Capital Case

Case No. _____

In the
Supreme Court of the United States

JAMES CHANDLER RYDER, by and through
Next Friend, SUE RYDER,
Petitioner,
v.
THE 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
VOL. I of II
Appendices A through H
(Pet. App. 1 through Pet. App. 139)

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2021 WL 4929914
Court of Criminal Appeals of Oklahoma.

James Chandler RYDER, Petitioner,
v.
The STATE of Oklahoma, Respondent.

No. PCD-2020-613
|
FILED OCTOBER 21, 2021

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OPINION DENYING SECOND APPLICATION FOR POST-CONVICTION RELIEF AND DENYING MOTION TO STAY PROCEEDINGS

LUMPKIN, JUDGE:

***1** ¶1 Petitioner James Chandler Ryder was convicted of two (2) counts of First Degree Murder (21 O.S.1991, § 701.7), Case No. CF-99-147, in the District Court of Pittsburg County. In Count I, the jury recommended a sentence of life imprisonment without the possibility of parole. In Count II, the jury found the existence of two (2) aggravating circumstances and recommended the punishment of death. The Honorable Thomas M. Bartheld, District Judge, sentenced accordingly. This Court affirmed the judgment and sentence in *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856. Petitioner's first application for post-conviction relief was denied by this Court in *Ryder v. State*, 83 P.3d 856 (Okl.Cr.App.2004) opinion not for publication, Case No. PCD-2002-257. The United States Supreme Court denied *certiorari* in *Ryder v. Oklahoma*, 543 U.S. 886, 125 S.Ct. 215, 160 L.Ed.2d 146 (2004). On September 8, 2020, Petitioner filed this second and successive application for post-conviction relief.

¶2 The Capital Post-Conviction Procedure Act, 22 O.S.2011, § 1089(D)(8) provides for the filing of successive post-conviction applications. The statutes governing our review of second or successive capital post-conviction applications provide even fewer grounds to collaterally attack a judgment and sentence than the narrow grounds permitted in an original post-conviction proceeding. *See Sanchez v. State*, 2017 OK CR 22, ¶ 6, 406 P.3d 27, 29.

¶3 In his sole proposition of error, Petitioner claims the District Court of Pittsburg County lacked jurisdiction to try him. Relying upon *McGirt v. Oklahoma*, 591 U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), Petitioner argues that the State of Oklahoma did not have jurisdiction to prosecute, convict, and sentence him for the murders of Daisy and Sam Hallum, citizens of the Choctaw Nation, when such crimes occurred within the boundaries of the Choctaw Reservation.

¶4 Although this Court initially granted Petitioner relief based upon this proposition after an evidentiary hearing in the

district court, [1] we subsequently decided *State ex rel. Mark Matloff, District Attorney v. The Honorable Jana Wallace, Associate District Judge*, 2021 OK CR 21, —— P.3d ——, and denied retroactive application of *McGirt* to cases on collateral review. Thereafter, prior to issuance of the mandate, the order granting post-conviction relief was withdrawn in this case. [2]

¶5 In *Matloff*, we began our consideration of the retroactivity issue by finding, "*McGirt* announced a rule of criminal procedure ... 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." *Id.*, 2021 OK CR 21, ¶ 26, —— P.3d ——. This rule affected only the manner of deciding a criminal defendant's culpability; therefore, it was a procedural ruling. *Id.*, 2021 OK CR 21, ¶ 27, —— P.3d ——. We further found that the *McGirt* rule was new because it broke new ground, imposed new obligations on both the state and the federal governments and the result was not required by precedent existing when the conviction at issue in *Matloff* was final. *Id.*, 2021 OK CR 21, ¶¶ 28-32, —— P.3d ——.

***2** ¶6 In reaching our decision on the non-retroactivity of *McGirt*, this Court held that our authority under state law to constrain the collateral impact of *McGirt* and its progeny "is consistent with both the text of the opinion and the Supreme Court's apparent intent. ... The Supreme Court itself has not declared that *McGirt* is retroactive to convictions already final when the ruling was announced." *Id.*, 2021 OK CR 21, ¶ 33, —— P.3d ——. Ultimately, we held in *Matloff* that "*McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction" *Id.*, 2021 OK CR 21, ¶ 40, —— P.3d ——.

¶7 Applying *Matloff* to the instant case, we find Petitioner's claim in this successive post-conviction proceeding warrants no relief.

DECISION

¶8 Petitioner's Second Application for Post-Conviction Relief and Motion to Stay Proceedings are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ROWLAND, P.J.: Concur

HUDSON, V.P.J.: Concur

LEWIS, J.: Concur

All Citations

--- P.3d ----, 2021 WL 4929914, 2021 OK CR 36

Footnotes

1 *Ryder v. State*, 2021 OK CR 11, 489 P.3d 528.
2 *Ryder v. State*, 2021 OK CR 25, 495 P.3d 669.

495 P.3d 669 (Mem)
Court of Criminal Appeals of Oklahoma.

James Chandler RYDER, Petitioner,
v.
The STATE of Oklahoma, Respondent.

Case No. PCD-2020-613
|
FILED AUGUST 31, 2021

ORDER VACATING PREVIOUS ORDER AND JUDGMENT GRANTING POST-CONVICTION RELIEF AND WITHDRAWING OPINION FROM PUBLICATION

¶1 Based on the Court's decision in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, —— P.3d ——, the previous order and judgment granting post-conviction relief in this case are hereby **VACATED** and **SET ASIDE.** The issuance of the mandate in this case was previously stayed by this Court on May 28, 2021, and no mandate has issued. The opinion in *Ryder v. State*, 2021 OK CR 11, 489 P.3d 528, is **WITHDRAWN**. The Court will issue a separate order addressing Petitioner's claims for post-conviction relief at a later time.

¶2 **IT IS SO ORDERED.**

/s/ SCOTT ROWLAND, Presiding Judge

/s/ ROBERT L. HUDSON, Vice Presiding Judge

/s/ GARY L. LUMPKIN, Judge

/s/ DAVID B. LEWIS, Judge

All Citations

495 P.3d 669 (Mem), 2021 OK CR 25

2021 OK CR 11
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER,	)	**FOR PUBLICATION**
	)	
Petitioner,	)	
vs.	)	No. PCD-2020-613
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION GRANTING SECOND APPLICATION FOR POST-CONVICTION RELIEF

LUMPKIN, JUDGE:[1]

¶1 Petitioner James Chandler Ryder was convicted of two (2) counts of First Degree Murder (21 O.S.1991, § 701.7), Case No. CF-99-147, in the District Court of Pittsburg County. In Count I, Petitioner was sentenced to life imprisonment without parole. In Count II, the jury found the existence of two (2) aggravating circumstances

[1] As stated in my separate writing in *Bosse v. State*, 2021 OK CR 3, __ P.3d __ (Lumpkin, J., concurring in result), I am bound by my oath and adherence to the Federal-State relationship under the U.S. Constitution to apply the edict of the majority opinion in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). However, I continue to share the position of Chief Justice Roberts' dissent in *McGirt*, that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed.

and recommended the punishment of death. The trial court sentenced accordingly. This Court affirmed the judgment and sentence in *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856. Petitioner's first application for post-conviction relief was denied by this Court in *Ryder v. State*, (Okl.Cr.2004) opinion not for publication, Case No. PCD-2002-257. The United States Supreme Court denied *certiorari* in *Ryder v. Oklahoma*, 543 U.S. 886 (2004). On September 8, 2020, Petitioner filed this second and successive application for post-conviction relief.

¶2 Pursuant to 22 O.S.2011, § 1089(D)(8) "if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that the current claims and issues have not been and could not have been presented previously in a previously considered application filed under this section, because the factual or legal basis for the claim was unavailable."

¶3 For purposes of the Capital Post-Conviction Procedure Act, a legal basis of a claim is unavailable if: (1) it was not recognized by or could not have been reasonably formulated from a final decision of the

United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date; or (2) it is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date; or (2) it is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date. A factual basis of a claim is unavailable if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date. 22 O.S.2011, § 1089(D)(9).

¶4 In his sole proposition of error, Petitioner argues that pursuant to *McGirt v. Oklahoma*, ___ U.S. ___, 140 S.Ct. 2452 (2020), the State of Oklahoma did not have jurisdiction to prosecute, convict, and sentence him for the murders of Daisy and Sam Hallum, citizens of the Choctaw nation when such crimes occurred within the boundaries of the Choctaw Reservation.

¶5 Under the particular facts and circumstances of this case, and considering the pleadings before this Court, we find Petitioner's claim is properly before this Court as the claim could not have been

previously presented because the legal basis for the claim was unavailable. *Bosse v. State*, 2021 OK CR 3, __ P.3d __. ("*McGirt* provides a previously unavailable legal basis for [the jurisdictional] claim. Subject-matter jurisdiction may—indeed, must--be raised at any time. No procedural bar applies, and this issue is properly before us. 22 O.S.2011, §§ 1089(D)(8)(a), 1089(D)(9)(a)." *Id.*, at ¶ 22, ___ P.3d at ___.

[2]

¶6 Petitioner's claim raises two separate questions: (a) the Indian status of the victims, and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore remanded this case to the District Court of Pittsburg County for an evidentiary hearing.

¶7 Recognizing the historical and specialized nature of this remand for evidentiary hearing, we requested the Attorney General and District Attorney work in coordination to effect uniformity and

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[2] While the majority in *McGirt* alluded to the availability of procedural bars, Chief Justice Roberts correctly noted in his dissent at footnote 9 that subject matter jurisdiction is never waived under Oklahoma law. *McGirt*, 140 S. Ct. 2452, 2501 n.9 (2020) (Roberts, C.J., dissenting). *See Wallace v. State*, 1997 OK CR 18, ¶ 15, 935 P.2d 366, 372. While Art. 7 of the Oklahoma Constitution vests the district courts of Oklahoma with "unlimited original jurisdiction of all justiciable matters," the federal government has pre-empted the field as it relates to major crimes committed by or against Indians in Indian country.

completeness in the hearing process. Upon Petitioner's presentation of *prima facie* evidence as to the legal status of the victims as Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction. The District Court was ordered to determine whether the victims had some Indian blood and were recognized as Indian by a tribe or the federal government. The District Court was also directed to determine whether the crime occurred in Indian Country. The District Court was directed to follow the analysis set out in *McGirt* to determine (1) whether Congress established a reservation for the Choctaw Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In so doing, the District Court was ordered to consider any evidence the parties provided, including but not limited to treaties, statutes, maps, and/or testimony.

¶8 We also directed the District Court that in the event the parties agreed as to what the evidence would show with regard to the questions presented, the parties may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court.

The District Court was also ordered to file written findings of facts and conclusions of law with this Court.

¶9 An evidentiary hearing was timely held before the Honorable Tim Mills, Associate District Judge, and a *Court Order with Findings of Fact and Conclusion of Law in Accordance with Order Remanding for Evidentiary Hearing issued September 25, 2020* was timely filed with this Court. The record indicates that appearing before the District Court were attorneys from the offices of the Attorney General of Oklahoma, the Pittsburg County District Attorney, Federal Public Defender, and counsel for the Choctaw Nation.

¶10 In its Order to this Court, the District Court stated in pertinent part that the parties had entered into a stipulation that each of the victims, Daisy and Sam Hallum, "had 1/16th Indian blood quantum and was enrolled as a Choctaw Nation citizen at the time of the crimes." The District Court noted that "[t]he Choctaw Nation of Oklahoma/CDIB Tribal Membership certifications for Daisy and Sam Hallum" were attached to the stipulation and that the parties agree they should be admitted into the record of the case.

¶11 The District Court found, based upon treaties and documents provided to the court, that a reservation was established

by the federal government for the Choctaw Nation. The District Court further found "[n]o evidence was presented to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation or that the State of Oklahoma has jurisdiction in this matter . . . Therefore, the crimes occurred in Indian Country."

¶12 Both Petitioner and the State were given the opportunity to file response briefs addressing issues from the evidentiary hearing.[3] Petitioner argues in part that this Court should affirm the District Court's factual findings under an abuse of discretion standard. *See Young v. State,* 2000 OK CR 17, ¶ 109, 12 P.3d 20, 48 ("we afford the trial court's findings on factual issues great deference and will review its findings applying a deferential abuse of discretion standard"). In addition to referencing the stipulations as to the victims' Indian status

[3] The State additionally filed a *Motion to File Supplemental Brief* in which the State cites to an order from the Tenth Circuit Court of Appeals which denied a Petitioner's motion to file a second or successive habeas petition. We grant the State's request to file the supplemental brief but find its reasoning is not persuasive. In *In re: David Brian Morgan,* Tenth Circuit No. 20-6123 (unpublished, Sept. 18, 2020) the Court denied the order after examining its rule regarding the granting of these motions. The Court found that the petitioner failed to show his application actually relied upon *McGirt,* and even if it did, *McGirt* did not create a "new rule of constitutional law" that the Supreme Court "made retroactive to cases on collateral review," but simply interpreted acts of Congress in order to determine if a federal statute applied to a given situation. We find this analysis inapposite to the jurisdictional issue raised by Petitioner herein.

and the location of the crime as Indian country, Petitioner presents argument and authority, which was presented to the District Court, supporting the District Court's conclusion that the Choctaw reservation has not been disestablished. Petitioner asserts this Court should conclude that the State lacks subject matter jurisdiction over his case.

¶13 Petitioner also responds to an argument first presented by the State at the evidentiary hearing that under the General Crimes Act (18 U.S.C. § 1152), the State and the federal government have concurrent jurisdiction over crimes committed by a non-Indian defendant against an Indian victim. The State raised the argument with the intent to preserve the argument for appeal. Defense counsel objected to the preservation of the argument on grounds that the issue was not a part of this Court's remand order for evidentiary hearing. The issue of concurrent jurisdiction formed no part of the trial court's order.

¶14 In his response brief, Petitioner argues: 1) the issue of concurrent jurisdiction is not properly before this Court as the issue is beyond the scope of the supplemental briefing; 2) the issue is not properly before this Court as it is beyond the scope of this Court's order

on evidentiary hearing; and 3) the issue of concurrent jurisdiction between the State and federal governments fails on the merits.

¶15 We find Petitioner has read our Order remanding for an evidentiary hearing too narrowly. Our Order allowed the parties to address "issues pertinent to the evidentiary hearing" in the supplemental briefs. Pursuant to our Order, "[u]pon the Appellant's presentation of *prima facie* evidence as to the victim's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction." Here, the District Court found that the victims in this case were Indians and that the crimes occurred in Indian Country. The State now has the burden of showing it has subject matter jurisdiction. An argument of concurrent jurisdiction is relevant in potentially meeting that burden. As the State raised the issue of concurrent jurisdiction at the evidentiary hearing, although the issue seemingly played no part in the trial court's ruling, we find the issue is now properly before this Court for our consideration.

¶16 The State's argument hinges on its reading of the General Crimes Act which it claims confers federal jurisdiction over Petitioner's case, but does not explicitly deprive the State of concurrent

jurisdiction. The State acknowledges that courts in other states have held that states lack jurisdiction over non-Indians who commit crimes against Indians in Indian country, but argues the reasoning of those cases lacks merit. Relying on civil cases, the State asserts that states have jurisdiction over non-Indians on Indian Country even when they are interacting with Indians so long as the jurisdiction would not "interfere with reservation self-government or impair a right granted or reserved by federal law" citing *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation,* 502 U.S. 251, 257-58 (1992). The State argues that under the plain language of the General Crimes Act, state jurisdiction over non-Indians who victimize Indians does not interfere with the federal government's concurrent jurisdiction over such crimes.

¶17 In anticipation of the State's argument, Petitioner has filed a response rejecting the State's theory of concurrent jurisdiction. Petitioner asserts that under a well-defined federal statutory scheme and decisions by the United States Supreme Court, jurisdiction in Indian Country has historically been exercised by only tribal and federal courts, and states acquire jurisdiction only by express grants.

No statute has granted the State of Oklahoma criminal jurisdiction over crimes committed by or against Indians in Indian Country.

¶18 Petitioner has not claimed to be Indian. Therefore, the issue before us is state jurisdiction over non-Indians who victimize Indians in Indian Country. Having thoroughly reviewed both briefs and authority cited therein, we find the State does not have the concurrent jurisdiction to prosecute Petitioner.

¶19 Under the federal Major Crimes Act (MCA), "[a]ny Indian who commits" certain enumerated offenses "against the person or property of another Indian or any other person" "within Indian country" "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

¶20 Under the General Crimes Act (GCA), 18 U.S.C. § 1152, federal courts have jurisdiction over a broader range of crimes committed by or against Indians in Indian Country. Section 1152 specifically provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

¶21 In *McGirt*, the Supreme Court ruled that federal criminal jurisdiction under both the MCA and the GCA is exclusive of state jurisdiction. 140 S.Ct. at 2479. The Supreme Court stated:

> But the MCA applies only to certain crimes committed in Indian country by Indian defendants. A neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country. See 18 U.S.C. § 1152. States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. See *McBratney*, 104 S.Ct. at 624.

Id. (internal citation omitted).

¶22 In *United States v. McBratney*, 104 U.S. 621, 624 (1881), the Supreme Court held that federal jurisdiction over crimes committed in Indian Country does not extend to crimes committed by non-Indians against non-Indians. [4]

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[4] In *McBratney*, the question before the Supreme Court was "whether the [federal court] had jurisdiction of the crime of murder committed by a white man upon a white man" on a reservation in Colorado. 104 U.S. at 624. The Supreme Court said that "[w]henever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive

¶23 "[C]riminal offenses by or against Indians have been subject only to federal or tribal laws . . . except where Congress in the exercise of its plenary and exclusive power over Indian affairs has 'expressly provided that State laws shall apply.'" *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979)(internal citation omitted).

¶24 "[S]tate criminal jurisdiction in Indian country is limited to crimes committed 'by non-Indians against non-Indians ... and victimless crimes by non-Indians'". *Ross v. Neff*, 905 F.2d 1349, 1353 (10th Cir. 1990) (quoting *Solem v. Bartlett*, 465 U.S. 463, 465 n. 2 (1984)).

¶25 This Court recognized in *State v. Klindt*, 1989 OK CR 75, ¶ 3, 782 P.2d 401, 402 that "[j]urisdiction over Indian Country has been given to either the states or the federal government through statutes." This Court went on to explain why the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.

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jurisdiction over that reservation, it has done so by express words." 104 U.S. at 623-624. The Supreme Court found that by its admission into the Union by Congress, no exceptions had been made for the State of Colorado.

> The Act of August 15, 1953, Pub.L. No. 83–280, 67 Stat. 588 (1953) provided the states permission to assume criminal and civil jurisdiction over any "Indian Country" within the borders of the state. Under this public law, Oklahoma could have, without the consent of the affected Indians, assumed jurisdiction over any Indian Country in the state by constitutional amendment. Because of Title IV of the Civil Rights Act of 1968, 25 U.S.C. §§ 1321–1326 (1970), however, the consent of the affected Indians is now required before a State is permitted to assume criminal and civil jurisdiction over "Indian Country." See 25 U.S.C. §§ 1321(a) and 1322(a) (1970); . . . The State of Oklahoma has never acted pursuant to Public Law 83–280 or Title IV of the Civil Rights Act to assume jurisdiction over the "Indian Country" within its borders. . . . Accordingly, the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.

1989 OK CR 75, ¶ 3, 782 P.2d at 402-403 (internal citations omitted).

¶26 In *Cravatt v. State*, 1992 OK CR 6, ¶ 16, 825 P.2d 277, 279-280, this Court again recognized that the State of Oklahoma has never acted pursuant to Public Law 83-280, stating, "the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country".

¶27 The fact that Petitioner is not Indian does not exempt him from the above cited law. The cases make clear, that absent an express exception by Congress for state jurisdiction over crimes by or against Indians in Indian Country, federal law applies. *See Donnelly v. United*

States, 228 U.S. 243, 272 (1913) (predecessor to GCA applies "with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying [Indian land]")[5]; *United States v. Prentiss,* 273 F.3d 1277, 1278 (10th Cir. 2001) ("18 U.S.C. § 1152 establishes federal jurisdiction over 'interracial' crimes, those in which the defendant is an Indian and the victim is a non-Indian, or vice-versa").[6]

¶28 Applying the above principles to the present case, the State of Oklahoma does not have jurisdiction concurrent with the federal government to prosecute Petitioner. *See Bosse,* 2021 OK CR 3, ¶¶ 23-28, ___ P.3d at ___ (rejecting concurrent jurisdiction argument).

¶29 Turning to the District Court's Order on evidentiary hearing, we find the court's conclusions that the victims in this case were Indian and specifically members of the Choctaw Nation; that the crimes occurred in Indian Country as a reservation was established by

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[5] In *Donnelly,* the Supreme Court specifically considered the question of whether "the killing of an Indian by a person not of Indian blood, when committed upon an Indian reservation within the limits of a State, cognizable in the Federal courts?" *Id.* at 269.

[6] In *Prentiss,* the Tenth Circuit considered whether the government's failure to allege the Indian/non-Indian statuses of the victim and the defendant contributed to the jury's verdict. *Id.* at 1283.

the federal government for the Choctaw Nation; and that no evidence was presented to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation, as set out in *McGirt,* are supported by the record of the evidentiary hearing. Reviewing the District Court's conclusion that the State of Oklahoma did not have jurisdiction in this case for an abuse of discretion, we find no abuse of the court's discretion. *See State v. Delso,* 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194. After thorough consideration of the entire record before us on appeal we find that under the law and the evidence relief is warranted. Petitioner has met his burden of establishing the status of his victims as Indian on the date of the crime. We also find the District Court appropriately applied *McGirt* to determine that Congress did establish a Choctaw Reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Choctaw Nation or that the State of Oklahoma had jurisdiction in this matter. We find the State of Oklahoma did not have jurisdiction to prosecute Petitioner in this matter. The Judgments and Sentences in this case are hereby reversed and the case remanded to the District Court of Pittsburg County with instructions to dismiss the case.

DECISION

¶30 The **JUDGMENTS and SENTENCES are REVERSED AND REMANDED with instructions to Dismiss.** The **MANDATE** is not to be issued **until twenty (20)** days from the delivery and filing of this decision.[7]

AN APPEAL FROM THE DISTRICT COURT OF PITTSBURG COUNTY
THE HONORABLE TIM MILLS, ASSOCIATE DISTRICT JUDGE

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[7] By withholding the issuance of the mandate for 20 days, the State's request for time to determine further prosecution is rendered moot.

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OPINION BY: LUMPKIN, J.
KUEHN, P.J..: Concur in Results
ROWLAND, V.P.J.: Specially Concur
LEWIS, J.: Specially Concur
HUDSON, J.: Specially Concur

KUEHN, PRESIDING JUDGE, CONCURRING IN RESULT:

¶1 I agree with the Majority that the State of Oklahoma had no jurisdiction to try Petitioner, and his case must be dismissed. This Court recently found that the Choctaw Reservation was not disestablished, and is Indian Country. *Sizemore v. State*, 2021 OK CR 6, ¶¶ 15-16. Oklahoma does not have jurisdiction to prosecute crimes committed against Indians in Indian Country. *Bosse v. State*, 2021 OK CR 3, ¶ 5; 18 U.S.C. § 1152. Furthermore, this Court has determined that the State does not have concurrent jurisdiction over crimes committed by or against Indians in Indian Country. *Bosse*, 2021 OK CR 3, ¶ 28. Because these issues have already been decided, I find the Majority's discussion of both reservation status and concurrent jurisdiction superfluous dicta. I recognize with regret the painful effect this decision will have on the victims' family.

ROWLAND, VICE PRESIDING JUDGE, SPECIALLY CONCURRING:

¶1 I agree with the majority that the U.S. Supreme Court's decision in *McGirt v. Oklahoma,* 591 U.S.___, 140 S.Ct. 2452 (2020), unfortunately, requires dismissing these two murder convictions, one of which resulted in a sentence of death. I write separately to make clear that although footnote 2 quotes Chief Justice Roberts' mention of subject matter jurisdiction, that is not what is implicated here. As I set forth in my separate writing to *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___, the federal Major Crimes Act does not, indeed cannot, divest Oklahoma courts of subject matter jurisdiction granted by the Oklahoma Constitution and statutes enacted pursuant thereto. This federal criminal statute, based upon the plenary power of Congress to regulate affairs with Indian tribes, is instead an exercise of federal territorial jurisdiction which preempts the authority of Oklahoma state courts under these circumstances.

LEWIS, JUDGE, SPECIALLY CONCURRING:

¶1 Pursuant to my special writings in *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___ and *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___, I specially concur. Following the precedent of *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), Oklahoma has no jurisdiction over persons who commit crimes against Indians in Indian Country. This crime occurred within the historical boundaries of the Choctaw Nation Reservation and that Reservation has not been expressly disestablished by the United States Congress. Additionally, the crime occurred against Indian victims, thus the jurisdiction is governed by the Major Crimes Act found in the United States Code.

¶2 Oklahoma, therefore, has no jurisdiction, concurrent or otherwise, over the petitioner in this case. Thus, I concur that this case must be reversed and remanded with instructions to dismiss. Jurisdiction is in the hands of the United States Government.

HUDSON, J., SPECIALLY CONCURRING:

¶1 Today's decision applies *McGirt v. Oklahoma*, 140 U.S. 2452 (2020) to the facts of this case and dismisses two first degree murder convictions, one that resulted in a death sentence, from the District Court of Pittsburg County. I fully concur in the majority's opinion based on the stipulations below concerning the victims' Indian status and the location of these crimes within the historic boundaries of the Choctaw Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Petitioner. Instead, Petitioner must be prosecuted in federal court. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶2 I also join Judge Rowland's observation in his special writing that the Major Crimes Act does not affect the State of Oklahoma's subject matter jurisdiction in criminal cases but, rather, involves the exercise of federal criminal jurisdiction to effectively preempt the exercise of similar state authority. Further, I maintain my previously expressed views on the significance of *McGirt*, its far-reaching impact on the criminal justice system in Oklahoma and the need for a practical solution by Congress. *See Bosse*, 2021 OK CR 3, __P.3d__ (Hudson, J., Concur in Results); *Hogner v. State*, 2021 OK CR 4,

__P.3d__ (Hudson, J., Specially Concurs); and *Krafft v. State*, No. F-2018-340 (Okl.Cr., Feb. 25, 2021) (Hudson, J., Specially Concurs) (unpublished).

ORIGINAL

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

PCD 2020 613

JAMES CHANDLER RYDER, through Next Friend, Sue Ryder,	***Pittsburg County District Court*** ***Case No.: F-1999-147***
Petitioner,	***Court of Criminal Appeals*** ***Direct Appeal Case No.: D-2000-886***
-vs-	***Court of Criminal Appeals Original*** ***Post-Conviction Case No.: PCD- 2002-257***
THE STATE OF OKLAHOMA,	***Successive Post-Conviction Case No.:***
Respondent.	

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF
- DEATH PENALTY -

PART A: PROCEDURAL HISTORY

Petitioner, James Chandler Ryder, through his next friend, Sue Ryder,[1] and through undersigned counsel, submits his successive application for post-conviction relief pursuant to section 1089 of Title 22. This is the second application for post-conviction relief to be filed.[2]

The sentences from which relief is sought are: Death Sentence and Life Sentence.

1. a. Court in which sentences were rendered: Pittsburg County District Court

   b. Case Number: F-1999-147

[1] Mr. Ryder's mother, Sue Ryder, was appointed as Petitioner's next friend by the federal district court in the Eastern District in *Ryder ex rel. Ryder v. Workman,* Case No. CIV-05-24-JHP-KEW (E.D. Okla.), Dkt. 150 (Sealed).

[2] Pursuant to Rule 9.7(A)(3)(d), attached hereto is a copy of Mr. Ryder's initial application in case No. PCD-2002-257. *See* Appendix ("App.") at 3, Attachment ("Att.") 1. Mr. Ryder remains indigent. *See* App. at 51, Att. 2 (trial court's finding of indigency); App. at 53, Att. 3 (order appointing appellate counsel); and App. at 60, Att. 4 (federal court's finding of indigency). Mr. Ryder is represented in this matter by undersigned counsel, Patti Palmer Ghezzi and Meghan LeFrancois, appearing with permission of the federal district court in *Ryder ex rel. Ryder v. Workman*, Case No. CIV-05-24-JHP-KEW (E.D. Okla.), Dkt. 174.

ORIGINAL

APPENDIX D **Pet. App. 27**

2. Date of Sentences: July 21, 2000

3. Terms of Sentences: Mr. Ryder received a sentence of death for one count of first-degree murder and a sentence of life without possibility of parole for another count of first-degree murder.

4. Name of Presiding Judge: Honorable Thomas Bartheld

5. Is Petitioner currently in custody? Yes (X) No ( )

Where? Oklahoma State Penitentiary

Does Petitioner have criminal matters pending in other courts? Yes ( ) No (X)

Does Petitioner have sentences (capital or non-capital) to be served in other states/jurisdictions? Yes ( ) No (X)

I. CAPITAL OFFENSE INFORMATION

6. Petitioner was convicted of the following crime, for which a sentence of death was imposed:

a. Murder in the First Degree in violation of 21 O.S. 2011, § 701.7

Aggravating factors alleged:

a. Defendant knowingly created a great risk of death to more than one person; and

b. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Aggravating factors found:

a. Defendant knowingly created a great risk of death to more than one person; and

b. The existence of a probability that the defendant would commit criminal acts of violence that constitute a continuing threat to society.

Mitigating factors listed in jury instructions:

a. no significant history of prior criminal activity;
b. defendant is likely to be rehabilitated;
c. defendant has behaved well while in the Pittsburg County Jail;
d. defendant was a hard worker;
e. cooperation by the defendant with authorities;

f. defendant's age;
g. defendant's emotional/family history;
h. defendant has a family who loves and cares for him.

Victim impact testimony was not presented at the trial.

7. The finding of guilt was made after a plea of not guilty.

8. The finding of guilt was made by a jury.

9. The sentence imposed was recommended by the jury.

II. NON-CAPITAL OFFENSE INFORMATION

10. Mr. Ryder was also convicted of another count of first-degree murder but the bill of particulars was struck prior to trial and he was sentenced to life without possibility of parole.

III. CASE INFORMATION

11. Trial Counsel:

Craig Corgan & Wayna Tyner
Capital Trial Division - Norman
Oklahoma Indigent Defense System

12. OIDS Capital Trial Division was initially appointed by the court but the appeal was handled under contract with OIDS.

13. The convictions and sentences were appealed to the Oklahoma Court of Criminal Appeals.

The case was remanded for a retrospective competency jury hearing.

Date of Opinion by OCCA: Jan. 14, 2004

14. Appellate Counsel:
Gloyd McCoy
119 N. Robinson, Suite 320
Oklahoma City, Oklahoma 73102

15. Was an opinion written by the appellate court? Yes (X) No ( )

If "yes," give citations if published: *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856

16. Was further review sought? Yes (X) No ( )

Ryder v. State, PCD-2002-257 (denying post-conviction relief), Mar. 18, 2004.

Ryder v. Oklahoma, 125 S. Ct. 215 (2004) (certiorari denied).

Ryder ex rel. Ryder v. Trammell, 2013 WL 5603851 (E.D. Okla. 2013) (denying federal habeas corpus relief).

Ryder ex rel. Ryder v. Warrior, 810 F.3d 724 (10th Cir. 2016) (denying federal habeas corpus relief).

Ryder ex rel. Ryder v, Royal, 137 S. Ct. 498 (2016) (certiorari denied).

PART B: GROUNDS FOR RELIEF

17. Has a Motion for Discovery been filed with this application? Yes ( ) No (X)

18. Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No ( )

19. Have other motions been filed with this application or prior to the filing of this application? Yes ( ) No (X)

20. List Propositions raised (list all sub-propositions):

PROPOSITION

***McGirt v. Oklahoma* Confirms Oklahoma Did Not Have Jurisdiction to Prosecute, Convict, and Sentence Mr. Ryder for Murders that Occurred Within the Boundaries of the Choctaw Nation Reservation.**

A. This Jurisdictional Matter Is Properly Before This Court.

1. The Legal Basis for Mr. Ryder's Jurisdictional Claim Was Unavailable Until *McGirt* and *Murphy* Became Final.

2. Subject-Matter Jurisdiction Can Be Raised at Any Time.

B. *McGirt* Controls Reservation Status and Federal Criminal Jurisdiction.

1. Certain Crimes in Indian Country in Oklahoma Are Subject to Federal Jurisdiction Under the Major Crimes Act and the Indian Country Crimes Act.

2. Indian Country Includes Restricted and Trust Allotments, Tribal Trust Lands, and All Fee Lands Within Choctaw Reservation Boundaries.

C. **The Choctaw Reservation Was Established by Treaty, and Its Boundaries Have Been Altered Only by Express Cessions in 1855 and 1866.**

1. **The Creek Reservation Was Established by Treaty.**

2. **The Choctaw Treaties Contain the Same or Similar Provisions as the Creek Treaties.**

3. **Special Terminology Is Not Required to Establish a Reservation, and Tribal Fee Ownership Is Not Inconsistent with Reservation Status.**

4. **The Choctaw Reservation Has Been Diminished Only by Express Cessions of Portions of the Reservation in Its 1855 and 1866 Treaties.**

D. **Congress Has Not Disestablished the Choctaw Reservation.**

1. **Only Congress Can Disestablish a Reservation by Explicit Language for the Present and Total Surrender of All Tribal Interests in the Affected Lands.**

2. **The Allotment of Choctaw Land Did Not Disestablish the Choctaw Reservation.**

3. **Allotment Era Statutes Intruding on Choctaw Nation's Right to Self-Governance Did Not Disestablish the Reservation.**

4. **The Events Surrounding the Enactment of Choctaw Allotment Legislation and Later Demographic Evidence Cannot, and Did Not, Result in Reservation Disestablishment.**

PART C: FACTS

Petitioner's request for post-conviction relief raises the sole issue of whether the State of Oklahoma ("Oklahoma" or "State") had jurisdiction to prosecute, convict, and sentence Mr. Ryder for the murders of Daisy and Sam Hallum, citizens of the Choctaw Nation, when their murders occurred within the boundaries of the Choctaw reservation – boundaries that have not been disestablished by Congress. Facts that relate to the offense have limited value regarding the jurisdictional issue and will be addressed only briefly.

FACTS RELATING TO THE OFFENSE[3]

Mr. Ryder returned to Oklahoma from Georgia in early April 1999, after failing to recruit family members to escape the end of the world by going with him to the Canadian Yukon. The property he intended to take to the Yukon had been stored with the Hallums. When he tried, with the help of a Pittsburg County deputy, to get the Hallums to return his property, there were only two small boxes left. Tr. 365-66. Daisy and Sam Hallum were killed on April 9, 1999 at their rural Pittsburg county property. Tr. 344. Mr. Ryder was tried and convicted for the murders, receiving a death sentence for Daisy Hallum's death and a life-without-possibility-of-parole sentence for Sam Hallum's death.

FACTS RELATING TO THE CHOCTAW NATION AND INDIAN COUNTRY JURISDICTION

Choctaw Nation is a federally recognized Indian tribe. It is one of five tribes that are often treated as a group for purposes of federal legislation (Cherokee, Muscogee (Creek), Choctaw, Chickasaw, and Seminole Nations – historically referred to as the "Five Civilized Tribes" or "Five Tribes"). The Choctaw Reservation boundaries encompass lands in an eleven-county area, including all or portions of McCurtain, LeFlore, Haskell, Latimer, Pushmataha, Choctaw, Atoka, Pittsburg, Bryan, Coal, and Hughes counties, all within the borders of the State of Oklahoma.[4] The Nation's government, headquartered in Durant, Oklahoma, consists of executive, legislative, and

[3] References to the trial transcript will be by page number ("Tr.__"). Additional supporting documents are cited to as attachments ("Att."), provided in the separately bound and sequentially numbered appendix ("App.").

[4] The following link superimposes an Oklahoma Department of Transportation map of the Choctaw Nation Reservation over Oklahoma counties contained within the boundaries: http://www.odot100/maps-spec/misc_tribaljurisdictions.pdf (last visited Aug. 26, 2020).

judicial branches, and includes a constitutional court and a court of general jurisdiction, with active district and appellate courts.[5] The Choctaw Nation provides law enforcement through its tribal police, and maintains cross-deputation agreements with state, county, and city law enforcement agencies to ensure protection of citizens and non-citizens.[6]

Choctaw Nation maintains a significant and continuous presence in the Choctaw Reservation. There are approximately 223,279 Choctaw citizens, 84,670 residing in Oklahoma. The Nation provides extensive services to communities throughout the reservation, including, among others: health and medical centers, educational services for adults and children, including the operation of a residential learning center for elementary and secondary school age children, employment, housing, bridge and road construction, improvement of water systems for local governments, wild-land firefighting units, tourism, food distribution, child support services, child care assistance, child welfare, victim's assistance programs, donations to county drug courts, public schools, and charitable contributions. The Nation's activities, including its business operations, resulted in a statewide $2.4 billion favorable economic impact in 2018.[7]

The homicides of Daisy and Sam Hallum occurred in a rural area of Pittsburg County at 9th and McAnnally Road. Tr. 202, 309. The home is located on fee land within the Choctaw Nation

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[5] *See* https://choctawnation.com/government/judicial-branch/about-judicial-branch (last visited Aug. 26, 2020).

[6] *See* https://sos.ok.gov/tribal.aspx (last visited Aug. 26, 2020); use search word "Choctaw" to access Choctaw Nation Cross-Deputization Agreements (1994-2020); maintained by Oklahoma Secretary of State.

[7] *See* https://choctawnation.com/news-events/press-media/choctaw-nation-oklahoma-brings-nearly-24-billion-impact-2018-oklahoma (last visited Aug. 26, 2020).

Reservation. *See* App. at 62, Att. 5 (Choctaw Nation Real Estate Services Memo).[8] Both Daisy and Sam Hallum are Choctaw citizens with Indian blood. *See* App. at 70, Att. 7 (Choctaw Nation Verification of CDIB/Tribal Citizenship – Daisy Hallum.); and App. at 72, Att. 8 (Choctaw Nation Verification of CDIB/Tribal Citizenship – Sam Hallum). Mr. Ryder is non-Indian.

Historical facts are also relevant in determining whether Oklahoma had jurisdiction to prosecute, convict, and sentence Mr. Ryder for crimes that occurred against the Hallums on the Choctaw Reservation. The historical facts are discussed below in Part D and documented in the attachments, which are incorporated herein by reference. *See* App. at 003-187, Atts. 1-21.

[8] The legal description of the Pittsburg County property is found in the probate records for Daisy and Sam Hallum. *See* App. at 64, Att. 6 (Daisy and Sam Hallum probate records; inventory of property showing legal description of home and 10 acres where crimes occurred).

PART D: ARGUMENTS AND AUTHORITIES

PROPOSITION

***McGirt v. Oklahoma* Confirms Oklahoma Did Not Have Jurisdiction to Prosecute, Convict, and Sentence Mr. Ryder for Murders that Occurred Within the Boundaries of the Choctaw Nation Reservation.**

The direct holding in *McGirt* is elegantly simple. The Government promised the Muscogee (Creek) Nation (MCN) a reservation in present-day Oklahoma. Only Congress can break such a promise and only by using explicit language that provides for the "'present and total surrender of tribal interests' in the affected lands." *McGirt v. Oklahoma*, 140 S. Ct 2452, 2464 (2020). Congress never, in any of the laws Oklahoma relied on, used "anything like" such language. *Id.* Therefore, the MCN reservation is intact; Oklahoma has no criminal jurisdiction over Mr. McGirt, a Seminole, whose crimes occurred within the boundaries of the MCN reservation. *McGirt* also established a methodical analysis of what standard courts must apply in determining whether any given reservation has been diminished or disestablished by Congress. *See Oneida v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) ("We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation.").

A. This Jurisdictional Matter Is Properly Before This Court.

1. The Legal Basis for Mr. Ryder's Jurisdictional Claim Was Unavailable Until *McGirt* and *Murphy* Became Final.

This claim is properly before this Court. Mr. Ryder recognizes Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, and Okla. Stat. tit. 22 § 1089(D) typically apply to the filing and review of subsequent applications for post-conviction relief in capital cases.

Under § 1089(D)(9), the legal basis for raising this claim in a successor application was unavailable until *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (*McGirt)* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (*Murphy*) became final. The mandate in *McGirt* issued on August 10, 2020. The judgment in *Murphy* issued on August 26, 2020. Before the issuance of the mandates, Mr. Ryder's claim "was not recognized by or could not have been reasonably formulated from a *final* decision of the United States Supreme Court [or the Tenth Circuit Court of Appeals]." Okla. Stat. tit. 22 § 1089(D) (emphasis added). With the legal basis now available, this Court should decide the federal claim on the merits, vacate Mr. Ryder's convictions and sentences, and dismiss the charges.[9] By faithfully applying *McGirt* and *Murphy*, this Court must conclude the Choctaw Nation Reservation is intact and Oklahoma had no jurisdiction to try, convict, and sentence Mr. Ryder.

2. Subject-Matter Jurisdiction Can Be Raised at Any Time.

Even if successive post-conviction applications were not allowed in this unique situation, subject-matter jurisdiction is a fundamental issue that can be raised at any time. Under the Indian Country Crimes Act (ICCA), also known as the General Crimes Act (GCA), Oklahoma does not have subject-matter jurisdiction over the crimes that arose within the Choctaw Nation Reservation.

"[L]ack of jurisdiction" is a constitutional right which is "never finally waived." *Johnson v. State*, 1980 OK CR 45, ¶ 30, 611 P.2d 1137, 1145. In three capital cases in which Indian country jurisdictional issues were raised belatedly, this Court repeatedly confirmed such a fundamental jurisdictional issue can be raised at any time. *See Cravatt v. State*, 1992 OK CR 6 at ¶3, 825 P.2d 277, 278 (deciding Indian country jurisdictional question though raised for first time on the day

[9] This Court has confirmed that the legal basis for such a jurisdictional claim was not available until *McGirt* and *Murphy* were final. *See* Order Remanding for Evidentiary Hearing, *Bosse v. State*, No. PCD-2019-124 (Aug. 12, 2020).

appellate oral argument was set); *Murphy v. State*, 2005 OK CR 25, ¶2, 124 P.3d 1198 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue though raised for first time in successor post-conviction relief action); and *Magnan v. State*, 2009 OK CR 16, ¶9, 207 P.3d 397, 402 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue even though issue was not raised in the trial court where appellant pled guilty and waived his appeal). This Court's decisions permitting jurisdiction to be raised at any time rest on bedrock principles which have existed for nearly a century. *See Armstrong v. State*, 1926 OK CR 259, 35 Okla. Crim. 116, 118, 248 P. 877, 878.

Such respect for jurisdictional claims is proper. The Supreme Court defines jurisdiction as "the courts' statutory and constitutional *power* to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002). *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Because subject-matter jurisdiction involves a court's power to act, the Supreme Court concludes "it can never be forfeited or waived." *Cotton*, 535 U.S. at 630. Consequently, defects in subject-matter jurisdiction require correction regardless of when the issue is raised. This concept is so grounded in law that defects in jurisdiction cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U.S. 413, 421 (1911). Likewise, the Tenth Circuit in *Murphy v. Royal,* 875 F.3d 896, 907 n.5 (10th Cir. 2017) recognized issues of subject-matter jurisdiction in Oklahoma are "never waived" and can "be raised on a collateral appeal." Similarly, Oklahoma's Solicitor General acknowledges "Oklahoma allows collateral challenges to subject-matter jurisdiction *at any time*." Brief of Respondent at 43, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526) (emphasis added).

Consideration of the merits of Mr. Ryder's claim is appropriate.

B. *McGirt* Controls Reservation Status and Federal Criminal Jurisdiction.

As recognized by this Court more than thirty years ago, Oklahoma failed to assume criminal and civil jurisdiction under Public Law 280 before it was amended to require tribal consent, 25 U.S.C. § 1321, and Oklahoma "does not have jurisdiction over crimes committed by or against an Indian in Indian Country." *See Cravatt*, 825 P.2d at 279 (citing *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 403). This Court determined in *Klindt* that trust allotments within the boundaries of the Cherokee Nation constitute Indian country as defined by 18 U.S.C. § 1151(c) and overruled *Ex Parte Nowabbi*, 1936 OK CR 111, 61 P.2d 1139, which wrongly held Oklahoma had jurisdiction to convict and sentence a full-blood Choctaw for the murder of another full-blood Choctaw on a restricted Choctaw allotment. *Klindt*, 782 P.2d at 403.

This Court has not addressed whether all lands within the boundaries of the Choctaw Nation constitute Indian country as defined by § 1151(a) ("all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). The United States Supreme Court likewise had not addressed reservation status as to any of the Five Tribes, until July 9, 2020, when it decided *McGirt*, 140 S. Ct. at 2463-81. In *McGirt*, the Court ruled that the Muscogee (Creek) Reservation was established by treaty; Congress never disestablished the reservation; all land, including fee land, within the reservation is Indian country under 18 U.S.C. § 1151(a); federal statutes concerning the Five Tribes near the time of statehood did not grant jurisdiction to Oklahoma over crimes committed by Indians on the reservation; the Major Crimes Act, 18 U.S.C. § 1153 (MCA), applies to certain listed crimes committed by Indians on the reservation; and Oklahoma had no jurisdiction to prosecute a Seminole citizen for crimes committed on fee lands within the reservation. *Id.*

On the same date that the Supreme Court issued the *McGirt* decision, it affirmed the Tenth Circuit's ruling in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd, Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (*Murphy*), determining that Oklahoma had no jurisdiction over the murder of an Indian by another Indian on the Creek Reservation under the MCA. On July 9, 2020, the Supreme Court also remanded four cases pending certiorari in the Supreme Court involving other reservations in Oklahoma, in light of *McGirt*.[10] Notably, one of those cases involves whether the Choctaw reservation is intact. *See Davis v. Oklahoma*, OCCA No. PC-2019-451, U.S. S. Ct. No. 19-6428. In its response in *Davis* the State acknowledges that *McGirt* informs the analysis of whether there also exists a Choctaw reservation, but seeks to delay any determination until other cases this Court had remanded for evidentiary hearings involving the Choctaw reservation are decided. *See* Appellee's Response to Claim Based on *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) at 24-45, *Davis v. State*, No. PC-2019-451 (Aug. 21, 2020).

1. Certain Crimes in Indian Country in Oklahoma Are Subject to Federal Jurisdiction Under the Major Crimes Act and the Indian Country Crimes Act.

Although the applicability of federal and state criminal laws in the exercise of federal or state jurisdiction in Indian country nationwide is fairly complex, the jurisdictional parameters are clearly defined by federal law as amended from time to time. First, under the MCA, federal courts have exclusive jurisdiction, as to Oklahoma, over prosecutions for certain listed qualifying crimes

[10] *See Bentley v. Oklahoma*, OCCA No. PC-2018-743, U.S. S. Ct. No. 19-5417, Judgment Vacated and Case Remanded, July 9, 2020 (Citizen Band Potawatomi Reservation); *Johnson v. Oklahoma*, OCCA No. PC-2018-343, U.S. S. Ct. No. 18-6098, Judgment Vacated and Case Remanded, July 9, 2020 (Seminole Reservation); *Terry v. Oklahoma*, OCCA No. PC-2018-1076, U.S. S. Ct. No. 18-8801, Judgment Vacated and Case Remanded, July 9, 2020 (Quapaw/Modoc/Ottawa Reservations); and *Davis v. Oklahoma*, OCCA No. PC-2019-451, U.S. S. Ct. No. 19-6428, Judgment Vacated and Case Remanded, July 9, 2020 (Choctaw Reservation).

committed by Indians against Indians or non-Indians in Indian country.[11] *See McGirt*, 140 S. Ct. at 2459-60, 2470-71, 2477-78. Second, under the ICCA, (also known as the GCA)), Oklahoma lacks jurisdiction over prosecutions of crimes, such as Mr. Ryder's, that are committed against an Indian in Indian country.[12] Such crimes are subject to federal or tribal jurisdiction. *McGirt*, 140 S. Ct. at 2478 ("But Oklahoma doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over Creek lands. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma."). Third, Oklahoma has criminal jurisdiction over all offenses committed by non-Indians against non-Indians in Indian country. *Id.* (citing *United States v. McBratney*, 104 U.S. 621, 624 (1881)). *See also United States v. Langford,* 641 F.3d 1195 (10th Cir. 2011) (holding state possesses exclusive criminal jurisdiction over non-Indians who commit victimless crimes in Indian country). *See* App. at 74, Att. 9 (Indian Country Criminal Jurisdictional Chart).

The *McGirt* decision laid to rest Oklahoma's position that the MCA and the ICCA do not apply in Oklahoma. The Court noted that even the dissent declined "to join Oklahoma in its latest

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[11]The MCA provides in pertinent part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter . . . [and] robbery . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

[12] The ICCA provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152.

twist." *See McGirt*, 140 S. Ct. at 2476 (criticizing Oklahoma's use of "statutory artifacts" to argue its "established and enlightened policy of applying the same law in the same courts to everyone" somehow granted it criminal jurisdiction in Indian country even if the MCN reservation was intact). The Court specifically found no validity to Oklahoma's argument that the MCA was rendered inapplicable by three statutes: the Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 (granting federal courts in Indian Territory[13] "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense"); the Act of June 28, 1898, ch. 517, § 28, 30 Stat. 495, 504-505 (Curtis Act) (abolishing Creek Nation courts and transferring pending criminal cases to federal courts in Indian Territory); and the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267, as amended by the Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286) (concerning transfer of cases upon statehood).[14] *McGirt,* 140 S. Ct. 2477. The Court noted that Oklahoma was formed from Oklahoma

[13] Federal courts in the bordering states of Arkansas and Texas, and later in Muskogee, Indian Territory, were originally authorized to exercise federal jurisdiction in Indian Territory, subject to changes over time. *See* Act of Jan. 31, 1877, ch. 41, 19 Stat. 230 (Arkansas); Act of Jan. 6, 1883, ch. 13, § 3, 22 Stat. 400 (Texas); Act of Mar. 1, 1889, ch. 333, §§ 1, 5, 25 Stat. 783 (Muskogee, Indian Territory); Act of May 2, 1890 ch. 182 §§ 29-44, 26 Stat. 81 (Indian Territory); Act of Mar. 1, 1895, ch. 145, §§ 9, 13, 28 Stat. 693 (repealing laws conferring jurisdiction on the federal courts in Arkansas, Kansas, and Texas over offenses committed in Indian Territory, and authorizing the federal court in Indian Territory to exercise such jurisdiction, including jurisdiction over "all offenses against the laws of the United States").

[14] The Enabling Act required transfer to the new federal courts of prosecutions of "all crimes and offenses" committed within Indian Territory "which, had they been committed within a State, would have been cognizable in the Federal courts." § 16, 34 Stat. 267, 276, as amended by § 1, 34 Stat. 1286. It required transfer of prosecutions not arising under federal law to the new state courts. §20, 34 Stat. 267, 277, as amended by §3, 34 Stat. 1286.

Territory in the west and Indian Territory in the east,[15] and that criminal prosecutions in Indian Territory were split between tribal and federal courts. *McGirt,* 140 S. Ct. 2476 (citing Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81, 94).[16] The Court held that Congress "abolished that [Creek tribal/federal court split] scheme" with the 1897 act, but "[w]hen Oklahoma won statehood in 1907, the MCA applied immediately according to its plain terms." *Id.* The Enabling Act sent federal-law cases to federal court in Oklahoma, and crimes arising under the federal MCA "belonged in federal court from day one, wherever they arose within the new state." *Id.* at 2478. Crimes arising under the federal ICCA, which "applies to a broader range of crimes by or against Indians in Indian country," *id.* at 2479, likewise applied immediately upon statehood, and are not subject to state jurisdiction.[17] Mr. Ryder's crime arises under the ICCA.

2. Indian Country Includes Restricted and Trust Allotments, Tribal Trust Lands, and All Fee Lands Within Choctaw Reservation Boundaries.

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[15] No territorial government was ever created in the reduced Indian Territory, and it remained directly subject to tribal and federal governance until statehood. *See* App. at 77, Att. 10 (1866 Map of Indian Territory; App. at 79, Att. 11 (1887 Map of Indian Territory); App. at 81, Att. 12 (1889 Map of Indian Territory); and App. at 83, Att. 13 (1892 Map of Oklahoma and Indian Territories).

[16] *See Talton v. Mayes*, 163 U.S. 376, 381 (1896) (finding that Cherokee Nation had exclusive jurisdiction over an 1892 Cherokee murder in Cherokee Nation under its treaties and the 1890 Act). The 1897 act "broadened the jurisdiction of the federal courts, thus divesting the Creek tribal courts of their exclusive jurisdiction over cases involving only Creeks." *See Indian Country, U.S.A., Inc. v. Okla. ex rel. Oklahoma Tax Com'n*, 829 F.2d 967, 978 (10th Cir. 1987) *cert. denied*, 487 U.S. 1218 (1988) (emphasis added).

[17] Both the dissenters and Oklahoma Solicitor General acknowledged that Oklahoma would not have jurisdiction over crimes against Indians that occurred within the intact boundaries of the Creek reservation. *See McGirt*, 140 S. Ct. at 2500-01 (Roberts, J. dissenting); Oral Arg. transcript at 55, *McGirt*, 140 S. Ct. 2452 (2020) (No. 18-9526) (emphasis added) (Solicitor General Mithun Mansinghani argued the number he used for prisoners who would be affected by a ruling that the MCN reservation was not disestablished "doesn't include crimes committed against Indians *which the state would not have jurisdiction over*.").

The Choctaw Reservation includes individual restricted and trust Choctaw allotments[18] that constitute Indian country under 18 U.S.C. § 1151(c) for purposes of application of the MCA and ICCA ("all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same"). *See United States v. Ramsey*, 271 U.S. 467, 469, 472 (1926) (applying ICCA to murder of Indian by non-Indian on restricted Osage allotment); *United States v. Sands*, 968 F.2d 1058, 1061-62 (10th Cir. 1992) *cert. denied*, 506 U.S. 1056 (1993) (applying MCA to murder of Indian by Indian on restricted Creek allotment, and allotment era statutes "did not abrogate the federal government's authority and responsibility, nor allow jurisdiction by the State of Oklahoma" over those allotments); *Klindt*, 782 P.2d at 403 (finding no state jurisdiction over assault with dangerous weapon by or against Indian on Cherokee trust allotment).

The Choctaw Reservation also includes tribal lands held in trust by the United States and unallotted tribal lands that constitute Indian country under 18 U.S.C. § 1151(a) for jurisdictional purposes ("all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). *See United States v. John*, 437 U.S. 634, 649 (1978) (Mississippi Choctaw tribal trust land); *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990) (Cherokee tribal trust land); *Indian Country, U.S.A. Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) (unallotted Creek land).

Oklahoma has no jurisdiction over crimes covered by the MCA or the ICCA, even when committed on individual fee land within the Choctaw Reservation. A reservation includes all land

[18] Restricted Choctaw allotments are subject to federal statutory requirements for conveyances and encumbrances. Act of May 27, 1908, c. 199, § 4, 35 Stat. 312.

within its boundaries, even if owned in fee by non-Indians. "[W]hen Congress has once established a reservation, *all tracts included within it* remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909) (emphasis added). "[The Supreme Court] long ago rejected the notion that the purchase of lands by non-Indians is inconsistent with reservation status." *McGirt*, 140 S. Ct. at 2464 n.3 (citing *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58 (1962)). "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *McGirt*, 140 S. Ct. at 2468 (citing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).

C. The Choctaw Reservation Was Established by Treaty, and Its Boundaries Have Been Altered Only by Express Cessions in 1855 and 1866.

1. The Creek Reservation Was Established by Treaty.

In *McGirt,* the Court discussed Creek treaties in detail, before concluding that they established the Creek Reservation. The Court noted that the 1832 and 1833 Creek removal treaties "solemnly guarantied" the land; established boundary lines to secure "a country and permanent home"; stated the United States' desire for Creek removal west of the Mississippi River; included Creek Nation's express cession of their lands in the East; confirmed the treaty obligation of the parties upon ratification; required issuance of a patent, in fee simple, to Creek Nation for the new land, which was formally issued in 1852; and guaranteed Creek rights "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them." *McGirt*, 140 S. Ct. at 2461 (citing Treaty with the Creeks, arts. I, XII, XIV, XV, Mar. 24, 1832, 7 Stat. 366-68, and Treaty with the Creeks, preamble, arts. III, IV, IX, Feb. 14, 1833, 7 Stat. 417, 419).

The Court further noted that the 1856 Creek treaty promised that no portion of the reservation "shall ever be embraced or included within, or annexed to, any Territory or State," and secured to the Creeks "the unrestricted right of self-government," with "full jurisdiction" over enrolled citizens and their property. *McGirt*, 140 S. Ct. at 2461 (citing Treaty with Creeks and Seminoles, arts. IV, XV, Aug. 7, 1856, 11 Stat. 699, 700, 704).

The Court recognized that although the 1866 post-Civil War Creek treaty reduced the size of the Creek Reservation, it restated a commitment that the remaining land would "be forever set apart as a home for said Creek Nation," referred to as the "reduced Creek reservation." *McGirt*, 140 S. Ct. at 2461 (citing Treaty between the United States and the Creek Nation of Indians, arts. III and IX, June 14, 1866, 14 Stat. 785, 786, 788).

The Court stressed in *McGirt* that the Creek treaties promised a "permanent home" that would be "forever set apart," and the Creek were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. The Court concluded that "[u]nder any definition, this was a reservation." *McGirt*, 140 S. Ct. at 2461-62.

2. The Choctaw Treaties Contain the Same or Similar Provisions as Creek Treaties.

Petitioner recognizes "[e]ach tribe's treaties must be considered on their own terms," in determining reservation status. *Id.* at 2479. The approval of Creek and Choctaw/Chickasaw treaties during the same period of time, and the similarity of Creek treaties described in *McGirt* and Choctaw/Chickasaw treaties, conclusively demonstrate that the Choctaw Reservation was established by treaty.

Choctaw Nation, along with other Indian Nations, occupied much of the southern and southeastern parts of the United States. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622 (1970). In 1786 the Choctaw Nation entered into a treaty that established their boundaries in that part of

the country. Treaty of Hopewell with the Choctaw Nation, Act of Jan. 2, 1786, 7 Stat. 21, art. II, III. A similar treaty was entered into by the Chickasaw. Treaty of Hopewell with the Chickasaw Nation, Act. of Jan, 10, 1786, 7 Stat. 24, art. II, III. But as non-Indian settlers migrated westward and encroached on Choctaw and Chickasaw lands, the Choctaw and Chickasaw ceded portions of these lands to the United States in a succession of treaties. Treaty with Choctaw of 1801, 7 Stat. 66 (ceding lands in Mississippi); Treaty with Choctaw of November 16, 1805, 7 Stat. 96 (ceding lands in Alabama and Mississippi); and Treaty with the Chickasaw of July 23, 1805, 7 Stat. 89 (ceding portions of lands in Tennessee and Alabama). By such treaties the Choctaw were promised exclusive use and occupancy of their remaining lands in the East and the right to live on the land under their own laws. *Choctaw*, 287 U.S. at 623. These guarantees by the United States were of short duration as the first proposals for relocating Indians to new lands in the west occurred soon after the Louisiana Purchase of 1803. *Id.* The United States succeeded in getting further cessions of southeastern lands from the Choctaw and Chickasaw in 1816 and 1818.[19]

Like the Creeks, the Choctaws, under further pressure of the emerging national removal policy, expressly ceded lands in the Southeast for new lands in Indian Territory. In 1820, the Choctaw explicitly ceded the southwestern portion of their territory in Mississippi in exchange for lands in what is now the southern part of Oklahoma and eastern Arkansas, but did not take possession of the lands at that time. Treaty of Doak's Stand, Oct. 18, 1820, 7 Stat. 210) ("1820 Treaty"); A. Debo, *The Rise and Fall of the Choctaw Republic* at 49 (Debo). Then in 1825, the Choctaw ceded the lands granted in 1820, which include lands in the Arkansas Territory, back to

[19] Treaty with the Choctaw of 1816, 7 Stat. 152 (ceding lands in Alabama and Mississippi). *See also* Treaty with the Chickasaw of 1816, 7 Stat. 150 (ceding lands in Tennessee and Alabama); Treaty with Chickasaw of 1818, 7 Stat. 192 (ceding lands in Tennessee).

the United States because that land had already been settled by non-Indians. Treaty of Jan. 20, 1825, 7 Stat. 234 ("1825 Treaty"). While the 1825 Treaty confirmed the boundaries of their lands west of the Mississippi, the voluntary emigration federal officials were hoping for did not happen. Debo at 50.

The Indian Removal Act of 1830, Act of May 28, 1830, ch. 148, 4 Stat. 411, which implemented removal policy, authorized the President to divide public domain lands into defined "districts" for tribes removing west of the Mississippi River. *Id.* at § 1. It also provided that the United States would "forever secure and guaranty" such lands to the removed tribes, "and if they prefer it . . . the United States will cause a patent . . . to be made and executed to them for the same[.]" *Id.* at § 3. President Andrew Jackson was anxious to make the Choctaw project the model for removal. Debo at 53.

Four months after the passage of the Indian Removal Act, the Choctaw became the first southeastern Indian Nation to acquiesce and accept removal from their ancestral lands.[20] The Choctaw Nation's reservation in Indian Territory was established by treaty entered into by the Choctaw and Chickasaw Nations in anticipation of their removal to present-day Oklahoma. The Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 ("1830 Treaty"), using precise geographic terms, secured to the Choctaw Nation "a tract of country west of the Mississippi River" to "exist as a nation and live on it," *id.* art. 2. The United States promised that the Choctaw could exercise the "jurisdiction and government" over "all the persons and property" within their lands,

[20] As with other southeastern tribes the non-Indian population was intruding on the Choctaw and Chickasaw territories. The Mississippi Legislature passed laws to go into effect in January 1830 extending its jurisdiction over Choctaw and Chickasaw lands within the state and seeking to unilaterally abolish tribal government and punish tribal office holders with fines and imprisonment. It was clear the federal government was not going to intervene. Debo at 51-52.

and that "no part of the land granted them shall ever be embraced in any Territory or State." *Id.* art. 4. The United States further promised that the removal to Indian Territory would be accomplished "under the care of discreet and careful persons, who will be kind and brotherly to them." *Id.* art. 16.

The forcible removal of the Choctaw to their reservation in present day Oklahoma occurred in three phases between 1831 and 1833. Nearly 14,000 Choctaws made the move in the winter of 1831. According to French observer Alexis de Tocqueville, many Choctaw died during that exceptionally harsh winter. https://www.okhistory-org/publications/enc/entry/php?entry_TR003 (last visited Sept. 3, 2020). *See* Debo at 56 ("the suffering of the emigrants was almost beyond belief").

The Treaty of Doaksville, Jan. 17, 1837, 11 Stat 573 ("1837 Treaty"), secured to the Chickasaw Nation a "district" within the Choctaw Nation's reservation, again using precise geographic terms to describe the Chickasaw "district". *Id.* art. 2. The Chickasaw Nation was to hold its district "on the same terms that the Choctaws now hold it, except the right of disposing of it (which is held in common with the Choctaws and Chickasaws)." *Id.* art. 1. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995).

The boundaries of the Choctaw Reservation as established by the 1830 and 1837 Treaties have been specifically set out in Choctaw Constitutions since 1838, and in subsequent Constitutions. App. at 85, Att. 14 (1838 Choctaw Constitution); App. at 94, Att. 15 (1850 Choctaw Constitution); App. at 108, Att. 16 (1857 Choctaw Constitution); and App. at 126, Att. 17 (1983 Choctaw Constitution). The Choctaw Nation's right to the reservation established for it under the 1830 and 1837 Treaties was reaffirmed in the 1855 Treaty of Washington, June 22, 1855, 11 Stat.

611 ("1855 Treaty"), which separated the Chickasaw district into a distinct reservation with its own government.

Like Creek treaty promises, the United States' treaty promises to Choctaw Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Under the 1830 treaty, Choctaw Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. *Id.* art. 2. In return, the United States agreed to convey to Choctaw Nation, by fee patent, specific lands with specific geographical boundaries. *Id.* at 4. Like Creek treaties, the 1830 Choctaw Treaty described the United States' conveyance to the Choctaw Nation as a cession; required Choctaw removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured to the Choctaw Nation the right to exercise "jurisdiction and government "in their new lands. *Id.* The Treaty was a guarantee the Choctaws would not again be forced to move. *Choctaw*, 387 U.S at 620.

In 1842, President John Tyler conveyed fee patented title to the Choctaw and Chickasaw Nations for their reservations. C. Kidwell, *The Choctaws in Oklahoma: From Tribe to Nation 1855-1970,* at 10. The patent recited the United States' treaty commitments to convey lands specifically identified by geographic boundaries to the Choctaw and Chickasaw Nations and affirmed that title was to be held by the Nations "for the common use and equal benefit of all the members." The conveyance made was promised "while they shall exist as [] nation[s] and live on it" A.R. Durant, *Constitution and Laws of the Choctaw Nation* 31-34 (1894) (quoting terms of 1842 fee patent; available at https://www.loc.gov./law/help/american-indian-consts/PDF/28014192.pdf (last visited Aug. 26, 2020)). *See also Fleming v. McCurtain*, 215 U.S 56, 58 (1909).

Following the forced removal the Choctaw and Chickasaw settled in their new lands. In the 1855 Treaty the Choctaw and Chickasaw governments were made independent of one another. The Choctaw, for the benefit of the Chickasaw, specifically relinquished any claim to territory west of 100th degree west longitude. 1855 Treaty, art. 9. The boundaries of "Choctaw and Chickasaw country" were again specifically set forth in geographic terms and the United States reaffirmed the promises it made in 1830 to "forever secure and guarantee the lands embraced within such limits" to the Choctaw and Chickasaw. *Id.* art. 1. The boundaries of the Chickasaw "district" were described in geographic terms. *Id.* art. 2. The treaty repeated the promise to secure to the Choctaw and Chickasaw "the unrestricted right of self-government, and full jurisdiction, over person and property." *Id.* art. 7.

Like Creek Nation, Choctaw and Chickasaw Nations negotiated a treaty with the United States after the Civil War. In the 1866 Treaty of Washington, Apr. 28, 1866, 14 Stat. 769 ("1866 Treaty") the Nations explicitly "cede[d] to the United States the territory west of the 98[th meridian, known as the leased district]," *id.* art. 3, modifying only the western boundary of the reservation. The United States expressly "reaffirm[ed] all obligations arising out of the treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to" the Civil War. *Id.* art. 10.

The 1866 treaty recognized the Nations' control of their respective reservations, by expressly providing that no legislation "shall [] in anywise interfere with or annul their present tribal organization, or respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw Nations." 1866 Treaty, art 7. The Treaty called for a council to be convened annually with Choctaw and Chickasaw delegates. *Id.* art 8. Surveys for the possible future change to the common title were to be "made at the cost of the United States." *Id.*

art. 11. The United States promised that no white person would be permitted to go into the Nations' territories, unless "incorporated and naturalized" by the joint action of authorities of both Nations, according to their "laws, customs, and usage." *Id.* art 43. Only portions of treaties inconsistent with the 1866 Treaty were voided. *Id.* art 51. This left intact the United States' promise in 1855 to remove intruders and keep them out of Choctaw and Chickasaw reservations. 1855 Treaty, art. 7. This treaty was the last to diminish boundaries of the Choctaw reservation.

Like Creek treaties, the Choctaw treaties involved exchange of tribal homelands in the East for a new homeland in Indian Territory, deeded to the Nation, and included the promise of a permanent home and the assurance of the right to self-government outside the jurisdiction of a state. These treaties established the Choctaw Reservation.

3. Special Terminology Is Not Required to Establish a Reservation, and Tribal Fee Ownership Is Not Inconsistent with Reservation Status.

In *McGirt*, the Court easily rejected Oklahoma's argument that Creek treaties did not establish a reservation and instead created a dependent Indian community, as defined by 18 U.S.C. § 1151(b) ("all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state"). *McGirt*, 140 S. Ct. at 2475-76. The "entire point" of this reclassification attempt was "to avoid *Solem*'s rule that only Congress may disestablish a reservation."[21] *Id.* at 2474. The Court was not persuaded by Oklahoma's argument that a reservation was not created due to tribal fee ownership of the lands, and the absence of the words "reserved from sale" in the Creek treaties. *Id.* The Creek land was reserved from sale in the "very real sense" in that the United States could

[21] Neither the United States nor the dissent made any arguments supporting Oklahoma's novel dependent Indian community theory. *McGirt*, 140 S. Ct. at 2474.

not give the tribal lands to others or appropriate them to its own purposes, without engaging in "an act of confiscation." *Id.* at 2475 (citing *United States v. Creek Nation*, 295 U.S. 103, 110 (1935)). Additionally, fee title is not inherently incompatible with reservation status, and the establishment of a reservation does not require a "particular form of words." *McGirt*, 140 S. Ct. at 2475 (citing *Maxey v. Wright,* 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)).

The "most authoritative evidence of [a tribe's] relationship to the land" does not lie in scattered references to "stray language from a statute that does not control here, a piece of congressional testimony there, and the scattered opinions of agency officials everywhere in between." *McGirt,* 140 S. Ct. at 2475. "[I]t lies in the treaties and statutes that promised the land to the Tribe in the first place." *Id.* at 2476. As previously noted, the 1830 Indian Removal Act promised issuance of fee patents upon removal of tribes affected by its implementation, which were granted to Creek Nation and Choctaw and Chickasaw Nations. The treaties for these tribes contain extensive evidence of their relationships with their respective lands in Indian Territory. The Choctaw Reservation was established by treaty, just as Creek treaties established the Creek Reservation. As with Creek Nation, later federal statutes also recognized the existence of the Choctaw Reservation as a distinct geographic area.[22] *See also* App. at 77, Atts. 10-13 (Department

[22] *See* Act of June 21, 1906, ch. 3504, 34 Stat. 325, 346 (authorizing Secretary of Interior to investigate character, extent and value of coal deposits "in and under the segregated coal lands of the Choctaw and Chickasaw nations"); Act of June 30, 1913, ch. 4, § 18, 38 Stat. 77, 95 ("common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations"); and the Oklahoma Indian Welfare Act, Act of June 26, 1936, ch. 831, 49 Stat. 1967, codified at 25 U.S.C. §§ 5201-5210 (authorizing Secretary of the Interior to acquire land "within or without existing Indian reservations" in Oklahoma).

of Interior Maps referencing Choctaw Nation as a "reservation" in the legend delineating boundaries).

4. The Choctaw Reservation Has Been Diminished Only by Express Cessions of Portions of the Reservation in Its 1855 and 1866 Treaties.

The current boundaries of Choctaw Nation are as established in Indian Territory in the 1830 and 1837 treaties, diminished only by the express cession by the Choctaw to the Chickasaw in the 1855 Treaty and the 1866 Treaty, described in Section C (2) above.[23] Choctaw Nation did not cede or restore any other portion of the Choctaw Reservation to the public domain in the 1855 and 1866 Treaties, and no other cession has occurred since that time.

The original 1838 Choctaw Constitution identified its boundaries as described in its removal treaties. *See* App. at 85, Att. 14 (1838 Choctaw Constitution). The present Constitution describes the boundaries as those recognized in the 1855 Treaty. See App. at 126, Att. 17 (1983 Choctaw Constitution).

D. Congress Has Not Disestablished the Choctaw Reservation.

1. Only Congress Can Disestablish a Reservation by Explicit Language for the Present and Total Surrender of All Tribal Interests in the Affected Lands.

Congress has not disestablished the Choctaw Reservation as it existed following the last express cession in 1866. All land within reservation boundaries, including fee land, remains Indian country under 18 U.S.C. § 1151(a). Courts do not lightly infer that Congress has exercised its power to disestablish a reservation. *McGirt*, 140 S. Ct. at 2462 (citing *Solem,* 465 U.S. at 470). Once a reservation is established, it retains that status "until Congress explicitly indicates

[23] The 1866 Treaty and the Choctaw's conveyance of the leased district to the United States in exchange for money was "plainly and obviously" a cession. *Choctaw Nation v. United States,* 179 U.S. 494, 531, 531 (1900).

otherwise." *Id.* at 2468 (citing *Solem,* 465 U.S. at 470). Congressional intent to disestablish a reservation "must be clear and plain." *Id.* (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)). Congress must clearly express its intent to disestablish, commonly by "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Id.* at 2463 (citing *Nebraska v. Parker*, 577 U.S. 481, ___, 136 S. Ct. 1072, 1079 (2016)).

The reservation disestablishment analysis here must focus on the statutory text that allegedly resulted in reservation disestablishment. The only "step" proper for a court of law is "to ascertain and follow the original meaning of the law" before it. *McGirt*, 140 S. Ct. at 2468. Disestablishment has never required any particular form of words. *Id.* at 2463 (citing *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). A statute disestablishing a reservation may provide an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land." *McGirt,* 140 S. Ct. at 2462 (citing *Solem*, 465 U.S. at 470). It may direct that tribal lands be "restored to the public domain," *id.* (citing *Hagen,* 510 U.S. at 412), or state that a reservation is "'discontinued,' 'abolished,' or 'vacated,'" *id.* at 2463 (citing *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973)). *See also DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 439-40 n.22 (1975). "History shows that Congress knows how to withdraw a reservation when it can muster the will." *McGirt*, 140 S. Ct. at 2462. No explicit language of total withdrawal of the reservation exists in Choctaw treaties or allotment acts.

2. Allotment of Choctaw Land Did Not Disestablish the Choctaw Reservation.

The General Allotment Act, which authorized allotment of the lands of most tribes nationwide, was expressly inapplicable to the Five Tribes. Act of Feb. 8, 1887, ch. 119, § 8, 24 Stat. 38. In 1893 Congress established the Dawes Commission to negotiate agreements with the Five Tribes for "the extinguishment of the national or tribal title to any lands" in Indian Territory

"either by cession," by allotment, or by such other method as agreed upon. § 16, 27 Stat. 612, 645-46.[24] The Commission reported in 1894 that the Creek Nation "would not, under any circumstances, agree to cede any portion of their lands." *McGirt*, 140 S. Ct. at 2463.[25]

Under continued pressure, the Choctaw and Chickasaw Nations agreed to the allotment of their reservations under the Atoka Agreement, the terms of which were set forth in the Curtis Act, ch. 517, § 29, 30 Stat. 495, and the Act of July 1, 1902, 32 Stat. 641 ("1902 Act").[26] Like the Creek Allotment Agreement, Act of Mar. 1, 1901, ch. 676, 31 Stat. 861 (Creek Agreement) the Choctaw agreement contained no cessions of land to the United States, and did not disestablish the Choctaw Reservation, which also "survived allotment." *See McGirt*, 140 S. Ct. at 2464.[27] Where Congress contemplates, but fails to enact, legislation containing express disestablishment language, the statute represents "a clear retreat from previous congressional attempts to vacate the . . . Reservation in express terms[.]" *DeCoteau*, 420 U.S. at 448.

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[24] Congress clearly knew how to diminish the Choctaw reservation in Oklahoma as it did so explicitly in 1855 and 1866.

[25] Although *McGirt* referenced only Creek Nation in this statement, the 1894 report reflects that each of the Five Tribes refused to cede tribal lands to the United States. App. at 175, Att. 20 (Ann. Rept. of the Comm. Five Civ. Tribes of 1894, 1895, and 1896 at 14 (1897)). This refusal is also reflected in the Commission's 1900 annual report: "*Had it been possible to secure from the Five Tribes a cession to the United States of the entire territory at a given price*, . . . the duties of the commission would have been immeasurably simplified . . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty . . . *it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment*, no matter how simple its evolutions." App. at 180, Att. 21 (emphasis added) (Seventh Ann. Rept. of the Comm. Five Civ. Tribes at 9 (1900).

[26] The Curtis Act contained a proposed agreement with the Creek for the allotment of their lands, but the agreement was rejected by the Creek. *McGirt*, 140 S. Ct. at 2463.

[27] Even the dissent did not "purport to find any of the hallmarks of diminishment in the Creek Allotment Agreement." *McGirt*, 140 S. Ct. at 2465 n.5.

The central purpose of the Atoka Agreement and the Choctaw/Chickasaw 1902 Supplemental Allottment Agreement, like that of the Creek Agreement, was to facilitate transfer of title from the Nation to individual tribal citizens. 30 Stat. 505-06; 32 Stat. at 642.[28] With exceptions for certain pre-existing town sites and other exempted lands, the Choctaw/Chickasaw Agreements relied on their reservation boundaries to implement the terms of the agreements. The United States was to maintain records of "land titles *in the territory occupied by the Choctaw and Chickasaw tribes*," 30 Stat. at 505 (emphasis added); maintain strict laws against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality "*in the territory of the Choctaw and Chickasaw tribes*," *id.* at 509 (emphasis added); and provide that all coal and asphalt "*within the limits of the Choctaw and Chickasaw tribes*" remain the common property of the members of the Choctaw and Chickasaw tribes. *Id.* at 510 (emphasis added). *See also McGirt*, 140 S. Ct. at 2463 (citing Creek Agreement, §§ 3, 7, 31 Stat. 861, at 862-64).

The restricted status of the allotments reflects the Choctaw Nation's understanding that allotments would not be acquired by non-Indians, would remain in the ownership of tribal citizens, and would be subject to federal protection. Tribal citizens were given deeds that conveyed to them "all the right, title, and interest" of the Choctaw and Chickasaw Nations. The homestead allotment of 160 acres was to be "inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment." 30 Stat § 12. *See also McGirt*, 140 S. Ct. at 2463 (citing Creek Agreement, § 23, 31 Stat. at 867-68).

[28] Lands exempt from allotment included capitol buildings of both Choctaw and Chickasaw Nations, as well as "all court houses and jails and other public buildings," and lands for schools, seminaries, missionaries, orphanages and churches. 30 Stat. at 506. *See also* Creek Agreement, § 24, 31 Stat. at 868-69.

The 1902 Act also reserved from allotment public buildings, churches, and schools, 32 Stat. § 26, thereby exempting the lands necessary for the Chickasaw and Choctaw to "exist as [] nations and live on" their reservations as promised in their treaties. The 1902 Act further provided that the lands remaining after allotment were to be sold, and proceeds applied to equalize allotments to tribal members. 32 Stat. § 14. Such equalization provisions do not diminish boundaries. *Parker,* 135 S. Ct 1072, 1079. *Cf. Woodward v. DeGraffenried*, 238 U.S. 284, 312 (1915) (noting that similar terms for equalizing the allotments for the Creek were provided in the 1901 Creek Allotment Act, § 9, 31 Stat. 861, 864). The 1902 Act, as the Atoka Agreement had done, specifically referenced the boundaries of the Nations' reservations in implementing the allotments. *See* 32 Stat.§§ 25, 41, 45, 51, 53, and 55 (referring to locations being located within Choctaw and Chickasaw "country" and within the Choctaw and Chickasaw "nations").

Neither the Atoka Agreement nor the 1902 Act disestablished the Choctaw reservation. This is clear from the Supreme Court's decision in *Morris v. Hitchcock*, 194 U.S. 384 (1904). In *Morris*, decided after Congress enacted the Curtis Act and 1902 Act, the Court upheld the validity of a privilege tax on livestock enacted by the Choctaw and Chickasaw Nations. The Court held the Curtis Act did not affect the right of the Chickasaw "to control the presence within *the territory assigned to it* of persons who might otherwise be regarded as intruders." (emphasis added). The Court concluded the Chickasaw Nation had the authority to impose the tax under the 1855 and 1866 treaties. *Id.* at 388-89.

As of 1910, three years after statehood, 87% of the lands of Choctaw Nation subject to allotment (5,672,435.87 acres out of 6,490,515.01acres) had been allotted to tribal citizens, and an additional 1,835,857.08 acres were reserved for the forest service, coal and asphalt, town sites,

schools, churches, and other uses.[29] Only 818,079.14 acres scattered throughout the nation remained unallotted in 1910 – approximately 13% of the nation's allottable land within its reservation area. *Id.* A few additional allotments to the 26,730 Choctaw members occurred in 1911, with substantial acreage remaining reserved for timber, coal and asphalt, schools, churches, and other uses. App. at 144, Att. 19 (Ann. Rept. of the Comm. Five Civ. Tribes at 386-87 (1911)). Later federal statutes, which generally continued restrictions on disposition of allotments, contributed to the loss of individual Indian ownership of allotments over time, based on a variety of factors.[30]

"Missing in all this, however, is a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands" required for disestablishment. *McGirt*, 140 S. Ct. at 2464. Allotment alone does not disestablish a reservation. *Id.* (citing *Mattz*, 412 U.S. at 496-97) (explaining that Congress's expressed policy during the allotment era "was to continue the reservation system," and that allotment can be "completely consistent with continued reservation status"); and *Seymour*, 364 U.S. at 356-58 (allotment act "did no more than open the way for non-Indian settlers to own land on the reservation")). So, though Congress may have hoped and even planned to extinguish Choctaw reservation boundaries in the future, it never did. *McGirt* clarifies this point: "[J]ust as wishes are not laws, future plans aren't either. Congress may have

[29] App. at 138, Att. 18 (Ann. Rept. of the Comm. Five Civ. Tribes at 171(1910)).

[30] *See McGirt*, 140 S. Ct. at 2463 (citing Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312). *See also* Act of Apr. 26, 1906, ch. 1876, §§ 19, 20, 34 Stat. 137 (Five Tribes Act); Act of Aug. 4, 1947, ch. 458, 61 Stat. 731; Act of Aug. 11, 1955, ch. 786, 69 Stat. 666; Act of Dec. 31, 2018, Pub. L. No. 115-399, 132 Stat. 5331. *See "Fatally Flawed:" State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform,"* Vollmann, Tim, and Blackwell, M. Sharon, 25 Tulsa Law Journal 1 (1989).

passed allotment acts to create conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination." *McGirt*, 140 S. Ct. at 2465-66.

3. Allotment Era Statutes Intruding on Choctaw Nation's Right to Self-Governance Did Not Disestablish the Reservation.

Statutory intrusions during the allotment era were "serious blows" to the promised right to Creek self-governance, but did not prove disestablishment. *McGirt*, 140 S. Ct. at 2466. This conclusion is mandated with respect to the Choctaw Reservation as well, in light of the applicability of relevant statutes to both the Creek and Choctaw Nations, and similarities in the Cherokee and Choctaw Agreements.

The Curtis Act provided "for forced allotment and termination of tribal land ownership without tribal consent unless the tribe agreed to allotment." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988). "[P]erhaps in an effort to pressure the Tribe to the negotiating table," the Curtis Act included provisions for termination of tribal courts. *McGirt*, 140 S. Ct. at 2465 (citing § 28, 30 Stat. 495, 504–05). A few years later, the 1901 Creek Allotment Act expressly recognized the continued applicability of the Curtis Act abolishment of Creek courts, by providing that it did not "revive" Creek courts.[31] Nevertheless, the Curtis Act's abolishment of Creek courts did not result in reservation disestablishment. *McGirt*, 140 S. Ct. at 2465-66. Although *McGirt* eliminates a need to determine whether Choctaw courts were abolished, they were not. The Atoka Agreement, unlike the Creek Agreement, superseded the Curtis Act's

[31] The Creek Agreement provided that nothing in that agreement "shall be construed to revive or reestablish the Creek courts which have been abolished" by former laws. 31 Stat. at 873, ¶47. The 1936 OIWA, 25 U.S.C. § 5209, impliedly repealed this limitation on Creek courts. *Muscogee (Creek) Nation v. Hodel,* 851 F.2d at 1446-47.

abolishment of courts. The Curtis Act provided that § 28 (the abolishment of tribal courts) would not apply if the tribes ratified the separate agreements set forth in the Curtis Act itself by an October 1, 1898 deadline. The Choctaw ratified the Atoka Agreement as set out in the Curtis Act, § 29, 30 Stat. 505-513 and did so on August 24, 1898, before the deadline, and preserved their courts from abolition. *Woodward*, 238 U.S. at 308. *See also Muscogee Creek Nation v. Hodel*, 851 F.2d 1439, 1441-42 (D.C. Cir. 1988) (recognizing Atoka Agreement preserved Choctaw tribal courts).

Another "serious blow" to Creek governmental authority was a provision in the Creek Agreement that conditioned the validity of Creek ordinances "affecting the lands of the Tribe, or of individuals after allotment, or the moneys or other property of the Tribe, or of the citizens" thereof, on approval by the President. *McGirt*, 140 S. Ct. at 2466 (citing § 42, 31 Stat. at 872). There are no similar limitations in the Atoka Agreement. With respect to tribal jurisdiction, the Atoka Agreement only provided that the "United States courts now existing, or that may thereafter be created in Indian Territory shall have exclusive jurisdiction of all controversies growing out of titles, ownership, occupation, or use of real estate, coal, and asphalt in the territory occupied by the Choctaw and Chickasaw tribes; and of all persons charged with homicide, embezzlement, bribery, or embracery, breaches or disturbances of the peace, and carrying weapons, hereafter committed in the territory of said tribes, without regard to race or citizenship of persons charged with such crime." 30 Stat. 511. Certain acts, ordinances, and resolutions were not valid "until approved by the President of the United States." *Id.* at 512. This retained legislative authority, like a similar provision in the 1901 Creek Allotment Act, indicates Choctaw continued to have the authority to legislate. *McGirt,* 140 S. Ct. at 2465-66. Even though there was an intrusion on legislative authority, such provision did not result in reservation disestablishment, in light of the

absence of any of the hallmarks for disestablishment in the Atoka Agreement and the 1902 Act, such as cession and compensation. *See McGirt*, 140 S. Ct. at 2465 n.5.

Like the Creek Agreement, § 46, 31 Stat. 872, the Atoka Agreement provided that tribal government would not continue beyond March 4, 1906. Before that date, Congress approved a Joint Resolution continuing Five Tribes governments "in full force and effect" until distribution of tribal property or proceeds thereof to tribal citizens. Act of Mar. 2, 1906, 34 Stat. 822. The following month, Congress enacted the Five Tribes Act, which expressly continued the governments of all of the Five Tribes "in full force and effect for all purposes authorized by law, until otherwise provided by law." *McGirt,* 140 S. Ct. at 2466 (citing § 28, 34 Stat. at 148). The Five Tribes Act included a few incursions on the Five Tribes' autonomy. It authorized the President to remove and replace their principal chiefs, instructed the Secretary of the Interior to assume control of tribal schools, and limited the number of tribal council meetings to no more than 30 days annually. *Id.* (citing §§ 6, 10, 28, 34 Stat. 139–140, 148). The Five Tribes Act also addressed the handling of the Five Tribes' funds, land, and legal liabilities in the event of dissolution. *Id.* (citing §§ 11, 27, 34 Stat. at 141, 148).

"Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land." *McGirt*, 140 S. Ct. at 2466. Instead, Congress left the Five Tribes "with significant sovereign functions over the lands in question." *Id.* For example, Creek Nation retained the power to collect taxes; to operate schools; and to legislate through tribal ordinances (subject to Presidential approval of certain ordinances as required by the Creek Agreement, § 42, 31 Stat. 872). *Id.* (citing §§ 39, 40, 42, 31 Stat. at 871–872). Like the Creek Agreement, the Atoka Agreement and 1902 Act recognized continuing tribal government authority. "Congress never withdrew its recognition of the tribal government, and none of its [later]

adjustments[32] would have made any sense if Congress thought it had already completed that job." *Id.*

Instead, Congress changed course in a shift in policy from assimilation to tribal self-governance. *See McGirt*, 140 S. Ct. at 2467. The 1934 Indian Reorganization Act (IRA) officially ended the allotment era for all tribes. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101, *et seq.*).[33] In 1936, the OIWA included a section reorganizing tribal authority to adopt constitutions and corporate charters, and repealed all acts or parts of acts inconsistent with the OIWA. 25 U.S.C. §§ 5203, 5209. Choctaw Nation's government, like those of other tribes, was strengthened later by the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975. Act of January 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 5301, *et seq.*). The ISDEAA enables Choctaw Nation to utilize federal funds in accordance with multi-year funding agreements after government-to-government negotiations with the Department of the Interior. Congress, for the most part, has treated the Five Tribes in a manner consistent with its treatment of tribes across the country.

Notwithstanding the shift in federal policy, the Five Tribes spent the better part of the twentieth century battling the consequences of the "bureaucratic imperialism" of the Bureau of

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[32] "Adjustments" included the 1908 requirement that Five Tribes officials turn over all "tribal properties" to the Secretary of the Interior, § 13, 35 Stat. 316; a law seeking Creek National Council's release of certain money claims against the United States, Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805; and a law authorizing Creek Nation to file suit in the federal Court of Claims for "any and all legal and equitable claims arising under or growing out of any [Creek] treaty or agreement." Act of May 24, 1924, ch. 181, 43 Stat. 139. *See McGirt*, 140 S. Ct. at 2466. The Act of June 7, 1934, 43 Stat. 537, similarly authorized Choctaw Nation to file suit in the federal Court of Claims for the same type of claims against the United States.

[33] The IRA excluded Oklahoma tribes from applicability of five IRA sections, 25 U.S.C. § 5118, but all other IRA sections applied to Oklahoma tribes, including provisions ending allotment.

Indian Affairs (BIA), which promoted the erroneous belief that the Five Tribes possessed only limited governmental authority. *Harjo v. Kleppe,* 420 F. Supp. 1110, 1130 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus,* 581 F.2d 949 (D.C. Cir. 1978) (finding that the evidence "clearly reveals a pattern of action on the part of" the BIA "designed to prevent any tribal resistance to the Department's methods of administering those Indian affairs delegated to it by Congress," as manifested in "deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by § 28 of the [Five Tribes] Act."). This treatment, which impeded the Tribes' ability to fully function as governments for decades, cannot overcome lack of statutory text demonstrating disestablishment. *See Parker*, 136 S. Ct. at 1082.

4. The Events Surrounding the Enactment of Choctaw and Chickasaw Allotment Legislation and Later Demographic Evidence Cannot, and Did Not, Result in Reservation Disestablishment.

There is no ambiguous language in any of the relevant allotment-era statutes applicable to Creek Nation and Choctaw Nation, including their separate allotment agreements, "that could plausibly be read as an Act of disestablishment." *McGirt*, 140 S. Ct. at 2468. Events contemporaneous with the enactment of relevant statutes, and even later events and demographics, are not alone enough to prove disestablishment. *Id.* A court may not favor contemporaneous or later practices *instead of* the laws Congress passed. *Id.* There is "no need to consult extratextual sources when the meaning of a statute's terms is clear," and "extratextual sources [may not] overcome those terms." *Id.* at 2469. The only role that extratextual sources can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning. *Id.*

The "perils of substituting stories for statutes" were demonstrated by the "stories" that Oklahoma claimed resulted in disestablishment in *McGirt*. *Id.* at 2470. Oklahoma's long-historical practice of asserting jurisdiction over Indians in state court, even for serious crimes on

reservations, is "a meaningless guide for determining what counted as Indian country." *Id.* at 2471. Historical statements by tribal officials and others supporting an idea that "everyone" in the late nineteenth and twentieth centuries believed the reservation system and Creek Nation would be disbanded, without shedding light on any "disputed and ambiguous statutory direction," were merely prophesies that were not self-fulfilling. *Id.* at 2472. Finally, the "speedy and persistent movement of white settlers" onto Five Tribes land throughout the late nineteenth and early twentieth centuries is not helpful in discerning statutory meaning. *Id.* at 2473. It is possible that some settlers had a good faith belief that Five Tribes lands no longer constituted a reservation, but others may not have cared whether the reservations still existed or even paused to think about the question. *Id.* Others may have been motivated by the discovery of oil in the region during the allotment period, as reflected by Oklahoma court "sham competency and guardianship proceedings that divested" tribal citizens of oil rich allotments. *Id.* Reliance on the "practical advantages of ignoring the written law" would be "the rule of the strong, not the rule of law." *Id.*

CONCLUSION

Congress had no difficulties using clear language to diminish reservation boundaries in the 1820, 1825, 1830 1837, 1855, and 1866 treaties. There are no other statutes containing any hallmark language altering the Choctaw Reservation boundaries as they existed after the 1866 Treaty. Clear language of disestablishment was available to Congress when it enacted laws specifically applicable to the Five Tribes as a group and to Choctaw Nation individually, but it did not use it. The Choctaw Reservation boundaries as established by treaty and as defined in the Choctaw Constitution have not been disestablished. Oklahoma has no jurisdiction over crimes, such as Mr. Ryder's, that are covered by the ICCA and were committed on the reservation.

Respectfully Submitted,

Patti Palmer Ghezzi

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COUNSEL FOR SUE RYDER, next friend for JAMES CHANDLER RYDER

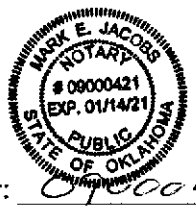
VERIFICATION

State of Oklahoma)
) ss:
County of Oklahoma)

Patti Palmer Ghezzi, being first duly sworn upon oath, states he signed the above pleading as attorney for SUE RYDER, next friend for JAMES CHANDLER RYDER, and that the statements therein are true to the best of his knowledge, information, and belief.

PATTI PALMER GHEZZI

Subscribed and sworn to before me this 8th day of September, 2020.



Notary Public

Commission Number: 09000421

My commission expires: 01/14/21

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2020, a true and correct copy of the foregoing Successive Application for Post-Conviction Relief, along with a separately bound Appendix of Attachments were delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9(B), Rules of the Court of Criminal Appeals.

PATTI PALMER GHEZZI

ORIGINAL

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 25 2020

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JAMES CHANDLER RYDER,	)	
	)	NOT FOR PUBLICATION
Petitioner,	)	
vs.	)	No. PCD-2020-613
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER REMANDING FOR EVIDENTIARY HEARING

James Chandler Ryder was tried by jury and convicted of two counts of First Degree Murder in the District Court of Pittsburg County, Case No. CF-1999-147. In accordance with the jury's recommendation, the Honorable Thomas Bartheld sentenced Petitioner to death in Count I and life in prison without the possibility of parole in Count II. His appeal was affirmed by this Court in *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856. Petitioner is now before us on a successive application for post-conviction relief.

In his sole proposition, Petitioner claims the District Court lacked jurisdiction to try him. Petitioner argues that while he is not Indian, his victims, Daisy and Sam Hallum, were citizens of the Choctaw

Nation and the crimes occurred within the boundaries of the Choctaw Nation.

Pursuant to *McGirt v. Oklahoma*, No. 18-9526 (U.S. July 9, 2020), Petitioner's claim raises two separate questions: (a) the Indian status of Daisy and Sam Hallum and (b) whether the crimes occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Pittsburg County, for an evidentiary hearing to be held within sixty (60) days from the date of this Order.

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 Petitioner's presentation of *prima facie* evidence as to the victims" legal status as Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

The hearing shall be transcribed, and the court reporter shall file an original and two (2) certified copies of the transcript within twenty (20) days after the hearing is completed. The District Court shall then make written findings of fact and conclusions of law, to be submitted

to this Court within twenty (20) days after the filing of the transcripts in the District Court. The District Court shall address only the following issues.

First, the victims' status as Indian. The District Court must determine whether (1) Daisy and Sam Hallum had some Indian blood, and (2) were recognized as Indian by a tribe or the federal government.[1]

Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Choctaw Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony.

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record,

[1] *See Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116. *See also United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.2d 1277, 1280-81 (10th Cir. 2001).

to the Clerk of this Court, and counsel for Petitioner, within five (5) days after the District Court has filed its findings of fact and conclusions of law. Upon receipt thereof, the Clerk of this Court shall promptly deliver a copy of that record to the Attorney General. A supplemental brief, addressing only those issues pertinent to the evidentiary hearing and limited to twenty (20) pages in length, may be filed by either party within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed in this Court.

Provided however, in the event the parties agree as to what the evidence will show with regard to the questions presented, they may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. In this event, no hearing on the questions presented is necessary. Transmission of the record regarding the matter, the District Court's findings of fact and conclusions of law and supplemental briefing shall occur as set forth above.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit copies of the following, with this Order, to the District Court

of Pittsburg County: Petitioner's Successive Application for Post-Conviction Relief filed September 8, 2020.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 25th day of September, 2020.

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

Clerk

IN THE DISTRICT COURT OF PITTSBURG COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	
Plaintiff,	**Pittsburg County Case No. CF-1999-147**
-vs-	**Court of Criminal Appeals: PCD-2020-613**
JAMES CHANDLER RYDER,	
Defendant.	

PETITIONER'S REMANDED HEARING BRIEF APPLYING *McGIRT* ANALYSISTO CHOCTAW NATION RESERVATION

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October 9, 2020

ORIGINAL

IN THE DISTRICT COURT OF PITTSBURG COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	
Plaintiff,	**Pittsburg County Case No. CF-1999-147**
-vs-	
JAMES CHANDLER RYDER,	**Court of Criminal Appeals: PCD-2020-613**
Defendant.	

PETITIONER'S REMANDED HEARING BRIEF APPLYING *McGIRT* ANALYSISTO CHOCTAW NATION RESERVATION

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October 9, 2020

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IN THE DISTRICT COURT OF PITTSBURG COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, **Plaintiff,**	)	
	)	**Pittsburg County Case No.: CF-1999-147**
vs.	)	
	)	**Court of Criminal Appeals: PCD-2020-613**
JAMES CHANDLER RYDER, **Defendant.**	)	

PETITIONER'S REMANDED HEARING BRIEF
APPLYING *McGIRT* ANALYSIS TO CHOCTAW NATION RESERVATION

COMES NOW Petitioner, James Chandler Ryder, through his next friend, Sue Ryder,[1] and through undersigned counsel, to address the two separate questions this Court must answer in this "historical and specialized" remanded hearing scheduled for October 14, 2020. Order Remanding for Evidentiary Hearing at 2, *Ryder v. State*, No. PCD-2020-613 (Okla. Crim. App. Sept. 25, 2020). The Oklahoma Court of Criminal Appeals (OCCA) directs this Court to answer:

> First, the victims' status as Indian. The District Court must determine whether (1) Daisy and Sam Hallum had some Indian blood, and (2) were recognized as Indian by a tribe or the federal government.
>
> Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Choctaw Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation.

Id. at 3 (footnote omitted). By using the analysis as set out in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and as directed in the OCCA's Order Remanding for Evidentiary Hearing, this Court will conclude Daisy and Sam Hallum were Indian and the crime occurred in Indian country.

[1] Sue Ryder, Mr. Ryder's mother, was appointed as his next friend by the federal district court in the Eastern District in *Ryder ex rel. Ryder v. Workman*, Case No. CIV-05-24-JHP-KEW (E.D. Okla.), Dkt. 150 (Sealed).

I. INTRODUCTION

In its remand order, the OCCA made the burden of proof clear: "Upon Petitioner's presentation of *prima facie* evidence as to the victims['] legal status as Indian and 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 2. The OCCA (following Black's Law Dictionary's lead) has defined "prima facie case" to suffice "until contradicted and overcome by other evidence." *Hill v. State*, 672 P.2d 308, 310 (Okla. Crim. App. 1983). *See also Malone v. Royal,* No. CIV-13-1115-D, 2016 WL 6956646, at *15 (W.D. Okla. Nov. 28, 2016) (describing *prima facie* case as a "low threshold" to meet). Mr. Ryder will present evidence establishing that Daisy and Sam Hallum were Indian and that the crimes occurred in Indian Country. Mr. Ryder does not anticipate the presentation of any contradictory evidence by the State.

The direct holding in *McGirt* is simple. The Government promised the Muscogee (Creek) Nation (MCN) a reservation in present-day Oklahoma. Only Congress can break such a promise and only by using explicit language that provides for the "'present and total surrender of all tribal interests' in the affected lands." *McGirt*, 140 S. Ct. at 2464. Congress never used "anything like" such language. *Id.* Therefore, the MCN reservation is intact; the State has no criminal jurisdiction over Mr. McGirt, a Seminole, whose crimes occurred within the boundaries of the MCN reservation. *McGirt* also established the analysis for courts to apply in determining whether any given reservation has been diminished or disestablished by Congress. *See Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) ("We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation."). The OCCA has specifically

directed this Court to apply the analysis in *McGirt* to the jurisdictional claim here. Order Remanding for Evidentiary Hearing at 3.

II. OKLAHOMA HAS NO CRIMINAL JURISDICTION OVER CRIMES COMMITTED BY OR AGAINST INDIANS IN INDIAN COUNTRY

Mr. Ryder recognizes this Court need not analyze the basic principles of federal jurisdiction (and the lack of state jurisdiction) over crimes committed in Indian country within Oklahoma to answer the questions the OCCA has charged it to answer in this hearing. However, because *McGirt* controls reservation status *and* federal criminal jurisdiction, Mr. Ryder offers a brief description of those basic principles to place the questions in context.

The OCCA recognized more than thirty years ago that the State failed to assume criminal and civil jurisdiction under Public Law 280 before it was amended to require tribal consent, 25 U.S.C. § 1321, and that the State "does not have jurisdiction over crimes committed by or against an Indian in Indian Country." *See Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) (quoting *State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989)) (internal quotation marks omitted).[2]

Federal law clearly defines the jurisdictional parameters of criminal jurisdiction in Indian country. First, under the Major Crimes Act (MCA),[3] federal courts have exclusive jurisdiction, as to Oklahoma, over prosecutions for certain enumerated crimes committed by Indians against

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[2] The OCCA overruled *Ex Parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936), which wrongly held Oklahoma had jurisdiction to convict and sentence a full-blood Choctaw for the murder of another full-blood Choctaw on a restricted Choctaw allotment. *See Klindt*, 782 P.2d at 403-04.

[3] The MCA provides: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter . . . and [other enumerated offenses] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

Indians or non-Indians in Indian country. *See McGirt,* 140 S. Ct. at 2459. Second, the State lacks jurisdiction over prosecutions of crimes defined by federal law committed by or against Indians in Indian country within Oklahoma under the General Crimes Act (GCA) (also known as the Indian Country Crimes Act (ICCA))[4]; such crimes are subject to federal or tribal jurisdiction. *See McGirt,* 140 S. Ct. at 2478. The GCA expressly protects tribal courts' jurisdiction over prosecutions of "a broader range of crimes by or against Indians in Indian country." *Id.* at 2479. *See United States v. Prentiss*, 273 F.3d 1277, 1278 (10th Cir. 2001) (noting GCA "establishes federal jurisdiction over 'interracial' crimes, those in which the defendant is an Indian and the victim is a non-Indian, or vice-versa"). Third, the State has jurisdiction over all offenses committed by non-Indians against non-Indians in Indian country, but it extends no further. *See McGirt*, 140 S. Ct. at 2460 (citing *United States v. McBratney*, 104 U.S. 621, 624 (1882)). *See also* Indian Country Criminal Jurisdiction Chart, *available at* justice.gov/usao-wdok/page/file/1300046/download (last visited Oct. 8, 2020).

McGirt laid to rest the State's position that the MCA and the GCA do not apply in Oklahoma. The Court found the State's claim to a special exemption from the MCA for the eastern half of Oklahoma, where Choctaw lands can be found, to be "one more error in historical practice." *McGirt*, 140 S. Ct. at 2471. The State's use of "statutory artifacts" to argue it was granted criminal

[4] The GCA provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152.

jurisdiction in Indian country, even if the MCN reservation was intact, was a "twist" even the *McGirt* dissenters declined to join. *Id.* at 2476.

If this Court concludes that Daisy and Sam Hallum were Indian and the crime occurred within the boundaries of the intact Choctaw Nation reservation, the State has no jurisdiction over Mr. Ryder. Rather, jurisdiction rests with the federal courts.

III. DAISY AND SAM HALLUM WERE INDIAN

The OCCA instructs in its remand order that the test for whether Daisy and Sam Hallum were Indian comes from *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012), and *United States v. Prentiss*, 273 F.3d 1277, 1279 (10th Cir. 2001). Under that test, this Court must be satisfied Daisy and Sam Hallum each had "some Indian blood" and were "recognized as an Indian by a tribe or by the federal government." *Diaz*, 679 F.3d at 1187. Although the Tenth Circuit has approved a "totality-of-the-evidence approach to determining Indian status," the test is satisfied when a person "has an Indian tribal certificate that includes the degree of Indian blood." *Id. See also United States v. Lossiah*, 537 F.2d 1250, 1251 (4th Cir. 1976) (finding tribal enrollment certificate showing defendant possessed some Indian blood was "adequate proof").[5]

[5] Counsel suspects the State may argue that in order to meet the test for Indian status, some minimum quantum of Indian blood is required. That argument is rejected by case law, as exemplified by *Prentiss*, *Diaz*, and *Lossiah*. Congress has also recently rejected blood quantum requirements. *See* Stigler Act Amendments of 2018, Pub. L. No. 115–399 (amending the Stigler Act of 1947 to eliminate blood quantum requirement, extending restrictions on alienation of property for any citizen of the Five Tribes "of whatever degree of Indian blood"). *See also* Statement of Rep. Tom Cole upon passage of the Stigler Act Amendments, *available at* https://cole.house.gov/media-center/press-releases/cole-and-mullin-praise-final-passage-stigler-act-amendments (last visited Oct. 8, 2020) (emphasis added) ("I am pleased that both chambers of Congress approved changes to the misguided Stigler Act of 1947 . . . . Without question and especially in Oklahoma, Native American heritage is something to be celebrated. But that special heritage must also be protected, preserved and passed on. Land ownership is part of that unique inheritance for many tribal citizens and their descendants, and over the years, the Stigler Act has unfortunately diminished that rightful inheritance *due to an unfair blood quantum requirement*.").

The test for Indian status is satisfied here. Daisy Hallum is a registered citizen of the Choctaw Nation (Membership # CN228110), has a Certificate of Degree of Indian Blood (CDIB), and had 1/16 Choctaw Indian Blood. *See* Attachment ("Att.") 1 (Choctaw Nation Certification of CDIB/Tribal Membership of Daisy Hallum). Sam Hallum is a registered citizen of the Choctaw Nation (Membership # CN211446), has a Certificate of Degree of Indian Blood (CDIB), and had 1/32 Choctaw Indian Blood. *See* Att. 2 (Choctaw Nation Certification of CDIB/Tribal Membership of Sam Hallum). The parties will stipulate that the Choctaw Nation is a federally recognized tribe.

IV. THE CRIME OCCURRED IN INDIAN COUNTRY

A. Introduction.

Choctaw Nation is a federally recognized Indian tribe. It is one of five tribes that are often treated as a group for purposes of federal legislation (Cherokee, Muscogee (Creek), Choctaw, Chickasaw, and Seminole Nations, historically referred to as the "Five Civilized Tribes" or "Five Tribes"). The Choctaw Reservation boundaries encompass lands in an eleven-county area, including all or portions of McCurtain, LeFlore, Haskell, Latimer, Pushmataha, Choctaw, Atoka, Pittsburg, Bryan, Coal, and Hughes counties, within the borders of the State of Oklahoma.[6]

The OCCA has not addressed whether all lands within the boundaries of the Choctaw Nation constitute Indian country as defined by § 1151(a) ("all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). The United States Supreme Court likewise had not addressed reservation status as to any of the Five Tribes until it decided *McGirt*. 140 S. Ct. at 2463-81.

[6] The following link superimposes an Oklahoma Department of Transportation map of the Choctaw Nation Reservation over Oklahoma counties contained within the boundaries: https://www.ok.gov/health2/documents/map_tribal_jurisdictions.pdf (last visited Oct. 8, 2020).

B. The Crime Occurred in Indian Country.

Mr. Ryder and the State will stipulate that Mr. Ryder's crime occurred at SW of SW of SW of Section 1, Township 8 North, Range 16 East, Pittsburg County, Oklahoma. The parties will also stipulate that legal description is within the boundaries set forth in the 1855 and 1866 treaties between the Choctaw Nation, the Chickasaw Nation, and the United States. *See id.* The State, however, is leaving it up to this Court to determine whether that geographic area constitutes the Choctaw Nation's current "reservation," and thus is Indian country as defined by 18 U.S.C. § 1151(a). This Court should find that a reservation was established and Congress has never disestablished it.

C. A Reservation Was Established for the Choctaw Nation.

Under the remand order, Mr. Ryder need only make a *prima facie* case that the crime occurred on the Choctaw Reservation, which is "Indian country" as defined by §1151(a). Mr. Ryder exceeds this low threshold. *See Hill*, 672 P.2d at 310; *Malone,* 2016 WL 6956646, at *15. The Choctaw Nation's reservation is intact and over a century of history proves it. Mr. Ryder does not expect the State to introduce evidence or offer argument suggesting a reservation was never established for the Choctaw.

For the Choctaw, as for the Creek, there was a promise "[o]n the far end of the Trail of Tears." *McGirt*, 140 S. Ct. at 2459. Choctaw Nation, along with other Indian Nations, occupied much of the southern and southeastern parts of the United States. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622 (1970). Like the Creeks, the Choctaw exchanged lands in the Southeast for new lands in Indian Territory under pressure of the national removal policy. The Indian Removal Act of 1830, Act of May 28, 1830, ch. 148, 4 Stat. 411, § 1, authorized the President to divide public domain lands into defined "districts" for tribes removing west of the Mississippi River. *Id.* It

provided that the United States would "forever secure and guaranty" such lands to the removed tribes, "and if they prefer it . . . the United States will cause a patent . . . to be made and executed to them for the same[.]" *Id.* at § 3.

Four months after the passage of the Indian Removal Act, the Choctaw became the first southeastern Indian Nation to acquiesce and accept removal from their ancestral lands.[7] The Choctaw Nation's reservation in Indian Territory was established by treaty entered into by the Choctaw and Chickasaw Nations in anticipation of their removal to present-day Oklahoma. The Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 ("1830 Treaty"), using precise geographic terms, secured to the Choctaw Nation "a tract of country west of the Mississippi River" to "exist as a nation and live on it," *id.* art. 2. The United States promised that the Choctaw could exercise the "jurisdiction and government" over "all the persons and property" within their lands, and that "no part of the land granted them shall ever be embraced in any Territory or State." *Id.* art. 4. The United States further promised that the removal to Indian Territory would be accomplished "under the care of discreet and careful persons, who will be kind and brotherly to them." *Id.* art. 16. The Treaty was a guarantee the Choctaws would not again be forced to move. *Choctaw Nation*, 397 U.S. at 625.

The forcible removal of the Choctaw to their reservation in present day Oklahoma occurred in three phases between 1831 and 1833. Nearly 14,000 Choctaws made the move in the winter of

[7] As with other southeastern tribes the non-Indian population was intruding on the Choctaw and Chickasaw territories. The Mississippi Legislature passed laws to go into effect in January 1830 extending its jurisdiction over Choctaw and Chickasaw lands within the state and seeking to unilaterally abolish tribal government and punish tribal office holders with fines and imprisonment. It was clear the federal government was not going to intervene. A. Debo, *The Rise and Fall of the Choctaw Republic* at 51-52 (Debo).

1831. According to French observer Alexis de Tocqueville, many Choctaw died during that exceptionally harsh winter. https://www.okhistory.org/publications/enc/entry.php?entry=TR003 (last visited Oct. 8, 2020). *See* Debo at 56 ("the suffering of the emigrants was almost beyond belief").

The Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573 ("1837 Treaty"), secured to the Chickasaw Nation a "district" within the Choctaw Nation's reservation, again using precise geographic terms to describe the Chickasaw "district." *Id.* art. 2. The Chickasaw Nation was to hold its district "on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws[])." *Id.* art. 1. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995).

In 1842, President John Tyler conveyed fee patented title to the Choctaw and Chickasaw Nations for their reservations. C. Kidwell, *The Choctaws in Oklahoma: From Tribe to Nation 1855-1970,* at 10. The patent recited the United States' treaty commitments to convey lands specifically identified by geographic boundaries to the Choctaw and Chickasaw Nations and affirmed that title was to be held by the Nations "for the common use and equal benefit of all the members." https://www.loc.gov./law/help/american-indian-consts/PDF/28014192.pdf (last visited Oct. 8, 2020). The conveyance made was promised "while they shall exist as [] nation[s] and live on it." A.R. Durant, *Constitution and Laws of the Choctaw Nation* 31-34 (1894) (quoting terms of 1842 fee patent). *See also Fleming v. McCurtain*, 215 U.S. 56, 58 (1909).

The Choctaw Nation's right to the reservation established for it under the 1830 and 1837 Treaties was reaffirmed in the 1855 Treaty of Washington, June 22, 1855, 11 Stat. 611 ("1855 Treaty"), which separated the Chickasaw district into a distinct reservation with its own government. The Choctaw, for the benefit of the Chickasaw, specifically relinquished any claim

to territory west of 100th degree west longitude. 1855 Treaty, art. 9. The boundaries of "Choctaw and Chickasaw country" were again specifically set forth in geographic terms and the United States reaffirmed the promises it made in 1830 to "forever secure and guarantee the lands embraced within the said limits" to the Choctaw and Chickasaw. *Id.* art. 1. The boundaries of the Chickasaw "district" were described in geographic terms. *Id.* art. 2. The Treaty repeated the promise to secure to the Choctaw and Chickasaw "the unrestricted right of self-government, and full jurisdiction, over persons and property." *Id.* art. 7.

Like Creek Nation, Choctaw and Chickasaw Nations negotiated a treaty with the United States after the Civil War. In the 1866 Treaty of Washington, Apr. 28, 1866, 14 Stat. 769 ("1866 Treaty") the Nations explicitly "cede[d] to the United States the territory west of the 98[th meridian], known as the leased district," *id.* art. 3, modifying only the western boundary of the reservation. The United States expressly "re-affirm[ed] all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to" the Civil War. *Id.* art. 10.

The 1866 Treaty recognized the Nations' control of their respective reservations, by expressly providing that no legislation "shall [] in anywise interfere with or annul their present tribal organization, or respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw Nations." 1866 Treaty, art 7. The Treaty called for a council to be convened annually with Choctaw and Chickasaw delegates. *Id.* art 8. Surveys for the possible future change to the common title were to be "made at the cost of the United States." *Id.* art. 11. The United States promised that no white person would be permitted to go into the Nations' territories, unless "incorporated and naturalized by the joint action of the authorities of both nations," "according to their laws, customs, or usages." *Id.* art 43. Only portions of treaties

inconsistent with the 1866 Treaty were voided. *Id.* art 51. This left intact the United States' promise in 1855 to remove intruders and keep them out of Choctaw and Chickasaw reservations. *See* 1855 Treaty, art. 7. This treaty was the last to diminish boundaries of the Choctaw reservation.

Like Creek treaty promises, the United States' treaty promises to Choctaw Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Like Creek treaties, the Choctaw treaties involved exchange of tribal homelands in the East for a new homeland in Indian Territory, deeded to the Nation, and included the promise of a permanent home and the assurance of the right to self-government outside the jurisdiction of a state. These treaties established the Choctaw Reservation.

This Court should "[s]tart with what should be obvious" as the *McGirt* Court did, 140 S. Ct. at 2460: Congress established a reservation for the Choctaw. These early treaties, like the early treaties of the Creeks, did not refer to the Choctaw lands as a "'reservation'– perhaps because that word had not yet acquired such distinctive significance in federal Indian law." *Id.* at 2461. But the Supreme Court does not insist "on any particular form of words when it comes to establishing a reservation." *Id.* at 2475. Like the Creek, the Choctaw were promised a permanent home, assured the right of self-government on those homelands, and promised the lands "would lie outside both the legal jurisdiction and geographic boundaries of any State. *Under any definition, this was a reservation.*" *Id.* at 2462 (emphasis added).

The State's position on whether a reservation ever existed is a mercurial one. Before the Tenth Circuit, the State admitted the Creek had a reservation. *See Murphy v. Royal*, 875 F.3d 896, 954 (2017) (quoting Appellee's brief at 75 n.25) (noting "the State 'does not dispute that the reservation was intact in 1900'"). Then, in an effort "to turn the tables in a completely different way," the State said the Creek never received a reservation; the land to which they were removed was "a dependent Indian community." *McGirt*, 140 S. Ct. at 2474. The Court pointed out,

"'dependent Indian communities' *also* qualify as Indian country under [18 U.S.C. §1151(b)]." *Id.* The State admitted the entire point of this "bold feat of reclassification" was to "avoid *Solem's* rule that only Congress may disestablish a reservation." *Id. McGirt* rejected the State's belated reclassification, saying that "[h]olding that the Creek never had a reservation would require us to stand willfully blind before a host of federal statutes." *Id.* According to the State, "*[t]he reason*" the Creek lands were not a reservation was because the Creek insisted on having the additional protection of the land patent with fee title. *Id.* at 2475. But the Court found fee title is not "inherently incompatible with reservation status." *Id.* (citing *Maxey v. Wright,* 54 S.W. 807, 810 (Indian Terr. 1900)).[8]

The current boundaries of Choctaw Nation are as established in Indian Territory in the 1830 and 1837 Treaties, diminished only by the express cession by the Choctaw to the Chickasaw in the 1855 Treaty and the 1866 Treaty.[9] Choctaw Nation did not cede or restore any other portion of the Choctaw Reservation to the public domain in the 1855 and 1866 Treaties, and no other cession has occurred since that time.

The original 1838 Choctaw Constitution identified its reservation boundaries as described in its removal treaties. *See* 1838 Choctaw Constitution, *available at* https://www.choctawnation.com/sites/default/files/2015/09/29/1838constitution_original.pdf

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[8] It is unknown whether the State will now march out new reasons or theories to say the Choctaw never had a reservation. Oklahoma Attorney General Mike Hunter publicly acknowledged *McGirt* applies with equal force to all Five Tribes. ("The opinion directly relates to the Muscogee Creek. We think it applies to the other four tribes eventually.") *See* https://www.newson6.com/story/5f09c526c1a44923d073166a/the-hot-seat:-attorney-general-mike-hunter-addresses-mcgirt-v-oklahoma-ruling at 1:04. (KOTV Tulsa News on 6, July 11, 2020) (last visited Oct. 8, 2020).

[9] The Choctaw's conveyance of the leased district to the United States in exchange for money in the 1866 Treaty was "plainly and obviously" a cession. *Choctaw Nation v. United States*, 179 U.S. 494, 531, 531 (1900).

(last visited Oct. 8, 2020). The present Constitution describes the boundaries as those recognized in the 1855 Treaty. *See* 1983 Choctaw Constitution, *available at* https://www.choctawnation.com/sites/default/files/2020-02/FINAL%20Constitution_1983%20with%202020%20corrections%20and%20amendments%20%28v004%20PDF%29.pdf (last visited Oct. 8, 2020).

Mr. Ryder's crime occurred within the boundaries of Choctaw Nation Reservation that was established as described above. The reservation is "Indian country" under 18 U.S.C. § 1151(a) and this Court should so find.

D. Congress Has Not Specifically Erased Choctaw Nation Boundaries or Disestablished the Reservation.

There is a presumption that the Choctaw Nation Reservation continues to exist until Congress acts to disestablish it. *Solem v. Bartlett*, 465 U.S. 463, 470, 481 (1984). It is further clear that Mr. Ryder bears no burden to show that the reservation has *not* been disestablished. In *Murphy*, the court held that the OCCA improperly required Mr. Murphy to show the Creek Reservation had *not* been disestablished:

> Instead of heeding *Solem*'s "presumption" that an Indian reservation continues to exist until Congress acts to disestablish or diminish it, *see* 465 U.S. at 481, 104 S. Ct. 1161, the OCCA flipped the presumption by requiring evidence that the Creek Reservation had *not* been disestablished—that it "still exists today," 124 P.3d at 1207. In other words, the OCCA improperly required Mr. Murphy to show the Creek Reservation had not been disestablished instead of requiring the State to show that it had been.

875 F.3d at 926.

Mr. Ryder has demonstrated by more than *prima facie* evidence that a reservation was established and the crime thus occurred in Indian country. The burden now shifts to the State to

prove it has subject matter jurisdiction.[10] Because the reasoning and analysis of *McGirt* clearly support the conclusion that Congress never disestablished the Choctaw Reservation, Mr. Ryder will briefly address the disestablishment issue.

Courts do not lightly infer that Congress has exercised its power to disestablish a reservation. *McGirt*, 140 S. Ct. at 2462 (citing *Solem*, 465 U.S. at 470). "[O]nce a reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'" *Id.* at 2469 (quoting *Solem*, 465 U.S. at 470). Congressional intent to disestablish a reservation "must be clear and plain." *Id.* (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)) (internal quotation marks omitted).

A reservation disestablishment analysis is controlled by the statutory text that allegedly resulted in reservation disestablishment. "[T]he only 'step' proper for a court of law" is "to ascertain and follow the original meaning of the law" before it. *McGirt*, 140 S. Ct. at 2468. "Disestablishment has 'never required any particular form of words.'" *Id.* at 2463 (quoting *Hagen v. Utah*, 510 U.S 399, 411 (1994)). A statute disestablishing a reservation may provide an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land." *Id.* at 2462 (quoting *Solem*, 465 U.S. at 470) (internal quotation marks omitted). It also may direct that tribal lands be "restored to the public domain," *id.* at 2462 (quoting *Hagen*, 510 U.S. at 412) (internal quotation marks omitted), or state that a reservation is "'discontinued,' 'abolished,' or 'vacated.'" *id.* at 2463 (quoting *Mattz v. Arnett*, 412 U.S. 481, 504, n.22 (1973)). *See also DeCoteau v. Dist. Cnty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 439-40, n.22 (1975). But Congress must clearly express its intent to disestablish, commonly by

[10] Mr. Ryder does not anticipate that the State will present any evidence the Choctaw Reservation was disestablished.

"[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Id.* at 2463 (quoting *Nebraska v. Parker*, 577 U.S. 481, __, 136 S. Ct. 1072, 1079 (2016)) (internal quotation marks omitted).

The State can point to no statute where Congress explicitly erased the Choctaw Nation boundaries and disestablished the Choctaw Nation reservation. The State's attempt to find disestablishment from the context of eight statutes failed. *Murphy*, 875 F.3d at 939 (questioning whether "the overall thrust of eight different laws deserves to be called a step-one argument"). And of those eight statutes, only the Creek Allotment Acts were unique to the Creek; all others apply equally to the Choctaw. *See id.* The Choctaw Allotment Acts contained no language of disestablishment.

In 1893 Congress established the Dawes Commission to negotiate agreements with the Five Tribes for "the extinguishment of the national or tribal title to any lands" in Indian Territory "either by cession," by allotment, or by such other method as agreed upon. § 16, 27 Stat. 612, 645-46. The Commission reported in 1894 that the Creek Nation "would not, under any circumstances, agree to cede any portion of their lands." *McGirt*, 140 S. Ct. at 2463 (citation and internal quotation marks omitted).[11]

[11] Although *McGirt* referenced only Creek Nation in this statement, the Commission's 1894 report reflects that each of the Five Tribes refused to cede tribal lands to the United States. Ann. Rept. of the Comm. Five Civ. Tribes of 1894, 1895, and 1896 at 14 (1897), *available at* https://digital.libraries.ou.edu/utils/getfile/collection/cornish/id/1557/filename/1558.pdf (last visited Oct. 7, 2020). This refusal is also reflected in the Commission's 1900 annual report: "*Had it been possible to secure from the Five Tribes a cession to the United States of the entire territory at a given price* . . . the duties of the commission would have been immeasurably simplified . . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty . . . *it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment*, no matter how simple its evolutions." Seventh Ann. Rept. of the Comm. Five Civ. Tribes at 9 (1900), *available at* http://images.library.wisc.edu/History/EFacs/CommRep/AnnRep1900p2/reference/history.annre

Under continued pressure, the Choctaw and Chickasaw Nations agreed to the allotment of their reservations under the Atoka Agreement, the terms of which were set forth in the Curtis Act, Act of June 28, 1898, ch. 517, § 29, 30 Stat. 495, and the Choctaw/Chickasaw 1902 Supplemental Allotment Agreement, Act of July 1, 1902, 32 Stat. 641 ("1902 Act"). The central purpose of these Agreements was to facilitate transfer of title from the Nation to individual tribal citizens. 30 Stat. 505-06; 32 Stat. at 642.[12] With exceptions for certain pre-existing town sites and other exempted lands, the Agreements relied on reservation boundaries to implement the terms. Like the Creek Allotment Agreement, Act of Mar. 1, 1901, ch. 676, 31 Stat. 861, the Choctaw Agreements contained no cessions of land to the United States, and did not disestablish the Choctaw Reservation, which, like the Creek Reservation, "survived allotment." *See McGirt*, 140 S. Ct. at 2464.

There is no ambiguous language in any of the relevant allotment-era statutes applicable to the Creek Nation or Choctaw Nation "that could plausibly be read as an Act of disestablishment." *McGirt*, 140 S. Ct. at 2468. As *McGirt* makes clear, "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *Id.* at 2464. Thus, even if "Congress may have passed allotment laws to create conditions for disestablishment," "to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination." *Id.* at 2465.

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p1900p2.i0003.pdf (last visited Oct. 8, 2020) (emphasis added).

[12] Lands exempt from allotment included capitol buildings of both Choctaw and Chickasaw Nations, as well as "all court-houses and jails and other public buildings," and lands for schools, seminaries, missionaries, orphanages and churches. 30 Stat. at 506.

Congress knows what language to use to diminish or disestablish reservations. *Id.* at 2462. It used such language across the country and it used it specifically to obtain Choctaw territory in the Southeast. *See Murphy*, 875 F.3d at 948 ("The absence of such language is notable because Congress is fully capable of stating its intention to disestablish or diminish a reservation . . . ."). "If Congress wishes to break the promise of a reservation, it must say so." *McGirt*, 140 S. Ct. at 2462. There are simply no statutes containing any hallmark language altering the Choctaw Reservation boundaries as they existed after the 1866 Treaty. As with the Creek, what is missing is "a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands." *Id.* at 2464.

Further, the Tenth Circuit and Supreme Court soundly rejected the State's claim that congressional intrusions on tribal self-governance disestablish reservations. *Murphy*, 875 F.3d at 939 ("[T]he State's attempts to shift the inquiry into questions of title and governance are unavailing."); *McGirt*, 140 S. Ct. at 2466 ("But Congress never withdrew its recognition of the tribal government, and none of its adjustments would have made any sense if Congress thought it had already completed that job.").

Choctaw Reservation boundaries as established by treaty and as defined in the Choctaw Constitution have not been disestablished. By applying the *McGirt* analysis, this Court must find that the Choctaw Nation Reservation is Indian country under 18 U.S.C. § 1151(a).

V. CONCLUSION

Therefore, upon consideration of the facts outlined above, after applying the analysis as set out in *McGirt* and as directed in the OCCA Order Remanding for Evidentiary Hearing, this Court must conclude Daisy and Sam Hallum were Indian and the crimes occurred in Indian country.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2020, a true and correct copy of the foregoing *Petitioner's Remanded Hearing Brief Applying McGirt Analysis to Choctaw Nation Reservation* was served via U.S. Mail and email:

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MEGHAN LeFRANCOIS

ATTACHMENT 1

Choctaw Nation Certification of CDIB/Tribal Membership of Daisy Hallum

Choctaw Nation of Oklahoma
CDIB/Tribal Membership

PO Box 1210
Durant, Oklahoma 74702-1210
580-924-8280, Ext. 4030
1-800-522-6170

August 07, 2020

To Whom It May Concern:

This letter is to certify that Daisy Mae (Mills) Hallum, born on 3/23/1929, with social security number XXX-XX-8068 has a Certificate of Degree of Indian Blood (CDIB), is 1/16 degree of Indian Blood of the Choctaw Tribe, and is a Tribal Member of the Choctaw Nation of Oklahoma (Membership # CN228110).

If you have any questions please, contact this office at the number listed above.

Sincerely,

Terry Stephens

Terry Stephens
Director, CDIB/Membership
Choctaw Nation of Oklahoma

ATTACHMENT 2

Choctaw Nation Certification of CDIB/Tribal Membership of Sam Hallum

Choctaw Nation of Oklahoma
CDIB/Tribal Membership

PO Box 1210
Durant, Oklahoma 74702-1210
580-924-8280, Ext. 4030
1-800-522-6170

August 07, 2020

To Whom It May Concern:

This letter is to certify that Sam Hallum, born on 11/5/1960, with social security number XXX-XX-3277 has a Certificate of Degree of Indian Blood (CDIB), is 1/32 degree of Indian Blood of the Choctaw Tribe, and is a Tribal Member of the Choctaw Nation of Oklahoma (Membership # CN211446).

If you have any questions please, contact this office at the number listed above.

Sincerely,

Terry Stephens

Terry Stephens
Director, CDIB/Membership
Choctaw Nation of Oklahoma

ORIGINAL

RECEIVED AND FILED
IN DISTRICT COURT
PITTSBURG COUNTY, OKLA

OCT 28 2020

CINDY LEDFORD
BY _____ DEPUTY

IN THE DISTRICT COURT OF PITTSBURG COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, **Plaintiff (Respondent),**	)	**Pittsburg County Case No.: CF-1999-147**
vs.	)	**Court of Criminal Appeals: PCD-2020-613**
JAMES CHANDLER RYDER, **Defendant (Petitioner).**	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV - 9 2020

JOHN D. HADDEN
CLERK

COURT ORDER
WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW
IN ACCORDANCE WITH ORDER REMANDING FOR
EVIDENTIARY HEARING ISSUED SEPTEMBER 25, 2020

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before the Court on October 14, 2020, in accordance with the Oklahoma Court of Criminal Appeals' remand order issued on September 25, 2020. Defendant/Petitioner, Mr. Ryder, through his next friend, Sue Ryder,[1] appeared by and through Assistant Federal Public Defenders Meghan LeFrancois and Michael W. Lieberman. Plaintiff/Respondent, the State, appeared by and through Assistant Attorneys General Julie Pittman and Caroline E.J. Hunt, along with Pittsburg County District Attorney Chuck Sullivan. The Choctaw Nation appeared as Amicus Curiae by and through Jacob Keyes. A record was taken by Certified Court Reporter, Emily Wright. The Court makes its findings based upon the stipulations,

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[1] Sue Ryder, Mr. Ryder's mother, was appointed as his next friend in *Ryder v. Ryder et al.*, *Workman*, Case No. CIV-05-24-JHP-KEW (E.D. Okla.), Dkt. 150 (Sealed).

evidence,[2] and argument presented at the hearing, and the pleadings and attachments filed in this Court[3] and the Oklahoma Court of Criminal Appeals ("OCCA").

The OCCA remanded this matter to this Court to address only: 1) the victims' status as Indian, and 2) whether the crimes occurred in Indian Country. Order Remanding for Evidentiary Hearing at 3, *Ryder v. State*, No. PCD-2020-613 (Okla. Crim. App. Sept. 25, 2020). This Court will address each issue separately.

THE VICTIMS' STATUS AS INDIAN

The OCCA directed this Court to address: "First, the victims' status as Indian. The District Court must determine whether (1) Daisy and Sam Hallum had some Indian blood, and (2) were recognized as Indian by a tribe or the federal government." Order Remanding for Evidentiary Hearing at 3 (footnote omitted).

Findings of Fact

Prior to the hearing, the parties stipulated as follows:

a. Daisy Hallum had 1/16th Indian blood quantum and was enrolled as a Choctaw Nation citizen at the time of the crimes.

b. Sam Hallum had 1/32nd Indian blood quantum and was enrolled as a Choctaw Nation citizen at the time of the crimes.

c. The Choctaw Nation of Oklahoma/CDIB Tribal Membership certifications for Daisy and Sam Hallum are attached to this stipulation and the parties agree they should be admitted into the record of this case.

d. The Choctaw Nation is a federally recognized tribe.

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[2] At the hearing, this Court admitted into evidence the entirety of Petitioner's Evidentiary Hearing Exhibits ("Pet. Ex.") packet, with the exception of Exhibit 22 (Indian Country Criminal Jurisdictional Chart) and Exhibit 23 (Choctaw Nation Cross-Deputization Agreements List (1994-2020)).

[3] Prior to the hearing, this Court read Petitioner's Remanded Hearing Brief Applying *McGirt* Analysis to Choctaw Nation Reservation and the Amicus Curiae Choctaw Nation's Brief in Support of the Continued Existence of the Choctaw Reservation and Its Boundaries, each filed October 9, 2020. These were the only pleadings filed in this Court in relation to this hearing.

Pet Exs. 1-3.

This Court adopts these stipulations as facts. Based upon these stipulated facts, the Court finds Daisy and Sam Hallum (1) had some Indian blood, and (2) were recognized as Indian by a tribe or the federal government.

Conclusions of Law

Having answered both of the above questions in the affirmative, this Court finds that Daisy and Sam Hallum were Indian.

WHETHER THE CRIMES OCCURRED IN INDIAN COUNTRY

The OCCA directed this Court to address: "Second, whether the crimes occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Choctaw Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation." Order Remanding for Evidentiary Hearing at 3. The Court finds as follows:

Findings of Fact

1. "[The Choctaw Nation] and other Indian Nations occupied much of what are today the southern and southeastern parts of the United States." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622 (1970). In the early nineteenth century, Congress sought to remove all Indian tribes from their native lands to west of the Mississippi River. *Id.* at 623.
2. The Indian Removal Act of 1830, Act of May 28, 1830, ch. 148, 4 Stat. 411 (Pet. Ex. 9), § 1, authorized the President to divide public domain lands into defined "districts" for tribes removing west of the Mississippi River. It authorized "the President . . . to assure the [Nations] . . . that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and if they prefer it . . . the United

States will cause a patent or grant to be made and executed to them for the same." *Id.* at § 3.

3. The 1830 Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 ("1830 Treaty") (Pet. Ex. 10), art 2, using precise geographical terms, secured to the Choctaw Nation "a tract of country west of the Mississippi River, in fee simple to them and their descendants, to insure to them while they shall exist as a nation and live on it." The 1830 Treaty secured to the Choctaw Nation "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." *Id.* art 4. The 1830 Treaty was "a guarantee that [the Choctaw] would not again be forced to move." *Choctaw Nation*, 397 U.S. at 625.
4. The Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573 ("1837 Treaty") (Pet. Ex. 11), art 1, secured to the Chickasaw Nation a "district" within the Choctaw Nation's reservation, using precise geographic terms to describe the Chickasaw district, *id.* art. 2. The Chickasaw Nation was to hold its district "on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws[])." *Id.* art. 1.
5. In 1842, President John Tyler conveyed fee patented title to the Choctaw Nation. 1842 Patent (Pet. Ex. 12). The patent recited the terms of Article 2 of the 1830 Treaty and reserved the lands from sale without the Nation's consent. *Id.*
6. The 1855 Treaty of Washington, June 22, 1855, 11 Stat. 611 ("1855 Treaty") (Pet. Ex. 13) reaffirmed the 1830 and 1837 Treaties and modified the western boundary of the Choctaw

Reservation. The 1855 Treaty made the Choctaw and Chickasaw governments independent of each other. *Id.* pmbl., art. 4. The Choctaw, for the benefit of the Chickasaw, specifically relinquished any claim to territory west of 100th degree west longitude. *Id.* art. 9. The boundaries of "Choctaw and Chickasaw country" were again specifically set forth in geographic terms. *Id.* art 1. The United States explicitly asserted that "pursuant to [the Indian Removal Act], the United States do hereby forever secure and guarantee the lands embraced within the said limits" to the Choctaw and Chickasaw and explicitly reserved those lands from sale "without the consent of both tribes." *Id.* The 1855 Treaty repeated the promise to secure to the Choctaw and Chickasaw "the unrestricted right of self-government, and full jurisdiction, over persons and property." *Id.* art. 7.

7. Following the Civil War, the Choctaw and Chickasaw Nations negotiated another treaty with the United States. In the 1866 Treaty of Washington, Apr. 28, 1866, 14 Stat. 769 ("1866 Treaty") (Pet. Ex. 14), the Nations explicitly "cede[d] to the United States the territory west of the 98[th meridian], known as the leased district," *id.* art. 3, modifying only the western boundary of the reservation. The United States expressly "re-affirm[ed] all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to" the Civil War. *Id.* art. 10. The 1866 Treaty reaffirmed the Nations' right to self-governance by expressly providing that no legislation "shall [] in anywise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw Nations respectively." *Id.* art 7. The 1866 Treaty reaffirmed all pre-existing Treaty rights of the Chickasaw and Choctaw Nations not inconsistent with its

terms. Id. arts. 10, 45. This treaty was the last to diminish boundaries of the Choctaw Reservation.

8. In 1893, Congress established the Dawes Commission to negotiate agreements with the Five Tribes for "the extinguishment of the national or tribal title to any lands" in Indian Territory "either by cession," by allotment, "or by such other method as may be agreed upon." § 16, 27 Stat. 612, 645-46. The Commission reported in 1894 that the Creek Nation "would not, under any circumstances, agree to cede any portion of their lands." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020) (citation and internal quotation marks omitted). Although *McGirt* referenced only the Creek Nation in this statement, the Commission's 1894 report reflects that each of the Five Tribes refused to cede tribal lands to the United States. Ann. Rept. of the Comm. Five Civ. Tribes of 1894, 1895, and 1896 (1897) (Pet. Ex. 18) at 14. The Commission's 1900 annual report also reflects this refusal: "*Had it been possible to secure from the Five Tribes a cession to the United States of the entire territory at a given price* . . . the duties of the commission would have been immeasurably simplified . . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty . . . *it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment*, no matter how simple its evolutions." Seventh Ann. Rept. of the Comm. Five Civ. Tribes (1900) (Pet. Ex. 19) at 9 (emphasis added).

9. Under continued pressure, the Choctaw and Chickasaw Nations agreed to the allotment of their reservations under the Atoka Agreement, the terms of which were set forth in the Curtis Act, Act of June 28, 1898, ch. 517, 30 Stat. 495 (Pet. Ex. 20), § 29, and the Choctaw/Chickasaw 1902 Supplemental Allotment Agreement, Act of July 1, 1902, 32

Stat. 641 ("1902 Act") (Pet. Ex. 21). The central purpose of these Agreements was to facilitate transfer of title from the Nation to individual tribal citizens. 30 Stat. at 505-06; 32 Stat. at 642. Some lands were exempt from allotment, including capitol buildings of both Choctaw and Chickasaw Nations, as well as "all court-houses and jails and other public buildings," and lands for schools, seminaries, orphanages, and churches. 30 Stat. at 506. The Agreements relied on reservation boundaries to implement the terms. *See id.* at 508, 509, 510. They contained no cessions of land to the United States.

10. Prior to the hearing, the parties stipulated:

> The crimes in this case occurred at SW of SW of SW of Section 1, Township 8 North, Range 16 East, Pittsburg County, Oklahoma. That legal description is within the boundaries set forth in the 1855 and 1866 treaties between the Choctaw Nation, the Chickasaw Nation, and the United States.

Pet. Ex. 1. *See also* Pet Exs. 4-6, 15. This Court adopts this stipulation as facts.

11. The State offered no evidence or argument as to whether a reservation was ever established or disestablished for the Choctaw Nation. The State takes no position as to the facts underlying the existence, historically or now, of the Choctaw Nation Reservation.

12. There is no evidence before the Court that Congress has acted to erase or diminish the Choctaw Nation boundaries set forth in the 1855 and 1866 Treaties.

13. The Choctaw Nation is a federally recognized Indian tribe, *see* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5465 (Jan. 30, 2020), that exercises sovereign authority under a Constitution approved by the Secretary of Interior, *see* 1983 Choctaw Constitution (Pet. Ex. 17).

14. Prior to the hearing, the parties stipulated:

If the Court determines that those treaties established a reservation, and if the Court further concludes that Congress never explicitly erased those boundaries and disestablished that reservation, then the crime occurred within Indian Country as defined by 18 U.S.C. § 1151(a).

Conclusions of Law

Following the *McGirt* analysis, this Court must first determine whether Congress established a reservation for the Choctaw Nation. In *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2475 (2020), the Supreme Court explained it has "never insisted on any particular form of words . . . when it comes to establishing [a reservation]." The Court noted that the "early treaties did not refer to the Creek lands as a 'reservation'– perhaps because that word had not yet acquired such distinctive significance in federal Indian law. But we have found similar language in treaties from the same era sufficient to create a reservation." *Id.* at 2461 (citation omitted). The Supreme Court explained that "the Creek were promised not only a 'permanent home' that would be 'forever set apart'; they were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State." *Id.* at 2461-62. The Court found, "Under any definition, this was a reservation." *Id.* at 2462.

In applying the analysis set out in *McGirt* to the case at bar, this Court finds that a reservation was established for the Choctaw Nation by the treaties described above. Like Creek treaty promises, the United States' treaty promises to Choctaw Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Like Creek treaties, the Choctaw treaties involved exchange of tribal homelands for a new homeland in Indian Territory, and promised "a 'permanent home' that would be 'forever set apart'" and "a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State." *Id.* at 2461-62. It is clear that Congress established a reservation for the Choctaw Nation.

Upon finding that Congress established a reservation for the Choctaw Nation, this Court must next determine whether Congress erased those boundaries and disestablished the reservation. As the Supreme Court made clear in *McGirt*, "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *Id.* at 2462. "[T]he only 'step' proper for a court of law" is "to ascertain and follow the original meaning of the law" before it. *Id.* at 2468. The constitutional authority to breach Congress's promises and treaties "belongs to Congress alone." *Id.* at 2462 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-68) (1903)). The Supreme Court will not "lightly infer such a breach once Congress has established a reservation." *Id.* (citing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). "[O]nce a reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'" *Id.* at 2469 (quoting *Solem*, 465 U.S. at 470).

A statute disestablishing a reservation may provide an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land." *Id.* at 2462 (quoting *Solem*, 465 U.S. at 470) (internal quotation marks omitted). It also may direct that tribal lands be "restored to the public domain," *id.* (quoting *Hagen v. Utah*, 510 U.S. 399, 412 (1994)) (internal quotation marks omitted), or state that a reservation is "discontinued, abolished, or vacated." *id.* at 2463 (quoting *Mattz v. Arnett*, 412 U.S. 481, 504, n.22 (1973) (internal quotation marks omitted)). *See also DeCoteau v. Dist. Cnty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 439-40, n.22 (1975). While "[d]isestablishment has 'never required any particular form of words,'" *id.* (quoting *Hagen*, 510 U.S. at 411), "it does require that Congress clearly express its intent to do so, '[c]ommon[ly with an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests,'" *id.* (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016)).

No evidence was presented to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation or that the State of Oklahoma has jurisdiction in this matter. The relevant allotment-era statutes applicable to the Choctaw Nation – the Atoka Agreement and the 1902 Act – did not erase the boundaries of or disestablish the Choctaw Reservation. There is no language in these statutes "that could plausibly be read as an Act of disestablishment." *McGirt*, 140 S. Ct. at 2468. As *McGirt* makes clear, "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *Id.* at 2464 (citations omitted). "Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination." *Id.* at 2465. Without "a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands," *id.* at 2464, this Court finds the Choctaw Reservation was not disestablished.

This Court finds that Congress established a reservation for the Choctaw Nation, and Congress never specifically erased those boundaries and disestablished the reservation. Therefore, the crimes occurred in Indian Country.

CONCLUSION

WHEREFORE, this Court finds that Daisy and Sam Hallum were Indian and that the crimes for which Petitioner/Defendant was convicted occurred in Indian Country.

IT IS SO ORDERED THIS 27th DAY OF OCTOBER, 2020.

TIM MILLS
ASSOCIATE DISTRICT JUDGE
PITTSBURG COUNTY

CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of October, 2020, a true and correct copy of the foregoing *COURT ORDER WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW* was served via U.S. Mail and email upon:

Office of the Oklahoma Attorney General
Julie Pittman, Assistant Attorney General
Caroline E.J. Hunt, Assistant Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
julie.pittman@oag.ok.gov
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Pittsburg County District Attorney's Office
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201 Dean A. McGee, Suite 707
Oklahoma City, OK 73102

Choctaw Nation Judicial Branch
Jacob Keyes
PO Box 1210
Durant, OK 74702

~~Misty Jones~~
Cindy Ledford, Court Clerk

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

JAMES CHANDLER RYDER, **through Next Friend, Sue Ryder,** *Petitioner,* *-vs-* **THE STATE OF OKLAHOMA,** *Respondent.*	*Pittsburg County District Court Case No.: F-1999-147* *Court of Criminal Appeals Direct Appeal Case No.: D-2000-886* *Court of Criminal Appeals Original Post-Conviction Case No.: PCD-2002-257* *Successive Post-Conviction Case No.: PCD-2020-613*

PETITIONER'S POST-HEARING SUPPLEMENTAL BRIEF IN SUPPORT OF SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF - DEATH PENALTY -

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November 23, 2020

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(Chronological Order)

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Petitioner's Post-Hearing Supplemental Brief in Support of Successive Application for Post-Conviction Relief

Petitioner, James Chandler Ryder, through his next friend, Sue Ryder, and through undersigned counsel, submits this Post-Hearing Supplemental Brief in Support of His Successive Application for Post-Conviction Relief pursuant to this Court's Order Remanding for Evidentiary Hearing.

I. Background.

On September 8, 2020, Mr. Ryder filed a Successive Application for Post-Conviction Relief ("Successive APCR") in this Court. In the sole proposition, Mr. Ryder argued *McGirt v. Oklahoma* confirms the State did not have jurisdiction to prosecute, convict, and sentence him for murders that occurred within the boundaries of the Choctaw Nation Reservation. On September 25, 2020, this Court remanded Mr. Ryder's case to the District Court of Pittsburg County for an evidentiary hearing. O.R.[1] 2. In its remand order, this Court directed the District Court to answer "two separate questions: (a) the Indian status of Daisy and Sam Hallum and (b) whether the crimes occurred in Indian Country." O.R. 2.

On October 14, 2020, the District Court held a hearing to answer these two questions.[2] On November 2, 2020, the District Court filed the original record with this Court, which included its findings of fact and conclusions of law. O.R. 110-20. In its remand order, this Court provided that "[a] supplemental brief, addressing only those issues pertinent to the evidentiary hearing and limited to twenty (20) pages in length, may be filed by either party within twenty (20) days after

[1] In this brief, "O.R." refers to the 120-page original record filed in this Court on November 2, 2020; "Tr." refers to the transcript of the October 14, 2020 evidentiary hearing.

[2] Prior to the hearing, on October 9, 2020, Mr. Ryder filed in the District Court Petitioner's Remanded Hearing Brief Applying *McGirt* Analysis to Choctaw Nation Reservation. O.R. 70-97. On the same day, Amicus Curiae Choctaw Nation filed its Brief in Support of the Continued Existence of the Choctaw Reservation and Its Boundaries. O.R. 22-69. The State has not filed any pleadings related to Mr. Ryder's Successive APCR in the District Court or this Court. *See* O.R. 100 n.3.

the District Court's written findings of fact and conclusions of law are filed in this Court." O.R. 4. Accordingly, Mr. Ryder submits this brief for the Court's consideration.

II. The State Does Not Have Subject Matter Jurisdiction over Mr. Ryder's Case.

In its remand order, this Court directed, "Upon Petitioner's presentation of *prima facie* evidence as to the victims[']' legal status as Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction." O.R. 2. The State failed to meet its burden. Following the hearing, the District Court answered both of this Court's questions in the affirmative: "[T]his Court finds that Daisy and Sam Hallum were Indian and that the crimes for which Petitioner/Defendant was convicted occurred in Indian Country." O.R. 119. Under *McGirt*, the State does not have subject matter jurisdiction over Mr. Ryder's case.

A. The Victims Were Indian.

This Court directed the District Court to address: "First, the victims' status as Indian. The District Court must determine whether (1) Daisy and Sam Hallum had some Indian blood, and (2) were recognized as Indian by a tribe or the federal government." O.R. 3.

Under *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012), and *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001), cited in the remand order, O.R. 3 n.1, this Court must be satisfied Daisy and Sam Hallum each had "some Indian blood" and were "recognized as an Indian by a tribe or by the federal government." Although the Tenth Circuit has approved a "totality-of-the-evidence approach to determining Indian status," the test is satisfied when a person "has an Indian tribal certificate that includes the degree of Indian blood." *Diaz*, 679 at 1187.

Prior to the hearing, the parties stipulated as follows:

a. Daisy Hallum had 1/16th Indian blood quantum and was enrolled as a Choctaw Nation citizen at the time of the crimes.
b. Sam Hallum had 1/32nd Indian blood quantum and was enrolled as a Choctaw Nation citizen at the time of the crimes.

c. The Choctaw Nation of Oklahoma/CDIB Tribal Membership certifications for Daisy and Sam Hallum are attached to this stipulation and the parties agree they should be admitted into the record of this case.

d. The Choctaw Nation is a federally recognized tribe.[3]

O.R. 111-12 (citing Petitioner's Evidentiary Hearing Exhibits[4] ("Pet. Ex.") 1-3). The District Court "adopt[ed] these stipulations as facts." O.R. 112.

The District Court held, "Based upon these stipulated facts, the Court finds Daisy and Sam Hallum (1) had some Indian blood, and (2) were recognized as Indian by a tribe or the federal government." O.R. 112. The District Court concluded, "Having answered both of the above questions in the affirmative, this Court finds that Daisy and Sam Hallum were Indian." O.R. 112.

B. The Crimes Occurred in Indian Country.

This Court directed the District Court to address: "Second, whether the crimes occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Choctaw Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation." O.R. 3.

The District Court made various specific factual findings regarding the United States' establishment of the Choctaw Nation Reservation. *See* O.R. 112-16. These findings include:

3. The 1830 Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 ("1830 Treaty") (Pet. Ex. 10), art 2, using precise geographical terms, secured to the Choctaw Nation "a tract of country west of the Mississippi River, in fee simple to them and their descendants, to insure to them while they shall exist as a nation and live on it." The 1830 Treaty secured to the Choctaw Nation "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

[3] At the hearing, the State explained, "Respondent's position is that we stipulated to the relevant facts, that being the blood quantum, as well as the Hallum's [sic] association with the tribe. However, the ultimate legal determination is left to this Court per the OCCA's order. So we neither stipulate as to Indian status nor contest." Tr. 8.

[4] At the hearing, this Court admitted into evidence the entirety of Petitioner's Evidentiary Hearing Exhibits packet, with the exception of Pet. Ex. 22 (Indian Country Criminal Jurisdictional Chart) and Pet. Ex. 23 (Choctaw Nation Cross-Deputization Agreements List (1994-2020)). *See* O.R. 111 n.2.

shall ever be embraced in any Territory or State." *Id.* art 4. The 1830 Treaty was "a guarantee that [the Choctaw] would not again be forced to move." *Choctaw Nation* [*v. Oklahoma*], 397 U.S. [620,] 625 [(1970)].

4. The Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573 ("1837 Treaty") (Pet. Ex. 11), art 1, secured to the Chickasaw Nation a "district" within the Choctaw Nation's reservation, using precise geographic terms to describe the Chickasaw district, *id.* art. 2. The Chickasaw Nation was to hold its district "on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws[])." *Id.* art. 1. . . .
6. The 1855 Treaty of Washington, June 22, 1855, 11 Stat. 611 ("1855 Treaty") (Pet. Ex. 13) reaffirmed the 1830 and 1837 Treaties and modified the western boundary of the Choctaw Reservation. The 1855 Treaty made the Choctaw and Chickasaw governments independent of each other. *Id.* pmbl., art. 4. The Choctaw, for the benefit of the Chickasaw, specifically relinquished any claim to territory west of 100th degree west longitude. *Id.* art. 9. The boundaries of "Choctaw and Chickasaw country" were again specifically set forth in geographic terms. *Id.* art 1. The United States explicitly asserted that "pursuant to [the Indian Removal Act], the United States do hereby forever secure and guarantee the lands embraced within the said limits" to the Choctaw and Chickasaw and explicitly reserved those lands from sale "without the consent of both tribes." *Id.* The 1855 Treaty repeated the promise to secure to the Choctaw and Chickasaw "the unrestricted right of self-government, and full jurisdiction, over persons and property." *Id.* art. 7.
7. Following the Civil War, the Choctaw and Chickasaw Nations negotiated another treaty with the United States. In the 1866 Treaty of Washington, Apr. 28, 1866, 14 Stat. 769 ("1866 Treaty") (Pet. Ex. 14), the Nations explicitly "cede[d] to the United States the territory west of the 98[th meridian], known as the leased district," *id.* art. 3, modifying only the western boundary of the reservation. The United States expressly "re-affirm[ed] all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to" the Civil War. *Id.* art. 10. The 1866 Treaty reaffirmed the Nations' right to self-governance by expressly providing that no legislation "shall [] in anywise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw Nations respectively." *Id.* art 7. The 1866 Treaty reaffirmed all pre-existing Treaty rights of the Chickasaw and Choctaw Nations not inconsistent with its terms. Id. arts. 10, 45. This treaty was the last to diminish boundaries of the Choctaw Reservation.

O.R. 113-15. The District Court found, "The State offered no evidence or argument as to whether a reservation was ever established or disestablished for the Choctaw Nation. The State takes no position as to the facts underlying the existence, historically or now, of the Choctaw Nation Reservation." O.R. 116.

The parties stipulated:

> The crimes in this case occurred at SW of SW of SW of Section 1, Township 8 North, Range 16 East, Pittsburg County, Oklahoma. That legal description is within the boundaries set forth in the 1855 and 1866 treaties between the Choctaw Nation, the Chickasaw Nation, and the United States.[5]

O.R. 116 (citing Pet. Exs. 1, 4-6, 15). The District Court "adopt[ed] this stipulation as facts." O.R. 116. The court found, "There is no evidence before the Court that Congress has acted to erase or diminish the Choctaw Nation boundaries set forth in the 1855 and 1866 Treaties." O.R. 116.

Based on these factual findings, the District Court made the following conclusions of law:

> Following the *McGirt* analysis, this Court must first determine whether Congress established a reservation for the Choctaw Nation. In *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2475 (2020), the Supreme Court explained it has "never insisted on any particular form of words . . . when it comes to establishing [a reservation]." The Court noted that the "early treaties did not refer to the Creek lands as a 'reservation'– perhaps because that word had not yet acquired such distinctive significance in federal Indian law. But we have found similar language in treaties from the same era sufficient to create a reservation." *Id.* at 2461 (citation omitted). The Supreme Court explained that "the Creek were promised not only a 'permanent home' that would be 'forever set apart'; they were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State." *Id.* at 2461-62. The Court found, "Under any definition, this was a reservation." *Id.* at 2462.
>
> In applying the analysis set out in *McGirt* to the case at bar, this Court finds that a reservation was established for the Choctaw Nation by the treaties described above. Like Creek treaty promises, the United States' treaty promises to Choctaw Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Like Creek treaties, the Choctaw treaties involved exchange of tribal homelands for a new homeland in Indian Territory, and promised "a 'permanent home' that would be 'forever set apart'" and "a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State." *Id.* at 2461-62. It is clear that Congress established a reservation for the Choctaw Nation.
>
> Upon finding that Congress established a reservation for the Choctaw Nation, this Court must next determine whether Congress erased those boundaries and disestablished the reservation. As the Supreme Court made clear in *McGirt*, "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *Id.* at 2462. "[T]he only 'step' proper for a court of law" is "to ascertain and follow the original meaning of the law" before it. *Id.* at 2468. The constitutional authority to breach Congress's promises

[5] As with the victims' Indian status, the State explained at the hearing, "The State has stipulated to the relevant facts, leaving the ultimate legal determinations to be left to Your Honor . . . ." Tr. 14.

and treaties "belongs to Congress alone." *Id.* at 2462 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-68) (1903)). The Supreme Court will not "lightly infer such a breach once Congress has established a reservation." *Id.* (citing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). "[O]nce a reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'" *Id.* at 2469 (quoting *Solem*, 465 U.S. at 470).

A statute disestablishing a reservation may provide an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land." *Id.* at 2462 (quoting *Solem*, 465 U.S. at 470) (internal quotation marks omitted). It also may direct that tribal lands be "restored to the public domain," *id.* (quoting *Hagen v. Utah*, 510 U.S. 399, 412 (1994)) (internal quotation marks omitted), or state that a reservation is "discontinued, abolished, or vacated." *id.* at 2463 (quoting *Mattz v. Arnett*, 412 U.S. 481, 504, n.22 (1973) (internal quotation marks omitted)). *See also DeCoteau v. Dist. Cnty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 439-40, n.22 (1975). While "[d]isestablishment has 'never required any particular form of words,'" *id.* (quoting *Hagen*, 510 U.S. at 411), "it does require that Congress clearly express its intent to do so, '[c]ommon[ly with an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests,'" *id.* (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016)).

No evidence was presented to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation or that the State of Oklahoma has jurisdiction in this matter. The relevant allotment-era statutes applicable to the Choctaw Nation – the Atoka Agreement and the 1902 Act – did not erase the boundaries of or disestablish the Choctaw Reservation. There is no language in these statutes "that could plausibly be read as an Act of disestablishment." *McGirt*, 140 S. Ct. at 2468. As *McGirt* makes clear, "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *Id.* at 2464 (citations omitted). "Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination." *Id.* at 2465. Without "a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands," *id.* at 2464, this Court finds the Choctaw Reservation was not disestablished.

This Court finds that Congress established a reservation for the Choctaw Nation, and Congress never specifically erased those boundaries and disestablished the reservation. Therefore, the crimes occurred in Indian Country.

O.R. 117-19.

This Court should adopt the District Court's findings and conclusions. This Court "afford[s] the trial court's findings on factual issues great deference and will review its findings applying a deferential abuse of discretion standard." *Young v. State*, 2000 OK CR 17, 12 P.3d 20,

48 (citations omitted). The District Court found that the victims were Indian and, meticulously following the analysis set out in *McGirt*, found that the crimes occurred in Indian Country. This Court should now conclude that the State lacks subject matter jurisdiction over Mr. Ryder's case.

C. The State Does Not Have Concurrent Jurisdiction over Mr. Ryder's Case.

At the evidentiary hearing, the State claimed:

> [S]hould your Honor find that the Hallums were Indians, then the State maintains that it has concurrent jurisdiction to prosecute this matter. In the General Crimes Act set forth in Title 18, Section 1152, proof does not exempt the State from prosecuting cases that involve non-Indians that occur against an Indian in Indian Country.

Tr. 15. This claim is not properly before this Court, and it fails on the merits.

1. Any Argument for Concurrent Jurisdiction Is Not Properly Before This Court.

The State's cursory statement at Mr. Ryder's hearing, without citation to authority, is the only indication the State has given that it intends to argue for concurrent jurisdiction in this case. Because the State has failed to make such an argument and it is beyond the scope of supplemental briefing, the State has waived any argument for concurrent jurisdiction it might now make.[6]

In cases where a party raised an issue for the first time in a supplemental brief, this Court has held, "Supplemental briefs are intended to be limited to supplementation of recent authority bearing on the issues raised in the brief in chief, or on issues specifically directed to be briefed as ordered by this Court. Therefore, we do not believe that this issue is properly before this Court." *Castro v. State*, 1987 OK CR 182, 745 P.2d 394, 404. *See Brown v. State*, 1994 OK CR 12, 871

[6] The State's cursory mention of the issue at the evidentiary hearing was not sufficient to preserve it. *See Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010) ("[I]ssues may not be raised for the first time at oral argument."); Rule 3.5(C)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019) ("Failure to present relevant authority in compliance with [the Court's] requirements will result in the issue being forfeited on appeal."); Rule 3.5(A)(5) ("Merely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal.").

P.2d 56, 68; Rules 3.4(F)(2), 9.3(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). The concurrent jurisdiction issue does not fit into either of these categories. First, it does not provide "recent authority bearing on the issues raised in the brief in chief," *Castro*, 745 P.2d at 404, as the State opted not to file a response to Mr. Ryder's Successive APCR, despite having done so in similar cases. *See, e.g.,* Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), *Bosse v. State,* No. PCD-2019-124 (Okla. Crim. App. Aug. 4, 2020) ("*Bosse* Response").

Second, concurrent jurisdiction is not an "issue[] specifically directed to be briefed as ordered by this Court." *Castro*, 745 P.2d at 404. In fact, this Court made clear it does not want briefing on this issue at this juncture. In its remand order, this Court directed that the District Court "shall address *only*" the two issues this Court specified. O.R. 3. This Court then directed that following the evidentiary hearing, each party could file "[a] supplemental brief, addressing *only those issues pertinent to the evidentiary hearing.*" O.R. 4 (emphasis added). At the evidentiary hearing, the State acknowledged, regarding its concurrent jurisdiction claim, "Th[is] issue[] [is] beyond the scope of the OCCA's remand order . . . ." Tr. 16. The District Court agreed the issue was

> beyond the scope of the Remand Order. And since the order is very direct, telling me exactly what to – to do and what to address, I'll – I'll make th[at] part of the record for preservation purposes but I'm not going to make any specific findings or rulings on – on that.

Tr. 17. Because, as the State conceded, any argument regarding concurrent jurisdiction was beyond the scope of the hearing, it is also beyond the scope of this supplemental briefing, which may "address[] only those issues pertinent to the evidentiary hearing." O.R. 4. As the State has failed to argue for concurrent jurisdiction and it is beyond the scope of the supplemental briefing, the State has waived any such argument.

2. The State's Concurrent Jurisdiction Argument Fails on the Merits.

Although Mr. Ryder maintains the concurrent jurisdiction issue is beyond the scope of this briefing, he will address it here in anticipation of the State's argument.[7] If this Court somehow determines the State's concurrent jurisdiction argument is properly before it, it should find the argument fails on the merits. Because the State has not argued for concurrent jurisdiction in this case, Mr. Ryder can only guess what the State's argument will be based on its argument in other cases. *See Bosse* Response at 13-21.[8]

Under the Indian Country Crimes Act, also known as the General Crimes Act ("GCA"), the State does not have subject matter jurisdiction over the crimes committed within the Choctaw Nation Reservation in Mr. Ryder's case. In *Bosse*, the State acknowledged courts have held that states lack jurisdiction over crimes committed by non-Indians against Indians in Indian country, but the State claimed "the reasoning of these decisions lacks merit." *Bosse* Response at 15. The State argued a backwards theory: that for federal jurisdiction to be exclusive, Congress must expressly withdraw state jurisdiction. In fact, under a well-defined federal statutory scheme, jurisdiction in Indian country has historically been exercised by only tribal and federal courts, and states acquire such jurisdiction only by express grants. No statute has granted the State of Oklahoma criminal jurisdiction over crimes committed by or against Indians in Indian country.

a. Federal Criminal Jurisdiction in Indian Country Under the GCA and MCA Is Exclusive of State Jurisdiction, Except Where Congress Has Expressly Granted States Such Jurisdiction.

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[7] As this Court has ordered simultaneous supplemental briefing, Mr. Ryder will not have an opportunity to respond to any new arguments in the State's supplemental brief – including its concurrent jurisdiction argument – without leave of this Court. Mr. Ryder reserves the right to seek leave of this Court to file a reply brief to address any new arguments the State makes in its supplemental brief.

[8] Although Mr. Ryder addresses arguments from the *Bosse* Response here, he maintains this Court's rules do not allow the State to rely in this case on its briefing in another case. *See* Rules 3.5(A)(5), (C)(6).

The Supreme Court has made clear, "[C]riminal offenses by or against Indians have been subject only to federal or tribal laws . . . except where Congress in the exercise of its plenary and exclusive power over Indian affairs has 'expressly provided that State laws shall apply.'" *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979) (citation omitted). *See also Langley v. Ryder*, 778 F.2d 1092, 1095-06 (5th Cir. 1985) ("In order for a state to exercise criminal jurisdiction within Indian country there must be clear and unequivocal grant of that authority.").

First, under the Major Crimes Act ("MCA"), 18 U.S.C. § 1153, federal courts have exclusive jurisdiction over prosecutions for enumerated crimes committed by Indians against Indians or non-Indians in Indian country. *See McGirt*, 140 S. Ct. at 2459, 2470-71, 2477-78. Second, under the GCA, 18 U.S.C. § 1152, federal courts have jurisdiction over "a broader range of crimes by or against Indians in Indian country." *See id.* at 2479. The GCA extends the criminal laws of the United States applicable to crimes committed "in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia," to any crime committed in Indian country, subject to only three exceptions involving tribal jurisdiction over Indian offenders.[9] The GCA "establishes federal jurisdiction over 'interracial' crimes, those in which the defendant is an Indian and the victim is a non-Indian, or vice-versa."[10] *Prentiss*, 273 F.3d at 1278 (citations omitted); *Donnelly v. United States*, 228 U.S. 243, 269-270 (1913).

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[9] The GCA provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152.

[10] In *United States v. McBratney*, 104 U.S. 621, 623-24 (1881), the Supreme Court established a judicial exception to the GCA when it ruled that crimes by non-Indians against non-Indians are subject to state

The Supreme Court has made clear that states have no jurisdiction in Indian country over cases, such as Mr. Ryder's, involving a non-Indian defendant and Indian victims. As the Tenth Circuit recognized, "The Supreme Court has expressly stated that state criminal jurisdiction in Indian country is limited to crimes committed 'by non-Indians against non-Indians . . . and victimless crimes by non-Indians.'" *Ross v. Neff*, 905 F.2d 1349, 1353 (10th Cir. 1990) (quoting *Solem*, 465 U.S. at 465 n.2). In *Williams v. United States*, 327 U.S. 711, 714 (1946), the Court found, "While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian." *See id.* at n.10. *See also St. Cloud v. United States*, 702 F. Supp. 1456, 1459 (D.S.D. 1988) ("If the defendant is a non-Indian and the victim is an Indian, federal courts have exclusive jurisdiction over the offense.").

In *McGirt*, the Supreme Court once again made clear that federal criminal jurisdiction under both the MCA and the GCA is exclusive of state jurisdiction. As the Court explained:

> [T]he MCA applies only to certain crimes committed in Indian country by Indian defendants. A neighboring statute [the GCA] provides that federal law applies to a broader range of crimes by or against Indians in Indian country. *See* 18 U.S.C. § 1152. States are *otherwise* free to apply their criminal laws in cases of non-Indian victims *and* defendants, including within Indian country. *See McBratney*, 140 U.S. at 624.

McGirt, 140 S. Ct. at 2479 (emphasis added). Thus, the Court reaffirmed that under the GCA, federal law applies to Indian country crimes "by or against Indians," while states have jurisdiction over crimes involving both "non-Indian victims and defendants," as *McBratney* made clear. *Id.* [11]

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jurisdiction. "The single question" *McBratney* decided was "whether the [federal court] has jurisdiction of the crime of murder committed by a white man upon a white man" on a reservation in Colorado. *Id.* at 624.

[11] In *McGirt*, both the dissenters and the Oklahoma Solicitor General acknowledged the State would not have jurisdiction over crimes against Indians that occurred within the intact boundaries of the Creek Reservation. *See* 140 S. Ct. at 2500-01 (Roberts, J. dissenting) (emphasis added) ("[T]he Court's decision

1. Crimes by Non-Indians Against Indians and Crimes by Indians Against Non-Indians Have Historically Been Subject to Exclusive Federal Jurisdiction Under the GCA and MCA.

"The present federal jurisdictional statutes governing Indian reservations are a direct outgrowth of 19th century enactments. The provisions now found in 18 U.S.C. §§ 1152-1153 (1970) [the GCA and MCA] codify almost verbatim 19th century statutes." Robert Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. Law Rev. 951, 966 n.80 (1975) ("Clinton"). As explained below, the GCA "has its origins in the early Indian Trade and Intercourse Acts of the 1790's and was amended into its final and current form in 1854." Alexander Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 Alb. Gov't. L. Rev. 49, 51 (2017) ("Skibine").

"[R]elations with the Indians were primarily handled by treaty until 1871," but this period also saw "important federal legislation affecting criminal jurisdiction." Clinton at 958. In the late 1700's and first half of the 1800's, "Congress passed a series of temporary Indian trade and intercourse acts," many of which "contained provisions for federal prosecution of certain criminal offenses committed in Indian country, although in general they merely implemented the arrangements previously established in the treaties." *Id.* The first of these acts, passed in 1790, authorized federal prosecution of crime or trespass by United States citizens or residents on Indian land. *Id.* (citing Act of July 22, 1790, ch. 33, § 5-6, 1 Stat. 138). An 1817 revision "significantly expanded federal criminal jurisdiction over Indian lands" by providing for the application of federal enclave laws over crimes committed within Indian country. *Id.* at 959 (citing Act of Mar.

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draws into question thousands of convictions obtained by the State for crimes involving Indian defendants *or Indian victims* across several decades."); Oral Arg. Tr. at 55, *McGirt*, 140 S. Ct. 2452 (2020) (available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-9526_32q3.pdf) (last visited Nov. 19, 2020)) (emphasis added) (Oklahoma Solicitor General argued his estimated number of inmates who would be affected by a ruling that the Creek Reservation was not disestablished "doesn't include crimes committed against Indians *which the state would not have jurisdiction over.*").

3, 1817, ch. 92, §§ 1, 2, 3 Stat. 383). "The substance of the 1817 Act was incorporated into . . . the first permanent Indian Trade and Intercourse Act in 1834." *Id.* at 960 (citing Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729). In 1854, Congress enacted a law containing the three exceptions concerning offenses by Indians set forth in the current version of the GCA. *Id.* at n.57 (citing Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 270).

In order to address "the potential assertion of state authority over Indian lands located within the exterior boundaries of some of the new states," Congress began to include express reservations of federal authority and prohibitions of the extension of state jurisdiction over Indian lands in the enabling acts of states not yet admitted to the Union. *Id.* at 960. In accordance with that practice, Oklahoma's Enabling Act preserved federal jurisdiction over Indian lands, and required the state to disclaim all right and title to such lands. *Id.* at 960-61 & n.60; Act of June 16, 1906, ch. 3335, §§ 1, 3, 34 Stat. 267. *See also* Okla. Const. art. 1, § 3.

"Thus, during [the treaty] period, Congress slowly encroached on the tribal jurisdiction over Indian territory by providing a federal forum for the trial of crimes committed on Indian lands in which either the victim or perpetrator of the crime was a non-Indian." Clinton at 961."[T]oward the end of the treaty period, Congress sought to protect both federal jurisdiction over interracial crimes and tribal jurisdiction over intra-Indian crimes from state encroachment by prohibiting the new states from exercising jurisdiction over Indian lands as a condition for their admission to statehood." *Id.* at 962.

The GCA originally left prosecution of all crimes by Indians against each other in Indian country, including major crimes, to each tribe according to its local customs. *Ex parte Crow Dog*, 109 U.S. 556, 571-72 (1883) (holding the murder of an Indian by another Indian on Sioux reservation in Dakota Territory was subject to tribal, rather than federal, jurisdiction under the

GCA). However, in direct response to *Crow Dog*, Congress enacted the MCA in 1885. Clinton at 962-63; Skibine at 52. *See United States v. Kagama*, 118 U.S. 375, 382-83 (1886). The MCA removed tribal jurisdiction over certain enumerated major crimes by Indians,[12] including murder, and conferred federal jurisdiction over such crimes if committed on an "Indian reservation."[13]

2. States Have Acquired Criminal Jurisdiction over Crimes by Non-Indians Against Indians, and Crimes by Indians Against Non-Indians, Only by Express Statutory Grants; No Statute Has Granted Such Jurisdiction to Oklahoma.

In 1940, Congress "enacted the first of a series of statutes granting criminal jurisdiction over Indian reservations to the states, thereby radically altering the law enforcement roles traditionally exercised by the federal government and the tribes." Clinton at 968. In *Negonsott v. Samuels*, 507 U.S. 99, 110 (1993), the Supreme Court found that the 1940 statute, the Kansas Act, "quite unambiguously confers [concurrent] jurisdiction on the State over major offenses committed by or against Indians on Indian reservations." (Citation omitted). The Court explained:

> This case concerns the first major grant of jurisdiction to a State over offenses involving Indians committed in Indian Country . . . . Passed in 1940, the Kansas Act was followed in short order by virtually identical statutes granting to North

[12] As a general rule, tribes have no criminal jurisdiction over crimes by *non-Indians* in Indian country. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), the Supreme Court held that "Indian tribes do not have inherent jurisdiction to try and punish non-Indians." The Court noted, "In 1891, this Court recognized that Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated *an intent to reserve jurisdiction over non-Indians for the federal courts*." *Id.* at 204 (emphasis added).

[13] *McGirt* laid to rest the State's position in that case that the MCA does not apply in Oklahoma. The Court found the State's claim to a special exemption from the MCA for the eastern half of Oklahoma to be "one more error in historical practice." *McGirt*, 140 S. Ct. at 2471. The State's use of "statutory artifacts" to argue it was granted criminal jurisdiction in Indian country, even if the Creek Reservation was intact, was a "twist" even the *McGirt* dissent declined to join. *Id.* at 2476. The Court noted that Oklahoma was formed from "Oklahoma Territory in the west and Indian Territory in the east," and that "criminal prosecutions in the Indian Territory were split between tribal and federal courts." *Id.* (citing Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81, 94). The Court held that Congress "abolished that scheme" in 1897, granting federal courts in Indian Territory "'exclusive jurisdiction' to try 'all criminal causes for the punishment of any offense.'" *Id.* (quoting Act of June 7, 1897, ch. 3, 30 Stat. 62, 83). "When Oklahoma won statehood in 1907, the MCA applied immediately according to its plain terms." *Id.* at 2477. The Enabling Act "sent federal-law cases to federal court" in Oklahoma, and crimes arising under the MCA "belonged in federal court from day one, wherever they arose within the new state." *Id.*

> Dakota and Iowa, respectively, jurisdiction to prosecute offenses committed by or against Indians on certain Indian reservations within their borders.

Id. at 103-04 (citations omitted).

Public Law 280, originally enacted in 1953, granted criminal jurisdiction over Indian reservations to certain designated states. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 25 U.S.C. § 1321-26); Clinton at 969; Skibine at 52. Section 1162, entitled "State jurisdiction over offenses committed by or against Indians in the Indian country" expressly granted to certain enumerated states "jurisdiction over offenses committed by or against Indians" in Indian country, and provided that state criminal laws "shall have the same force and effect within such Indian country as they have elsewhere within the State." 18 U.S.C. § 1162(a). It provided that the GCA and MCA "shall not be applicable within the areas of Indian country listed in subsection (a) of this section." 18 U.S.C. § 1162(c). Public Law 280 gave "consent of the United States . . . to any other State not having jurisdiction with respect to criminal offenses or civil causes of action . . . to assume jurisdiction . . . by affirmative legislative action." Pub. L. No. 83-280, ch. 505, §§ 6-7.

When Congress enacted Public Law 280 in 1953, Oklahoma declined to exercise the option of voluntarily assuming criminal and civil jurisdiction over Indian country within its boundaries. In 1968, Congress amended Public Law 280 to require tribal consent to acquire such jurisdiction. Act of Apr. 11, 1968, 82 Stat. 78 (codified at 25 U.S.C. § 1321). Section 1321 gives federal consent to "any State not having jurisdiction over criminal offenses committed by or against Indians" in Indian country within the state "to assume, with the consent of the Indian tribe . . . jurisdiction over any or all of such offenses . . . to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State." 25 U.S.C. § 1321(a)(1). Section 1321 provides that, "At the request of an Indian tribe, and after consultation with and consent by the

Attorney General, the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of title 18 [GCA and MCA] within the Indian country of the Indian tribe." 25 U.S.C. § 1321(a)(2). In other words, states may exercise criminal jurisdiction over crimes by or against Indians in Indian country under Public Law 280 only if a tribe consents, and concurrent federal jurisdiction under the GCA and MCA may be exercised only if the tribe requests it and the Attorney General consents. Oklahoma has never requested tribal consent to state assumption of jurisdiction under Public Law 280, and Oklahoma tribes have not issued such consent.

Over thirty years ago, this Court recognized that Oklahoma failed to assume criminal and civil jurisdiction under Public Law 280 before it was amended to require tribal consent, 25 U.S.C. § 1321, and found that "[b]ased on the State's failure to act in this regard . . . 'the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.'" *See Cravatt v. State*, 1999 OK CR 6, 825 P.2d 277, 279 (quoting *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 403). In *McGirt*, the Supreme Court likewise concluded, "Oklahoma doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over Creek lands. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma." 140 S. Ct. at 2478.

b. The Department of Justice Understands the GCA to Authorize Exclusive Federal Jurisdiction over Crimes by Non-Indians Against Indians and Crimes by Indians Against Non-Indians.

An archived version of the Department of Justice's ("DOJ") Criminal Resource Manual provides its understanding of the GCA: https://www.justice.gov/archives/jm/criminal-resource-manual-685-exclusive-federal-jurisdiction-over-offenses-non-indians-against (last visited Nov. 18, 2020). According to Section 685, "Except for those exempted by *McBratney*, the Federal government has jurisdiction over non-Indian offenders. 18 U.S.C. § 1152." Section 685 states that more than thirty years ago, "the Solicitor General [took] the position that federal jurisdiction is

exclusive in an amicus brief recommending that certiorari be denied in *Arizona v. Flint*, 492 U.S. 911 (1989)." Section 685 states, "Concurrent state jurisdiction has, moreover, been rejected by the appellate courts of four states with substantial exp[a]nses of Indian country within their borders." Section 685 cites the same cases the State cited as supportive of Mr. Ryder's position, *Bosse* Response at 15: *State v. Larson*, 455 N.W.2d 600 (S. Ct. S.D. 1990); *State v. Flint*, 157 Ariz. 227, 756 P.2d 324 (Ct. App. Az. 1988); *State v. Greenwalt*, 204 Mont. 196, 663 P.2d 1178 (S. Ct. Mont. 1983); and *State v. Kuntz*, 66 N.W.2d 531 (S. Ct. N.D. 1954).

A chart currently available on the DOJ's website for the United States Attorney's Office for the Western District of Oklahoma affirms its continued understanding that under the GCA, the federal government has exclusive jurisdiction of crimes involving non-Indian defendants and Indian victims. *See* Indian Country Criminal Jurisdictional Chart, Aug. 2020 version (https://www.justice.gov/usao-wdok/page/file/1300046/download (last visited Nov. 18, 2020)).

c. Cases Concerning Civil Jurisdiction Are Irrelevant to the Interpretation of Statutes Defining Criminal Jurisdiction in Indian Country.

In *Bosse*, the State relied on scattered phrases in cases concerning tribal and state *civil* jurisdiction over non-Indians in Indian country to argue the State has *criminal* jurisdiction. The State used these phrases to suggest a "presumption" of state criminal jurisdiction. *See Bosse* Response at 17-19 (citing *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (involving an Indian's tribal court civil suit against state game wardens for alleged civil rights violations and tort in executing a search warrant on a reservation related to alleged off-reservation state law crimes); *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257–58 (1992) (involving county ad valorem tax on reservation land owned in fee by a tribe or tribal citizens); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (upholding state severance

tax on non-Indian lessees' production of oil and gas on a reservation, when production was also subject to a tribal severance tax); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148-49 (1984) (involving a civil suit for negligence and breach of contract filed by a tribe in state court against a corporation); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 71-74 (1962) (involving enforcement of state anti-fish trap conservation law against member of an Alaska tribe that had no reservation)).

The State also relied on scattered phrases from civil cases to support its claims that "there is no reason to assume" federal jurisdiction "necessarily precludes concurrent state jurisdiction," and that the GCA "does not clearly preclude state jurisdiction over crimes committed by non-Indians against Indians." *See Bosse* Response at 15-17. None of the cases cited by the State address criminal jurisdiction or involve Indians or Indian country. *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349-52 (2020) (state court suit related to federal environmental laws); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (state law claims concerning warning label requirements for prescription drug); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (state court civil personal injury action); *Silas Mason Co. v. Tax Com'n of State of Washington*, 302 U.S. 186, 207 (1937) (state income tax on receipts by contractors with the United States for dam construction work); *United States v. Bank of New York & Tr. Co.*, 296 U.S. 463, 479 (1936) (state court suits for accounting and delivery filed by the United States, seeking to recover funds held by a bank); *Claflin v. Houseman*, 93 U.S. 130, 134 (1876) (creditor's state court claim against a debtor subject to federal bankruptcy proceeding)). Civil cases are irrelevant to the State's argument given the specific statutory scheme that has historically governed criminal jurisdiction in Indian country. The federal government has exclusive jurisdiction over Mr. Ryder's case.[14]

[14] According to the State, *McGirt* "leaves Indians vulnerable under the exclusive federal jurisdiction of the Major Crimes Act," and "there is no reason to perpetuate that injustice . . . or reason to believe the State of

III. Mr. Ryder's Claim Is Properly Before This Court.

At the evidentiary hearing, the State indicated its intent to

> present the procedural argument that the Petitioner first raised this claim in a successive . . . capital post-conviction proceeding. He didn't raise it in his direct appeal nor his first PC but waited until this year to raise the claim. Therefore, under Section 1029-D8 [sic], Petitioner has waived his appeal as he has failed to raise it before.

Tr. 15-16. This assertion is not properly before this Court, and it fails on the merits.

A. Any Argument for Procedural Defenses Is Not Properly Before This Court.

For the reasons described in section II(C)(1), *supra* at 7-8, any argument regarding procedural defenses the State might raise in its supplemental brief is waived.[15] Mr. Ryder incorporates the argument above without repeating it.

B. Any Argument for Procedural Defenses Fails on the Merits.

Even if this Court somehow finds the State's argument is not waived, it fails on the merits.[16] In his Successive APCR, Mr. Ryder explained why this matter is properly before this Court. He argued that under § 1089(D), the legal basis for his jurisdictional claim was unavailable until *McGirt* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) became final,[17] and that subject

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Oklahoma will not vigorously defend the rights of Indian victims, as it has for a century." *Bosse* Response at 20-21. However, in *Bosse*, the Chickasaw Nation argued federal criminal jurisdiction under the GCA and MCA is exclusive of state jurisdiction and that Oklahoma's "long asserted criminal jurisdiction in violation of federal law . . . is itself an injustice that goes to the heart of the criminal justice system." Amicus Curiae Chickasaw Nation's Brief in Support of the Continued Existence of the Chickasaw Reservation and Its Boundaries at 16-18, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Nov. 4, 2020). Further, "this is not a case of denying Indians court protection, but rather is a case of determining which court is responsible for providing that protection. If federal prosecution is lacking, the answer is for federal prosecutors to fulfill their responsibility, not for the State to usurp jurisdiction over these cases." *Larson*, 455 N.W.2d at 602.

[15] As with concurrent jurisdiction, the State conceded this issue was beyond the scope of the evidentiary hearing and the District Court agreed. Tr. 16, 17.

[16] As with the State's concurrent jurisdiction argument, Mr. Ryder can only guess what the State's procedural defenses argument will be based on its argument in other cases. *See Bosse* Response at 22-49.

[17] This Court has found the legal basis for such a jurisdictional claim was not available until *McGirt* and *Murphy* were final. *See* Order Remanding for Evidentiary Hearing at 2, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Aug. 12, 2020) (citing 22 O.S. §§ 1089(D)(8)(a), (9)(a)) (finding "[t]he issue could not have been previously presented because the legal basis for the claim was unavailable"); Order Dismissing

matter jurisdiction can be raised at any time.[18] Instead of repeating these arguments here, Mr. Ryder refers this Court back to his original brief. *See* Successive APCR at 1-3. For the reasons explained there, this Court's consideration of the merits of Mr. Ryder's claim is appropriate.

IV. Conclusion.

This Court "[r]ecogniz[ed] the historical and specialized nature of th[e] remand for evidentiary hearing" and directed the District Court to address the only two issues relevant to this Court's analysis under *McGirt*. O.R. 2. Following that hearing, the District Court carefully considered and clearly answered those questions, concluding that the victims were Indian and the crimes occurred in Indian country. By faithfully applying *McGirt*, this Court must conclude the State of Oklahoma had no jurisdiction to try, convict, and sentence Mr. Ryder.

Respectfully Submitted,

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Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance at 3-4, *Goode v. State*, No. PCD-2020-333 (Okla. Crim. App. June 9, 2020) (dismissing successive APCR as premature "[b]ecause neither *Murphy* nor *McGirt* is a final opinion").

[18] *See McGirt*, 140 S. Ct. at 2501 n.9 (Roberts, J., dissenting) (citing *Murphy*, 875 F.3d 697, 907 n.5 (10th Cir. 2017); *Wallace v. State*, 1997 OK CR 18, 935 P.2d 366, 372) ("[U]nder Oklahoma law, it appears that there may be little bar to state habeas relief because 'issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal.").

VERIFICATION

State of Oklahoma)
) ss:
County of Oklahoma)

Meghan LeFrancois, being first duly sworn upon oath, states she signed the above pleading as attorney for SUE RYDER, next friend for JAMES CHANDLER RYDER, and that the statements therein are true to the best of her knowledge, information, and belief.

MEGHAN LeFRANCOIS

Subscribed and sworn to before me this 23rd day of November, 2020.

ANGELA BEERY NOTARY # 14011145 EXP. 12/15/22 PUBLIC STATE OF OKLAHOMA

Notary Public

Commission Number: 14011145

My commission expires: 12/15/22

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of November, 2020, a true and correct copy of the foregoing Post-Hearing Supplemental Brief in Support of Successive Application for Post-Conviction Relief was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant to Rule 1.9(B), Rules of the Court of Criminal Appeals.

MEGHAN LeFRANCOIS