

601 F.Supp.3d 1105

United States District Court, E.D. Oklahoma.

UNITED STATES of America, Plaintiff,

v.

Jeriah Scott BUDDER, Defendant.

Case No. 6:21-CR-00099-DCJ

|

Signed 04/29/2022

**Synopsis**

**Background:** After jury convicted defendant of voluntary manslaughter, defendant filed renewed motion to dismiss indictment.

**Holdings:** The District Court, David C. Joseph, J., sitting by designation, held that:

[1] Oklahoma was without subject matter jurisdiction over offense committed by member of federally recognized tribe in Indian Country, and

[2] as matter of first impression, Supreme Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452, which precluded defendant from asserting Oklahoma self-defense law, did not violate Ex Post Facto and Due Process Clauses.

Motion denied.

**Procedural Posture(s):** Pre-Trial Hearing Motion.

West Headnotes (11)

- [1] **Homicide** 🔑 Passion as element or as factor affecting degree or grade of offense
- Heat of passion negates element of malice aforethought required for conviction of murder in either first or second degree. 18 U.S.C.A. § 1111(a).

- [2] **District and Prosecuting Attorneys** 🔑 Charging discretion

Whether to prosecute and what charge to file or bring before grand jury are decisions that generally rest in prosecutor's discretion, and prosecutorial decisions are not readily susceptible to kind of analysis that courts are competent to undertake.

- [3] **Indictments and Charging Instruments** 🔑 Prosecutorial misconduct
- Indictments and Charging Instruments** 🔑 Evidence supporting indictment

Facially valid indictments cannot generally be challenged on ground that grand jury acted on basis of inadequate or incompetent evidence; rather, when looking at whether indictment should be dismissed, standard is whether there is prosecutorial misconduct that is flagrant to point that there is some infringement on grand jury's ability to exercise independent judgment.

- [4] **Indians** 🔑 State court or authorities

State of Oklahoma was without subject matter jurisdiction over offense committed by member of federally recognized tribe in Indian Country.

2 Cases that cite this headnote

- [5] **Constitutional Law** 🔑 Legislative branch

Ex Post Facto Clause of United States Constitution applies only to legislative action. U.S. Const. art. 1, § 9, cl. 3.

- [6] **Constitutional Law** 🔑 Punishment in general
- Constitutional Law** 🔑 Evidence

Ex Post Facto Clause bars any legislation that imposes punishment for act that was not punishable at time it was committed, or imposes additional punishment to that then prescribed, or changes rules of evidence to make it easier to convict person of crime previously committed. U.S. Const. art. 1, § 9, cl. 3.

- [7] **Constitutional Law** 🔑 Penal laws in general  
**Constitutional Law** 🔑 Punishment in general  
**Constitutional Law** 🔑 Criminal Proceedings

Ex Post Facto Clause prohibits application of law that punishes as crime act previously committed, that was innocent when done, that makes more burdensome punishment for crime, after its commission, or that deprives one charged with crime of any defense available according to law at time when act was committed. U.S. Const. art. 1, § 9, cl. 3.

- [8] **Constitutional Law** 🔑 Vagueness as to Covered Conduct or Standards of Enforcement; Offenses and Penalties  
**Constitutional Law** 🔑 Purpose  
**Constitutional Law** 🔑 Certainty and definiteness in general

Ex Post Facto Clause, as well as Due Process Clause and rule of definiteness, demonstrate basic shared principle of right to fair warning of that conduct that will give rise to criminal penalties. U.S. Const. art. 1, § 9, cl. 3; U.S. Const. Amend. 5.

- [9] **Constitutional Law** 🔑 Penal laws in general  
**Constitutional Law** 🔑 Certainty and definiteness in general

Ex Post Facto Clause and Due Process Clause ensure that person of ordinary intelligence has fair notice that his contemplated conduct is forbidden by statute and that no man shall be held criminally responsible for conduct that he could not reasonably understand to be proscribed. U.S. Const. art. 1, § 9, cl. 3; U.S. Const. Amend. 5.

- [10] **Constitutional Law** 🔑 Retroactive laws and decisions; change in law

While Ex Post Facto Clause by its own terms does not apply to judicial decisions, Fifth Amendment's Due Process Clause operates to protect criminal defendants from any unforeseeable judicial enlargement that when

applied retroactively operate precisely like ex post facto law. U.S. Const. art. 1, § 9, cl. 3; U.S. Const. Amend. 5.

- [11] **Constitutional Law** 🔑 Criminal Proceedings  
**Constitutional Law** 🔑 Defenses in general  
**Homicide** 🔑 Self-Defense  
**Indians** 🔑 Constitutional and statutory provisions  
**Indians** 🔑 State court or authorities

Change wrought in United States Supreme Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452, which precluded enrolled member of federally recognized tribe from asserting Oklahoma self-defense law in prosecution for murder in Indian country, did not violate defendant's right under Ex Post Facto and Due Process Clauses to fair warning of conduct that would give rise to criminal penalties, even though *McGirt* brought about unforeseeable judicial enlargement of geographical scope of federal Indian Country jurisdiction in Oklahoma, and jury decided that defendant's actions would have constituted justifiable homicide under Oklahoma law. U.S. Const. art. 1, § 9, cl. 3; U.S. Const. Amend. 5; 21 Okla. Stat. Ann. § 733(A) (2).

2 Cases that cite this headnote

#### Attorneys and Law Firms

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#### MEMORANDUM ORDER

DAVID C. JOSEPH, UNITED STATES DISTRICT JUDGE

Before the Court is Defendant Jeriah Scott Budder's MOTION TO DISMISS THE SUPERSEDING INDICTMENT FOR DENIAL OF DUE \*1107 PROCESS AND FAIR NOTICE (the "Motion"). [Doc. 161]. The government opposes this Motion. [Doc. 160],<sup>1</sup> For the following reasons and as discussed below, the Defendant's Motion is DENIED.

### **FACTUAL BACKGROUND**

This case involves the lethal shooting of David Wayne Jumper ("Jumper"), by the Defendant, Jeriah Scott Budder ("Budder" or the "Defendant"), in Tahlequah Oklahoma, on April 24, 2019. At the time of the shooting, Defendant was an 18-year-old high school senior and a member of the Cherokee Nation. He stood at approximately five-foot nine-inches tall and weighed approximately 180 pounds.

On April 24, 2019, Budder was moving his belongings to a different house. To this end, he "packed" his clothes and other items in a plastic "garbage bag" along with his recently purchased Glock 19 pistol, magazines, and ammunition. Budder called his friend and classmate, Dyson Hanson ("Hanson"), to help him move his belongings and to provide transportation. Thereafter, Hanson, Jumper (who was Hanson's uncle), and another man, Lewis Thompson,<sup>2</sup> arrived at Defendant's home in a car to pick him up and help him move. On the drive to pick up the Defendant, Jumper, who was 36 at the time of his death and weighed approximately 240 pounds, was driving the vehicle and drinking vodka.<sup>3</sup> When Jumper learned from his nephew that they needed to pick up the Defendant to help him move, he told Hanson and Thompson that he was going to "teach [Budder] a lesson." Notably, Jumper had threatened Budder with violence on previous occasions.

Jumper was driving his daughter's car on that day and had recently been asked to move out of his girlfriend's residence. As such, the trunk of the vehicle was full of Jumper's personal belongings and could not accommodate the addition of the "garbage bag" containing Budder's belongings. For this reason, when Jumper, Hanson, and Thompson arrived to pick Budder up, he brought his bag of clothes and firearm with him into the rear-seat driver's side compartment of the vehicle.

Shortly after the car pulled away, Jumper learned that Budder had brought a firearm into the vehicle. Jumper stopped the car and demanded that Budder get out of the car. The Defendant did not get out of the car.<sup>4</sup> The victim proceeded to drive a little farther down the road before stopping the vehicle in the middle of the street at an intersection. Jumper again demanded that the Defendant get out of the car. When Budder didn't immediately comply, Jumper got out of the car, opened Budder's door, and began striking Budder in the face with his fists and trying to pull \*1108 him out of the vehicle.<sup>5</sup> Jumper also attempted to wrestle the firearm away from the Defendant. The altercation ended when Defendant fired his handgun into Jumper's body multiple times, killing him.<sup>6</sup>

### **PROCEDURAL HISTORY**

Budder was originally charged with manslaughter by the Cherokee County District Attorney, in Tahlequah, Oklahoma. Before the matter proceeded to trial in Oklahoma state court, *McGirt v. Oklahoma* was decided on July 9, 2020. Defendant, as a Cherokee, is an enrolled member of a federally recognized tribe and the offenses charged are alleged to have occurred on the Cherokee Nation reservation. Accordingly, the *McGirt* decision effectively divested Oklahoma of jurisdiction and extended jurisdiction over the offense conduct to the United States Attorney under the Major Crimes Act. 18 U.S.C. § 1153; *McGirt v. Oklahoma*, — U.S. —, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020).<sup>7</sup> The state criminal charges were therefore dismissed for lack of subject matter jurisdiction. [Docs. 61-1, 61-2].

On April 15, 2021, the United States charged Budder with First-Degree Murder in Indian Country, in violation of 18 U.S.C. §§ 1111(a), 1151, and 1153. [Doc. 2]. On September 14, 2021, the United States filed a Superseding Indictment (the "Indictment") charging counts of: (i) First-Degree Murder in Indian Country, in violation of 18 U.S.C. §§ 1111(a), 1151, and 1153, (ii) Using, Carrying, Brandishing, and Discharging a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A), and (iii) Causing the Death of a Person in the Course of a Violation of Title 18 U.S.C. § 924(c), in violation of 18 U.S.C. § 924(j)(1), as well as a forfeiture allegation. [Doc. 38].

[1] [2] [3] In February and March of 2022, the Defendant filed several motions seeking dismissal of all or some of the counts in the Indictment. *See* [Docs. 61, 62, 63, 65, 67, 68,

69, 70, 71 (amending Doc. 67), and 125 (supplementing Doc. 62)]. The Court denied or deferred the motions, with two exceptions. The Court granted, in part, Defendant's Motion requesting the disclosure or *in camera* review of the grand jury transcript. [Doc. 67, amended by Doc. 71]. The Court subsequently conducted an *in-camera* review of the grand jury transcript, including the instructions given to the grand jurors prior to returning its true bill to the Indictment.<sup>8</sup> After its review, \*1109 the Court did not find cause for dismissal of the Indictment and declined to disclose grand jury materials to the Defendant.<sup>9</sup>

[4] The Defendant also filed a motion requesting that the Court apply the Oklahoma state law of self-defense, arguing that the change from the Oklahoma law to the somewhat narrower federal law of self-defense violated the Constitution's Ex-Post Facto Clause and otherwise violated his right to due process under the law. [Doc. 62]. Prior to trial, the Court denied the motion as presented and declined to offer an advisory opinion on the *ex post facto* and due process issues raised in the motion – determining, essentially, that it was unable to determine before presentation of evidence at trial if the differences in the Oklahoma and federal laws of self-defense would be significant. *See Dobbert v. Florida*, 432 U.S. 282, 293, 300, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) (noting that the Ex Post Facto Clause does not apply to procedural changes or situations where the changes have no effect on the defendant's case). However, finding Defendant's arguments and authority compelling, the Court advised counsel at the pre-trial conference that, if there was evidence of self-defense presented at trial, the Court was inclined to provide the jury with instruction and an interrogatory that explained the Oklahoma law of self-defense using the Oklahoma pattern jury instruction.<sup>10</sup> The Court later \*1110 advised counsel that it intended to ask the jury to fill out a special interrogatory, thus allowing a determination of whether the jury believed that the Oklahoma law of self-defense would have applied differently to the facts of this case than federal law.<sup>11</sup>

Ultimately, the “Special Interrogatory” given to the jury was as follows:

Under Oklahoma law, a person is justified in using deadly force in self-defense if that person reasonably believed that use of deadly force was necessary to:

a) prevent death or great bodily harm to himself; or

b) to terminate or prevent the commission of a forcible felony against himself.

Under Oklahoma law, self-defense is still a valid defense even if, although the danger to life or personal security may not have been real, a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that he was in imminent danger of death or great bodily harm. A forcible felony is any felony which involves the use or threat of physical force or violence against any person.<sup>12</sup>

Assault and battery are misdemeanors under Oklahoma law, not a felony. An assault is any willful and unlawful attempt or offer to do a bodily hurt to another with force or violence. A battery is any willful and unlawful use of force or violence upon the person of another.

Attempted aggravated assault and battery is a felony under Oklahoma law. An attempted aggravated assault and battery involves either (1) an attempt to inflict great bodily injury, meaning bone fracture, protracted and obvious disfigurement, protracted loss or impairment of the function of a body part, organ or mental faculty, or substantial risk of death upon the person assaulted or (2) an attempted assault and battery by a person of robust health or strength upon one who is aged, decrepit, or incapacitated.

Attempted robbery is a felony under Oklahoma law. Attempted robbery is the attempted wrongful taking and carrying away of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

If the Oklahoma law of self-defense is determined to be applicable in this case, has the Government proved beyond a reasonable doubt that the Defendant did not act in self-defense for the conduct \*1111 charged in Count One of the Superseding Indictment? [Doc. 158].

After a three-day trial, the jury returned a verdict of guilty on Count One of the Indictment to the lesser-included offense of Voluntary Manslaughter under federal law. In rendering this verdict, the jury considered the Court's instruction on the federal law of self-defense. [Doc. 154]; *see also*, 10th Circuit Pattern Jury Instruction 1.28. Accordingly, in finding the Defendant guilty of Voluntary Manslaughter, the jury necessarily also found that the federal law of self-defense did not apply and were instructed as such by the Court.<sup>13</sup>

Compare *United States v. Serawop*, 410 F.3d 656, 665 (10th Cir. 2005) (quoting *United States v. Browner*, 889 F.2d 549, 552 (5th Cir. 1989)) (“voluntary manslaughter encompasses all of the elements of murder ... [including] the physical act of unlawfully causing the death of another, and of the mental state that *would* constitute malice, but for the fact that the killing was committed in adequately provoked heat of passion or provocation”) with *United States v. Huitron-Guizar*, 678 F.3d 1164, 1165 (10th Cir. 2012) (self-defense is a “traditionally lawful” activity).

In response to the “Special Interrogatory,” however, the jury answered “No,” determining that the government had not proved beyond a reasonable doubt that Budder had not acted in self-defense under Oklahoma law.<sup>14</sup> As such, the jury found that application of Oklahoma's law of self-defense to the facts of this case would have operated to acquit the Defendant. After the trial, the Defendant renewed his Motion to Dismiss arguing that the change wrought in *McGirt*, which precluded him from asserting the self-defense law of Oklahoma, raises *ex post facto* and due process issues. This issue is now ripe for ruling.

## DISCUSSION

### I. Legal Standard

[5] [6] [7] It is well settled that the Ex Post Facto Clause of the United States Constitution applies only to legislative action. *Marks v. United States*, 430 U.S. 188, 191, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). The Ex Post Facto Clause bars any legislation “which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence” to make it easier to convict a person of a crime previously committed. *Cummings v. Missouri*, 71 U.S. 277, 325-26, 4 Wall. 277, 18 L.Ed. 356 (1866). In essence, this clause prohibits the application of a law “which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed.” *Beazell v. Ohio*, 269 U.S. 167, 170, 46 S.Ct. 68, 70 L.Ed. 216 (1925) (emphasis added); see also *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (including a more recent discussion of the \*1112 Ex Post Facto Clause and its historical meaning).

[8] [9] Supreme Court precedent establishes that the Ex Post Facto Clause, as well as the Due Process Clause and rule of definiteness, demonstrate the basic shared principle of “a right to fair warning of that conduct which will give rise to criminal penalties.” See e.g., *Marks*, 430 U.S. at 191-92, 97 S.Ct. 990 (1977) (citing *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954)). In short, these Constitutional rules ensure that “a person of ordinary intelligence [has] fair notice that his contemplated conduct is forbidden by statute” and that “no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *Harriss*, 347 U.S. at 617, 74 S.Ct. 808. The Ex Post Facto Clause, then, bars any legislative action that would change criminal statutes after conduct has been committed in a way that disadvantages a criminal defendant.

[10] While the Ex Post Facto Clause by its own terms does not apply to judicial decisions, the Supreme Court has made clear that the Fifth Amendment's Due Process Clause operates to protect criminal defendants from any “unforeseeable judicial enlargement” which when applied retroactively “operate precisely like an *ex post facto* law.” *Bouie v. City of Columbia*, 378 U.S. 347, 353, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); see also *Marks*, 430 U.S. at 192, 97 S.Ct. 990 (applying this principle to Fifth Amendment Due Process Clause).

In *Bouie*, civil rights protesters were charged and convicted of criminal trespass after conducting a sit-in at a segregated South Carolina restaurant. *Bouie*, 378 U.S. at 348-350, 84 S.Ct. 1697. When the protestors had sat down, no signs barred their entry, although they subsequently refused to leave when asked. *Id.* The South Carolina statute in question barred the “entry upon the lands of another\*\*\*after notice from the owner\*\*\*prohibiting such entry.” *Id.* at 355, 84 S.Ct. 1697 (as included in original). Thus, a plain reading of the statute at the time showed that the individuals had not criminally trespassed since they had not been prohibited from their initial entry. The South Carolina Supreme Court, however, upheld the convictions, judicially expanding the statute for the first time to include “the act of remaining on the premises of another after receiving notice to leave.” *Id.* at 350, 84 S.Ct. 1697. The United States Supreme Court held that this type of judicial enlargement violated the petitioners’ due process rights in the same way as a legislative violation of the Ex Post Facto Clause. *Id.* at 362, 84 S.Ct. 1697.

The Supreme Court's stated basis for its decision was its desire to protect "[t]he fundamental principle that the required criminal law must have existed when the conduct in issue occurred." *Id.* at 354, 84 S.Ct. 1697 (quotation omitted). In doing so, the *Bouie* court acknowledged that, similar to *ex post facto* application of legislative changes, retroactive application of judicial decisions can "subject a person to criminal liability for past conduct" and in the process "deprive him of due process of law" without "fair warning that his contemplated conduct constitutes a crime." *Id.* at 354-55, 84 S.Ct. 1697.

In its post-trial brief, the government cites to several cases which they argue narrow the *Bouie* holding. [Doc. 160, pp. 6-9]. These cases, however, continue to recognize that due process in this context fundamentally focuses on "concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct." *Rogers v. Tennessee*, 532 U.S. 451, 459, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001) (citations omitted). See \*1113 also *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (citations omitted) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"); *Marks*, 430 U.S. at 191-92, 97 S.Ct. 990 (1977) (citations omitted) (The "right to fair warning of that conduct which will give rise to criminal penalties ... is protected against judicial action by the Due Process Clause of the Fifth Amendment"). While it is certainly true that the Supreme Court has declined to strictly apply an "*ex post facto* analysis" to every judicial decision that has acted to retroactively change the legal framework applicable to a criminal defendant, the Supreme Court has held fast to the principle that judicial alterations may still "violate[ ] the principle of fair warning" where the judicial change to a statute or common law rule is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers*, 532 U.S. at 462, 121 S.Ct. 1693 (quoting *Bouie*, 378 U.S. at 354, 84 S.Ct. 1697).

In *Rogers*, for example, the Supreme Court held that a state supreme court's decision to retroactively dispense with a common law rule requiring that death occur within "a year and a day" after the charged conduct for it to constitute murder was not "unexpected and indefensible" where the rule had never actually been applied in the state. *Rogers*, 532 U.S. at 466-67, 121 S.Ct. 1693. Rather, the Court found that the Due

Process Clause should not apply to a situation involving "a routine exercise of common law decisionmaking" involving a common law rule with "only the most tenuous foothold" in the state. *Id.* at 467, 121 S.Ct. 1693.

Likewise, *Metrish v. Lancaster* is of limited precedential value in this case. 569 U.S. 351, 133 S.Ct. 1781, 185 L.Ed.2d 988 (2013). In *Metrish*, the Michigan Supreme Court denied a defendant a common law defense, finding that the defense no longer had statutory support in the aftermath of legislative changes. *Id.* at 364-66, 133 S.Ct. 1781. Notably, the updated statutes were enacted by the Michigan legislature prior to the criminal activity in the case. *Id.* at 362, 133 S.Ct. 1781. Thus, the situation involved the proper interpretation of these revised statutes, which the state supreme court ultimately held did not retain the common law defense in question. *Id.* at 365-66, 133 S.Ct. 1781. Further, *Metrish* involved habeas reliefs very demanding standard of review, requiring that the state court had "unreasonably applied federal law clearly established in our decisions." *Id.* at 357, 133 S.Ct. 1781 (citing 28 U.S.C. § 2254(d)(1)). Regardless, as noted in *Metrish*, the Supreme Court maintained the threshold question from *Bouie*, *i.e.*, whether the judicial alteration is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue." *Id.* at 360, 133 S.Ct. 1781 (quoting *Rogers*, 532 U.S. at 462, 121 S.Ct. 1693). This brings the Court to the question of whether *McGirt* created such an "unexpected and indefensible" change.<sup>15</sup>

#### \*1114 II. The *McGirt* Decision

On July 9, 2020, a Supreme Court decision, *McGirt v. Oklahoma*, dramatically altered the jurisdictional boundaries of the State of Oklahoma. — U.S. —, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). In that decision, the majority held that while Congress had diminished the Creek reservation in Eastern Oklahoma, it had never formally disestablished it. *Id.* Though the Court acknowledged that its decision would upset a century of practice, it found that Congress had "never withdrawn the promised reservation" and rejected arguments that the affected area should be considered disestablished simply because the "price of keeping [promises regarding the reservation] has become too great." *Id.* at 2482. However, the majority recognized that its decision would raise substantial issues, which Courts would need to resolve using "other legal doctrines." *Id.* at 2481.

The dissent in *McGirt*, authored by Chief Justice Roberts, went into much greater detail concerning the fundamental

nature of this jurisdictional shift. As the dissent noted, the essential holding of the *McGirt* decision is that “unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation, on which the State may not prosecute serious crimes committed by Indians.” *Id.* (Roberts, C.J. dissenting). In the view of the four dissenting justices, “[w]hat has gone unquestioned for a century remain[ed] true ... [a] huge portion of Oklahoma is not a Creek Indian reservation.” *Id.*

Cases since *McGirt* have shown the practical impact the decision has had on criminal prosecutions in eastern Oklahoma. The Oklahoma Court of Criminal Appeals, for example, noted that *McGirt* “imposed new and different obligations on the state and federal governments” by imposing federal “jurisdiction over the apprehension and prosecution of major crimes by or against Indians in a vastly expanded Indian Country.” *State ex rel. Matloff v. Wallace*, 497 P.3d 686, 692 (Okla. Ct. Crim. App. 2021). Indeed, as recognized in *Matloff*, *McGirt* had arguably called into question “decades of final convictions for crimes that might never be prosecuted in federal court.” *Id.* at 693. In considering whether *McGirt* should be retroactive, the Oklahoma Court of Criminal Appeals noted that applying the new decision to past cases would have “disruptive and costly consequences” including “shattered expectations of so many crime victims ... the trauma, expense, and uncertainty awaiting victims and witnesses in federal re-trials ... [and] the impracticability of new prosecutions.” *Id.* at 693-94.<sup>16</sup> Federal courts have also noted *McGirt*'s tremendous impact. See *Oklahoma v. U.S. Dep't of Interior*, 577 F.Supp.3d 1266 (W.D. Okla. Dec. 22, 2021) (noting that “[c]ore functions of state government, relied upon by all Oklahomans for over a hundred years, are called into question” by the *McGirt* decision in a civil case regarding the ability of Oklahoma to regulate surface mining on an Indian reservation); *United States v. Hamett*, 535 F.Supp.3d 1133, 1135-36 (N.D. Okla. 2021) (noting that *McGirt* “called into question many aspects of Oklahoma's exercise of criminal jurisdiction over Native Americans within the boundaries of that reservation”); *Deerleader v. Crow*, 2020 WL 7345653 (N.D. Okla. Dec. 14, 2020) (noting that while “the *McGirt* decision addressed a narrow issue” regarding \*1115 jurisdictional boundaries, it had a significant impact on settled expectations regarding jurisdiction).

Although the issue before the Court is one of first impression, other federal district courts in Oklahoma have found in different contexts that it was reasonable for the public to rely

on Oklahoma's jurisdiction prior to the *McGirt* decision. For example, several district courts have evaluated lawfulness of the investigatory activities of the Oklahoma State Police in Indian Country prior to *McGirt*. In *United States v. Patterson*, for example, a criminal defendant sought to suppress evidence on several grounds, including that the investigating state officer was operating in Indian Country without jurisdiction. *United States v. Patterson*, 2021 WL 633022 at \*1 (E.D. Okla. Feb. 18, 2021).<sup>17</sup> The district court declined to suppress evidence on that ground, holding that the good faith exception should apply since the officer in question “acted with an objectively reasonable belief that he had the authority to investigate the alleged crime at issue.” *Id.* at \*4 (E.D. Okla. Feb. 18, 2021). The court further stated that it could not “close its eyes and pretend the last century of state court prosecutions did not happen.” *Id.* Because, prior to *McGirt*, all parties were operating under the belief that Oklahoma had jurisdiction over these areas, Oklahoma federal courts have uniformly refused to suppress evidence gathered by police officers reasonably acting under that belief. *Id.*; see also *United States v. Bailey*, 2021 WL 3161550 (N.D. Okla. July 26, 2021) and *United States v. Hamett*, 535 F.Supp.3d 1133 (N.D. Okla. 2021) (with both cases applying *Patterson* in refusing to exclude evidence).

The present case also demonstrates the change wrought by *McGirt*. This case was originally brought in Oklahoma state court, which at the time was viewed as the proper jurisdiction to prosecute this homicide. It was only after *McGirt* that the state court dismissed its case for lack of jurisdiction and a federal prosecution was initiated. Put simply, both the Oklahoma authorities and the Defendant had every reason to believe that on April 24, 2019, Budder's actions were subject to Oklahoma law.

Thus, the crux of the issue in this case is whether the jurisdictional change wrought by *McGirt* – effectively removing Budder's ability to avail himself of Oklahoma's self-defense law – was “unexpected and indefensible” to the point of violating his due process rights. The government argues that it was not, citing *McGirt*'s own language that it was merely applying the law as it already existed, namely that Congress had “never withdrawn the promised reservation,” *McGirt*, 140 S.Ct. at 2482, as well as *Murphy v. Royal*, which held that the Creek reservation had not been disestablished. *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). Notably, however, the Tenth Circuit's mandate in *Murphy v. Royal* was stayed pending appeal in the United States Supreme Court. See *United States v. Murphy*, 2021 WL 646775 at \*1 (E.D.

Okla. Feb. 18, 2021). And while the majority in *McGirt* couched its decision in terms of a straightforward application of existing law, the reality prior to *McGirt* was that Oklahoma had been exercising jurisdiction in these areas for over a century.

\*1116 At best, the most notice that any party had of a potential jurisdictional change were several appellate cases then under review. However, as my colleagues have noted in other rulings, such notice of a potential change was not enough to overcome police officers' good faith belief prior to *McGirt* that they had jurisdiction under Oklahoma law to investigate crimes in Indian Country. Indeed, Oklahoma had prosecuted crimes in these areas ever since Oklahoma's accession to statehood in 1907. While the Court certainly does not offer opinion or argument as to the merits of the *McGirt* decision or implications, the Court finds it necessary for purposes of this analysis to note the reality that *McGirt* dramatically altered what the people of Oklahoma – absent, perhaps, a few appellate lawyers – considered settled jurisdictional questions.

Given this framework, there can be no doubt that on the night of April 24, 2019, the Defendant would have had every reason to believe that he was subject to Oklahoma criminal law. Indeed, the Oklahoma prosecutorial authorities also reasonably believed that Oklahoma law applied to Budder, as evidenced by his arrest and initial prosecution in state court. Only after *McGirt* was decided did any party to this case come to understand that federal Indian Country jurisdiction applied and that therefore federal self-defense laws would apply to Budder's actions.

Though in most cases this change would have little practical effect, in this case it meant that Budder could no longer assert the affirmative defense that his actions were justified in order “to terminate or prevent the commission of a forcible felony against himself.” 21 OKLA. STAT. § 733(A)(2).<sup>18</sup>

Here, the practical and retroactive application of the *McGirt* decision to Budder, as a member of the Cherokee nation, resulted in his conviction of Voluntary Manslaughter under

federal law. Were Budder not a Native American or in absence of the *McGirt* decision,<sup>19</sup> the jury determined that his actions would have constituted justifiable homicide under Oklahoma law, and he would have been acquitted.

## CONCLUSION

It seems self-evident that the *McGirt* decision brought about an “unforeseeable judicial enlargement” of the geographical scope of federal Indian Country jurisdiction in Oklahoma. By supplanting Oklahoma law, the United States Supreme Court retroactively changed the criminal law applicable to the approximately 400,000 Native Americans living in eastern Oklahoma, as well as those accused of victimizing Native Americans. In doing so, the *McGirt* decision “operate[d] precisely like an *ex post facto* law” with respect to a large group of Americans, including the Defendant in this case. *Bouie*, 378 U.S. at 353, 84 S.Ct. 1697.

[11] Ultimately, however, there is no analogous Tenth Circuit or Supreme Court precedent. Despite the Court's expressed concerns with the due process afforded to this Defendant under the facts of this case, \*1117 the Court declines to vacate the jury's lawful verdict convicting the Defendant of Voluntary Manslaughter in the killing of David Jumper.<sup>20</sup> To do so would be to extend the scope of the Supreme Court precedent in *Bouie* and its progeny beyond the contours within which the Supreme Court and Tenth Circuit have thus far indicated it should apply.<sup>21</sup>

As such, while the Court firmly believes that appellate review of this issue of law is warranted, the Defendant's Motion [Doc. 161] is hereby DENIED.

THUS, DONE AND SIGNED in Chambers on this 29<sup>th</sup> day of April 2022.

## All Citations

601 F.Supp.3d 1105

## Footnotes

- 1 Prior to trial, the Defendant had urged a similar motion to dismiss the Indictment based on *ex post facto* and due process implications associated with the Defendant's rights under Oklahoma self-defense law. Primarily because the issue was not yet ripe for the Court's consideration, the Court denied that Motion after oral argument. [Docs. 62, 128]. Although the Defendant filed the instant Motion as a "supplement" to the previous filing, the Court construes Defendant's post-trial request – based, in part, on the jury's finding discussed *infra* – as a new and independent motion to dismiss the Indictment.
- 2 Lewis Thompson was arrested shortly after the incident for public intoxication.
- 3 There was also a recently purchased "30-pack" of beer in the rear of the vehicle. Jumper's Blood Alcohol Content was later determined to be .14 at the time of his death.
- 4 It is unclear whether the Defendant refused to get out of the car or was physically unable to get out of the vehicle. There was some evidence presented at trial that the child locks may have been engaged in the back seat, which would have prevented the Defendant from opening the rear door from inside the vehicle.
- 5 Budder sustained injury to his face during the fight, including minor lacerations.
- 6 Although the expert testimony regarding ballistics and trajectory was inconclusive as to exactly what occurred, the government presented some evidence that, of the twelve shots fired, the Defendant fired at least two shots into Jumper's body after he had fallen to the ground.
- 7 Although the *McGirt* ruling only facially applied to the Muscogee (Creek) Nation, its effective jurisdictional holding likewise applies to the boundaries of four other tribes, including the Cherokee Nation. See *United States v. Billey*, 2021 WL 3519279 at \*2 n. 1 (N.D. Okla. Aug. 10, 2021); *United States v. Bailey*, 2021 WL 3161550 at \*1 n.2 (N.D. Okla. July 26, 2021).
- 8 Although the government charged the Defendant in this case with First-Degree Murder, it did not present any evidence at trial of pre-meditation – a required element of a murder in the first degree. 18 U.S.C. § 1111(a). Even more, Tenth Circuit case law is clear that "heat of passion" negates the element of malice aforethought required for a conviction of murder in either the first or second degree. See e.g., *United States v. Serawop*, 410 F.3d 656, 665 (10th Cir. 2005) ("the only difference between second degree murder and voluntary manslaughter in the homicide hierarchy is that voluntary manslaughter is committed in the heat of passion, and the presence of this mitigating factor negates the malice that would otherwise attach"). The evidence presented at trial showed that this shooting occurred during a physical altercation that the victim, Jumper, precipitated with his nephew's teenage friend, the Defendant. The Defendant shot and killed Jumper during the fight. The government presented no evidence – direct or circumstantial – of any other motivation for the shooting, much less any planning or deliberation by the Defendant. While the undersigned fully acknowledges that "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion," *United States v. Batchelder*, 442 U.S. 114, 124, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979), and that "[prosecutorial decisions] are not readily susceptible to the kind of analysis the courts are competent to undertake," *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985), there can be little doubt that the facts of this case do not support the government's decision to charge the Defendant with First-Degree Murder. Furthermore, the fact that the homicide occurred during a heated physical altercation initiated by the victim may well have counseled against charging second-degree murder. Indeed, the jury ultimately determined that the government's evidence proved the lesser included offense of voluntary manslaughter – a verdict that is supported by the evidence.
- 9 Facially valid indictments cannot generally be challenged "on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States v. Pino*, 708 F.2d 523, 531 (10th Cir. 1983). Rather, when looking at whether the indictment should be dismissed, the standard is whether there is "prosecutorial

misconduct which is flagrant to the point that there is some infringement on the grand jury's ability to exercise independent judgment." *Id.* (citations omitted).

- 10 Both prior to and during trial, the government objected to the Court's state law instruction and interrogatory on several grounds. One of the government's primary contentions was that the Defendant had waived his right to Oklahoma self-defense law by seeking dismissal of his state court charge of manslaughter subsequent to the *McGirt* decision. However, regardless of whether the Defendant sought dismissal of the state court proceeding, the State of Oklahoma was without subject matter jurisdiction over this offense because it occurred in Indian Country and the Defendant is an Indian. *McGirt v. Oklahoma*, — U.S. —, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). As such, even if the Defendant had wished to proceed as a defendant in his state court manslaughter prosecution, it is a fundamental tenet of the American judicial system that subject matter jurisdiction cannot be waived. See *United States v. Tony*, 637 F.3d 1153, 1157-58 (10th Cir. 2011) ("Subject-matter jurisdiction cannot be forfeited or waived 'because it involves a court's power to hear a case.... Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court' ").

The government has also objected to the inclusion of the instruction and interrogatory by arguing that only federal law should govern in federal court. See [Doc. 160, pp. 16-17]. Though federal criminal proceedings, of course, apply federal criminal law, the Court notes that state law is regularly brought into federal cases under the Assimilative Crimes Act. 18 U.S.C. § 13. Indeed, it is a regular occurrence for federal prosecutors to use state criminal statutes to prosecute crimes occurring in federal enclaves. State substantive law is also brought into federal court in other contexts. See, e.g., *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

- 11 The Oklahoma self-defense statute in question, 21 OKLA. STAT. § 733, was passed in 2014. Since that time, Oklahoma state courts have not developed significant case law regarding its proper application. Specifically, Oklahoma case law has not defined or expounded on the term "forcible felony" beyond the definition included in the statute, nor has the case law addressed how this statute interplays with other statutes pertaining to self-defense that already existed when the statute was passed.
- 12 In order to properly tailor the instructions and interrogatory to the facts of this case, the Court asked counsel for input with regard to Oklahoma criminal statutes that the victim may have violated in his confrontation with the Defendant immediately prior to his death – including both potential "forcible felonies" as well as any crimes amounting to mere misdemeanors.
- 13 Because voluntary manslaughter, an unlawful killing, and self-defense, a lawful action, cannot be present at the same time, the Court noted in the jury instructions that to convict the Defendant of Voluntary Manslaughter, they must find that the government had proved beyond a reasonable doubt that the Defendant had not acted in self-defense. [Doc. 154].
- 14 Although the Special Interrogatory was sent to the jury with the verdict form, it was explained to the jury to be separate from the verdict form. Both the verdict form and the Special Interrogatory required unanimity of the jury and were independently signed and dated by the Foreperson.
- 15 Other cases cited by the government are inapposite. For example, *Griffith v. Kentucky*, on which the government heavily relies in its briefing, discusses when and how judicial decisions altering procedural aspects of criminal prosecutions – in that case *Batson* challenges – are to be applied retroactively. 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). In the case *sub judice*, however, the key question is: (i) whether a judicial decision, (ii) that effectively changes the substantive law of self-defense applicable to a defendant, (iii) after his alleged commission of the relevant conduct, and (iv) has demonstrably and negatively impacted

such defendant, violates the Due Process Clause of the Fifth Amendment. *Griffith* has no direct bearing on that issue.

- 16 Ultimately, the court in *Matloff* held that *McGirt* precedent does not apply to vacate state court convictions that were final on July 9, 2020. *Matloff*, 497 P.3d at 694. The Supreme Court subsequently denied writ of certiorari on the issue of *McGirt*'s retroactivity with regard to final state convictions. *Parish v. Oklahoma*, — U.S. —, 142 S.Ct. 757, 211 L.Ed.2d 474 (2022).
- 17 Notably, the *Patterson* case rejected that defendant's contention that the Tenth Circuit's decision in *Murphy v. Royal* put the officer on notice. In that case, Chief Judge White noted that the Tenth Circuit had stayed issuance of the mandate pending appeal and refused to fault the officer, or other members of the police force "for not adhering to a court decision that had not yet taken effect and could have, at any moment, been reversed by the Supreme Court." *Patterson*, 2021 WL 633022 at 5.
- 18 The inclusion of the "forcible felony provision" broadens the law of self-defense in Oklahoma beyond the federal law of self-defense on which the Court instructed the jury. Federal law permits lethal force to be used in self-defense "only if he reasonably believes that force is necessary to prevent death or great bodily harm to himself." 10<sup>th</sup> Circuit Pattern Jury Instruction 1.28, accessed at: <https://www.ca10.uscourts.gov/form/criminal-pattern-jury-instructions>.
- 19 Although the government charged this case under 18 U.S.C. § 1153 because of Budder's status as a Native American, there was some evidence presented at trial that Jumper was also a Native American. This may have provided an independent basis of post-*McGirt* federal criminal jurisdiction.
- 20 In this respect, it should be noted that no other district court judge sitting in the federal jurisdictions affected by *McGirt* have yet confronted this issue. Undersigned is a District Court judge from the Western District of Louisiana sitting in the Eastern District of Oklahoma by designation as a collateral duty to assist my Oklahoma colleagues with the large influx of criminal cases resulting from *McGirt v. Oklahoma*.
- 21 The Court notes that this issue only applies to Indian Country cases in which the subject crime was committed prior to July 9, 2020, and for which the expanded federal jurisdiction resulting from the *McGirt* decision demonstrably changed the law to a defendant's detriment.