

April 22, 2022

IN THE
Supreme Court of the United States

ROBERT ELTON,
Petitioner,
v.
THE STATE OF OKLAHOMA,
Respondent.

APPENDICES
A-E

PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

ORIGINAL



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

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

ROBERT ELTON,

FEB - 9 2022

Petitioner,

JOHN D. HADDEN
CLERK

-vs-

No. PC-2021-1315

STATE OF OKLAHOMA,

Respondent.

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner, through counsel, appealed to this Court from an order of the District Court of Tulsa County in Case No. CF-2002-5476 denying his request for post-conviction relief based upon issues addressed in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, *cert. denied*, 595 U.S. __, No. 21-467 (Jan. 10, 2022), this Court determined that the United States Supreme Court decision in *McGirt*, because it is a new procedural rule, is not retroactive and does not void final state convictions. See *Matloff*, 2021 OK CR 21, ¶¶ 27-28, 40, 497 P.3d at 691-92, 694.

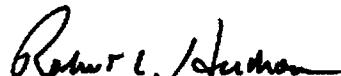
The conviction in this matter was final before the July 9, 2020, decision in *McGirt*, and the United States Supreme Court's holding in

McGirt does not apply. Therefore, the trial court's denial of post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

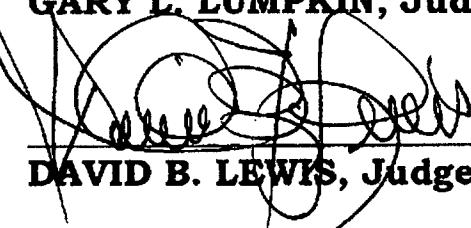
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this
9th day of February, 2022.

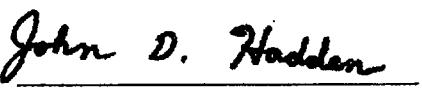

SCOTT ROWLAND, Presiding Judge


ROBERT L. HUDSON, Vice Presiding Judge


GARY L. LUMPKIN, Judge


DAVID B. LEWIS, Judge

ATTEST:


John D. Hadden
Clerk
PA

APPENDIX B

STATE EX REL. MATLOFF V. WALLACE

2021 OK CR 21 | 497 P.3d 686

Case: PR-2021-366

Decided: 8/12/2021

OPINION

LEWIS, JUDGE:

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

FACTS

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

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

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

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

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

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

ANALYSIS

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

¶8 New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law. *See Carter v. State*, 2006 OK CR 42, ¶ 4, 147 P.3d 243, 244 (citing *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)) (applying new instructional rule of *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 to case tried before the rule was announced, but pending on

direct review). But new rules generally do *not* apply retroactively to convictions that are final, with a few narrow exceptions. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1114-15; *Thomas v. State*, 1994 OK CR 85, ¶ 13, 888 P.2d 522, 527 (decision requiring that prosecution file bill of particulars no later than arraignment did not apply to convictions already final).

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

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

¶11 Like the Supreme Court, we have long adhered to the principle that the narrow purposes of collateral review, and the reliance, finality, and public safety interests in factually accurate convictions and just punishments, weigh strongly against the application of new procedural rules to convictions already final when the rule is announced. Applying new procedural rules to final convictions, after a trial or guilty plea and appellate review according to then-existing procedures, invites burdensome litigation and potential reversals unrelated to accurate verdicts, undermining the deterrent effect of the criminal law. *Ferrell*, 1995 OK CR 54, ¶¶ 6-7, 902 P.2d at 1114-15.

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

¶13 Before and after *McGirt*, this Court has treated Indian Country claims as presenting non-waivable challenges to criminal subject matter jurisdiction. *Bosse v. State*, 2021 OK CR 3, ¶¶ 20-21, 484 P.3d 286, 293-94; *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (both characterizing claim as subject matter jurisdictional

challenge that may be raised at any time). After *McGirt* was decided, relying on this theory of non-waivability, this Court initially granted post-conviction relief and vacated several capital murder convictions, and at least one non-capital conviction (Jimcy McGirt's), that were final when *McGirt* was announced.³

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

¶15 After careful examination of the reasoning in *Cuch*, as well as the arguments of counsel and *amici curiae*, we reaffirm our recognition of the Cherokee, Choctaw, and Chickasaw Reservations⁴ in those earlier cases. However, exercising our independent state law authority to interpret the remedial scope of the state post-conviction statutes, we now hold that *McGirt* and our post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided. Any statements, holdings, or suggestions to the contrary in our previous cases are hereby overruled.

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

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

¶18 The Court of Appeals noted that the Supreme Court had applied non-retroactivity principles to new rules that alter subject matter jurisdiction. *Id.* at 990 (citing *Gosa v. Mayden*, 413 U.S. 665 (1973)) (refusing to apply new jurisdictional limitation on military courts-martial retroactively to void final convictions). The policy of non-

retroactivity was grounded in principles of finality of judgments and fundamental fairness: *Hagen* had been decided after the petitioners' convictions were final; it was not dictated by precedent; and the accuracy of the underlying convictions weighed against the disruption and costs of retroactivity. *Id.* at 991-92.

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

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

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

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

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

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

that immediate release of these prisoners would have on victims, many of whom were child victims of sexual abuse. *Id.*

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

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

¶25 Finding neither of the exceptional circumstances that might warrant retroactive application of *Hagen's* jurisdictional ruling to final convictions, the Court of Appeals found "the circumstances surrounding these cases make prospective application of *Hagen* unquestionably appropriate in the present context." *Id.* Prior federal jurisdiction was well-established before *Hagen*; the convictions were factually accurate; the procedural safeguards and truth-finding functions of the courts were not impaired; and retroactive application would compromise both reliance and public safety interests that legitimately attached to prior proceedings.

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

¶27 *McGirt* did not "alter[] the range of conduct or the class of persons that the law punishes" for committing crimes. *Schrivo v. Summerlin*, 542 U.S. 348, 353 (2004). *McGirt* did not determine whether specific conduct is criminal, or whether a punishment for a class of persons is forbidden by their status. *McGirt's* recognition of an existing Muscogee (Creek) Reservation effectively decided *which sovereign* must prosecute major crimes committed by or against Indians within its boundaries, crimes which previously had been prosecuted in Oklahoma courts for more than a century. But this significant change to the extent of state and federal criminal

jurisdiction affected "only the *manner of determining* the defendant's culpability." *Schrivo*, 542 U.S. at 353 (emphasis in original). For purposes of our state law retroactivity analysis, *McGirt*'s holding therefore imposed only *procedural* changes, and is clearly a procedural ruling.

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

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

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

¶31 In 2005, this Court had declined to recognize the claimed Muscogee (Creek) Reservation, and thus denied the essential premise of the claim on its merits, in *Murphy v. State*, 2005 OK CR 25, ¶¶ 50-52, 124 P.3d at 1207-08. From then until the Tenth Circuit Court of Appeals' 2017 decision in *Murphy v. Royal*, 866 F.2d 1164 (10th Cir. 2017), no court that had addressed the issue, including the federal district court that initially denied Murphy's habeas claim, had embraced the possibility that the old boundaries of the Muscogee (Creek) Nation remained a reservation.⁷

¶32 With no disrespect to the views that later commanded a Supreme Court majority in *McGirt*, the dissenting opinion of Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Thomas, whom we take to be "reasonable jurists" in the required sense, certainly did *not* view the holding in *McGirt* as dictated by precedent even in 2020, much less in 2014.⁸ Chief Justice Roberts's dissent raised a host of reasonable doubts about the majority's adherence to precedent,⁹ arguing at length that it had divined the existence of a reservation only by departing from the governing standards for proof of Congress's intent to disestablish one, *McGirt*, 140 S.Ct. at 2489; and in many other ways besides,¹⁰ "disregarding the 'well settled' approach required by our precedents."

Id. at 2482 (Roberts, C.J., dissenting). The *McGirt* majority, of course, remains just that, but the Chief Justice's reasoned, precedent-based objections are additional proof that *McGirt's* holding was not "apparent to all reasonable jurists" when Mr. Parish's conviction became final in 2014.

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

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

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

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

¶37 The State's reliance and public safety interests in the results of a guilty plea or trial on the merits, and appellate review according to then-existing rules, are always substantial. Though Oklahoma's jurisdiction over major crimes in the newly recognized reservations was limited in *McGirt* and our post-*McGirt* reservation

rulings, the State's jurisdiction was hardly open to doubt for over a century and often went wholly unchallenged, as it did at Mr. Parish's trial in 2012.

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

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

¶40 Because we hold that *McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction, the order vacating Mr. Parish's murder conviction was unauthorized by state law. The State ordinarily may file a regular appeal from an adverse post-conviction order, but here, it promptly petitioned this Court for extraordinary relief and obtained a stay of proceedings. The time for filing a regular post-conviction appeal (twenty days from the challenged order) has since expired. Rule 5.2(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

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

OPINION BY: LEWIS, J.

ROWLAND, P.J.: CONCURS

HUDSON, V.P.J.: SPECIALLY CONCURS

LUMPKIN, J.: SPECIALLY CONCURS

FOOTNOTES

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

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

³ *Bosse, supra*; *Cole v. State*, 2021 OK CR 10, ___ P.3d ___; *Ryder v. State*, 2021 OK CR 11, 489 P.3d 528, *Bench v. State*, 2021 OK CR 12, ___ P.3d ___. We later stayed the mandate in these capital post-conviction cases pending the State's petition for certiorari to the Supreme Court. We have also granted *McGirt*-based relief and vacated many convictions in appeals pending on direct review. *E.g., Hogner v. State*, 2021 OK CR 4, ___ P.3d ___; *Spears v. State*, 2021 OK CR 7, 485 P.3d 873; *Sizemore v. State, supra*.

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

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

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

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

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

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

⁸ The mere existence of a dissent does not establish that a rule is new, but a 5-4 split among Justices on whether precedent dictated a holding is strong evidence of a novel departure from precedent. *Beard*, 542 U.S. at 414-15 (finding that the four dissents in *Mills v. Maryland* strongly indicated that the rule announced was not dictated by *Lockett v. Ohio*).

⁹ Principally *Solem v. Bartlett*, 465 U.S. 463 (1984), *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), and *Nebraska v. Parker*, 577 U.S. 481 (2016).

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

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCUR:

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

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

LUMPKIN, JUDGE, SPECIALLY CONCURRING:

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

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

¶3 Keeping the policy decisions reflected in those opinions in mind, I do diverge from the court in labeling the *McGirt* ruling as procedural. When the federal government pre-empts a field of law, the legal effect is to deprive states of their jurisdiction in that area of the law. If a court lacks jurisdiction to act then any rulings and judgments would appear to be void when rendered.¹ As the opinion notes, this Court since statehood has recognized and honored federal jurisdiction as to Indian allotments and dependent Indian communities. Those areas are subject to federal jurisdiction and that jurisdiction is recognized by the federal government, the tribes and the State of Oklahoma. There was no question Oklahoma had jurisdiction over the rest of the state and this Court, as the court with exclusive jurisdiction in criminal cases, faithfully honored those jurisdictional claims.

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

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

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

FOOTNOTES

¹ I realize courts in the past have engaged in legal gymnastics to keep from voiding judgments rendered by a court without jurisdiction by finding that a court's judgment must be void on its face before it can be held void. *Springer v. Townsend*, 336 F.2d 397, 401 (10th Cir. 1964) (in deciding whether a probate decree was void, the Court stated "our scope of review is limited to determining whether a lack of jurisdiction in the approval proceeding affirmatively appears from the record."; "[a] judgment will not be held to be void on its face unless an

inspection will affirmatively disclose that the court had no jurisdiction of the person, no jurisdiction of the subject matter, or had no judicial power to render the particular judgment." *Clay v. Sun River Mining Co.*, 302 F.2d 599, 601 (10th Cir. 1962); "[a]s long as the supporting record does not reflect the district court's lack of authority, the district court order cannot be declared "void." Such an order is instead only "voidable." *Bumpus v. State*, 1996 OK CR 52, ¶ 7, 925 P.2d 1208, 1210; "[t]his Court has held in numerous cases that in order for a judgment to be void as provided in the Statute just quoted, it must be void on the face of the record, and that extrinsic evidence is not admissible to show judgment is void on the face of the record." *Scoufos v. Fuller*, 1954 OK 363, 280 P.2d 720, 723. However, logic and common sense dictate that if a court had no authority to act then any actions would be a nullity. Regardless, I apply the precedent cited in the opinion and specially concur.

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

APPENDIX C



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

ROBERT THOMAS ELTON,

Certified copy to Defendant

Petitioner,

vs.

STATE OF OKLAHOMA,

Case No. CF-2002-5476

Respondent.

Judge Priddy

DISTRICT COURT
FILED

OCT 11 2021

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

**ORDER DENYING PETITIONER'S APPLICATION
FOR POST-CONVICTION RELIEF**

This matter came on for consideration on October 4, 2021 pursuant to the Petitioners Application for Post-Conviction Relief ("Application") filed by Petitioner Robert Thomas Elton (hereinafter "Petitioner") on July 29, 2020. The State filed its Response on November 4, 2020. Petitioner filed his Motion for Stay and Abatement ("Motion") on August 13, 2012.

STATEMENT OF THE CASE

Robert Thomas Elton, Petitioner, was tried by jury in the District Court of Tulsa County, Case No. CF-2002-5476, where he was convicted of Count 1 -Robbery with a Dangerous Weapon and Count 2 - Assault and Battery with a Dangerous Weapon. The jury recommended fifty (50) years imprisonment on Count 1 and ten (10) years imprisonment on Count 2. The Honorable Rebecca Brett Nightingale, who presided at trial, sentenced Petitioner accordingly and ordered the sentences to be served consecutively. From this judgment and sentence, Petitioner perfected an appeal to the Oklahoma Court of Criminal Appeals ("OCCA") where he raised the following propositions of error:

- I. The jury should not have been instructed on the lesser offense of assault and battery with a dangerous weapon over Appellant Elton's objection;
- II. Appellant Elton's multiple convictions violate Okla. Stat.Tit. 21 O.S. 11;

- III. The trial court's erroneous belief that it could not instruct on parole ineligibility, and its refusal to do so in light of that erroneous belief, requires reversal;
- IV. Under the facts and circumstances of this particular case, the imposition of sixty years imprisonment does not serve the ends of justice;
- V. Prosecutorial misconduct warrants reversal or sentence reduction;
- VI. The court erred in failing to instruct on impeachment by prior inconsistent statements; and
- VII. Prosecutorial misconduct- Failure to disclose evidence constitutes reversible error.

Petitioner filed his first Application for Post-Conviction-Relief in 2006 where he alleged as grounds for relief the following:

- 1. Statements obtained in violation of Miranda 5th Amendment right to protection from self incrimination fruits derived from illegally obtained statements used to infringe upon Petitioner's Due Process/Counsel ineffective.
- 2. Incompetence to stand trial in violation of Petitioner's right to Due Process as guaranteed by the U.S. Constitution Amendments 5, 14, Petitioner was tried without sufficient ability to consult with a lawyer with reasonable degree or assist in his defense.
- 3. Petitioner convicted by jury not accurately representative of fair cross section of racially diverse community requirement.
- 4. Vagueness of statute/indictment/verdict forms give uncontrolled discretion for arbitrary enforcement of the law leading to errors of constitutional dimension not harmless beyond a reasonable doubt; court interference with sentencing jury.
- 5. Self representation denied post-denial of requested appointment of counsel: Post-trial motion for new trial denied solely based on pro se submission ... discriminatory.
- 6. Appellate counsel ineffectiveness improperly raised claims improperly litigated issues on appeal in violation of 6th Amendment right to effective assistance of counsel.
- 7. Disproportionate sentence: unconstitutional statute Title 21 O.S. § 801, violates Petitioner's right to be free from cruel and unusual punishment as guaranteed by U.S. Constitution Amendments 5,8, &14. Petitioner was arbitrarily sentenced to 60 years @ 85% mandatory service without prior felony convictions/offenses.
- 8. Error of Constitutional dimension when pre-sentence-investigation based on erroneous information; pre sentence investigation report for first felony creates

liberty interest, as possible sentence reduction is dependant upon defendant's conduct prior to conviction and the result of recommendation derived from erroneously based report, violating Petitioner's right to Due Process as protected by Amendments 5 & 14 of the U.S. Constitution, and 6th Amendment right to adequate counsel at sentencing proceedings.

9. 6th Amendment right to effective assistance of counsel denied pre-trial, trial and further at sentencing and on appeal.

Petitioner's application was denied by Order on February 3, 2006. Petitioner appealed the district court's order to the OCCA, which affirmed the district court's order denying post-conviction relief on June 14, 2006.

The Petitioner has now filed his second application for post-conviction relief wherein he argues that based on *McGirt v. Oklahoma*, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020) the district court lacked jurisdiction to impose judgment and sentence as he was an enrolled member of the Chippewa Cree Tribe of the Rocky Boy's Reservation at the time of his criminal acts and has a significant degree of Indian blood.

FINDINGS OF FACTS

1. A representative of the Chippewa Cree Tribe Citizenship Office would testify that Petitioner was a citizen of the Chippewa Cree Tribe on the date of the offense October 24, 2002. This representative would testify Petitioner became enrolled as a citizen of the Chippewa Cree Tribe on February 28, 1992.
2. A representative of the Chippewa Cree Tribe Citizenship Office would testify that Petitioner has a degree of Chippewa Cree blood.
3. The Chippewa Cree Tribe is a federally recognized tribe.
4. A representative of the Tulsa Police Department would testify that Petitioner committed the offenses he was convicted of within Tulsa County.

5. A representative of the Muscogee Creek Nation or a representative of the Cherokee Nation, or an expert witness testifying on Petitioner's behalf, would testify that the location of the offense Petitioner was convicted of in the above case occurred within the Muscogee Creek Nation and/or the Cherokee Nation.

CONCLUSIONS OF LAW

I. MCGIRT SHOULD NOT BE APPLIED RETROACTIVELY TO VOID A CONVICTION THAT WAS FINAL WHEN THAT CONVICTION WAS DECIDED.

A. Application of Retroactivity Principles to Indian Country Claims

United States v. Cuch, 79 F.3d 987 (10th Cir. 1996) is the most relevant decision to the specific issue, presented by this case, of the proper forum for prosecution after the issuance of a new decision, regarding disestablishment or diminishment of an Indian reservation. In *Cuch*, the Tenth Circuit considered the question of whether it should retroactively apply the Supreme Court's decision in *Hagen v. Utah*, 510 U.S. 399 (1994), that a reservation's boundaries had been diminished, to vacate convictions that were made final prior to that decision. *See Cuch*, 79 F.3d at 989-90. The Tenth Circuit started by noting "[t]he Supreme Court can and does limit the retroactive application of subject matter jurisdiction rulings," citing the Court's decision in *Gosa v. Mayden*, 413 U.S. 665 (1973). *Cuch* 79 F.3d. at 990. The *Cuch* court recounted the principles that underlie retroactivity analysis: "finality and fundamental fairness." *Cuch*, 79 F.3d at 991. "A subset of the principle of finality is the prospect that the invalidation of a final conviction could well mean that the guilty will go unpunished due to the impracticability of charging and retrying the defendant after a long interval of time." *Id.*

The *Cuch* court also considered that the issue of fairness to petitioners did not support retroactivity: "There is no question of guilt or innocence here" and these cases "involved conduct made criminal by both state and federal law." *Id.* at 992. The petitioners do not "assert any unfairness in the procedures by which they were charged, convicted, and sentenced" and the Supreme Court's recent reservation boundaries decision does not "bring[] into question the truth finding functions of the ... courts that prosecuted Indians for acts committed within the historic boundaries of the ... Reservation." *Id.* Similarly, *Cuch* distinguished cases where courts retroactively applied decisions holding the crime at issue could not be constitutionally punished by any court or where the acts committed were not actually criminalized by the statute of conviction. *Id.* at 993-94. There is not "complete miscarriage of justice to these movants that would mandate or counsel retroactive application of *Hagen* to invalidate these convictions." *Id.* at 994 (internal marks omitted). Rather, the question solely "focuses on *where* these Indian defendants should have been tried for committing major crimes." *Id.* at 992. As a result, the court found "the circumstances surrounding these cases make prospective application of *Hagen* unquestionably appropriate in the present context." *Id.* at 994.

Cuch also rejected the argument that a decision on reservation boundaries "did not effect a 'change' in federal law, but merely clarified what had been the law all along." *Id.* The *Cuch* court dismissed "the Blackstonian common law view that courts do no more than discover the law," noting that in *Linkletter v. Walker*, 381 U.S. 618 (1965), the Supreme Court recognized under American law "such a rule was out of tune with actuality." *Id.* at 994-95. In other words, "the Supreme Court admitted that '[t]he past cannot always be erased by a new judicial declaration.'"

Id at 995 (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940)).

“While the jurisdictional nature of a holding makes the retroactivity question more critical, the nature of the case alone does not dispense with the duty to decide whether the Court may in the interest of justice make the rule prospective where the exigencies of the situation require such application.” *Cuch*, 79 F.3d at 995. (citations and internal marks omitted). Instead, “the rule of law is strengthened when courts, in their search for fairness, giving proper consideration to the facts and applicable precedent, allow the law to be an instrument in obtaining a result that promotes order, justice and equity.” *Id*. (citation and internal marks omitted).

B. *McGirt* Shall Not Apply Retroactively to Void a Final State Conviction

In *State ex rel, District Attorney v. Wallace*, 2021 OK CR 21, ___ P.3d ___, 2021 WL 3578089, the Oklahoma Court of Criminal Appeals (“OCCA”) recently stated that it found persuasive the analysis and authorities provided by the United States Court of Appeals for the Tenth Circuit in *Cuch*, in considering the “independent state law question of collateral non-retroactivity for *McGirt*.¹ *Id.* at ¶ 26. The OCCA also explained that new rules of criminal procedure “generally do not apply retroactively to convictions that are final, with a few narrow exceptions.” *Id.* at ¶ 8 (emphasis in original).

Related to its analysis of the *McGirt* decision under these principles, the *Wallace* court first determined that the holding in *McGirt* only imposed procedural changes and was “clearly a procedural ruling.” *Id* at ¶ 27. Second, the *Wallace* court held that the “procedural rule announced in *McGirt* was new.” *Id.* at ¶ 28. Third, the court explained in detail in *Wallace* that the OCCA’s “independent exercise of authority to impose remedial constraints under state law on the collateral impact of *McGirt* and post-*McGirt* litigation is consistent with both the text of the opinion and the

¹ *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020).

Supreme Court's apparent intent." *Id.* at ¶ 33. Ultimately, the OCCA held that "McGirt and our post-McGirt reservation rulings shall not apply retroactively to void a final state conviction. . ."² *Id.* at ¶¶ 6, 40.

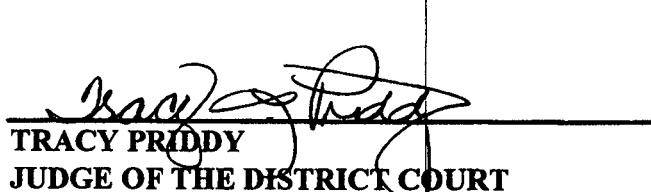
As discussed above, the Tulsa County District Court found Petitioner guilty on December 8, 2003 and sentenced him accordingly. Petitioner appealed this judgment and sentence to the OCCA. The OCCA affirmed the District Court's judgment and sentence on March 2, 2005. Since Respondent did not file a petition for a writ of certiorari with the United States Supreme Court within the ninety-day time limit following this decision, his conviction became final May 31, 2005.

See U.S. Sup. Ct. Rule 13, 28 U.S.C.A.

Since Petitioner's conviction was final long prior to the July 9, 2020 decision in *McGirt*, this Court holds that the *McGirt* decision does not apply retroactively in Petitioner's state post-conviction proceeding to void his final conviction. *See Wallace*, 2021 OK CR 21, at ¶¶ 6, 40. Accordingly, the Court hereby denies Petitioner's Application on this basis.

Based on the foregoing, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Petitioner's application for post-conviction relief and motion for stay and abatement is hereby **DENIED**,

SO ORDERED this 4th day of October, 2021.



TRACY PRIDDY
JUDGE OF THE DISTRICT COURT

² *Teague v. Lane*, 489 U.S. 288, 295 (1989) defines "a final conviction as one where judgment was rendered, the availability of appeal exhausted, and the time to petition for certiorari had elapsed." *Wallace*, 2021 OK 21, at ¶ 2, n.1.

CERTIFICATE OF MAILING/DELIVERY

I certify that on the date of filing, a file stamped certified copy of the above and foregoing Order was mailed to:

JAMES O GOODWIN
P.O. BOX 3267
TULSA, OK 74101-3267
Attorney for Petitioner

And I further certify that on the date of filing, a file stamped certified copy of the above and foregoing Order was hand delivered to:

Marianna E. McKnight, Esq.
Assistant District Attorney
Tulsa County District Attorney's Office
800 County Courthouse
500 S. Denver Ave.
Tulsa, OK 74103

DON NEWBERRY
TULSA COUNTY COURT CLERK

BY: 
DEPUTY COURT CLERK

APPENDIX D

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2014 Oklahoma Statutes

Title 22. Criminal Procedure

§22-1080. Post-Conviction Procedure Act - Right to challenge conviction or sentence.

Universal Citation: 22 OK Stat § 22-1080 (2014)

Any person who has been convicted of, or sentenced for, a crime and who claims:

- (a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;
- (b) that the court was without jurisdiction to impose sentence;
- (c) that the sentence exceeds the maximum authorized by law;
- (d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
- (f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

Added by Laws 1970, c. 220, § 1, eff. July 1, 1970.

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APPENDIX E



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ELTON v. DINWIDDIE

Case No. 06-CV-389-TCK-FHM.

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ROBERT ELTON, Petitioner, v. WALTER DINWIDDIE, Warden, Respondent.

United States District Court, N.D. Oklahoma.

November 19, 2009.

OPINION AND ORDER

TERENCE KERN, District Judge.

This is a 28 U.S.C. § 2254 habeas corpus proceeding. Petitioner is a state prisoner appearing *pro se*. Respondent filed a response to the petition (Dkt. # 9), and provided the state court record necessary for resolution of Petitioner's claims (Dkt. ## 9, 10, 11). Petitioner did not file a reply. For the reasons discussed below, the Court finds the petition shall be denied.

BACKGROUND

During the early morning hours of October 24, 2002, Petitioner Robert Thomas Elton ("Petitioner"), his brother Robert Lance James Elton ("Lance"), and his friends Runningbear Gibson ("Gibson") and Chris Robedeaux, went to the home of Joe Carralez ("Carralez") and Joshua Jones, to socialize. During the next few hours, the group of young men consumed beer and rum in large quantities. Some time around 2 a.m., Petitioner entered the house armed with a 20 gauge shotgun. He discharged the gun twice. The first shot hit Carralez in the right hand, blowing off his thumb. Carralez went to the bathroom because blood was spurting from his hand. Meanwhile, Lance carried stereo equipment, speakers, and a PlayStation belonging to Carralez out of the house and loaded the equipment into Petitioner's van. After Carralez returned from the bathroom, Petitioner used the gun to force him to the floor and then shot Carralez in the left leg. Petitioner, Lance, and Gibson left the scene in Petitioner's van. The stereo equipment, speakers, and PlayStation taken from Carralez's house were soon recovered from an apartment where Petitioner's mother stayed. The 20 gauge shotgun was found hidden in the ceiling of the apartment.

As a result of those events, Petitioner was arrested and charged with Robbery With a Firearm (Count 1) and Assault and Battery With a Deadly Weapon (Count 2) in Tulsa County District Court, Case No. CF-2002-5476. Lance and Gibson were also charged with Robbery With a Firearm (Count 1). Lance was additionally charged with Receiving/Concealing Stolen Property (Count 3).¹ On May 6, 2003, Petitioner's attorney filed an application for determination of competency. By letter dated June 17, 2003, Dr. William L. Cooper reported his conclusion that Petitioner was not competent to stand trial. Petitioner requested a jury trial on the issue of competency. On July 8, 2003, a jury heard the evidence and found Petitioner to be not incompetent. Thereafter, on October 13-16, 2003, Petitioner was tried by a jury. As to Count 1, the jury returned a verdict of guilty and recommended a sentence of fifty (50) years imprisonment. As to Count 2, the jury found Petitioner guilty of the lesser included offense of Assault and Battery With a Dangerous Weapon and recommended a sentence of ten (10) years imprisonment. On December 8, 2003, the trial court judge sentenced Petitioner in accordance with the jury's recommendation and ordered the sentences to be served consecutively. Petitioner was represented during his criminal proceedings by attorney Richard Couch.

Petitioner perfected a direct appeal in the Oklahoma Court of Criminal Appeals ("OCCA"). Represented by attorney Stephen Greubel, he raised the following propositions of error:

1. The jury should not have been instructed on the lesser offense of Assault and Battery With a Dangerous Weapon over Appellant Elton's objection.
2. Appellant Elton's multiple convictions violate Okla. Stat. tit. 21, § 11.
3. The trial court's erroneous belief that it could not instruct on parole ineligibility, and its refusal to do so in light of that erroneous belief, requires reversal.
4. Under the facts and circumstances of this particular case, the imposition of sixty years imprisonment does not serve the ends of justice.
5. Prosecutorial misconduct warrants reversal or sentence reduction.
6. The court erred in failing to instruct on impeachment by prior inconsistent statements.

See Dkt. # 9, Ex. 1. Petitioner also filed a *pro se* supplemental brief, raising one additional proposition of error as follows:

7. Prosecutorial misconduct — failure to disclose evidence constitutes reversible error.

See Dkt. # 9, Exs. 9 and 18. In an unpublished summary opinion filed March 2, 2005, in Case No. F-2003-1335 (Dkt. # 9, Ex. 3), the OCCA rejected all seven (7) claims and affirmed the Judgment and Sentence of the trial court.

On December 15, 2005, Petitioner filed an application for post-conviction relief in the state district court. See Dkt. # 9, Ex. 4. Appearing *pro se*, Petitioner raised nine (9) grounds of error:

Ground 1: Statements obtained in violation of *Miranda v. Arizona*/5th Amendment right to protection from self-incrimination/ruits derived from illegally obtained statements used to infringe upon Petitioner's due process/counsel ineffective.

Ground 2: Incompetence to stand trial in violation of Petitioner's right to due process as guaranteed by the U.S. Constitution Amendments 5, 14, Petitioner was tried without sufficient ability to consult with a lawyer with reasonable degree . . . or assist in his defense.

Ground 3: Petitioner convicted by jury not accurately representative of fair cross-section of racially diverse community requirement.

Ground 4: Vagueness of statute/indictment/verdict forms give uncontrolled discretion for arbitrary enforcement of the law leading to errors of constitutional dimension not harmless beyond a reasonable doubt; court interference with sentencing jury.

Ground 5: Self-representation right denied post-denial of requested reappointment of counsel; post-trial motion for new trial denied solely based on *pro se* submission . . . discriminatory.

Ground 6: Appellate counsel ineffectiveness. Improperly raised claims, improperly litigated issues on appeal in violation of 6th Amendment right to effective assistance of counsel.

Ground 7: Disproportionate sentence: unconstitutional statute Title 21 O.S. 801 violates Petitioner's right to be free from cruel and unusual punishment as guaranteed by U.S. Constitution Amendments 5, 8, 14. Petitioner was arbitrarily sentenced to 60 years @ 85% mandatory service without prior felony convictions/offenses.

Ground 8: Error of constitutional dimension when P.S.I. based on erroneous information; presentence investigation report for first felony creates liberty interest, as possible sentence reduction is dependent upon defendant's conduct prior to conviction and the result of recommendation derived from erroneously based report, violating Petitioner's right to due process as protected by Amendments 5 and 14 of the United States Constitution, and 6th Amendment right to adequate counsel at sentencing proceedings.

Ground 9: 6th Amendment right to effective assistance of counsel denied pretrial, trial, and further at sentencing and appeal.

See Dkt. # 9, Ex. 4. That application was denied on February 3, 2006 (Dkt. # 9, Ex. 6). Petitioner appealed. By order filed June 9, 2006, in Case No. PC-2006-218 (Dkt. # 9, Ex. 7), the OCCA affirmed the district court's denial of post-conviction relief.

On July 26, 2006, Petitioner filed his federal petition for writ of habeas corpus (Dkt. # 1). Petitioner raises three (3) grounds for relief, as follows:

Ground 1: Elton's convictions are violative of Oklahoma's prohibition against double jeopardy and double punishment, and the State of Oklahoma is barred by doctrines of res judicata and/or estopped from arguments inconsistent with preliminary hearing position, requesting charge of intent to kill.

Ground 2: Mr. Elton did not receive reasonably competent counsel — trial counsel's failure to communicate effectively with Petitioner Elton or communicate with the district court, request a neurological evaluation or inform the court of mitigating circumstances are evidence that Elton's counsel's independent decisions to withhold such communication is strictly ineffective and does not serve any strategic purpose, falling below an objective standard of reasonableness.

Ground 3: Disproportionate sentence — sentence violative of the Petitioner's Eighth Amendment right to be free from cruel and unusual punishment/statute contrary to *Apprendi v. New Jersey*.

See Dkt. # 1. In response to the petition, Respondent asserts that Petitioner's claims are not cognizable in these proceedings, or do not justify relief under 28 U.S.C. § 2254(d), or are procedurally barred. See Dkt. # 9.

ANALYSIS

A. Exhaustion/Evidentiary Hearing

Before addressing the claims raised in the petition, the Court must determine whether Petitioner meets the exhaustion requirement of 28 U.S.C. § 2254(b) and (c). See *Rose v. Lundy*, 455 U.S. 509, 510 (1982). As discussed in more detail below, Petitioner's double jeopardy claim has not been fairly presented to the OCCA and is technically unexhausted. In light of the procedural posture of this case, however, the Court finds it would be futile to require Petitioner to return to state court because his unexhausted claim ³³ would undoubtedly be subject to a procedural bar independent and adequate to

prevent habeas corpus review. Therefore, there is no available state corrective process, and consideration of the claim is not precluded by the exhaustion requirement of § 2254(b). Petitioner's remaining claims were fairly presented to the OCCA on either direct or post-conviction appeal. Therefore, the exhaustion requirement is satisfied in this case.

In addition, the Court finds that Petitioner is not entitled to an evidentiary hearing. See *Michael Williams v. Taylor*, 529 U.S. 420 (2000).

B. Claims adjudicated by the OCCA

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides the standard to be applied by federal courts reviewing constitutional claims brought by prisoners challenging state convictions. Under the AEDPA, when a state court has adjudicated a claim, a petitioner may obtain federal habeas relief only if the state decision "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 402 (2000); *Neill v. Gibson*, 278 F.3d 1044, 1050-51 (10th Cir. 2001). When a state court applies the correct federal law to deny relief, a federal habeas court may consider only whether the state court applied the federal law in an objectively reasonable manner. See *Bell v. Cone*, 535 U.S. 685, 699 (2002); *Hooper v. Mullin*, 314 F.3d 1162, 1169 (10th Cir. 2002). Furthermore, the "determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). In this case, the OCCA adjudicated Petitioner's double punishment and instructional error claims, both asserted in his first ground of error, and his third ground for relief on direct appeal. In addition, the OCCA adjudicated Petitioner's claim of ineffective assistance of appellate counsel on post-conviction appeal. Therefore, to the extent those claims are cognizable, they shall be reviewed pursuant to § 2254(d).

1. Double Jeopardy/Double Punishment (part of ground 1)

In his first ground of error, Petitioner alleges that because the "facts of the case support one continual course of conduct," his convictions for both Robbery With a Firearm and Assault and Battery With a Dangerous Weapon violate the State of Oklahoma's prohibition against double jeopardy and double punishment. On direct appeal, Petitioner cited Okla. Stat. tit. 21, § 11. See Dkt. # 9, Ex. 1. The OCCA rejected the claim, citing *Davis v. State*, 916 P.2d 251, 261 (Okla. Crim. App. 1996), and *Hale v. State*, 888 P.2d 1027, 1028 (Okla. Crim. App. 1985), and finding that "Appellant's two convictions, while occurring in close proximity to one another, were separate and distinct and do not violate 21 O.S.2001, § 11." See Dkt. # 9, Ex. 3.

First, the Court finds Petitioner's claim that he has suffered multiple punishments in violation of Oklahoma statutory law should be denied because it is not cognizable on federal habeas corpus review. A federal habeas court has no authority to review a state court's interpretation or application of its own state laws. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (emphasizing that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions). Instead, when conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. *Id.*; 28 U.S.C. §§ 2254(a). Petitioner's multiple punishment claim, insofar as it is based on an Oklahoma statute, is not cognizable in this federal habeas corpus proceeding and shall be denied on that basis.

Nor is Petitioner entitled to relief on his double jeopardy claim. The Court notes that Petitioner did not raise a federal double jeopardy claim in either his direct appeal or in his post-conviction proceeding.² As a result, the claim is unexhausted. Nonetheless, a request for habeas corpus relief may be denied on the merits, notwithstanding a petitioner's failure to exhaust state remedies. 28 U.S.C. § 2254(b)(2). In this case, Petitioner's double jeopardy claim lacks merit and shall be denied. The Double Jeopardy Clause protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). This protection is limited to ensuring "that the sentencing discretion of courts is confined to the limits established by the legislature," for it is the legislature that is vested with "the substantive power to prescribe crimes and determine punishments." *Ohio v. Johnson*, 467 U.S. 493, 499 (1984). Thus, when a course of criminal conduct violates two statutory provisions, the test to determine whether the punishments are "multiple," in violation of the Double Jeopardy Clause, is "essentially one of legislative intent." *Id.*; see also *Missouri v. Hunter*, 459 U.S. 359, 365 (1983). In the absence of clear legislative intent, courts must apply the *Blockburger* test, which states that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

Although each of Petitioner's convictions resulted from a series of acts committed by Petitioner, they are not violative of the Double Jeopardy Clause as events resulting from a single criminal episode, as argued by Petitioner. The crimes of Robbery With a Firearm and Assault and Battery With a Dangerous Weapon are separate crimes under Oklahoma law. They require proof of distinct facts and elements, even though some of the facts supporting each crime may overlap. See *Brown v. Ohio*, 432 U.S. 161, 166 (1977) (holding that "[i]f each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes"). Therefore, Petitioner's convictions on the two crimes did not violate the constitutional prohibition against double jeopardy. Petitioner's request for habeas corpus relief shall be denied. 28 U.S.C. § 2254(b)(2).

2. Instructional error (part of ground 1)

In his first ground of error, Petitioner also complains that the trial court judge, over his objection, gave the jury an instruction on Assault and Battery With a Dangerous Weapon, a lesser included offense of the crime charged, Assault and Battery With a Deadly Weapon. Petitioner maintains that pursuant to the doctrines of res judicata and collateral estoppel, the State is bound by the theory of the case presented at the preliminary hearing. On direct appeal, the OCCA cited *Shrum v. State*, 991 P.2d 1032, 1036-37 (Okla. Crim. App. 1999), and found that "the trial court did not abuse its discretion in instructing the jury on assault and battery with a dangerous weapon." See Dkt. # 9, Ex. 3. The OCCA also stated that Petitioner "had adequate notice to defend the assault and battery with a dangerous weapon charge." *Id.*

The Court finds that Petitioner is not entitled to habeas relief on his claim challenging the trial court's issuance of a lesser included offense instruction. "[F]ederal habeas review does not extend to the correction of purely state law procedural errors that do not rise to the level of a constitutional due process violation." *Shipley v. Oklahoma*, 313 F.3d 1249, 1251 (10th Cir. 2002). The trial court's decision to issue a lesser included offense instruction was based on state law. The OCCA has interpreted state law to hold that while a defendant is free to adopt an "all or nothing" strategy with regard to any lesser-offense alternatives, the trial court is not bound by that strategy, and may instruct *sua sponte* on any lesser-related offense it believes to be supported by the evidence, without any formal request by the State. *McHam v. State*, 126 P.3d 662, 670 (Okla. Crim. App. 2005) (clarifying holding of *Shrum*). In this case, the evidence supported the lesser included offense and Petitioner has failed to demonstrate that he was unfairly surprised by the instruction. The issuance of the instruction did not rise to the level of a constitutional due process violation. Therefore, Petitioner is not entitled to habeas corpus relief on this claim.

3. Ineffective assistance of appellate counsel (part of ground 2)

As part of ground two, Petitioner claims he received ineffective assistance of appellate counsel. Specifically, he claims that appellate counsel was constitutionally ineffective for failing to raise the following ineffective assistance of trial counsel claims on direct appeal: (1) that trial counsel failed to communicate mitigating circumstances to the court, (2) that trial counsel failed to request a neurological evaluation, and (3) that trial counsel worked under a conflict of interest. He also claims that he is entitled to an evidentiary hearing. See Dkt. #1. The OCCA rejected Petitioner's claim of ineffective assistance of appellate counsel on post-conviction appeal, finding that Petitioner did not establish his counsel's performance was deficient under the standards enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). See Dkt. #9, Ex. 7 at 2. The OCCA ruled as follows:

As a reason for not previously asserting his current propositions of error, Petitioner claims his appellate counsel was ineffective. To support a claim of ineffective appellate counsel, Petitioner must establish counsel's performance was deficient under prevailing professional norms and that but for the deficient performance the outcome of his trial and appeal would have been different, or he must establish factual innocence. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674, 693, 698. Petitioner has not established that his appellate counsel's performance was deficient under prevailing professional norms. Id. He has not established that the results of his jury's verdict would have or should have been different, or that the result of his trial and appeal were unreliable or fundamentally unfair. Id. He has not established that he is factually innocent. Id. Therefore, the order of the District Court of Tulsa County denying Petitioner's application for post-conviction relief in Case No. CF-2002-5476 should be, and is hereby, AFFIRMED.

Id.

Petitioner is not entitled to habeas corpus relief on his claim of ineffective assistance of appellate counsel unless he demonstrates that the OCCA's adjudication was an unreasonable application of Supreme Court law. In evaluating a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* two-pronged standard used for general claims of ineffective assistance of trial counsel. See *United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995). To establish ineffective assistance of counsel under *Strickland*, a petitioner must show that his counsel's performance was deficient and that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687; *Osborn v. Shillinger*, 997 F.2d 1324, 1328 (10th Cir. 1993). A petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. *Strickland*, 466 U.S. at 687-88. There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Id. at 688. In making this determination, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. To establish the second prong, a defendant must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; see also *Sallahdin v. Gibson*, 275 F.3d 1211, 1235 (10th Cir. 2002); *Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999).

When a habeas petitioner alleges that his appellate counsel rendered ineffective assistance by failing to raise an issue on direct appeal, the Court first examines the merits of the omitted issue. *Hawkins v. Hannigan*, 185 F.3d 1146, 1152 (10th Cir. 1999). If the omitted issue is meritless, then counsel's failure to raise it does not amount to constitutionally ineffective assistance. Id.; see also *Parker v. Champion*, 148 F.3d 1219, 1221 (10th Cir. 1998) (citing *Cook*, 45 F.3d at 392-93). If the issue has merit, the Court then must determine whether counsel's failure to raise the claim on direct appeal was deficient and prejudicial. *Hawkins*, 185 F.3d at 1152; see also *Cook*, 45 F.3d at 394. More particularly, "the relevant questions are whether appellate counsel was 'objectively unreasonable' in failing to raise these . . . claims on direct appeal and, if so, whether there is a 'reasonable probability that, but for his counsel's unreasonable failure' to raise these claims, [Petitioner] 'would have prevailed on his appeal.'" *Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001) (quoting *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000)).

a) Failure to communicate mitigating circumstances to the trial court

Petitioner first argues that his appellate attorney provided ineffective assistance when he omitted a claim that Petitioner's trial counsel failed to communicate "mitigating circumstances" to the trial court. In support of this claim concerning trial counsel's representation, Petitioner states that:

While Elton does not argue that his appointed defender did or did not enjoy typing motions, Elton is arguing that the appointed defender failed to communicate to the court mitigating circumstances and therefore, the jury were not privy to the mitigating information, which clearly [would] have had a more reasonable effect as to the sentencing phase of the trial, if not altogether changed the verdict (vis a vis insanity) or incompetent to be tried at all. Though none of these due process responsibilities were applied, jurors did not weigh the mitigating circumstances with the other evidence and so their own reasonings were skewed.

(Dkt. #1).

To the extent Petitioner faults his attorney for failing to present "mitigating circumstances" in the form of evidence of incompetence or insanity during

trial, the Court finds he has failed to satisfy the deficient performance prong of the Strickland standard. As a preliminary matter, under Oklahoma law, a defendant's competence to stand trial and sanity at the time of the offense are separate and distinct issues. See, e.g., *Ellis v. State*, 867 P.2d 1289, 1296-97 (Okla. Crim. App. 1992). While the question of Petitioner's competence to stand trial was resolved by a jury prior to his trial on the criminal charges, there is nothing in the record to suggest that Petitioner's sanity at the time of the offense was ever an issue. Furthermore, Petitioner has presented no evidence in this habeas action suggesting that there was a basis for the assertion of an insanity defense. After a jury found Petitioner to be not incompetent, Petitioner's trial counsel pursued defenses of self-defense and defense of others at trial. Petitioner has failed to demonstrate that counsel's strategy was unsound. Petitioner testified in his own defense and admitted that he shot Carralez in the leg, but claimed Carralez was armed with a gun and that he shot Carralez in the leg because he feared for his life. See Tr. Trans. at 491. Thus, Petitioner's testimony aligned with his defense of self-defense. Petitioner has not demonstrated that trial counsel performed deficiently in failing to present evidence of incompetence or insanity at trial.

To the extent Petitioner faults his attorney for failing to present mitigation evidence at sentencing, the Tenth Circuit has noted that a petitioner's Eighth Amendment or due process or equal protection rights are not violated when a trial court does not consider mitigating factors during sentencing in a noncapital case. *Scrivner v. Tansy*, 68 F.3d 1234, 1240 (10th Cir. 1995) (citing *United States v. LaFleur*, 971 F.2d 200, 211-12 (9th Cir. 1991)). This was a noncapital case. Thus, Petitioner's trial counsel did not perform deficiently in failing to present mitigation evidence at sentencing.

Having found that trial counsel's performance was not deficient for the omissions identified by Petitioner, this Court cannot find appellate counsel was ineffective for failing to raise a non-meritorious claim of ineffective assistance of counsel. Petitioner is not entitled to habeas corpus relief on this ground.

b) Failure to request a neurological examination

Petitioner next contends that his appellate counsel should have raised an ineffective assistance of trial counsel claim for failing to request a neurological examination. In support of this claim, Petitioner alleges that:

A mental health evaluation would have aided the judge in her final sentence and also have the more favorable effect of ensuring the goals of society — as to (a more realistic course of offender treatment and or) appropriate medical care based on the actions within the criminal offense, rather than cruelly incarcerate Elton (or any other first-time offender with such resolute life sentence, which Elton (or anyone else) could ever achieve, or even hope to earn his freedom back — in some form — due to the statutory restrictions placed on Robbery offenders since 2001

(Dkt. # 1).

In this habeas corpus action, Petitioner maintains that he was incompetent to stand trial. At the time of trial, however, Petitioner maintained that he was competent. During pretrial proceedings, Petitioner's attorney, Rick Couch, recognized that Petitioner had trust issues and expressed concern that letters written by Petitioner to the trial court and the district attorney contained potentially damaging information reflecting a lack of understanding of the seriousness of the charges filed against him. See Dkt. # 9, Ex. 11. The record also reflects that, contrary to Petitioner's allegation, attorney Couch did in fact request that Petitioner be examined by a second mental health expert, at the State's expense. See Dkt. # 9, Ex. 13 at 6. However, the trial court denied the request because the State had already paid for a mental health evaluation by Dr. William L. Cooper. Id. at 7. Significantly, the record before the Court reflects that the trial court judge, Hon. Rebecca Brett Nightingale, was well aware of Petitioner's mental health issues. See Dkt. # 9, Exs. 11, 12, 13, 15. The Court finds because trial counsel did in fact request a second mental health evaluation, there is no factual basis for Petitioner's claim of ineffective assistance of trial counsel based on counsel's alleged failure to request a mental health evaluation. As a result, Petitioner's claim of ineffective assistance of trial counsel lacks merit and appellate counsel did not perform deficiently in failing to raise the claim on direct appeal. Petitioner is not entitled to habeas corpus relief on this claim.

c) Trial counsel's conflict of interest

Petitioner next complains that appellate counsel provided ineffective assistance in failing to raise on direct appeal that trial counsel worked under a conflict of interest. He provides no statement of fact in support of this claim. See Dkt. # 1. As part of his application for post-conviction relief, however, Petitioner provided "Exhibit B," a summary of the record demonstrating his dissatisfaction with his court-appointed counsel. See Dkt. # 9, Ex. 4. To the extent the conflict of interest identified by Petitioner is based on the evidence cited in "Exhibit B" and Petitioner's generalized allegation that his trial counsel failed to communicate with him and the trial court, the Court finds Petitioner has failed to demonstrate that appellate counsel provided ineffective assistance in failing to raise a claim based on the existence of trial counsel's alleged conflict of interest.

To establish the existence of a conflict of interest, a petitioner must demonstrate that counsel "actively represented conflicting interests" in the pending case. See *United States v. Soto Hernandez*, 849 F.2d 1325, 1329 (10th Cir. 1988). Nothing in the record in this case suggests that Petitioner's counsel "actively represented conflicting interests." However, the Tenth Circuit has also recognized that "a complete breakdown in communication between an attorney and client may give rise to a presumption of ineffectiveness." *Hale v. Gibson*, 227 F.3d 1298, 1313 (10th Cir. 2000) (citing *Romero v. Furlong*, 215 F.3d 1107, 1111 (10th Cir. 2000)); *Soto Hernandez*, 849 F.2d at 1328. "To prove a total breakdown in communication, a defendant must put forth evidence of a severe and pervasive conflict with his attorney or evidence that he had such minimal contact with the attorney that meaningful communication was not possible." *United States v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002). If a defendant can demonstrate that there was "[a] complete breakdown in communication" between himself and his attorney, a presumption of ineffectiveness will arise, making it unnecessary for the defendant to satisfy the two-pronged Strickland test. *United States v. Cronic*, 466 U.S. 648, 658 (1984). In determining whether a purported breakdown in the attorney-client relationship has rendered a defendant's representation constitutionally deficient, a court considers several elements, including the following: (1) whether the defendant made a timely motion requesting new counsel; (2) whether the court adequately inquired into the matter; (3) whether the conflict between the defendant and his attorney was "so great that it resulted in a total lack of communication preventing an adequate defense"; and (4) whether the defendant substantially and unjustifiably contributed to the breakdown in communication. *Romero*, 215 F.3d at 1113.

To the extent Petitioner's conflict of interest claim is premised on a complete breakdown in communication, the Court finds he has failed to

Petitioner has failed to establish entitlement to habeas corpus relief. Only the first Romero factor favors Petitioner. The record reflects the Court demonstrates that Petitioner made several timely requests for new counsel. See Dkt. # 9, Ex. 14, docket entries at pages 14, 15, 16. Each request was denied. As to the second Romero factor, the record reflects that prior to the jury trial on competency, the trial court inquired as to the basis of Petitioner's dissatisfaction with Mr. Couch's representation. See Dkt. # 9, Ex. 13 at 3-5. Petitioner explained that he believed a conflict existed because Mr. Couch had filed an application for determination of competency when Petitioner believed himself to be competent. The trial court judge explained to Petitioner that counsel had never taken the position that Petitioner was incompetent and had always advocated Petitioner's position that he was competent. Id. at 4. The trial court further inquired concerning the extent of communication between Petitioner and Mr. Couch. Id. at 5. After making the inquiry, the trial court denied Petitioner's motion to allow Mr. Couch to withdraw. Id. at 6. Mr. Couch then requested appointment of a second mental health expert, at the State's expense, for the purpose of evaluating Petitioner. Id. That request was denied. Id. at 7. As to the third factor for consideration, the Court finds nothing in the record suggests a total lack of communication between Petitioner and Mr. Couch preventing an adequate defense. The trial record reflects that Mr. Couch worked to present Petitioner's defenses to the jury. Many of the complaints identified by Petitioner in "Exhibit B" attached to his application for post-conviction relief reflect dissatisfaction with strategic decisions made by trial counsel. As to the fourth Romero factor, the record reflects that Petitioner's complaints about his attorney's performance may have been based upon his lack of understanding of court procedures and misunderstanding of actions taken by counsel. Thus, Petitioner substantially and unjustifiably contributed to the breakdown in communication between himself and Mr. Couch by making unreasonable demands and unfounded criticisms of Mr. Couch's efforts. Upon review of the record, the Court finds no merit to Petitioner's allegation of a complete communication breakdown between himself and trial counsel.

In summary, Petitioner has failed to demonstrate that the OCCA's adjudication of his ineffective assistance of appellate counsel claim was contrary to or an unreasonable application of Supreme Court law. Therefore, Petitioner is not entitled to habeas corpus relief on this claim. 28 U.S.C. § 2254(d).

4. Excessive sentence resulting from failure to instruct on "85% Rule" (ground 3)

As his third proposition of error, Petitioner complains that his sentence is disproportionate as a result of the trial court's refusal to instruct on Oklahoma's "85% Rule." See Dkt. # 1. The OCCA rejected this claim on direct appeal, citing *Mayes v. State*, 887 P.2d 1288, 1316 (Okla. Crim. App. 1994); *Ellis v. State*, 749 P.2d 114, 116 (Okla. Crim. App. 1988); and *Miller v. State*, 522 P.2d 642, 644 (Okla. Crim. App. 1974), and finding that "the trial court did not err in refusing Appellant's request for a jury instruction that he would have to serve 85% of his sentence before becoming eligible for parole." See Dkt. # 9, Ex. 3.

Under Oklahoma's 85 percent rule, "[p]ersons convicted of: . . . [r]obbery with a dangerous weapon as defined in Section 801 of this title . . . shall be required to serve not less than eighty-five percent (85%) of any sentence of imprisonment imposed by the judicial system prior to becoming eligible for consideration for parole." Okla. Stat. tit. 21, § 13.1 (2002). In 2006, after Petitioner was convicted and sentenced, the OCCA held that trial courts should instruct jurors on the 85 percent rule prior to sentencing. *Anderson v. State*, 130 P.3d 273, 283 (Okla. Crim. App. 2006). The Anderson court, however, specified that its holding was prospective and did not apply to "cases before this decision." Id.

The United States Supreme Court has not held that the Constitution requires the jury to be informed of a defendant's parole eligibility in a non-capital case. Indeed, the Court has only held that the Constitution requires such information to be provided to a jury in a limited set of capital cases. See, e.g., *Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding, in a capital case, that the jury must be informed of parole eligibility when: (1) the defendant, if sentenced to life, will never become legally eligible for parole; and (2) the prosecution argues that the defendant presents a future danger). In light of this precedent, Petitioner has failed to demonstrate constitutional error. 28 U.S.C. § 2254(a). The trial court's failure to instruct on the 85 percent rule did not render Petitioner's trial fundamentally unfair in a constitutional sense. See *Taylor v. Parker*, 276 Fed.Appx. 772, 775-76 (10th Cir. 2008) (unpublished) (in a non-capital case, rejecting petitioner's contention that he was entitled to habeas relief because the trial court failed to instruct the jury on Oklahoma's 85 percent rule).

Petitioner also alleges a violation of the Eighth Amendment's prohibition on cruel and unusual punishment as a basis for this claim. The Court finds, however, that Petitioner is not entitled to relief because his sentence is not grossly disproportionate to the crimes for which he was convicted: Robbery With a Firearm and Assault and Battery With a Dangerous Weapon. See *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999); see also *Rummel v. Estelle*, 445 U.S. 263 (1980). The length of Petitioner's sentence cannot be said to be unreasonable in light of the deferential standard that binds this Court's analysis. See *Lockyer v. Andrade*, 538 U.S. 63, 72-73 (2003) (observing numerous impediments to challenging the length of a prison sentence under federal habeas review). A sentence violates the Eighth Amendment only if it is "grossly disproportionate to the severity of the crime." *Ewing v. California*, 538 U.S. 11, 21 (2003) (quoting *Rummel*, 445 U.S. at 271). But "[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case." *Lockyer*, 538 U.S. at 77. This is not that case. Petitioner is not entitled to habeas corpus relief based on his claim that his sentence is constitutionally excessive. Petitioner's request for habeas corpus relief on this ground shall be denied.

C. Procedural bar (part of ground 2)

The record confirms that Petitioner's claims of ineffective assistance of trial counsel identified in ground 2 were not presented to the OCCA on direct appeal. These claims were raised for the first time in Petitioner's application for post-conviction relief. In its order affirming the district court's denial of post-conviction relief, the OCCA stated:

Petitioner has failed to establish entitlement to relief in this post-conviction proceeding. Petitioner reasserts several propositions of error presented to the District Court, but he has not established the District Court erred or abused its discretion. With one exception [the claim of ineffective assistance of appellate counsel], all of the propositions of error either were or could have been raised during his trial or in his direct appeal. All issues that could have and should have been raised in a direct appeal are waived and may not be the basis of a post-conviction application. 22 O.S.2001, § 1086; *Fowler v. State*, 1995 OK CR 29, ¶ 2, 896 P.2d 566, 569.

Dkt. # 991, Ex. 7. Thus, the OCCA found that Petitioner had defaulted his claims of ineffective assistance of trial counsel and, for that reason, did not adjudicate the claims on the merits.

The doctrine of procedural bar prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless petitioner can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 724 (1991); see also *Maes v. Thomas*, 46 F.3d 979, 985 (10th Cir. 1995); *Gilbert v. Scott*, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." *Maes*, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases."¹¹ *Id.* (quoting *Andrews v. Deland*, 943 F.2d 1162, 1190 (10th Cir. 1991)). The Tenth Circuit has recognized that "Oklahoma's procedural rule barring post-conviction relief for claims petitioner could have raised on direct appeal constitutes an independent and adequate ground" barring federal habeas corpus review. *Sherrill v. Hargett*, 184 F.3d 1172, 1175 (10th Cir. 1999).

Applying the principles of procedural bar to this case, the Court concludes that Petitioner's claims of ineffective assistance of trial counsel as asserted in ground 2 are procedurally barred. The OCCA's procedural bar, based on Petitioner's failure to raise these grounds on direct appeal, is an "independent" state ground because state law provided "the exclusive basis for the state court's holding." *Maes*, 46 F.3d at 985. As to the adequacy of the procedural bar imposed on Petitioner's claims of ineffective assistance of trial counsel, the Tenth Circuit Court of Appeals has recognized that countervailing concerns may justify an exception to the general rule of procedural default. *Brecheen v. Reynolds*, 41 F.3d 1343, 1363 (10th Cir. 1994) (citing *Kimmelman v. Morrison*, 477 U.S. 365 (1986)). The unique concerns are "dictated by the interplay of two factors: the need for additional fact-finding, along with the need to permit the petitioner to consult with separate counsel on appeal in order to obtain an objective assessment as to trial counsel's performance." *Id.* at 1364 (citing *Osborn v. Shillinger*, 861 F.2d 612, 623 (10th Cir. 1988)). In *English v. Cody*, 146 F.3d 1257 (10th Cir. 1998), the Tenth Circuit held that "the Oklahoma bar will apply in those limited cases meeting the following two conditions: trial and appellate counsel differ; and the ineffectiveness claim can be resolved upon the trial record alone. All other ineffectiveness claims are procedurally barred only if Oklahoma's special appellate remand rule for ineffectiveness claims is adequately and evenhandedly applied." *Id.* at 1264 (citation omitted).

After reviewing the record in this case in light of the factors identified in *English*, the Court finds that the procedural bar imposed by the state courts on Petitioner's ground 2 ineffective assistance of trial counsel claims is based on grounds adequate to preclude federal habeas review. Petitioner was represented at trial by attorney Rick Couch. On direct appeal, Petitioner was represented by attorney Stephen J. Greubel. For purposes of the first requirement identified in *English*, the Court finds that Petitioner had the opportunity to confer with separate counsel during trial proceedings and on direct appeal.

The second English factor requires that the claim could have been resolved either "upon the trial record alone" or after adequately developing a factual record through some other procedural mechanism. *Id.* at 1263-64. In applying a procedural bar to Petitioner's claims of ineffective assistance of trial counsel, the OCCA specifically determined that the claims could have been but was not raised on direct appeal. See Dkt. # 9, Ex. 7. Each of Petitioner's defaulted claims, including his allegation that trial counsel failed to communicate resulting in a "conflict of interest," could be resolved based on the trial record alone. Furthermore, even if his defaulted claims could not all be resolved on the record alone, Petitioner has not alleged that the Oklahoma remand procedure provided by Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, was inadequate to allow him to supplement the record on his ineffective assistance of counsel claims. See *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999) (once the state pleads the affirmative defense of an independent and adequate state procedural bar, the burden shifts to the petitioner to make specific allegations as to the inadequacy of the state procedure). Although Respondent alleged an independent and adequate procedural bar, see Dkt. # 9 at 6-15, Petitioner failed to file a reply to Respondent's response and has not otherwise specifically put the adequacy of Oklahoma's remand procedure at issue. See Dkt. # 1. As a result, he has not demonstrated that Oklahoma's procedural bar is inadequate and his ground 2 claims of ineffective assistance of trial counsel are procedurally barred.³

This Court may not consider Petitioner's procedurally barred claims unless he is able to show "cause and prejudice" for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See *Coleman*, 501 U.S. at 750; *Demarest v. Price*, 130 F.3d 922, 941-42 (10th Cir. 1997). The cause standard requires a petitioner to "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. *Id.* As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. *McCleskey v. Zant*, 499 U.S. 467, 494 (1991).

Petitioner attributes his failure to raise these claims on direct appeal to ineffective assistance of appellate counsel (Dkt. # 1). It is well established that, in certain circumstances, counsel's ineffectiveness can constitute "cause" sufficient to excuse a state prisoner's procedural default. See *Murray*, 477 U.S. at 488-89. The ineffective assistance of appellate counsel claim itself must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. *Id.* at 489; *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). In this case, Petitioner did raise a claim of ineffective assistance of appellate counsel on post-conviction appeal. However, this Court determined in Part B above that Petitioner's appellate counsel did not provide ineffective assistance in failing to raise the claims of ineffective assistance of trial counsel on direct appeal. As a result, ineffective assistance of appellate counsel cannot serve as "cause" to overcome the procedural bar.

Petitioner may also overcome the procedural bar applicable to his defaulted claims under the fundamental miscarriage of justice exception. That exception to the procedural bar doctrine is applicable only when a petitioner asserts a claim of actual innocence. *Herrera v. Collins*, 506 U.S. 390, 403-04 (1993); *Sawyer v. Whitley*, 505 U.S. 333, 339-41 (1992); see also *Schlup v. Delo*, 513 U.S. 298 (1995). To meet this test, a criminal defendant must make a colorable showing of factual innocence. *Beavers v. Saffle*, 216 F.3d 918, 923 (10th Cir. 2000) (citing *Herrera*, 506 U.S. at 404). Under *Schlup*, a showing of innocence sufficient to allow consideration of procedurally barred claims must be "so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error . . ." *Schlup*, 513 U.S. at 316. Petitioner has the burden of persuading this Court "that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* at 329. "The exception is intended for those rare situations 'where the State has convicted the wrong person of the crime. . . [Or where] it is evident that the law has made a mistake.'" *Klein v. Neal*, 45 F.3d 1395, 1400 (10th Cir. 1995) (citation omitted). Petitioner does not claim that he is actually innocent of the crimes for which he was convicted. Therefore, the fundamental miscarriage of justice exception is inapplicable in this case.

Accordingly, because Petitioner has not demonstrated "cause and prejudice" or that a "fundamental miscarriage of justice" will result if his claims are not considered, the Court concludes that it is procedurally barred from considering the merits of Petitioner's claims of ineffective assistance of trial counsel asserted in ground 2. *Coleman*, 510 U.S. at 724. He is not entitled to habeas corpus relief on those claims.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. Therefore, his petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus (Dkt. # 1) is denied.

FootNotes

1. According to the docket sheet for Case No. CF-2002-5476, Lance was convicted on his pleas of guilty of Larceny From House (Count 1) and Receiving/Concealing Stolen Property (Count 3). He was sentenced to four (4) years imprisonment, suspended, on each count. The charge against Runningbear Gibson was dismissed. See www.oscn.net.
2. In ground 6 of his application for post-conviction relief, Petitioner raised a claim of ineffective assistance of appellate counsel based on the assertion that a double jeopardy claim was inadequately raised on direct appeal. See Dkt. # 9, Ex. 4.
3. Even if Petitioner's claims of ineffective assistance of trial counsel are not procedurally barred, they are without merit as determined in Part B(3) of this opinion.

A lesson in sovereignty: The "level playing field"

By Phoenix Archives
Jan 8, 2004



archived image

By Principal Chief Chad Smith

On occasion, I hear anti-Indian business interests complain that the "playing field" is not level because Indian nations have "unfair advantages." Usually this hypocritical assertion comes from certain business people in industries that have enjoyed tremendous tax breaks and subsidies from both the federal and state government. For example, under the new federal energy bill, the oil and gas industry received \$15 billion in tax breaks.

The following is a legal chronology of the Cherokee Nation. What this shows is that the "playing field" was set at Oklahoma statehood when the Indian nations, including the Cherokee Nation, reserved our rights. The state of Oklahoma became a state subject to the rights of Indian nations. In fact, the Enabling Act and Constitution for Oklahoma specifically disclaims the state from asserting any authority over tribal rights. The anti-Indian interests now want to change this level playing field because it does not benefit them.

We should always remember the rights the Cherokee Nation now has were not given to us by the federal or state government, they are rights we have always had and have reserved.

Chronology of Cherokee Nation Sovereignty

1830 - Indian Removal Act provided the U.S. President authority to exchange lands of the Indians of the Southeast for U.S. lands in Indian Territory.

1832 - The U.S. Supreme Court in Cherokee Nation v. Georgia held that tribes were "dependent domestic nations" not subject to the laws of Georgia.

1835 - Treaty of New Echota (which led to the Cherokee Trail of Tears during which 4,000 Cherokees died in 1838-1839) provided

* "securing a permanent home for themselves and their posterity in the country selected

by their forefathers without the territorial limits of state sovereignties...."
(Preamble)

* "The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall, **in no future time without their consent, be included within the territorial limits**

or jurisdiction of any State or Territory." (Article 5)

1906 - Five Civilized Tribes Act provided

* "**That the tribal existence and present tribal governments** of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations **are hereby continued in full force and effect** for all purposes authorized by law, until otherwise provided by law,...." (Section 28)

1906 - Oklahoma Enabling Act that allowed Oklahoma to form as a state provided

* "That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided:

Provided, that nothing contained in the said constitution shall be construed

to limit or impair the rights of the persons or property pertaining to the

Indians of said Territories (so long as such rights shall remain unextinguished) or

to limit or affect the authority of the Government of the United States to make

any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent

to make of this Act had never been passed." (Section 1)

1907 - Constitution of the State of Oklahoma provides

*** "The people inhabiting the State do agree and declare that they forever disclaim**

all right and title in or to any unappropriated public lands lying within

the boundaries thereof, and to all lands lying within said limits owned or

held

by any Indian tribe, or nation; and that until the title to any such public

land shall have been extinguished by the United States, the same shall be and

remain subject to the jurisdiction, disposal, and control of the United States." (Section 3)

This brief legal history shows how the relationship between the United States, the state of Oklahoma, and the Cherokee Nation has developed through the years. Our treaties guaranteed us we would never have to become part of a state. When that promise was broken, we were assured that our government would continue in full force and effect, when in reality it was nearly eliminated. The state further disclaimed interest in our lands, and then watched idly as our lands quickly slipped away into non-Indian hands.

This is the "playing field" that Indian tribes have to deal with. It is to our credit they we, as Cherokees, have continued our legacy. Our legacy is that we are a people who face adversity, survive, adapt, prosper and excel. It is in the times when we prosper and excel that we come under attack. I find it ironic that at just the time when we overcome all the historic obstacles to financial success as a tribe, enemies of tribal sovereignty say they want a "level playing field."

We have had an uphill fight for hundreds of years. All we have ever wanted was a level playing field against the interests that have conspired to rob Cherokees of their land, resources and sovereignty. Business interests who complain they are somehow being mistreated are conveniently ignoring the fact that Indian businesses succeed despite the playing field being tilted against us for decades, not the other way around.
