IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JUAN MANUAL LOPEZ,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

No. PC-2021-731

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner, pro se, appealed to this Court from an order of the District Court of Caddo County in Case No. CF-2016-163 denying his request for post-conviction relief pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___, this Court determined that the United States Supreme Court decision in *McGirt*, because it is a new procedural rule, is not retroactive and does not void final state convictions. *See Matloff*, 2021 OK CR 21, ¶¶ 27-28, 40.

The conviction in this matter was final before the July 9, 2020 decision in *McGirt*, and the United States Supreme Court's holding in *McGirt* does not apply. Therefore, the trial court's denial of post-conviction relief is **AFFIRMED**. 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.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 5th day of October, 2021.

Scott Rowland

SCOTT ROWLAND, Presiding Judge

Robert L Hudson

ROBERT L. HUDSON, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

ATTEST:

John D. Haddan

Clerk

PA

IN THE DISTRICT COURT OF CADDO COUNTY
STATE OF OKLAHOMA

State of Oklahoma,	)	
Plaintiff,	)	
v.	)	**Case No. CF-2016-163**
Juan Manuel Lopez,	)	
Defendant.	)	

Order Denying Defendant's Application For Post Conviction Relief

This matter comes on before me upon the Defendant's Application For Post Conviction Relief filed November 5, 2020, pursuant to **22 O.S. §1080.** The Court considers this matter without hearing, pursuant to **Rule 4(h) of the District Courts of the State of Oklahoma** and **22 O.S. §1083(b).** Neither party appears.

WHEREUPON the Court reviewed the pleadings and takes judicial notice of the prior proceedings contained in the Court files, without the assistance of Counsel, independently researched the issues presented and typed the Court's order. Further, the Court finds that the Court is able to dispose of this matter on the pleadings and record, without further evidentiary hearing, pursuant to **22 O.S. §1084.**

THE COURT FURTHER FINDS that the Defendant is raising for the first time the assertion that the crimes were committed in the Indian Country to wit:

> THE PETITIONER'S CONVICTION FOR ACTS COMMITTED IN INDIAN COUNTRY AND AS A FEDERALLY RECOGNIZED INDIAN IS IN VIOLATION OF THE LAWS OF THE UNITED STATES AS RECOGNIZED IN MCGIRT V. OKLAHOMA, 140 S.CT. 2452, 2020 WL 3848063 (JULY 9, 2020) AND MURPHY V. ROYAL, 875 F.3D 896 (10TH CIR. 2017), AND IS SUBJECT TO COLLATERAL ATTACK.

THE COURT FURTHER FINDS that the Defendant contends that his offenses occurred within, "The land within the boundaries of this county is recognized as Indian Country". The Court takes judicial notice of the Affidavit For Issuance Of Arrest Warrant filed on April 29, 2016 which notes the location of the offense as 313 West Mississippi, Anadarko, Oklahoma which is within the former Kiowa, Comanche and Apache Reservation.

THE COURT FURTHER FINDS that the Defendant is invoking the subject matter jurisdiction of the Federal and Tribal Courts which are Court's of limited jurisdiction, therefore the burden of proof is on the Defendant to affirmatively prove prima facie subject matter jurisdiction. In **Safe Streets All. v. Hickenlooper**, 859 F.3d 865, 878 (10th Cir. 2017) the United States Court of Appeals for the 10th Circuit held to wit:

> "Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." Id. at 1151 (quoting Gunn v. Minton, 568 U.S. 251, 133 S.Ct. 1059, 1064, 185 L.Ed.2d 72 (2013)). ***"[F]ederal subject matter jurisdiction is elemental," and "must be established in every cause under review in the federal courts." Id. (quoting Firstenberg v. City of Santa Fe, 696 F.3d 1018, 1022 (10th Cir. 2012)). The "burden of establishing" a federal court's subject matter jurisdiction "rests upon the party asserting jurisdiction."*** Id. (citation omitted). "A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." Id. (quoting Full Life Hospice, LLC v. Sebelius, 709 F.3d 1012, 1016 (10th Cir. 2013)). For that reason, "[w]e also review" a district court's rulings on Article III "standing de novo." Niemi v. Lasshofer, 770 F.3d 1331, 1344 (10th Cir. 2014) (citation omitted).

THE COURT FURTHER FINDS that first the Defendant must first establish that the Defendant is an "Indian". In **Goforth v. State**, 1982 OK CR 48 the Oklahoma Court of Criminal Appeals set out a two part test to wit:

> "***Therefore, fundamental to the appellant's claim that state jurisdiction was preempted by federal statute is a determination of whether appellant is an Indian***. Two elements must be satisfied before it can be found that the appellant is an Indian under federal law. ***Initially, it must appear that he has a significant percentage of Indian blood***. ***Secondly, the appellant must be recognized as an Indian either by the federal government or by some tribe or society of Indians***. United States v. Rogers, 45 U.S. (4 How.) 567, 11 L.Ed. 1105 (1846). See also, United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976); Makah Indian Tribe v. Clallam County, 73 Wash.2d 667, 440 P.2d 442 (1968); F. Cohen, Handbook of Federal Indian Law 2 (1942)."

THE COURT FURTHER FINDS that the Defendant has established a prima facie case by attaching a certification issued by Liz Ware Enrollment Officer and Matthew M. Komalty, Chairman of the Kiowa Tribe that the Defendant is an enrolled member of an Kiowa Tribe with 3/8 degree Kiowa Tribal Blood. The Court takes judicial notice of the former Kiowa Reservation, therefore the Defendant is an Indian of a tribe recognized by the Federal Government. **Tooisgah v. United States,** 186 F.2d 93 (10 Cir. App., 1950).

THE COURT FURTHER FINDS that the Oklahoma Court of Criminal Appeals has clearly stated in, **State v. Klindt**, 1989 OK CR 75 to wit:

> "The State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country."

THE COURT FURTHER FINDS that Indian Country is defined at **18 U.S.C. §1151** to wit:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means ***(a) all land within the limits of any Indian reservation*** under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, ***(b) all dependent Indian communities*** within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and ***(c) all Indian allotments***, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

THE COURT FURTHER FINDS that the City of Anadarko is contained within the former Kiowa, Comanche and Apache Reservation which was located South of the Washita River. **15 Statutes At Large §581 & §589.**

THE COURT FURTHER FINDS that United States Court of Appeals for the 10th Circuit set the test for "Indian Country" in **United States v. Arrieta**, 436 F.3d 1246, 1250 (10th Cir. 2006) to wit:

> "Two requirements must be satisfied for Indian lands to be classified as a "dependent Indian community." ***First, the lands must have been "set aside by the Federal Government for the use of the Indians as Indian land***." Venetie, 522 U.S. at 527, 118 S.Ct. 948. This requirement guarantees that the land is actually occupied by an Indian community. Id. at 531, 118 S.Ct. 948. ***Second, the lands must be "under federal superintendence."*** Id. at 527, 118 S.Ct. 948. The latter requirement ensures that the community is dependent on the federal government such that the federal government and the Indians, rather than the states, exercise primary jurisdiction. Id. at 531, 118 S.Ct. 948."

THE COURT FURTHER FINDS that the 10th Circuit of the United States Court of Appeals held in **Tooisgah v. United States**, 186 F.2d 93 (10 Cir. App., 1950) involving the former Kiowa, Comanche and Apache Reservation held that the reservation was disestablished to wit:

> ***In the resolution of that question, it is important to keep in mind that when in 1907, the Territory of Oklahoma was admitted into the Union upon an equal footing with the original states, it thereby acquired full and complete jurisdiction over all persons and things within its boundaries***, including the Indians, except to the extent that the federal government expressly retained or asserted paramount jurisdiction *97 over them as guardian and ward. See United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869; Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed.. ..... ***When, however, the tribes occupying the reservation ceded the lands embraced within it to the United States, relinquishing and surrendering 'all their***

claim, title and interest,' subject to the allotments in severalty, and every allottee was given the benefit of and made subject to the laws, both criminal and civil, of the state or territory, with the gift of citizenship and equal protection of the laws, Section 6 of the Act of February 8, 1887, 24 Stat. 388, we think it cannot be doubted that Congress thereby intended to dissolve the tribal government, *98 disestablish the organized reservation, and assimilate the Indian tribes as citizens of the state or territory. United States v. LaPlant, D.C., 200 F. 92.

THE COURT FURTHER FINDS that Courts are required to take judicial notice of the County Seat of the District Court in which they preside, which is the City of Anadarko, Caddo County, State of Oklahoma. The City of Anadarko as a County Seat of Caddo County, is a political subdivision of the State of Oklahoma. The State of Oklahoma Governmental Tort Claims Act defines a Political Subdivision to include municipalities and counties. **51 O.S. §152(11)**. As a County Seat the City of Anadarko, as a matter of law cannot be under federal superintendence, since the City is the site of the Caddo County Courthouse which is governed by the Commissioners of Caddo County, with the law enforced by Sheriff and Deputies for Caddo County. The Caddo County Courthouse is also the site of the District Court of Caddo County. Further the City of Anadarko is governed pursuant to its city charter with elected municipal officials and a standing municipal police force. The City of Anadarko which includes Caddo County Governmental Courthouse are political subdivisions of the State of Oklahoma and as a matter of law cannot be under federal superintendence, therefore the second element for dependent Indian community has failed.

THE COURT FURTHER FINDS that the Court shall take judicial notice of the Criminal Court Files within the Caddo County Court Clerk's Office and finds that the undersigned judge as Special District Judge of Caddo County since appointment on January 1, 2005 is unaware of any land within Caddo County, not held in trust or titled in the name of an Indian Tribe being judicially determined to be a Dependent Indian Community, pursuant to **18 U.S.C. §1151(b).**

THE COURT FURTHER FINDS that the Defendant has failed to attach any real estate records to show that the crimes were committed on an Indian Allotment held in Trust by the United States Department of the Interior Bureau of Indian Affairs, pursuant to **18 U.S.C. §1151(c).** Further, the Court finds that the Department of the Interior Bureau of Indian Affairs BIA Police did not participate in the criminal prosecution of the Defendant upon the Court's review of the Affidavit of the Arresting Officer and review of the Court file, which is indicative that the crimes were not committed on "Indian Country", pursuant to **18 U.S.C. §1151.**

THE COURT FURTHER FINDS that the Defendant argues that **McGirt v. Oklahoma**, 140 S. Ct. 2452, 2479, 207 L. Ed. 2d 985 (2020) is persuasive authority that all of the Indian Reservations within the State of Oklahoma remain intact, however **McGirt, supra** holds explicitly to the contrary to wit:

> "Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek."

THE COURT FURTHER FINDS that the United States Supreme Court has held that Congress has the Plenary Power to unilaterally change, modify or eliminate an Indian Treaty at any time. In Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66, 23 S. Ct. 216, 221, 47 L. Ed. 299 (1903) the Chief of the Kiowa Tribe objected to the minimal payments being made in the Jerome Agreement in exchange for the termination of the KCA Reservation by holding to wit:

> "***Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning***, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the *566 Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations (Chinese Exclusion Case, 130 U. S. 581, 600, 32 L. ed. 1068, 1073, 9 Sup. Ct. Rep. 623), the legislative power might pass laws in conflict with treaties made with the Indians. Thomas v. Gay, 169 U. S. 264, 270, 42 L. ed. 740, 743, 18 Sup. Ct. Rep. 340; Ward v. Race Horse, 163 U. S. 504, 511, 41 L. ed. 244, 246, 16 Sup. Ct. Rep. 1076; Spalding v. Chandler, 160 U. S. 394, 405, 40 L. ed. 469, 473, 16 Sup. Ct. Rep. 360; Missouri, K. & T. R. Co. v. Roberts, 152 U. S. 114, 117, 38 L. ed. 377, 379, 14 Sup. Ct. Rep. 496; Cherokee Tobacco, 11 Wall. 616, Sub nom. 207 Half Pound papers of Smoking Tobacco v. United States, 20 L. ed. 227. The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. ***When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress***, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. In United States v. Kagama (1885) 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109, speaking of the Indians, the court said (p. 382, L. ed. p. 230, Sup. Ct. Rep. p. 1113):"

THE COURT FURTHER FINDS that the entire State of Oklahoma was organized by survey by the Federal Government under the rectangular survey system by Section, Township and Range with 77 Counties with county seats and municipalities. **Historical Atlas Of Oklahoma,** Charles Robert Goins and Danney Goble, (2006) pages 115 and 157. Further, the Court finds that the United States Government, pursuant to the Jerome Agreement disbursed the Indian Reservations of the KCA and WCD by purchasing their surplus lands not allotted to individual tribal members, then Congress exercised its Plenary Powers by the **Organic Act, 26 Statutes At Large §81,** and **Enabling Act, 34 Statutes At Large 267** to create the State of Oklahoma with all of its political subdivisions. It is inconceivable that the United States would create the State of Oklahoma to stand on equal footing with other states with KCA Indian Reservation and WCD Indian Reservation to continue to exist, since together they would encompass the entirety of Caddo County.

THE COURT FURTHER FINDS that the Defendant was represented by counsel at the time of sentencing, further all issues that could have been raised on direct appeal but were not raised on appeal are waived as a matter of law. **Slaughter v. State,** 2005 OK CR 2; **Carter v. State,** 1997 OK CR 22, 936 P.2d 342; **Thomas v. State,** 1994 OK CR 85; **Richie v. State**, 1998 OK CR 26; **Nguyen v. State**, 1994 OK CR 48; **Coleman v. State**, 1984 OK CR 104. In **Murphy v. State,** 2005 OK CR 25 the Oklahoma Court of Criminal Appeals restated the finality of Judgement & Sentences on appeal and through the Post Conviction Procedure Act to wit:

> On numerous occasions this Court has set forth the narrow scope of review available under the amended Post–Conviction Procedure Act. *See e.g., McCarty v. State,* 1999 OK CR 24, ¶ 4, 989 P.2d 990, 993, *cert. denied,* 528 U.S. 1009, 120 S.Ct. 509, 145 L.Ed.2d 394 (1999). The Post–Conviction Procedure Act was neither designed nor intended to provide applicants another direct appeal. *Walker v. State,* 1997 OK CR 3, ¶ 3, 933 P.2d 327, 330, *cert. denied,* 521 U.S. 1125, 117 S.Ct. 2524, 138 L.Ed.2d 1024 (interpreting Act as amended). The Act has always provided petitioners with very limited grounds upon which to base a collateral attack on their judgments. ***Accordingly, claims that could have been raised in previous appeals but were not are generally waived; claims raised on direct appeal are res judicata.*** *Thomas v. State,* 1994 OK CR 85, ¶ 3, 888 P.2d 522, 525, *cert. denied.* 516 U.S. 840, 116 S.Ct. 123, 133 L.Ed.2d 73 (1995)

THE COURT THEREFORE FINDS, ORDERS, ADJUDGES AND DECREES that the Defendant's Application For Post Conviction Relief is hereby ordered denied in all respects, for the reasons set out above. **Murphy v. State,** 2005 OK CR 25.

IT IS SO ORDERED this 15 day of June 2021.

David A. Stephens
Special District Judge

Court Clerk Deliver Copy To: **District Attorney**
Defendant in DOC Custody

Additional material from this filing is available in the Clerk's Office.