

# APPENDIX

# A

IN THE COURT OF CRIMINAL APPEALS, FILED  
COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA  
OF THE STATE OF OKLAHOMA

OCT -1 2021

ROBERT JAMES GRASS,

JOHN D. HADDEN  
CLERK

Petitioner,

v.

No. PC-2020-827

STATE OF OKLAHOMA,

Respondent.

**ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF**

Petitioner, pro se, appealed to this Court from an order of the District Court of Cherokee County in Case No. CF-1997-311 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.

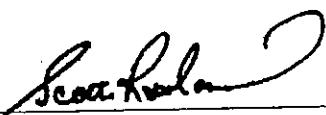
The conviction in this matter was final before the July 9, 2020 decision in *McGirt*, and the United States Supreme Court's holding in *McGirt* does not apply. Therefore, the trial court's denial of post-conviction relief is **AFFIRMED**. Petitioner's motion for an extension of

time to file brief and motion to file a brief of greater length are **GRANTED**. 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.

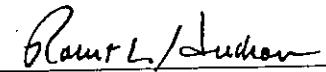
**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this

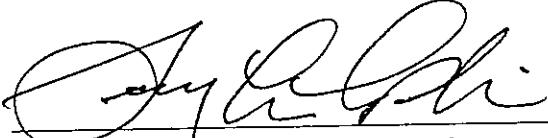
1<sup>st</sup> day of October, 2021.



**SCOTT ROWLAND, Presiding Judge**



**ROBERT L. HUDSON, Vice Presiding Judge**

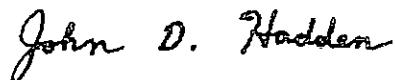


**GARY L. LUMPKIN, Judge**



**DAVID B. LEWIS, Judge**

ATTEST:



Clerk

PA

# APPENDIX

## B

ROBERT JAMES GRASS, ) JUN 22 2021  
Petitioner, ) JOHN D. HADDEN  
v. ) CLERK  
THE STATE OF OKLAHOMA, ) No. PC-2020-827  
Respondent. )

## ORDER STAYING PROCEEDINGS

On March 24, 2021, this Court remanded this matter to the District Court of Cherokee County in case number CF-1997-311 for an evidentiary hearing to aid the resolution of issues raised pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). The hearing was to be held within sixty days.

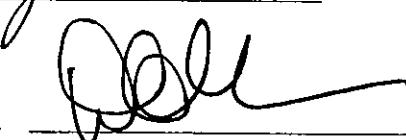
Presently before the Court are Respondent's motions for additional time to complete the hearing and to stay the proceedings. Essentially, Respondent requests an indefinite stay of proceedings until issues pending before the United States Supreme Court (*Bosse v. State*, 2021 OK CR 3, 484 P.3d 286) and this Court (*State ex rel. District Attorney v. Wallace*, 2021 OK CR 15, \_\_\_ P.3d \_\_\_) are resolved.

Respondent's motion for a stay is **GRANTED**. Proceedings are stayed pending further order of this Court. Respondent shall file a notice in this Court within ten (10) days of the resolution of *Bosse* and/or *Wallace*.

**IT IS SO ORDERED.**

**WITNESS MY HAND AND THE SEAL OF THIS COURT** this

22nd day of June 2021.



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**DANA KUEHN, Presiding Judge**

ATTEST:

John D. Hadden  
Clerk

NF

# APPENDIX

# C

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

ROBERT JAMES GRASS,      )      MAY 21 2021  
Petitioner,      )      JOHN D. HADDEN  
v.      )      CLERK  
STATE OF OKLAHOMA,      )      No. PC-2020-827  
Respondent.      )

**ORDER GRANTING MOTION FOR EXTENSION  
OF TIME IN WHICH TO HOLD EVIDENTIARY HEARING**

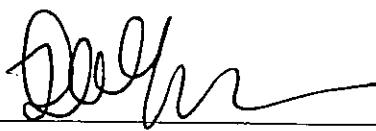
On March 24, 2021, this Court ordered an evidentiary hearing to be held in Cherokee County District Court Case No. CF-1997-311 regarding issues raised pursuant to *McGirt v. Oklahoma*, 591 U.S. \_\_\_, 140 S.Ct. 2452 (2020).

On May 5, 2021, counsel for Respondent filed a motion seeking additional time to complete the hearing. Counsel advises that certain stipulations have been reached by the parties and seeks additional time for a final ruling. The motion is **GRANTED**. The hearing shall be completed on or before June 10, 2021. The timeframes set out on the March 24, 2021, order otherwise remain in effect.

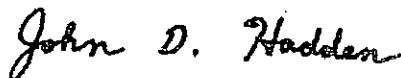
**IT IS SO ORDERED.**

WITNESS MY HAND AND THE SEAL OF THIS COURT this

21st day of May, 2021.

  
DANA KUEHN, Presiding Judge

ATTEST:



Clerk

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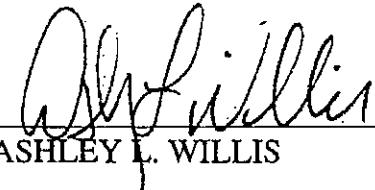
**CERTIFICATE OF MAILING**

On this 1<sup>st</sup> day of June 2021, a true and correct copy of the foregoing was mailed via United States Postal Service to:

Robert Grass, DOC #278055  
Lexington Correctional Center  
P.O. Box 260  
Lexington, OK 73051

Eric Jordan  
Assistant District Attorney  
213 West Delaware  
Tahlequah, OK 74464

Jimmy Dunn  
Assistant District Attorney  
301 E. Cherokee  
Wagoner, OK 74467

  
\_\_\_\_\_  
ASHLEY L. WILLIS

# APPENDIX

# D

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

ROBERT JAMES GRASS,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

MAR 24 2021

JOHN D. HADDEN  
CLERK

No. PC-2020-827

**ORDER REMANDING FOR EVIDENTIARY HEARING**

On November 13, 2020, Petitioner appealed to this Court from an order of the District Court of Cherokee County denying Petitioner's application for post-conviction relief in Case No. CF-1997-311.

Following a jury trial in this case, Petitioner was convicted of First Degree Murder and sentenced to life imprisonment with all but the first one hundred years suspended. Petitioner's conviction was affirmed by this Court. *Grass v. State*, F-1999-1023 (Okl.Cr. August 24, 2000)(unpublished).

In his post-conviction appeal Petitioner argues, in relevant part, that the State lacked jurisdiction to charge, try and convict him because the crime charged occurred on Indian land and that he is a member of the Cherokee Nation. These claims are based upon the

decision in *Murphy v. Royal*, 866 F.3d 1164 (10<sup>th</sup> Cir. 2017), which was affirmed by the United States Supreme Court in *Sharp v. Murphy*, 591 U.S. \_\_\_, 140 S.Ct. 2412 (2020) for the reasons stated in *McGirt v. Oklahoma*, 591 U.S. \_\_\_, 140 S.Ct. 2452 (2020).

In an order entered and filed October 15, 2020, the District Court of Cherokee County, the Honorable Douglas Kirkley, District Judge, denied Petitioner's application for post-conviction relief finding that it was not ripe for consideration. Petitioner seeks remand of the District Court's order for further proceedings, and a proper ruling on his application for post-conviction relief.

The District Court's October 15, 2020, order found Petitioner's claims were not ripe and in doing so avoided addressing Petitioner's application on its merits. We disagree. There is nothing in the record before this Court to support the District Court's findings. Petitioner's claim raises two separate questions: (a) his Indian status, and (b) whether the crime occurred in Indian Country. Both issues are ripe for consideration and require fact-finding. We therefore **REMAND** this case to the District Court of Cherokee County, the Honorable Douglas Kirkley, District Judge, 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 Petitioner'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. In its written findings of fact and conclusions of law the District Court shall rule on Petitioner's post-conviction claim that the State lacked jurisdiction to charge, try and convict him because the crime occurred on the Cherokee Reservation and that he is an Indian. In determining whether Petitioner is entitled to post-conviction relief the District Court shall address the following issues.

First, Petitioner's Indian status. The District Court must determine whether (1) Petitioner has some Indian blood, and (2) is recognized as Indian by a tribe or by the federal government.<sup>1</sup>

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). 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 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 promptly deliver a copy of that record to the Attorney General. A supplemental brief, addressing only those issues pertinent to the evidentiary hearing and

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

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.

The District Court, upon making its determination as to Petitioner's Indian status and whether the crime occurred in Indian Country, shall then address the claims presented in Petitioner's application for post-conviction relief, specifically his claim that the State lacked jurisdiction to charge, try and convict him because the crime occurred in Indian Country and that he is an Indian. The District Court, pursuant to this Court's Rule 5.4(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), shall

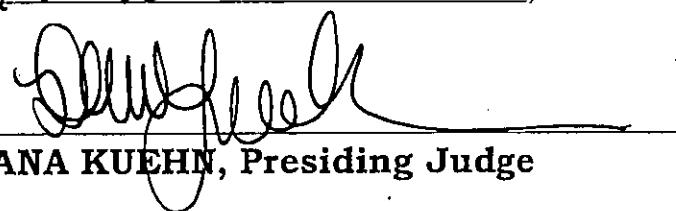
then make written findings of fact and conclusions of law, a certified copy of which shall be forwarded to this Court, Petitioner and all counsel of record. Petitioner shall be allowed thirty (30) days from the date the order is filed in the District Court to file a supplemental application and brief for post-conviction relief with this Court, using this Court's Case No. PC-2020-827. If no supplemental brief is filed Petitioner's application will be decided based upon his application and brief filed with this Court on October 9, 2020.

**IT IS FURTHER ORDERED** that the Clerk of this Court shall transmit copies of this order to the District Court of Cherokee County with a copy of Petitioner's November 13, 2020 post-conviction Petition in Error and brief in support filed in this Court, Case No. PC-2020-827.

**IT IS SO ORDERED.**

**WITNESS MY HAND AND THE SEAL OF THIS COURT** this

24th day of March, 2021.



DANA KUEHN, Presiding Judge

ATTEST: John D. Hadden

Clerk

NF

# APPENDIX

# E

IN THE DISTRICT COURT OF CHEROKEE COUNTY  
STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Petitioner,

vs.  
Robert J. Gross

Defendant.

CASE NO.

*Gf 97-311*  
OCT 16 2020

LESA ROUSEY-DANIELS, Clerk  
CHEROKEE COUNTY

By *BR* Dep.

ORDER

COMES NOW on this 15 day of October, 2020 the Court

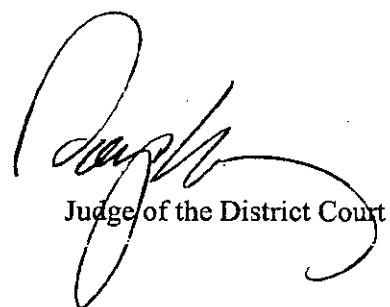
holds the Defendant's Motion/Application for Post-Conviction Relief as the issue of the Court lacking Subject Matter Jurisdiction is denied based upon the doctrine of ripeness. The Defendant claims membership of a Federally recognized Indian Tribe and the crime occurred within the boundaries of the Cherokee Nation Reservation; therefore, this Court lacks jurisdiction to convict the Defendant.

Pursuant to the recent decision of *McGirt v Oklahoma*, No. 18-9526 (U.S. July 9, 2020) the United States Supreme Court only addressed crimes committed by Tribal Members within the boundaries of the Creek Nation Reservation. The Oklahoma Court of Criminal Appeals is currently considering whether the United States Congress established a reservation for the Cherokee Nation; and if so, whether Congress specially erased those boundaries and disestablished the reservation. *See, Hogner vs. State*, Case No. F-18-138 (Craig County) attached.

E.R

Wherefore, as the Motion/Application for post-conviction relief is not ripe for decision and is therefore denied.

IT IS SO ORDERED.



Judge of the District Court

Cc: Jack Thorp, District Attorney

Robert Cooper #278055  
L.C.C. UNIT 5-H-2-P  
Pro Se  
P.D. Box 260  
Lexington, OK 73051

# APPENDIX

## F

IN THE DISTRICT COURT OF CHEROKEE  
STATE OF OKLAHOMA

EE COUNTY  
**FILED**  
FEB 09 2021

STATE OF OKLAHOMA,  
Plaintiff.

V.

Robert James Grass

Defendant.

LESA ROUSEY-DANIELS, Court Clerk  
CHEROKEE COUNTY  
By \_\_\_\_\_ Deputy

Case No. CF-1997-311

## **STATE'S REPONSE TO DEFENDANT'S APPLICATION**

## **FOR POST-CONVICTION RELIEF**

COMES NOW the State of Oklahoma, by and through Eric Jordan, Assistant District Attorney, and responds to the defendant's Application for Post-Conviction Relief filed with this honorable Court. The State would show the Court as follows:

The defendant has failed to meet his burden to present *prima facie* evidence that the jurisdiction of the Oklahoma State District Court is defeated in favor of exclusive Federal Jurisdiction and/or tribal jurisdiction.

In order for the State to have been deprived of the jurisdiction to prosecute the defendant, the defendant must establish through properly admitted evidence, and the court must find:

1. The crime alleged is a crime enumerated in the major crimes act, 18 U.S.C. § 1153 or the General Crimes Act, § 1152.
2. The defendant is “Indian” as that term is defined for major crimes act jurisdiction; and,
3. The crime took place in “Indian Country” as that is defined by law.

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

### **I. Was the Crime Alleged a Major Crime Under the Act**

18 U.S.C. §§ 1152,1153 confers exclusive federal jurisdiction over certain major crimes. The State believes this point is not in controversy, as the crime was for which the defendant was convicted was First Degree Murder – Malice Aforethought.

### **II. Is the defendant an Indian, as That Term is Defined and Used, Under the Act**

In order for the defendant to prevail in defeating the State's jurisdiction the defendant must present evidence that the defendant is an Indian under the Act. Because there is no statutory definition of Indian, we look to federal law interpreting that term under the act.

Under the Act an Indian is a person who meets the following two part test:

1. Has some degree of Indian blood; and,
2. Is an individual recognized by the federal government or a federally recognized tribe as an Indian.

Enrollment is not necessary, but the defendant must have an Indian ancestor.

*United States v. Prentiss*, 273 F. 3d 1277 (10<sup>th</sup> Cir. 2001); *See Also, Goforth v. State*, 1982 OK CR 48, ¶ 6, *United States v. Diaz*, 679F.3d 1183, 1187 (10<sup>th</sup> Cir. 2012).

A defendant must show they are Indian under the act in order to avail themselves of the act's jurisdiction. A defendant's bald assertion should be given no persuasive weight absent the production of evidence sufficient to satisfy the requirement of *Prentiss*. The State believes the defendant HAS made a proper *prima facie* showing that he is an Indian under the Federal statutory definition.

### **III. Did the Crime Take Place in Indian Country as Defined by Relevant Law?**

Indian country is defined in 18 U.S.C. § 1151:

(a) All land within the limits of an Indian reservation under U.S. jurisdiction  
including potential lands and rights of way running through...

Defendant asserts that the crime, which occurred in Cherokee County, occurred in "Indian Country" as defined by the Statute. The defendant offered no *evidence* of this fact. It is improper for the Court to grant relief merely on defendant's assertions without some proof.

The State concedes that Cherokee County, in its entirety, falls within the traditional boundaries of the Cherokee Nation reservation. The question then becomes, was that reservation disestablished by congress, applying the *McGirt* analysis.

On August 14, 2020 the Oklahoma Court of Criminal Appeals (hereafter OCCA) issued an Order Remanding for Evidentiary Hearing in *Hogner v. State*, F-18-138.

In that case, defendant Hogner asserted that he is a citizen of the federally recognized Miami Tribe of Oklahoma. He further argued that Craig County, the state venue where he was prosecuted and where the crime was alleged to have occurred, is within the boundaries of the Cherokee Nation. Therefore, he concluded, as an Indian, in Indian country, the State of Oklahoma had no jurisdiction to prosecute him and that authority lied with the Federal Government exclusively.

The OCCA found that pursuant to *McGirt v. Oklahoma*, Supra, Hogner's claim raised two issues:

1. The defendant's Indian status; and,
2. Whether the crime occurred in Indian country.

The OCCA determined that these two issues required fact finding and remanded the case to the District Court of Craig County for an evidentiary hearing. The Court stated that upon the *Appellant's* presentation of *prima facie* evidence as to his legal status as Indian and the location

of the crime being in Indian Country the burden *then* shifts to the State of Oklahoma to prove they have jurisdiction. *Hogner v. State*, F-18-138, Order Remanding for Evidentiary Hearing, 08/14/20

Specifically regarding the question whether the Cherokee Nation territory is Indian Country, the Court of Criminal Appeals directed the District court to follow the analysis set out in *McGirt* and make a determination, based upon evidence, as to:

1. Whether congress established a reservation for the Cherokee Nation; and,
2. Whether congress specifically erased these boundaries and disestablished the reservation.

In Order to make this determination, the OCCA said that “[T]he District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps and/or testimony.” The District Court should then transmit the record of the evidentiary hearing. *Hogner Order Remanding for Evidentiary Hearing*, p.4.

#### **IV. Conclusion**

Under the analysis evident in the *Hogner* order, as well as *State v. Bosse*, PCD-2019-124, posing the same jurisdictional question but in regard to the Chickasaw Nation territory, remanded for evidentiary hearing August 12, 2020 (two days prior to *Hogner*), it would appear to the State that the Oklahoma Court of Criminal Appeals, in its wisdom, has remanded cases for thorough evidentiary analysis under *McGirt* regarding the original territories of the other similarly situated tribal nations, or Five Original Tribes. (Formerly known by the pejorative “Five Civilized Tribes”) *Hogner*, which is on schedule to be decided imminently will definitively answer the jurisdictional question of whether, under the legal analysis set forth in *McGirt*, the Cherokee Nation reservation was or was not disestablished.

Therefore, in the interest of judicial economy, and in the interest of saving the defense from the time, effort and expense of gathering and presenting evidence to support a *prima facie* showing that Cherokee County is Indian country, the State respectfully suggests that the Court stay the instant Application for Post-Conviction Relief for the reasonably brief time it will take for the Court of Criminal Appeals to settle the question and issue a mandate.

Therefore, the State of Oklahoma asks the Court to **DENY** the requested relief until the case mandates noted above issue from the Court of Criminal Appeals.

Respectfully Submitted,

JACK THORP  
DISTRICT ATTORNEY

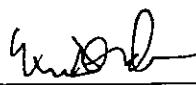
By: 

Eric Jordan  
Assistant District Attorney  
Cherokee Co. District Attys Office  
213 West Delaware  
Tahlequah, OK 74464  
(918)456-6173

**CERTIFICATE OF MAILING OR DELIVERY**

I do hereby certify that on the day of filing, I mailed or delivered a true and correct copy of the above and foregoing to the Attorney of record for the Defendant.

Robert Grass #278055  
L.C.C. Unite 5-H-2-P  
P.O. Box 260  
Lexington, OK 73051

  
Eric Jordan  
Assistant District Attorney

# APPENDIX

# G

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

FILED  
APR 29 2021

ROBERT JAMES GRASS,

Defendant/Petitioner,

v.

THE STATE OF OKLAHOMA,

Plaintiff/Respondent.

LESA ROUSEY-DANIELS, Court Clerk  
CHEROKEE COUNTY

Deputy

Cherokee County District Court

Case No. CF-1997-311

Court of Criminal Appeals

Case No. PC-2020-827

STIPULATIONS

This case is before the Court pursuant to an Order Remanding for Evidentiary Hearing from the Oklahoma Court of Criminal Appeals, dated March 24, 2021. In that Order, the Court of Criminal Appeals directed this Court to make findings of fact on two issues: (1) whether the defendant/petitioner, Robert Grass, has "some Indian blood" and "is recognized as an Indian by a tribe or the federal government" and (2) whether the crime occurred within "Indian Country."

In response to the two questions this Court has been directed to answer, the parties have reached the following stipulations:

1. As to the status of the defendant/petitioner, the parties hereby stipulate and agree as follows:

The defendant/petitioner, Robert James Grass, has 27/64 Indian blood and was a member of the Cherokee Nation at the time of the crime. The Cherokee Nation is an Indian Tribal Entity recognized by the federal government.

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

The crime in this case occurred within Cherokee County, Oklahoma – the entirety of which is within the historical boundaries of the Cherokee Nation. This location falls within the geographic area set out by the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified by the Treaty of July 19, 1866, 14 Stat. 799, and as modified by the 1891 agreement ratified by the Act of March 3, 1893, 27 Stat. 612.

Robert J. Gross

Counsel for Defendant/Petitioner

Eric Jordan

Eric Jordan/James Dunn  
Assistant District Attorney

# APPENDIX H

IN THE DISTRICT COURT OF CHEROKEE COUNTY  
STATE OF OKLAHOMA

FILED

APR 29 2021

ROBERT JAMES GRASS,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

LESA ROUSEY-DANIELS, Court Clerk  
CHEROKEE COUNTY

By \_\_\_\_\_ Deputy

District Court Case No. CF-1997-311

Appellate Case No. PC-2020-827

STATE'S PRE-EVIDENTIARY HEARING BRIEF  
ON INDIAN COUNTRY REMAND

Robert James Grass, hereinafter referred to as Petitioner, was convicted of first-degree murder and sentenced to life imprisonment with all but the first one hundred (100) years suspended in Cherokee County District Court, Case No. CF-1997-311. Petitioner is now before this Court, some twenty-two (22) years later, for an evidentiary hearing on his claim that the State lacked jurisdiction over this crime pursuant to 18 U.S.C. § 1153.

I. Procedural History

After his conviction in 1999, Petitioner appealed his Judgment and Sentence to the Oklahoma Court of Criminal Appeals ("OCCA"), arguing the evidence was insufficient to support his conviction for first degree murder. On August 24, 2000, the OCCA affirmed Petitioner's conviction in an unpublished opinion in Case No. F-1999-1023 (attached as Exhibit "A").

Petitioner did not challenge his conviction and sentence again for eighteen (18) years. In 2018, Petitioner filed a *pro se* application for post-conviction relief in which he argued, relying on *Miller v. Alabama*, 567 U.S. 460 (2012), his sentence violated the Eighth Amendment (attached as Exhibit "B").<sup>1</sup> This application for post-conviction relief was never ruled on by the district court. See Docket Sheet – Case No. CF-1997-311 (attached as Exhibit "C").

On July 9, 2020, the United States Supreme Court held in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020), that the Creek Nation's Reservation had not been disestablished for purposes of the Major Crimes Act, 18 U.S.C. § 1153. After the United States Supreme Court issued its opinion in *McGirt*, Petitioner filed a successive application for post-conviction relief, arguing the district court did not have jurisdiction to prosecute him or certify him as an adult because he is Indian and the crime occurred in Indian Country (attached as Exhibit "D"). This Court denied Petitioner's application for post-conviction relief finding Petitioner's claims were not ripe for consideration as the OCCA had not yet determined whether the United States Congress had established a reservation for the Cherokee Nation; and if so, whether Congress specifically erased those boundaries and disestablished the reservation (attached as Exhibit "E").

Petitioner appealed the denial of his application for post-conviction relief to the OCCA in Case No. PC-2020-827 (attached as Exhibit "F"). On March 24, 2021, the OCCA granted an evidentiary hearing and ordered this Court to determine: (1) "Petitioner's Indian

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<sup>1</sup> Respondent has not included the exhibits filed with the application for post-conviction relief.

status" and (2) "whether the crime occurred in Indian Country." 3/24/2021 Order Remanding for Evidentiary Hearing (OCCA No. PC-2020-827) ("Remand Order"). This Court has scheduled the evidentiary hearing on April 29, 2021, at 1:30 p.m. As an aid to this Court in advance of the hearing, the State presents the following argument and authority in support of its contention that Petitioner's claim is barred by the doctrines of waiver and laches.

## II. Petitioner's Indian Status

Regarding Petitioner's Indian status, the OCCA ordered this Court to determine "whether (1) Petitioner has some Indian blood, and (2) is recognized as Indian by a tribe or by the federal government." Remand Order at 4 (footnote omitted). The State has confirmed that Petitioner has "some" Indian blood and was enrolled in the Cherokee Nation on August 6, 1988. *See - Letter from the Cherokee Nation* (attached as Exhibit "G"). The State has further confirmed that the Cherokee Nation is an Indian Tribal Entity recognized by the federal government. *See United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977) (members of tribes which are not federally recognized are not subject to the Major Crimes Act).

The OCCA invited the parties to reach stipulations where possible. Remand Order at 5. The State is willing to stipulate that Petitioner has "some" Indian blood and was enrolled in the Cherokee Nation, a federally recognized tribe, at the time of the crime in Cherokee County District Court, Case No. CF-1997-311. *See United States v. Zepeda*, 792

F.3d 1103, 1113 (9<sup>th</sup> Cir. 2015) (*en banc*) (a defendant must be recognized by a tribe at the time of the offense).

### **III. Indian Country**

As noted, in addition to determining Indian status, this Court must also determine whether Petitioner's crime occurred in Indian Country. Remand Order at 4.

The entirety of Cherokee County lies within the historical boundaries of the Cherokee Nation. The historical boundaries have been explicitly recognized as establishing a reservation as defined by 18 U.S.C. § 1151(a), and affirmed by the OCCA in *Spears v. State*, 2021 OK CR 7, ¶ 16, \_\_ P.3d \_\_, and *Hogner v. State*, 2021 OK CR 4, ¶ 18, \_\_ P.3d \_\_.

The State is willing to stipulate the crime occurred within the boundaries of the Cherokee Reservation and, therefore in Indian Country.<sup>2</sup>

### **IV. Petitioner's Jurisdiction Claim is Waived**

Petitioner was convicted in 1999, but did not file a proper challenge to the State's exercise of jurisdiction until his post-conviction application in 2020. Petitioner's lack of diligence in raising this claim should preclude relief.

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<sup>2</sup> The State of Oklahoma argued strenuously at the United States Supreme Court in both *McGirt* and *Murphy* that the reservations were disestablished. The State of Oklahoma still strongly believes that *McGirt* was wrongly decided. However, lower courts are bound to follow Supreme Court precedent as only the United States Supreme Court can overrule itself. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016).

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

Other defendants [aside from those who choose not to seek relief] who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.<sup>15</sup>

<sup>15</sup> For example, Oklahoma appears to apply a general rule that “issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review.” *Logan v. State*, 2013 OK CR 2, ¶ 1, 293 P.3d 969, 973. . . .

*McGirt*, 140 S. Ct. at 2479.

Oklahoma law limits the grounds for relief that may be raised in a post-conviction application to those that were not, and could not have been, raised on direct appeal. *See, e.g., Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973; *Woodruff v. State*, 1996 OK CR 5, ¶ 2, 910 P.2d 348, 350; *Berget v. State*, 1995 OK CR 66, ¶ 3, 907 P.2d 1078, 1080-81.

Respondent recognizes the OCCA recently held that federal law prevents state courts from applying doctrines such as waiver to Indian Country jurisdictional claims like that raised by Petitioner. *Bosse v. State*, 2021 OK CR 3, ¶¶ 20-22, \_\_\_ P.3d \_\_\_. The OCCA also held that Indian Country jurisdictional claims were unavailable prior to *McGirt* because “[s]ubject-matter jurisdiction may – indeed, must – be raised at any time.” *Id.*, 2021 OK CR 3, ¶ 22. However, the State is going to file a petition for writ of certiorari, asking the United States Supreme Court to review these determinations of federal law,

which conflict with the *McGirt* Court's recognition that such doctrines may be applied to Indian Country jurisdictional claims, and with its acknowledgement that it was saying "nothing new." *McGirt*, 140 S. Ct. at 2464, 2479 & n.15, 2481. Thus, the OCCA has stayed the mandate in *Bosse* until May 30, 2021, *Bosse v. State*, No. PCD-2019-124 (Okl. Cr. Apr. 15, 2021) (attached as Exhibit "H"). The State has further asked the Supreme Court to extend the stay granted by the OCCA, until the Supreme Court either denies certiorari or renders a decision on the merits. This stay application was docketed on April 26, 2021. On April 27, 2021, Justice Gorsuch—Circuit Justice of the Tenth Circuit—requested a response from Mr. Bosse, which is due on May 7, 2021. Thus, the State preserves its argument that Petitioner's belated Indian Country jurisdictional claim is waived by his failure to raise the claim in his direct appeal or original application for post-conviction relief.

#### **V. Petitioner's Jurisdictional Claim is Barred by the Doctrine of Laches.**

The OCCA has long held that, pursuant to the laches doctrine, "one cannot sit by and wait until lapse of time handicaps or makes impossible the determination of the truth of a matter, before asserting his rights." *Thomas v. State*, 1995 OK CR 47, ¶ 11, 903 P.2d 328, 331 (quotation marks omitted, alteration adopted) (collecting cases); *see also Berry v. Anderson*, 1972 OK CR 192, ¶ 4, 499 P.2d 959, 960 (barring claim based on laches even where it was "apparent" that the petitioner "would have been entitled to release" had he earlier brought his challenge); *Application of Smith*, 1959 OK CR 59, ¶ 10, 339 P.2d 796, 797-98 ("The right to relief . . . may be lost by laches, when the petition for habeas corpus

is delayed for a period of time so long that the minds of the trial judge and court attendants become clouded by time and uncertainty as to what happened, or due to dislocation of witnesses, the grim hand of death and the loss of records the rights sought to be asserted have become mere matters of speculation, based upon faulty recollections, or figments of imagination, if not outright falsifications."). Furthermore, the laches doctrine applies to collateral attacks upon convictions, including by means of an application for post-conviction relief. *Thomas*, 1995 OK CR 47, ¶ 15, 903 P.2d at 332; *see also Paxton v. State*, 1995 OK CR 46, ¶ 8, 903 P.2d 325, 327 ("We hold, therefore, that the doctrine of laches has been and continues to be applicable, in appropriate cases, to collateral attacks upon convictions, whether by means of an extraordinary writ, as in former times, or by means of an application for post-conviction relief."). "Thus, the doctrine of laches may prohibit the consideration of an application for post-conviction relief where a petitioner has forfeited that right through his own inaction." *Paxton*, 1995 OK CR 46, ¶ 8, 903 P.2d at 327.

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

burden upon the State to demonstrate actual prejudice before laches applies. *Id.*, 1995 OK CR 47, ¶ 14, 903 P.2d at 332.

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

Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are “fre[e] to say what we know to be true . . . today, while leaving questions about . . . reliance interest[s] for later proceedings crafted to account for them.” *Ramos*, 590 U. S., at —, 140 S.Ct., at 1047 (plurality opinion).

*McGirt*, 140 S. Ct. at 2481.

Here, Petitioner committed the crime in this case, twenty-two (22) years ago, and his conviction became final in 2000, more than twenty (20) years ago. Yet, all of the facts underlying his jurisdictional claim—that is, evidence related to the alleged existence of a Cherokee Reservation and that he is a member of the Cherokee Nation—were available to him at every prior stage of his criminal case, including at the time of the crime, his trial, his direct appeal, and his first post-conviction application. The OCCA has repeatedly found laches to bar collateral attacks in cases with delays far shorter in length than the present one. See, e.g., *Thomas*, 1995 OK CR 47, ¶ 7, 903 P.2d at 332 (fifteen years); *Ex parte French*, 1952 OK CR 13, 240 P.2d 818 (almost fifteen years); *Ex parte Workman*, 1949 OK CR 68, 207 P.2d 361 (eight years).

Indeed, the OCCA has on multiple occasions applied laches to jurisdictional claims.

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

Respondent recognizes the OCCA’s decision in *Bosse*, wherein the OCCA suggested that Indian Country jurisdictional claims can never be subject to laches because of “[t]he principle that subject-matter jurisdiction may not be waived.” *Bosse*, 2021 OK CR 3, ¶ 21 n.9, \_\_\_ P.3d at \_\_\_. As already set forth above, the OCCA’s conclusion that Indian Country jurisdictional claims are non-waivable subject matter jurisdictional claims is in conflict with federal authority. As stated in subsection IV, *supra*, the State is going to file a petition for writ of certiorari, asking the United States Supreme Court to review these determinations of federal law, which conflict with the *McGirt* Court’s recognition that such doctrines may be applied to Indian Country jurisdictional claims. *McGirt*, 140 S. Ct. at 2464, 2479 & n.15, 2481. Thus, the State preserves its argument that Petitioner’s belated Indian Country jurisdictional claim barred by the doctrine of laches.

## VI. Conclusion

Petitioner's lengthy delay in raising his jurisdictional challenge is inexcusable. Petitioner's jurisdictional claim is both waived and barred by the doctrine of laches, and Petitioner is not entitled to post-conviction relief. The State asks this Court to make a determination as to whether Petitioner's claim would be waived, and barred by laches, if the OCCA has not held that such doctrines are inapplicable, while alternatively answering the questions asked by the OCCA based on the undisputed facts.

Respectfully submitted,

MIKE HUNTER  
ATTORNEY GENERAL OF OKLAHOMA<sup>3</sup>

*Ashley J. Willis*  
ASHLEY J. WILLIS, OBA #22210  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>st</sup> Street  
Oklahoma City, Oklahoma 73105  
(405) 522-4423 FAX (405) 522-4534

ATTORNEYS FOR THE STATE

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

# APPENDIX

## I

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

FILED  
COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

MAY 5 2021

ROBERT JAMES GRASS,

JOHN D. HADDEN  
CLERK

Petitioner,

v.

Case No. PC-2020-827

THE STATE OF OKLAHOMA,

Cherokee County No.

Respondent.

CF-1997-311

**REQUEST FOR ENLARGEMENT OF TIME IN WHICH TO COMPLETE  
REMANDED EVIDENTIARY HEARING**

Comes now the State of Oklahoma, by and through Mike Hunter, Attorney General of the State of Oklahoma, and respectfully makes application for an enlargement of time until June 10, 2021, within which to complete the remanded evidentiary hearing in this case. In support hereof, it is submitted as follows:

1. On March 24, 2021, this Court remanded Petitioner's case to the District Court of Cherokee County for an evidentiary hearing to address Petitioner's "post-conviction claim that the State lacked jurisdiction to charge, try and convict him because the crime occurred on the Cherokee Reservation and that he is an Indian." *3/24/2021 Order Remanding for Evidentiary Hearing at 3* (Oklahoma Court of Criminal Appeals, Case No. PC-2020-827). This Court further ordered the District Court of Cherokee County address Petitioner's Indian Country claim and make written findings of fact and conclusions of law pursuant to Rule 5.4(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2021). *3/24/2021 Order Remanding for Evidentiary Hearing at 5-6*.

2. This Court gave the District Court sixty (60) days in which to hold the hearing.

3. On April 29, 2021, the District Court held an evidentiary hearing. During the evidentiary hearing the parties stipulated to Petitioner's Indian status and that the location occurred in Indian Country. 4/29/2021, Minute Order (Cherokee County District Court, Case No. CF-1997-311) (Attached as Exhibit 1). The District Court passed the ruling on Petitioner's application for post-conviction relief until June 10, 2021, per the stay of the Mandate in *Bosse v. State*, No. PCD-2019-124 (Okl. Cr. Apr. 15, 2021) (Exhibit 1 at 1).

4. This motion is made in good faith and not for purposes of delay.

For the reasons stated above, the State respectfully requests an extension until June 10, 2021, in which to complete the remanded evidentiary hearing.

Respectfully submitted,

**MIKE HUNTER  
ATTORNEY GENERAL OF OKLAHOMA<sup>1</sup>**

  
**ASHLEY L. WILLIS, No. 22210  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
(405) 521-3921  
(405) 522-4534 (FAX)**

**ATTORNEYS FOR RESPONDENT**

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

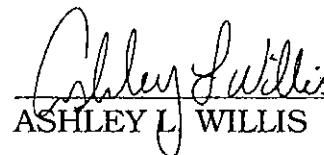
**CERTIFICATE OF MAILING**

On this 5<sup>th</sup> day of May, 2021, a true and correct copy of the foregoing was mailed to:

Eric Jordan  
Assistant District Attorney  
213 West Delaware  
Tahlequah, OK 74464

Jimmy Dunn  
Assistant District Attorney  
301 E. Cherokee  
Wagoner, OK 74467

Robert Grass, DOC #278055  
Lexington Correctional Center  
P.O. Box 260  
Lexington, OK 73051

  
\_\_\_\_\_  
ASHLEY L. WILLIS

# APPENDIX

## J

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

FILED  
COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

ROBERT JAMES GRASS, ) JUN - 1 2021

Petitioner, ) JOHN D. HADDEN  
CLERK

v. ) Case No. PC-2020-827

THE STATE OF OKLAHOMA, )

Respondent. )

**MOTION TO STAY AND ABATE PROCEEDINGS**

Comes now Respondent, by and through Mike Hunter, Attorney General of the State of Oklahoma, and respectfully makes a motion to stay and abate Petitioner's post-conviction appeal due to ongoing litigation in *Bosse v. State* and *State ex re. District Attorney v. Wallace*. In support of this Motion, Respondent submits the following:

**I. Procedural History**

Robert James Grass, hereinafter referred to as Petitioner, was convicted of first-degree murder and sentenced to life imprisonment with all but the first one-hundred (100) years suspended in Cherokee County District Court Case No. CF-1997-311. Petitioner's conviction and sentence was affirmed in an unpublished opinion in Case No. F-1999-1023. In a successive application for post-conviction relief, filed after the United States Supreme Court held in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020), that the Muscogee (Creek) Nation's Reservation had not been disestablished for purposes of the Major Crimes Act, 18 U.S.C. § 1153, Petitioner argued the district court did not have jurisdiction to

prosecute him or certify him as an adult because he is Indian and the crime occurred in Indian Country. The district court denied Petitioner's application for post-conviction relief. Petitioner subsequently appealed the denial of his application for post-conviction relief to this Court.

On March 24, 2021, this Court granted an evidentiary hearing and ordered the District Court to determine: (1) "Petitioner's Indian status" and (2) "whether the crime occurred in Indian Country." 3/24/2021 Order Remanding for Evidentiary Hearing (OCCA No. PC-2020-827).

An evidentiary hearing was held on April 29, 2021. During the hearing, the District Court found, pursuant to the stipulations entered into by the parties, that Petitioner has some Indian blood and was a member of the Cherokee Nation at the time of the crime. The District Court further found, pursuant to the stipulations, that the crime occurred within Cherokee County, Oklahoma which is within the historical boundaries of the Cherokee Nation as set out by the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified by the Treaty of July 19, 1866, 14 Stat. 799, and as modified by the 1891 agreement ratified by the Act of March 3, 1893, 27 Stat. 612.<sup>1</sup>

In its pre-hearing brief, filed in the District Court on April 29, 2021, the State preserved its argument that Petitioner's Indian Country jurisdictional claim was waived

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<sup>1</sup> The State of Oklahoma argued strenuously at the United States Supreme Court in both *McGirt* and *Murphy* that the reservations were disestablished. The State of Oklahoma still strongly believes that *McGirt* was wrongly decided. However, lower courts are bound to follow Supreme Court precedent as only the United States Supreme Court can overrule itself. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016).

and barred by the doctrine of laches. The District Court passed a ruling on Petitioner's application for post-conviction relief due to this Court's stay of the mandate in *Bosse v. State*, PCD-2019-124.

## **II. Argument and Authority.**

Petitioner's Indian Country jurisdictional claim should be waived because it was not raised on direct appeal or in his first application for post-conviction relief. Additionally, Petitioner's Indian Country jurisdictional claim should be considered barred because Petitioner waited twenty-two (22) years to raise it. Respondent recognizes this Court's decision in *Bosse v State*, 2021 OK CR 3, ¶¶ 20-22, 484 P.3d 286, 293-294, wherein this Court ruled that "[s]ubject-matter jurisdiction can never be waived or forfeited". Respondent also recognizes this Court further held that Indian Country jurisdictional claims can never be subject to laches because of "[t]he principle that subject-matter jurisdiction may not be waived." *Bosse*, 2021 OK CR 3, ¶ 21 n.9, 484 P.3d at 294. However, the United States Supreme Court just granted a stay of *Bosse*'s mandate as part of the State's certiorari appeal:

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

Order in Pending Case, *Oklahoma v. Bosse*, Case No. 20A161 (May 26, 2021) (attached as Exhibit "A"). As the mandate in *Bosse* has been stayed, this Court should not decide

any cases that might be affected by the Supreme Court's decision in *Bosse*, just as this Court stayed its hand pending Supreme Court review of the Tenth Circuit's decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017).

This Court began abating direct appeals which raised Indian Country jurisdictional claims after the Tenth Circuit held, in *Murphy*, that the Muscogee (Creek) Nation's Reservation was not disestablished. For example, in one case, this Court abated an appeal before the Supreme Court granted certiorari in *Murphy*, for the reason that the Tenth Circuit's mandate had not yet issued: "The litigation in *Murphy* is ongoing and not final. Until the matter in *Murphy* is settled, Jackson's application and case should be held in abeyance . . . ." *Jackson v. State*, No. F-2016-453, 9/26/2017 Order Holding Case in Abeyance and Directing Attorney General to Provide Status Update (attached as Exhibit "B"); *see Royal v. Murphy*, 138 S. Ct. 2026 (May 21, 2018) (mem.) (granting petition for writ of certiorari); *see also, e.g., Bosse v. State*, No. PCD-2019-124, 3/22/2019 Order Holding Case in Abeyance and Directing Attorney General to Provide Status Update (attached as Exhibit "C") (holding Bosse's post-conviction proceeding in abeyance because "[t]he litigation in *Murphy v. Royal* is ongoing and not final" as the Supreme Court had granted certiorari); *Bragg v. State*, No. F-2017-1028, 3/27/2019 Order Holding Case in Abeyance and Directing Attorney General to Provide Status Update (attached as Exhibit "D") (same). And in non-capital post-conviction appeals, this Court simply denied relief—both before and after the Supreme Court granted certiorari—because *Murphy* was not final. *See, e.g., Caudill v. State*, No. PC-2018-913, 2/11/2019 Order Affirming Denial of Third

Application for Post-Conviction Relief at 4 (attached as Exhibit "E") ("Because the Supreme Court's disposition of the *Murphy* appeal will likely have an impact on, or be controlling of, cases such as Petitioner's, we find no error in the District Court denying post-conviction relief at this juncture."); *Anthony Jackson v. State*, No. PC-2018-1254, 2/5/2019 Order Affirming Denial of Application for Post-Conviction Relief (attached as Exhibit "F"); *Rodney Jackson v. State*, No. PC-2018-42, 5/7/2018 Order Affirming Denial of Application for Post-Conviction Relief (attached as Exhibit "G"). This Court should proceed similarly here, and abate this appeal pending the outcome of *Bosse*.

Abatement is further warranted based on this Court's recent call for briefing on the question of whether defendants whose convictions became final prior to the issuance of the *McGirt* decision are entitled to its retroactive application on collateral review:

In light of *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *Edwards v. Vannoy* (No. 19-5807), 593 U.S. \_\_ (May 17, 2021), cases cited therein, and related authorities, should the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* be applied retroactively to void a state conviction that was final when *McGirt* and *Sizemore* [v. *State*, 2021 OK CR 6, \_\_ P.3d \_\_] were announced?

*State ex. rel. District Attorney v. Wallace*, 2021 OK CR 15, ¶ 6, \_\_ P.3d \_\_, \_\_\_. Briefs from the District Attorney and defense counsel, as well as optional briefs from the Attorney General and Choctaw Nation, are currently due June 10, 2021, on the above-listed question. *Wallace*, 2021 OK CR 15, ¶¶ 6-7, \_\_ P.3d at \_\_\_. The unresolved issue regarding whether

*McGirt* may be applied retroactively on collateral review further warrants abatement of this post-conviction appeal.<sup>2</sup>

The State respectfully asks this Court to abate Petitioner's post-conviction appeal until the Supreme Court denies certiorari, or rules on the merits, in *Bosse*, and/or until this Court issues a decision in *State ex. rel. District Attorney v. Wallace*.

### **III. Conclusion**

The instant motion is made in good faith and not for the purpose of delay. For the foregoing reasons, this Court should abate this post-conviction appeal as a result of the ongoing litigation in *Bosse* and *Wallace*.

Respectfully submitted,

**MIKE HUNTER  
ATTORNEY GENERAL OF OKLAHOMA**



**ASHLEY L. WILLIS, OBA #22210  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>st</sup> Street  
Oklahoma City, Oklahoma 73105  
(405) 522-4423      FAX (405) 522-4534**

**ATTORNEYS FOR THE STATE**

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<sup>2</sup> As of the writing of this brief, the State is still reviewing the issue raised by this Court in *Wallace*. However, in the present case, for preservation purposes, the State hereby incorporates any arguments it will make in its *Wallace* brief in this case.

# APPENDIX

# K

**ORIGINAL**



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

ROBERT JAMES GRASS,

AUG 17 2021

Petitioner,

JOHN D. HADDEN  
CLERK

v.

Case No. PC-2020-827

THE STATE OF OKLAHOMA,

Respondent.

**NOTICE OF DECISION IN STATE EX REL DISTRICT ATTORNEY V.  
WALLACE, 2021 OK CR 21, AND REQUEST TO AFFIRM THE DISTRICT  
COURT'S DENIAL OF POST-CONVICTION RELIEF**

Petitioner is seeking post-conviction relief from his criminal conviction based on the United States Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). This Court granted the State's request for a stay of this post-conviction appeal pending a decision in *State ex rel. District Attorney v. Wallace*, 2021 OK CR 15, \_\_\_ P.3d \_\_\_, or *Bosse v. State*, No. 21-186 (U.S.), and ordered the State to notify this Court within ten days of a decision in either of those cases.

On August 12, 2021, this Court held in *Wallace* that, as a matter of state law, post-conviction claims based on *McGirt* are barred in cases in which the conviction became final on direct review before July 9, 2020—the day *McGirt* was decided. *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, \_\_\_ P.3d \_\_\_. Petitioner's conviction was final in 2000 when this Court denied his direct appeal (F-1999-1023) and he failed to file a petition for writ of certiorari. See *Wallace*, 2021 OK CR 21, ¶ 2 n.1 (a conviction is final "where judgment was rendered, the

K

availability of appeal exhausted, and the time to petition for certiorari had elapsed"). Pursuant to *Wallace*, Petitioner is not entitled to post-conviction relief.

Although the district court held an evidentiary hearing, wherein the district court made findings of facts and conclusions of law as to Petitioner's Indian status and the Indian Country claim, the district court stayed its ultimate ruling on Petitioner's application for post-conviction relief. However, the decision in *Wallace* has rendered the questions addressed at the hearing, and the need for any further ruling by the district court, moot. The State asks that, in light of *Wallace*, this Court enter an order affirming the district court's denial of post-conviction relief on October 16, 2020, because Petitioner's claim is barred by *Wallace*.<sup>1</sup>

Respectfully submitted,

**JOHN M. O'CONNOR  
ATTORNEY GENERAL OF OKLAHOMA**

*Jennifer Willis*  
ASHLEY L. WILLIS, OBA #22210  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>st</sup> Street  
Oklahoma City, Oklahoma 73105  
(405) 522-4423 FAX (405) 522-4534

**ATTORNEYS FOR THE STATE**

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<sup>1</sup> In making this request the State in no way abandons any other claims or defenses.

**CERTIFICATE OF MAILING**

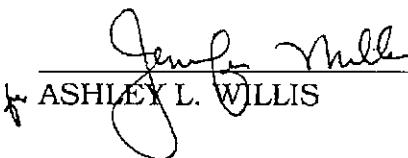
On this 17<sup>th</sup> day of August, 2021, a true and correct copy of the foregoing was mailed *via* United States Postal Service to:

Angela Viramontes  
Federal Public Defenders Office  
3801 University Avenue, Suite 700  
Riverside, CA 92501

Robert Grass, DOC #278055  
Lexington Correctional Center  
P.O. Box 260  
Lexington, OK 73051

Eric Jordan  
Assistant District Attorney  
213 West Delaware  
Tahlequah, OK 74464

Jimmy Dunn  
Assistant District Attorney  
301 E. Cherokee  
Wagoner, OK 74467

  
ASHLEY L. WILLIS

# APPENDIX

## L

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

Robert James Grass,  
Petitioner,  
v.  
STATE OF OKLAHOMA,  
Respondent,

**SERVICE COPY**



Case Number: PC-2020-827

TCC Number(s): CF-1997-311

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MANDATE

To the Honorable Judge of the District Court in and for the County of CHEROKEE,  
State of Oklahoma, Greetings:

Whereas, the Court of Criminal Appeals of the State of Oklahoma has rendered its decision in the above styled and numbered case on the 1<sup>st</sup> day of October, 2021, resolving the appeal from the District Court in Case Number CF-1997-311.

AFFIRMED

Now, therefore, you are hereby commanded to cause such Decision to be filed and spread of record in your court and to issue such process (see 22 O.S. 2001, §§ 978 & 979, and 22 O.S. 2004 §980) and to take such other action as may be required by said Order (see 22 O.S. 2001 §§ 1066 and 1072). You shall then make due and prompt return to this court showing ultimate disposition of the above case.

Witness, the Honorable Scott Rowland, Presiding Judge of the Court of Criminal Appeals of the State of Oklahoma, State Capitol Building, Oklahoma City, this 1<sup>st</sup> day of October, 2021.

JOHN D. HADDEN  
Clerk

(seal)

By: Glenda Burris  
Deputy

# APPENDIX

# M



**CHEROKEE NATION**  
**OFFICE OF THE ATTORNEY GENERAL**  
**Attorney General P.O. Box 1533**

**Sara Hill**

**Tahlequah, OK 74465**  
**918-453-5000**

**March 31, 2021**

**To Whom It May Concern:**

This letter shall verify Robert James Grass, (Citizen ID: 88827), born May 03, 1981, is a registered citizen of the Cherokee Nation as of August 06, 1988.

He also has some degree of Indian blood according to the Bureau of Indian Affairs. Under Cherokee Nation and federal law and regulation, individual's degree of Indian blood is confidential. If you request confirmation of exact fraction of Indian blood you must provide a signed release by the citizen or their Sponsor per 3 C.N.C.A. § 3(O). The Authorization for Release of Information is available here: [https://www.cherokee.org/media/cwbnishl/authorization-forrelease-of-information-form.pdf](https://www.cherokee.org/media/cwbnishl/authorization-for-release-of-information-form.pdf)

The response in this letter is based on information exactly as provided by the requesting party. Any incorrect or incomplete information may invalidate the above determination. Cherokee Nation can only confirm citizenship and blood degree for Cherokees. It is possible for the individual to be a member of another tribe and/or to have some degree of Indian blood from another tribe.

This letter does not reflect a finding of eligibility under the Federal Indian Child Welfare Act, 25 U.S.C. §1901 *et seq.*, ("ICWA"). Per 25 U.S.C. §1912(a) legal notice regarding an Indian child under ICWA must be sent to Cherokee Nation Indian Child Welfare, PO Box 948, Tahlequah, OK 74465.

**If you have questions regarding this determination, please email [CNOAG@cherokee.org](mailto:CNOAG@cherokee.org) or call the Cherokee Nation Office of the Attorney General at (918) 453-5438.**

*M*