Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma has jurisdiction in this matter. As a result, the Court finds B.C. was an Indian and that the crime occurred in Indian Country.

IT IS SO ORDERED this 12 day of Nov, 2020.

KASSIE N. MCCOY
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

I hereby certify that on the 12 day of November, 2020 a true and correct copy of the above document was hand delivered, emailed or mailed with proper postage fully prepaid thereon, to the following:

Mike Hunter, Attorney General
Julie Pittman, Assistant Attorney General
Randall Young, Assistant Attorney General
State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
mike.hunter@oag.ok.gov
julie.pittman@oag.ok.gov
randall.young@oag.ok.gov

Matt Ballard, District Attorney
200 S. Lynn Riggs Blvd.
Claremore, OK 74017
Matt.Ballard@dac.state.ok.us
Anthony.evans@dac.state.ok.us

Michael Lieberman
Thomas Hird
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee Ave, Suite 707
Oklahoma City, OK 73102

Sara Hill, Attorney General
Chrissi Nimmo, Deputy Attorney General
Cherokee Nation
P.O. Box 1533
Tahlequah, OK 74464

BAILIFF

1047827022

ORIGINAL

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC - 7 2020

JOHN D. HADDEN
CLERK

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

BENJAMIN ROBERT COLE, SR.,	*Rogers County District Court* *Case No.: CF-2002-597*
Petitioner,	*Court of Criminal Appeals* *Direct Appeal Case No.: D-2004-1260*
-vs-	
THE STATE OF OKLAHOMA,	*Court of Criminal Appeals Original* *Post-Conviction Case No.: PCD-2005-23*
Respondent.	*Successive Post-Conviction Case No.:* *PCD-2020-529*

PETITIONER'S POST-HEARING SUPPLEMENTAL BRIEF IN SUPPORT OF SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF - DEATH PENALTY -

Michael W. Lieberman, OBA No. 32694
Thomas D. Hird, OBA No. 13580
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975
Michael_Lieberman@fd.org
Tom_Hird@fd.org

Counsel for Benjamin Robert Cole, Sr.

December 8, 2020

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

BENJAMIN ROBERT COLE, SR., ***Petitioner*,** ***-vs-*** **THE STATE OF OKLAHOMA,** ***Respondent*.**	***Rogers County District Court*** ***Case No.: CF-2002-597*** ***Court of Criminal Appeals*** ***Direct Appeal Case No.: D-2004-1260*** ***Court of Criminal Appeals Original*** ***Post-Conviction Case No.: PCD-2005-23*** ***Successive Post-Conviction Case No.:*** ***PCD-2020-529***

PETITIONER'S POST-HEARING SUPPLEMENTAL BRIEF IN SUPPORT OF SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF - DEATH PENALTY -

Michael W. Lieberman, OBA No. 32694
Thomas D. Hird, OBA No. 13580
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975
Michael_Lieberman@fd.org
Tom_Hird@fd.org

Counsel for Benjamin Robert Cole, Sr.

December 8, 2020

TABLE OF CONTENTS

Table of Contents I

Table of Authorities ii

I. Background 1

II. The State Does Not Have Subject Matter Jurisdiction over Mr. Cole's Case 2

A. B.C. Was an Indian 2

B. The Crime Occurred in Indian Country 3

1. Congress Established a Reservation for the Cherokee Nation 4

2. Congress Never Specifically Erased the Boundaries of the Cherokee Nation Reservation and Disestablished the Reservation 6

C. This Court Should Adopt the District Court's Findings and Conclusions 8

III. The State Has Waived Any Further Issues It May Raise 8

IV. The State Does Not Have Concurrent Jurisdiction 10

A. Federal Criminal Jurisdiction in Indian Country Under the GCA and MCA Is Exclusive of State Jurisdiction, Except Where Congress Has Expressly Granted States Such Jurisdiction 10

1. Crimes by Non-Indians Against Indians and Crimes by Indians Against Non-Indians Have Historically Been Subject to Exclusive Federal Jurisdiction Under the GCA and MCA 13

2. States Have Acquired Criminal Jurisdiction over Crimes by Non-Indians Against Indians, and Crimes by Indians Against Non-Indians, Only by Express Statutory Grants; No Statute Has Granted Such Jurisdiction to Oklahoma 15

3. Cases Concerning Civil Jurisdiction Are Irrelevant to the Interpretation of Statutes Defining Criminal Jurisdiction in Indian Country 17

V. Mr. Cole's Claim Is Properly Before This Court 19

VI. Conclusion 20

Certificate of Service 21

TABLE OF AUTHORITIES

SUPREME COURT CASES

Atl. Richfield Co. v. Christian,
140 S. Ct. 1335 (2020) 18

Cherokee Nation v. Hitchcock,
187 U.S. 294 (1902) 5

Cherokee Nation v. Journeycake,
155 U.S. 196 (1894) 5

Claflin v. Houseman,
93 U.S. 130 (1876) 18

Cotton Petroleum Corp. v. New Mexico,
490 U.S. 163 (1989) 18

Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,
502 U.S. 251 (1992) 17

Donnelly v. United States,
228 U.S. 243 (1913) 11

Ex parte Crow Dog,
109 U.S. 556 (1883) 14

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) 18

Holden v. Joy,
84 U.S. 211 (1872) 5

McGirt v. Oklahoma,
140 S. Ct. 2452 (2020) . . . . Passim

Minnesota v. Hitchcock,
185 U.S. 373 (1902) 5

Negonsott v. Samuels,
507 U.S. 99 (1993) 15

Nevada v. Hicks,
533 U.S. 353 (2001) 17

Oliphant v. Suquamish Indian Tribe,
435 U.S. 191 (1978) 15

Organized Vill. of Kake v. Egan,
369 U.S. 60 (1962) 18

Sharp v. Murphy,
140 S. Ct. 2412 (2020) 19

Silas Mason Co. v. Tax Com'n of State of Washington,
302 U.S. 186 (1937) 18

Solem v. Bartlett,
465 U.S. 463 (1984) 11, 12

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.,
467 U.S. 138 (1984) 18

United States v. Bank of New York & Tr. Co.,
296 U.S. 463 (1936) 18

United States v. Cherokee Nation,
202 U.S. 101 (1906) 7

United States v. Kagama,
118 U.S. 375 (1886) 14

United States v. McBratney,
104 U.S. 621 (1882) 11, 12

Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,
439 U.S. 463 (1979) 11

Williams v. United States,
327 U.S. 711 (1946) 12

Wyeth v. Levine,
555 U.S. 555 (2009) 18

FEDERAL COURT CASES

Langley v. Ryder,
778 F.2d 1092 (5th Cir. 1985) 11

Maxey v. Wright,
54 S.W. 807 (Indian Terr. 1900) 5

Ross v. Neff,
905 F.2d 1349 (10th Cir. 1990) 11

St. Cloud v. United States,
702 F. Supp. 1456 (D.S.D. 1988) 12

United States v. Diaz,
679 F.3d 1183 (10th Cir. 2012) 2

United States v. Prentiss,
273 F.3d 1277 (10th Cir. 2001) 2, 11

STATE COURT CASES

Brown v. State,
871 P.2d 56 (Okla. Crim. App. 1994) 9

Castro v. State,
745 P.2d 394 (Okla. Crim. App. 1987) 9

Cravatt v. State,
825 P.2d 277 (Okla. Crim. App. 1992) 17

State v. Klindt,
782 P.2d 401 (Okla. Crim. App. 1989) 17

State v. Larson,
455 N.W.2d 600 (S. Ct. S.D. 1990) 19

Wallace v. State,
935 P.2d 366 (Okla. Crim. App. 1997) 19

Young v. State,
12 P.3d 20 (Okla. Crim. App. 2000) 8

DOCKETED CASES

Bosse v. State,
Case No. PCD-2019-124 (Okla. Crim. App. Aug. 4, 2020) 9, 10, 17, 18, 19, 20

Ryder v. State,
Case No. PCD-2020-613 (Okla. Crim. App. Nov. 23, 2020) 19

FEDERAL STATUTES

18 U.S.C. § 1152 (The General Crimes Act) 11, 12, 13

18 U.S.C. § 1153 (The Major Crimes Act) 11, 13

18 U.S.C. § 1162 16

25 U.S.C. § 1321 16

STATE LAWS

22 O.S. § 1089 . . . . . 19, 20

Okla. Const. art. 1 14

COURT RULES

Rule 3.4, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019) 9

Rule 3.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019) . . . 10

Rule 9.3, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019) 9

ACTS AND TREATIES
(Chronological Order)

Act of July 22, 1790, 1 Stat. 138 13

Act of Mar. 3, 1817, 3 Sat. 383 13

Act of June 30, 1834, 4 Stat. 729 13

Treaty with the Cherokee, December 29, 1835, 7 Stat. 478 . . . . . 3, 5

Act of Mar. 27, 1854, 10 Stat. 270 14

1866 Treaty of Washington, Apr. 28, 1866, 14 Stat. 769 (1866 Treaty) 5, 6, 7

Act of May 2, 1890, 26 Stat. 81 15

Act of Mar. 3, 1893, 27 Stat. 612 (1891 Agreement) 3, 6, 7

Act of June 7, 1897, 30 Stat. 62 15

Act of Aug. 15, 1953, 67 Stat. 588 16

Act of Apr. 11, 1968, 82 Stat. 78 16

OTHER AUTHORITIES

Clinton, Robert, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. Law Rev. 951 (1975) 13, 14, 15, 16

Skibine, Alexander Tallchief, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 Alb. Gov't. L. Rev. 49 (2017) 13, 14, 16

Petitioner, Benjamin Robert Cole, Sr., through undersigned counsel, submits this Post-Hearing Supplemental Brief in Support of Successive Application for Post-Conviction Relief pursuant to this Court's Order Remanding for Evidentiary Hearing.

I. Background.

On August 12, 2020, Mr. Cole filed a Successive Application for Post-Conviction Relief ("Successive APCR") in this Court, along with a Motion for Evidentiary Hearing. In the sole proposition, Mr. Cole argued *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), confirms the State did not have jurisdiction to prosecute, convict, and sentence him for a murder that occurred within the boundaries of the Cherokee Nation Reservation. On August 24, 2020, this Court remanded Mr. Cole's case to the District Court of Rogers County for an evidentiary hearing. O.R.[1] 625-29. In its remand order, this Court directed the District Court to answer "two separate questions: (a) the Indian status of B.C. and (b) whether the crime occurred in Indian Country." O.R. 626.

On September 28, 2020, the District Court held a hearing to answer these two questions. Prior to the hearing, Mr. Cole filed Petitioner's Remanded Evidentiary Hearing Brief Applying McGirt Analysis to Cherokee Nation Reservation. O.R. 642-84. After the hearing, Petitioner filed Proposed Findings of Fact and Conclusions of Law. O.R. 686-92. The State did not file anything in the District Court either before or after the evidentiary hearing. Nor did the State file anything in this Court in response to Mr. Cole's Successive APCR prior to the remand. Moreover, at the hearing, the State introduced no evidence and the substance of its argument consisted of two paragraphs:

> Your Honor, the State does not take a position as to whether or not the victim in this case was or wasn't an Indian under the law; and the State does not take a position as to whether or not the Cherokee reservation existed in the first

[1] In this brief, "O.R." refers to the 709-page original record filed in this Court; "Tr." refers to the 10-page transcript of the September 28, 2020 evidentiary hearing.

> place and the State does not take a position one way or the other as to whether or not, if the Cherokee reservation did exist, if it remains intact.
>
> To that end, Your Honor, the State has nothing else to present.

Tr. 8. The District Court filed its "Order on Remand," which contained its findings of fact and conclusions of law on November 12, 2020. O.R. 701-07.

In its remand order, this Court provided that "[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." O.R. 628 (emphasis added). Accordingly, Mr. Cole submits this brief for the Court's consideration.

II. The State Does Not Have Subject-Matter Jurisdiction over Mr. Cole's Case.

In its remand order, this Court directed, "Upon Petitioner's presentation of *prima facie* evidence as to the victim's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction." O.R. 626. The State failed to meet its burden. Following the hearing, the District Court answered both of this Court's questions in the affirmative: "[T]he Court finds B.C. was an Indian and that the crime occurred in Indian Country." O.R. 706. Under *McGirt*, the State does not have subject-matter jurisdiction over Mr. Cole's case, and this Court must vacate his conviction and sentence.

A. B.C. Was an Indian.

This Court directed the District Court to address: "First, the status of B.C. as an Indian. The District Court must determine whether (1) B.C. had some Indian blood, and (2) was recognized as an Indian by a tribe or the federal government." O.R. 627.

Under *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012), and *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001), cited in the remand order, O.R. 627 n.1, this Court

must be satisfied B.C. had "some Indian blood" and was "recognized as an Indian by a tribe or by the federal government."

Prior to the hearing, the parties stipulated as follows:

a. An application for B.C.'s enrollment with the Cherokee Nation was filed on August 28, 2002. That application was pending at the time of her death on December 20, 2002, and was subsequently approved on June 23, 2003.

b. B.C. had 1/16 Cherokee blood quantum.

c. The Cherokee Nation is a federally recognized tribe.

O.R. 702 (citing Stipulations filed September 21, 2020).[2]

The District Court held, "Based upon the stipulations provided, the Court specifically finds B.C. (1) had some Indian blood, and (2) was recognized as an Indian by a tribe or the federal government." O.R. 702.

B. The Crime Occurred in Indian Country.

The second question this Court directed the District Court to address was, "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 Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation." O.R. 627. On these two questions, the parties reached the following stipulation:

> The crime in this case occurred at 320 S Moore Ave, Claremore, OK. This address is within the geographic area set out in the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612.

O.R. 702 (citing Stipulations filed September 21, 2020).

[2] The Stipulations are located at O.R. 640-41. At the hearing, the court admitted Mr. Cole's entire set of exhibits, which contained 15 tabs, as Defendant's Exhibit 1 (Def. Ex. 1). Tr. 5. The stipulations are located at Tab 1 of Def. Ex. 1.

1. Congress Established a Reservation for the Cherokee Nation.

Prior to making its specific findings and conclusions regarding the United States' establishment of the Cherokee Nation Reservation, the District Court noted, "The State of Oklahoma and Defendant/Petitioner stipulated that the crime occurred within the historical boundaries of the Cherokee Nation. The State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation." O.R. 702. Adopting the stipulation, and based upon the undisputed evidence presented by Mr. Cole, the District Court made a number of specific findings, including:

2. The current boundaries of Cherokee Nation encompass lands in a fourteen-county area within the borders of the State of Oklahoma (Oklahoma), including all of Adair, Cherokee, Craig, Nowata, Sequoyah, and Washington Counties, and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Tulsa, and Wagoner Counties.
3. The Cherokee Nation's treaties must be considered on their own terms, in determining reservation status. *McGirt*, 140 S. Ct. at 2479.
4. In *McGirt*, the United States Supreme Court 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. *McGirt*, 140 S. Ct. at 2461-62. As such, the Supreme Court found that "Under any definition, this was a reservation." *Id.* at 2461-62.
5. The Cherokee treaties were negotiated and finalized during the same period as the Creek treaties, contained similar provisions that 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.
6. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokees on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414.
7. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of the new Cherokee lands, and provided that a patent would issue as soon as reasonably practical. Art. 1, 7 Stat. 414.
8. The 1835 Cherokee treaty was ratified two years later "with a view to re-unite their people in one body and to secure to them a permanent home for themselves and their posterity," in what became known as Indian Territory, "without the

territorial limits of the state sovereignties," and "where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be consonant with their views, habits and condition." Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 and *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872).

9. Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." Art. 2, 7 Stat. 478.

10. The 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation of the new lands in Indian Territory as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government…within their own country," so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Arts. 1, 5, 8, 19, 7 Stat. 478.

11. On December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new lands in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The title was held by Cherokee Nation "for the common use and equal benefit of all the members." *Cherokee Nation v. Hitchcock*, 187 U.S. at 307; *See also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894). Fee title is not inherently incompatible with reservation status, and establishment of a reservation does not require a "particular form of words." *McGirt*, 140 S. Ct. at 2475 (citing *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)).

12. The 1846 Cherokee treaty required federal issuance of a deed to the Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the "Neutral Lands") and the "outlet west." Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871.

13. The 1866 treaty resulted in Cherokee cessions of lands in Kansas and the Cherokee Outlet and required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council." Treaty with the Cherokee, July 19, 1866, art. 21, 14 Stat. 799.

14. The 1866 Cherokee treaty "re-affirmed and declared to be in full force" all previous treaty provisions "not inconsistent with the provisions of" the 1866

treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. Art. 31, 14 Stat. 799.

O.R. 703-04.

Regarding the creation of the Cherokee Reservation, the District Court concluded, "[a]s a result of the treaty provisions referenced above and related federal statutes, this Court hereby finds Congress did establish a Cherokee reservation as required under the analysis set out in *McGirt*." O.R. 704.

2. Congress Never Specifically Erased the Boundaries of the Cherokee Nation Reservation and Disestablished the Reservation.

The District Court then turned its attention to the question of "whether Congress specifically erased the boundaries or disestablished the Cherokee Reservation." O.R. 705. On that question, the District Court made the following findings:

1. The current boundaries of Cherokee Nation are as established in Indian Territory in the 1833 and 1835 Cherokee treaties, diminished only by two express cessions.
2. First, the 1866 treaty expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. Art. 17, 14 Stat. 799.
3. Second, the 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet); and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country…until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." Art. 16, 14 Stat. 799.
4. The Cherokee Outlet cession was finalized by an 1891 agreement ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43.
5. The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and Creek Nation on the south, and located between the ninety-sixth

degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906).

6. The 1893 statute that ratified the 1891 Agreement required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. 27 Stat. 612, 640-43; *United States v. Cherokee Nation*, 202 U.S. at 112.
7. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time.
8. The original 1839 Cherokee Constitution established the boundaries as described in the 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may be made necessary" by the 1866 treaty. 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, reprinted in Volume I of West's Cherokee Nation Code Annotated (1993 ed.).
9. Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." 1999 Cherokee Constitution, art. 2.

O.R. 705. Based upon these undisputed facts, the District Court concluded Congress never disestablished the Cherokee Reservation. O.R. 706.

In so holding, the District Court noted:

> The State has argued the burden of proof regarding whether Congress specifically erased the boundaries or disestablished the reservation rests solely with Defendant/Petitioner. The State also made clear that the State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation. No evidence or argument was presented by the State specifically regarding disestablishment or boundary erasure of the Cherokee Reservation. The Order Remanding for Evidentiary Hearing states, "Upon Petitioner's presentation of *prima facie* evidence as to the victim's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction." Order Remanding for Evidentiary Hearing at 2 [O.R. 626].
>
> On this point, *McGirt* provides that once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S. Ct. at 2468. Reading the order of remand together with *McGirt*, regardless of where the

> burden of production is placed, no evidence was presented to this Court to establish Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma has jurisdiction in this matter.

O.R. 706.

C. This Court Should Adopt the District Court's Findings and Conclusions.

This Court "afford[s] the trial court's findings on factual issues great deference and will review its findings applying a deferential abuse of discretion standard." *Young v. State*, 2000 OK CR 17, 12 P.3d 20, 48 (citations omitted). The District Court found the victim was an Indian and, meticulously following the analysis set out in *McGirt*, found that the crime occurred in Indian Country. The State presented no evidence and did not challenge any of those findings. This Court should adopt the uncontested findings and conclusions of the District Court, and hold the State lacks subject-matter jurisdiction over Mr. Cole's case.

III. The State Has Waived Any Further Issues It May Raise.

As noted, the State has never raised any issues in this case. The record is devoid of any mention of the State contesting Mr. Cole's claim in any way, for any reason, or in any court. At no point, either before this Court prior to the remand, or in the District Court orally or in writing has the State said it contests Mr. Cole's position for any reason. The State has thus waived any potential issue it might now attempt to raise (to include any argument that the victim was not an Indian or that the crime did not occur in Indian country). Because the supplemental briefs are being filed simultaneously, however, Mr. Cole reserves the right to seek further briefing after receiving and reviewing the State's supplemental brief in the event new issues are raised.

In cases where a party has raised an issue for the first time in a supplemental brief, this Court has held, "Supplemental briefs are intended to be limited to supplementation of recent authority bearing on the issues raised in the brief in chief, or on issues specifically directed to be

briefed as ordered by this Court. Therefore, we do not believe that this issue is properly before this Court." *Castro v. State*, 1987 OK CR 182, 745 P.2d 394, 404. *See Brown v. State*, 1994 OK CR 12, 871 P.2d 56, 68; Rules 3.4(F)(2), 9.3(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). Any issue the State might now try to raise would not fit either of these categories. Having not filed anything in this Court prior to the remand,[3] the State has no "issues raised" that could possibly require supplementation. Likewise, this Court's remand order was very clear; the issues to be addressed were only Indian status and whether the crime occurred in Indian country and that the only issues to be raised in this supplemental briefing were those issues pertinent to the remanded issues. The State has waived any argument on those two issues by explicitly stating in the District Court that it took no position with regard to either of them. Any other issue the State might try to raise would be beyond the scope of the remand order.

In short, the State has forfeited review of any issues in this case, and the Court accordingly should not consider any arguments raised for the first time in the State's supplemental brief.

Despite the State's waiver, counsel nonetheless is aware the State has argued for concurrent jurisdiction and procedural defenses in other post-*McGirt* Indian Country cases and counsel for the State has informed undersigned counsel informally the State intends to argue them again in its supplemental brief here. Although Mr. Cole maintains these issues are waived, he addresses their merits below out of an abundance of caution.

---

[3] The State was certainly aware it could request and obtain leave to file a response in this case having done so in similar cases. *See, e.g.,* Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), *Bosse v. State,* No. PCD-2019-124 (Okla. Crim. App. Aug. 4, 2020) ("*Bosse* Response").

IV. The State Does Not Have Concurrent Jurisdiction.

Although Mr. Cole maintains the concurrent jurisdiction issue is beyond the scope of this briefing, he will address it here in anticipation of the State's argument. If this Court somehow determines the State's concurrent jurisdiction argument is properly before it, it should reject the argument on the merits. Because the State has never argued for concurrent jurisdiction in this case, Mr. Cole can only guess what the State's argument will be based on its argument in other cases. *See Bosse* Response at 13-21.[4]

Under the Indian Country Crimes Act, more commonly known as the General Crimes Act ("GCA"), the State does not have subject matter jurisdiction over the crimes committed within the Cherokee Nation Reservation in Mr. Cole's case. In *Bosse*, the State acknowledged courts have held that states lack jurisdiction over crimes committed by non-Indians against Indians in Indian country, but the State claimed, "the reasoning of these decisions lacks merit." *Bosse* Response at 15. The State argued a backwards theory: that for federal jurisdiction to be exclusive, Congress must expressly withdraw state jurisdiction. In fact, under a well-defined federal statutory scheme, jurisdiction in Indian country has historically been exercised by only tribal and federal courts, and states acquire such jurisdiction only by express grants. No statute has granted the State of Oklahoma criminal jurisdiction over crimes committed by or against Indians in Indian country.

A. Federal Criminal Jurisdiction in Indian Country Under the GCA and MCA Is Exclusive of State Jurisdiction, Except Where Congress Has Expressly Granted States Such Jurisdiction.

The Supreme Court has made clear, "[C]riminal offenses by or against Indians have been subject only to federal or tribal laws…except where Congress in the exercise of its plenary and

[4] Although Mr. Cole addresses arguments from the *Bosse* Response here, he maintains this Court's rules do not allow the State to rely in this case on its briefing in another case. *See* Rules 3.5(A)(5), (C)(6).

exclusive power over Indian affairs has 'expressly provided that State laws shall apply.'" *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979) (citation omitted). *See also Langley v. Ryder*, 778 F.2d 1092, 1095-06 (5th Cir. 1985) ("In order for a state to exercise criminal jurisdiction within Indian country there must be clear and unequivocal grant of that authority").

First, under the Major Crimes Act ("MCA"), 18 U.S.C. § 1153, federal courts have exclusive jurisdiction over prosecutions for enumerated crimes committed by Indians against Indians or non-Indians in Indian country. *See McGirt*, 140 S. Ct. at 2459, 2470-71, 2477-78. Second, under the GCA, 18 U.S.C. § 1152, federal courts have jurisdiction over "a broader range of crimes by or against Indians in Indian country." *See id.* at 2479. The GCA extends the criminal laws of the United States applicable to crimes committed "in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia," to any crime committed in Indian country, subject to only three exceptions involving tribal jurisdiction over Indian offenders. The 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."[5] *Prentiss*, 273 F.3d at 1278 (citations omitted); *Donnelly v. United States*, 228 U.S. 243, 269-270 (1913).

The Supreme Court has made clear that states have no jurisdiction in Indian country over cases, such as Mr. Cole's, involving a non-Indian defendant and an Indian victim. As the Tenth Circuit recognized, "The Supreme Court has expressly stated that state criminal jurisdiction in Indian country is limited to crimes committed 'by non-Indians against non-Indians…and victimless crimes by non-Indians.'" *Ross v. Neff*, 905 F.2d 1349, 1353 (10th Cir. 1990) (quoting

---

[5] In *United States v. McBratney*, 104 U.S. 621, 623-24 (1881), the Supreme Court established a judicial exception to the GCA when it ruled that crimes by non-Indians against non-Indians are subject to state jurisdiction. "The single question" *McBratney* decided was "whether the [federal court] has jurisdiction of the crime of murder committed by a white man upon a white man" on a reservation in Colorado. *Id.* at 624.

Solem, 465 U.S. at 465 n.2). In *Williams v. United States*, 327 U.S. 711, 714 (1946), the Court found, "While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian." *See id.* at n.10. *See also St. Cloud v. United States*, 702 F. Supp. 1456, 1459 (D.S.D. 1988) ("If the defendant is a non-Indian and the victim is an Indian, federal courts have exclusive jurisdiction over the offense.").

In *McGirt*, the Supreme Court once again made clear that federal criminal jurisdiction under both the MCA and the GCA is exclusive of state jurisdiction. As the Court explained:

> [T]he MCA applies only to certain crimes committed in Indian country by Indian defendants. A neighboring statute [the GCA] provides that federal law applies to a broader range of crimes by or against Indians in Indian country. *See* 18 U.S.C. § 1152. States are *otherwise* free to apply their criminal laws in cases of non-Indian victims *and* defendants, including within Indian country. *See McBratney*, 140 U.S. at 624.

McGirt, 140 S. Ct. at 2479 (emphasis added). Thus, the Court reaffirmed that under the GCA, federal law applies to Indian country crimes "by or against Indians," while states have jurisdiction over crimes involving both "non-Indian victims and defendants," as *McBratney* made clear. *Id.* [6]

---

[6] In *McGirt*, both the dissenters and the Oklahoma Solicitor General acknowledged the State would not have jurisdiction over crimes against Indians that occurred within the intact boundaries of the Creek Reservation. *See* 140 S. Ct. at 2500-01 (Roberts, J. dissenting) (emphasis added) ("[T]he Court's decision draws into question thousands of convictions obtained by the State for crimes involving Indian defendants *or Indian victims* across several decades."); Oral Arg. Tr. at 55, *McGirt*, 140 S. Ct. 2452 (2020) (available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-9526_32q3.pdf) (last visited Dec. 6, 2020) (emphasis added) (Oklahoma Solicitor General argued his estimated number of inmates who would be affected by a ruling that the Creek Reservation was not disestablished "doesn't include crimes committed against Indians *which the state would not have jurisdiction over*").

1. Crimes by Non-Indians Against Indians and Crimes by Indians Against Non-Indians Have Historically Been Subject to Exclusive Federal Jurisdiction Under the GCA and MCA.

"The present federal jurisdictional statutes governing Indian reservations are a direct outgrowth of 19th century enactments. The provisions now found in 18 U.S.C. §§ 1152-1153 (1970) [the GCA and MCA] codify almost verbatim 19th century statutes." Robert Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. Law Rev. 951, 966 n.80 (1975) ("Clinton"). As explained below, the GCA "has its origins in the early Indian Trade and Intercourse Acts of the 1790's and was amended into its final and current form in 1854." Alexander Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 Alb. Gov't. L. Rev. 49, 51 (2017) ("Skibine").

"[R]elations with the Indians were primarily handled by treaty until 1871," but this period also saw "important federal legislation affecting criminal jurisdiction." Clinton at 958. In the late 1700's and first half of the 1800's, "Congress passed a series of temporary Indian trade and intercourse acts," many of which "contained provisions for federal prosecution of certain criminal offenses committed in Indian country, although in general they merely implemented the arrangements previously established in the treaties." *Id.* The first of these acts, passed in 1790, authorized federal prosecution of crime or trespass by United States citizens or residents on Indian land. *Id.* (citing Act of July 22, 1790, ch. 33, § 5-6, 1 Stat. 138). An 1817 revision "significantly expanded federal criminal jurisdiction over Indian lands" by providing for the application of federal enclave laws over crimes committed within Indian country. *Id.* at 959 (citing Act of Mar. 3, 1817, ch. 92, §§ 1, 2, 3 Stat. 383). "The substance of the 1817 Act was incorporated into…the first permanent Indian Trade and Intercourse Act in 1834." *Id.* at 960 (citing Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729). In 1854, Congress enacted a law containing the three exceptions

concerning offenses by Indians set forth in the current version of the GCA. *Id.* at n.57 (citing Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 270).

In order to address "the potential assertion of state authority over Indian lands located within the exterior boundaries of some of the new states," Congress began to include express reservations of federal authority and prohibitions of the extension of state jurisdiction over Indian lands in the enabling acts of states not yet admitted to the Union. *Id*. at 960. In accordance with that practice, Oklahoma's Enabling Act preserved federal jurisdiction over Indian lands, and required the state to disclaim all right and title to such lands. *Id.* at 960-61 & n.60; Act of June 16, 1906, ch. 3335, §§ 1, 3, 34 Stat. 267. *See also* Okla. Const. art. 1, § 3.

"Thus, during [the treaty] period, Congress slowly encroached on the tribal jurisdiction over Indian territory by providing a federal forum for the trial of crimes committed on Indian lands in which either the victim or perpetrator of the crime was a non-Indian." Clinton at 961."[T]oward the end of the treaty period, Congress sought to protect both federal jurisdiction over interracial crimes and tribal jurisdiction over intra-Indian crimes from state encroachment by prohibiting the new states from exercising jurisdiction over Indian lands as a condition for their admission to statehood." *Id.* at 962.

The GCA originally left prosecution of all crimes by Indians against each other in Indian country, including major crimes, to each tribe according to its local customs. *Ex parte Crow Dog*, 109 U.S. 556, 571-72 (1883) (holding the murder of an Indian by another Indian on Sioux reservation in Dakota Territory was subject to tribal, rather than federal, jurisdiction under the GCA). However, in direct response to *Crow Dog*, Congress enacted the MCA in 1885. Clinton at 962-63; Skibine at 52. *See United States v. Kagama*, 118 U.S. 375, 382-83 (1886). The MCA

removed tribal jurisdiction over certain enumerated major crimes by Indians,[7] including murder, and conferred federal jurisdiction over such crimes if committed on an "Indian reservation."[8]

2. States Have Acquired Criminal Jurisdiction over Crimes by Non-Indians Against Indians, and Crimes by Indians Against Non-Indians, Only by Express Statutory Grants; No Statute Has Granted Such Jurisdiction to Oklahoma.

In 1940, Congress "enacted the first of a series of statutes granting criminal jurisdiction over Indian reservations to the states, thereby radically altering the law enforcement roles traditionally exercised by the federal government and the tribes." Clinton at 968. In *Negonsott v. Samuels*, 507 U.S. 99, 110 (1993), the Supreme Court found that the 1940 statute, the Kansas Act, "quite unambiguously confers [concurrent] jurisdiction on the State over major offenses committed by or against Indians on Indian reservations." (Citation omitted). The Court explained:

> This case concerns the first major grant of jurisdiction to a State over offenses involving Indians committed in Indian Country…. 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.

Id. at 103-04 (citations omitted).

---

[7] As a general rule, tribes have no criminal jurisdiction over crimes by *non-Indians* in Indian country. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), the Supreme Court held that "Indian tribes do not have inherent jurisdiction to try and punish non-Indians." The Court noted, "In 1891, this Court recognized that Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated *an intent to reserve jurisdiction over non-Indians for the federal courts*." *Id.* at 204 (emphasis added).

[8] *McGirt* laid to rest the State's position in that case that the MCA does not apply in Oklahoma. The Court found the State's claim to a special exemption from the MCA for the eastern half of Oklahoma to be "one more error in historical practice." *McGirt*, 140 S. Ct. at 2471. The State's use of "statutory artifacts" to argue it was granted criminal jurisdiction in Indian country, even if the Creek Reservation was intact, was a "twist" even the *McGirt* dissent declined to join. *Id*. at 2476. The Court noted that Oklahoma was formed from "Oklahoma Territory in the west and Indian Territory in the east," and that "criminal prosecutions in the Indian Territory were split between tribal and federal courts." *Id.* (citing Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81, 94). The Court held that Congress "abolished that scheme" in 1897, granting federal courts in Indian Territory "'exclusive jurisdiction' to try 'all criminal causes for the punishment of any offense.'" *Id.* (quoting Act of June 7, 1897, ch. 3, 30 Stat. 62, 83). "When Oklahoma won statehood in 1907, the MCA applied immediately according to its plain terms." *Id*. at 2477. The Enabling Act "sent federal-law cases to federal court" in Oklahoma, and crimes arising under the MCA "belonged in federal court from day one, wherever they arose within the new state." *Id*.

Public Law 280, originally enacted in 1953, granted criminal jurisdiction over Indian reservations to certain designated states. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 25 U.S.C. § 1321-26); Clinton at 969; Skibine at 52. Section 1162, entitled "State jurisdiction over offenses committed by or against Indians in the Indian country" expressly granted to certain enumerated 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). It provided that the GCA and MCA "shall not be applicable within the areas of Indian country listed in subsection (a) of this section." 18 U.S.C. § 1162(c). Public Law 280 gave "consent of the United States…to any other State not having jurisdiction with respect to criminal offenses or civil causes of action…to assume jurisdiction…by affirmative legislative action." Pub. L. No. 83-280, ch. 505, §§ 6-7.

When Congress enacted Public Law 280 in 1953, Oklahoma declined to exercise the option of assuming jurisdiction over Indian country within its boundaries. In 1968, Congress amended Public Law 280 to require tribal consent to acquire such jurisdiction. Act of Apr. 11, 1968, 82 Stat. 78 (codified at 25 U.S.C. § 1321). Section 1321 gives federal consent to "any State not having jurisdiction over criminal offenses committed by or against Indians" in Indian country within the state "to assume, with the consent of the Indian tribe…jurisdiction over any or all of such offenses…to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State." 25 U.S.C. § 1321(a)(1). Section 1321 provides that, "At the request of an Indian tribe, and after consultation with and consent by the Attorney General, the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of title 18 [GCA and MCA] within the Indian country of the Indian tribe." 25 U.S.C. § 1321(a)(2). In

other words, states may exercise criminal jurisdiction over crimes by or against Indians in Indian country under Public Law 280 only if a tribe consents, 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.

Over thirty years ago, this Court recognized 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 found that "[b]ased on the State's failure to act in this regard…'the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.'" *See Cravatt v. State*, 1999 OK CR 6, 825 P.2d 277, 279 (quoting *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 403). In *McGirt*, the Supreme Court likewise concluded, "Oklahoma doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over Creek lands. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma." 140 S. Ct. at 2478.

3. Cases Concerning Civil Jurisdiction Are Irrelevant to the Interpretation of Statutes Defining Criminal Jurisdiction in Indian Country.

In *Bosse*, the State relied on scattered phrases in cases concerning tribal and state *civil* jurisdiction over non-Indians in Indian country to argue the State has *criminal* jurisdiction. The State used these phrases to suggest a "presumption" of state criminal jurisdiction. *See Bosse* Response at 17-19 (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 lessees' 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 relied on scattered phrases from civil cases to support its claims that "there is no reason to assume" 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." *See Bosse* Response at 15-17. None of the cases cited by the State address criminal jurisdiction or involves 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); *Claflin v. Houseman*, 93 U.S. 130, 134 (1876) (creditor's state court claim against a debtor subject to federal bankruptcy proceeding). Civil cases are irrelevant to the State's argument given the

specific statutory scheme that has historically governed criminal jurisdiction in Indian country. The federal government has exclusive jurisdiction over Mr. Cole's case.[9]

V. Mr. Cole's Claim Is Properly Before This Court.

As with the State's concurrent jurisdiction argument, Mr. Cole can only guess what, if any, procedural defenses the State will seek to assert based on its argument in other cases. *See Bosse* Response at 22-49; *see also* Supplemental Brief of Respondent After Remand, *Ryder v. State,* No. PCD-2020-613 (Okla. Crim. App. November 23, 2020). The State waived review of this issue for the same reasons it waived review of its concurrent jurisdiction arguments.

Even if this Court somehow finds the State's argument is not waived, it fails on the merits. In his Successive APCR, Mr. Cole explained why this matter is properly before this Court. He argued that under § 1089(D), the legal basis for his jurisdictional claim was unavailable until *McGirt* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) became final, and that subject-matter jurisdiction can be raised at any time.[10] Instead of repeating these arguments here, Mr. Cole

---

[9] According to the State, *McGirt* "leaves Indians vulnerable under the exclusive federal jurisdiction of the Major Crimes Act," and "there is no reason to perpetuate that injustice . . . or reason to believe the State of Oklahoma will not vigorously defend the rights of Indian victims, as it has for a century." *Bosse* Response at 20-21. However, in *Bosse*, the Chickasaw Nation argued federal criminal jurisdiction under the GCA and MCA is exclusive of state jurisdiction and that Oklahoma's "long asserted criminal jurisdiction in violation of federal law . . . is itself an injustice that goes to the heart of the criminal justice system." Amicus Curiae Chickasaw Nation's Brief in Support of the Continued Existence of the Chickasaw Reservation and Its Boundaries at 16-18, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Nov. 4, 2020). *See also* Amicus Curiae Choctaw Nation's Brief in Support of the Continued Existence of the Choctaw Reservation and Its Boundaries at 17-18, *Ryder v. State*, No. PCD-2020-613 (Okla. Crim. App. Nov. 23, 2020) (tendered for filing along with Motion for Leave to File). Further, "this is not a case of denying Indians court protection, but rather is a case of determining which court is responsible for providing that protection. If federal prosecution is lacking, the answer is for federal prosecutors to fulfill their responsibility, not for the State to usurp jurisdiction over these cases." *Larson*, 455 N.W.2d at 602.

[10] *See McGirt*, 140 S. Ct. at 2501 n.9 (Roberts, J., dissenting) (citing *Murphy*, 875 F.3d 697, 907 n.5 (10th Cir. 2017); *Wallace v. State*, 1997 OK CR 18, 935 P.2d 366, 372)) ("[U]nder Oklahoma law, it appears that there may be little bar to state habeas relief because 'issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal.").

refers this Court back to his original brief. *See* Successive APCR at 1-3. For the reasons explained there, this Court's consideration of the merits of Mr. Cole's claim is appropriate.

This Court has already found the legal basis for Mr. Cole's claim was not available until *McGirt* and *Murphy* became final. *See* Order Remanding for Evidentiary Hearing at 2, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Aug. 12, 2020) (citing 22 O.S. §§ 1089(D)(8)(a), (9)(a)) (finding "[t]he issue could not have been previously presented because the legal basis for the claim was unavailable"). In fact, when Mr. Cole filed the identical claim prior to the date *McGirt* became final, this Court dismissed it as premature. O.R. 620 (dismissing Mr. Cole's prior successive APCR as premature "[b]ecause neither *Murphy* nor *McGirt* is a final opinion").

VI. Conclusion.

This Court "[r]ecogniz[ed] the historical and specialized nature of th[e] remand for evidentiary hearing" and directed the District Court to address the only two issues relevant to this Court's analysis under *McGirt*. O.R. 626-27. Following that hearing, the District Court carefully considered and clearly answered those questions, concluding that the victim was an Indian and the crimes occurred in Indian country. By faithfully applying *McGirt*, this Court must conclude the State of Oklahoma had no jurisdiction to try, convict, and sentence Mr. Cole.

Respectfully Submitted,

MICHAEL W. LIEBERMAN, OBA #32694
THOMAS D. HIRD, OBA #13580
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975
Michael_Lieberman@fd.org
Tom_Hird@fd.org

VERIFICATION

State of Oklahoma)
) ss:
County of Oklahoma)

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

MICHAEL W. LIEBERMAN

ANGELA BERRY NOTARY # 14011145 EXP. 12/15/22 PUBLIC STATE OF OKLAHOMA

Subscribed and sworn to before me this 8th day of December, 2020.

Notary Public

Commission Number: 14011145

My commission expires: 12-15-2022

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2020, a true and correct copy of the foregoing Post-Hearing Supplemental Brief in Support of Successive Application for Post-Conviction Relief 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.

MICHAEL W. LIEBERMAN