

No. 21-488

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,
Petitioner,
v.
DAKOTA SHAY FOX,
Respondent.

**On Petition for a Writ of Certiorari to the
Oklahoma Court of Criminal Appeals**

**BRIEF OF *AMICUS CURIAE*
THE CHOCTAW NATION OF OKLAHOMA
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICUS¹

Amicus Choctaw Nation of Oklahoma (“Nation”) is a federally-recognized Indian tribe, 86 Fed. Reg. 7,554, 7,557 (Jan. 29, 2021), residing on and governing the Choctaw Reservation in southeastern Oklahoma, which was “secure[d] to the said Choctaw Nation of Red People and their descendants” in the Treaty of Dancing Rabbit Creek, art. 4, Sept. 27, 1830, 7 Stat. 333 (“1830 Treaty”). In *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), this Court explained the terms of the 1830 Treaty that, in exchange for the Choctaws’ removal from their ancestral lands, secured to them a new homeland and broad sovereign authority, in the following terms:

the United States promised to convey the land to the Choctaw Nation in fee simple ‘to inure to them while they shall exist as a nation and live on it.’ In addition, the United States pledged itself to secure to the Choctaws the ‘jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation * * * and that no part of the land granted them shall ever be embraced in any Territory or State.’ Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-334.

Id. at 625. The United States reaffirmed the existence of the Reservation, with modified boundaries, in

¹ No counsel for a party authored this brief in whole or part. No one other than the Nation made a monetary contribution to fund preparation or submission of this brief. The parties’ counsels of record received notice of the Nation’s intent to file more than ten days before the date for filing and consented thereto.

subsequent treaties with the Choctaw and Chickasaw Nations. See Treaty of Doaksville, art. 1, Jan. 17, 1837, 11 Stat. 573; 1855 Treaty of Washington with the Choctaw and Chickasaw, June 22, 1855, 11 Stat. 611; 1866 Treaty of Washington with the Choctaw and Chickasaw, Apr. 28, 1866, 14 Stat. 769. The Nation, along with the Cherokee Nation, Chickasaw Nation, Muscogee (Creek) Nation, and Seminole Nation, is one of the so-called “Five Civilized Tribes,” all of whom were “forcibly removed from their native southeast by the federal Government under the Indian Removal Act of 1830,” to present-day Oklahoma. *Morris v. Watt*, 640 F.2d 404, 408 n.9 (D.C. Cir. 1981) (citation omitted); see *Choctaw Nation*, 397 U.S. at 622-27.

After the continuing existence of the Creek Reservation was upheld by this Court in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the state courts in Oklahoma applied that decision to determine, in this case and others, whether the Reservations of the other four of the Five Tribes continue to exist. In each case, the Oklahoma Court of Criminal Appeals (“OCCA”) first remanded the case to the state district court for the county in which each case arose, for an evidentiary hearing and the development of a record on that question. In this case, the OCCA determined, following remand to the state district court, that under the analytic framework set forth in *McGirt*, the Choctaw Reservation was established, never disestablished, and still exists today. It has since reaffirmed that determination. See *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 3. The State was of course a party to this case throughout those proceedings, but never contested—until now—the continuing existence of the Choctaw Reservation.

The State now attacks *McGirt* in an effort to restore a legal regime that denied federal rights to Indians and Indian nations in Oklahoma for over a century. Were it to succeed, this Court's decision in *McGirt* would be reduced to a brief moment in which "the rule of law," not "the rule of the strong," 140 S. Ct. at 2474, determined the existence of the Creek Reservation in Oklahoma, the state courts' faithful application of the *McGirt* decision would be imperiled, and justice would be denied its opportunity to mend a difficult history by reinstating rights long denied, and turning back purposeful resistance to their implementation. *Cf. Cooper v. Aaron*, 358 U.S. 1 (1958). The Nation submits this brief to prevent that result, to demonstrate that it is implementing *McGirt* and the decision in this case with diligence and success in cooperation with local governments, and to show that the State's petition should be denied.

SUMMARY OF ARGUMENT

The State's petition should be denied because the State and its *amici* offer no principled basis for revisiting *McGirt*. This Court's decision in *McGirt* corrected an injustice that had endured for over a century in violation of treaties that Congress had never abrogated. And after *McGirt* was decided the Oklahoma state courts properly applied it to like challenges, after reviewing the treaties and statutes relied on to establish the reservation's continuing existence, based on a record developed in each case. These decisions need no correction. And the Choctaw Nation is now implementing *McGirt* on the Choctaw Reservation with diligence and determination that is producing success. By contrast, the argument against *McGirt* that the State relies on does not even address its application to the Choctaw Reservation. Instead,

the State borrows its argument from another case, concerning the Cherokee Reservation. As Indian reservations are not interchangeable, the State’s petition should be denied. Furthermore, this case does not in any event provide a proper vehicle to consider any legal questions concerning *McGirt* because the State forfeited its right to challenge the Choctaw Reservation—by attacking *McGirt* or otherwise—by waiving the issue below.

REASONS FOR DENYING THE PETITION

I. *McGirt* Corrected a Longstanding Moral and Legal Error by Acknowledging the Existence of the Reservation, and the State’s Petition Seeks to Reinstate that Error.

In this case, the OCCA considered the Choctaw Nation’s Treaties and held that the Choctaw Reservation continues to exist. Pet’r’s App. 6a-7a. That accords with this Court’s instruction that “[e]ach tribe’s treaties” and subsequent histories “must be considered on their own terms,” *McGirt*, 140 S. Ct. at 2479. Yet to argue that *McGirt* should be revisited in this case, the State relies on its petition in *Oklahoma v. Castro-Huerta*, No. 21-429 (“*Castro-Huerta* Pet.”), see Pet. 6 (citing *Castro-Huerta* Pet. 17-29). The Nation urges the Court to reject the State’s attempt to petition-jump, since it provides the State a strategic litigation advantage foreclosed by the Court’s rules.² But even if considered—in this case or others—the State’s argument fails.

² Compare Rule 15.6 (describing time for filing reply briefs), with Reply Br. of Pet’r at 2-3, *Oklahoma v. Mize*, No. 21-274 (incorporating by reference arguments not yet made and promis-

McGirt applied principles of federal law to remedy a long enduring injustice—the exercise of jurisdiction by the State of Oklahoma in violation of treaties that established the Creek Reservation and that Congress had never abrogated—and to redeem the word of the United States, freely given to the Creeks in exchange for their eastern lands, as it was in the treaties the United States entered into with each of the Five Tribes. And after *McGirt* was decided, the state courts faithfully applied it in this case and others. Yet, in this and other certiorari petitions, the State seeks to portray its own courts’ acknowledgment of the Five Tribes’ reservations as a runaway train, adding that “[b]eyond the Five Tribes, other Tribes in Oklahoma are seeking affirmation of their reservation status in state criminal cases.” *Castro-Huerta* Pet. 19. What the record actually shows is principled application of the law, not a crisis requiring correction, much less a need to deny justice before it can be realized by those entitled to it, to which justice had long been denied.

In these cases, as here, *see infra* at 18-20, the state courts’ reservation determinations were based on an evaluation of the historical record, as well as treaties, and statutes affecting the Nations’ Reservations, in the state district courts. That was done pursuant to remands for evidentiary hearings ordered by the OCCA in cases in which petitioners or defendants raised the existence of a Reservation as a defense. At those hearings, the State, (through the Attorney General’s office and District Attorneys), the criminal defendants, and in many cases the affected Tribe as *amicus curiae*, participated and had the opportunity to

ing to consolidate reply arguments into a reply in *Castro-Huerta* several weeks after reply would otherwise be due).

present evidence, stipulations, and legal arguments. The Nation participated in cases where the Choctaw Reservation was at issue by providing an amicus brief with in-depth historical and legal analysis of the creation and continuing existence of the Reservation. *See infra* at 18-19. After such hearings, the state district courts found that the Cherokee, Chickasaw, Choctaw, and Seminole Reservations still exist, and the OCCA affirmed those rulings after reviewing the District Courts' findings, conclusions and the record on which they were made. *See Hogner v. State*, 2021 OK CR 4 (Cherokee); *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, *withdrawn on other grounds*, 2021 OK CR 23, *reservation ruling reaffirmed*, 2021 OK CR 30, ¶ 12 (Chickasaw); *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867 (Choctaw); *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250 (Seminole). Notably, in cases dealing with the Five Tribes' Reservations, the State did not challenge the existence of the Reservations until June 2021—after the former elected Attorney General was replaced by a new Attorney General, appointed by the Governor, *see* Chris Casteel, *American Bar Association Questioned Oklahoma AG John M. O'Connor's Experience, Judgment*, *Oklahoman* (July 23, 2021, 4:17 PM).³

In other cases, the State advanced such challenges, and in some cases lost, and in others prevailed. Applying the statutory analysis described in *McGirt*, the District Court in Ottawa County has found that three Indian reservations in Ottawa County, Oklahoma still exist today. *State v. Lee*, No. CF-2021-00012 (Okla. Dist. Ct. Mar. 1, 2021), *on review* No. S-2021-206 (Okla. Crim. App. pet. in error filed May 21, 2021) (Ottawa); *State v. Dixon*, No. CF-2020-00072 (Okla.

³ <https://bit.ly/3GbTK1i>

Dist. Ct. Mar. 1, 2021), *on review* No. S-2021-205 (Okla. Crim. App. pet in error filed May 21, 2021) (Peoria and Miami). The OCCA has affirmed another reservation exists in Ottawa County, as well. *State v. Lawhorn*, 2021 OK CR 37 (Quapaw), *aff'g* No. CF-2020-00189 (Okla. Dist. Ct. Nov. 18, 2020).⁴ These rulings correct historical injustices, but at the same time deal with four Reservations which have a combined total resident population of less than 20,000 and make up a small fraction of northeast Oklahoma. *See* U.S. Census Bureau, Census – Table Results (table created Oct. 6, 2021);⁵ U.S. Census Bureau, Census – Map Results (map created Oct. 6, 2021);⁶ Okla. Dep't of Trans., *Tribal Jurisdictions in Oklahoma* (2010).⁷ They do not make a runaway train.

In other cases, which the State notably does not cite, the state courts have found, based on the unique circumstances of each Tribe, that other reservations were diminished, *Bentley v. State*, No. CF-2015-1240

⁴ The State incorrectly says that the affected tribes “are seeking affirmation” of Reservations in all these cases, *Casto-Huerta* Pet. 19, but the Peoria Tribe has not participated in *Dixon*, and only on October 18, *after* the State made this representation, did the Miami Tribe and Ottawa Tribe seek leave to file as amici in *Dixon* and *Lee*, respectively, *see* Ottawa Tribe of Okla.’s Mot. for Leave to File Amicus Br., *State v. Dixon*, No. S-2021-205 (Okla. Crim. App. filed Oct. 18, 2021), <https://bit.ly/3nswdqb>; Miami Tribe of Okla.’s Mot. for Leave to File Amicus Br., *State v. Lee*, No. S-2021-206 (Okla. Crim. App. filed Oct. 18, 2021), <https://bit.ly/3vxYfhW>, after not filing briefs or evidence in the district courts.

⁵ <https://bit.ly/306gXSI>

⁶ <https://bit.ly/3AfTs5E>

⁷ <https://bit.ly/3oyO3nX>

(Okla. Dist. Ct. Feb. 24, 2021),⁸ *aff'd on other grounds*, No. PC-2018-743 (Okla. Crim. App. Oct. 1, 2021) (Potawatomi Reservation), or disestablished, *see Codynah v. State*, No. CF-2016-00479 (Okla. Dist. Ct. Apr. 16, 2021),⁹ *on review* No. C-2019-293 (Okla. Crim. App. pet. for cert. filed May 30, 2019) (Kiowa-Comanche-Apache Reservation). And although the State cites *Young*, it fails to mention that in that case, the district court determined that procedural bars prevent Osage tribal citizens from asserting the Osage Reservation exists, and the OCCA affirmed on other procedural grounds. *See State v. Young*, No. CF-2005-00266A (Okla. Dist. Ct. Apr. 8, 2021) (citing *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010)),¹⁰ *aff'd on other grounds* No. PC-2020-954 (Okla. Crim. App. Sept. 20, 2021) (citing *Wallace*, 2021 OK CR 21).¹¹ This too confirms that the application of *McGirt* by the state courts is proceeding properly and in an orderly fashion, not, as the State would have it, as a creeping threat.

II. The Nation is Acting to Implement *McGirt*.

The State tries to paint eastern Oklahoma as a land that has descended into uncertainty and fear, which it asserts is the result of the shift of some criminal jurisdiction away from the State and back to the federal government and Indian tribes. *Castro-Huerta* Pet. at 2-3, 18-23. Nothing could be further from the truth. In fact, the Nation has made a sustained effort to ensure that *McGirt* is implemented in a manner that protects the public while upholding the rule of

⁸ <https://bit.ly/3BPTQJH>

⁹ <https://bit.ly/3uJRMQG>

¹⁰ <https://bit.ly/3AszggY>

¹¹ <https://bit.ly/2YzNShK>

law. And that effort is paying off. That negates the State's effort to inveigle this Court into striking down *McGirt* or the Choctaw Reservation.

For nearly two years before the OCCA acknowledged the Choctaw Reservation in this case, the Nation had been preparing for the jurisdictional shifts that would accompany such a ruling. See Chris Casteel, *Choctaw, Seminole Reservations Recognized by Oklahoma Appeals Court*, *Oklahoman* (Apr. 1, 2021, 4:27 PM) ("Casteel").¹² For instance, in January 2020, the Nation arranged for its Assistant Prosecuting Attorney to be named a Special Assistant United States Attorney for the Eastern District of Oklahoma, which would allow him to pursue federal charges if and when the Nation's Reservation was acknowledged by a judicial decision. Choctaw Nation Sovereignty for Strong Communities Comm'n, *Commission Report April 2021* at 3 (2021) ("Commission Report").¹³ The Nation also secured federal funding to hire four new tribal prosecutors and established a Public Defender's Office. *Id.* So, the Nation was prepared for the outcome in *McGirt* when it came and did not seek its reckless implementation.

Indeed, immediately after this Court decided *McGirt* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), the leaders of the Five Tribes, including Choctaw Nation Chief Gary Batton, acknowledged its historic significance, and made clear that

[t]he Nations and the State are committed to ensuring that Jimcy McGirt, Patrick Murphy, and all other offenders face justice for the

¹² <https://bit.ly/3n1A6fU>

¹³ <https://bit.ly/2YXNCsm>

crimes for which they are accused. We have a shared commitment to maintaining public safety and long-term economic prosperity for the Nations and Oklahoma.

Press Release, Choctaw Nation, U.S. Supreme Court Announces *McGirt v. Oklahoma* Decision (July 9, 2020).¹⁴ In a public statement shortly thereafter, Chief Batton made clear that

[t]his decision directly addresses the Creek Nation's Reservation and criminal jurisdiction. Nothing has immediately changed for the Choctaw Nation or southeastern Oklahoma. *McGirt* does not change individual property ownership, business taxation, or any citizen's responsibility to uphold the law.

ChoctawNationOK, *Chief Batton Special Report: McGirt vs Oklahoma*, YouTube (July 14, 2020) (beginning at 1:00).¹⁵ Following these decisions, the Nation allocated \$2 million to address the immediate impacts of *McGirt* and *Murphy*, including hiring ten additional police and patrolmen and establishing the Sovereignty for Strong Communities Commission to study how the Nation could implement *McGirt* while protecting public safety and make recommendations to policymakers. Press Release, Choctaw Nation Pub. Relations, Choctaw Nation Chief Announces Formation of Sovereignty Committee (Sept. 2, 2020, 2:58 PM).¹⁶

Since the state courts applied *McGirt* to the Choctaw Reservation, the Nation has followed through

¹⁴ <https://bit.ly/3je6GKj>

¹⁵ <https://bit.ly/3jEiBRR>

¹⁶ <https://bit.ly/2YWFxVx>

on this public commitment to protect the public by taking steps to ensure that criminal offenders in the Choctaw Reservation are held accountable. Immediately after the ruling in *Sizemore*, 2021 OK CR 6, 485 P.3d 867, the Nation met with all the District Attorneys in the Reservation to develop a system of case identification and correspondence between tribal and state prosecutors to “prevent any currently incarcerated individual from being released based solely on a McGirt jurisdictional claim.” Casteel; *see* Commission Report at 3. The Nation is also working with tribal, local, and state law enforcement to ensure the law is enforced properly and fairly on the Reservation, and that officers understand jurisdictional issues and ensure the proper judicial system is charging and prosecuting offenders. The Nation developed virtual training materials for tribal, local, and state law enforcement and has been providing trainings using those materials since November 2020, and established a 24-hour hotline that officers can call to verify suspects’ tribal citizenship. Commission Report at 3, 5. The Nation also entered into agreements with all county jails in the Reservation to ensure people arrested by tribal officers anywhere on the Reservation can be safely detained in the county where the offense occurred. *Id.* at 5; Derrick James, *Choctaw Nation’s Top Prosecutor Outlines McGirt Process*, McAlester News-Capital (Apr. 10, 2021) (“James”).¹⁷

These efforts are a continuation of the Nation’s longstanding cooperation with local law enforcement. Since 1994, the Nation has signed cross-deputization agreements with eleven state agencies, forty-five municipalities, and eleven of the thirteen counties fully or

¹⁷ <https://bit.ly/2Xm6Vvf>

partially on the Reservation, which allow state, local, and tribal police to enforce state, local, and tribal criminal laws against all offenders on the Reservation, regardless of Indian status. *See Tribal Compacts and Agreements*, Okla. Sec’y of State, <https://www.sos.ok.gov/gov/tribal.aspx> (last visited Oct. 25, 2021) (enter “Choctaw” into “Doc Type” searchbar and select “Submit”). Since the decision below, the Nation has cross-deputized 794 officers in 54 agencies on the Reservation pursuant to those agreements. Austin Breasette, *Tribal Attorneys Discuss Changes Within Tribes 13 Months After McGirt Ruling*, KFOR (Aug. 18, 2021, 4:30 AM) (“Breasette”).¹⁸ Notably, cross-deputization is precisely the approach that the Oklahoma Sheriffs’ Association recommended after the decision in *McGirt* was handed down. *See Guidance for Oklahoma Law Enforcement Following McGirt v. Oklahoma*, Okla. Sheriffs’ Ass’n (July 14, 2020).¹⁹ As a result of this history and the efforts of local governments and the Nation, for most law enforcement on the Reservation, the transition after *McGirt* and *Sizemore* has been simple:

Both Pittsburg County Sheriff Chris Morris and McAlester Police Chief Kevin Heard spoke with the News-Capital following a decision by the Oklahoma Court of Criminal Appeals [that] applied the U.S. Supreme Court’s analysis in *McGirt v. Oklahoma* to the Choctaw Nation, which gives the federal government and the tribe criminal jurisdiction over Native Americans within the tribe’s boundaries.

¹⁸ <https://bit.ly/3FVxp8f>

¹⁹ <https://bit.ly/3lMaRyK>

“For the majority of the stuff, it’ll be business as usual for us,” Hearod said.

....

“We’re ready,” Hearod said. “But, you know, it’s like anything new, sometimes some things may be a little trial and error. There may be a mistake, an honest mistake made here or there, but for the most part, all my guys got this down.”

Derrick James, *‘Business as Usual’: Local Law Enforcement Detail Post-McGirt Policing*, McAlester News-Capital (Apr. 3, 2021).²⁰ Other Sheriffs in other parts of the Reservation agree that the Nation and local police can work together to ensure public safety. In the words of Choctaw County Sheriff Terry Park:

Choctaw County Sheriff’s Office working relationship with the Choctaw Nation Tribal Police is excellent. The Choctaw County Sheriff’s Office deputies back Tribal Units as do[] the Tribal Officers back our deputies all the time. We have been working together for numerous years. Our office has no complaints with the Choctaw Nation Tribal Police. We look forward to working with Choctaw Nation Tribal Police for years to come.

Statement of Choctaw Cnty. Sheriff Terry Park (Oct. 25, 2021) (on file with Nation).

The Nation’s commitment to inter-governmental cooperation extends to working with the State, when the State is a willing partner. To that end, shortly after *McGirt* was decided the Nation entered into

²⁰ <https://bit.ly/3vjLJCG>

an agreement with the State, which acknowledges the existence of the Nation's Reservation and gives the State and Nation concurrent jurisdiction over Indian child custody matters in the Reservation. *See Intergov'tl Agreement Between Okla. & Choctaw Nation of Okla. Regarding Jurisdiction over Indian Children Within the Tribe's Reservation* (Aug. 17, 2020).²¹ Since *McGirt* was decided, the Nation renewed its Hunting and Fishing Compact with the State, which requires the Nation to regulate the management of wildlife resources within its jurisdiction and authorizes the Nation, in exchange for payments to the State, to issue hunting and fishing licenses to Choctaw citizens that allow them to hunt and fish within the Nation's jurisdiction. *See Extension Agreement of Hunting & Fishing Compact Between Okla. & Choctaw Nation* (Dec. 7, 2020).²² Similarly, the Nation has also worked with the state Office of Juvenile Affairs to ensure there is no disruption to vital education and treatment services to juvenile offenders on the Reservation.

The Nation has also thrown huge resources into ensuring a seamless transition from state to tribal prosecution of criminal offenders. To handle prosecutions, the Nation has doubled the size of its prosecutor's office by hiring six full-time prosecutors, added two full-time tribal District Court judges, and is opening a juvenile court. Breasette. The criminal process in the Nation's courts is much like the process followed under state jurisdiction:

[O]nce a person is taken into custody, an initial appearance will be held within 48

²¹ <https://bit.ly/2Z0B2Zn>

²² <https://bit.ly/3pEOoGa>

hours and a Choctaw Nation District Judge will set bail. If a defendant can't afford an attorney, then an attorney from the Office of the Choctaw Nation of Oklahoma Public Defender will be assigned to the defendant's case.

“For misdemeanors, we have a disposition hearing thereafter and for felonies, we have a preliminary hearing conference and then later a preliminary hearing,” [Choctaw Nation Tribal Prosecutor Kara] Bacon said. “So it moves along the same lines as the state.”

James. The Nation amended its Criminal Code, *see* Choctaw Nation Res. CB-10-21 (Oct. 14, 2020),²³ to strengthen its ability to prosecute violent crimes by increasing the range of punishment for certain violent crimes, including murder and domestic violence, and increase its abilities to increase sentencing for habitual offenders. The Nation also became the first tribe in Oklahoma to enact a Public Defenders Code to guarantee the right to counsel and provide counsel for defendants in Choctaw Nation District Court. *See* Choctaw Nation Res. CB-13-21 (Oct. 14, 2020).²⁴ The Nation also amended its Juror Code to more clearly define those eligible to serve as jurors in Choctaw courts and clarify the process by which a jury is seated. *See* Choctaw Nation Res. CB-07-21 (Oct. 14, 2020).²⁵

The Nation's efforts are working. As of September 30, 2021, since the Nation's Reservation was acknowl-

²³ <https://bit.ly/3pgjRyb>

²⁴ <https://bit.ly/3vVCQQ4>

²⁵ <https://bit.ly/2XkEUnF>

edged it has brought 1,012 felony and misdemeanor cases in tribal court and issued an additional 582 traffic citations. Inter-Tribal Council of Five Civilized Tribes, Res. No. 21-34 (Oct. 8, 2021).²⁶ In short: “We are responsible. We are stepping up.” *Inter-Tribal Council McGirt Decision*, Choctaw Nation (July 14, 2021).²⁷ And the Nation will continue to do so.

III. The State Waived Any Challenge to the Existence of the Choctaw Reservation in this Case.

The State waived any claim that *McGirt* was wrong or improperly applied in this case by choosing not to challenge the existence of the Choctaw Reservation before the District Court or the OCCA. Before it filed this petition, the State did not contest the existence of the Nation’s Reservation in the proceedings in this case. Now, under the direction of a new Attorney General, recently appointed by the Governor, the State contends that “[u]nder the correct framework . . . Congress disestablished the Creek territory in Oklahoma, as well as the territories of the rest of the Five Tribes,” and that *McGirt* is incorrect. *Castro-Huerta* Pet. 18.²⁸ That framework, it says, requires “[c]onsideration of history . . . because the effect on reservation status of statutes targeting Indian land ownership is inherently ambiguous.” *Id.* But below, the State neither made an argument that the Choctaw Reservation was disestablished, nor considered history, and it cannot do so for the first time here. When a party does not raise an argument below, and the

²⁶ <https://bit.ly/3j8rymo>

²⁷ <https://bit.ly/3pb6r6B>

²⁸ *McGirt* addressed only the Creek Reservation, not all Five Tribes’ Reservations. 140 S. Ct. at 2479.

lower court does not rule on it, “it is waived.” *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); see *United States v. Jones*, 565 U.S. 400, 413 (2012) (argument “forfeited” where not raised below). “Waiver is the intentional relinquishment or abandonment of a known right,” *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (cleaned up), which is exactly what the State did here.

In this case, Respondent challenged the State’s jurisdiction on direct appeal on the basis that Respondent is an Indian and he committed his crime on the Choctaw Reservation. Br. of Appellant at 18-21, *Fox v. State*, No. F-2019-196 (Okla. Crim. App. filed Dec. 2, 2019).²⁹ After *McGirt* and *Murphy* were decided, the State represented that it needed “time to review the record and pleadings in this case and determine what impact *McGirt* has on this case under the specific circumstances involved; what, if any, findings have been made by the district court with regard to the *McGirt* issue; and whether any additional findings may be necessary,” Request to File Resp. to Appellant’s Jurisdictional Claim at 1-2 (filed July 16, 2020).³⁰

The OCCA remanded for an evidentiary hearing on, *inter alia*, “whether the crime occurred in Indian Country,” and directed the District Court to “follow the analysis set out in *McGirt*” to determine if the Choctaw Reservation had been disestablished. Pet’r’s App. 22a. The OCCA made clear the State should

²⁹ <https://bit.ly/3n1Nj8v>.

³⁰ <https://bit.ly/3BQruij>.

develop evidence below on the question of Reservation status:

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Appellant's presentation of *prima facie* evidence . . . as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

Id. at 21a.

Notwithstanding that request, the State presented no evidence on whether the Choctaw Reservation continues to exist. The Nation submitted an extensive amicus brief showing the establishment and continued existence of the Choctaw Reservation, Amicus Curiae Choctaw Nation's Br., *State v. Fox*, No. CF-2018-00007 (Okla. Dist. Ct. filed Oct. 5, 2020), and Respondent also briefed the issue, Def./Appellant's Remanded Hr'g Br. (filed Oct. 5, 2020).³¹ The State did not file any briefs in response. Instead, it joined a stipulation, filed with the District Court, that Respondent's crime occurred "within the historical boundaries of the Choctaw Nation" as set out in the Choctaw Nation's treaties. *See* Pet'r's App. 4a. The State and Respondent presented these stipulations to the District Court at a hearing, *see* Evidentiary Hr'g Tr. at 3:1-14 (Oct. 5, 2020), at which the Respondent also presented evidence that the Reservation was

³¹ These filings and Evidentiary Hearing Transcript are available from the District Court as part of the record in this case but are not available online.

established and never disestablished, *see id.* at 4:4-10. At the hearing, the State represented that “the State of Oklahoma obviously stands on the stipulation and . . . this Court does need to make legal determinations of the two questions [f]rom the Court of Criminal Appeals. And the state takes no position on those legal questions, but we do stipulate as to these facts.” *Id.* at 6:17-22. The District Court then issued its decision, in which it found that “there is no evidence presented to the Court that Congress has ever explicitly erased th[e] boundaries and disestablished [the Choctaw] reservation.” Pet’r’s App. 18a.

Back before the OCCA, the State made no argument on the existence of the Choctaw Reservation, *see* Suppl. Br. of Appellee After Remand, *Fox v. State*, No. F-2019-196 (filed Nov. 12, 2020),³² but instead simply repeated the District Court’s findings on Reservation status, *id.* at 3, noted that “[t]he State takes no position as to the existence, or absence, of a Choctaw Reservation,” *id.* at 3 n.2, and asked that the OCCA stay any order reversing Respondent’s conviction so that the federal government could take custody of him, *id.* at 3. The OCCA then granted relief to Respondent. Pet’r’s App. 8a. It noted that the State had not taken a position on the existence of the Reservation, *id.* 5a, and that “[a]fter thorough consideration of this proposition and the entire record before us on appeal including the original record, transcripts and the briefs of the parties, we find that under the law and evidence relief is warranted,” *id.* 6a-7a. Specifically, the OCCA ruled that “the District Court appropriately applied *McGirt* to determine that Congress established a Choctaw Nation Reserva-

³² <https://bit.ly/3pBL1zL>

tion and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Choctaw Nation.” *Id.* 7a.

By this conduct, the State forfeited its right to challenge the Choctaw Reservation here, by attacking *McGirt* or otherwise. The OCCA ordered a hearing on the existence of Indian country and requested the State to help develop a record on that question. The State chose not to do so, nor did it challenge *McGirt*.³³ Nor did it challenge the District Court’s conclusion before the OCCA, after remand. The State’s effort to reverse its earlier decisions not to challenge the existence of the Choctaw Reservation “comes too late in the day” to be considered here. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011). Thus, the Court should deny the petition.

³³ The State began attempting to reserve its right to challenge *McGirt* after the former Attorney General left office. *See, e.g.*, Br. in Supp. of Mot. to Stay & Abate Proceedings at 5 n.3, *Russell v. Oklahoma*, No. F-2019-892 (Okla. Crim. App. filed June 24, 2021), <https://bit.ly/3jbOhOh>. That does not cure its waiver in this case and appears to admit that its earlier failures to contest *McGirt* and reservation status gave up the challenges it advances here and other places.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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