

No. _____

Previously: No. 18-8801

*IN THE
SUPREME COURT OF THE UNITED STATES*

PATRICK JOSEPH TERRY - Petitioner

-vs-

THE STATE OF OKLAHOMA - Respondent

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS**

APPENDIX OF PETITIONER

**Patrick Joseph Terry, *pro se*
1011 S. Muskogee Avenue
Tahlequah OK 74464**

March 5, 2022

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A	7/9/2020	Supreme Court of the United States <i>Judgment; Patrick Joseph Terry v Oklahoma</i> , Case No. 18-8801; Granting motion of petitioner's motion For leave to proceed <i>in forma pauperis</i> And the petition for writ of certiorari.	1
B	8/10/29	Supreme Court of the United States <i>Mandate: Patrick Joseph Terry v Oklahoma</i> , Case No. 18-8801, Vacating the judgment of the lower Court, and remanding for further Consideration in light of <i>McGirt v Oklahoma</i> , 591 U. S. ____, 140 S. Ct. 2452 (2020).	1
C	10/14/20	Court of Criminal Appeals of Oklahoma: <i>Patrick Joseph Terry v Oklahoma</i> , Case No. PC-2018-1076; <i>Order Remanding for Evidentiary Hearing.</i>	6
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<u>No.</u>	<u>Date</u>	<u>Description</u>	<u># Pgs</u>
F	1/18/20	Map Bureau of Indian Affairs showing Historical boundary of the Ottawa Indian Nation Reservation established By Congress in the <i>Treaty of February 23, 1827.</i>	1
G	10/6/21	Court of Criminal Appeals of Oklahoma: <i>Patrick Joseph Terry v Oklahoma</i> , Case No. PC-2018-1076; <i>Order Affirming Denial of Post-Conviction Relief</i>	2
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J	01/04/22	Letter from Clerk of Court SCOUS per Application No. 21A290 Order of Justice Gorsuch, directing that an extension of time of sixty (60) days Had been granted to file, or, Until March 5, 2022.	2

Supreme Court of the United States

No. 18-8801

PATRICK JOSEPH TERRY,

Petitioner

v.

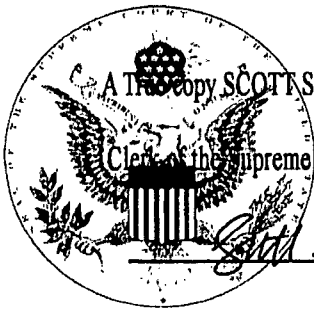
OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of Oklahoma.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the above court in this cause is vacated, and the case is remanded to the Court of Criminal Appeals of Oklahoma for further consideration in light of *McGirt v. United States*, 591 U. S. ____ (2020).

July 9, 2020



A True copy SCOTT S. HARRIS

Clerk of the Supreme Court of the United States

Scott S. Harris

A True copy SCOTT S. HARRIS

Test:

Clerk of the Supreme Court of the United States

By *Donny Bedall*
Deputy

Petitioner's
Appendix A

United States of America, ss:
THE PRESIDENT OF THE UNITED STATES OF AMERICA

No. 18-8801

PATRICK JOSEPH TERRY,

Petitioner

v.

OKLAHOMA

To the Honorable the Judges of the Court of Criminal Appeals of Oklahoma.

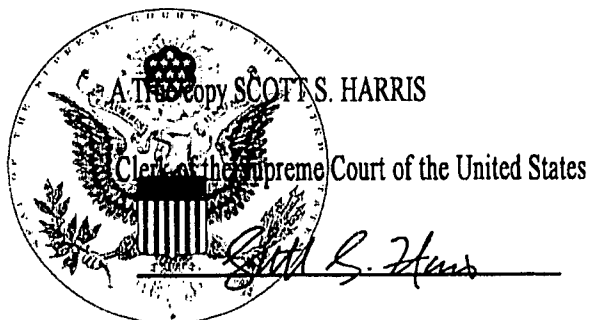
GREETINGS:

Court of Criminal Appeals of Oklahoma case, PATRICK JOSEPH TERRY, Petitioner v. OKLAHOMA, Respondent, No. PC-2018-1076, was submitted to the **SUPREME COURT OF THE UNITED STATES** on the petition for writ of certiorari and the response thereto; and the Court Having granted the petition.

It is ordered and adjudged on July 9, 2020, by this Court that the judgment of the above court in this cause is vacated, and the case remanded to the Court of Criminal Appeals of Oklahoma for further consideration in light of *McGirt v. Oklahoma*, 591 U. S. ____ (2020).

THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and Laws of the United States.

Witness the Honorable **JOHN G. ROBERTS, JR.**, Chief Justice of the United States,
the 9th day of July, in the year Two Thousand and Twenty.



A True copy SCOTT S. HARRIS

Test:

Clerk of the Supreme Court of the United States

By *Dannys B. [Signature]*
Deputy

**Petitioner's
Appendix B**

* 1 0 4 7 8 7 6 2 0 4 *

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JOHN D. HADDEN
CLERK-

Petitioner,

v.

No. PC-2018-1076

STATE OF OKLAHOMA,

Respondent.

The Petitioner has appealed to this Court from an order of the District Court of Ottawa County denying his application for post-conviction relief in Case No. CF-2012-242. Petitioner was found guilty following a non-jury trial and convicted of Manufacturing a Controlled Dangerous Substance Within 2,000 Feet of a School, in violation of 63 O.S. § 2-401 (Count 1), Possession of a Controlled Dangerous Substance, in violation of 63 O.S. § 2-402(A) (Count 2), and Unlawful Possession of Drug Paraphernalia, in violation of 63 O.S. § 2-405 (Count 3). He was sentenced to thirty years imprisonment on Count 1, six years imprisonment on Count 2, and one year imprisonment on Count 3. The sentences were ordered to be served concurrently. Petitioner's convictions were affirmed by this Court. *See Terry v. State*, 2014 OK CR 14, 334 P.3d 953.

Petitioner's Appendix

C

REMAND this case to the District Court of Ottawa County, for an evidentiary hearing to be held within sixty (60) days from the date of this Order.

We request the Oklahoma Attorney General and Ottawa County 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 with the trial court clerk within twenty (20) days after the hearing is completed. The District Court shall 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:

the Clerk of this Court within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed in this Court.

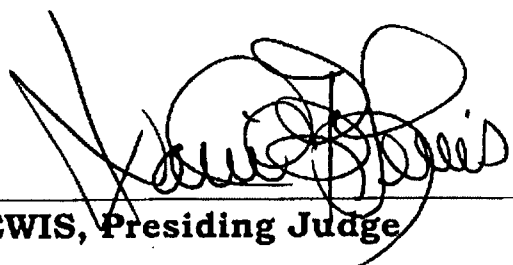
Provided however, if the parties agree what the evidence will show with regard to the questions presented, they may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. In this event, 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 Ottawa County: Petitioner's Appeal of Order Denying Application for Post-Conviction Relief Post-Conviction Petition in Error and Brief in Support filed with the Clerk of this Court on October 22, 2018.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

14th day of October, 2020.



DAVID B. LEWIS, Presiding Judge

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IN THE DISTRICT COURT OF OTTAWA COUNTY
STATE OF OKLAHOMA

PATRICK JOSEPH TERRY,

Petitioner,

vs

No. CF-2012-242

THE STATE OF OKLAHOMA,

Respondent.

HEARING

BEFORE THE HONORABLE JUDGE BARRY DENNEY
Held on January 19, 2021 in Miami, Oklahoma

APPEARANCES

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REPORTED BY: Mary K. Beckham, CSR, RPR

Petitioner's
Appendix D

APPEARANCES continued

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1 THE COURT: We will go on the record on
2 Ottawa County Case Number CF-12-242. This is also
3 the Court of Criminal Appeals matter PC-18-1076,
4 Patrick Joseph Terry vs. The State of Oklahoma. He
5 had filed a motion for post-conviction relief. The
6 court has received an order from the Oklahoma Court
7 of Criminal Appeals directing me to conduct this
8 evidentiary hearing regarding the aspect of
9 Mr. Terry's motion claiming the State of Oklahoma
10 lacked jurisdiction to try him in that particular
11 case number. We have present here in the courtroom
12 Mr. Kenny Wright here, the district attorney for
13 Ottawa County, and --

14 MS. HUNT: Good morning, Your Honor.
15 Caroline Hunt from the Oklahoma Attorney General's
16 Office, also on behalf of the State.

17 THE COURT: Thank you, Ms. Hunt.

18 I believe Mr. Terry is with us by video;
19 correct, Mr. Terry?

20 MR. TERRY: Yes.

21 THE COURT: Okay. All right. That's you,
22 sir. All right. Patrick Terry is also present.

23 Then we also have Mr. Joe Halloran here;
24 correct, sir?

25 MR. HALLORAN: Yes, Your Honor, good

1 morning.

2 THE COURT: You are here on behalf of?

3 MR. HALLORAN: So, Your Honor, I'm here on
4 behalf of the Amici Ottawa Tribe, Miami Tribe.

5 THE COURT: All right.

6 MR. HALLORAN: Eastern Shawnee Tribe and
7 Shawnee Tribe, and with me here today are Attorney
8 Katie Klass, Michael McMahan and William Norman who
9 represent the Amici Wyandotte Nation, who joined in
10 the joint brief that we filed --

11 THE COURT: Okay.

12 MR. HALLORAN: -- with the court. I'm
13 sorry, Your Honor, also with me is the general
14 counsel, Robin Lash, for the Miami Tribe of
15 Oklahoma.

16 THE COURT: I think that you've named
17 everybody that's on the screen then. Okay.

18 So I think we're ready to go. Is there
19 anybody else that anyone is aware of that needs to
20 be attending this hearing, whether in person or by
21 Zoom or Skype that is not -- has not been
22 recognized?

23 MR. GRIFFIN: Your Honor, my name is Peter
24 Griffin. I'm an attorney with the Jacobson Law
25 Group, Mr. Halloran's firm. I do not have an

1 appearance in, but I am appearing just as a member
2 of the public, if that's all right.

3 THE COURT: That's fine. Sure. It's an
4 open proceeding.

5 MR. BUZZARD: Yes, Your Honor. My name is
6 Greg Buzzard. I represent the Peoria Tribe of
7 Indians of Oklahoma. We did make an appearance, but
8 the Tribe elected not to join the Amici brief, and
9 I'm also here as a member of the public, if that's
10 all right with the court.

11 THE COURT: Certainly. Certainly. All
12 right. Anybody else that we don't have down on our
13 record yet?

14 Hearing none, I think we're good to go
15 here. All right. Let me just inquire first of all,
16 is there any stipulations to be made here before we
17 begin, or are we just waiting for Mr. Terry to make
18 his prima facie case here?

19 MR. WRIGHT: I think we do have some
20 stipulations to enter into.

21 THE COURT: Mr. Wright, if you could --

22 MR. WRIGHT: Either one.

23 THE COURT: Your name again, ma'am?

24 MS. HUNT: Caroline Hunt.

25 THE COURT: Ms. Hunt, you have some

1 stipulations to offer here?

2 MS. HUNT: Yes, Your Honor. I don't have
3 it prepared in the form of stipulations, but there
4 are a number of matters we agree on, and
5 documentation in support of those undisputed facts
6 are included in an exhibit packet I prepared for the
7 court. I mailed a copy to Mr. Terry. Hopefully, he
8 can confirm whether he received that.

9 THE COURT: Okay.

10 MS. HUNT: But as far as the stipulated
11 facts, we agree that he does have an Indian blood
12 quantum and we have a letter, a tribal membership
13 verification letter reflecting that, and also that
14 he was a registered citizen of the Cherokee Nation
15 at the time of the crimes.

16 THE COURT: Okay.

17 MS. HUNT: So as in other McGirt cases,
18 the State takes no position legally on Indian
19 status, but we do agree that these are all the facts
20 Your Honor needs to decide Indian status, which is a
21 two-part showing of some Indian blood and whether
22 he's recognized as an Indian by a tribe or the
23 federal government.

24 THE COURT: Okay. Any other stipulations
25 to offer?

1 MS. HUNT: We do -- we do also agree, Mr.
2 Wright has confirmed, that the crimes occurred
3 within the historical boundaries of the Ottawa
4 Nation.

5 THE COURT: Okay.

6 MS. HUNT: So as far as location, that is
7 agreed as well. The dispute here does come down to
8 current status as a reservation.

9 THE COURT: All right. Mr. Terry, you
10 heard Ms. Hunt's offering of those stipulations.
11 Mr. Terry, are you in agreement with those facts
12 that she's offered to the court?

13 MR. TERRY: Yes, Your Honor. I am
14 agreeable to the fact that they have determined that
15 I'm a citizen of the Cherokee Nation, that I have a
16 quantum of blood pursuant to the Bureau of --
17 Department of Interior, Bureau of Indian Affairs. I
18 also agree with the State's Exhibit 2, which shows
19 the outline of the Ottawa Nation, pursuant to the
20 Treaty of 1867, which was the argument that
21 ultimately got us here today. It shows clearly in
22 her exhibit that I am well within the boundaries of
23 the Ottawa Nation where the search incident to
24 arrest occurred, prior to the crime and prosecution
25 for these events.

1 I hope Your Honor has the motions that I
2 filed. One of them is to adopt the joint appendix,
3 the exhibits packet that the State submitted,
4 because use of that exhibit packet will clearly lead
5 you to the conclusion that this was Indian country,
6 based on the Brief of Amici, that was filed on
7 January 6th, and the brief I filed on October 18th,
8 2018, in the Court of Criminal Appeals.

9 If your judge -- as Your Honor is aware,
10 the remand from the Court of Criminal Appeals on
11 October 14th, 2020, specifically detailed that the
12 clerk of the appellate courts would forward both my
13 petition in error with Judge Haney's order attached,
14 as well as my appeal of order denying
15 post-conviction relief. These will be the two
16 documents that I would have submitted on my behalf,
17 as well as the motions that I filed subsequent to
18 that order.

19 Your Honor has a motion showing my degree
20 of Indian blood, which the State's attorney has
21 already stipulated to. As for me, I want to
22 stipulate to the authenticity of the State's
23 exhibits. I would like to use them as joint
24 exhibits when you review the briefs. I would also
25 like to stipulate to the facts presented in the

1 Amicus brief that was filed on January 18 -- I mean,
2 January 6, 2021. So as far as that is concerned, I
3 am in agreement so far with everything that has
4 happened, Your Honor.

5 THE COURT: All right. So, obviously, you
6 did receive that packet of exhibits that Ms. Hunt
7 spoke about, correct?

8 MR. TERRY: I'm sorry, Your Honor, I have
9 a sketchy connection here. I didn't understand you.

10 THE COURT: You did receive then the
11 packet of exhibits that Ms. Hunt sent to you?

12 MR. TERRY: Yes, ma'am -- yes, sir, I
13 mean. I'm sorry. Excuse me.

14 THE COURT: All right. So he's accepted
15 the stipulations that Ms. Hunt has offered here, in
16 addition to offering some other stipulations, I
17 believe. Ms. Hunt, did you care to speak to those?

18 MS. HUNT: Yes, Your Honor. I think I
19 covered all of the stipulated, undisputed facts. I
20 was going to ask permission to approach and provide
21 you the packet, if that's okay.

22 THE COURT: That would be great, as I
23 believe Mr. Terry has stipulated to the admission of
24 that document.

25 MS. HUNT: Okay.

1 THE COURT: We are marking that as what?

2 MS. HUNT: Well, I have them individually
3 numbered as State Respondent exhibits, if that
4 works.

5 THE COURT: Let's just go ahead and show
6 them that way.

7 MS. HUNT: Okay.

8 THE COURT: So, Mr. Terry, the State has
9 offered Exhibits 1 through 18 in the packet of
10 exhibits that you received from Ms. Hunt. Are you
11 in agreement --

12 MR. TERRY: Yes, sir.

13 THE COURT: Are you in agreement with
14 admitting those Exhibits 1 through 18 into the
15 evidence here?

16 MR. TERRY: Yes, Your Honor, I am.

17 THE COURT: All right. We'll show then
18 State's Exhibits 1 through 18 are admitted.

19 (Exhibits 1 through 18 admitted into
20 evidence.)

21 THE COURT: Anything else, Ms. Hunt?

22 MS. HUNT: Yes, Your Honor. The remainder
23 of my presentation is really more in the form of an
24 oral argument, and so if it pleases Your Court, I'd
25 like to come to the podium and offer some argument

1 based on the admitted exhibits.

2 THE COURT: All right. Would you agree,
3 Ms. Hunt, that at this point Mr. Terry has made a
4 prima facie case for his admission for Indian blood,
5 that he does have Indian blood as well as the
6 membership in the Cherokee Tribe and that the crime,
7 again, prima facially occurred within the boundaries
8 of Ottawa Nation?

9 MS. HUNT: Agreed, Your Honor.

10 THE COURT: All right. So with that being
11 the case, it now goes to the State here has the
12 burden of proving that, in fact, the State does have
13 jurisdiction of this matter. So, Ms. Hunt, go ahead
14 and proceed there at the podium.

15 MS. HUNT: Thank you, Your Honor. Before
16 I turn to the disestablishment issue, I would like
17 to say, for the record, for preservation purposes,
18 it is the State's position that Petitioner Terry's
19 jurisdictional claim is waived for his failure to
20 raise it until a second post-conviction application
21 and by the doctrine of latches; however, we
22 acknowledge this is beyond the scope of the remand
23 order and the determinations this court has
24 specifically been instructed to make.

25 So turning to the Indian country issue,

P- Bar: 2nd (080 App, Latches

1 the State's position is simple. The Ottawa
2 reservation was disestablished when in 1956 federal
3 supervision of the Tribe was terminated, thereby
4 removing federal superintendence, which is a
5 necessary element of reservation status. And as I
6 said before -- we've already gone over the things --
7 we agreed to the location within the historical
8 boundaries.

9 Then the question I'll spend the most time
10 on is disestablishment. That is covered -- so that
11 brings us to Exhibit 3 in the packet. That is
12 Section 1151 of Title 18. It provides the
13 definition of Indian country that's relevant here.
14 Under Subsection A, Indian country includes, "all
15 land within the limits of any Indian reservation
16 under the jurisdiction of the United States
17 Government, notwithstanding the issuance of any
18 patent, and, including rights-of-way running through
19 the reservation." A portion of that definition,
20 "under the jurisdiction of the United States
21 Government," is very important in this case as I
22 will explain.

23 Continuing on, as far as the definition of
24 a reservation, Exhibit 4 in the packet, the Supreme
25 Court case, United States vs. John, a Major Crimes

1 Act case, the court said, The question as to
2 reservation status is "whether the land in question
3 'had been validly set apart for the use of the
4 Indians as such, under the superintendence of the
5 Government.'" That's on page 649 of John. So as we
6 see in the Supreme Court's plain language, a
7 necessary element --

8 THE COURT: Excuse me, what page did you
9 say that is on?

10 MS. HUNT: 649, Your Honor.

11 THE COURT: Okay.

12 MS. HUNT: So as we see in that language
13 from John, a necessary element of reservation status
14 is federal superintendence. So turning to the
15 Ottawa Indians in particular, as I've gone over this
16 morning and in the Attorney General's Office brief
17 in opposition before the Supreme Court, which is
18 Exhibit 5 in the packet, we've previously admitted
19 that there was at one point a reservation. I'm not
20 disputing that this morning, but I have included the
21 historical documents for Your Honor's reference.

22 As I said, Exhibit 5 is our brief in
23 opposition, filed before the Supreme Court while the
24 Murphy -- McGirt litigation was still pending. It
25 goes over a lot of that history. Exhibits 6 through

1 8 are some cases that provide helpful history on the
2 Ottawas, and then Exhibits 9 through 11 are the
3 operative treaties, as far as originally
4 establishing the reservation.

5 Continuing on to disestablishment, prior
6 to the 1956 termination of the Tribe, the Ottawa
7 faced a similar fate as the five tribes, being
8 subjected to allotment and various other measures.
9 However, in light of the Supreme Court's decision in
10 McGirt, I'll be clear that the State is not relying
11 on allotment or statehood to argue disestablishment
12 here; rather, the engine of disestablishment in this
13 case is the Act of August 3rd, 1956 titled, "An Act
14 to provide for the termination of federal
15 supervision over the property of the Ottawa Tribe of
16 Indians in the State of Oklahoma and the individual
17 members thereof, and for other purposes." This is
18 Exhibit 12 in the packet.

19 This court previously found that this Act,
20 Public Law 943, which I'll refer to as the
21 Termination Act, disestablished the reservation, and
22 that's from this Court's September 2018 order, pages
23 5 through 7. But for purposes of the record and in
24 light of the intervening law in McGirt, I will
25 explain the effect of the Termination Act and why

1 McGirt does not change this Court's earlier
2 conclusion that the reservation was, in fact,
3 disestablished.

4 As way of background, this Termination Act
5 was not limited to the Ottawa. It was part of the
6 so-called termination era starting in 1953 and
7 lasting through the mid 1960s, in which Congress
8 adopted a policy of terminating the trust
9 relationship between some Indian tribes and the
10 federal government and, in furtherance of that
11 policy, passed a series of acts severing the trust
12 relationship with more than 100 Indian tribes or
13 bands. And the Termination Act here provided a
14 number of provisions typical of such acts and that
15 are relevant to the question before this court with
16 regard to disestablishment.

17 The opening act -- excuse me, the opening
18 clause of the Act provides that its purpose "is to
19 provide for the termination of Federal supervision
20 over the trust and restricted property of the Ottawa
21 Tribe of Indians," and I'm jumping forward a little,
22 "and for a termination of Federal services furnished
23 to such Indians because of their status as Indians."
24 Under Section 2 the Secretary of the Interior was
25 directed to transfer to each member of the Ottawa

1 Tribe unrestricted title to funds or other personal
2 property then being held in trust by the federal
3 government. Also under that section, all
4 restrictions on the land were lifted and the members
5 received unrestricted title to their land.

6 Section 8A is also very important. "The
7 Federal trust relationship," and I'm quoting "to the
8 affairs of the Ottawa Tribe and its members shall
9 terminate three years after the date of this Act,
10 and thereafter individual members of the tribe shall
11 not be entitled to any of the services performed by
12 the United States for Indians because of their
13 status as Indians. All statutes of the United
14 States which affect Indians because of their status
15 as Indians shall no longer be applicable to the
16 members of the tribe, and the laws of the several
17 States shall apply to the tribe and its members in
18 the same manner as they apply to other citizens or
19 persons within their jurisdiction." After
20 litigation in the Indian Court of Claims, Congress
21 at last provided for the final payments to the
22 tribes -- excuse me, to the Tribe in the Act of
23 1967, which is Exhibit 13 in the packet.

24 So when we look at the plain language of
25 the Termination Act, the Ottawa Tribe lost its

1 federal supervision, and, as I discussed, that's a
2 necessary element to reservation status. We find
3 that both in Section 1151 and in the Supreme Court's
4 opinion in John. And so when that element, federal
5 superintendence, was terminated here, so was any
6 reservation status. In fact, the Tribe's Amicus
7 brief essentially admits this point.

8 On page 20 the Tribe's brief admits
9 repeatedly that the termination statute ended the
10 federal government's relationship with the Ottawa
11 Tribe. Another example, on page 22, "The
12 termination statute ended federal supervision of the
13 Ottawa Tribe." And that is exactly why the
14 Termination Act disestablished the reservation,
15 because federal superintendence is a necessary
16 element. *B5*

17 The Court of Criminal Appeals, of course,
18 asks this court, in its remand order, to apply the
19 analysis in McGirt, which I've included for Your
20 Honor's convenience as Exhibit 14 in the packet.
21 While McGirt is relevant, it is like comparing
22 apples and oranges, because the State is taking a
23 very different position as to disestablishment here.
24 As I've already said, we're not pointing to the
25 allotment or statehood era legislation, but

1 termination of the federal supervision of the Tribe.
2 That's something that did not happen with the Creeks
3 in McGirt.

4 In fact, one of the arguments that the
5 State made in McGirt that was rejected is that the
6 first -- allotment was often the first step in a
7 plan ultimately aimed at disestablishment. The
8 Supreme Court agreed, that is often a first step.
9 Congress' policy at the time of the allotment era
10 was to -- for a time to continue the reservation
11 system and trust status of Indian lands, but to
12 allot tracts to individual Indians for agriculture
13 and grazing; thus, once all the lands had been
14 allotted and the trust expired, the reservation
15 could be abolished.

16 The problem for the State in the case of
17 the Creek Nation, however, is that while this plan
18 was set in motion with the General Allotment Act,
19 Congress never followed through, and that's where
20 the Supreme Court in McGirt said, "Just as wishes
21 are not laws, future plans aren't either. Congress
22 may have passed allotment lands to create the
23 conditions for disestablishment, but to equate
24 allotment with disestablishment would confuse the
25 first step of a march with arrival at its

1 destination."

2 That's the difference here. We don't have
3 just a first step towards disestablishment. We have
4 arrival at that destination with the Termination
5 Act. That history, as far as the various treaties
6 and legislation regarding the Ottawa Tribe that were
7 passed in the years prior to termination, are set
8 out in more detail in the brief in opposition, but
9 all of that, ultimately, culminated with
10 disestablishment and termination in the 1954
11 Termination Act.

12 There's another point I'd like to make
13 about McGirt. McGirt held that "to disestablish a
14 reservation, Congress must express" -- excuse me,
15 "clearly express its intent to do so, commonly with
16 an explicit reference to session or other language
17 evidencing the present and total surrender of all
18 tribal interests." This is language that the
19 Tribe's brief repeatedly relies on to argue that
20 there are no words similar to this in the
21 Termination Act. But I would have two responses to
22 that.

23 First, we have to look at the context of
24 McGirt. Again, this is a case that was deciding
25 whether allotment and statehood era legislation

1 disestablished a reservation, and so the State was
2 arguing, look at all these things that were taken
3 from the Tribe, and all the land was passed into
4 private hands, and so it's in that context that the
5 Supreme Court is saying, yes, but we still need this
6 language with the -- you know, present and total
7 surrender of all tribal interests. Again, here,
8 it's really a different kind of case, because it's
9 this federal superintendence element that Congress
10 is clearly expressing its disestablishment of the
11 reservation through.

12 The second thing I would add is in the
13 same breath as that quoted language, the McGirt
14 court said that "Disestablishment has never required
15 any particular form of words." So we don't need
16 magic words. We do need words that clearly express
17 Congress' intent, but here Congress did that.
18 Another source the McGirt court used is looking at
19 language from other statutes to decide what Congress
20 meant as far as the statutes aimed at the Creeks.
21 So we can do that here as well.

22 As I said before, there were many other
23 tribes and bands subject to the termination era, and
24 one such example, that I've included as Exhibit 15
25 in the packet, is the Termination Act for the

1 Menominee Tribe, which was very similar to the
2 Ottawas. Then Exhibit 16 in the packet is a Supreme
3 Court case, Menominee Tribe of Indians vs. United
4 States. And the Supreme Court in that case was
5 examining a claim regarding the Menominee's fishing
6 rights in a prior reservation, and they never
7 questioned whether the reservation was
8 disestablished because of the Termination Act. The
9 dissent expressly says more than once that the
10 reservation was terminated and the majority never
11 disagrees with that. So it is admittedly dicta, but
12 it is telling that there was no question among any
13 of the justices that the Termination Act had
14 disestablished the reservation, and so it provides
15 persuasive authority here where we have a very
16 similar Termination Act with the Ottawa.

17 And the Menominee Tribe case also
18 forecloses another argument relied on by the Tribe.
19 On page 22 of their brief they argue that because
20 the Termination Act preserved the Tribe's water
21 rights, it must have not terminated the reservation,
22 but this is nearly identical to the issue in
23 Menominee Tribe. The Supreme Court held that the
24 Tribe still had fishing rights in the prior
25 reservation, but it never held that there was a

1 reservation. So, in other words, if the Tribe's
2 theory there -- here, excuse me, were correct, that
3 water rights equal continuing reservation, the
4 Menominee Tribe would have turned out differently.
5 The Supreme Court would have necessarily found
6 there's still a reservation when it found there were
7 water rights.

8 The final thing I need to discuss is the
9 1978 Act that restored federal recognition of the
10 Ottawa Tribe, included as Exhibit 17 in your packet.
11 And among other tribes at issue in that act, this
12 act reinstated the Ottawa Tribe as a federally
13 supervised and recognized Indian Tribe; however,
14 nothing in the Restoration Act mentioned the former
15 lands of the Ottawa Tribe, and it certainly didn't
16 recreate or reestablish a reservation for them.
17 Going back to McGirt, the Supreme Court says that
18 Congress doesn't have to use the word, reservation,
19 or any particular language, but it must evidence
20 some kind of set-aside for a Tribe, as examples
21 where land is either held in trust for the benefit
22 of the Tribe or owned by the Tribe in fee simple, as
23 was the case of the Creeks.

24 Here, when we look at the Reinstatement
25 Act for the Ottawa, we don't have any kind of

1 set-aside, and so even if you've got federal
2 supervision, again, you don't have a set-aside of
3 the land for the Tribe. And practically speaking,
4 this outcome makes sense as well, as far as the
5 conclusion, there's no recreation of the
6 reservation, because to do so -- to recreate it
7 would have been very complicated. This underscores
8 the fact that Congress would have done so expressly.
9 The Tribe's original lands had been allotted as the
10 brief in op covers. It had no recognized land base
11 by the time of the Termination Act, all restrictions
12 on the original land had been removed, land has
13 passed into non-Indian hands, and so if Congress
14 were to restore that reservation and backtrack on
15 decades of settled expectations, it would have made
16 it clear that's what it's doing. And again, we can
17 look at contemporaneous acts of Congress to discern
18 its meaning, and, here again, the Tribe's brief --
19 I'll rely on their own example. They point to the
20 Restoration Act of the Menominee Tribe and I
21 believe -- I did not have this. I prepared my
22 exhibit packet before I got their brief, but I
23 believe Mr. Wright has this Act, if we may approach
24 and give that to Your Honor.

25 THE COURT: All right.

1 MR. WRIGHT: What was our last number we
2 had on the exhibits, Judge?

3 THE COURT: Eighteen.

4 MR. WRIGHT: So if it pleases the court,
5 I'll mark this State's 19.

6 THE COURT: You are offering that as an
7 exhibit at this time?

8 MR. WRIGHT: Yes, sir.

9 MS. HUNT: Thank you.

10 THE COURT: All right. Mr. Terry, do you
11 have any objection to State's 19, which is the
12 Restoration of Federal Supervision, Section 903 of
13 the -- that's the best I can do.

14 Has this been forwarded to Mr. Terry?

15 MS. HUNT: It hasn't.

16 THE COURT: Okay. Mr. Terry, do you have
17 any objection to State's Exhibit 19 as I've
18 described it? I can have Ms. Hunt further describe
19 it if that might help you.

20 MS. HUNT: Yes.

21 MR. TERRY: I'm not quite sure, Judge. Do
22 I have an objection to the State's argument or --
23 absolutely, I have objection to the argument if the
24 State believes that the Termination Act dissolved
25 the treaty.

1 THE COURT: Okay. What I'm --

2 MR. TERRY: What happened to the
3 reservation.

4 THE COURT: What I'm asking is, they have
5 offered another exhibit besides 1 through 18 that
6 you've earlier agreed could be admitted.

7 Ms. Hunt, if you would --

8 MS. HUNT: Sure.

9 THE COURT: -- more descriptively explain
10 for Mr. Terry, since he doesn't have a copy of this,
11 for him what this is?

12 MR. WRIGHT: If you don't mind, Judge,
13 since I've got it right in front of me.

14 THE COURT: Sure.

15 MR. WRIGHT: If that would be okay.

16 THE COURT: Mr. Wright is going to
17 explain.

18 MR. WRIGHT: So, Patrick, what we're
19 offering is -- I mean, for the record, Title 25 of
20 the U.S. Code, Sections 903 et seq, which is the
21 Menominee Restoration Act. So this is from 1973
22 when the Menominee Tribe regained their federal
23 recognition. So these were the laws --

24 MR. TERRY: Okay.

25 MR. WRIGHT: -- that Congress passed in

1 relation to their regaining recognition. We're
2 offering it to the court to show how this is
3 slightly different than the Ottawa Tribe's
4 restoration.

5 MR. TERRY: Correct.

6 MR. WRIGHT: Okay.

7 MR. TERRY: This is different. I will
8 stipulate to the accuracy and veracity of that Act.
9 Thank you.

10 MR. WRIGHT: Thanks, Patrick.

11 THE COURT: All right. So you're agreeing
12 to the admission of that statute then?

13 MR. TERRY: I agree that that statute is
14 valid, yes, sir, it is, and you can receive it.

15 THE COURT: All right. I'm going to go
16 ahead and admit State's Exhibit 19, which is the
17 statute Mr. Wright just spoke about.

18 (Exhibit 19 admitted into evidence.)

19 THE COURT: All right. Ms. Hunt, go ahead
20 and continue.

21 MS. HUNT: Yes. So I'm going to find the
22 relevant section I was going to talk about, so I can
23 direct Your Honor to that.

24 THE COURT: Yes, if you would.

25 MS. HUNT: Okay. So the part I'm going to

1 talk about is under Section 903d, Subsection C.

2 THE COURT: Okay.

3 MS. HUNT: So again, the Tribe's brief
4 points to both this Restoration -- excuse me,
5 Restoration Act and to a Wisconsin case, holding
6 that it recreated the Menominee reservation, but I
7 disagree with the Tribe's assertion that this
8 Restoration Act is nearly identical -- that is the
9 phrase they used on page 26 of the brief -- to the
10 Restoration Act we have here with the Ottawa. This
11 section I've directed Your Honor to is exactly the
12 important distinction. In particular, this
13 subsection deals with property, and the sentence
14 almost all the way down, I would direct the court
15 to, talks about the transfer of land stating, "The
16 land transfer shall be taken in the name of the
17 United States in trust for the Tribe and shall be
18 their reservation." So that is a clear set-aside,
19 you know, Congress is even using the word,
20 restoration, and we have no comparable language in
21 the Ottawa's Restoration Act, so, in fact, this
22 underscores the fact that Congress did not clearly
23 express its intent to recreate any reservation with
24 the Ottawa's Restoration Act.

25 We have another example of this explained

1 in the brief in opposition, and that's discussed on
2 pages 11 and 20 of the brief in opposition. Then
3 I've included the Restoration Act as Exhibit 18, and
4 that involves a different band of Ottawas not
5 included here -- excuse me, not involved here. And,
6 again, Congress used very specific language as far
7 as the set-aside stating, "The land acquired by or
8 transferred to the Secretary under or pursuant to
9 this section shall be taken in the name of the
10 United States in trust for the bands and shall be
11 part of the respective band's reservation."

12 THE COURT: Which exhibit were you just
13 reading from?

14 MS. HUNT: Exhibit 18. So that is a
15 different band of Ottawa, in which their Restoration
16 Act expressed clear intent by Congress to recreate a
17 reservation. So again, using the kind of statutory
18 analysis in McGirt where we compare acts of Congress
19 to determine whether its words intend to reestablish
20 a reservation, we have no similar language of
21 set-aside in the Ottawa's Restoration Act. Congress
22 knows how to disestablish a reservation and used
23 language evidencing that. Likewise, it knows how to
24 recreate a reservation, as shown in these examples,
25 and it did not do that here.

1 I have nothing further. I know I've
2 covered a lot of information, and so I'm happy to
3 provide briefing or proposed findings of fact and
4 conclusions of law to this court, if that would be
5 helpful.

6 THE COURT: Okay. Thank you, Ms. Hunt.

7 MS. HUNT: Thank you, Your Honor.

8 THE COURT: Be seated for the moment.

9 Mr. Terry, the State has indicated, other
10 than the exhibits that they have offered here and
11 that have been admitted, that they are offering no
12 further evidence as far as their argument here that
13 they do have jurisdiction, so let me address that
14 issue first. I've heard, of course, also from
15 Ms. Hunt her argument here, but do you have any
16 evidence that you wish to present to the court,
17 whether it's by testimony or exhibits to contradict
18 what the State is asserting here, the evidence that
19 they have put forward regarding their contention to
20 still have jurisdiction of this case or did at the
21 time this was tried?

22 MR. TERRY: Yes, Your Honor, thank you.

23 THE COURT: Go ahead. Take it pretty
24 slow. It's a little harder with this Zoom to
25 understand everybody than the people that are right

1 here in court. So if you will, kind of go slow for
2 us; okay?

3 MR. TERRY: That will be fine, sir. Thank
4 you.

5 Your Honor, I would point out to the
6 State's last statement indicated that Congress knows
7 how to disestablish a reservation. The State's
8 reliance on the 1956 Termination Act is a poor
9 window in which to drive the sovereignty truck
10 through. There is nowhere in the language of the
11 1956 Termination Statute that expressly repeals or
12 disestablishes any reservation boundary, whether it
13 be for the Ottawas or the Peoria or the Wyandotte
14 who had similar termination statutes entered around
15 approximately the same time by Congress.

16 One thing, the Termination Statute ended
17 the federal supervision of the tribal property,
18 which is true, it ended certain federal services
19 available to individual Indians, and it made state
20 law applicable to tribal members; however, nothing
21 in the Termination Statute showed an unequivocal
22 intent to disestablish the Ottawa reservation. The
23 applicable laws that the Termination Statute may
24 have been beside -- which that means that's sales
25 tax and property tax, but it certainly did not

1 discuss tribal boundaries or tribal properties.

2 While the Termination Statute ended the
3 federal government's relationship with the Ottawa
4 Tribe, an examination of the language of that Act
5 reveals nothing in it that evinces explicit
6 Congressional intent to disestablish the Ottawa
7 reservation, and that is required by McGirt.

8 Now, Justice Gorsuch was very clear in
9 McGirt. In all this history, there simply was at no
10 moment when any act of Congress dissolved the Creek
11 Tribe or disestablished its reservation, and this is
12 the same year. This is the truth in this case.
13 While there were a number of statutes enacted, the
14 State of Oklahoma asserted sovereignty over the
15 Indians of -- in a tribe, there never was an act by
16 Congress that clearly disestablished the reservation
17 boundaries. We want to ascertain and follow the
18 original meaning in the law. And the law was clear
19 in the 1956 Act that the Tribe's formal relationship
20 with the government would be severed. But,
21 specifically, in Section 11, I believe, of that Act,
22 the federal government discusses that no language
23 within this Act shall ever break the water rights of
24 the Ottawa Indian Tribe.

25 Now, that language is significant, Your

1 Honor, because it indicates very clearly that the
2 federal government continues to view the land as
3 being reservation land and that the Ottawas retain
4 their water rights. Why would they say that they
5 have water rights to anything if they were not bound
6 by treaty? And that is correct, Section 11.

7 "Nothing in this act shall ever break any water
8 rights of the Ottawa Tribe or its members." We can
9 see clearly, here, Your Honor, that Congress'
10 subsequent treatment of the Tribe, even as time
11 progressed, clearly recognized that they had water
12 rights within the reservation boundaries established
13 under the 1867 Act.

14 While the State's argument is very
15 powerful regarding the Menominee Tribe, it falls
16 flat here with regard to the Ottawa, members of the
17 Tribe and their sovereign status. The Termination
18 Statute, of course, as you know, has been argued and
19 was repealed, and when it was repealed, it was clear
20 that Congress at that time did not wish to reinstate
21 their former relations and the -- excuse me.

22 THE COURT: You might let us know, Mr.
23 Terry. Mr. Terry, just a moment. Mr. Terry.

24 MR. TERRY: Pardon me?

25 THE COURT: Would you let us know what

1 exhibit that you're referring to? Could you do that
2 for our record?

3 MR. TERRY: That exhibit, the State's
4 exhibit is Number 12, and then it is on page one,
5 two -- three of Number 12, Section 11 of 70
6 Statutes. It's on 965 as they list it, your Exhibit
7 12, 965. This is the 1956 Termination Statute that
8 the State finds so compelling. I point to the fact
9 that Section 11 clearly indicates that Congress is
10 aware of the rights of the Ottawa Tribe, because
11 water rights are an integral part of any executive
12 decision by the President or the Congress to allot
13 land or to reserve land for a specific use by a
14 specific tribal sovereign.

15 Okay. So -- here we go. The Restoration
16 Act, I would like to point to, Your Honor --

17 THE COURT: Which is exhibit?

18 MR. TERRY: State's Exhibit -- let me get
19 it. I believe it's a little bit -- I'm sorry, Your
20 Honor, I'm a little bit --

21 MS. HUNT: Exhibit 17.

22 MR. TERRY: Okay. Let's go to Exhibit 17,
23 is the act to reinstate Wyandotte and Peoria and
24 Ottawa Indian Tribes as federally supervised. In
25 that 17, a review would indicate that there is

1 language that clearly revokes any implication that
2 the Termination Statute might have imposed. The
3 termination of the federal Ottawa Tribe does not
4 serve as an explicit expression by Congress of its
5 intent to disestablish the Ottawa reservation and
6 that the 1978 Act would clearly indicate, the
7 reservation statute expressly repeals the 1956
8 Termination Statute and, otherwise, reinstated any
9 treaty rights that may have been diminished by the
10 Termination Statute.

11 Any legal relevance of the 1956 statute
12 was divested in 1978. It did not provide a savings
13 clause, similar to what our state constitution has,
14 to address changes in statutory authority. You know
15 our state savings clause provides if you're
16 convicted today of a crime under the law before a
17 bench of competent jurisdiction and you receive a
18 sentence of incarceration or a fine and then 10 days
19 later that law is repealed and is decriminalized,
20 under our state savings clause, the conviction
21 standing on the first day cannot be repealed by
22 intent.

23 Congress is very clear when it wants to
24 address issues like this, and it also would include
25 language pertinent to that fact. Not only did

1 Congress not provide language in the 1956
2 Termination Act regarding reservation
3 disestablishment, the fact is, even if they had,
4 they repealed it in the 1978 statute. It was
5 divested. Everything in 1956 was divested. It was
6 as if it never happened. There was no indication
7 that Congress at all wished to do anything but
8 correct an injustice by implicating -- by passing
9 the 1978 statute.

10 I would point out that Congress knows how
11 to take its land back. They are not unfamiliar with
12 that. There have been historical references
13 throughout the 20th century that Congress has moved
14 to take back land, but not in this instance. The
15 area of land in question was so small and seemingly
16 insignificant to the power of the federal government
17 that they just didn't think to take it back, and
18 there is no Act that can be pointed to by the State
19 or the respondent that clearly shows that the land
20 was dissolved or disestablished.

21 Furthermore, Your Honor, as you well know,
22 the Ottawa Indian Tribe, as well as the other eight
23 tribes or the nine tribes reaching out there, all
24 have a robust relationship with one another and with
25 other sovereigns and the State of Oklahoma. They

1 have never stopped living. And simply by passing,
2 by saying, oh, we're not going to provide you
3 federal assistance anymore, that in no way says
4 we're taking your land back, and they didn't. They
5 haven't, and they won't now.

6 As far as Tribal sovereignty is there, I
7 believe the State has not made its case that
8 anything has occurred that would indicate that the
9 discretion of the Congress has been reversed. As
10 I'm going to point out in McGirt, "once a lot of
11 land is set aside for an Indian reservation," as is
12 the case here for the Ottawa Indian Tribe in 1867,
13 "no matter what happens to the title of that
14 individual plot within the area, the entire block
15 retains its reservation status until Congress
16 explicitly indicates otherwise."

17 Now, Your Honor, I know you have a lot of
18 material to go through up there before you enter
19 your order, and I would urge you to review it
20 seriously, but the reservation statute was
21 established in the 1867 Treaty, which is marked as
22 People's Exhibit 11. People's Exhibit 11, Section
23 16 clearly points to the fact that Congress
24 satisfied this land -- oh, my Lord. She got -- I'm
25 sorry, I'm sorry, Your Honor, I misspoke. That is

1 Exhibit 11, I'm sorry, Article 16 provides clearly
2 that "The west part of the Shawnee reservation,
3 ceded to the United States by the third article, is
4 hereby sold to the Ottawas at one dollar per acre;
5 and for the purpose of paying for said reservation
6 the United States shall take the necessary amount,"
7 then it gives the physical parameters, the
8 geographic location of the reservation, which the
9 State has kindly enough provided in the map, which
10 is Exhibit Number 2.

11 Exhibit Number 2 clearly shows the
12 boundaries of the Ottawa reservation as established
13 under Article 16 of the 1867 Act, and there has been
14 nothing since regarding this land or the language
15 establishing this reservation that has been enacted
16 by any act of Congress, who has the only authority
17 to take away that reservation boundary.

18 The court in McGirt said that unlawful
19 acts committed with sufficient vigor over a
20 sufficiently long period of time are not enough to
21 justify the unlawful acts. And simply because the
22 infrastructure in Miami, Oklahoma, has grown up
23 within the historical boundaries of the Ottawa
24 reservation does not in any way displace or
25 disestablish those boundaries.

1 While the State's vigorous argument
2 regarding the 1956 Act appears to lay itself down in
3 credibility to the conclusion that perhaps the
4 relationship of the members of the Tribe was
5 formally terminated with the Bureau of Indian
6 Affairs and the Department of Interior, there is
7 nothing in that act or any other legislation that
8 indicates that the boundaries established under
9 Article 16 of the 1867 Act have been disestablished.

10 What they did with the Menominee tribes in
11 Wisconsin or what they did with the Mohawk Tribe in
12 Nebraska or in any of the hundreds of various tribes
13 around the country, that's moot. It's nothing but
14 smoke and mirrors. The fact is, the Treaty of 1867,
15 Article 16 established the reservation, and it said
16 so by name, and nothing since has occurred that
17 would in any way effectively disestablish or
18 terminate those reservation boundaries.

19 Your Honor, as to this point I am no
20 expert in Tribal law, but I think that the evidence
21 is very, very clear that the Treaty was established
22 in 1867, the reservation boundaries were set, there
23 were many subsequent acts and incidents, not only by
24 the State of Oklahoma but by the federal Congress,
25 regarding the Tribe and tribal members, but once

1 again, there is nothing that can be pointed to that
2 clearly contains language disestablishing this
3 reservation boundary.

4 As such, given the fact that the State has
5 stipulated that I'm an American Indian, that I'm a
6 member of a Tribe and that I have a quantum of
7 Indian blood, that has appeared to satisfy the first
8 prong of the two prong McGirt litmus test.

9 The only other prong left as a question of
10 fact for you to decide, Your Honor, is whether the
11 boundary still exists, it still survives. I would
12 ask you to look to the Brief of Amicus that was
13 filed on January 6th, 2021, on behalf of the --
14 Joseph Halloran, who is a member attending these
15 proceedings. The brief clearly discusses all of the
16 aspects of the establishment and the history of the
17 Tribe, up to and including the date where the search
18 incident to my arrest occurred, July 12th, 2012.

19 Having said that, I hope I've made it
20 clear, I hope you could hear me clearly. I'm having
21 a little trouble hearing you, but I think I've made
22 the case, and other courts seem to agree, that as
23 far as under McGirt, this treaty boundary for the
24 reservation of the Ottawa Indian Tribe still exists
25 even today. I would ask you, Your Honor, if counsel

1 for the Ottawa have a moment or two to argue before
2 you, I think perhaps they can make it more clear
3 about how this boundary remains intact, and I would
4 ask that you would allow them to have five minutes,
5 if possible.

6 THE COURT: All right.

7 MR. TERRY: Having said that, that's my
8 statement to the court for now.

9 THE COURT: All right.

10 MR. TERRY: The introduction of the other
11 evidence by the State that I haven't seen, but which
12 I stipulate to, may indicate that I should have
13 maybe ten more days to brief, if necessary, but it
14 doesn't seem like they have put much of a defense
15 up, based on the fact that they have relied on the
16 Menominee Tribe relationship with Wisconsin and not
17 on the Ottawa Tribe's relationship with Oklahoma. I
18 just don't think they have met their burden.

19 THE COURT: All right.

20 MR. TERRY: Having said that, Your Honor,
21 I hope I was clear enough, and I would refer you to
22 my brief filed October 18th, 2018, before the Court
23 of Criminal Appeals, which was remanded back to this
24 court on October 14th, 2020, as one of the review
25 instruments available to the court in making its

1 determination as to the veracity of my claim, and I
2 would refer you also to the brief of Amici, that was
3 filed January 6th, 2021, as far as establishing the
4 real time relationship with the Ottawas, the State
5 of Oklahoma, and the federal government. Their
6 evidence, too, concludes clearly, under even a
7 cursory review of the statutes, there has been
8 nothing said by Congress to disestablish the
9 reservation boundaries or to take away the
10 reservation or Indian country status of the land.
11 Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Terry. I've
13 heard you very well. You've very eloquently made
14 your position known here. I take it you don't have
15 any other evidence actually to offer, you primarily
16 offered argument referring to the exhibits that were
17 already admitted here; am I correct there? Am I
18 correct that there's no other evidence, Mr. Terry?

19 MR. TERRY: No -- yeah, there is. That is
20 correct. I've already submitted a couple of motions
21 to you, Your Honor, and you should have one today
22 that states it's a reference to another Indian
23 sovereignty case that was decided on December 9th,
24 and I filed a motion with you today that is asking
25 you to review this in your discussion. This is the

1 case of Keith Davis vs. the State of Oklahoma and
2 this is a -- oh, Lord. Here we go. Davis vs.
3 Oklahoma. It was decided on December 9th, and it
4 talks about a similar case remanded back, but it is
5 talking about the Choctaw Nation. Do you happen to
6 have that motion yet, Judge?

7 THE COURT: I don't have the file here in
8 front of me.

9 MR. TERRY: Okay. Well, I sent this to
10 the court this morning, the court clerk's office.

11 THE COURT: Okay.

12 MR. TERRY: I was asking you to take
13 judicial notice of Davis vs. Oklahoma. And in
14 Davis, on December the 9th, as filed with the Court
15 of Criminal Appeals, they had the same dilemma.
16 They had the same fact question before them, if the
17 petitioner is recognized as an Indian and whether he
18 has Indian blood, and second, whether the crime
19 occurred within the boundaries of Indian country.

20 Using the analysis set forth in McGirt, a
21 judge down in Latimer County, Oklahoma, entered an
22 order determining that the reservation boundary of
23 the Choctaw Nation is alive and well today, as a
24 sovereign termination and other statutes, and that
25 it completely encompasses Latimer, Pittsburg and

1 Haskell Counties. I'm just asking Your Honor to
2 review this motion as compelling evidence showing
3 what other judges in courts of common jurisdiction
4 throughout our great state have decided regarding
5 the McGirt question that is before them. And I
6 spoke to, maybe, Brittany this morning in the
7 court's clerk's office, and I believe they received
8 my fax. And if they didn't, I will send it again,
9 and I've asked them to put it in the court file for
10 you to review when you are making your judicial
11 determination as to the question that's been posed.

12 THE COURT: Okay. I'll certainly look
13 into it. Did you say that's --

14 MR. TERRY: I have not submitted any other
15 evidence that has not already been stipulated to by
16 the State.

17 THE COURT: All right. Thank you. Did
18 you say that was out of Latimer County?

19 MR. TERRY: Thank you, Your Honor.

20 THE COURT: Sir, did you say that was out
21 of Latimer County? Mr. Terry?

22 MR. TERRY: Yes, sir.

23 THE COURT: Did you say that decision was
24 out of Latimer County --

25 MR. TERRY: Latimer County.

1 THE COURT: Latimer?

2 MR. TERRY: Latimer County, L-A-T-I-M-E-R,
3 that is Case Number CF-04-05, and it's also at the
4 Court of Criminal Appeals under PC-2019-451.

5 THE COURT: Okay. Thank you.

6 MR. TERRY: You're welcome, sir. Thank
7 you.

8 THE COURT: Now, I do want to get back --
9 or get on to Mr. Mallory or other tribal individuals
10 that have filed Amicus briefs. I certainly will
11 allow to you present argument today. Are you ready
12 to do so?

13 MR. HALLORAN: Yes, Your Honor.

14 THE COURT: All right. You are
15 Mr. Halloran, correct?

16 MR. HALLORAN: Mr. Halloran, yes, Your
17 Honor. Thank you.

18 THE COURT: Go ahead with your argument,
19 sir.

20 MR. HALLORAN: I think at this point, Your
21 Honor, I probably ought to defer all of my time to
22 Mr. Terry. He did such a fine job, but I will
23 proceed -- I'll proceed to provide the highlights of
24 the brief that we submitted with Your Honor. I will
25 walk you, Your Honor, through the history backwards,

1 because I think what we need to do is we need to
2 determine what the law is today, what the law was in
3 2012, in 2017 when Judge Haney considered this
4 matter, and today.

5 The law applicable today, Your Honor, is
6 the law that fully reinstated all rights and
7 privileges and expressly repealed the Termination
8 Act of 1959. What that means, Your Honor, is that
9 the Ottawa Tribe was, following restoration, a tribe
10 that had continued to exist through the time of
11 termination as a sovereign and had been returned to
12 a full relationship with the United States. I think
13 it's also important, Your Honor, to consider that
14 following restoration, whatever the State might
15 suggest the Termination Act did, the effect of the
16 law as an express repeal -- the effect that the
17 restoration order as an express legislative appeal
18 of the Termination Act means that the court must
19 proceed as though that law never existed. It is a
20 legal nullity in any statutory language, legislative
21 history. Any material related to that legislation
22 is an empty set from the perspective of the court's
23 consideration of jurisdiction.

24 We cite case law to Your Honor, that was
25 not responded to by the State, regarding the effect

1 of an express repeal, and the effect of the express
2 repeal, as I've indicated, is that the repealed
3 statute is to be treated as though it never existed.
4 That's significant, Your Honor. That's significant
5 with respect to the Ottawa Tribe's treaty
6 established reservation boundaries, among other
7 rights.

8 It's interesting to consider, Your Honor,
9 what the termination period was intended to affect
10 and what it was not intended to affect. And the
11 termination period represented a very short period
12 of time of roughly 20 years where the United States
13 decided that it was going to get out of the Indian
14 business, and what I mean by that is it was going to
15 get out of the responsibility to engage in a
16 government-to-government relationship to provide
17 services and to provide supervision over Indian
18 lands; okay? Case law has demonstrated what is --
19 what logically follows from that, which is what the
20 termination period did not do. You might be
21 confused by that, given the argument of the State
22 which would imply to the contrary.

23 Termination period policy did not end the
24 existence of the Tribe and, in fact, could not end
25 the existence of the Tribe as an independent

1 sovereign exercising its own constitutional rights.
2 In addition, the termination period policy has been
3 interpreted by the United States Supreme Court in
4 the Menominee decision and its progeny that the
5 termination era policy had no intention to and did
6 not affect the true rights of tribes terminated.

7 Contrary to the State's representation,
8 the court in Menominee did reach a decision with
9 respect to whether the Menominee tribal -- Tribe and
10 its members continue to benefit from treaty
11 protected rights following its termination, and it
12 said that it would -- it was its conclusion that it
13 would not interpret the abrogation of treaty rights
14 in a back-handed way, that the abrogation of treaty
15 rights has to be clear and it was clearly not the
16 intention of termination period legislation to do
17 that. In fact, the primary sponsor of the
18 termination legislation was quoted at the time that
19 it was enacted for the Menominee Tribe that the
20 enactment in no way affected any treaty reserved
21 rights of the Tribe and its members.

22 THE COURT: Now, you were referring to
23 which exhibit, sir? You were referring to which
24 exhibit there you just read from a moment ago?

25 MR. HALLORAN: The Menominee -- the United

1 States versus -- Menominee vs. The United States.

2 I'm not sure what exhibit.

3 THE COURT: I think that was --

4 MR. HALLORAN: It is United States Supreme
5 Court 1968 decision at 391 U.S. 404.

6 THE COURT: Yes. Okay. That was Exhibit
7 16, I believe. Okay. Go ahead.

8 MR. HALLORAN: So the issue, Your Honor,
9 of the implication of termination era legislation is
10 an empty set. It is a distinction between Tribe --
11 the tribes of the 1867 Treaty is different, and that
12 is because in the 1980 (inaudible) --

13 THE COURT: Mr. Halloran, I've lost --

14 MR. HALLORAN: (Audio distortion).

15 THE COURT: Mr. Halloran, could you back
16 up just --

17 MR. HALLORAN: (Audio distortion).

18 THE COURT: Mr. Halloran? Can you hear
19 me, Mr. Halloran? Can you hear me? If you would
20 back up just a moment, we've lost our connection
21 there for just a short time. If you could back up
22 just a few sentences to what you were saying because
23 we lost you there a little bit.

24 MR. HALLORAN: Are you hearing me now,
25 Your Honor?

1 THE COURT: Yeah, we hear you now, but
2 there was a few sentences there that you were trying
3 -- that you were saying but just weren't coming
4 through on this side. You were referring, I
5 believe, to the Menominee vs. U.S., Section -- or
6 the Exhibit 16 had mentioned that in there, that
7 quoted, I believe, that the federal government would
8 not in a back-handed way, that that particular --
9 you may remember that that you quoted from that.

10 MR. HALLORAN: Yes.

11 THE COURT: From there forward, we were
12 losing you.

13 MR. HALLORAN: So, Your Honor, that
14 decision has been followed by a number of courts in
15 the Ninth Circuit and including in the Tenth
16 Circuit, in United States vs. Felter, where the
17 court, applying Menominee, determined that a Ute
18 tribal member continued to benefit from treaty
19 rights reserved by the Ute Tribe even after the Ute
20 Tribe Termination Act.

21 I think it's important, Your Honor, for
22 this purpose. The Termination Act, in applicability
23 to treaty rights, is relevant because the Ottawa
24 Tribe's reservation is established by Article 16 of
25 the 1867 Treaty. It is a treaty right that a

1 reservation exists irrespective of the landholding
2 within its boundaries. So reliance on the
3 Termination Act -- while ignoring the effect of the
4 express repeal, reliance on the Termination Act does
5 not get the court to the answer that it needs
6 because the Termination Act, even if it existed with
7 any legal effect, has been interpreted by the courts
8 not to adversely affect treaty rights, and the
9 Ottawa reservation is a treaty right established
10 under Article 16 of the 1867 Treaty.

11 I think, Your Honor, that it is also
12 important to note that -- so we're walking back in
13 time, right? Let's deal with what the law is right
14 now, and the law right now is there is no
15 Termination Act to interpret. There is (Zoom froze,
16 inaudible) -- even if it did apply, it did not
17 affect treaty rights reserved under the 1867 Treaty.

18 Moreover, it's important to take a look at
19 what the Restoration Act did. In addition to its
20 express repeal language, it was very clear that the
21 restoration order reversed any diminishment or loss
22 of treaty or other rights of the inherent rights of
23 the Tribe that were affected by the Termination Act.
24 The statute says that it will -- that any -- "that
25 the statute reinstated all rights and privileges of

1 each of the tribes restored and their members under
2 federal treaty, statute, or otherwise, which may
3 have been diminished or lost pursuant to the Act to
4 them which is hereby repealed."

5 I don't know how or why we would need to
6 look at implications of other tribes' termination
7 and restoration legislation when the Ottawa
8 restoration legislation is so crystal clear. It
9 restored all treaty rights and privileges that may
10 have been affected by the termination statute. So
11 not only did the restoration statute expressly
12 vacate, expressly repeal the termination statute,
13 but it went a step further and said all rights that
14 may have been diminished are restored.

15 Now, the State argues to you, flipping the
16 burden, flipping the legal analysis on its head,
17 suggesting, well, we don't see any language that
18 expressly says that the reservation continues to
19 exist, and without that language, the United States
20 didn't intend to create a reservation, but, Your
21 Honor, that's not the test. That's not the test.
22 We're not establishing a reservation. What the
23 restoration statute does is make clear that all
24 rights that existed in 1959 exist today, period,
25 fully.

1 So the question is, did the Ottawa
2 reservation exist before the Termination Act?
3 There's been no dispute or argument to the court
4 that the Ottawa reservation boundaries did not exist
5 at the time of the Termination Act. The State can't
6 turn legislative analysis on its head and suggest
7 that an express repeal and restoration of rights is
8 somehow inadequate because it doesn't spell out
9 every single right restored and that those rights
10 would be excluded if not expressed. The entire
11 repeal of the statute speaks to the legal undoing of
12 the nefarious effects, all effects of the
13 termination statute.

14 So, Your Honor, I think that it's
15 important to read the law and interpret the law and
16 apply the law as it exists today, and understanding
17 what law is effective and valid and what isn't.

18 THE COURT: Anything else, Mr. Halloran?

19 MR. HALLORAN: Yes, Your Honor, I'm just
20 reviewing my notes.

21 THE COURT: That's fine. Take your time.

22 MR. HALLORAN: So I think, Your Honor,
23 that it's important that following the 1978
24 Restoration Act that the Ottawa Tribe which, as I've
25 indicated, continued doing business as a sovereign

1 tribe exercising authority over its people and any
2 of its lands, was restored to a full
3 intergovernmental relationship. More importantly,
4 any rights that were lost, be they federal
5 supervision of land that the Tribe might acquire on
6 its reservation, health care, other benefits that
7 come from that intergovernmental relationship, those
8 are enormously important to the Tribe, and the Tribe
9 is a thriving, growing, self-determined tribal
10 government today.

11 But let's not mistake the fact that the
12 United States determining to restore that
13 relationship is -- is in any way limiting to what
14 the restoration statute did against any other
15 argument, and that it was to restore all rights and
16 privileges under any treaty or otherwise, and that
17 includes, in the event there's any question about
18 the status of the Ottawa reservation following the
19 Termination Act, it restored all rights under the
20 treaty, the applicable treaty, the 1867 Treaty, and
21 the applicable article is Article 16, which
22 establishes the boundaries.

23 So here now in the 21st century, it
24 happens that Mr. Terry was engaged in unlawful
25 conduct on an Indian reservation established nearly

1 two centuries earlier, and, as a result, his conduct
2 was subject to prosecution by the feds and, yes,
3 even the Tribe, if it were to choose to exercise its
4 jurisdiction, but not the State of Oklahoma, because
5 the land within the boundaries of the Ottawa
6 reservation constitutes Indian country under 1153,
7 and the jurisdiction of the State does not extend to
8 conduct -- criminal conduct within Indian country.

9 I want to review, Your Honor, a couple of
10 additional matters with respect to the State's
11 argument. In discussing -- in discussing language
12 regarding the Ottawa Termination Act and other
13 tribal termination acts, the State suggests that the
14 court must consider the "context" and that there are
15 no magic words for disestablishing a reservation.
16 Now, that is language that you may have seen argued
17 to a court before McGirt.

18 Matter of fact, it was an argument made in
19 McGirt based on the test -- the announced -- the
20 three-part test announced in Solem vs. Bartlett, but
21 McGirt made very clear that its test, the three-part
22 test is not a balancing test, and the court was very
23 clear that any language regarding the
24 disestablishment of a reservation must be a clear
25 expression of Congress on the face of the statute.

1 Legislative history, contemporaneous facts, facts
2 after the fact, cannot be used to create an
3 ambiguity where Congress has either clearly spoken
4 or Congress has either -- as Congress has clearly
5 not spoken. And in this instance, you are obligated
6 to review not just the allotment history, which
7 you've addressed in the Leopard case and the court
8 addressed in the Leopard case, you look at the
9 Termination Act to determine whether the Act
10 expressly terminated or disestablished the
11 reservation. There is no such language.

12 I think it's also important to note, with
13 respect to Mr. Terry's argument and our argument
14 about water rights that were left undiminished by
15 the Termination Act, that really, Your Honor, gets
16 to the fact that treaty protected rights weren't
17 intended to be undone by the Termination Act, and
18 among those would be water rights, because the
19 reservation boundary is relevant as to the exercise
20 of those water rights, just as it would have been
21 relevant if, like in the Ute case, an Ottawa tribal
22 member, let's say in the 1960s, was hunting on the
23 Ottawa reserve. There would have been a case that
24 arose about those reserve rights, and the fact that
25 the legislation expressly tipped its hat to reserved

1 treaty rights of the Ottawa indicates (audio
2 distortion, inaudible) --

3 THE COURT: Okay. We lost you there.

4 MR. HALLORAN: Let's talk about also
5 briefly about the State's position with --

6 THE COURT: Mr. Halloran, I'm sorry.
7 There just for about 30 seconds we didn't hear you.

8 MR. HALLORAN: Okay. Am I back?

9 THE COURT: Yes, you are back. I think
10 you were just finishing your context argument, I
11 believe, and about the rights, the water rights
12 being restored.

13 MR. HALLORAN: Yes, the water rights were
14 specifically called out by Congress as not affected
15 by termination, which is an acknowledgment that
16 those treaty rights and the exercise of those treaty
17 rights within the treaty established reservation
18 boundary were unaffected. That is the point of
19 mentioning that language, and that language is
20 supported by the case law that you see developed in
21 the Menominee case in 1968 and its progeny which
22 say, yes, that wasn't the intent of the Termination
23 Act to adversely affect the treaty rights.

24 I want to also return to the State's
25 comment regarding the Restoration Act. It was, I

1 think, the height of -- height of disestablishment
2 by implication, because it suggests that unlike some
3 other restoration statutes, not the Ottawa
4 restoration statute, the Ottawa restoration statute
5 didn't mention the reestablishment of a reservation
6 land base. I don't know what to make of that, other
7 than what we've already spoken about, Your Honor,
8 which is the restoration statute in the Ottawa case
9 is actually more precise and more wide ranging than
10 any other restoration statute that would have
11 qualifications of that sort. It reverses all
12 effects of the Termination Act and expressly
13 repealed it. The fact that the court didn't -- that
14 the Congress didn't talk about the reacquisition of
15 lost land is really of no moment, because that isn't
16 determinative of the existence of a reservation in
17 any event.

18 But what we do know, Your Honor, is that
19 following reinstatement, about 27 acres of land was
20 restored to Tribal trust status. Up to that point
21 it had been -- prior to the termination, it had been
22 allotted status, as a result of the General
23 Allotment Act. So there was a restoration of land
24 and within the reservation boundaries, as part of
25 the Tribe's reacquisition of its lost land base,

1 that had really been lost over the course of 230
2 years. They continue that effort to restore that
3 lost land base. Whether or not there was a
4 restoration of trust land within the boundaries, as
5 a result of the Restoration Act, really is
6 immaterial to the effect of the Restoration Act and
7 the existence of the boundaries.

8 It would appear that in order to -- in the
9 State's view of what was required, this sort of
10 rights not restored unless they were expressed, it
11 would appear as though that the State wouldn't
12 acknowledge the Ottawa reservation unless they went
13 back and ratified and re-executed the 1867 Treaty,
14 but we know that isn't necessary, Your Honor. Your
15 Honor has already ruled in the Leopard case that
16 these reservations were established, that they
17 existed, and with respect to the Tribes that were
18 not subject to termination, continue to exist today,
19 that there has not been any expression of Congress
20 -- clear expression of Congress in any statute that
21 disestablishes the reservation.

22 So we come back to the question of the law
23 as applicable to the Ottawa Tribe of Oklahoma. Is
24 there any clear expression that the court can
25 consider that the reservation was disestablished,

1 and, Your Honor, there just isn't any indication of
2 Congress. And to the contrary, the indication of
3 Congress was that the Ottawa Tribe was to be
4 restored to its full status as it existed before the
5 ill-conceived and misguided policies of the
6 termination period.

7 Finally, there was a fair bit of
8 conversation about the John case, Your Honor, and,
9 frankly, it is an apposite to this case. The John
10 case was not a disestablishment case. The John case
11 related to and addressed whether the United States
12 could recognize and the Tribe could exercise -- the
13 Choctaw could exercise sovereign authority over a
14 reservation that lacks supervision, and that really
15 doesn't have anything to do with this case, and
16 that's why it wasn't addressed in our brief.

17 So again in closing, Your Honor, the law
18 right now, the law as it exists today with respect
19 to the status of the Ottawa Tribe of Oklahoma and
20 its reservation, the law that applied at the time of
21 the investigation and arrest and charging of
22 Mr. Terry is clear. The Ottawa Tribe of Oklahoma
23 exists, and its reservation boundaries that were
24 never diminished exist today and that the conduct
25 that formed the basis of the criminal charge

1 occurred in Indian country and is beyond the
2 jurisdiction of the State of Oklahoma to prosecute.

3 THE COURT: All right. Thank you, Mr.
4 Halloran.

5 MR. HALLORAN: Thank you, Your Honor.

6 THE COURT: Is there anybody else that's
7 with this, excluding those that are just here
8 watching, that had any other statements to make to
9 the court?

10 Mr. Halloran, can I safely assume that you
11 pretty much summarized the Amicus briefs that were
12 submitted?

13 Anyone else? Hearing none, Ms. Hunt or
14 Mr. Wright, do either of you -- since you carry the
15 burden of proof here, I'm going to give you the last
16 shot, if you wish to make any further argument.

17 MR. WRIGHT: I would, Judge, just a few
18 things.

19 THE COURT: You might step -- yeah, if you
20 will. Go ahead.

21 MR. WRIGHT: Thank you, Judge. We've
22 heard talk about a whole bunch of different things.
23 We've talked about individual rights, individual
24 privileges, group rights, group privileges, the
25 existence of a tribe, but really what we're here to

1 talk about is a reservation, and that's it. So
2 that's what I would urge the court to focus on is
3 the reservation itself and the status of that
4 reservation as of today. When we look at the 1956
5 Act, what we see there is a whole handful of things,
6 and I would urge the court to read that Act in its
7 entirety to understand overall what was happening
8 there.

9 So as part of the loss of federal
10 recognition, it's necessary for all of the tribal
11 assets to be resolved, and the Act of '56 begins
12 that process. So one of the things it does is say
13 that "any land held on behalf of the Tribe by the
14 United States is going to be sold and those assets
15 are going to go back to the tribal members." In
16 addition, "any land that's individually held by a
17 tribal member, that is somehow restricted by virtue
18 of it being Indian land is no longer restricted."

19 So what Congress is doing is taking care
20 of all the land associated with the Ottawa Tribe at
21 that particular point in time, so that when we get
22 to the effective date of that Act in 1959, there
23 isn't any Indian land left. So specifically when we
24 look at Section 8, which is the big one, and this is
25 of the 1956 Act, "federal trust relationship to the

1 affairs of the Ottawa Tribe and its members shall
2 terminate three years after the date of this Act
3 and, thereafter, individual members of the Tribe
4 shall not be entitled to any of the services
5 performed by the United States for Indians because
6 of their status as Indians." So that's a loss of
7 rights and privileges that the United States accords
8 to individuals as Indians.

9 In addition, Congress states that "all
10 statutes of the United States which affect Indians
11 because of their status as Indians shall no longer
12 be applicable to the members of the Tribe. The laws
13 of the several states shall apply to the Tribe and
14 its members in the same manner as they apply to
15 other citizens or persons within their
16 jurisdiction."

17 If Congress intended the reservation to
18 continue in perpetuity at that point, they could not
19 have written Section 8. It is incompatible with the
20 idea that a reservation was going to continue after
21 1959 for the Ottawa Tribe. When we look at -- I
22 mean, there's no -- I think everybody would agree
23 that from 1959, at least until 1978, nobody is going
24 to claim a reservation existed during that time. I
25 mean, you don't -- you don't have any relationship

1 with the federal government, and the existence of a
2 reservation is 100 percent contingent upon that
3 relationship. It's not a thing that exists
4 naturally. It is a pure creation of the United
5 States Congress, and without that relationship
6 between the federal government, Congress and the
7 Tribe, there can be no reservation. It absolutely
8 can't exist, at least in the sense that we're
9 talking about today in relation to criminal
10 jurisdiction, which is really one of the important
11 points.

12 We're talking about reservations --
13 whether reservations exist for the purposes of
14 establishing criminal jurisdiction and allotting
15 that jurisdiction between the State, the federal
16 government and the tribes. We know that Congress'
17 intent was not for that -- was not for that
18 reservation to exist anymore, because they say
19 specifically "that the laws of the State will apply
20 to the former members, just as they apply to anyone
21 else," and that includes criminal. So the Major
22 Crimes Act was already in existence at this point in
23 time. So for the laws of the State to apply to
24 those former Indians, there has to not be a
25 reservation anymore.

1 Now, what probably makes all this a little
2 bit more difficult, looking back in time, is that I
3 would offer to the court that no one in 1956 or 1978
4 believed that the Ottawa Tribe or any other Indians
5 in Oklahoma had reservations. So when Congress is
6 crafting these acts, again, I would submit that they
7 weren't thinking in the back of their minds, gee,
8 what do we do with this reservation, because the
9 common -- the common perception in 1956 was that
10 there weren't any reservations in Oklahoma, maybe
11 with the exception of the Osage, but probably not
12 even them. Again, in 1978, the legal understanding
13 was, there aren't any reservations in Oklahoma.

14 So, you know, that's one thing to consider
15 when we look at the Restoration Act is -- and I know
16 this is probably arguing more on the Tribe's behalf,
17 but it may have been that it didn't occur to
18 Congress to include reservation in that particular
19 restoration piece of legislation, because they
20 didn't really think that the Ottawa Tribe ever had a
21 reservation to begin with, and then in Oklahoma
22 there aren't any reservations. Now, that's probably
23 going to be important in our review of all this
24 because, as Justice Gorsuch instructs us in McGirt
25 is that we really need to put aside common sense and

1 practical understanding of what's happened.

2 THE COURT: Mr. Wright, if you need a
3 moment, there's water right there in the jury room.

4 MR. WRIGHT: Thank you.

5 THE COURT: Let's go off the record just a
6 moment.

7 (A discussion was had.)

8 THE COURT: Back on the record on the
9 Terry vs. Oklahoma matter. Mr. Wright, we
10 interrupted you there. We'll let you continue with
11 your final argument.

12 MS. HUNT: Thank you, Judge. I appreciate
13 that opportunity for me to get a drink of water
14 there. That seems to have helped out.

15 Basically, what I was trying to talk about
16 was the idea that when we look at the 1956 Act that
17 completely severs the federal government's
18 relationship with the Ottawa Tribe and results in
19 their loss of recognition as a tribe, that doesn't
20 mean the Tribe ceases to exist; okay? What a lot of
21 these tribes did was form nonprofit organizations or
22 collectives of tribes, much like our Intertribal
23 Council here in Miami, which is a product of those
24 times. The tribes transferred a lot of their assets
25 into those nonprofits, but the reservation, which

1 was established in 1867, had to have been
2 disestablished in 1956, because there's no way --
3 there's no way to end that relationship and leave a
4 giant piece of property recognized by the federal
5 government as an Indian reservation. It just
6 doesn't make any sense at all.

7 Now, when we look at the '78 Act, the
8 Restoration Act, the Tribe talks a little bit about
9 the express repeal and that through that express
10 repeal it's like the 1956 Act didn't exist at all.
11 That's probably a little bit of an
12 oversimplification. I would urge the court to read
13 the entire Restoration Act. It's not particularly
14 long. But just for one example of how the express
15 repeal didn't completely get rid of the 1956 Act
16 altogether, all we have to do is look at Subsection
17 D, which Mr. Terry mentioned is the subsection that
18 talks about water rights, is that -- well, again,
19 we've got to read that in context a little bit with
20 what comes above. So that's that "the following
21 acts are repealed from 1956," and then we get to D,
22 which says, "Except as specifically provided in this
23 Act, nothing contained in this Act shall alter any
24 property rights or obligations, any contractual
25 rights or obligations, including existing fishing or

1 any obligation for taxes already levied."

2 So what we see is Congress' explicit
3 intent in the Restoration Act that it not change any
4 property rights or obligations in any way, shape or
5 form from the way they existed prior to 1978, and
6 the State's position is that with the reservation
7 having been disestablished in 1956, when we get to
8 1978, certainly a reservation -- that's property
9 rights. That's property rights obligations. In the
10 Restoration Act, it appears to specifically except
11 those types of issues from -- from the repealer
12 that's built into the '78 Act.

13 I think it's also important, when we're
14 talking water rights -- that was something that
15 Mr. Terry focused on a fair bit -- what we're really
16 dealing with is individual property owner's water
17 rights, not the Tribe as a whole, because the Tribe
18 ceased to exist in the eyes of the federal
19 government in 1959. So when they talk about water
20 rights in the Restoration Act, what they're really
21 talking about is individual water rights, whether
22 that be held by an entity or an organization, but
23 that this somehow recreated.

24 So I think Mr. Perry -- Terry has two
25 potential arguments; one, that it was never

1 disestablished. We've talked about how the 1956 Act
2 did, in fact, disestablish the reservation. The
3 second argument is that if it was disestablished in
4 1956, it was re-established by the Restoration Act
5 in 1978. Again, that can't be the case either,
6 first of all, because of the wording in D and,
7 second of all, because every other Tribe that
8 Congress restored status to, if it was going to have
9 a reservation, they put specific language in those
10 restoration acts about reservation, whether it's set
11 aside for the use of the Tribe forever and ever,
12 some of the words that we're really familiar with.
13 That's why we encourage the court to look at the
14 Menominee Tribe, as well as the other two that are
15 cited in the State's materials, so we could see that
16 the Ottawa Tribe is different than some of these
17 other tribes, where they did specifically include
18 language about restoring a reservation, and that is
19 completely absent from the '78 Act.

20 So, Judge, for those reasons we would urge
21 the court to make a finding that although the Tribe
22 initially had a reservation pursuant to the 1867
23 Act, that that reservation was disestablished in the
24 1956 Act, and that nothing in the Restoration Act of
25 '78 did anything to change that position and that as

1 of today the Ottawa reservation is still
2 disestablished.

3 THE COURT: All right. Thank you, Mr.
4 Wright. I think that concludes both the evidence
5 and the argument.

6 Ms. Beckham, our reporter, is directed
7 here by the Court of Criminal Appeals to prepare a
8 transcript --

9 MR. TERRY: Your Honor --

10 THE COURT: -- of this proceeding and get
11 that to the -- have that ready within 20 days. This
12 court, of course, is going to go through all of the
13 evidence and the exhibits, including the exhibits
14 that have been put forth today, and will render some
15 findings of fact and conclusions of law.

16 Mr. Terry, you were trying to get the
17 attention of the court?

18 MR. TERRY: Yes. Your Honor, I'd like to
19 say one thing. Although the State's attorney has
20 made an eloquent plea, the fact is, there's no
21 language in that 1956 statute -- or it was 1959 that
22 ever disestablished the reservation formally.

23 THE COURT: Okay.

24 MR. TERRY: And under McGirt, which relies
25 on a host of Supreme Court case law, there are three

1 principles. Congress' intent is paramount, and
2 statutory text is the only unfailing evidence of
3 Congress' intent. And Congress never intended to
4 disestablish that reservation in the 1956 Act. They
5 merely mention terminate formal relations with the
6 Tribe. It's just like saying, oh, we're going to
7 pass a law, you don't exist anymore. That's not the
8 case here, and it can't be relied on. The State has
9 made a couple of large statements to the effect that
10 this 1956 Act disestablished the reservation
11 boundaries, and I would urge Your Honor to read that
12 Act clearly and closely. There's no language in
13 there that does that.

14 THE COURT: I will be doing --

15 MR. TERRY: That --

16 THE COURT: -- doing -- Mr. Terry --

17 (Simultaneous speakers)

18 MR. TERRY: -- statutory interpretation is
19 in the text.

20 THE COURT: Mr. Terry, I will --

21 Mr. Terry -- Mr. Terry, let me stop you there. I've
22 heard the arguments at this point. You very
23 eloquently, as I said earlier, made this argument.
24 I will be reading those, both the '56 and the '78
25 Acts, as well as many of the other cases here, that

1 were referenced. Believe me, I will be doing that.

2 MR. TERRY: Okay, Your Honor. I'm sorry.
3 I'm sorry. I didn't mean to step in or get rude.

4 THE COURT: No, you --

5 MR. TERRY: I just had a comment. Thank
6 you so much for your patience.

7 THE COURT: All right. Before we go off
8 the record, is there anything else that anyone -- I
9 know I've got to get my findings of fact and
10 conclusions of law out. The first thing I'm going
11 to need is that transcript Ms. Beckham is going to
12 prepare for us. Anything else that anyone has to
13 say to the court before we adjourn this hearing?

14 Ms. Hunt?

15 MS. HUNT: I don't believe --

16 MR. TERRY: Your Honor, I ask Your Honor
17 to be sure that I get copies of all that material.

18 THE COURT: Yes, we will.

19 MR. TERRY: Thank you, sir. I appreciate
20 you.

21 THE COURT: Thank you.

22 Ms. Hunt?

23 MS. HUNT: Other than, Your Honor, to ask
24 you whether you wanted any proposed findings of fact
25 and conclusions of law, the State has nothing else.

1 THE COURT: The only thing I was concerned
2 about there is just the time period that we've been
3 allowed here. Is that something -- if Ms. Beckham
4 is able to get you a transcript sometime in the next
5 couple of weeks or so, is that something you believe
6 you could do relatively quickly?

7 MS. HUNT: Yes, Your Honor. And we've
8 done them in a number of our other McGirt cases, so
9 that is something I could turn around quickly, if
10 that would be helpful to Your Honor.

11 THE COURT: I see. All right. I would
12 certainly allow you, Mr. Terry and Mr. Halloran, to
13 also present proposed findings of fact and
14 conclusions of law. Ms. Beckham is to have that
15 transcript done within 20 days, hopefully, maybe a
16 little quicker. And then if counsel then -- and Mr.
17 Terry, believe that you could have those -- once you
18 have received the transcript of this proceeding, if
19 you believe you could have those presented within a
20 couple of weeks, that might get us within our time
21 frame.

22 MS. HUNT: Yes.

23 THE COURT: I think --

24 MR. WRIGHT: I was going to say, when we
25 extended that, when did they get extended to?

1 THE COURT: I think to like February the
2 15th.

3 MS. HUNT: Yes, that's correct, and I will
4 say, that deadline was actually for us to hold the
5 evidentiary hearing, and then the subsequent
6 deadlines run from that. So, thankfully, it builds
7 that in --

8 THE COURT: That's true, and I'm sorry, I
9 was overly concerned about that date.

10 MS. HUNT: No. I understand.

11 THE COURT: All right. Then just to be
12 clear, yes, once Ms. Beckham -- she does have a full
13 20 days to get that done under the Court's order --

14 MS. HUNT: Yes.

15 THE COURT: -- gets that transcript
16 prepared and presented to counsel and to Mr. Terry,
17 you would each have -- is there any issue with
18 getting those proposed findings of fact and
19 conclusions of law to the court within two weeks
20 after you've received the transcript of this
21 proceeding?

22 Ms. Hunt?

23 MS. HUNT: No, Your Honor.

24 THE COURT: Mr. Terry, would that work for
25 you? Mr. Terry, would that work for you?

1 MR. TERRY: Yes, Your Honor.

2 THE COURT: All right. Mr. Halloran, will
3 that work for you?

4 MR. HALLORAN: Yes, Your Honor. Your
5 Honor, I did want to note -- not to drag this out,
6 but I did want to note that, you know, the State's
7 last position really was not in the form of a reply
8 or response to the previous arguments, and it is our
9 position and argument in very broad statements or
10 assertions of law that the Amici would like an
11 opportunity to respond to, but I would request Your
12 Honor's permission to submit a letter reply -- to
13 reply within the next five days, certainly within
14 the time of the drafting and review of the proposed
15 order and the transcript.

16 THE COURT: Is that something you would be
17 able to, if I allowed you today, to make by oral
18 argument, or do you need that time to address that
19 issue? If I allow you to make that by oral argument
20 today, can you do so, or do you need the five days
21 to actually put your brief together?

22 MR. HALLORAN: I think, Your Honor, we can
23 address it orally. I'm fine proceeding, if you
24 would like to consider it.

25 THE COURT: You understand, though, that I

1 will give the State then the opportunity to respond
2 to that?

3 MR. HALLORAN: That's fine, Your Honor.

4 THE COURT: All right. I'll allow it
5 then. Go ahead.

6 MR. HALLORAN: If it would be more
7 efficient, Your Honor, I'd be happy to put together
8 a letter of submission and have it to you in the
9 next three business days.

10 THE COURT: That would be Friday? Of
11 course, I'm going to give the State -- as I said, I
12 give them -- since they're the ones with the burden
13 of proof here, I give them the last shot. So if
14 there's anything in that that they care to respond
15 to, I would give them an opportunity to do so.

16 Are you understanding what Mr. Halloran is
17 saying?

18 MR. WRIGHT: Yes. My only -- if we could
19 proceed orally today, I think that would be a little
20 bit better. I'm afraid if Mr. Halloran files a
21 reply letter for the court to consider, depending on
22 the context or the content of that letter, it might
23 be necessary for the State to then write some form
24 of a reply letter, again, with us carrying the
25 burden, and I don't know that we want to get into

1 chasing competing letters down the road when we
2 probably could just hash it out today.

3 THE COURT: I get that.

4 Mr. Halloran, if you can make your
5 argument today orally, I would appreciate doing it
6 that way, and then, like I say, I'll give --

7 MR. HALLORAN: That's fine, Your Honor.

8 THE COURT: All right. Go ahead.

9 MR. HALLORAN: I'll be happy to. So there
10 were several assertions that I think need to be
11 pinned back to what the law actually provides.
12 Specifically, the existence of treaty rights, and
13 let's be clear, the Ottawa's reservation is a
14 treaty-established right. Whether or not there's
15 any land within the boundary that is owned by the
16 Tribe, the reservation is a treaty right, and the
17 suggestion that the withdrawal of federal
18 supervision over allotted land or tribal trust land,
19 the withdrawal of rights to tribal members is an
20 abrogation of treaty rights is simply unsupported by
21 law. There is no law in the body of law in the
22 United States that stands for that proposition. So
23 the United States absolutely can get out of the
24 Indian business and withdraw its supervision, and
25 that is not an abrogation of the treaty-established

1 right of the Ottawa to its 1867 reservation.

2 The State also suggests that when the
3 Termination Act occurred or was enacted, state
4 criminal law extended to the reservation, and that
5 couldn't occur -- to the divestiture of the United
6 States, that couldn't occur if there was an Indian
7 reservation. That also is not true. There's no law
8 for that proposition, and, in fact, the law is
9 contrary to that proposition.

10 The Ninth Circuit Court of Appeals
11 addressed that in Kimball vs. Callahan, the 1974
12 decision, where it discussed the Menominee court, re
13 the termination act and Public Law 280 in pari
14 materia, meaning together with one another, to
15 interpret what rights are affected as a result of
16 the Termination Act.

17 Now, that is significant, Your Honor,
18 because up here in Minnesota, all of the tribes,
19 except Red Lake, were subjected to Public Law 280.
20 It extended the criminal jurisdiction in the state
21 of Minnesota to the reservation. The statute has
22 never been interpreted by that extension of criminal
23 law to have resulted in a diminishment,
24 disestablishment or abdication of a Tribe's
25 reservation. There simply is no law that

1 suggests that suggestion, that argument, and, in
2 fact, the law is absolutely to the contrary.

3 The State would suggest that we would all
4 agree, therefore, that there was no Ottawa
5 reservation between 1959 and 1978. I raise my hand.
6 I absolutely disagree. That's why we're here. We
7 are applying the McGirt decision. We are not
8 arguing in a vacuum as though McGirt didn't exist.
9 We are looking for express language that
10 disestablished the Ottawa reservation, and we can't
11 make the ruling regarding the status of that
12 reservation based on what someone suggests we all
13 knew, because we don't know that. We are learning
14 that right now, through the application of
15 established law to the Tribe's rights.

16 Finally, Your Honor, the State would
17 suggest that the tribe reservation -- or that the
18 Restoration Act did additional things so that it
19 didn't completely repeal the 1956, effective in
20 1959, Termination Act. I would direct you to the
21 statutory language (audio distortion) --

22 THE COURT: We lost you.

23 MR. HALLORAN: (audio distortion) --
24 Subdivision 3, the Act of August 3rd, 1956, relating
25 to the Ottawa Tribe --

1 THE COURT: Hold on. Hold on. If you
2 would start your argument again on the -- referring
3 to the 1978 specific language in that Restoration
4 Act, because we lost you there for about 40 seconds.

5 MR. HALLORAN: Oh, boy. Okay, Your Honor.
6 Thanks. So the State has suggested that because --
7 because there's some language in the Restoration Act
8 that does other things, that it implies that the
9 effects of the Termination Act were not complete,
10 that it was not a complete repeal. The statute --
11 the language of the statute, Your Honor, is
12 relevant, Subdivision B of PL 95 281 says, "The
13 following Acts are hereby repealed, Subdivision 3,
14 the Act of August 3, 1956, relating to the Ottawa
15 Tribe." Period. The Termination Act was repealed.

16 Now, the language in Subsection C then
17 makes even more clear that any rights or privileges
18 affected by that statute that was repealed are
19 reinstated. So if we go to Subdivision D, which is
20 what the State is speaking about, the -- essentially
21 what we call the status quo language has nothing to
22 do with the repealer of the Termination Act, except,
23 as we call it, to maintain the status quo to the
24 extent there were contracts, there was non-Indian
25 land ownership, there were taxes that had accrued

1 and then become due during the effective time of the
2 statute. That's fine. That's fine. That's not a
3 limitation on the repealer. That is a clarification
4 of the status quo.

5 So, again, statutory language does
6 clearly, expressly and completely repeal the
7 Termination Act, period. There may be other
8 provisions for third parties that it provided for,
9 but there is no qualification on the repeal. The
10 Termination Act is a legal nullity. It does not
11 exist in the eyes of the law; its legislative
12 history doesn't exist, and it can't be used as a
13 basis for arguing in futuro that the Ottawa Tribe's
14 rights are somehow limited by it not having -- by
15 remnants of it surviving. We know that they did. I
16 think that's it, Your Honor. Thank you very much.

17 THE COURT: All right. Now, I will give
18 Mr. Wright or Ms. Hunt, either one, if you wish to
19 address those specific issues that Mr. Halloran
20 requested to be able to address.

21 Go ahead, Ms. Hunt.

22 MS. HUNT: Thank you, Your Honor. I'll
23 try to make this brief. I'll respond to Mr.
24 Halloran's first point, his assertion that there is
25 no law requiring federal superintendence for

1 reservation status.

2 First, to the extent he's suggesting that
3 this was a new point on our reply, I strongly
4 disagree with that. In fact, this is the heart of
5 our argument that has gone entirely unaddressed up
6 until now, and his only response is to say, that's
7 not the law, but, in fact, that is the law. As I
8 said, John is entirely relevant. It's a Major
9 Crimes Act case. It tells us that federal
10 superintendence is a necessary element, and then,
11 even setting John aside, we have the definition of a
12 reservation in Section 1151, referring to under the
13 jurisdiction of the United States.

14 As far as his point regarding express
15 language again, what I'll say here, and it's the
16 crux of our case, is that express language is
17 removing the federal superintendence. Congress
18 knows that's an element required for a reservation,
19 and so that's how it expressly affected
20 disestablishment here.

21 Finally, as to the Restoration Act, I
22 disagree with Mr. Halloran's point that there were
23 no qualifications on that repeal. There were. All
24 of the subsections thereafter, after it stated --
25 the Act stated that the Rest- -- excuse me, the

1 Termination Act was repealed. And again, as far as
2 the law governing how a reservation is created,
3 McGirt tells us there has to be a set-aside. And if
4 we look at the other acts of Congress with other
5 statutes where they did recreate a reservation,
6 that's what they could have done here. Again, this
7 is exactly the type of analysis McGirt applied,
8 looking at other acts of Congress to see what type
9 of language could create a reservation.

10 THE COURT: Okay. Thank you.

11 MS. HUNT: Thank you, Your Honor.

12 THE COURT: That's going to conclude our
13 argument.

14 Let me go back to my original question to
15 you, Mr. Halloran. Will you be able to present any
16 proposed findings of fact and conclusions of law
17 within two weeks of receiving the transcript of this
18 proceeding from Ms. Beckham?

19 MR. HALLORAN: Yes, Your Honor.

20 THE COURT: Great. I think that then
21 gives us our time limits here, and I believe we can
22 conclude the hearing at this point. Thank you all
23 very much, very well presented to the court. Thank
24 you.

25 (HEARING CONCLUDED AT 11:37 A.M.)

CERTIFICATE

STATE OF OKLAHOMA)
) SS:
COUNTY OF TULSA)

I, Mary K. Beckham, Certified Shorthand Reporter within and for the State of Oklahoma, do hereby certify that the above and foregoing hearing was by me taken in shorthand and thereafter transcribed; that the same was taken, pursuant to stipulations hereinbefore set out; and that I am not an attorney for nor relative of any of said parties or otherwise interested in the event of said action.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 19th day of January, 2021.

Mary Beckham

Mary K. Beckham, CSR, RPR
CSR No. 01053



CHEROKEE NATION
OFFICE OF THE ATTORNEY GENERAL

P.O. Box 1533
Tahlequah, OK 74465
918-453-5000

Sara Hill
Attorney General

October 14, 2020

To Whom It May Concern:

This letter shall verify that Patrick Joseph Terry, born February 9, 1956, is a registered citizen of the Cherokee Nation as of January 6, 2011. His blood quantum is 1/32, dated August 26, 2011.

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 or call the Cherokee Nation Office of the Attorney General at (918) 453-5262.

Petitioner's
Appendix E

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT - 6 2021

JOHN D. HADDEN
CLERK

PATRICK JOSEPH TERRY,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

No. PC-2018-1076

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner, pro se, appealed to this Court from an order of the District Court of Ottawa County in Case No. CF-2012-242 denying his request for post-conviction relief.¹ Petitioner's post-conviction application asserted the same issues ultimately addressed in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). This Court affirmed the District Court's ruling and denied Petitioner's post-conviction appeal. *Terry v. State*, PC-2018-1076 (Okl.Cr. February 25, 2019) (unpublished). 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

¹ Petitioner sought review of our decision by the United States Supreme Court and that Court vacated our judgment and remanded this case to this Court for further consideration in light of *McGirt*. *Terry v. Oklahoma*, 141 S.Ct. 191 (2020).

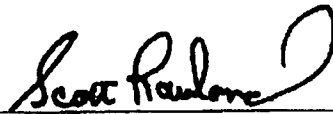
OK CR 21, ¶¶ 27-28, 40.

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**. The Respondent's Motion to File a Supplemental Brief filed with this Court's Clerk on September 2, 2021, is **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.

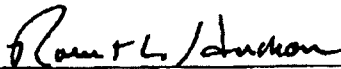
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

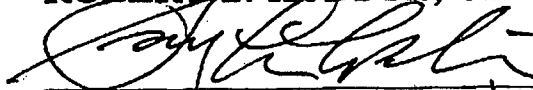
6th day of October, 2021.



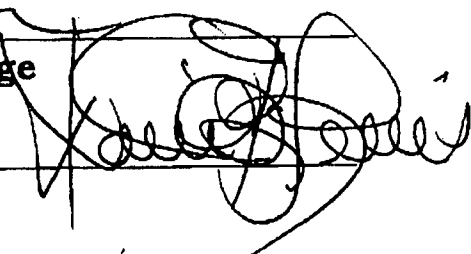
SCOTT ROWLAND, Presiding Judge



ROBERT L. HUDSON, Vice Presiding Judge



GARY L. LUMPKIN, Judge



DAVID B. LEWIS, Judge

ATTEST:

John D. Hadden

Clerk

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA



Patrick Joseph Terry,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent,

OCT 12 2021

Case Number: PC-2018-1076

JOHN D. HADDEN
CLERK

TCC Number(s): CF-2012-242

RETURN OF THE COURT CLERK

To the Court of Criminal Appeals of the State of Oklahoma:

On the 8th day of October, 2021, I received the mandate issued in case number: PC-2018-1076, Terry, Patrick Joseph; appellant v. STATE OF OKLAHOMA; appellee, with a copy of the Order in the same. I have stamped, filed, and spread of record the mandate on the day I received same.

On the 8th day of October, 2021, I issued appropriate process -- i.e. a certified copy of the Judgment and Sentence as affirmed by the mandate -- to the appropriate officer of County of OTTAWA, State of Oklahoma, as required by 22 O.S. 2001 §978 who then made return to my office as follows:

1. Use this space if the punishment assessed was solely confinement in state penitentiary. See 22 O.S. 2004 §980. Count 1 30 Yrs. DOC / Count 2 6 Yrs. DOC
2. Use this space if the punishment assessed was solely confinement in the County Jail. See 22 O.S. 2005 §979. Count 3 — 1 Yr. county jail.
3. Use this space if the punishment assessed was confinement, due to failure to pay, in whole, or in part, a fine. See 22 O.S. 2001 §§ 979 and 983.
4. Use this space if the case was Reversed and Remanded for a New Trial. See 22 O.S. 2001 §1066.

Witness my hand this 8 day of October, 2021.

Carrie Do

Court Clerk

Ottawa County

OTTAWA County, Oklahoma

By:

Sam Blalock

Deputy

(seal)

Petitioner's
Appendix H



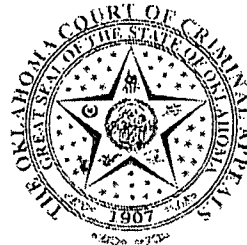
STATE v. LAWHORN

2021 OK CR 37

Case Number: S-2020-858

Decided: 10/21/2021

THE STATE OF OKLAHOMA, Appellant v. JEREMY LAWHORN, Appellee



Cite as: 2021 OK CR 37, __ __

OPINION

ROWLAND, PRESIDING JUDGE:

¶1 The State of Oklahoma charged Appellee Jeremy Lawhorn in the District Court of Ottawa County, Case No. CF-2020-189, with one count of Lewd or Indecent Acts with a Child Under 16, in violation of 21 O.S. Supp. 2018, § 1123 (A)(2). Lawhorn filed a motion to dismiss, asserting that the State of Oklahoma lacked jurisdiction over the matter because he is an Indian and the offense occurred in Indian Country, specifically the Quapaw Nation Reservation. The district court held a hearing and concluded, based upon the stipulations and exhibits, that Lawhorn is an Indian for purposes of federal criminal law and that the crime occurred in Indian Country, namely within the historic boundaries of the Quapaw Nation Reservation. The district court granted Lawhorn's Motion to Dismiss, quashed the Information, and dismissed the case for lack of jurisdiction. The State announced its intent to appeal the ruling in open court to settle the status of the Quapaw Reservation and ultimately perfected the instant appeal. We exercise jurisdiction under 22 O.S. 2011, § 1053. The sole issue for review is whether the Quapaw Nation Reservation is Indian Country. Because the answer is yes, we affirm the district court's order for the reasons discussed below.

DISCUSSION

A. The Major Crimes Act

¶2 The federal Major Crimes Act (MCA) grants exclusive federal jurisdiction to prosecute certain enumerated offenses committed by Indians within Indian Country. *Sizemore v. State*, 2021 OK CR 6, ¶ 6, 485 P.3d 867, 869; 18 U.S.C. § 1153(a) (2013). There is no dispute that the crime charged against Lawhorn fits squarely within the MCA and its exclusive federal jurisdiction provided he is an Indian and the crime occurred in Indian Country. See *State v. Klindt*, 1989 OK CR 75, ¶ 3, 782 P.2d 401, 403 ("[T]he State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.")

B. *McGirt v. Oklahoma*

¶3 In *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), the Supreme Court held the reservation Congress established for the Muscogee (Creek) Nation remains in existence today because Congress has never explicitly disestablished it. That ruling meant Oklahoma lacked jurisdiction to prosecute McGirt, an Indian, because he committed his crimes on the Creek Reservation, i.e., in Indian Country, and the federal government has jurisdiction of such criminal matters under the MCA. Although the case now before us involves the lands of the Quapaw Nation, we find *McGirt's* reasoning controlling.

C. Status of Quapaw Reservation

¶4 The parties stipulated that the charged crime occurred within the historic geographic boundaries of the Quapaw Nation as designated by various treaties. The district court admitted, without objection, two treaties purportedly establishing a Quapaw Reservation, namely, the 1833 Treaty with the Quapaw, 7 Stat. 424 (May 13, 1833) and the 1867 Treaty with the Seneca, Mixed Seneca and Shawnee, Quapaw, etc., 15 Stat. 513 (Feb. 23, 1867). (Defense Exhibits 2 and 3).

¶5 The district court accepted the stipulation and concluded, without any opposition from the State, that the land set aside for the Quapaw Nation in the 1833 Treaty, as reaffirmed and modified by the 1867 Treaty, established a Quapaw Reservation. This finding is consistent with *McGirt*, and we adopt the district court's conclusion that Congress established a Quapaw Nation Reservation in the 1800s.

¶6 "To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt*, 140 S.Ct. at 2462. While no particular words or verbiage are required to disestablish a reservation, evidence of a clear expression of congressional intent to terminate the reservation is required. *Sizemore*, 2021 OK CR 6, ¶ 13, 485 P.3d at 870.

¶7 The record before the district court in this case, similar to that in *McGirt*, showed Congress, through a treaty, removed the Quapaws from one area of the United States to another where they were promised certain lands. A subsequent treaty redefined the geographical boundaries of those lands, but nothing in any of the documents showed a congressional intent to erase the boundaries of the Reservation and terminate its existence. Congress, and Congress alone, has the power to abrogate those treaties, and "this Court [will not] lightly infer such a breach once Congress has established a reservation." *McGirt*, 140 S.Ct. at 2462 (citing *Solem v. Bartlett*, 465 U.S. 463, 470, (1984)).

¶8 The District Attorney informed the district court that he and the Attorney General's Office conducted "extensive research" and found no evidence that Congress disestablished the Quapaw Nation Reservation. Noting that the State of Oklahoma presented no evidence to show Congress erased or disestablished the boundaries of the Quapaw Reservation, and citing *McGirt*, the district court concluded that the Quapaw Nation Reservation remains in existence and is Indian Country and that the State had no jurisdiction in this matter. This finding is supported by the record and we adopt it.

¶9 For these reasons, we hold, for purposes of federal criminal law, the land upon which the parties agree Lawhorn allegedly committed this crime is within the Quapaw Nation Reservation and is Indian Country. The ruling in *McGirt* governs this case and requires us to find the State of Oklahoma is without jurisdiction to prosecute Lawhorn.

DECISION

¶10 The ruling of the district court dismissing the case against Lawhorn based upon lack of jurisdiction 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 delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF OTTAWA COUNTY
THE HONORABLE BECKY BAIRD, ASSOCIATE DISTRICT JUDGE**

APPEARANCES IN DISTRICT COURT

KENNY WRIGHT
DISTRICT ATTORNEY OF
OTTAWA COUNTY
102 E. CENTRAL AVE.
SUITE 201
MIAMI, OK 74354
ATTORNEY FOR STATE

APPEARANCES ON APPEAL

KENNY WRIGHT
DISTRICT ATTORNEY OF
OTTAWA COUNTY
102 E. CENTRAL AVE.
SUITE 201
MIAMI, OK 74354
ATTORNEY FOR APPELLANT

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

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

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

John Collier, Commissioner of Indian Affairs, *Memorandum of Explanation* (regarding S. 2755), p. 145, hearing before the United States Senate Committee on Indian Affairs, February 27, 1934. Senator Morris Sheppard, D-Texas, also on the Senate Committee on Indian Affairs, stated in response to the Commissioner's speech that in Oklahoma, he did not think "we could look forward to building up huge reservations such as we have granted to the Indians in the past." *Id.* at 157. In 1940, in the Foreword to Felix S. Cohen, *Handbook of Federal Indian Law* (1942), Secretary of the Interior Harold Ickes wrote in support of the IRA, "[t]he continued application of the allotment laws, **under which Indian wards have lost more than two-thirds of their reservation lands**, while the costs of Federal administration of these lands have steadily mounted, must be terminated." (emphasis added).

Citationizer® Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Court of Criminal Appeals Cases	
Cite	Name Level
<u>2021 OK CR 38,</u>	<u>MCCLAIN v. STATE</u> Cited

Citationizer: Table of Authority

Cite Name	Level
Oklahoma Court of Criminal Appeals Cases	
Cite	Name Level
<u>1989 OK CR 75, 782 P.2d 401,</u>	<u>STATE v. KLINDT</u> Discussed
<u>2021 OK CR 4,</u>	<u>HOGNER v. STATE</u> Discussed
<u>2021 OK CR 6, 485 P.3d 867,</u>	<u>SIZEMORE v. STATE</u> Discussed at Length
<u>2021 OK CR 27,</u>	<u>ROTH v. STATE</u> Discussed at Length
<u>1998 OK CR 74, 973 P.2d 330, 70 OBJ</u>	<u>Hanes v. State</u> Discussed
<u>535,</u>	
Title 21. Crimes and Punishments	
Cite	Name Level
<u>21 O.S. 1123,</u>	<u>Lewd or Indecent Proposals or Acts to Child Under 16</u> Cited
Title 22. Criminal Procedure	
Cite	Name Level
<u>22 O.S. 1053,</u>	<u>State or Municipality May Appeal in What Cases</u> Cited

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AMICUS CURIAE
FOR QUAPAW NATION

OPINION BY: ROWLAND, P.J.

HUDSON, V.P.J.: Specially Concur
LUMPKIN, J.: Concur in Results
LEWIS, J.: Concur

HUDSON, VICE PRESIDING JUDGE: SPECIALLY CONCURS

¶1 Today's decision dismisses a felony charge of Lewd or Indecent Acts With a Child Under 16 from the District Court of Ottawa County based on the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The Ottawa County District Attorney commendably acknowledges that, after conducting his own extensive research, he has found no evidence showing the Quapaw Reservation was ever disestablished by Congress. Based upon the District Court's findings that Appellee is an Indian for purposes of federal criminal law, and that the crime in this case occurred within the historic boundaries of the Quapaw Reservation, we have no choice but to dismiss this case for lack of jurisdiction. Under *McGirt*, the State has no jurisdiction to prosecute Appellee for the crime in this case. Instead, Appellee must be prosecuted in federal court where the exclusive jurisdiction for this crime lies. See *Roth v. State*, 2021 OK CR 27, ___ P.3d ___. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶2 I write separately to re-urge my previous views on the need for a practical solution by Congress concerning criminal jurisdiction in eastern Oklahoma. With each passing day, more state criminal cases are dismissed pursuant to *McGirt* while more counties in Oklahoma are transformed into jurisdictional mine fields for the bench, bar and public. Ottawa County, nestled in Oklahoma's far northeastern corner, presents an extreme example. The county is famously known for being the boyhood home of baseball great Mickey Mantle (from Commerce).¹ Many Oklahomans, however, are less familiar with the vast tribal presence in this part of the state. They will soon be hearing much more about it.

¶3 The federal government utilized much of present-day Ottawa County to resettle smaller tribes from around the country starting in the 1830s.² See *Hanes v. State*, 1998 OK CR 74, ¶¶ 15-16, 973 P.2d 330, 335. Today, Ottawa County is home to ten separate tribes--the Cherokee, Quapaw, Peoria, Ottawa, Miami, Modoc, Seneca-Cayuga, Wyandotte, Shawnee and Eastern Shawnee. According to the U.S. Department of Justice,³ these Tribes' historic reservation lands cover the entire land mass of Ottawa County, an area consisting of roughly 485 square miles⁴ and 30,000 residents.⁵ One could easily mistake the map showing these historic tribal territories for a jigsaw puzzle with nine⁶ pieces of varying shapes and sizes dividing up the puzzle board.

¶4 Since *McGirt*, we have recognized the existence of Indian country criminal jurisdiction within the historical reservation boundaries of the Cherokee Nation which covers a substantial portion of Ottawa County. See *Hogner v. State*, 2021 OK CR 4, ¶ 9, ___P.3d___. Today's decision recognizes the ongoing vitality of a *second* reservation in Ottawa County--this one associated with the Quapaw Tribe--because there is no evidence showing it was ever disestablished by Congress. Other jurisdictional challenges to State authority to prosecute crimes in Ottawa County involving Indian defendants or victims are sure to follow concerning the other tribes. Some have already made their way to this Court and are in the process of being briefed. See e.g., *State v. Dixon*, No. S-2021-205 (Ottawa); *State v. Lee*, No. S-2021-206 (Peoria and Miami).

¶5 Meanwhile, Congress neglects the practical effects of the *McGirt* decision on the local community and the cycle repeats: more reservations are recognized, more state criminal cases get dismissed and the public holds its breath wondering what will happen next. The failure of Congress to provide a practical solution to criminal jurisdiction in eastern Oklahoma in the post-*McGirt* universe has a real impact on real people--Indians and non-Indians alike--living on a reservation. Recently, we reversed a conviction for first degree manslaughter from Wagoner County involving an Indian child victim killed on the Creel Reservation by a non-Indian defendant. See *Roth*, 2021 OK CR 27, ¶¶ 2-3. That case is particularly tragic because there is a serious question whether it will be prosecuted in federal court due to issues surrounding the statute of limitations. *Id.*, 2021 OK CR 27, ¶ 17. Local authorities too must run the gauntlet of performing routine law enforcement matters that may now involve one or more sovereigns depending upon the location of a crime and the status of the parties involved. And this is just the tip of the iceberg. See *Hogner v. State*, 2021 OK CR 4, ___P.3d___ (Hudson, J., Specially Concurring) (discussing the practical problems associated with *McGirt*).

¶6 Congress has the ultimate authority to provide practical solutions in the post-*McGirt* world. It takes little imagination to understand how the most basic elements of law enforcement, from toll collection to traffic enforcement, are implicated by *McGirt*. The wholesale redistribution from state to federal court of a large number of criminal cases involving Indian defendants or victims highlights the extraordinary strain placed on the criminal justice system and presents its own set of problems. The post-*McGirt* fallout becomes more apparent with each passing day and deserves the attention of our elected representatives in Congress.

¶7 Recently, the Judicial Conference of the United States recommended that Congress add three new federal judgeships for the U.S. District Court sitting in Muskogee along with two new federal judgeships for the U.S. District Court sitting in Tulsa to handle the skyrocketing caseloads in both federal districts stemming from the filing of Indian country cases. The Conference reported a 400 percent increase in the number of criminal cases filed in the Eastern District of Oklahoma from 2020 to 2021 and a nearly 200 percent increase in the number of criminal cases filed in the Northern District of Oklahoma during the same time period.⁷ According to local media reports, federal prosecutors from across America have volunteered to assist locally with these burgeoning caseloads after *McGirt*.⁸

¶8 None of this is a surprise. Sadly, I am pessimistic the matter will be addressed by our elected representatives in Washington for the benefit of all. At this point, the clock is ticking. As *Roth* shows, both Indians and non-Indians alike have a vested interest in how the criminal justice system is administered in the post-*McGirt* world. The consequences of failure, however, are shockingly real and these issues should be tackled sooner rather than later.

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

¶1 Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, ___ U.S. ___, 140 S. Ct. 2452 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt*, I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas, I was forced to conclude the Majority had totally failed to

follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

¶2 My quandary is one of ethics and morality. One of the first things I was taught when I began my service in the Marine Corps was that I had a duty to follow lawful orders, and that same duty required me to resist unlawful orders. Chief Justice Roberts's scholarly and judicially penned dissent, actually following the Court's precedents and required analysis, vividly reveals the failure of the majority opinion to follow the rule of law and apply over a century of precedent and history, and to accept the fact that no Indian reservations remain in the State of Oklahoma.¹ The result seems to be some form of "social justice" created out of whole cloth rather than a continuation of the solid precedents the Court has established over the last 100 years or more.

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

¶4 My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.

¶5 This particular case is further evidence of the error in analysis in the *McGirt* decision's failure to apply the Supreme Court's past precedents and analysis. Using the prior method of analysis of precedent set out by the dissent it would be readily recognized the Quapaw reservation was disestablished at Oklahoma statehood. Had Congress intended a different result, it surely would have expressly stated such intentions in the Enabling Act. Upon passage of the Enabling Act, Congress joined the former Indian Territory and Oklahoma Territory into one new state of Oklahoma and its sovereignty was established. The *McGirt* decision seeks to overrule an Act of Congress by eroding the State's sovereignty piecemeal, recognizing reservations long extinguished under the criteria set forth in *Solem v. Bartlett*. Tragically, this erosion of state sovereignty is being accomplished through this 5-4 decision in *McGirt*.

FOOTNOTES

HUDSON, VICE PRESIDING JUDGE: SPECIALLY CONCURS

¹ See <http://mickeymantle.com/bio/>

² See also <https://www.okhistory.org/publications/enc/entry.php?entry=OT003>

³ See <https://www.justice.gov/usao-wdok/page/file/1303046/download>

⁴ See <https://www.okhistory.org/publications/enc/entry.php?entry=OT003>

⁵ See <https://www.census.gov/quickfacts/fact/table/ottawacountyoklahoma/POP060210>

⁶ The territory for the Shawnee and Eastern Shawnee tribes are shown as a single unit on the map used by the Department of Justice.

⁷ <https://www.uscourts.gov/news/2021/09/28/judiciary-supplements-judgeship-request-prioritizes-courthouse-projects> (posted September 28, 2021)

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 4, 2022

Mr. Patrick Joseph Terry
1011 S. Muskogee Avenue
Tahlequah, OK 74464

Re: Patrick Joseph Terry
v. Oklahoma
Application No. 21A290

Dear Mr. Terry:

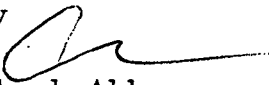
The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Gorsuch, who on January 4, 2022, extended the time to and including March 5, 2021.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by


Claude Alde
Case Analyst

Petitioner's
Appendix

