No. 23-_____

IN THE

Supreme Court of the United States

NAWLLAH SHAYANNE TIGER,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

NAWLLAH SHAYANNE TIGER,	Filed April 18, 2023
Petitioner,	No. PC-2022-605
vs.	
STATE OF OKLAHOMA,	
Respondent.	

ORDER AFFIRMING THE VACATION OF THE ORDER GRANTING POST-CONVICTION RELIEF

Petitioner, through counsel, appeals the denial of post-conviction relief by the District Court of Pontotoc County in Case No. CF-2018-293. Before the District Court, Petitioner asserted the State lacked jurisdiction over her case because she is Indian and her crimes were committed in Indian country. On March 17, 2021, the District Court entered an order granting post-conviction relief pursuant to *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and *Bosse v. State*, 2021 OK CR 3, 484 P.3d 268, *opinion withdrawn*, 2021 OK CR 23, 495 P.3d 669. The State did not appeal this order. See 22 O.S.2011, § 1087.

On October 21, 2021, the State filed a motion requesting the District Court vacate the order granting post-conviction relief and reinstate Petitioner's convictions and sentence. The State's motion was based on our August 12, 2021, decision in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, *cert. denied*, 142 S.

Ct. 757 (2022), which held that *McGirt* does not apply to convictions final at the time that decision was announced. *See Matloff*, 2021 OK CR 21, ¶¶ 27-28, 40, 497 P.3d at 691-92, 694. Petitioner, through counsel, filed a written response opposing the State's motion. Following a hearing on the issue, the Honorable Steven Kessinger, District Judge, granted the State's motion to vacate the March 17, 2021 order and reinstated Petitioner's Judgment and Sentence in an order filed on May 9, 2022. It is from that order that Petitioner appeals.

We review the District Court's determination for an abuse of discretion. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Petitioner argues on appeal that the District Court lacked jurisdiction to vacate a final, unappealed order granting postconviction relief. Because the convictions in this matter were final before the July 9, 2020, decision in *McGirt*, the holding in *McGirt* does not apply. *See Matloff*, 2021 OK CR 21, ¶ 40, 497 P.3d at 694. Therefore, the District Court's March 17, 2021 order vacating those convictions was unauthorized by law as it was based on a non-final decision of this Court. *See* Rule 3.13(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023).

It is true, of course, that nothing in our cases suggests that a trial court maintains jurisdiction indefinitely after a final judgment is entered. Nevertheless, nothing in the Oklahoma statutes, or our own decisional authority,

prohibited the District Court's exercise of jurisdiction under these circumstances.

From the outset, the District Court's grant of post-conviction relief was based on an order and judgment of this Court in *Bosse* which, at that time, was not final and which we subsequently vacated and withdrew based on *Matloff*. *See Bosse*, 2021 OK CR 23, 495 P.3d 669. "The effect of the District Court's order was to discharge an offender who was under lawful [judgment and] sentence." *Application of Anderson*, 1990 OK CR 82, ¶ 5, 803 P.2d 1160, 1163. The erroneous judicial release by the District Court of a prisoner is subject to prompt correction by the court. *See Harris v. District Court of Oklahoma County*, 1988 OK CR 26, ¶ 4,750 P.2d 1129, 1130-31.

This outcome is fully consistent with *McGirt*, wherein the United States Supreme Court recognized the general applicability of procedural bar rules and other legal doctrines to these type of jurisdictional challenges on post-conviction review and contemplated that its decision would generally not result in post-conviction relief. *See McGirt*, 140 S. Ct. at 2479 n.15 and 2481; *Matloff*, 2021 OK CR 21, ¶ 35, 497 P.3d at 693. As we recognized in *Matloff*:

> *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.

Matloff, 2021 OK CR 21, ¶ 34, 497 P.3d at 693. We decline Petitioner's invitation to revisit our holding in *Matloff*.

Petitioner has failed to demonstrate an abuse of discretion by the District Court. Therefore, the District Court's order vacating the order granting post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2023), 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 18th day of April, 2023.

s/Scott Rowland - Dissent. Please see separate writing.
SCOTT ROWLAND, Presiding Judge.

s/Robert L. Hudson - Special concur; see writing.
ROBERT L. HUDSON, Vice Presiding Judge.

s/Gary L. Lumpkin - Dissent; writing attached
GARY L. LUMPKIN, Judge.

s/David B. Lewis - Specially concurring; writing attached
DAVID B. LEWIS, Judge.

s/William J. Musseman
WILLIAM J. MUSSEMAN, Judge.

ATTEST:

s/John D. Hadden
Clerk

ROWLAND, PRESIDING JUDGE, DISSENTING:

I cannot join the majority's decision today and must dissent. In my view, the appeal should be granted because Judge Kessinger no longer had jurisdiction over this case when, at the State's request, and more than a year after granting post-conviction relief, he vacated that order.

Post-conviction relief in Oklahoma is governed entirely by statute, and where the Post-Conviction Procedure Act does not grant a court jurisdiction, no jurisdiction exists. *See Weatherford v. State*, 2000 OK CR 22, ¶ 4, 13 P.3d 987, 988 (holding court is without jurisdiction to entertain an attempted appeal not in compliance with post-conviction statute) In this case, Judge Kessinger granted postconviction relief on March 17, 2021, and based upon the law at that time, his ruling was correct. The State had thirty days pursuant to 22 O.S.2011, § 1087 to perfect an appeal of that order, but it did not, and when that thirty day time period elapsed, so did Judge Kessinger's jurisdiction over that post-conviction matter.

Our post-conviction statutory scheme does not provide for a motion to vacate, motion to reconsider, or anything other than a timely-filed appeal to this Court. 22 0.8.2011, § 1087. The majority today glosses over this statutory limitation, focusing instead on the fact that Judge Kessinger's order turned out to have been contrary to a case this Court handed down five months later, namely *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, *cert. denied* 142 S. Ct. 757 (2022). The majority provides nothing to explain precisely what authority the district court was acting under when it entertained and then granted the state's motion to vacate more than a year after the appeal time had expired. Instead, it focuses on the fact that in granting post-conviction relief, Judge

Kessinger relied upon a "non-final decision of this court," *Bosse v. State*, 2021 OK CR 3, 484 P.3d 268, opinion withdrawn, 2021 OK CR 23, 495 P.3d 66. This is a red herring. What if Judge Kessinger had relied upon no precedent other than his own interpretation of whether *McGirt* was retroactive, and then months later this Court took the opposite position? Any way you view it, the fact remains that the State did not lodge an appeal within the lawful time period and the district court's authority over that case and those parties ended. Nothing that occurred afterward, be it our decision in *Matloff*, the State's filing of a motion to vacate, or the court's granting of that motion did anything to revive that court's jurisdiction.

In an effort to grant Judge Kessinger a one-time grant of jurisdiction to vacate his previous order, the majority relies upon *Application of Anderson*, 1990 OK CR 82, 803 P.2d 1160, a case which is, to say the least, a curious piece of jurisprudence. It is, to say the most, an invention by this Court three decades ago to stop a convicted axe murderer from being wrongly released where both sides agreed the trial court's order releasing him was wrong but the State failed to properly appeal that order. *Anderson* was wrong then and it is wrong now, but even conceding its precedential value, it should not be applied except where both sides agree the trial court's ruling was erroneous. Unlike *Anderson*, Tiger does not concede the original grant of post-conviction relief was unlawful; in fact, he vehemently disputes it.

Nonetheless, this Court holds that Judge Kessinger's original ruling was "unauthorized by law" without explaining how he should have predicted *Matloff* would come along five months later. It then upholds his later ruling vacating the order, when there was no case or controversy lawfully in front of him, which to me is clearly unauthorized by law. Tiger has shown that the district

court was without jurisdiction and thus abused its discretion in vacating his grant of post-conviction relief when there was no case or controversy before the district court. We should reverse the district court and reinstate the order of March 17, 2021 granting Petitioner postconviction relief.

Accordingly, I respectfully dissent.

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCURRING:

I fully concur with today's decision which recognizes the District Court's authority to promptly correct the erroneous judicial release of a prisoner.[2] Today's decision is based on governing precedent from this Court. The dissenters complain that today's decision is feel-good judicial decision making that equitably corrects the State's failure to appeal the District Court's decision. The dissenters complain that Application of Anderson, 1990 OK CR 82, 803 P.2d 1160, a published decision in which Judge Lumpkin joined and concurred, is an outlier that represents an abuse of power.

Today's decision, however, is firmly grounded in law and fact, not to mention common sense, and certainly this case involves extraordinary circumstances. This is one of several cases where unauthorized judicial relief was granted by the district court due to the misdirection caused by our decision in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 268, *opinion withdrawn*, 2021 OK CR 23, 495 P.3d 669. *See Neasbitt v. Coppedge*, No. PR-2021-1478 (Okl.Cr. Nov. 4, 2022) (unpublished). We continue to address the fallout from that misstep in today's case and there surely will be more that follow.

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[2] The District Court's order vacating the grant of post-conviction relief was prompt despite occurring more than a year after the original order granting postconviction relief. The record shows that a final resolution of the State's motion to vacate was delayed until after Petitioner's court-appointed counsel from the Federal Public Defender's Office in Phoenix, Arizona, entered an appearance in the case, participated in a hearing on the matter and sought leave for additional time to file a written response to the State's motion to vacate (O.R. 43-59).

In *Anderson*, this Court reinstated a judgment and sentence that was erroneously dismissed on post-conviction review and ordered the defendant to be recommitted to DOC custody even though the State failed to timely appeal the district court's erroneous post-conviction ruling. In the present case, by contrast, the District Court granted Tiger post-conviction relief before our mandate in *Bosse* issued. We stayed the mandate in *Bosse* for forty-five days at the request of the Attorney General who, in turn, obtained a stay of mandate from the United States Supreme Court pending the timely filing and disposition of the State's petition for writ of certiorari. See *Oklahoma v. Bosse*, ___U.S. ___, 141 S. Ct. 2696 (May 26, 2021). The net result was our decision in Bosse was not final.

Our application of *Anderson* is rare, infrequent and highlights the extraordinary nature and rarity of the circumstances at issue in this case. The dissenters urge in this case that releasing an inmate is required when the original grant of post-conviction relief was unauthorized by law and subject to prompt correction by the court. Our prior published decisions do not require us to follow the dissenters' misguided path. Today's decision rises above rigid ideological views of what the law should be and focuses on what the law actually requires. I commend my colleagues in the majority for their fortitude in addressing this important issue.

LUMPKIN, JUDGE: DISSENTING:

I dissent to the Order Affirming the Vacation of the Order Granting Post-Conviction Relief. As set forth in my dissent in *Neasbitt v. Coppedge*, PR-2021-1478, November 4, 2022, I cannot agree to the flawed analysis contained in this order.

This is another case that involves the district court's grant of post-conviction relief based upon our then existing interpretation of *McGirt* which the State failed to appeal and which the State subsequently sought to reverse based upon this Court's later *Matloff* decision. The record shows that on March 17, 2021, Pontotoc County District Judge Kessenger entered a valid order granting Petitioner post-conviction relief based upon the extant law at that time, *McGirt* and this Court's then interpretation of *McGirt* contained in *Bosse*.[1] The State did not appeal that order. Now the State and this Court are bound by that judgment regardless of the legal basis upon which it was entered.

Without finality in the law there is no law. This Court did what was legally required at the time *Bosse* was originally handed down. The District Court acted as it was legally required to do when it granted the post-conviction judgment which became final. The law was followed both times but now this Court is disregarding basic principles of law to reach a desired result.

On August 12, 2021, this Court issued its opinion in *Matloff*, holding *McGirt* announced a new rule of criminal procedure which does not apply retroactively to cases final on the date it was handed down, July 9, 2020, and

[1] The original published opinion in *Bosse* was handed down on March 11, 2021. The mandate issued on April 7, 2021, but was stayed on April 9, 2021, as shown on the docket.

withdrawing the original *Bosse* opinion. *Id.*, 2021 OK CR 21, ¶¶ 27-28, 40,497 P.3d at 691-92, 694. Based upon *Matloff*, on October 21, 2021, the State filed a motion to vacate Judge Kessenger's order granting Petitioner post-conviction relief. The State did not seek a post-conviction appeal out of time. Judge Kessenger granted the State's motion on May 9, 2022, and reinstated Petitioner's Judgment and Sentence. Judge Kessenger lacked authority to vacate his valid post-conviction order: he had no case pending before him and his order granting post-conviction relief had been final for several months.

Petitioner appealed the order, arguing the District Court of Pontotoc County lacked jurisdiction to vacate its order granting postconviction relief. In part, the instant order relies upon two opinions from this Court, *Application of Anderson*, 1990 OK CR 82, 803 P.2d 1160[2] and *Harris v. Oklahoma County Dist. Ct.*, 1988 OK CR 26, 750 P.2d 1129, neither of which support its ruling. The order cites *Anderson* and *Harris* as justification for affirming the District Court's reinstatement of Petitioner's judgment and sentence, despite the State's failure to appeal the post-conviction order granting Petitioner relief because this Court finds Petitioner's judgment and sentence was lawful and Judge Kessenger lacked authority on post-conviction to dismiss it.

In *Anderson*, the state charged defendant in CRF-74-69 with first degree murder in the deaths of five men, including Clarence Duty. This Information was later

[2] I acknowledge my vote for the order in December 1990. At the time *Anderson* was circulated, this Court faced a large volume of cases and staffing was not as it is today. Regardless, I failed in my due diligence to note the different case numbers addressed by the Court in *Anderson*. My vote was in error as the Court had no authority to vacate a judgment in a case over which it had no jurisdiction.

amended, charging defendant only with the murder of Duty. A jury convicted defendant of second degree murder and the trial court sentenced defendant to the mandatory sentence of ten years to life pursuant to 21 O.S.Supp.1974, § 701.4. This Court affirmed his conviction in 1976. Defendant later sought post-conviction relief and the district court, relying upon 57 O.S.1971, § 353, found defendant's indeterminate sentence unlawful and on December 1, 1989, granted defendant post-conviction relief in the form of modification of his sentence to time served. The State did not appeal this order.

The State filed an Information in the district court in CRF-90-49 charging defendant with first degree murder in the deaths of the other four men as originally charged in 197 4. At preliminary hearing, defendant filed a motion to quash regarding the charges. The magistrate granted the motion as to two victims, but bound defendant over on charges involving the other two victims. Defendant filed a petition for writ of mandamus in this Court in CRF-90-49, contending the State violated his right to a speedy trial regarding the murders of the four victims. He filed nothing regarding CRF-74-69. This Court requested briefing from the parties not only on the mandamus issue, but also on the grant of post-conviction relief in CRF-74-69. Nothing in the opinion indicates why the Court sought briefing regarding the post-conviction order, other than its denial of the State's request to appeal the post-conviction order out of time. The Court determined the State violated defendant's due process rights based upon the fact that the State failed to timely prosecute him for the four murders and dismissed CRF-90-49. The Court further determined that the district court lacked jurisdiction to grant defendant post-conviction sentencing relief since his sentence was lawful at the time it was entered. The Court reinstated defendant's sentence in CRF-74-69 and directed the district court to recommit

Petitioner to the Department of Corrections on his ten year to life sentence.

There was no basis in *Anderson* for this Court to address the merits of the CRF-74-69 post-conviction case. It seems clear that it only arose as an after-thought to provide the State another avenue to keep defendant in jail if it lost on the mandamus issue. Moreover, the State's request in this Court for a post-conviction appeal out of time was improper as such a motion must be filed initially in the trial court. *See* Rule 2. l(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 App. (2022); *Hopkins v. State*, 1988 OK CR 69, ¶ 5, 753 P.2d 1364, 1365 (where appeal time has expired for filing post-conviction appeal, recourse is to file an application for postconviction appeal out of time in the district court).

Anderson is more of an anomaly than valid precedent and is in reality an exercise of vain judicial power. This Court did not have jurisdiction over the 1974 case when the order was entered. The only commonality between *Anderson* and this case is that they are both anomalies in the law and are examples of the exercise of raw judicial power without authority and without the matter being properly before the Court at the time the subject order is entered.

In *Harris*, Petitioner was found not guilty by reason of insanity. The district court erroneously ordered his release from custody on January 15, 1988. This was error as 22 O.S.1981, § 1161 stated that a defendant acquitted by reason of insanity shall not be discharged until the court determines that he is not a danger to the public. At a hearing on the morning of January 22, 1988, presumably recognizing its error, the court issued an order directing that petitioner be picked up in order to place him under psychiatric care at Vinita. This Court entered an order on

the same afternoon staying all proceedings and ordering responses. Petitioner argued that the district court did not have continuing jurisdiction since it released him.

This Court held that Section 1161 gave the district court continuing jurisdiction over the case until the determination regarding the petitioner's threat to the public was made. Thus, a specific statute gave the trial court continued jurisdiction over the petitioner in *Harris*. There is no such statute involved in this case.

At the time of Petitioner's post-conviction proceeding, this Court held in *Bosse* that *McGirt* was applicable to cases on collateral review. The *Bosse* and *McGirt* holdings were changes in the law from the time of Petitioner's conviction. However, the law changes and courts must apply the law in existence at the time of making their decisions. Thus, pursuant to *McGirt* and *Bosse*, Petitioner's judgment and sentence was unlawful at the time it was entered as the District Court of Pontotoc County lacked jurisdiction to try him for his crime. Judge Kessenger's post-conviction order dismissing Petitioner's conviction was a final judgment (since the State did not appeal); thus, he lacked authority to grant the State's motion to vacate when no case was pending before him in the district court. By finding the District Court's reliance on *Bosse* unwarranted, the Court uses *Bosse* as a strawman to achieve its desired result.

While *Bosse* may be used as guiding the District Court's action, it is used here as an excuse and not a legal reason. The law is in flux at times and as a result, due to the consistent application of the rule of law, some cases benefit from the changes and others do not. That is just the nature of changing law. However, using those instances as a crutch based on feelings and not the law to seek to right some perceived wrong is not applying the law

in a uniform and consistent manner. We are required to adjudicate what is before us, not remake the case into something it is not to achieve a desired result.

As for the majority's reliance upon *Matloff* to affirm the District Court's vacation of the order granting post-conviction relief, that reliance is misplaced. *Matloff* announced a new rule of criminal procedure; therefore, its holding should not be applied retroactively, just as it held the *McGirt* decision would not be applied retroactively. Yet retroactive application of *Matloff* is exactly what the majority does in this order in its quest to preserve the conviction.

The rule of law and the finality of judgments are basic tenets which comprise the foundation of our jurisprudence. Rules regarding waiver, procedural default, appeal time limits and res judicata serve to promote finality of judgments. *Cf. Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356-57 (2006) (finding the finality of judgments is served by procedural default rules and such rules result in denying legal significance to otherwise cognizable legal claims); *Custis v. United States*, 511 U.S. 485, 497 (1994) (interest in promoting finality of judgments precludes defendants the ability to obtain review of state convictions used to enhance punishment in federal criminal cases); *Valdez v. State*, 2002 OK CR 20, ¶ 6, 46 P.3d 703, 712, Lumpkin, P.J., concur in part/dissent in part ("The legal doctrines of waiver and res judicata have been developed through the ages to ensure finality of judgments. By disregarding binding authority, in order to assist a defendant in litigating issues already decided or waived, this Court disregards the concept of the Rule of Law."); *Weatherford v. State*, 2000 OK CR 22, ¶¶ 4-5, 13 P.3d 987, 988-89 (holding time limit for filing statutorily created post-conviction appeal of a final judgment is jurisdictional; when it is not met, "this Court is without

jurisdiction to entertain the attempted appeal and the same must be dismissed.").

Our Republic's founders realized the imperfection of humanity must be channeled by laws and rules. Thus, our country from its inception has been guided by the rule of law. This provides us the vehicle for self-government and the discipline to ensure all citizens a system of laws which are to be applied consistently, equally and without respect to which party the law may apply. A cornerstone of our Constitution is the granting of inalienable individual rights. As part of that grant, individuals convicted of crimes are bound by the legal principal of finality of judgments. There has never been a legal principle that allows for vacation of a final judgment when a court has no jurisdiction or authority to do so. This is a finite principle of law regardless of whether the court granting the final judgment did so using the correct or incorrect basis for the decision.

We must apply the law in a consistent, equal manner, regardless of an individual's status. This is true in Petitioner's case, despite his commission of serious crimes. Everyday this Court denies requests by appellants to apply *McGirt* retroactively because of our holding in *Matloff*. This is proper due to our consistent application of the rule of law and established legal precedent. However, it is inconsistent to allow the State to re-imprison Petitioner after the lawful vacation of her conviction. Such a result obtains only through a process of result-driven legal gymnastics based upon the questionable provenance of *Anderson*[3] and the misapplication of *Matloff* and *Harris*.

[3] A case which should never have been published.

Both *Anderson* and this case are anomalies that do not reflect an appreciation of the rule of law. Instead, they show the exercise of raw judicial power in cases where the Court has no jurisdiction due to the failure of the State to act in a timely fashion to vest jurisdiction in the proper court to receive timely adjudication of the issues presented. It is not the function of this Court to fix the State's mistakes. However, now that the Court has started down this slippery slope it will be hard to find a place to stop and hard for the Court to explain to citizens convicted of crimes that this fixing of others' mistakes does not apply to them. I fear that issues of due process, equal protection and *ex post facto* prohibitions will haunt the Court if it persists in crossing the Rubicon with this type of jurisprudence.

I am deeply disappointed the majority has abandoned the rule of law in this case. Individuals convicted of crimes, as well as the State, should be able to rely on the rule of law. This Court must be bound by it. It is the rule of law that protects citizens from any single individual's or group's sense of justice at any particular time. That sense of justice often changes with each different situation. The rule of law always remains the same regardless of the party to which it may apply. For the reasons stated, I must dissent to the Court's order.

LEWIS, SPECIALLY CONCURRING:

I concur in the decision to affirm the trial court. The unauthorized and erroneous initial grant of post-conviction relief was subject to prompt correction by the court, and involved no extravagance of its unlimited original jurisdiction. *See Harris v. District Court*, 1988 OK CR 26, 750 P. 2d 1129, 1130-31.[1] The trial court granted Petitioner post-conviction relief based on our opinion in *Bosse*, which was never mandated and later entirely withdrawn. If the trial court had released the wrong prisoner, or granted relief upon other mistaken grounds, few would seriously maintain that the prisoner had thereby acquired an indefeasible interest in freedom from a valid criminal judgment and sentence of imprisonment.

The Supreme Court's recognition in *McGirt* of the historic Muscogee (Creek) Reservation as Indian Country eventually affected state, federal, and tribal criminal jurisdiction in almost half of Oklahoma, and presented courts with some formidable questions about its application. But more than two years on, this Court and others have repeatedly concluded that *McGirt* announced no new constitutional rights, and recognized no new jurisdictional grounds to collaterally attack final convictions.[2]

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[1] *See also*, *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930)(finding "no doubt of the power of the government to recommit a prisoner who is released or discharged by mistake, where his sentence would not have expired if he had remained in confinement").

[2] The Tenth Circuit Court of Appeals has also held, in *In re Morgan*, No. 20-6123 (10th Cir., Sept. 18, 2020) (unpublished), that *McGirt* did not create any new rule of constitutional law retroactive to cases on collateral review. *See also, e.g.*, *Mitchell v. Nunn*, No. 21-CV-0442-GKF-CDL (N.D.Okla., April 28, 2022) (unpublished; *Jones*

This Court came to realize in a matter of months after its *Bosse* decision that *McGirt* should not apply to convictions already final when *McGirt* was decided. We remedied that error in *Matloff*. And *McGirt* itself had never voided these convictions or even intended to do so. Petitioner and others granted post-conviction relief by trial courts in the brief interregnum of *McGirt* "retroactivity" between *Bosse* and *Matloff* were never entitled to post-conviction relief in the first place.

Judge Lumpkin's charge that the Court is now abandoning the rule of law is too strenuous. This Court is not obligated to helplessly release legally convicted prisoners who were erroneously granted post-conviction relief simply because certain district attorneys neglected to timely appeal those orders. We recognize this not because of some sentimental "feelings" about the matter, but because of the principle which "forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 718 (1990).

Nor did *Matloff* announce a "new rule" of procedure that is somehow inapplicable to these cases, as Judge Lumpkin now claims. *Matloff* applied well-established principles of non-retroactivity from this Court's earlier cases-cases which Judge Lumpkin either concurred in, or even authored (*Ferrell*, *Thomas*, *Smith*)-to hold that

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v. Pettigrew, No. CIV-18-633-G, 2021 WL 3854755, at *3 (W.D. Okla. Aug. 27, 2021) (citing *Littlejohn v. Crow*, No. 18-CV-477-CVE-JFJ, 2021 WL 3074171, at *5 (N.D. Okla. July 20, 2021); *Sanders v. Pettigrew*, No. CIV-20-350-RAW-KEW, 2021 WL 3291792, at *5 (E.D. Okla. Aug. 2, 2021); *Berry v. Braggs*, No. 19-CV-706-GKF-FHM, 2020 WL 6205849, at *7 (N.D. Okla. Oct. 22, 2020) (all concluding that *McGirt* did not create any new constitutional right when it recognized of the continued existence the Muscogee (Creek) Nation Reservation)).

McGirt did not void those criminal convictions that were already final when *McGirt* was decided.

Indeed, the Court's decision in *Bosse*, not *Matloff*, was the anomaly that departed from accepted tenets of non-retroactivity by extending *McGirt* to final convictions. That is largely why the Court vacated the never-mandated opinion in *Bosse*; and with it, a series of published (but also never mandated) orders granting *McGirt*-based post-conviction relief in several capital cases (*Cole*, *Ryder*, *Bench*).

The trial court here did likewise, reinstating a judgment that was valid before and after *McGirt*. The initial grant of post-conviction relief was nothing more or less than a judicial error in which this Court shares some of the responsibility; and which we, like the trial court, are obligated to correct in the public interest within the proper limits of our authority. This is upholding the rule of law, not abandoning it. The trial court's action in reinstating the conviction and executing its judgment was authorized by law, and should be affirmed.

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

STATE OF OKLAHOMA, Plaintiff, vs. NAWLLAH SHAYANNE TIGER, Defendant.	Filed May 9, 2022 No. CF-2018-293

ORDER VACATING TRIAL COURT'S PRIOR ORDER GRANTING POST-CONVICTION RELIEF

This matter came on for hearing on April 22, 2022, upon the State of Oklahoma's Motion to Vacate Order Granting Post-Conviction Relief. The State of Oklahoma appeared by Assistant District Attorney, Ms. Tara Portillo. The Defendant appeared by attorney of record, Mr. Keith J. Hilzendeger. The Defendant appeared via Zoom video conferencing.

The Court received the pleadings and heard argument of the State of Oklahoma. The Defendant's counsel requested additional time to file a written response and argument. The Court granted Defendant's counsel until May 6, 2022, to file a written response with authority. Defendant's counsel filed such pleading on May 5, 2022.

The Court, having reviewed the pleadings on file and heard the argument of counsel, the Court hereby enters the following findings of fact and conclusions of law:

1. The Defendant was convicted and a final judgment and sentence was entered herein on November 26, 2018.

2. On January 15, 2021, the Court entered herein an Order Granting Defendant's Application for Post-Conviction Relief based upon the then holdings in *McGirt v. Oklahoma*, 104 S. Ct. 2452 (2020) and *Bosse v. State of Oklahoma*, 2021 OK CR 3.

3. On October 21, 2021, the State of Oklahoma filed herein its Petition To Vacate and Reconsider Order Granting Post-Conviction Relief based upon a reversal of law.

4. The Court of Criminal Appeals, in State ex Rel. Mark Matloff. District Attorney, Petitioner v. the Honorable Jana Wallace, Associate District Judge, Respondent, 2021 OK. CR 21, ruled that McGirt shall not apply retroactively in post-conviction relief cases.

   "¶40 Because we hold that *McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction, the order vacating Mr. Parish's murder conviction was unauthorized by state law."

5. On August 31, 2021, the Court of Criminal Appeals vacated its previous holding in *Bosse v. Oklahoma*, 2021 OK CR 3, which held that *McGirt* could be applied to an Application for Post-Conviction Relief. See *Bosse v. Oklahoma*, 2021 OK CR 23.

6. That based upon the holding in *Bosse v. Oklahoma*, 2021 OK CR 23 and the holding in *State ex Rel. Mark Matloff, District Attorney, Petitioner, v. the Honorable Jana Wallace, Associate District Judge, Respondent*, 2021 OK CR 21, this Court hereby vacates the May 17, 2021, Order Granting Defendant's Application for Post-Conviction Relief.

7. The original Judgment and Sentence is hereby reinstated in full.

8. The Defendant shall be transferred to the Oklahoma Department of Corrections to complete her original sentence.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the Order Granting Defendant's Application for Post-Conviction Relief filed of record January 15, 2021, is hereby VACATED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the original Judgment and Sentence is reinstated in full.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant be transferred to the Oklahoma Department of Corrections to complete her original sentence.

Signed May 9, 2022.

s/C. Steven Kessinger
C. Steven Kessinger
District Judge

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

STATE OF OKLAHOMA, Plaintiff, vs. NAWLLAH SHAYANNE TIGER, Defendant.	Filed March 17, 2021 No. CF-2018-293

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 Assistant District Attorney, Ms. Tara Portillo. The Defendant did not appear in person or by counsel.

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
C. Steven Kessinger
District Judge

IN THE DISTRICT COURT OF THE TWENTY-SECOND JUDICIAL DISTRICT OF THE STATE OF OKLAHOMA IN AND FOR THE COUNTY OF PONTOTOC

STATE OF OKLAHOMA, Plaintiff, vs. NAWLLAH SHAYANNE TIGER, Defendant.	Filed May 4, 2022 No. CF-2018-293 Response to the State's Motion to Vacate Order Granting Postconviction Relief

Pursuant to the Court's order of April 22, 2022, Ms. Tiger now responds to the state's motion to vacate the Court's order granting postconviction relief.

Background

On July 27, 2018, a complaint was filed that accused Ms. Tiger of two counts of child abuse by injury, in violation of 21 Okla. Stat. § 843.5(A). Four months later, she pleaded *nolo contendere* to these charges, and was sentenced to two concurrent terms of 10 years in state prison.

In the wake of the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), Ms. Tiger filed an application for postconviction relief. She contended that this Court lacked jurisdiction to entertain the state's

charges against her because she is an Indian who was alleged to have committed these crimes in Indian country, and thus jurisdiction was proper only in federal court under 18 U.S.C. § 1153. On March 17, 2021, the Court granted Ms. Tiger's application and vacated her conviction. *See Bench v. State*, 2021 OK CR 12 (holding that the Chickasaw Nation was Indian county under *McGirt* and that federal jurisdiction over major crimes committed by Indians was exclusive), *overruled by Bench v. State*, 2021 OK CR 39, 504 P.3d 592 (holding that postconviction relief was not available because *McGirt* does not apply retroactively). Twelve days later, a complaint was filed in the United States District Court for the Eastern District of Oklahoma that accused Ms. Tiger of the same two child-abuse charges, in violation of Oklahoma law, as made applicable to Indian country under 18 U.S.C. § 1153. (Copies of the complaint and the subsequent indictment are attached to this filing as exhibits.) The state did not appeal this Court's decision to grant Ms. Tiger's application for postconviction relief under McGirt. Its deadline to do so was April 6, 2021. *See* Rule 5.2(C)(1), *Rules of the Oklahoma Court of Criminal Appeals*.

On August 12, 2021, the Oklahoma Court of Criminal Appeals decided in State ex rel. Matloff v. Wallace, 2021 OK CR 21,497 P.3d 686, cert. denied sub nom. Parish v. Oklahoma, 142 S. Ct. 757 (2022), that McGirt did not apply retroactively to cases that were final when McGirt was decided. Over two months later, the state asked this Court to vacate its final order granting Ms. Tiger's petition for postconviction relief. Pointing to what it calls this Court's "inherent power to correct erroneous judgments" (Mot. at 4 (citing *Morgan v. District Court of Woodward County*, 1992 OK CR 29, ¶ 9, 831 P.2d 1001, 1005; *Ussery v. State*, 1988 OK CR 122, ¶¶ 10–15, 758 P.2d 319, 320-21)), the state urged the Court to reinstate Ms. Tiger's conviction

because "allowing the erroneous vacatur of the defendant's final conviction(s) [*sic*] to stand would be unjust and provide him/her [*sic*] an entirely unfair windfall based merely on the fact that the vacatur was entered prior to the OCCA's decision on retroactivity in *Wallace*." (Mot. at 7)

With the Court's permission, Ms. Tiger now responds to the state's motion.

Argument

1. The Court lacks statutory authority to consider the state's motion.

Under 12 Okla. Stat. § 1031, a district court may "vacate or modify its own judgments" only in one of nine specifically enumerated circumstances. None of them involve changes in the law that take place once a district court's judgment is final and the time to appeal it has expired—the only reason the state has advanced for vacating this Court's order granting Ms. Tiger postconviction relief. Moreover, the state's motion is untimely under 12 Okla. Stat.§ 1031.1(B) because it filed the motion well after the 30-day deadline set forth there. It also filed the motion more than 30 days after the triggering event it relies on—the Court of Criminal Appeals's decision in *Matloff*. The state should have filed a petition to vacate judgment, not a motion, and its failure to heed this statutory distinction means that this Court has no authority to act on its motion. See 12 Okla. Stat. § 1033 (requiring a petition to vacate or modify a judgment, rather than a motion, if more than 30 days have passed since the order sought to be vacated was entered); *Hillhouse v. Fitzpatrick*, 2013 OK CIV APP 36, ¶ 12, 301 P.3d 891, 895 (explaining that the "words 'application' and 'petition' have clearly different meanings in Oklahoma

jurisprudence"); *In re Estate of Davis*, 2006 OK CIV APP 31, ¶ 20, 132 P.3d 609, 613 ("Where a motion to vacate judgment is not in the proper form of a verified petition, vacation of the judgment is properly refused.") (*citing State ex rel. Hunt v. Liberty Investors Life Insurance*, 1975 OK 165, 543 P.2d 1390).

2. Even if this Court were to construe the state's motion as a petition to vacate judgment, it should deny the state's request.

Nevertheless, an untimely motion to vacate judgment can be construed as a petition to vacate judgment if the motion "substantially complies with the statute" because it "contains all of the averments prescribed by the statute for a petition." *Yeagley v. Brewer*, 1976 OK CIV APP 30, 551 P.2d 312, 314. But in the absence of substantial compliance, this Court may refuse to vacate the judgment. Estate of Davis, 2006 OK CIV APP 31, ¶ 20, 132 P.3d 609, 613. "If more than thirty (30) days after a judgment, decree, or appealable order has been filed, proceedings to vacate or modify the judgment, decree, or appealable order on the grounds mentioned in paragraphs 2, 4, 5, 6, 7, 8, and 9 of Section 1031 of this title, shall be by petition, verified by affidavit, setting forth the judgment, decree, or appealable order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On this petition, a summons shall issue and be served as in the commencement of a civil action." 12 Okla. Stat. § 1033. Absent substantial compliance with these requirements, this Court lacks jurisdiction to entertain the state's request to reinstate Ms. Tiger's conviction. *Sadberry v. Hope*, 1968 OK 107, 444 P.2d 175, 177 (explaining that an "order made by the court at a subsequent term, vacating a judgment rendered at a former term, without complying with the conditions of the

statute in regard thereto, is void"), *overruled on other grounds by Patel v. OMH Medical Center, Inc.*, 1999 OK 33, ¶ 32, 987 P.2d 1185, 1198.

The state's motion does not substantially comply with § 1033, either in form or in substance. There is no supporting affidavit. No summons issued. No summons thus was served on Ms. Tiger. And the state's basis for vacating the order granting postconviction relief—a change in the law that came after the time for appealing that order expired—is not one of the listed grounds in § 1031. The state is not saying that it had no notice of the pending postconviction proceedings. *Cf.* § 1031(2). The state does not allege that Ms. Tiger procured the order granting postconviction relief by fraud. *Cf.* § 1031(4). Neither party is a child or otherwise incompetent. *Cf.* § 1031(5), (8). Neither party has died. *Cf.* § 1031(6). No *force majeure* prevented the state from defending against the postconviction petition. *Cf.* § 1031(7). And there is no allegation of "taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment." § 1031(9). All of these defects mean that the state has not demonstrated substantial compliance with § 1031, and so the Court lacks jurisdiction to entertain the state's motion.

3. The state is wrong to suggest that this Court has inherent authority to vacate a judgment based solely on a change in the law that occurs after the time to appeal has expired.

The state nevertheless contends that this Court has "an inherent power to correct erroneous judgments" (Mot. at 4), and suggests that this power extends to correcting judgments when the governing law changes

after the time for the aggrieved party to appeal has expired. But it cites no controlling authority to support this suggestion.

"If an order issued by the district court is clearly erroneous under a *current* statute, the court can modify or vacate its judgment." *Harris v. Oklahoma County District Court*, 1988 OK CR 26, 750 P.2d 1129, 1130–31 (citing *Hays v. L.C.I., Inc.*, 604 P.2d 861, 862 (Okla. 1979)). So in *Harris*, when the trial court departed from statutory procedures in effect at the time of its action, and released from jail a person found not guilty by reason of insanity instead of committing that person for a sanity examination as procedures required, the Court of Criminal Appeals held that the trial court had jurisdiction to "vacate[] its previous order so that the required statutory procedures could be followed." *Id.* By contrast here, the state does not—and cannot—contend that the order granting Ms. Tiger's application for postconviction relief and setting aside her conviction was not legally correct at the time it was entered. The order that the state is asking this Court to reconsider was long final when it filed its motion. Because this Court's order was legally correct when it was entered, the "inherent authority" on which the state is relying does not allow the Court to correct the order. *Cf. In re Application of Anderson*, 1990 OK CR 82, 803 P.2d 1160, 1162 (holding that a trial court may revise a final order that was legally incorrect when it was entered); *Powell v. District Court of Seventh Judicial District*, 1970 OK CR 67, 473 P.2d 254, 257 (holding that a trial court has no jurisdiction to grant a motion to vacate judgment and order a new trial filed by the prosecution, in violation of double jeopardy principles).

Similarly, before a final judgment is entered, a trial court has inherent authority to "reconsider [an] interlocutory order granting or denying a motion for a

new trial." *Ussery v. State*, 1988 OK CR 122, 758 P.2d 319, 321. But there is nothing interlocutory about the order the state is asking this Court to undo—the order is not one that does not "constitut[e] a final resolution of the whole controversy." *Black's Law Dictionary* 889 (9th ed. 2009). Rather, the order conclusively granted postconviction relief, vacated Ms. Tiger's conviction, and dismissed the state's charges against her. This Court has no "inherent authority" to undo such a final order.

Likewise, *Morgan v. District Court*, 1992 OK CR 29, 831 P.2d 1001, does not support the notion that this Court's "inherent authority" allows for modifying a final judgment based on a change in the law that occurred after the time to appeal has run. There a defendant's lawyer in a capital murder case had agreed to certain modes of discovery, then reneged on that agreement. "The District court has inherent and statutory powers to do many things when the judicial process is thwarted," the Court of Criminal Appeals said. *Id.*, 831 P .2d at 1005. There is no evidence of Ms. Tiger's "thwarting" the judicial process here. Ms. Tiger applied for relief under *McGirt*, and this Court granted that relief well before the Court of Criminal Appeals had said that *McGirt* did not apply retroactively. The state had an opportunity to appeal, but chose not to do so. Having allowed the Court's order granting Ms. Tiger postconviction relief to become final, the state now seeks to thwart the judicial process by asking for reconsideration based on a later change in the law. This Court should not sanction that effort.

The closest the state comes to identifying any support for its "inherent authority to undo a final judgment after the time to appeal has run" argument is the Tenth Circuit's decision in *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir. 1997). But even this decision does not support the state's

argument, because the nature of the change in the law involved there is not meaningfully similar to the nature of the change in the law here.

The legal rule involved in *Ute Indian Tribe* was whether the Uintah Valley Reservation had been diminished by act of Congress, such that the State of Utah could exercise criminal jurisdiction over the parts that were no longer "Indian country" under 18 U.S.C. § 1151. In 1985 the Tenth Circuit sitting en banc held that the reservation had not been diminished. *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986). But in 1992, the Utah Supreme Court held that it had been, and two years later the U.S. Supreme Court agreed with the Utah court. *See State v. Hagen*, 858 P.2d 925 (Utah 1992), *aff'd*, 510 U.S. 399 (1994). The question then before the Tenth Circuit was "whether to modify our judgment in *Ute Indian Tribe*, after the time for rehearing has passed, in light of a conflict with a later, contrary decision of the Supreme Court." 114 F.3d at 1516. A federal district judge had asked the Tenth Circuit for guidance on the issue. *Id.* at 1515.

The Tenth Circuit first held that the district court was bound by the earlier Tenth Circuit ruling because of the rule of the mandate, under which "a district court must comply strictly with the mandate rendered by the reviewing court." *Id.* at 1521 (quoting *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 962 F.2d 1528, 1534 (10th Cir. 1992)). The state argued that the Supreme Court's decision in *Hagen* was an "intervening change in the law" that allowed the district court to depart from the mandate, but the Tenth Circuit disagreed. The "intervening-change-in-law exception does not apply where, as here, the case in which the erroneous ruling occurred is no longer sub judice—that is, where the case

has become final." *Id.* (citing *Colorado Interstate Gas Co.*, 962 F.2d at 1534). Thus the district court had no authority not to follow the Tenth Circuit's previous ruling in the same case.

The Tenth Circuit then considered whether *it* had the power to revise the mandate in *Ute Indian Tribe* in order to harmonize it with the Supreme Court's contrary ruling in *Hagen*. The power was not limited by principles of res judicata, the court held, because in *Hagen* the state had already relitigated the issue of the diminishment of the reservation and the U.S. Supreme Court had ruled in a manner contrary to the Tenth Circuit's earlier ruling. *Ute Indian Tribe*, 114 F.3d at 1523. Nor did "a desire to achieve a more accurate judgment or to avoid the injustice that might result from a strict application of the principles of finality" play into the court's decision. *Id.* The state had managed to relitigate the question of jurisdiction in another case and obtain a ruling contrary to the ruling by which it was bound in *Ute Indian Tribe*. "The State's successful relitigation of the boundary issue has put the judgment in *Ute Indian Tribe*... on a collision course with *Hagen*, and therefore, we must directly confront whether *Ute Indian Tribe*... should give way to the equally final, contrary judgment in *Hagen*." *Ute Indian Tribe*, 114 F.3d at 1524. Because of the overarching importance of having a uniform rule about the boundaries of this particular Indian reservation, the Tenth Circuit held that it had the power to revise the judgment in *Ute Indian Tribe* to conform to the Supreme Court's ruling in *Hagen*. *Id.* at 1524-27. But at the same time, the court emphasized that decisions to revise earlier judgments should be rare, reserved for other equally important decisions. *Id.*

The state's attempt to reinstate Ms. Tiger's conviction in the wake of the Court of Criminal Appeals' s ruling in *Matloff* does not present the same kind of need for

uniformity of rules that the conflict between the Tenth Circuit and the Supreme Court did in *Ute Indian Tribe*. In *McGirt*, the Supreme Court held that the Creek Nation had not been disestablished by act of Congress. That decision applied retroactively to void the conviction of the petitioner there. The Court of Criminal Appeals applied that rule to the other four of the Five Tribes, holding that each of those reservations had also never been disestablished, and that these holdings applied retroactively to void convictions on both direct and collateral review. *See Bosse v. State*, 2021 OK CR 3, 484 P.3d 286 (Chickasaw); *Hogner v. State*, 2021 OK CR 4, 500 P.3d 629 (Cherokee); *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867 (Choctaw); *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250 (Seminole). This was the state of the law when this Court granted Ms. Tiger's application for postconviction relief and set aside her conviction. *See Matloff*, 2021 OK CR 21, ¶¶ 13–14, 497 P.3d at 689 (noting that the court had applied *McGirt* retroactively "without our attention ever having been drawn to the potential non-retroactivity of *McGirt*").

But under the Tenth Circuit's framework for deciding whether to revise a final judgment after the time to appeal has expired, the mere fact of a conflict of legal rules is insufficient to allow the court to revise that judgment. The state points to the "disruptive and costly consequences in the overturning of the defendant's final conviction(s) [*sic*] based on an erroneous application of *McGirt*." (Mot. at 7) But the "fact that *Ute Indian Tribe* may have been wrongly decided or operates unfairly against the state and local defendants" was "not a concern that inform[ed]" the Tenth Circuit's analysis. *Ute Indian Tribe*, 114 F.3d at 1523. So too here—the fact that *Matloff* came too late for the state to argue that it should deny Ms. Tiger's application for postconviction relief should not figure into this Court's decision to grant the state's present motion.

There is no "collision course" between this Court's order granting Ms. Tiger's application for postconviction relief and other orders from other courts denying similar applications in the wake of *Matloff*.

Moreover, the state exaggerates the extent of the disruption that vacating Ms. Tiger's conviction might cause. She has been indicted in federal court on the same two child-abuse charges of which she was convicted in this Court. Under the Major Crimes Act, she must be "tried in the same courts and in the same manner as are all other persons committing" an offense "within the exclusive jurisdiction of the United States," 18 U.S.C. § 3242, and if convicted must be "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). Assuming she is convicted in federal court, Ms. Tiger will not escape punishment entirely. The sky is not falling on Oklahoma in the wake of *McGirt*, notwithstanding the state's assertions to the contrary. *See also* Rebecca Nagle & Allison Herrera, *Where Is Oklahoma Getting Its Numbers from in Its Supreme Court Case?*, *The Atlantic* (Apr. 26, 2022) (attached as an exhibit to this filing) (explaining that the state's claim "that it has lost jurisdiction over 18,000 prosecutions a year, many of which are now going un-investigated and unprosecuted," "did not hold up to scrutiny").

Conclusion

If the state had wanted to preserve its right to contest the correctness of this Court's order granting Ms. Tiger's application for postconviction relief and vacating her conviction, it should have appealed the Court's order. But now the time has long passed for it to do so, and it has not shown that any of the extraordinary reasons for setting aside a final judgment apply here. The Court should deny

the state's motion, thereby leaving criminal jurisdiction over the charges in this case where it properly belongs—with the federal courts.

Respectfully submitted: May 2, 2022.

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No. PC-2022-605

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

NAWLLAH SHAYANNE TIGER,
Petitioner - Appellant,
vs.
STATE OF OKLAHOMA, *Respondent - Appellee.*

Appeal from the Twenty-Second Judicial District
Court in and for Pontotoc County
Hon. C. Steven Kessinger, District Judge, Presiding
D.C. No. CF-2018-293

APPELLANT'S OPENING BRIEF

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INTRODUCTION

In granting the state's motion to vacate an order granting postconviction relief to Ms. Tiger based on a lack of subject-matter jurisdiction, the district court committed a manifest error. The district court failed to identify any statutory or inherent authority for revising an order that had become final after the state allowed its time to appeal that order to lapse. The state, having chosen not to appeal an adverse order, should have been left with the consequences of its choice—here, to allow the federal government to prosecute and possibly imprison Ms. Tiger because of the exclusive jurisdiction it has to prosecute Indians who commit felony child abuse in Indian country. *See* 18 U.S.C. § 1153; *United States v. John*, 437 U.S. 634, 651 (1978).

But even if that action were somehow proper, the district court's ruling should not stand. The district court relied on this Court's decision in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 696, to grant the state's request to reinstate Ms. Tiger's conviction. In *Matloff*, this Court held that the Supreme Court's ruling in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), did not apply retroactively to cases on collateral review. This ruling was wrong as a matter of this Court's retroactivity jurisprudence. *McGirt* is undoubtedly a substantive rule, because it reiterates the state courts' lack of jurisdiction over accusations of felony child abuse committed by Indians in Indian country. Substantive rules always apply retroactively, whether new or not. This Court should overrule *Matloff*, reverse the district court's order that reinstated Ms. Tiger's convictions, and remand with instructions to dismiss the charges against her, thereby allowing the only sovereign with jurisdiction over her crimes—the United States government—to prosecute her.

PROPOSITIONS OF ERROR

I. The district court had no statutory or inherent authority to revise a postconviction order that had become final after the state failed to timely appeal an order granting postconviction relief, simply because of a change in the law that occurred after the order became final.

II. This Court should overrule *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 696, and hold that *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), applies retroactively to cases on collateral review, as the Court in *McGirt* implicitly held and as the Tenth Circuit would hold, *see Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020).

STATEMENT OF THE CASE

On July 27, 2018, a complaint was filed that accused Ms. Tiger of two counts of child abuse by injury, in violation of 21 O.S. § 843.5(A). Four months later, she pleaded nolo contendere to these charges, and was sentenced to two concurrent terms of 10 years in state prison. Ms. Tiger did not take a certiorari appeal to challenge her convictions or sentences. They became final on or about December 26, 2018, when the time expired for her to do so. *See Gonzalez v. Thaler*, 565 U.S. 134, 138 (2012).

In the wake of the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), Ms. Tiger filed a pro se application for postconviction relief. She alleged that she was an enrolled member of the Seminole Nation, that the crime occurred within the boundaries of the Chickasaw Nation, and that federal jurisdiction over her case was exclusive under 18 U.S.C. § 1153, under which an Indian charged with felony child abuse may be convicted

in federal court. *See United States v. John*, 437 U.S. 634, 651 (1978) (holding that federal jurisdiction under § 1153 is exclusive of state jurisdiction). Over the state's objection, on March 17, 2021, the district court granted Ms. Tiger's application for postconviction relief. The court found that Ms. Tiger was an enrolled member of a federally recognized Indian tribe; that the crime occurred in Pontotoc County, which was within the boundaries of the Chickasaw Nation; and that under *McGirt* there was exclusive federal jurisdiction over the charges to which Ms. Tiger pleaded. *See also Bench v. State*, 2021 OK CR 12 (holding that the Chickasaw Nation was Indian country under *McGirt*, such that federal jurisdiction over major crimes listed in § 1153 was exclusive), *overruled by Bench v. State*, 2021 OK CR 39, 504 P.3d 592 (holding that postconviction relief was not available because *McGirt* does not apply retroactively). The state did not appeal the district court's order granting Ms. Tiger postconviction relief. Its deadline to do so was April 6, 2021. *See* Rule 5.2(C)(1), *Rules of the Oklahoma Court of Criminal Appeals*.

Meanwhile, a complaint was filed in the United States District Court for the Eastern District of Oklahoma that accused Ms. Tiger of the same two child-abuse charges, in violation of Oklahoma law, as made applicable to Indian country under 18 U.S.C. § 1153. Ms. Tiger was brought into federal custody to face those charges, and the court appointed the Federal Public Defender for the District of Arizona to represent her in connection with them. A federal grand jury later indicted Ms. Tiger on those two charges.

On August 12, 2021, this Court decided in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, *cert. denied sub nom. Parish v. Oklahoma*, 142 S. Ct. 757 (2022), that *McGirt* did not apply retroactively to cases

that were final when *McGirt* was decided. Over two months later, the state asked the district court to vacate its final order granting Ms. Tiger's petition for postconviction relief. Pointing to what it called the district court's "inherent power to correct erroneous judgments" (Mot. at 4 (citing *Morgan v. District Court of Woodward County*, 1992 OK CR 29, ¶ 9, 831 P.2d 1001, 1005; *Ussery v. State*, 1988 OK CR 122, ¶¶ 10–15, 758 P.2d 319, 320–21)), the state urged the court to reinstate Ms. Tiger's conviction because "allowing the erroneous vacatur of the defendant's final conviction(s) [*sic*] to stand would be unjust and provide him/her [*sic*] an entirely unfair windfall based merely on the fact that the vacatur was entered prior to the OCCA's decision on retroactivity in *Wallace*." (Mot. at 7) Ms. Tiger objected to the state's motion, contending that the district court's order granting postconviction relief was final by virtue of the expiration of the time to appeal and that there was no valid reason to reopen the postconviction proceedings.

On May 9, 2022, the district court granted the state's motion to reinstate Ms. Tiger's convictions. Without addressing Ms. Tiger's arguments that the order granting postconviction relief was final and that no valid reasons existed for reopening postconviction proceedings, the district court ruled, based on *Matloff*, that Ms. Tiger's conviction should be reinstated. Three days later, the federal district court dismissed the federal indictment. Ms. Tiger was then returned to state prison.

This timely appeal followed.

ARGUMENT

Standard of Review. This Court reviews the denial of postconviction relief for abuse of discretion. *Stevens v. State*, 2018 OK CR 11, ¶ 12, 422 P.3d 741, 745 (citing *State*

ex rel. Smith v. Neuwirth, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766), *overruled on other grounds by White v. State*, 2021 OK CR 29, 499 P.3d 762. "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue." *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (citing *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225). "An abuse of discretion has also been described as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Id.* (quoting *Stouffer v. State*, 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263).

1. The district court's order granting postconviction relief was final by virtue of the state's failure to appeal it, and the district court had no statutory or inherent authority to disturb it once it became final.

A. The district court lacked statutory authority to consider the state's motion to vacate the order granting postconviction relief.

Under 12 O.S. § 1031, a district court may "vacate or modify its own judgments" only in one of nine specifically enumerated circumstances. None of them involve changes in the law that take place once a district court's judgment is final and the time to appeal it has expired—the only reason the state advanced for vacating the district court's order granting Ms. Tiger postconviction relief. Moreover, the state's motion was untimely under 12 O.S. § 1031.1(B), because it filed the motion well after the 30-day deadline set forth there. It also filed the motion more than 30 days after the triggering event it relied on—this Court's decision in *Matloff*. The state should have filed a petition to vacate judgment, not a motion, and its failure to heed this statutory distinction means that the district court had

no authority to act on the state's motion. *See* 12 O.S. § 1033 (requiring a petition to vacate or modify a judgment, rather than a motion, if more than 30 days have passed since the order sought to be vacated was entered); *Hillhouse v. Fitzpatrick*, 2013 OK CIV APP 36, ¶ 12, 301 P.3d 891, 895 (explaining that the "words 'application' and 'petition' have clearly different meanings in Oklahoma jurisprudence"); *In re Estate of Davis*, 2006 OK CIV APP 31, ¶ 20, 132 P.3d 609, 613 ("Where a motion to vacate judgment is not in the proper form of a verified petition, vacation of the judgment is properly refused.") (citing *State ex rel. Hunt v. Liberty Investors Life Insurance*, 1975 OK 165, 543 P.2d 1390). The district court thus erred by considering the state's motion on its own terms.

B. Even if the district court had construed the state's motion as a petition to vacate judgment, it abused its discretion in granting the petition.

Nevertheless, an untimely motion to vacate judgment can be construed as a petition to vacate judgment if the motion "substantially complies with the statute" because it "contains all of the averments prescribed by the statute for a petition." *Yeagley v. Brewer*, 1976 OK CIV APP 30, 551 P.2d 312, 314. But in the absence of such substantial compliance, a district court may refuse to vacate the judgment. *Estate of Davis*, 2006 OK CIV APP 31, ¶ 20, 132 P.3d 609, 613. "If more than thirty (30) days after a judgment, decree, or appealable order has been filed, proceedings to vacate or modify the judgment, decree, or appealable order on the grounds mentioned in paragraphs 2, 4, 5, 6, 7, 8, and 9 of Section 1031 of this title, shall be by petition, verified by affidavit, setting forth the judgment, decree, or appealable order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On this petition, a summons shall issue and be served as in the commencement of a civil

action." 12 O.S. § 1033. Absent substantial compliance with these requirements, the district court lacked jurisdiction to entertain the state's request to reinstate Ms. Tiger's conviction. *Sadberry v. Hope*, 1968 OK 107, 444 P.2d 175, 177 (explaining that an "order made by the court at a subsequent term, vacating a judgment rendered at a former term, without complying with the conditions of the statute in regard thereto, is void"), *overruled on other grounds by Patel v. OMH Medical Center, Inc.*, 1999 OK 33, ¶ 32, 987 P.2d 1185, 1198.

The state's motion did not substantially comply with § 1033, either in form or in substance. The state presented no supporting affidavit. The district court did not issue a summons, and thus no summons was served on Ms. Tiger. And the state's basis for vacating the order granting postconviction relief—a change in the law that came after the time for appealing that order expired—is not one of the listed grounds in § 1031. The state did not say that it had no notice of the pending postconviction proceedings. *Cf.* § 1031(2). The state did not allege that Ms. Tiger procured the order granting postconviction relief by fraud. *Cf.* § 1031(4). Neither party is a child or otherwise incompetent. *Cf.* § 1031(5), (8). Neither party has died. *Cf.* § 1031(6). No *force majeure* prevented the state from defending against the postconviction petition. *Cf.* § 1031(7). And there is no allegation of "taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment." § 1031(9). All of these defects mean that the state has not demonstrated substantial compliance with § 1031, and so the district court lacked jurisdiction to entertain the state's motion. The district court abused its discretion in concluding otherwise.

C. Contrary to the state's suggestion, the district court did not have inherent authority to vacate a judgment based solely on a change in the law that occurs after the time to appeal has expired.

The state nevertheless contended that the district court had "an inherent power to correct erroneous judgments," and posited that this power extends to revising judgments when the governing law changes after the time for the aggrieved party to appeal has expired. But it cited no controlling authority to support this suggestion. The district court did not address this contention.

"If an order issued by the district court is clearly erroneous under a current statute, the court can modify or vacate its judgment." *Harris v. Oklahoma County District Court*, 1988 OK CR 26, 750 P.2d 1129, 1130–31 (emphasis added) (*citing Hays v. L.C.I., Inc.*, 1979 OK 176, ¶ 4, 604 P.2d 861, 862). So in *Harris*, when the trial court departed from statutory procedures in effect at the time of its action, and released from jail a person found not guilty by reason of insanity instead of committing that person for a sanity examination as procedures required, this Court held that the trial court had jurisdiction to "vacate[] its previous order so that the required statutory procedures could be followed." *Id.* By contrast here, the state did not—and could not—contend that the order granting Ms. Tiger's application for postconviction relief and setting aside her conviction was not legally correct at the time it was entered. The order that the state asked the district court to reconsider was long final when it filed its motion. Because the district court's order granting postconviction relief was legally correct when it was entered, the "inherent authority" on which the state relied did not allow the district court to revise it. *Cf. In re Application of Anderson*, 1990 OK CR 82, 803 P.2d 1160,

1162 (holding that a trial court may revise a final order that was legally incorrect when it was entered); *Powell v. District Court of Seventh Judicial District*, 1970 OK CR 67, 473 P.2d 254, 257 (holding that a trial court has no jurisdiction to grant a motion to vacate judgment and order a new trial filed by the prosecution, in violation of double jeopardy principles).

Similarly, before a final judgment is entered, a trial court has inherent authority to "reconsider [an] interlocutory order granting or denying a motion for a new trial." *Ussery v. State*, 1988 OK CR 122, 758 P.2d 319, 321. But there is nothing interlocutory about the order the state asked the district court to undo—the order is not one that does not "constitut[e] a final resolution of the whole controversy." *Black's Law Dictionary* 889 (9th ed. 2009). Rather, the order conclusively granted postconviction relief, vacated Ms. Tiger's conviction, and dismissed the state's charges against her. The district court had no "inherent authority" to undo such a final order. It utterly failed to explain why it did, and thereby abused its discretion.

Likewise, *Morgan v. District Court*, 1992 OK CR 29, 831 P.2d 1001, does not support the notion that a district court's "inherent authority" allows for modifying a final judgment based on a change in the law that occurred after the time to appeal has run. There a defendant's lawyer in a capital murder case had agreed to certain modes of discovery, then reneged on that agreement. "The District court has inherent and statutory powers to do many things when the judicial process is thwarted," this Court said. *Id.*, 831 P.2d at 1005. There is no evidence of Ms. Tiger's "thwarting" the judicial process here. Ms. Tiger applied for relief under *McGirt*, and the district court granted that relief well before this Court said that *McGirt* did not apply retroactively. The state had an opportunity

to appeal, but chose not to do so. The district court abused its discretion by sanctioning the state's effort to thwart the judicial process by asking for reconsideration based on a later change in the law.

The closest the state comes to identifying any support for its "inherent authority to undo a final judgment after the time to appeal has run" argument is the Tenth Circuit's decision in *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir. 1997). But even this decision does not support the state's argument, because the nature of the change in the law involved there is not meaningfully similar to the nature of the change in the law here.

The legal rule involved in *Ute Indian Tribe* was whether the Uintah Valley Reservation had been diminished by act of Congress, such that the State of Utah could exercise criminal jurisdiction over the parts that were no longer "Indian country" under 18 U.S.C. § 1151. In 1985 the Tenth Circuit sitting en banc held that the reservation had not been diminished. *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986). But in 1992, the Utah Supreme Court held that it had been, and two years later the U.S. Supreme Court agreed with the Utah court. *See State v. Hagen*, 858 P.2d 925 (Utah 1992), *aff'd*, 510 U.S. 399 (1994). The question then before the Tenth Circuit was "whether to modify our judgment in *Ute Indian Tribe*, after the time for rehearing has passed, in light of a conflict with a later, contrary decision of the Supreme Court." 114 F.3d at 1516. A federal district judge had asked the Tenth Circuit for guidance on the issue. *Id.* at 1515.

The Tenth Circuit first held that the district court was bound by the earlier Tenth Circuit ruling because of the

rule of the mandate, under which "a district court must comply strictly with the mandate rendered by the reviewing court." *Id.* at 1521 (quoting *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 962 F.2d 1528, 1534 (10th Cir. 1992)). The state argued that the Supreme Court's decision in *Hagen* was an "intervening change in the law" that allowed the district court to depart from the mandate, but the Tenth Circuit disagreed. The "intervening-change-in-law exception does not apply where, as here, the case in which the erroneous ruling occurred is no longer sub judice—that is, where the case has become final." *Id.* (citing *Colorado Interstate Gas Co.*, 962 F.2d at 1534). Thus the district court had no authority not to follow the Tenth Circuit's previous ruling in the same case.

The Tenth Circuit then considered whether *it* had the power to revise the mandate in *Ute Indian Tribe* in order to harmonize it with the Supreme Court's contrary ruling in *Hagen*. The power was not limited by principles of *res judicata*, the court held, because in *Hagen* the state had already relitigated the issue of the diminishment of the reservation and the U.S. Supreme Court had ruled in a manner contrary to the Tenth Circuit's earlier ruling. *Ute Indian Tribe*, 114 F.3d at 1523. Nor did "a desire to achieve a more accurate judgment or to avoid the injustice that might result from a strict application of the principles of finality" play into the court's decision. *Id.* The state had managed to relitigate the question of jurisdiction in another case and obtain a ruling contrary to the ruling by which it was bound in *Ute Indian Tribe*. "The State's successful relitigation of the boundary issue has put the judgment in *Ute Indian Tribe*… on a collision course with *Hagen*, and therefore, we must directly confront whether *Ute Indian Tribe*… should give way to the equally final, contrary judgment in *Hagen*." *Ute Indian Tribe*, 114 F.3d at 1524. Because of the overarching importance of having

a uniform rule about the boundaries of this particular Indian reservation, the Tenth Circuit held that it had the power to revise the judgment in *Ute Indian Tribe* to conform to the Supreme Court's ruling in *Hagen*. *Id.* at 1524–27. But at the same time, the court emphasized that decisions to revise earlier judgments should be rare, reserved for other equally important decisions. *Id.*

The state's attempt to reinstate Ms. Tiger's conviction in the wake of this Court's ruling in *Matloff* does not present the same kind of need for uniformity of rules that the conflict between the Tenth Circuit and the Supreme Court did in *Ute Indian Tribe*. In *McGirt*, the Supreme Court held that the Creek Nation had not been disestablished by act of Congress. That decision applied retroactively to void the conviction of the petitioner there. This Court then applied that rule to the other four of the Five Tribes, holding that each of those reservations had also never been disestablished, and that these holdings applied retroactively to void convictions on both direct and collateral review. *See Bosse v. State*, 2021 OK CR 3, 484 P.3d 286 (Chickasaw); *Hogner v. State*, 2021 OK CR 4, 500 P.3d 629 (Cherokee); *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867 (Choctaw); *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250 (Seminole). This was the state of the law when the district court granted Ms. Tiger's application for postconviction relief and set aside her conviction. *See Matloff*, 2021 OK CR 21, ¶¶ 13–14, 497 P.3d at 689 (noting that this Court had applied *McGirt* retroactively "without our attention ever having been drawn to the potential non-retroactivity of *McGirt*").

But under the Tenth Circuit's framework for deciding whether to revise a final judgment after the time to appeal has expired, the mere fact of a conflict of legal rules is insufficient to allow the court to revise that judgment. Before the district court, the state pointed to the

"disruptive and costly consequences in the overturning of the defendant's final conviction(s) [*sic*] based on an erroneous application of *McGirt*." (Mot. at 7) But the "fact that *Ute Indian Tribe* may have been wrongly decided or operates unfairly against the state and local defendants" was "not a concern that inform[ed]" the Tenth Circuit's analysis. *Ute Indian Tribe*, 114 F.3d at 1523. So too here—the fact that *Matloff* came too late for the state to argue that the district court should deny Ms. Tiger's application for postconviction relief should not have figured into the district court's decision to grant the state's motion. There is no "collision course" between the district court's order granting Ms. Tiger's application for postconviction relief and other orders from other courts denying similar applications in the wake of *Matloff*.

Moreover, the state exaggerates the extent of the disruption that vacating Ms. Tiger's conviction might cause. She was indicted in federal court on the same two child-abuse charges of which she was convicted in state court. Under the Major Crimes Act, she must be "tried in the same courts and in the same manner as are all other persons committing" an offense "within the exclusive jurisdiction of the United States," 18 U.S.C. § 3242, and if convicted must be "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). Assuming she is convicted in federal court, Ms. Tiger will not escape punishment entirely. The sky is not falling on Oklahoma in the wake of *McGirt*, notwithstanding the state's assertions to the contrary. *See also* Rebecca Nagle & Allison Herrera, *Where Is Oklahoma Getting Its Numbers from in Its Supreme Court Case?*, The Atlantic (Apr. 26, 2022) (explaining that the state's claim "that it has lost jurisdiction over 18,000 prosecutions a year, many of which are now going un-investigated and unprosecuted," "did not hold up to scrutiny").

2. This Court's decision in State ex rel. Matloff v. Wallace was an extraordinary departure from over a century of settled postconviction law, and should be overruled.

Even if this Court concludes that the district court had some authority to reopen a final order granting postconviction relief in order to account for subsequent developments in the law, it should reverse the district court's order here. *Matloff* was such an extraordinary departure from over a century of settled postconviction law that it should be overruled.

"From the founding, Congress authorized federal courts to issue habeas writs to federal custodians. After the Civil War, Congress extended this authority, allowing federal courts to issue habeas writs to state custodians as well." *Brown v. Davenport*, 142 S. Ct. 1510, 1520 (2022). But through the end of the 19th century, the scope of relief available through habeas corpus was narrow. "A perceived error in the judgment or proceedings, under and by virtue of which the party is imprisoned, constituted no ground for relief." *Id.* at 1521 (quoting *Ex parte Siebold*, 100 U.S. 371, 375 (1880)). "Instead, a habeas court could examine only the power and authority of the court to act, not the correctness of its conclusions." *Id.* (quoting *Harlan v. McGourin*, 218 U.S. 442, 448 (1910)). Under this regime, a habeas court "could grant relief if the court of conviction lacked jurisdiction over the defendant or his offense." *Id.* (citing *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202–03 (1830)).

Consistent with this history, since the earliest days of statehood this Court has likewise said that "the remedy by habeas corpus" was "limited to cases in which… the petitioner be imprisoned under a judgment of a court which had no jurisdiction of the person or the subject-

matter or authority to render the judgment complained of." *Ex parte Justus*, 1909 OK CR 132, ¶ 2, 104 P. 933, 935. "Errors which go to the jurisdiction of the court may be raised for the first time on appeal, or in fact at any time by habeas corpus proceedings before the final completion of execution of the judgment and sentence of the trial court." *Crump v. State*, 1912 OK CR 214, ¶ 2, 124 P. 632, 632. "A lack of subject matter jurisdiction leaves a court without authority to adjudicate a matter. This Court has held that subject matter jurisdiction cannot be conferred by consent, nor can it be waived, and it may be raised at any time." *Hogner v. State*, 2021 OK CR 4, ¶ 4, 500 P.3d 629, 638 (Lewis, J., concurring) (citing *Magnan v. State*, 2009 OK CR 16, ¶¶ 9 & 12, 207 P.3d 397, 402; *Cravatt v. State*, 1992 OK CR 6, ¶ 7, 825 P.2d 277, 280; *Armstrong v. State*, 1926 OK CR 259, 248 P. 877, 878).

Until last summer, this was the settled understanding—postconviction relief is available to defendants who had been convicted in a court not of competent jurisdiction. That settled understanding came into play when the U.S. Supreme Court determined that the Muscogee (Creek) Nation had never been disestablished, in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Because the Muscogee (Creek) Nation had never been disestablished, federal jurisdiction over certain crimes committed by or against Indians there was exclusive, and thus reversed this Court's denial of postconviction relief. In the wake of *McGirt*, this Court held that the Chickasaw Nation (*Bosse v. State*, 2021 OK CR 3, ¶ 12, 494 P.3d 286, 291), the Choctaw Nation (*Sizemore v. State*, 2021 OK CR 6, ¶ 16, 485 P.3d 867, 871), the Cherokee Nation (*Spears v. State*, 2021 OK CR 7, ¶ 16, 485 P.3d 873, 877), and the Seminole Nation (*Grayson v. State*, 2021 OK CR 8, ¶ 12, 485 P.3d 250, 254) had likewise never been disestablished, such that federal jurisdiction committed over certain crimes committed by or against

Indians in those places was also exclusive. And in the wake of those holdings, this Court relied on the settled understanding that a criminal court's subject-matter jurisdiction may be challenged at any time to grant postconviction in four published cases. See *Bosse*, 2021 OK CR 3, ¶ 30, 484 P.3d at 295; *Cole v. State*, 2021 OK CR 10, 492 P.3d 11; *Ryder v. State*, 2021 OK CR 11, 489 P.3d 528; *Bench v. State*, 2021 OK CR 12, 492 P.3d 19. Indeed, *McGirt* itself arose in a postconviction posture, and on remand from the Supreme Court this Court granted postconviction relief and dismissed the conviction challenged there.

But last year, this Court veered off course. In *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, this Court held—for the first time in the history of American law—that a challenge to the jurisdiction of a criminal court was off-limits once the conviction became final. It so held even though the district court in that case had never considered the question of retroactivity, because this Court had always been clear that "the defect [of lack of subject-matter jurisdiction] can never be forfeited or waived and requires correction no matter if it is raised in district court." Indeed, this Court acknowledged that the district court in *Matloff* had applied the "familiar rule that defects in subject matter jurisdiction can never be waived, and can be raised at any time." *State ex rel. Matloff v. Wallace*, 2021 OK CR 15, ¶ 4. Nevertheless, the Court directed the parties to brief the question whether "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." *Id.* ¶ 6.

Having thus inserted the retroactivity question into the case, the Court held that *McGirt* and the follow-on

cases of *Bosse*, *Sizemore*, *Spears*, and *Grayson* could not be applied "retroactively in a state post-conviction proceeding to void a final conviction." *Matloff*, 2021 OK CR 21, ¶ 6, 497 P.3d at 688. Relying on its "inherent authority to interpret the remedial scope of state post-conviction statutes," *id.* ¶ 12, 497 P.3d at 689, the Court held that "*McGirt* and our post-*McGirt* decisions recognizing these reservations [as not having been disestablished] shall not apply retroactively to void a conviction that was final when *McGirt* was decided," *id.* ¶ 15, 497 P.3d at 689. That decision unfairly consigns hundreds of state prisoners like Ms. Tiger to serve sentences that the convicting courts never had any lawful authority to impose. It was and remains analytically flawed, and fails to afford those prisoners the relief that federal law requires this Court to afford them. This Court should correct the error it made in *Matloff*, hold that *McGirt* and the follow-on cases apply retroactively to cases on collateral review, and reverse the district court's decision to vacate the order granting Ms. Tiger's postconviction petition.

A. McGirt announced a substantive rule of law that applies retroactively under this Court's nonretroactivity rules.

When a court assesses the "retroactivity" of a new rule of law, it is determining not the "temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief" that he seeks. *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008). The "source of a 'new rule' is the Constitution itself, not any judicial power to create new rules. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule." *Id.* The U.S. Supreme Court relies on the framework set out in the plurality opinion in *Teague v.*

Lane, 489 U.S. 288 (1989), in order to determine whether "new" rules of constitutional law apply retroactively. *See Danforth*, 552 U.S. at 278–79 (explaining that the *Teague* framework arose out of the Supreme Court's "power to interpret the federal habeas statute"). But that court has also said that *Teague* "does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*." *Danforth*, 552 U.S. at 282.

The "remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." *Id.* at 288. This Court applies the *Teague* framework not only to changes in federal constitutional law, *see Thomas v. State*, 1994 OK CR 85, ¶ 13, 888 P.2d 522, 527 (determining whether the Sixth-Amendment-based rule of *Hunter v. State*, 1992 OK CR 19, 829 P.2d 64, applies retroactively under *Teague*), but also to other changes in the law not based on the federal constitution, *see Ferrell v. State*, 1995 OK CR 54, ¶ 5, 902 P.2d 1113, 1114 (determining whether the statutory-interpretation rule of *Burke v. State*, 1991 OK CR 116, 820 P.2d 1344, applies retroactively under *Teague*). Last year in *Matloff*, this Court emphasized that its retroactivity cases "often draw[] on, but [are] independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus." 2021 OK CR 21, ¶ 7, 497 P.3d at 688.

Under this Court's nonretroactivity cases, new "rules of constitutional criminal procedure are applied to criminal cases pending on direct appeal." *Baxter v. State*, 2010 OK CR 20, ¶ 11, 238 P.3d 934, 937 (citing *Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987)). "This Court has held a case adopts a new rule when it breaks new ground or imposes a new obligation on the States or Federal

Government, or, to put it differently, when the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* (quoting *Ferrell*, 1995 OK CR 54, ¶ 5, 902 P.2d at 1114). This Court generally does not apply new rules to cases on collateral review. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1114–15. However, it will apply a new rule on collateral review "if (i) it places certain kinds of primary conduct beyond the power of the criminal law-making authority to proscribe, or (ii) if it requires the observance of procedures that are implicit in the concept of ordered liberty." *Id.*, 902 P.2d at 1115. As an example of a rule that qualifies for these exceptions, the Court identified *Stewart v. State*, 1972 OK CR 94, 495 P.2d 834, which involved a "denial of the right to counsel, an error that infects the entire criminal trial mechanism and a right so basic it defies harmless error analysis." *Id.*, ¶ 9, 902 P.2d at 1115 (citing *Bartell v. State*, 1994 OK CR 59, ¶¶ 17, 19, 881 P.2d 92, 97–98).

Under this framework, there can be no doubt that *McGirt* announced a substantive rule of law that applies retroactively. Substantive rules include those that "alter[] the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). "Such rules apply retroactively because they necessarily carry a significant risk that a defendant… faces a punishment that the law cannot impose upon him." *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). By excluding a certain class of defendants from state prosecution for certain crimes, the *McGirt* rule both "place[s] certain criminal laws and punishments altogether beyond the State's power to impose," *Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016), and "alters… the class of persons that the law punishes," *Summerlin*, 542 U.S. at 352. Where a State has no authority to prosecute a defendant for a crime, no "possibility of a valid result" can exist. *Montgomery*, 577

U.S. at 201. All convictions by a court that lacks jurisdiction are, "by definition, unlawful" and "void." *Id.* at 201, 203; *see Waley v. Johnston*, 316 U.S. 101, 104–05 (1942) (per curiam) ("[J]udgment of conviction is void for want of jurisdiction of the trial court to render it."). Here, federal law preempts the Oklahoma legislature's prerogative to make laws that punish certain major crimes, including felony child abuse, that have been committed by Indians in Indian country. *United States v. John*, 437 U.S. 634, 651 (1978). Thus *McGirt* announced a new substantive rule that applies retroactively—or, more accurately, announced a rule that is "not subject to the bar" of *Teague*. *Montgomery*, 577 U.S. at 198 (quoting *Summerlin*, 542 U.S. at 352 n.4).

Viewed another way, *McGirt* did not announce a "new" rule at all, in the sense that would trigger any nonretroactivity analysis. Recall that a "new" rule is one that was not dictated by extant precedent when the conviction became final. Ms. Tiger's conviction became final in 2019. But *McGirt* simply applied the rule from *Solem v. Bartlett*, 465 U.S. 463 (1984), decided over 35 years before Ms. Tiger's conviction became final, to the different set of facts presented by the history of Indian country in Oklahoma. *See* 140 S. Ct. at 2462, 2465, 2468–70. "A case does not announce a new rule under *Teague* when it is merely an application of the principle that governed a prior decision to a different set of facts." *Murphy v. Royal*, 875 F.3d 896, 929 n.36 (10th Cir. 2017) (quoting *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013)), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020). So "garden-variety applications" of the test for disestablishing an Indian reservation articulated in *Bartlett* "do not produce new rules." *Chaidez*, 568 U.S. at 348. *McGirt* straightforwardly applied the *Bartlett* factors to determine whether the Muscogee (Creek) reservation had been disestablished. Thus *McGirt* did not announce a

new rule, and applies retroactively to Ms. Tiger's case even though it is on collateral review.

B. Even if this Court's retroactivity cases did not classify McGirt as a substantive rule that applies retroactively, federal law compels this Court to do so.

Indeed, federal law requires this Court to apply *McGirt*'s jurisdictional rule retroactively. When a "new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, 577 U.S. at 200. *McGirt* is precisely this sort of rule.

In *Matloff*, this Court refused to apply *McGirt* retroactively because it concluded that that case announced a mere procedural rule. This Court said 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." *Matloff*, 2021 OK CR 21, ¶ 26, 497 P.3d at 691. This change, this Court said, "affected only the manner of determining the defendant's culpability." *Id.* (quoting *Summerlin*, 542 U.S. at 353). Thus, this Court held, *McGirt* did not apply retroactively because it was a mere procedural change that "raises no serious questions about the truth-finding function of the state courts." *Id.* ¶ 39, 497 P.3d at 694.

But that holding reflects a basic misunderstanding of the division of authority to define and punish crimes in our federal system. Under the Constitution's recognition of separate state and federal sovereignty, a state crime is not the same offense as a federal crime. Rather, as the Double

Jeopardy Clause's dual-sovereignty doctrine recognizes, the states and the federal government are separate sovereigns invested with independent powers to proscribe conduct and punish crimes. "[A] crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign." *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019); *see Heath v. Alabama*, 474 U.S. 82, 92 (1985); *Abbate v. United States*, 359 U.S. 187, 195 (1959); *United States v. Wheeler*, 435 U.S. 313 (1978).

In ordinary circumstances, the dual-sovereignty doctrine means that both the state and federal governments can prosecute a defendant for the same conduct. Gamble, 139 S. Ct. at 1964. But here, the State of Oklahoma has been ousted altogether from prosecuting a crime covered by the Major Crimes Act. That means that it has prosecuted Ms. Tiger for no offense at all. "[A]n 'offence' is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two 'offences.'" *Id.* at 1965. But where only one sovereign has the power to prosecute—as here, only the federal government, by virtue of the Major Crimes Act and the Supremacy Clause of the U.S. Constitution—only one law can apply and only one offense can exist. Here, it is not the law of Oklahoma.

Under the U.S. Supreme Court's *Teague* jurisprudence, substantive rules must have retroactive effect regardless of when a claimant's conviction became final. *Montgomery*, 577 U.S. at 200. If "a State enforces a proscription or a penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." *Id.* at 201. When the Supreme 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). So when in *McGirt* the Supreme

Court interpreted those Acts of Congress that established the boundaries of the Muscogee (Creek) Nation, *see* 140 S. Ct. at 2462–63, it was articulating what Congress's enactments have always meant. And if Congress's enactments have always meant that the Muscogee (Creek) Nation was never disestablished, then the Supremacy Clause has always required exclusive federal jurisdiction over major crimes committed by Indians there. Federal courts would be required to grant Ms. Tiger and others like her who have been convicted of major crimes in Indian country relief from their illegal convictions and sentences under *McGirt*. *See Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (affirming for the reasons explained in *McGirt*). This Court likewise is bound by the Supremacy Clause to grant Ms. Tiger the same measure of relief. *See Montgomery*, 577 U.S. at 204–05 ("If 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.") (quoting *Yates v. Aiken*, 484 U.S. 211, 218 (1988)). This Court thus cannot continue to follow last year's decision in *Matloff*. That decision must yield to its federal constitutional obligation to afford Ms. Tiger relief from her illegal and unconstitutional conviction.

C. Nothing in McGirt sanctioned this Court's inventing a rule never before applied in American law to avoid granting postconviction relief to Ms. Tiger and others like her who were convicted of crimes in a court that lacked jurisdiction to impose sentence.

The Court in *McGirt* recognized the monumental implications of its decision. As the Court acknowledged, "[t]housands of Native Americans like Mr. McGirt" may "wait in the wings to challenge the jurisdictional basis of

their state-court convictions." 140 S. Ct. at 2479. The dissenting opinion recognized that the Court's decision "draws into question thousands of convictions obtained by the State" as "now subject to jurisdictional challenges." *Id.* at 2500 (Roberts, C.J., dissenting); *see also id.* at 2501 ("At the end of the day, there is no escaping that today's decision will undermine numerous convictions obtained by the State."). At the same time, the Court also suggested that "well-known state and federal limitations on postconviction review in criminal proceedings" might limit the number of cases in which void state-court convictions would lead to a prisoner walking out of the gates of state prison onto the streets. *Id.* at 2479.

That suggestion was not, however, an invitation to result-oriented judicial decisionmaking based on a legal theory that was heretofore unknown to American law. However "well known" other limitations on the scope of state or federal postconviction relief might have been, the fact that a jurisdictional defect in the court of conviction always supported habeas relief was equally well known at the time the Supreme Court decided *McGirt*. In 1880 the Supreme Court remarked that the "only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void." *Ex parte Siebold*, 100 U.S. 371, 375 (1880). To be sure, the conception of "jurisdiction" expanded through the late 19th and first half of the 20th centuries to include a number of errors that, strictly speaking, did not affect the subject-matter jurisdiction of the court of conviction. *See Brown v. Davenport*, 142 S. Ct. 1510, 1521 n.1 (2022). But the traditional, historical core of habeas relief—from convictions entered by courts that lack jurisdiction to do so—never became unavailable. And until last year, that

was the view of state postconviction review that prevailed in Oklahoma. *See Ledgerwood v. State*, 1911 OK CR 261, ¶ 8, 116 P. 202, 204; *Bowen v. State*, 1972 OK CR 146, ¶ 9, 497 P.2d 1094, 1097; *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402. Simply put, the Supreme Court's decision in *McGirt* did not anticipate that this Court would invent a new basis for foreclosing postconviction relief from convictions imposed by a court not of competent jurisdiction in order to stanch the tide of claims for relief from those convictions, no matter how many such claims might be brought in the courts of this state.

The "magnitude of a legal wrong is no reason to perpetuate it," the Court in *McGirt* said. 140 S. Ct. at 2480. No one seriously believes that prisoners will escape punishment entirely because of *McGirt*. To be sure, some prisoners will see their sentences shortened; some will walk free from state prison knowing they cannot be retried because the passage of time makes retrial infeasible; and some will be (or have been) successfully reprosecuted in federal court and punished accordingly. But all will have been punished to some degree for their transgressions, even though the state courts have belatedly been recognized to have lacked jurisdiction to do so. *Matloff* perpetuates the legal wrong of imposing punishment in the absence of jurisdiction to do so. This Court should reverse the decision of the district court to reinstate Ms. Tiger's conviction and remand with instructions to dismiss it, leaving it to federal authorities to prosecute her (as they have already tried to do).

CONCLUSION

The state allowed the district court's order granting Ms. Tiger's application for postconviction relief to become final by failing to timely appeal it. It should have accepted the consequences of this voluntary choice and allowed the

federal prosecution of Ms. Tiger for the same charges to play out in the only court with competent jurisdiction over them. The issuance of this Court's decision in *Matloff* four months after the district court's order became final was not license for the district court to revise the order in the manner the state asked for. By indulging the state's belated change of heart, the district court abused its discretion to disturb a final order.

Even if the district court had properly exercised discretion to revise the order granting postconviction relief, this Court should overrule the authority on which the district court relied to do so. It was unnecessary for this Court to invent a completely new rule of law to manage the fallout from the Supreme Court's decision in *McGirt*. This Court should overrule *Matloff* and remand with instructions to reinstate the grant of postconviction relief so that Ms. Tiger may be tried in federal court—the only court that has, and ever did have, subject-matter jurisdiction to convict and sentence her.

Respectfully submitted: August 3, 2022.

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