No.

IN THE

Supreme Court of the United States

GLEN D. GORE,

Petitioner,

v.

STATE OF OKLAHOMA

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), applies retroactively to convictions that were final when *McGirt* was decided.

RULE 14.1 (b) STATEMENT

The parties in the Oklahoma Court of Criminal Appeals were Petitioner Glen D. Gore and Respondent State of Oklahoma. The following is a list of all directly related proceedings:

State of Oklahoma v. Glen D. Gore, PC-2021-244 (Okla. Crim. App. Sept. 10, 2021).

State of Oklahoma v. Glen D. Gore, CF-01-126 (Pontotoc Cnty., Okla. Dist. Ct. Sept. 14, 2021).

State of Oklahoma v. Glen D. Gore, CF-01-126 (Pontotoc Cnty., Okla. Dist. Ct. Mar. 17, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Glen Gore respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals, which is unpublished, is reprinted in the Appendix (Pet. App.) at Pet. App. 1a–3a. In that decision, the Court of Criminal Appeals adopted and decided the appeal based on the reasoning of its prior decision in *State of Oklahoma ex rel. Matloff v. Wallace*, which is reprinted in the Appendix at Pet. App. 11a–30a. The Appendix also includes two unpublished directly related decisions of the Pontotoc County, Oklahoma District Court, one issued on September 14, 2021, and the other issued on March 17, 2021, which are reprinted in the Appendix at Pet. App. 4a –7a and at Pet. App. 8a –10a, respectively.

JURISDICTION

Petitioner Gore invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a), having timely filed this petition within ninety days of the judgment entered by the Oklahoma Court of Criminal Appeals on September 10, 2021.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent terms of the following constitutional and statutory provisions are set forth in the appendix: the Supremacy Clause (Pet. App. 11a); the Due Process Clause (Pet. App. 12a); the Indian Commerce Clause (Pet. App. 13a); the Treaty Clause (Pet. App. 14a); the Major Crimes Act, 18 U.S.C. § 1153 (Pet. App. 15a); Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267 (Pet. App. 16a); Treaty of Pontotoc Creek, ratified Oct. 20, 1832, 7 Stat. 381 (Pet. App. 17a); Treaty with the Choctaw and Chickasaw, ratified June 22, 1855, 11 Stat. 611 (Pet. App 18a).

INTRODUCTION

In *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), this Court held that land in Oklahoma Congress long ago recognized as belonging to Indians was "Indian country" for purposes of the Major Crimes Act and, consequently, that the State of Oklahoma has no authority to prosecute Indians for crimes committed on that land. *Id.* at 2478–80. Nonetheless, Oklahoma continues to imprison people convicted by its state courts on the ground that *McGirt* is not retroactive. Petitioner Gore is one of the people currently imprisoned for conduct that Oklahoma had no authority to criminalize, prosecute, or punish, based on a judgment of conviction entered by an Oklahoma court that lacked jurisdiction.

STATEMENT OF THE CASE

A. The Indian Major Crimes Act.

In 1885, Congress enacted the Major Crimes Act ("MCA"), Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 385, codified at 18 U.S.C. § 1153. That Act confers "exclusive jurisdiction" on the federal government to prosecute various major felonies committed by an "Indian" in "Indian country." 18 U.S.C. § 1153 (Pet. App. 15a). Indian country includes lands reserved for tribes. *See Donnelly v. United States*, 228 U.S. 243, 269 (1913) ("[N]othing can more appropriately be deemed 'Indian country,' . . . than . . . an Indian reservation.").

The MCA gives the federal government exclusive jurisdiction over crimes committed by Indians in Indian country. States lack jurisdiction to prosecute "offenses covered by the Indian Major Crimes Act." *Negonsott v. Samuels*, 507 U.S. 99, 102–03 (1993) (citations omitted); *see McGirt*, 140 S. Ct. at 2459 ("State courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country.'" (quoting *Negonsott*, 507 U.S. at 102–03)).

B. Chickasaw Nation Reservation.

Until the early 19th century, members of the Chickasaw Nation lived in Mississippi. In 1832, the Chickasaw signed the Treaty of Pontotoc Creek, under which they ceded their lands in Mississippi and

agreed to relocate, after the ratification of the treaty, to unspecified land west of the Mississippi River. Treaty of Pontotoc Creek, Arts. I, IV, Oct. 20, 1832, 7 Stat. 381, 382 (Pet. App. 17a). The treaty was ratified on October 20, 1832. *Id.* The Chickasaw initially merged with the Choctaws but separated in 1856 to form the Chickasaw Nation. Treaty with the Choctaw and Chickasaw, preamble and Arts. I, II, June 22, 1855, 11 Stat. 611, 611-12 (Pet. App. 18a). Under the treaty of dissolution, the Chickasaw received their own land, *see id.* Art. II.[1] The Chickasaw placed their headquarters on that land in Ada, Oklahoma. *See Geographic Information*, Chickasaw Nation, https://www.chickasaw.net/our-nation/government/geographic-information.aspx (last visited Nov. 27, 2021).

In 1907, Oklahoma joined the United States as the forty-eighth state. *See* Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267 (Pet. App. 16a). As a condition of admission to the Union, Oklahoma "forever disclaim[ed] all right and title in or to any unappropriated public lands lying within the boundaries" of land "owned or held by any Indian, tribe, or nation[.]" *Id.* §3 (Pet App. 16a). Subject only

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[1] The treaties between the federal government and the Chickasaw do not expressly refer to the Chickasaw lands as a "reservation," instead stating that they establish "the boundaries of the Choctaw and Chickasaw country." 11 Stat. 611 (Pet. App. 18a). That language is "similar" [to] "language in treaties from the same era" that has been held "sufficient to create a reservation." *McGirt*, 140 S. Ct. at 2461.

to the power of the federal government to extinguish title, those lands "shall be and remain subject to the jurisdiction, disposal, and control of the United States." *Id.*

Because the provision "prohibit[ing] state jurisdiction over Indian Country" has never been altered, "the Federal Government still has exclusive jurisdiction over Indian Country." *C.M.G. v. State*, 594 P.2d 798, 799 (Okla. Crim. App. 1979); *McGirt*, 140 S. Ct. at 2459 ("State courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country.'"). Accordingly, since its inception, the Chickasaw Nation has been and continues to be Indian country.

C. This Court's decision in *McGirt*.

Notwithstanding the MCA, Oklahoma continued to prosecute Indians who allegedly committed covered major crimes in Indian country. *McGirt*, 140 S. Ct. at 2470 (noting "Oklahoma's long historical prosecutorial practice of asserting jurisdiction over Indians in state court, even for serious crimes"). This Court's decision in *McGirt* ended that practice.

In that case, Oklahoma had convicted McGirt, an enrolled member of the Seminole Nation of Oklahoma, for three sexual offenses committed on the Creek Reservation. *Id.* at 2459. McGirt argued in post-

conviction proceedings that, under the MCA, "the State lacked jurisdiction to prosecute him." *Id.*

This Court agreed. In doing so, the Court rejected Oklahoma's argument that the MCA did not apply because the land on the reservation had become the property of Oklahoma. *Id.* at 2468. The Court held that Congress had established the reservation, no subsequent act of Congress had disestablished it, and neither historical disregard for the autonomy of reservations nor changes in demographics was sufficient to disestablish the reservation. *Id.* at 2462–68. The Court also rejected Oklahoma's argument that significant portions of Oklahoma were, and had always been, exempt from the MCA. *Id.* at 2477. Accordingly, the Court concluded, under the MCA, "only the federal government, not [Oklahoma]," has authority "to try tribal members for major crimes" on Oklahoma reservations. *Id.* at 2480.

The Court acknowledged that its holding might have significant repercussions, including the possibility that "thousands of Native Americans" who had been prosecuted by Oklahoma might "challenge the jurisdictional basis of their state-court convictions." *Id.* at 2479 (citation omitted). In that regard, the Court noted that "well-known state and federal limitations on postconviction review in criminal proceedings" might impose "significant procedural obstacles" to relief. *Id.*; *see also id.* at 2479 n.15. The Court did not, however, rule on what

limitations, if any, would apply since the issue was not before it.

D. Prior proceedings in this case.

In 2001, Oklahoma charged Gore with committing a murder in 1982 in Ada, Oklahoma, on the Chickasaw reservation. *See* Docket, *Oklahoma v. Gore*, Case No. CF-2001-00126 (Pontotoc Cnty., Okla. Dist. Ct.). Later in 2003, Gore was found guilty and sentenced to death. *See id.* The Oklahoma Court of Appeals reversed the conviction and remanded for a new trial. *Gore v. State*, 119 P.3d 1268 (Okla. Crim. App. 2005). On retrial in 2006, Gore was again found guilty of first-degree murder. *See* Docket, *Oklahoma v. Gore*, Case No. CF-2001-00126 (Pontotoc Cnty., Okla. Dist. Ct.). Gore was sentenced to life without parole. *Id.*

On September 23, 2020, Gore applied to the Oklahoma state court for post-conviction relief based on *McGirt*. He asserted that he was a citizen of the Chickasaw Nation at the time of the offense and that the crime occurred in Pontotoc County, which is Indian country. Gore sought relief on the ground that *McGirt* established Oklahoma lacked jurisdiction to prosecute him for first-degree murder in Indian country. *See* Application for Post-Conviction Relief, (Sept. 23, 2020).

In opposition, Oklahoma argued that *McGirt* was not retroactive and applies only to offenses

committed in the Muscogee Creek Nation Reservation. *See* State Response to Application for Post-Conviction Relief, CF-2001-126, at 2–4. Oklahoma also asserted that Gore had the burden to establish that he was a member of the Chickasaw at the time of the offense in 1982. It did not contend, however, that Gore did not qualify as an Indian at that time. *Id.* at 2–3.[2]

The District Court for Pontotoc County granted Gore's application. It found that Gore qualifies as an

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[2]A defendant qualifies as Indian if the person (1) has "some Indian blood" and (2) is a member of, or affiliated with, an Indian tribe. *See, e.g.*, *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015). Gore is fifty percent Chickasaw by blood, thus meeting the blood quantum requirement.

In 1982, the time of Gore's alleged offense, the Chickasaw Nation did not have a formal means for establishing citizenship. *See* Arrell M. Gibson, *The Chickasaws* 308 (1972) ("The Chickasaw constitution and laws no longer were operative, [after the 1898 Curtis Act, and tribal citizens were subject to administrative decrees and to the laws of Congress[.]"). Affiliation and membership were a matter of "custom[]." *United States v. Rogers*, 45 U.S. 567, 573 (1846). Gore lived as a member of the Chickasaw community in 1982.

In its 1983 Constitution, the Chickasaw defined its members to include all "Chickasaw Indians by blood whose names appeared" on the final rolls published in 1906, as well as "their lineal descendants." *See* Constitution, Chickasaw Nation, Art. II, Section 1. It therefore retroactively recognized as citizens all Chickasaw members in 1906 and their lineal descendants. Gore falls into that category and formally obtained confirmation of his pre-existing citizenship in 1986.

Indian who allegedly committed a major crime on the Chickasaw Nation Reservation, and accordingly that under *McGirt* that Oklahoma did not have jurisdiction to prosecute Gore. (Pet. App. 9a). On appeal, the Oklahoma Court of Criminal Appeals reversed. (Pet. App. 2a). In doing so, the court relied on its own prior decision in *State ex rel. Matloff v. Wallace*, 497 P.3d 686 (Okla. Crim. App. 2021), which held that *McGirt* is not retroactive. (Pet. App 29a-30a).

In *Matloff*, the court held that whether *McGirt* is retroactive depends on Oklahoma's doctrine, which "draw[s] on, but [is] independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus[.]" (Pet. App. 14a). As under the federal doctrine, the Oklahoma retroactivity doctrine requires that "a new substantive rule [apply] to final convictions if it place[s] certain primary (private) conduct beyond the power of the Legislature to punish, or categorically bar[s] certain punishments for classes of persons because of their status (capital punishment of persons with insanity or intellectual disability, or juveniles, for example)." (Pet. App. 15a). But a new rule of "criminal procedure" does "not apply retroactively to convictions that are final, with a few narrow exceptions." *Id.*

Applying that framework, the *Matloff* court held that *McGirt* is not retroactive because it was procedural, not substantive. According to the Court of Criminal Appeals, "*McGirt* did not 'alter[ ] the range of conduct or the class of persons that the law

punishes,'" (Pet. App. 23a), but merely "decided which sovereign must prosecute major crimes committed by or against Indians within its boundaries[.]" *Id.* Asserting that "the extent of state and federal criminal jurisdiction affected 'only the manner of determining the defendant's culpability[,]'" the court held that *McGirt* announced a procedural rather than substantive rule. *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).[3]

REASONS FOR GRANTING THE WRIT

In *McGirt,* this Court held that the MCA confers exclusive jurisdiction on the federal government over covered crimes, thereby overturning Oklahoma's longstanding practice of prosecuting Indians for major crimes committed in Indian country. *McGirt*, 140 S. Ct. at 2460–82. The rule announced in *McGirt* is substantive because it does not merely dictate procedures Oklahoma must follow to prosecute crimes covered by the MCA, but rather prohibits Oklahoma from prosecuting or punishing the conduct at all. *Id.* at 2460, 2478–82. Under this Court's precedents, decisions announcing substantive rules apply retroactively. *See, e.g.*, *Montgomery v. Louisiana*, 577 U.S. 190, 200–01 (2016).

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[3] After being granted post-conviction relief, Gore was indicted by a federal grand jury for one count of murder and one count of penetrative rape in the Eastern District of Oklahoma. *See* Indictment, *United States v. Gore*, 6:21-cr-00119 (E.D. Ok. Apr. 16, 2021). That case is pending.

In refusing to vacate Gore's conviction, the Oklahoma Court of Criminal Appeals reasoned that the rule announced in *McGirt* is procedural because it merely shifts prosecutions for covered major crimes from state court to federal court. (Pet. App. 23a). The *Matloff* court's reasoning is wrong.

Under *McGirt*, Oklahoma has no authority to prosecute an Indian under state law for a crime covered by the MCA committed in Indian country. It is true that the federal government may prosecute an Indian based on the same alleged underlying conduct, but that prosecution is for violating a federal law. The MCA and state criminal laws are separate and independent. They derive from separate sovereigns. Indians cannot be punished for committing a state law crime in Indian country based on alleged conduct that falls within the MCA. A rule that places conduct beyond the power of a state to punish is, in fact, substantive. *See Teague v. Lane*, 489 U.S. 288, 307 (1989).

The question presented by this petition is important and has significant repercussions for the many Indians who have been prosecuted under laws that did not govern their conduct and convicted in courts that lacked jurisdiction.

A. *McGirt* applies retroactively because it is a substantive rule.

By holding that states lack the power to punish Indians for major offenses committed in Indian country, *McGirt* announced a substantive rule that "alter[ed] the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 352 (citation omitted). *McGirt* therefore applies retroactively.

1. New substantive rules apply retroactively.

Whether a new rule applies on collateral review to cases in which a final judgment of conviction had been entered before the rule was announced turns on whether the new rule is substantive or procedural. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1562 (2021) ("[N]ew substantive rules apply . . . retroactively on federal collateral review."). A rule is substantive if it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311 (internal quotation marks omitted). In other words, a substantive rule "alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353 (citation omitted). Accordingly, substantive rules include those that "place particular conduct or persons . . . beyond the State's power to punish." *Id.* at 352

In contrast, procedural rules dictate the process that must be followed to impose a punishment. *Montgomery,* 577 U.S. at 201. A procedural rule therefore does not define or limit the state's power to criminalize particular conduct or to impose particular penalties. It does not question the right of the state to prosecute and convict the defendant for the crime alleged. Instead, a procedural rule determines the process that must be followed in prosecuting a defendant. *Id.*

The rationale for applying substantive rules but not procedural rules retroactively is clear and compelling. Where a rule is substantive, a person convicted before the rule was announced "stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352 (quoting *Bousley v. United States*, 523 U.S 614, 620 (1998)). In other words, when a state "enforces a proscription or penalty" in violation of a substantive rule, "the resulting conviction or sentence is, by definition, unlawful." *Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016).

In contrast, violation of a procedural rule does not call into question the state's power to criminalize particular conduct or to impose a particular punishment. Rather, a procedural violation goes only to the process that the state followed in obtaining a conviction and imposing punishment. *Id.* at 200–03.

Montgomery illustrates the distinction between substantive and procedural rules well. There, the Court considered whether *Miller v. Alabama*, 576 U.S. 460 (2012), should be applied retroactively. In *Miller*, the Court held that "a juvenile convicted of a homicide offense [may] not be sentenced to life in prison without [the possibility of] parole, absent consideration" of the special characteristics of youth and the defendant's circumstances. *Montgomery*, 577 U.S. at 193. Accordingly, the issue presented in *Montgomery* was whether *Miller's* limitation on the circumstances under which a state may impose a sentence of life without parole on a juvenile was substantive or procedural.

Reiterating that a rule is substantive if it "forbids 'criminal punishment of certain primary conduct' or prohibits 'a certain category of punishment for a class of defendants because of their status or offense,'" *id.* at 206 (internal citation omitted), the Court explained that the rule announced in *Miller* is substantive because it prohibits a category of punishment (life imprisonment without parole) on a class of offenders (juveniles convicted of a homicide) absent express consideration of the special characteristics of youth and the defendant's circumstances. *Id.* at 208–09.

The *Montgomery* Court acknowledged that *Miller* has a procedural component because it specifies a procedure that must be followed, namely that the sentencing court must "consider a juvenile offender's youth and attendant characteristics before

determining that life without parole is a proportionate sentence." *Id.* at 209–10. But the Court rejected the notion that a rule is procedural simply because it includes a procedural requirement. *Id.* at 210. In that regard, the Court emphasized that *Miller* created a substantive right for a juvenile not to be subject to a sentence of life without parole absent special circumstances. *Id.* at 208. That right is separate and distinct from the procedures that must be followed for determining whether those special circumstances are present. *Id.*

2. *McGirt* is substantive and therefore retroactive.

a. Under these principles, *McGirt* established a substantive rule because it did not merely specify what procedures Oklahoma must follow in prosecuting Indians for committing in Indian country crimes subject to the MCA, but rather confirmed that Oklahoma lacks authority to enforce certain laws in Indian territory at all because eastern Oklahoma falls within the MCA. *See McGirt*, 140 S. Ct. at 2482. Only the federal government may prosecute an Indian for crimes falling covered by the MCA and that federal prosecution is for violating federal law. *See id.* at 2476–77. In substance, then, Oklahoma has no authority to prosecute or punish an Indian for committing in Indian Country a crime falling within the MCA. *Id.* at 2469.

McGirt thus "place[d] particular conduct or persons . . . beyond the State's power to punish." *Schriro*, 542 U.S. at 352. *McGirt* establishes that Oklahoma cannot punish Indians who commit major crimes in Indian country. By conferring "exclusive jurisdiction" on the federal government, 18 U.S.C. § 1153, the MCA preempts Oklahoma's power to punish an Indian for committing a covered crime in Indian country. *See United States v. John*, 437 U.S. 634, 651 (1978) ("[Section] 1153 ordinarily is pre-emptive of state jurisdiction when it applies. . . ."); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 359 (1962) (reversing denial of habeas to Indian charged with state crime committed on a reservation because the state court "had no jurisdiction to try him for that offense").

Indeed, this Court necessarily recognized in *McGirt* itself that the rule it announced is retroactive. There, McGirt raised his challenge to his Oklahoma conviction on collateral review. 140 S. Ct. at 2459. As this Court has explained, retroactivity is a "threshold question in every habeas case." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Accordingly, by concluding that Oklahoma lacked the authority to convict McGirt, the Court implicitly determined that the rule it announced is retroactive.

Although not decided until 2020, *McGirt* establishes that Oklahoma lacked the power to punish Gore in 2006 for his alleged 1982 offense. "[W]hen this Court construes a statute, it is explaining its

understanding of what the statute has meant continuously since the date when it became law." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). Accordingly, when this Court held that the MCA provides exclusive federal jurisdiction over the crimes enumerated within the MCA, that ruling determined what the MCA has meant since its enactment in 1885. Therefore, since the 19th century, Oklahoma has not had authority to criminalize or prosecute Indians for crimes falling with the MCA, and the state courts entering convictions based on such state law prosecutions have not had the power to do so.

b. In refusing to apply *McGirt* retroactively, the *Matloff* Court suggested that it was not bound by this Court's approach to retroactivity. Instead, it applied its own "independent" retroactivity doctrine. (Pet. App. 16a). The *Matloff* Court erred in adopting this approach.

As this Court explained in *Montgomery*, the "retroactivity of new substantive rules is best understood as resting upon constitutional premises." 577 U.S. 190, 200. That constitutional doctrine is "binding on state courts." *Id.* Accordingly, state courts must apply new substantive rules retroactively in their own state court proceedings. *Id.* at 204 ("If a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings.").

It does not matter in this regard that *Montgomery* announced a substantive rule of constitutional law whereas *McGirt* interpreted federal statutes and treaties. Under the Supremacy Clause, federal laws and treaties are as binding on state courts as the Constitution. *See* U.S. Const. art. VI (Pet. App. 11a) ("[T]he laws of the United States . . . and all treaties made, . . . under the authority of the United States, shall be the supreme law of the land[.]").

New substantive rules based on the interpretation of federal statutes and treaties that "places particular conduct or persons . . . beyond the State's power to punish" render state laws purporting to impose punishment in those situations unlawful. *Schriro*, 542 U.S. at 352. Thus, under the Supremacy Clause, "[i]f a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'" *Montgomery*, 577 U.S. at 204–05. Accordingly, a state court is just as obliged to apply retroactively a new substantive rule of federal statutory law as a new substantive rule of Constitutional law. The *Matloff* court therefore erred by concluding that it could apply a state law test, instead of the federal retroactivity test articulated by this Court.

c. Under that controlling federal test, the Oklahoma Court of Criminal Appeals erred in holding that *McGirt* established a procedural rather than a substantive rule. The *Matloff* court reasoned that

McGirt stated a procedural rule because it merely determined in which of two forums (state or federal court) major crimes must be prosecuted—as opposed to restricting the power to punish for those crimes. (Pet. App. 23a).

This analysis fails to recognize that under our federal system the states and the federal government are separate sovereigns. State governments derive their authority from their respective state constitutions, whereas the federal government derives its power from the United States Constitution. *McCulloch v. Maryland*, 17 U.S. 316, 374, 406 (1819). Because they are separate sovereigns, the federal government and the states may each enact their own criminal laws, even where those laws apply to the same conduct. *United States v. Lanza*, 260 U.S. 377, 382 (1922). The Double Jeopardy clause does not prohibit such dual prosecutions for the same conduct in both state and federal court precisely because the states and the federal government are separate sovereigns each of which has the power to criminalize conduct. *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) ("[A] crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign.").

Viewed in light of these fundamental principles of federalism, *McGirt* is substantive because it holds that Oklahoma has no authority at all to punish under state law an Indian for engaging in conduct falling

within the MCA. Only the federal government has the power to criminalize and prosecute that conduct.[4]

These principles likewise demonstrate that the lower court's reliance on this Court's decision in *Gosa v. Mayden*, 413 U.S. 665 (1973) (plurality opinion), is misplaced. In *Gosa*, the Court considered whether its decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969) should be applied retroactively. *Gosa*, 413 U.S. at 668. *O'Callahan* held that a military service member charged with a crime that is not "service connected" may not be tried in a military tribunal and instead is entitled to indictment by a grand jury and a jury trial in civilian court. *Id.* at 667–68 (citing *O'Callahan*, 395 U.S. at 258, 272–73).

With no single opinion drawing a majority, the Court refused to apply *O'Callahan* retroactively. *Id.*

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[4] To be sure, if federal criminal law does not define and punish for a crime covered by the MCA, §1153 directs federal courts to punish "in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense." 18 U.S.C. §1153(b). That provision does not mean that state law instead of federal law applies in those instances and it does not strip the United State of its "exclusive jurisdiction." *Id.* Rather, it means that federal law incorporates state law if there is no separate federal law punishing a particular major crime. Here, the major crime Gore allegedly committed in Indian Country (first degree murder) is a crime under federal law. Consequently, neither Oklahoma nor the United States had authority to prosecute Gore for a violation of state law; he could be prosecuted only for violating federal law.

at 685. In doing so, the Court did not address whether the substantive provisions of the Uniform Code of Military Justice could be applied against *Gosa*. Instead, it addressed only whether the procedural rule identified in *O'Callahan*—which entitled service members charged with non-service connected offenses to be tried in an Article III court rather than a military tribunal—applied retroactively. *Id.* at 675. As the Court put it, "[t]he question was not whether O'Callahan could have been prosecuted; it was, instead, one related to the forum, that is, whether, . . . the exercise of jurisdiction by a military tribunal, pursuant to an act of Congress, over his nonservice-connected offense was appropriate when balanced against the important guarantees of the Fifth and Sixth Amendments." *Id.* at 677.

Here, in contrast, *McGirt* held that Oklahoma has no authority to punish an Indian for an alleged crime committed in Indian country, regardless of what procedures the state might follow. *McGirt*, 140 S. Ct. at 2459. In other words, it is not a matter of in which forum an alleged violation of state law may be prosecuted. Oklahoma lacks any authority to enforce its state laws as to Indians for alleged major crimes committed in Indian country. Any prosecution for the conduct at issue must be pursued under the law of a different sovereign, the United States, not merely in a different court.

d. In short, the rule announced in *McGirt* is substantive because it flatly prohibits states from

prosecuting or punishing an Indian who allegedly committed a major crime in Indian Country. Here, the state court that convicted Gore and sentenced him to prison had no jurisdiction over either Gore or the offense of which it convicted him, and that conviction therefore must be vacated.

B. The question presented is important.

The question presented in this case warrants review because it raises significant issues implicating due process, the federal government's relationship with Native Americans, and state power.

1. Wrongful treatment of Native Americans.

As this Court acknowledged in *McGirt*, Indian tribes have suffered immensely over the years at the hands of both the federal government and the State of Oklahoma. The federal government displaced tribes through force and promises only to break many of those promises. Oklahoma for decades failed to recognize claims to land that rightfully belonged to tribes, and consequently it prosecuted untold numbers of Indians for major crimes under state statutes despite lacking the authority to do so.

Refusing to apply *McGirt* retroactively perpetuates the mistreatment of Native Americans. It allows Oklahoma to continue holding Native Americans wrongfully in prison based on convictions resulting

from prosecutions Oklahoma had no authority to bring, for violating state laws that Oklahoma had no authority to enforce and entered by courts with no jurisdiction. Gore is just one of what is likely hundreds of Indians unlawfully prosecuted and convicted.

2. Interference with Federal-Native American relations.

In *United States v. Lara*, 541 U.S. 193 (2004), this Court held that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" 541 U.S. at 200 (citation omitted). *See also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). This federal power derives from the Constitution's Indian Commerce and Treaty Clauses, which grant the federal government all power over Indian tribes. U.S. Const. art. I, § 8, cl. 3 (Pet. App. 13a) (establishing that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes"); U.S. Const. art. II, § 2, cl. 2 (Pet. App. 14a) (establishing that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties").

The Court recognized this point in *McGirt*, noting that the Constitution "entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the 'supreme Law of the Land.'" *McGirt*,

140 S. Ct. at 2462 (citing U.S. Const. art. I, § 8; quoting *id*. at art. VI, cl. 2.). Oklahoma's refusal to apply *McGirt* retroactively therefore interferes with the federal government's plenary and exclusive power over relationships with tribes.

3. Wrongful deprivation of individual liberty.

According to one source, as of December 31, 2019, 1,887 Native Americans were incarcerated for offenses that occurred in "Indian country." Rebecca Nagle, *Oklahoma's Suspect Argument in Front of the Supreme Court*, ATL. (May 8, 2020), https://www.theatlantic.com/ideas/archive/2020/05/oklahomas-suspect-argument-front-supreme-court/611284/. That source estimates that less than ten percent of those prisoners could meet all requirements for obtaining post-conviction relief, which is not surprising considering that not all of them were convicted of crimes covered by the MCA and many of those who were convicted of covered crimes may not meet the procedural requirements for post-conviction relief. Still, that leaves hundreds of people incarcerated unlawfully.

Contrary to Oklahoma's assertion in its response to Gore's application for post-conviction relief, applying *McGirt* retroactively would not open a loophole by permitting convicted defendants who are not Indians to enroll in a tribe to manufacture grounds to vacate their convictions. State Response to

Application for Post-Conviction Relief, CF-2001-126, at 3. No one qualifies as an Indian for purposes of the MCA without meeting strict criteria. In particular, in order to qualify as an Indian, a person must (1) have "some quantum of Indian blood," and (2) be a member of, or affiliated with, an Indian tribe. *See, e.g.*, *Zepeda*, 792 F.3d at 1110. Both criteria must be met. Consequentially, no person without "some quantum of Indian blood" could qualify as an Indian for purposes of the MCA even if the person somehow attempted to become affiliated with a tribe. Likewise, a person with "some quantum of Indian blood" could not qualify unless the person was a member of or affiliated with a tribe at the time of the offense.

Gore is not attempting to exploit a loophole. He qualifies as an Indian and Oklahoma has imprisoned him for violating a state law that it has no authority to enforce as to him. Gore has not waived his right to post-conviction relief.[5] *McGirt* should be applied

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[5] As noted in *McGirt*, Oklahoma has a general rule that "issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *McGirt*, 140 S. Ct. at 2479 n.15 (quoting *Logan v. State*, 293 P.3d 969, 973 (Okla. Crim. App. 2013)). However, that Oklahoma waiver rule does not apply when, as in this case, the argument raised for the first time on collateral relief depends on "a subsequent change in the law." *Jones v. State*, 704 P.2d 1138, 1140 (Okla. Crim. App. 1985). In any event, the Court of Criminal Appeals did not rely on any waiver rule in its decision but instead decided the case based solely on its determination that *McGirt* does not apply retroactively.

retroactively to provide relief for Gore and the perhaps hundreds of other Indians similarly situated.

CONCLUSION

The petition for a writ of certiorari should be granted.

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December 9, 2021

APPENDIX

APPENDIX A — ORDER OF THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA, FILED SEPTEMBER 10, 2021

THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PC-2021-244

STATE OF OKLAHOMA,

Petitioner,

v.

GLEN D. GORE,

Respondent.

ORDER LIFTING STAY, DENYING MOTION TO DISMISS, REVERSING ORDER GRANTING POST-CONVICTION RELIEF, AND REMANDING FOR FURTHER PROCEEDINGS

The State appealed from an order granting Respondent Gore Post-Conviction relief in the District Court of Pontotoc County, Case No. CF-2001-126, pursuant to *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020). The matter was stayed several times pending completion of the post-conviction appeal record. On August 6, 2021, the State filed a Motion to Lift Stay and Re-Establish Briefing Schedule. On September

3, 2021, Gore filed a Motion to Dismiss for Failure to Properly File Appeal and Brief.

On August 12, 2021, in *State ex rel. Matloff v. Wallace,* 2021 OK CR 21, __ P.3d __, this Court determined that the United States Supreme Court decision in *McGirt,* because it is a new procedural rule, is not retroactive and does not void final state convictions. *See Matloff,* 2021 OK CR 21, ¶¶ 27-28,40.

The conviction in this matter was final before the July 9, 2020 decision in *McGirt,* and the United States Supreme Court's holding in *McGirt* does not apply. The District Court's Order granting relief is hereby **REVERSED** and **REMANDED** for further proceedings consistent with this order and our ruling in *Matloff.*

The stay in this matter is **LIFTED.** Gore's Motion to Dismiss is **DENIED.**

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 10th day of September, 2021.

Appendix A

/s/
SCOTT ROWLAND, Presiding Judge

/s/
ROBERT L. HUDSON, Vice Presiding Judge

/s/
GARY L. LUMPKIN, Judge

/s/
DAVID B. LEWIS, Judge

APPENDIX B — ORDER OF THE DISTRICT COURT IN AND FOR PONTOTOC COUNTY STATE OF OKLAHOMA, FILED SEPTEMBER 14, 2021

IN THE DISTRICT COURT IN AND FOR
PONTOTOC COUNTY, STATE OF OKLAHOMA

Case No. CF-2001-126
PC-2021-244

STATE OF OKLAHOMA,

Plaintiff,

vs.

GLEN D. GORE,

Defendant.

ORDER SPREADING COURT OF CRIMINAL APPEALS MANDATE, VACATING ORDER GRANTING DEFENDANT'S APPLICATION FOR POST-CONVICTION RELIEF AND REINSTATING ORIGINAL JUDGMENT AND SENTENCE

This matter came on for hearing *sua sponte* this September 14, 2021, pursuant to Orders issued by the Oklahoma Court of Criminal Appeals.

The District Court hereby finds as follows:

Appendix B

1. On March 17, 2021, the Pontotoc County District Court entered an Order Granting Defendant's Application for Post-Conviction Relief pursuant to *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020).

2. On September 10, 2021, the Oklahoma Court of Criminal Appeals issued an Order Lifting Stay, Denying Motion to Dismiss, Reversing Order Granting Post-Conviction Relief, and Remanding for Further Proceedings.

3. On August 12, 2021, in *State ex rel. Matloff v. Wallace,* 2021 OK CR 21, __P.3d __ "this Court determined that the United States Supreme Court decision in *McGirt,* because it is a new procedural rule, is not retroactive and does not void final state convictions. *See Matloff,* 2021 OK CR 21, ¶¶ 27-28, 40."

4. The Court further found that "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. The District Court's Order granting relief is hereby REVERSED and REMANDED for further proceedings consistent with this order and our ruling in *Matloff."*

5. On September 10, 2021, the Oklahoma Court of Criminal Appeals issued a Mandate which reversed and remanded this case to the district

court to enter Orders consistent with the Court of Criminal Appeals' findings.

6. Pursuant to the Order and Mandate by the Oklahoma Court of Criminal Appeals issued in this case, the Order Granting Defendant's Application for Post-Conviction Relief is hereby vacated.

7. Pursuant to the Order and Mandate by the Oklahoma Court of Criminal Appeals issued in this case, the previous Judgment and Sentence entered on June 23, 2006, and filed on record on July 12, 2006, is hereby reinstated.

8. The Defendant shall be returned to the Oklahoma Department of Corrections to serve the sentence as previously entered in this matter.

9. All Orders previously entered prior to and including March 29, 2007, are hereby reinstated.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Mandate dated September 10, 2021, shall be spread of record.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Order Granting Defendant's Application for Post-Conviction Relief filed March 17, 2021, is hereby vacated.

Appendix B

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the previous Judgment and Sentence entered on June 23, 2006, and filed on record on July 12, 2006, is hereby reinstated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendant shall be returned to the Oklahoma Department of Corrections to serve the sentence as previously entered in this matter.

Signed this September 14, 2021

/s/
C. Steven Kessinger
District Judge

APPENDIX C — ORDER IN THE DISTRICT COURT IN AND FOR PONTOTOC COUNTY, STATE OF OKLAHOMA, FILED MARCH 17, 2021

IN THE DISTRICT COURT IN AND FOR PONTOTOC COUNTY

STATE OF OKLAHOMA

Case No. CF-01-126

STATE OF OKLAHOMA,

Plaintiff,

vs.

GLEN D. GORE,

Defendant.

Filed: March 17, 2021

ORDER GRANTING DEFENDANT'S APPLICATION FOR POST-CONVICTION RELIEF

This matter came on for hearing on January 15, 2021, on the Defendant's Application for Post-Conviction Relief. The State of Oklahoma appeared by District Attorney, Mr. Paul B. Smith. The Defendant did not appear in person or by counsel.

Appendix C

The Court took this matter under advisement pending the ruling in *Bosse v. State of Oklahoma,* 2021 OK CR 3.

The Court has reviewed the Defendant's Application for Post-Conviction Relief and finds as follows:

1. The Defendant is enrolled as a member or eligible for enrollment as a member in a federally recognized Indian tribe.

2. The crime alleged was committed within Pontotoc County, which has been determined to be a part of the Chickasaw Nation Reservation.

Based upon the Supreme Court's decision in *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020), and the case of *Bosse v. State of Oklahoma,* 2021 OK CR 3, the Court finds that the Defendant's Application for Post-Conviction Relief should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Defendant's Application for Post-Conviction Relief is hereby GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the findings herein are **stayed for twenty (20) days after this Order is filed** to allow the State of Oklahoma to communicate with the United States Attorney for the Eastern District of Oklahoma and the Chickasaw Nation to insure timely

issuance of a warrant or detainer from the proper jurisdiction. See Title 22 O.S. §§845 and 846.

Signed this March 17, 2021.

/s/
C. Steven Kessinger
District Judge

APPENDIX D — RELEVANT STATUTORY PROVISIONS

The Supremacy Clause to the U.S. Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Appendix D

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Appendix D

The Indian Commerce Clause provides:

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

Appendix D

The Treaty Clause provides:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the senators present concur . . . .

Appendix D

The Major Crimes Act provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153(a).

> Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

18 U.S.C. §1153(b)

Appendix D

The Oklahoma Enabling Act of June 16, 1906, provides:

> [T]he 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 . . . .

Oklahoma Enabling Act of June 16, 1906, ch. 3335, §1, 34 Stat. 267, 267.

The Oklahoma Enabling Act of June 16, 1906, further provides:

> [T]he people inhabiting said proposed 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 jurisdiction, disposal, and control of the United States.

Oklahoma Enabling Act of June 16, 1906, ch. 3335, §3, 34 Stat. 267, 270.

Appendix D

The Treaty of Pontotoc Creek provides:

> [T]he Chickasaw nation do hereby cede, to the United States, all the land which they own on the east side of the Mississippi river, including all the country where they at present live and occupy. . . . It is therefore agreed to, by the Chickasaw nation, that they will endeavor as soon as it may be in their power, after the ratification of this treaty, to hunt out and procure a home for their people, west of the Mississippi river, suited to their wants and condition . . . .

Treaty of Pontotoc Creek, Arts. I, IV, Oct. 20, 1832, 7 Stat. 381, 382.

Appendix D

The Treaty with the Choctaw and Chickasaw provides:

> [T]he political connexion heretofore existing between the Choctaw and the Chickasaw tribes of Indians, has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States . . . .
>
> The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country, viz: Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running thence due south to Red River; thence up Red River to the point where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River; thence down said river; thence down said river to the place of beginning.
>
> A district for the Chickasaws is hereby established . . . .

Treaty with the Choctaws and Chickasaws, preamble and Arts. I, II, June 22, 1855, 11 Stat. 611, 611–12.

APPENDIX E — OPINION OF THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA, DATED AUGUST 12, 2021

2021 OK CR 21

Case No. PR-2021-366

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

STATE EX REL. MARK MATLOFF,
DISTRICT ATTORNEY,

Petitioner,

v.

THE HONORABLE JANA WALLACE,
ASSOCIATE DISTRICT JUDGE,

Respondent.

OPINION

LEWIS, JUDGE:

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.**

Appendix E

FACTS

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]

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.

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

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).

any time, Judge Wallace found Mr. Parish's conviction for second degree murder was void and ordered the charge dismissed.

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?

The parties and *amici curiae*[2] subsequently filed briefs on the question presented. For reasons more fully

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.

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 postconviction proceeding to void a final conviction. The writ of prohibition is therefore **GRANTED** and the order granting postconviction relief is **REVERSED.**

ANALYSIS

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*).

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, 14 7 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).

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).

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* retro activity analysis).

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.

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).

Appendix E

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]

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., Schlomann 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)

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., Hagner v. State,* 2021 OK CR 4, ___ P.3d ___; *Spears v. State,* 2021 OK CR 7, 485 P.3d 873; *Sizemore v. State, supra.*

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).

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 Reservations[4] 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.

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

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.

over crimes committed in the area. *Cuch,* 79 F.3d at 988.

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.

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.

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)).

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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.*

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.*

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.*

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.

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.

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.

We find *Cuch's* analysis and authorities persuasive as we consider the independent state law question of collateral nonretroactivity 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.

McGirt did not "alter[] the range of conduct or the class of persons that the law punishes" for committing crimes. *Schriro 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." *Schriro,* 542

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).

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.

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).

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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").

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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.

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).

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]

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

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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*).

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.

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.

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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).

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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.

The Supreme Court predicted that *McGirt's* disruptive potential to unsettle convictions ultimately would be limited by "other legal doctrines—procedural bars, resjudicata, 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 24 79. "[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).

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 *Cuch,* 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.

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.

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 re-trials; 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.

By comparison, Mr. Parish's legitimate interests in postconviction relief for this jurisdictional error are minimal or nonexistent. *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.

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).

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