IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ANTHONY KIMBROUGH,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PC-2021-938**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner, pro se, appeals the denial of post-conviction relief by the District Court of Tulsa County in Case No. CF-1993-1833. Before the District Court, Petitioner asserted that the District Court lacked jurisdiction to convict and punish him. *See* 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 convictions in this matter were final before the July 9, 2020, decision in *McGirt*, and the United States Supreme Court's holding in

APPENDIX A

McGirt does not apply. We decline Petitioner's invitation to revisit our holding in *Matloff*.

Therefore, the District Court's order denying post-conviction relief is **AFFIRMED**. Petitioner's motions for evidentiary hearing, for a stay of proceedings, and for appointment of counsel are **DENIED**. 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 21st day of January, 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

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

ANTHONY KIMBROUGH,	)	
	)	
Petitioner,	)	
vs.	)	**CF-1993-1833**
	)	
STATE OF OKLAHOMA,	)	**Judge Moody**
	)	
Respondent.	)	

ORDER DENYING PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF

This matter came on for hearing on July 12, 2021 pursuant to the Petitioner's Application for Post-Conviction Relief ("Application") and Motion for Evidentiary Hearing filed by Petitioner Anthony Kimbrough ("Petitioner") on June 8, 2021 and June 9, 2021. The State filed its Response to Petitioner's Application on July 12, 2021 ("State's Response").

PROCEDURAL HISTORY

Following a trial, on May 26, 1994, the jury found Petitioner guilty of Murder in the First Degree/Felony (Count 1), Trafficking in Illegal Drugs-Felony (Count 2), and Failure to Obtain Tax Stamp-Controlled Dangerous Substance (Count 3) in Tulsa County District Court Case CF-1993-1833. The District Court sentenced Petitioner to life without parole in the custody of the Department of Corrections ("DOC") on Count 1, to life imprisonment in Count 2, and to five years in DOC on Count 3 with all of these sentences to run consecutively to each other. Petitioner appealed this judgment and sentence to the Oklahoma Court of Criminal Appeals ("OCCA"), raising the following propositions of error:

> 1. In his first assignment of error, Appellant challenges the sufficiency of the evidence to support those convictions and argues the trial court erred in joining for trial the unrelated offenses.

2. In his second assignment of error, Appellant claims the manner in which the prosecution endorsed witnesses deliberately misled the defense in order to gain tactical advantages and resulted in the denial of a fair trial. Specifically, Appellant complains of the State's failure to name Patricia Kimbrough in the witness list included on the original information, the State's filing of an amended information two weeks before preliminary hearing adding thirty-eight additional witnesses, the State's filing of a second amended information three days after preliminary hearing listing an additional ninety-nine witnesses, and the addition of twenty-five more witnesses approximately two weeks before trial. Appellant asserts he repeatedly asked for continuances so he could prepare to meet the State's evidence but was overruled each time.

3. In his third assignment of error, Appellant argues the State did not comply with the "two day" provision of Article II , Section 20 of the Oklahoma Constitution.

4. In his fourth assignment of error Appellant finds error in the trial court's failure to let five year old Lamar Lewis, Jr. testify.

5. In his fifth assignment of error Appellant challenges the cross-examination of defense witness Marion Clifton.

6. In his sixth assignment of error, Appellant contends-the trial court erred in admitting testimony from an attorney who represented Appellant in another case concerning a conversation between the attorney and Appellant as to the existence of arrest warrants for Appellant's failure to appear for trial.

7. In his final assignment of error, Appellant challenges the constitutionality of the Tax Stamp Act of 63 O.S. 450.1 (1991) et. seq. Specifically, he argues the Act: 1) violates the privilege against self-incrimination; 2) violates the transactional immunity guarantees of the Oklahoma Constitution; and 3) violates the prohibitions against double jeopardy.

Kimbrough v. State of Oklahoma, F-94-0632, Slip op. (Okla. Crim. App. Oct. 18, 1995) (Not Published). The OCCA denied all of these propositions of error and ultimately affirmed the judgment ant sentence of the District Court. *See id.*

Petitioner filed his first Application for Post-Conviction Relief on April 22, 1997, raising the following propositions of error:

1. That his prosecution was malicious because the State failed to state which statute Petitioner was alleged to have violated, therefore the trial court never had jurisdiction over the matter.

2. The trial court lacked subject matter jurisdiction because the State failed to state which statute Petitioner was alleged to have violated, and the court erred in sentencing Petitioner. The duty of sentencing is solely for the jury.

3. There was insufficiency of service of process because State failed to state which statute Petitioner was alleged to have violated.

4. The government intruded into the attorney client relationship when the trial court held Petitioner's counsel in contempt of court.

5. Unprofessional conduct by the judge, prosecutor, and defense counsel. Prosecutor refused to comply with court's discovery orders; employees of defense counsel provided privileged attorney-client information to the prosecutor; the prosecutor failed to provide Petitioner with a list of witnesses; and the accumulation of the above allegations amounted to error.

6. The rulings of the trial judge and the appellate court is in conflict with the holdings of " the same court of last resort, and other federal courts of appeal and the United States Supreme Court" in that the State failed to state which statute Petitioner was alleged to have violated.

On June 12, 1997, Petitioner's Application for Post-Conviction-Relief was denied by the District Court. Petitioner appealed this denial to the OCCA. On August 22, 1997, the OCCA affirmed the denial of Petitioner's Application for Post-Conviction-Relief.

On January 11, 2007, Petitioner filed his second Application for Post-Conviction-Relief which Petitioner amended in his Amended Application in Support of Petitioner's Second Application for Post-Conviction Relief filed February 1, 2007. On February 22, 2007 the District Court denied Petitioner's Second Application for Post-Conviction Relief. Petitioner appealed this Court's decision in PC-2007-301 and that appeal was denied by the Court of Criminal Appeals on May 2, 2007 as untimely.

Thereafter in PC-2007-642 the Court of Criminal Appeals granted the Petitioner leave to file an out-of-time Post Conviction Relief appeal on August 24, 2007. Petitioner did not file his Post-Conviction Relief appeal until September 25, 2007 which the Court of Criminal Appeals declined and dismissed as untimely and outside the thirty day time frame allowed.

On November 15, 2007, Petitioner again filed another Request for Appeal Out of Time stating the same facts as in the last Request for Appeal Out of Time blaming the prison staff for not mailing his Legal Mail in time to meet the filing deadline. In an Order dated May 15, 2008, the OCCA allowed Petitioner to file his post-conviction appeal out of time. *See* PC-2008-288. Ultimately, the OCCA affirmed the District Court's denial of Petitioner's second Application for Post-Conviction Relief by Order dated September 5, 2008. *See* PC-2008-545.

In his third and current Application, Petitioner claims based on *McGirt v. Oklahoma*, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020) the Tulsa County District Court lacked jurisdiction to try him because "Petitioner is Indian" and his crimes occurred within reservation boundaries. Application at p. iv.

FINDINGS OF FACTS

1. A representative of the Cherokee Nation Office of the Attorney General would testify that Petitioner is not a citizen of the Cherokee Nation.
2. A representative of the Tulsa Police Department would testify that Petitioner committed the offenses he was convicted of within Tulsa County.
3. 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. PETITIONER HAS FAILED TO SUSTAIN HIS ALLEGATION THAT HE IS AN "INDIAN" FOR PURPOSES OF INVOKING AN EXCEPTION TO STATE JURISDICTION.

The prosecution of Petitioner's offenses was a justiciable matter, and Petitioner has not established that the trial court lacked jurisdiction. *See,* Okla. Const. Art. VII, § 7 (District Courts shall have unlimited original jurisdiction of all justiciable matters in Oklahoma). In *Russell v. Cherokee Cty. Dist. Court,* 1968 OK CR 45, 438 P.2d 293, 294,the Court stated:

> It is fundamental that where a petition for writ of habeas corpus, or for post-conviction appeal is filed, the burden is upon the Petitioner to sustain the allegations of his petition, and that every presumption favors the regularity of the proceedings had in the trial court. Error must affirmatively appear, and is never presumed.

Related to his burden to sustain his allegations that he is an Indian for purposes of invoking an exception to state jurisdiction, the Petitioner has not presented this Court with any affirmative evidence that he has any significant degree of Indian blood and that he is recognized as an Indian by the federal government or by some tribe or society of Indians. *See Goforth v. State,* 1982 OK CR 48, 644 P.2d 114 (Two elements must be satisfied before it can be found that appellant is an Indian under federal law. Initially, it must appear that he has a significant percentage of Indian blood. Secondly, the appellant must be recognized as an Indian either by the federal government or by some tribe or society of Indians.)

In his Application, Petitioner made a number of statements that he is "Indian." "Application at pp. iv, 4, 6-7. However, there was no tribal verification documentation attached to the Application or otherwise provided to the Court. Therefore, Petitioner has not met his burden to show he is "Indian." *See Russell*, 438 P.2d at 294. Accordingly, the Court hereby denies Petitioner's Application on this basis.

II. ALTERNATIVELY, PETITIONER DOES NOT MEET THE DEFINITION OF "INDIAN" FOR PURPOSES OF CRIMINAL JURISDICTION.

A. Definition of "Indian" for purposes of criminal jurisdiction

A person meets the definition of "Indian" for the purposes of criminal jurisdiction if that person "(1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government." *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001); *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). The first part of the test can be shown by a Certificate of Degree of Indian Blood issued by the U.S. Bureau of Indian Affairs. *See Davis v. U.S.*, 192 F.3d 951, 956 (10th Cir. 1999). In order to satisfy the second requirement of this definition, the defendant or victim must be affiliated with a Tribe that is recognized by the federal government.[1] The second prong of "whether an individual is recognized by an Indian tribe or the federal government" is considered under the following four factors:

> (1) tribal enrollment; (2) government recognition formally and informally through receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal affiliation; and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life."

United States v. Drewry, 365 F.3d 957, 961 (10th Cir. 2004) (quoting *United States v. Lawrence*, 51 F.3d 150 (8th Cir. 1995).

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[1] *See United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977) ("members of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act"); *State v. Daniels*, 16 P.3d 650, 654 (Wash. Ct. App. 2001); *see also State v. Sebastian*, 701 A.2d 13, 24 n. 28 (Conn. 1997) ("most recent federal cases consider whether the tribe to which a defendant or victim claims membership or affiliation has been acknowledged by the federal government").

B. Petitioner does not meet the definition of "Indian" under the *Drewry* factors.

First, the Court has confirmed that Petitioner is currently not enrolled as a citizen of the Cherokee Nation. *See Exhibit 1* to State's Response. Therefore, he clearly does not meet the first and most dispositive *Drewry* factor to show he meets the federal definition of "Indian." *See Drewry,* 365 F.3d at 960-61.

Next, Petitioner's claims to affiliation with the Cherokee Nation also fail to indicate Petitioner meets the federal definition of "Indian." For example, Petitioner alleges he has applied for citizenship in the Cherokee Nation and this application is currently pending approval.[2] See Application at p. 7 n.9. Petitioner claims this pending application proves "his Cherokee Heritage." *Id.* However, contrary to Petitioner's reliance on this claim, a pending application for citizenship is not one of the factors considered under the above detailed *Drewry* factors which are used for determining recognition by a tribe or the federal government. *See Drewry,* 365 F.3d at 960-61. Petitioner also claims he is "**Indian** because he is **eligible** to become a **member** of **Cherokee Nation** thru his **lineal descent**" and because he is an heir to his allegedly "Indian" ancestors' "**Special estate**" and, thus, is "entitled to the earnings and income from the royalties . . ." of this estate. Application at pp: 4-6. (emphasis in original). However, contrary to Petitioner's reliance on these allegations, eligibility for membership in a tribe and unsupported claims in the property interests of allegedly "Indian" ancestors are also not among the factors considered under the above detailed *Drewry* factors used for considering claims of recognition by a tribe or the federal government. *See Drewry,* 365 F.3d at 960-61. Therefore, Petitioner's assertions of affiliation with the Cherokee tribe or vague allegations of Indian-related

[2] Petitioner provides no documentation supporting his claim that he has applied for citizenship with the Cherokee Nation.

property interests also fail to show that Petitioner meets the federal definition of "Indian" under the *Drewry* factors. Accordingly, the Court also denies his Application on this basis.

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

A. The Supreme Court's Retroactivity Jurisprudence

As a general matter, the Supreme Court does not apply its rulings retroactively to final convictions on collateral review. The Supreme Court's "general rule of nonretroactivity was an exercise of [the] Court's power to interpret the federal habeas statute' to permit "adjusting the scope of federal habeas relief in accordance with equitable and prudential considerations." *Danforth v. Minnesota,* 552 U.S. 264, 278 (2008); *See also Edwards v. Vannoy,* 141 S.C6. 1547, 1554 (2021).[3]

Among those considerations is the reality that applying new decisions retroactively on post-conviction review "seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Edwards,* 141 S.Ct. at 1554 (quoting *Teague v. Lane,* 489 U.S. 288, 309 (1989) (plurality opin.)). As then-Tenth Circuit Judge Gorsuch explained, "[a] criminal conviction is a decisive and portentous event," only achieved after numerous safeguards and procedures to protect the innocent, after which "[w]e then double- and sometimes triple-check the result through our layered appellate system." *Prost v. Anderson,* 636 F.3d 578, 582 (10th Cir. 2011) (internal marks omitted). "The principle of finality" is thus "the idea that at *some* point a criminal conviction reaches an end, a conclusion, a termination." *Id.*

[3] There is also a constitutional dimension because certain new decisions must be applied retroactively under constitutional law but as discussed *infra* n. 4, *McGirt* is not such a decision.

Meanwhile, "the costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application." *Edwards,* 141 S. Ct. at 1555 (quoting *Sawyer v. Smith,* 497 U.S. 227, 272 (1990) (internal marks omitted). The equitable considerations the Supreme Court emphasized in *Edwards* are equally present-if not more so-in the wake of the *McGirt* decision: application of the new ruling "retroactively would potentially overturn decades of convictions obtained in reliance on" previous court cases. *Id.* at 1554. As discussed in *Edwards*:

> [C]onducting scores of retrials years after the crimes occurred would require significant state resources. And a State may not be able to retry some defendants at all because of lost evidence, faulty memory, and missing witnesses. When previously convicted perpetrators of violent crimes go free merely because the evidence needed to conduct a retrial has become stale or is no longer available, the public suffers, as do the victims. Even when the evidence can be reassembled, conducting retrials years later inflicts substantial pain on crime victims who must testify again and endure new trials. In this case, the victims of the robberies, kidnappings, and rapes would have to relive their trauma and testify again, 15 years after the crimes occurred.

Id. at 1554-55 (citations and internal marks omitted).[4]

Given these concerns, the Supreme Court, in the past, applied "a balancing test for determining retroactivity." *Id.* at 1554 (citing *Linkletter v. Walker,* 381 U.S. 618 (1965)). Over time, the Supreme Court refined this test to create a categorical bar on retroactivity with only one limited exception, the "substantive" rules exception. So, after *Edwards,* decisions recognizing new rules of constitutional procedure are never to be applied retroactively to overturn final convictions. *Id.* at 1559-60. Meanwhile, with certain new "substantive" rules-"a rule that particular conduct

[4] Indeed, these very same considerations justify barring long-delayed Indian country claims under laches, as the Oklahoma Court of Criminal Appeals has done in the past, in addition to the general bar on retroactive application. *See Ellis v. State,* 1963 OK CR 88 ¶¶ 5-8, 386 P.2d 326, 328; *Ex parte Wallace,* 81 Okla. Crim. 176, 188, 162 P.2d 205, 211 (1945).

cannot constitutionally be criminalized"-the Supreme Court "usually applies [them] retroactively on federal collateral review." *Id.* at 555 n.3 (citation and emphasis omitted).

Since its decision on retroactivity in *Teague,* the Supreme Court has yet to address whether there exists an exception to the general rule of non-retroactivity in cases such as this, concerning the appropriate *forum* for prosecuting a crime. But "[b]ecause *Teague* tightened the previous standard set forth in *Linkletter,*" earlier decisions holding a rule was *not* retroactive are instructive, even if "pre-*Teague* decisions holding that a rule *is* retroactive are not as relevant . . ." *Id.* at 1558 n.5.

One such case is *Gosa v. Mayden,* 413 U.S. 665 (1973), where the Supreme Court declined to apply retroactively its ruling in *O'Callahan v. Parker,* 395 U.S. 258 (1969), that military courts could not try service members for crimes that were not "service connected," but instead these crime must be tried in civilian court. The *Gosa* court explained the inappropriately exercised jurisdiction was not "sufficiently in doubt so as to require the reversal of all such convictions rendered since 1916 . . ." *Gosa,* 413 U.S. at 676.

In so holding, *Gosa* distinguished cases that had been applied retroactively because such cases "dealt with the kind of conduct that cannot constitutionally be punished in the first instance" such that it was "conduct constitutionally immune from punishment in any court"-in other words, what the Court later categorized as retroactive "substantive" rules. *Id.* at 677 (internal marks omitted). By contrast, *Gosa* (like this case) did not involve acts for which the defendant was "immune in any court"; "[t]he question was not whether [the defendant] could have been prosecuted; it was, instead, one related to the forum." *Id.*

Gosa considered three factors in deciding whether to apply *O'Callahan* retroactively. First, *Gosa* held since the purpose of the forum rule for non-service connected crimes was not to substantially improve the "truth-finding function" of the trial, "[t]he purpose behind the rule ... thus does not mandate retroactivity." *Gosa.* at 679-82. Second, *Gosa* considered the reliance interests present regarding the earlier military jurisdictional practices and found that "[t]here was justifiable and extensive reliance by the military and by all others" and held the "reliance factor, too, favors prospectivity," not retroactivity. *Id* at 682. Third, the *Gosa* court examined the effect of retroactivity on the administration of justice, considering the same concerns with attempting to retry past cases expressed in the above quoted language from *Edwards.* In light of these concerns, the *Gosa* court concluded retroactivity was not warranted because "[s]ociety 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 . . ." *Gosa,* 413 U.S. at 685.

B. Oklahoma Court of Criminal Appeals Retroactivity Jurisprudence

Non-retroactivity under state post-conviction law was most closely examined in *Ferrell v. State,* 1995 OK CF 54, 902 P.2d 1113. In *Ferrell,* the Oklahoma Court of Criminal Appeals ("OCCA") explained "[i]t is a general rule of law in Oklahoma that decisions of the highest court are prospective in application unless specifically declared to have retroactive effect," so "a petitioner is not necessarily entitled to retroactive application of the change, especially on collateral review." *Id.* at 1114. The OCCA indicated it was persuaded by the Supreme Court's justifications for its retroactivity holding in *Teague* where the Supreme

Court addressed principles of finality, deterrence, the purposes of collateral review, and the problems created when "a final criminal conviction were subjected to fresh litigation tomorrow and every day thereafter." *Id.* at 114-15.

C. 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* discussed above. *Id.* 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,* 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).

D. The Decision in *McGirt* Should Not Be Applied Retroactively

Here, *McGirt* is "new"[5] in that it was not "*dictated* by precedent existing at the time the defendant's conviction became final" such that its result was "already apparent to all reasonable jurists." *Edwards,* 141 S.Ct. at 1555 (citations and internal marks omitted). This is made clear by the lower court decisions rejecting the disestablishment argument, the forceful four-justice dissent in *McGirt*, and the arguments therein. *Cf. Edwards,* 141 S.Ct. at 1556. Petitioner's conviction became final in 1994 long before the decision in *McGirt*, so considerations of finality and fairness must be taken into account. *See id.* Therefore, the retroactivity principles discussed above should apply.

McGirt does not involve an exception to the general rule against retroactivity. In fact, the *McGirt* court endorsed taking into consideration pre-*McGirt* "reliance interest" through application

[5] To say that *McGirt* is "new" is not to say that the arguments accepted by *McGirt* were previously unavailable as an exception to the state's post-conviction bars. Under state statute, a legal basis was unavailable if it "was not recognized by or could not have been reasonably formulated from a final decision" of an appellate court. 22 O.S 2021 § 1089 (D)(9)(a). Here both the ruling in *McGirt* is "new" in that it was not dictated by prior precedent, and the arguments accepted in *McGirt* were "available" in that they could have been reasonably formulated from prior precedent. In other words, the decision in *McGirt* was neither dictated nor foreclosed by caselaw.

of doctrines such as "procedural bars" and "res judicata" in order "to protect those who have reasonably labored under a mistaken understanding of the law"-precisely the sort of equitable considerations relied upon by courts to decline to apply new judicial decisions retroactively. *Id.* at 2481. Accordingly, a prospective application of *McGirt* is entirely consistent with *McGirt* itself.

Meanwhile, *McGirt* is not an exception to the non-retroactivity rule because continued state jurisdiction does not "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin,* 542 U.S. 348, 352 (2004) (citations and internal marks omitted.). Similarly, *McGirt* does not question the "truth-finding function" of state courts, nor was it based on the determination the state court "lacks fundamental integrity in its truth-determining process." *Gosa,* 413 U.S. at 679-81 (internal marks omitted). In short, declining to apply *McGirt* retroactively here would not result in an incarceration that is fundamentally unjust. Instead of being part of the "substantive" rules exception to the rule against retroactive application of decisions, the *McGirt* decision is more like the situations evaluated in *Gosa* and *Cuch* where the issue involved was the proper *forum* for prosecution of conduct that was unquestionably made criminal by the laws of all forums and where the courts accordingly ruled against retroactivity. In fact, this case presents a stronger case than both *Cuch* and *Gosa* for denial of retroactive application of *McGirt* on post-conviction review since those cases involved federal forums of limited jurisdiction, able to exercise authority only when specifically granted. *Cf Gosa,* 413 U.S. at 702 (Marshall, J. dissenting). *McGirt,* by contrast found preemption of state courts which possess general jurisdiction that would otherwise have the inherent power to prosecute the crimes at issue. *See*

United States v. Prentiss, 206 F.3d 960 967 (10th Cir. 2000); *Application of Poston,* 1955 OK CR 39, ¶ 31, 281 P.2c 776, 784; Okla. Const. art. VII, § 7. Similarly, rather than holding Oklahoma courts inherently lack jurisdiction over crimes such as this, *McGirt* merely held that the exercise of Oklahoma courts undoubted jurisdiction is preempted by the Major Crimes Act. In summary, *McGirt* is not a decision within the exception to the general rule against retroactivity, but instead the Court should apply it prospectively only-in harmony with the equitable principles underlying non-retroactivity, including finality, fairness, reliance interests, and the sound operation of our criminal justice system.

Further, the State has a strong reliance interest in the pre-*McGirt* status quo protected by the general rule against retroactivity, based on over a century of court cases and unquestioned exercise of jurisdiction. *See Gosa,* 413 U.S. at 682; *Cuch,* 79 F.3d at 995; *McGirt,* 140 S.C.t at 2484-85, 2496, 2500 (Roberts, C.J., dissenting). Principal among these interests is that applying *McGirt* "retroactively would potentially overturn decades of convictions in reliance on" prior legal understandings. *Edwards,* 141 S.Ct. at 1554; *see also McGirt,* 140 S.Ct. at 2500 (Roberts, C.J., dissenting; *Gosa,* 413 U.S. at 683-85. Beyond the sheer cost of retrial in other forums, society will have to shoulder the burden of guilty individuals going free because of statutes of limitations, stale or lost evidence, faded memories, witnesses who have died or no longer can be found, or resource limitations. *Edwards,* 141 S.Ct. at 1554-55; *McGirt,* 140 S.Ct. at 2501 (Roberts, C.J. dissenting); *Gosa,* 413 U.S. at 683-85; *Cuch,* 79 F.3d at 993. If any of those who are released reoffend, including in vengeance against their original victims or witnesses, the cost to society will be great and trauma on the victims incalculable. *See Edwards,* 141 S.Ct. at 1554-55; *Cuch,* 79 F.3d at 993.

Even in cases which can be retried, the victims will have to relieve the horror of their darkest moments through trial and testimony. *See Edwards,* 141 S.Ct. at 1554-55.

Further, the upheaval caused by the retroactive application of *McGirt* is greater than the expected upheaval which prevented retroactive application in *Gosa* and *Cuch.* In *Gosa,* the Supreme Court ruled against retroactivity because it would jeopardize certain military convictions between 1916 and 1969. *Gosa,* 413 U.S. at 683-85 & n.7. In *Cuch,* the reservation ruling of *Hagen* was not made retroactive due to concerns about the federal prosecutions secured between 1976 and 1994 on a portion of a sparsely-populated reservation. *Cuch* 79 F.3d at 993. Here, the State has convicted tens of thousands of Indians between statehood in 1907 and *McGirt* in 2020. The State need not further elaborate, regarding the disruption caused by the *McGirt* decision that weighs heavily against creating a new exception to the rule against retroactive application, since this disruption is happening before our eyes.

For the foregoing reasons, this Court holds that *McGirt* and its progeny should not be retroactively applied on State post-conviction review to vacate convictions that became final before those decisions were rendered. This Court also makes clear that any such decision is based on state law, interpreting and equitably applying state post-conviction statutes, and any reliance upon federal decisions is for the purpose of persuasive guidance only for the Court's determinations of state law.

IV. PETITIONER'S CLAIM IS BARRED BY 22 O.S. § 1086

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

> Other defendants [aside from those who choose not to seek relief] who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.[1]
>
> [1] For example, Oklahoma appears to apply a general rule that "issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Logan v. State*, 2013 OKCR 2, ¶ 1, 293 P.3d 969, 973. . . .

McGirt, 140 S. Ct. at 2479.

It is axiomatic that Oklahoma law limits the grounds for relief that may be raised in a post-conviction application to those that were not, and could not have been, raised on direct appeal. 22 O.S.2011, § 1086; *see, e.g.*, *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973; *Woodruff v. State*, 1996 OK CR 5, ¶ 2, 910 P.2d 348, 350; *Berget v. State*, 1995 OK CR 66, ¶ 3, 907 P.2d 1078, 1080-81. Section 1086 of Title 22 states:

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceedings the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court founds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

Petitioner's allegation that Oklahoma jurisdiction was preempted by federal law should have been appealed. The Petitioner did not raise this claim as a proposition for relief on appeal, and is therefore barred by § 1086. The OCCA has held that it will not review claims "that could have or should have been brought at some previous point in time without proof of adequate grounds to excuse the delay." *Id.*, 1991 OK CR 124, ¶ 8, 823 P.2d at 373; *see also Carter v. State*, 1997 OK CR 22, ¶ 2, 936 P.2d 342, 344 ("The application of the act is limited to only those claims which, for whatever reason, could not have been raised on direct appeal.").

The Post-Conviction Procedure Act explicitly contemplates challenges to subject-matter jurisdiction. 22 O.S. 2011, § 1080(b). Yet, section 1086 provides that, "**All** grounds for relief available to an applicant under this act **must** be raised in his original supplemental or amended application. . . . or in any other proceeding the applicant has taken to secure relief [such as direct appeal]" without exception for jurisdictional claims. 22 O.S.2011, § 1086 (emphasis added). Petitioner and this Court are bound by the plain language of the statute. Therefore, since Petitioner failed to raise this jurisdictional claim on direct appeal, the Court finds this claim is waived and, thus, procedurally barred.

V. PETITIONER'S CLAIM THAT THIS COURT LACKED SUBJECT MATTER JURISDICTION IS BARRED BASED ON THE DOCTRINE OF LACHES

The Oklahoma Court of Criminal Appeals has long held that, pursuant to the laches doctrine, "one cannot sit by and wait until lapse of time handicaps or makes impossible the determination of the truth of a matter, before asserting his rights." *Thomas v. State*, 1995 OK CR 47, ¶ 11, 903 P.2d 328, 331 (quotation marks omitted, alteration adopted) (collecting cases); *see also Berry v. Anderson*, 1972 OK CR 192, ¶ 4, 499 P.2d 959, 960 (barring claim based on laches even where it was "apparent" that the petitioner "would have been entitled to release" had he earlier brought his challenge); *Application of Smith*, 1959 OK CR 59, ¶ 10, 339 P.2d 796, 797-98 ("The right to relief . . . may be lost by laches, when the petition for habeas corpus is delayed for a period of time so long that the minds of the trial judge and court attendants become clouded by time and uncertainty as to what happened, or due to dislocation of witnesses, the grim hand of death and the loss of records the rights sought to be asserted have become mere matters of speculation, based upon faulty recollections, or figments of imagination, if not outright falsifications.").

The laches doctrine applies to collateral attacks upon convictions, including by means of an application for post-conviction relief. *Thomas*, 1995 OK CR 47, ¶ 15, 903 P.2d at 332; *see also Paxton v. State*, 1995 OK CR 46, ¶ 8 903 P.2d 325, 327 ("We hold, therefore, that the doctrine of laches has been and continues to be applicable, in appropriate cases, to collateral attacks upon convictions, whether by means of an extraordinary writ, as in former times, or by means of an application for post-conviction relief."). "Thus, the doctrine of laches may prohibit the consideration of an application for post-conviction relief where a petitioner has forfeited that right through his own inaction." *Paxton*, 1995 OK CR 46, ¶ 8, 903 P.2d at 327.

The OCCA has "emphasize[d] that the applicability of the doctrine of laches necessarily turns on the facts of each particular case." *Id.* The question is whether the post-conviction applicant has provided "sufficient reason" for the delay in seeking post-conviction relief. *See id.*, 1995 OK CR 47, ¶ 16, 903 P.2d at 332 (holding that "Petitioner's contention that depression caused by incarceration for subsequent convictions have prevented him from seeking relief . . . for fifteen years is not sufficient reason to overcome the doctrine of laches"). Finally, the OCCA has refused to place a threshold burden upon the State to demonstrate actual prejudice before laches applies. *Id.*, 1995 OK CR 47, ¶ 14, 903 P.2d at 332.

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

> Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are "fre[e] to say what we know to be true . . . today, while leaving questions about . . . reliance interest[s] for later

proceedings crafted to account for them." *Ramos*, 590 U. S., at ——, 140 S.Ct., at 1047 (plurality opinion).
McGirt, 140 S. Ct. at 2481.

Here, Petitioner committed these crimes in 1993. Yet, all of the facts underlying his jurisdictional claim—that is, his evidence that he is an "Indian" and his assertion that his offense was committed in Indian Country-were available to him at every prior stage of his criminal case, including at the time of the crimes, at trial, and at the time of his appeal. Indeed, the OCCA has on multiple occasions applied laches to jurisdictional claims. In *Ex parte Wallace*, 81 Okla. Crim. 176, 178-79, 162 P.2d 205, 207 (1945), the defendant filed a state habeas petition three years after his guilty plea alleging that the federal court had exclusive jurisdiction over his crime because he and his rape victims were Comanche Indians and the crime occurred on a restricted allotment. Although the OCCA did not invoke the word "laches," it ultimately concluded that "at this late date" it would not consider the defendant's jurisdictional attack, noting in particular that the statute of limitations for any federal action against the defendant had lapsed.[6] *Ex parte Wallace*, 81 Okla. Crim. at 179, 188, 162 P.2d at 207, 211.

Similarly, in *Allen v. Raines*, 1961 OK CR 41, ¶¶ 6-8, 360 P.2d 949, 951, the OCCA applied laches to a state habeas petitioner's claim that he was not furnished counsel at the time of his guilty plea sixteen years prior. Importantly, at the time, the OCCA treated the denial of counsel as a jurisdictional issue. *See Allen*, 1961 OK CR 41, ¶ 6, 360 P.2d at 951 ("We have held that a trial court may lose jurisdiction to pronounce judgment by failure to complete the court by appointing counsel to represent the accused whose the accused has not effectively waived his constitutional

[6] Laches does not require that there be no possibility of a retrial. In this case, it is patently unfair that Petitioner sat on a potentially meritorious jurisdictional challenge for *twenty-eight* years.

right to the assistance of counsel."); *see also Application of Smith*, 1959 OK CR 59, ¶ ¶ 1, 10-14, 339 P.2d 796, 798-99 (barring based on laches jurisdictional claim of denial of counsel); *Ex parte Paul*, 93 Okla. Crim. 300, 301, 227 P.2d 422, 423 (1951) (same).[7] Petitioner has provided no reason whatsoever for his inaction, let alone "sufficient" reason. *Paxton*, 1995 OK CR 47, ¶ 16, 903 P.2d at 332. Again, this Court accepts the *McGirt* court's invitation to apply laches to belated jurisdictional claims.

Further, the State is not required to show prejudice from Petitioner's inaction for laches to apply. *Paxton*, 1995 OK CR 47, ¶ 14, 903 P.2d at 332. Given the State's legitimate reliance on the inaction of the Tribes and Petitioner himself (and that of the hundreds—if not thousands—of others inmates who will seek relief after *McGirt*), this Court refuses to consider this belated jurisdictional challenge. *See City of Sherrill*, 544 U.S. at 216-17; *cf. also McGirt*, 140 S. Ct. at 2500 (Roberts, C.J., dissenting) ("[T]he Court's decision draws into question thousands of convictions obtained by the State for crimes involving Indian defendants or Indian victims across several decades.").

At bottom, laches is an equitable doctrine. *See Sullivan v. Buckhorn Ranch P'ship*, 2005 OK 41, ¶ 32, 119 P.3d 192, 202 ("Laches is an equitable defense to stale claims. . . . Application of the doctrine is discretionary depending on the facts and circumstances of each case as justice requires."). Under these circumstances, the Court finds it is grossly inequitable and unjust to

[7] This Court has on occasion not applied laches to delayed jurisdictional claims. *See, e.g., Ex parte Ray*, 87 Okla. Crim. 436, 441-44, 198 P.2d 756, 759-60 (1948) (considering on the merits claim of deprivation of counsel before denying based on laches delayed habeas petition); *Ex parte Motley*, 86 Okla. Crim. 401, 404-09, 193 P.2d 613, 615-17 (1948) (same). But this is not surprising, as laches is applied on a case-by-case basis. *See Paxton*, 1995 OK CR 46, ¶ 8, 903 P.2d at 327. The facts of this case warrant application of laches.

reward Petitioner with consideration of his belated jurisdictional claim and hereby finds Petitioner's jurisdictional claim is barred by laches.

VI. AN EVIDENTIARY HEARING IS NOT NECESSARY

Section 1084 of the Post-Conviction Procedure Act provides that an evidentiary hearing may be had where the application cannot be disposed of on the pleadings or where there is a material issue of disputed fact. 22 O.S.2011, § 1084. "[A petitioner] has no constitutional or statutory right to an evidentiary hearing on post-conviction review unless his application cannot be disposed of on the pleadings and the record or a material issue of fact exists." *Fowler v. State*, 1995 OK CR 29, ¶ 8, 896 P.2d 566, 566; *see also Logan*, 2013 OK CR 2, ¶¶ 20–22, 293 P.3d at 978. Here, a request for a hearing contains no material dispute for which an evidentiary hearing is necessary to resolve because, as discussed herein, consideration of Petitioner's claims may be disposed on the record and as a matter of law. *See* 22 O.S.2011, § 1083(C). Therefore, this Court declines to conduct an evidentiary hearing.

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

SO ORDERED this 12 day of July, 2021.

DAWN MOODY
JUDGE OF THE DISTRICT COURT

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:

Anthony Lyn Kimbrough
Lawton Correctional Facility
8607 SE Flower Mound Road,
Lawton, OK 73501-976
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

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