Capital Case

Case No. _____

In the
Supreme Court of the United States

JEMAINE CANNON,
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 (Pet. App. 1 through Pet. App. 48)

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November 22, 2021

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ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JEMAINE MONTEIL CANNON,	)	
	)	
Petitioner,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. PCD-2020-620**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION DENYING SUCCESSIVE APPLICATION FOR CAPITAL POST-CONVICTION RELIEF

ROWLAND, PRESIDING JUDGE:

Before the Court is Jemaine Monteil Cannon's successive application for capital post-conviction relief and accompanying motion for evidentiary hearing, challenging only the State's jurisdiction to prosecute and punish him in this case. We granted his motion for evidentiary hearing and remanded the case to the District Court of Tulsa County to take evidence and make conclusions concerning Petitioner Cannon's Indian status and the location of his crime based on *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020). Prior to the completion of the remand proceedings, we stayed the proceedings pending the Court's consideration of *McGirt's*

retroactive application to otherwise final state convictions.[1] We have since decided *State ex rel. Matloff v. Wallace,* 2021 OK CR 21, ¶ 15, ___P.3d___, unanimously holding that the new rule of criminal procedure concerning Indian Country jurisdiction announced in *McGirt* would not be applied retroactively to void a state conviction that was final when *McGirt* was decided. Because Cannon's state conviction was long final when *McGirt* was decided,[2] his case is controlled by our decision in *Matloff* and he is not entitled to post-conviction relief based upon his jurisdictional challenge.

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[1] The district court had yet to conduct an evidentiary hearing at the time the Court stayed the proceedings on remand.

[2] *Cannon v. State,* 1998 OK CR 28, 961 P.2d 838 (affirming Cannon's Tulsa County conviction for First Degree Murder and his death sentence); *Cannon v. State,* Case No. PCD-1998-179, (Okl.Cr. April 9, 1999) (unpublished) (denying post-conviction relief); *Cannon v. Mullin,* Case No. 99-CV-297H(M), (N.D. Okla Dec. 9, 2002) (unpublished) (denying federal habeas relief); *Cannon v. Mullin,* 383 F.3d 1152 (10th Cir.2004) (affirming denial of federal habeas relief in part and remanding for consideration of ineffective assistance of counsel claim); *Cannon v. Mullin,* 544 U.S. 928 (2005) (denying certiorari review of denial of habeas relief); *Cannon v. Sirmons,* Case No. 99-CV-297-TCK-PJC (N.D. Okla May 30, 2007) (unpublished); *Cannon v. Sirmons,* Case No. 99-CV-297-TCK-PJC (N.D. Okla Dec. 6, 2007) (unpublished); *Cannon v. Workman,* Case No. 99-CV-297-TCK-PJC (N.D. Okla March 18, 2011) (unpublished); *Cannon v. Workman,* Case No. 99-CV-297-TCK-PJC (N.D. Okla Jan. 15, 2013) (unpublished); *Cannon v. Trammell,* Case No. 99-CV-297-TCK-PJC (N.D. Okla April 30, 2013) (unpublished) (denying federal habeas relief); *Cannon v. Trammell,* 796 F.3d 1256 (10th Cir. 2015) (affirming denial of federal habeas relief); *Cannon v. Duckworth,* 136 S.Ct. 2517 (2016) (denying certiorari from affirmance of denial of federal habeas relief).

DECISION

Petitioner Cannon's Successive Application for Post-Conviction Relief is **DENIED**. The Stay entered on June 11, 2021 is **LIFTED** and the Remand Order of September 25, 2020 is **MOOT.** 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 delivery and filing of this decision.

APPEARANCES ON APPEAL

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OPINION BY: ROWLAND, P.J.
HUDSON, V.P.J.: Concur
LUMPKIN, J.: Concur
LEWIS, J.: Concur

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 25 2020

JOHN D. HADDEN
CLERK

JEMAINE MONTEIL CANNON,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

Case No. PCD-2020-620

ORDER REMANDING FOR DETERMINATION OF COUNSEL AND EVIDENTIARY HEARING

Before the Court is Jemaine Monteil Cannon's *pro se* successive application for post-conviction relief and motion for evidentiary hearing. He was tried by jury in the District Court of Tulsa County, Case No. CF-1995-727, and convicted of one count of First Degree Murder, in violation of 21 O.S.1991, § 701.7(A). The Honorable Clifford E. Hopper sentenced Cannon in accordance with the jury's verdict to death. Cannon appealed and we affirmed his Judgment and Sentence in *Cannon v. State,* 1998 OK CR 28, 961 P.2d 838. He has subsequently exhausted his appeals.[1]

[1] *Cannon v. State,* Case No. PCD-1998-179, (Okl.Cr. April 9, 1999) (unpublished); *Cannon v. Mullin,* Case No. 99-CV-297H(M), (N.D. Okla Dec. 9, 2002)

Cannon now claims that the district court lacked jurisdiction to try him based on *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020) and *Sharp v. Murphy*, 591 U.S. ___, 140 S.Ct. 2412. Cannon argues that he is a Cherokee Indian and that the crime occurred within the boundaries of the Muscogee (Creek) Reservation. This claim is reviewable under Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020).

Cannon's post-conviction claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred on the Creek Reservation. These issues require fact-finding in the District Court. As Cannon is appearing *pro se*, we **REMAND** this case to the District Court of Tulsa County to hold a hearing within thirty (30) days of the date of this Order and determine whether Cannon intends to retain counsel, desires the appointment of counsel and is presently indigent, or whether he intends to represent himself in this matter. 22 O.S.2011,

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Okla May 30, 2007) (unpublished); *Cannon v. Sirmons*, Case No. 99-CV-297-TCK-PJC (N.D. Okla Dec. 6, 2007) (unpublished); *Cannon v. Workman*, Case No. 99-CV-297-TCK-PJC (N.D. Okla March 18, 2011) (unpublished); *Cannon v. Workman*, Case No. 99-CV-297-TCK-PJC (N.D. Okla Jan. 15, 2013) (unpublished); *Cannon v. Trammell*, Case No. 99-CV-297-TCK-PJC (N.D. Okla April 30, 2013) (unpublished); *Cannon v. Trammell*, 796 F.3d 1256 (10th Cir. 2015); *Cannon v. Duckworth*, 136 S.Ct. 2517 (2016).

§ 1089(B). The District Court shall either order retained counsel to enter an appearance in this matter, enter any necessary orders appointing the Oklahoma Indigent Defense System, or enter an order allowing Cannon to appear *pro se* after conducting a *Faretta* hearing.[2] The District Court shall then hold an evidentiary hearing within sixty (60) days from the date of its Order settling the issue of counsel to address Cannon's post-conviction claim.

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 Cannon's presentation of *prima facie* evidence as to his 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.

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

[2] *Faretta v. California*, 422 U.S. 806 (1975) (holding criminal defendant has Sixth Amendment right to self-representation and may proceed without counsel provided he or she voluntarily and intelligently waives his or her right to counsel).

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, Cannon's status as an Indian. The District Court must determine whether (1) Cannon has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.[3]

Second, whether the crime occurred within the boundaries of the Creek 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, to the Clerk of this Court, and Cannon or his counsel, 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

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

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 Tulsa County: Cannon's *Pro Se* Application for Post-Conviction Relief and Motion for Evidentiary Hearing filed September 11, 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:
John D. Hadden

Clerk

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 11 2020

JOHN D. HADDEN
CLERK

JEMAINE MONTEIL CANNON,
PETITIONER,
VS.
STATE OF OKLAHOMA,
RESPONDENT.

TULSA CO. DISTRICT COURT
CASE NO. CRF-95-727
COURT OF CRIMINAL APPEALS
DIRECT APPEAL CASE NO. 96-369
FIRST POST CONVICTION CASE NO. 98-179
SECOND POST CONVICTION CASE NO. PCD 2020 620

VERIFIED
PRO SE APPLICATION FOR POSTCONVICTION RELIEF
DEATH PENALTY

PART A-PROCEDURAL HISTORY

JEMAINE MONTEIL CANNON, A PRO SE CAPITAL POST-CONVICTION PETITIONER, SUBMITS HIS APPLICATION FOR POST-CONVICTION RELIEF UNDER SECTION 1089 OF TITLE 22. THIS IS THE SECOND TIME AN APPLICATION FOR POST-CONVICTION RELIEF HAS BEEN FILED. THE SENTENCE FROM WHICH RELIEF IS SOUGHT IS:

DEATH

1. (a) COURT IN WHICH SENTENCE WAS RENDERED:
DISTRICT COURT OF TULSA COUNTY, TULSA, OKLAHOMA
(b) CASE NUMBER: CRF-95-727, STATE OF OKLAHOMA V. JEMAINE CANNON

2. DATE OF SENTENCE: MARCH 26, 1996.

3. TERMS OF SENTENCE:
DEATH BY LETHAL INJECTION FOR FIRST DEGREE MALICE AFORETHOUGHT MURDER.

4. NAME OF PRESIDING JUDGE:
CLIFFORD HOPPER

5. IS PETITIONER CURRENTLY IN CUSTODY? YES
WHERE? OKLAHOMA STATE PENITENTIARY
DOES PETITIONER HAVE CRIMINAL MATTERS PENDING IN OTHER COURTS? NO

I.

CAPITAL OFFENSE INFORMATION

6 PETITIONER WAS CONVICTED OF THE FOLLOWING CRIME FOR WHICH A SENTENCE OF DEATH WAS IMPOSED:
FIRST DEGREE MURDER WITH MALICE AFORETHOUGHT, AFC

AGGRAVATING FACTORS ALLEGED:

(a) THE DEFENDANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON, 21 O.S. § 701.12 (1),

(b) THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, 21 O.S. § 701.12 (4).

(c) THE MURDER WAS COMMITTED BY A PERSON WHILE SERVING A SENTENCE OF IMPRISONMENT ON CONVICTION OF A FELONY, 21 O.S. § 701.12 (5).

(d) THE EXISTENCE OF A PROBABILITY THAT THE DEFENDANT WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY, 21 O.S. § 701.12 (7).

AGGRAVATING FACTORS FOUND:

(a) THE DEFENDANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON, 21 O.S. § 701.12 (1)

(b) THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, 21 O.S. § 701.12 (4)

(c) THE MURDER WAS COMMITTED BY A PERSON WHILE SERVING A SENTENCE OF IMPRISONMENT ON CONVICTION OF A FELONY. 21 O.S. § 701.12 (5)

(d) THE EXISTENCE OF A PROBABILITY THAT THE DEFENDANT WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY. 21 O.S. § 701.12 (7)

MITIGATING FACTORS LISTED IN JURY INSTRUCTIONS:

a. THAT JEMAINE MONTELL CANNON IS TWENTY FOUR (24) YEARS OLD.

b. THAT HE HAS A FAMILY WHO LOVES HIM AND WOULD BE SEVERELY IMPACTED IF HE WAS PUT TO DEATH.

c. THAT JEMAINE CANNON SUFFERED AS A CHILD DUE TO PHYSICAL, MENTAL, AND EMOTIONAL ABUSE.

d. THAT JEMAINE'S MOTHER FAILED TO PROTECT HIM WHICH TRANSGRESSED INTO UNCONTROLLABLE RAGE AGAINST WOMEN WITH WHOM HE DEVELOPED RELATIONSHIPS.

(e) THAT SUCH TRAUMA HAD A LONG TERM IMPACT ON JEMAINE CANNON'S LIFE WHICH CONTRIBUTED TO THE MURDER OF THE DECEASED.

f. THAT JEMAINE MONTELL CANNON HAS POSED NO THREAT TO SOCIETY WHILE INCARCERATED IN THE PENITENTIARY OR THE TULSA COUNTY JAIL AND WILL LIKELY POSE NO THREAT IN THE PENITENTIARY IF GIVEN A SENTENCE LESS THAN DEATH

WAS VICTIM IMPACT EVIDENCE INTRODUCED AT TRIAL? YES

7. CHECK WHETHER THE FINDING OF GUILTY WAS MADE: AFTER PLEA OF NOT GUILTY(X)

8. IF FOUND GUILTY AFTER PLEA OF NOT GUILTY, CHECK WHETHER THE FINDING WAS MADE BY: A JURY (X)

9. WAS THE SENTENCE DETERMINED BY: (X) A JURY

II

NON-CAPITAL OFFENSE INFORMATION

SECTION A (II) (10-12) OF THIS FORM ARE NOT APPLICABLE TO THIS POST-CONVICTION APPLICATION

III

CASE INFORMATION

13. NAME AND ADDRESS OF LAWYER IN TRIAL COURT:
SID CONWAY
ASST. TULSA COUNTY PUBLIC DEFENDER
PYTHIAN BLDG.
423 S. BOULDER AVE., SUITE 300
TULSA, OK 74103-3805
918-596-5530

NAME AND ADDRESS OF ALL CO-COUNSEL IN THE TRIAL COURT:
JULIA O'CONNELL
ASST. TULSA COUNTY PUBLIC DEFENDER
PYTHIAN BLDG
423 S. BOULDER AVE. SUITE 300
TULSA, OK 74103-3805
918-596-5530

14, WAS LEAD COUNSEL APPOINTED BY THE COURT? YES(X)

15, WAS THE CONVICTION APPEALED? YES(X)

TO WHAT COURT? THE OKLAHOMA COURT OF CRIMINAL APPEALS

DATE BRIEF IN CHIEF FILED: MAY 28th, 1997

DATE RESPONSE FILED: SEPTEMBER 23rd, 1997

DATE REPLY BRIEF FILED: DECEMBER 2, 1997

DATE OF ORAL ARGUMENT: FEBRUARY 18th, 1998

HAS THIS CASE BEEN REMANDED TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING ON DIRECT APPEAL? NO(X)

IS THIS PETITION FILED SUBSEQUENT TO SUPPLEMENTAL BRIEFING AFTER REMAND? NO(X)

16, NAME AND ADDRESS OF LAWYER FOR APPEAL:
BARRY DERRYBERRY
ASST. TULSA COUNTY PUBLIC DEFENDER
PYTHIAN BLDG
423 S. BOULDER AVE., SUITE 300
TULSA, OK 74103-3805
918-596-5530

17. WAS AN OPINION WRITTEN BY THE APPELLATE COURT? YES(X)

IF YES, GIVE CITATION IF PUBLISHED: 961 P.2d 838 (OKLA.CRIM. APP. 1998)

IF NOT PUBLISHED, GIVE APPELLATE CASE NO.: F-96-769

18. WAS FURTHER REVIEW SOUGHT? NO(X)

PART B: GROUNDS FOR RELIEF

19, HAS A MOTION FOR DISCOVERY BEEN FILED WITH THIS APPLICATION? NO(X)

20. HAS A MOTION FOR EVIDENTIARY HEARING BEEN FILED WITH THIS APPLICATION? YES(X)

21. HAVE OTHER MOTIONS BEEN FILED WITH THIS APPLICATION OR PRIOR TO THE FILING OF THIS APPLICATION? NO(X)

22. LIST PROPOSITIONS RAISED:

PROPOSITION I.

JURISDICTION

BASED UPON THE SUPREME COURT DECISION IN MCGIRT V. OKLAHOMA, 591 U.S. ___(2020), PETITIONER ALLEGES THE STATE OF OKLAHOMA LACKED JURISDICTION TO PROSECUTE HIM BECAUSE HE IS AN INDIAN, THE ALLEGED CRIME OCCURRED ON THE CREEK RESERVATION IN INDIAN COUNTRY, AND THE ALLEGED CRIME INVOLVED AN INDIAN DEFENDANT IN INDIAN COUNTRY SUBJECTING IT TO THE MAJOR CRIMES ACT AND JURISDICTION IS EXCLUSIVELY FEDERAL.

PART C: STATEMENT OF FACTS AND PROCEDURAL HISTORY

2-10-95: PETITIONER CHARGED BY STATE OF OKLAHOMA IN TULSA COUNTY DISTRICT COURT CASE NO. CRF-95-258 WITH FIRST DEGREE MALICE AFORETHOUGHT MURDER.

A PLEA OF NOT GUILTY WAS ENTERED IN DISTRICT COURT BEFORE HON. CLIFFORD HOPPER PETITIONER WAS TRIED BY JURY BETWEEN 3-4-96 AND 3-15-96. THE JURY RETURNED A VERDICT OF GUILTY OF FIRST DEGREE MALICE AFORETHOUGHT MURDER.

PART D - PROPOSITIONS - ARGUMENTS AND AUTHORITIES

PROPOSITION I.

JURISDICTION

BASED UPON THE SUPREME COURT DECISION IN MCGIRT V. OKLAHOMA, 591 U.S. ___(2020), PETITIONER ALLEGES THE STATE OF OKLAHOMA LACKED JURISDICTION TO PROSECUTE HIM BECAUSE HE IS AN INDIAN; THE ALLEGED CRIME OCCURRED ON THE CREEK RESERVATION IN INDIAN COUNTRY, AND THE ALLEGED CRIME INVOLVED AN INDIAN DEFENDANT IN INDIAN COUNTRY SUBJECTING IT TO THE MAJOR CRIMES ACT AND JURISDICTION IS EXCLUSIVELY FEDERAL.

THE MAJOR CRIMES ACT (MCA) PROVIDES THAT, WITHIN "THE INDIAN COUNTRY," "[A]NY INDIAN WHO COMMITS "CERTAIN ENUMERATED OFFENSES" SHALL BE SUBJECT TO THE SAME LAWS AND PENALTIES AS ALL OTHER PERSONS COMMITTING ANY OF [THOSE] OFFENSES; WITHIN THE EXCLUSIVE JURISDICTION OF THE UNITED STATES." 18 U.S.C. § 1153(a). "INDIAN COUNTRY" INCLUDES "ALL LAND WITHIN THE LIMITS OF ANY INDIAN RESERVATION UNDER THE JURISDICTION OF THE UNITED STATES GOVERNMENT," § 1151

ENROLLMENT IN AN INDIAN TRIBE IS NOT THE ONLY MEANS OF ESTABLISHING INDIAN STATUS UNDER STATUTE GOVERNING CRIMES COMMITTED IN INDIAN COUNTRY, NOR IS IT NECESSARILY DETERMINATIVE 18 U.S.C.A. § 1153 (a).

TRIBAL ENROLLMENT IS NOT REQUIRED TO ESTABLISH "RECOGNITION" AS AN INDIAN. "INDEED," ENROLLMENT IN AN OFFICIAL TRIBE HAS NOT BEEN HELD TO BE AN ABSOLUTE REQUIREMENT FOR FEDERAL JURISDICTION, AT LEAST WHERE THE INDIAN DEFENDANT LIVED ON THE RESERVATION AND MAINTAINED TRIBAL RELATIONS WITH THE INDIANS THEREON. U.S. V. ANTELOPE, 430 U.S. 641, 647 n. 7, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977).

WHILE VOTING AND PARTICIPATING IN TRIBAL ACTIVITIES ARE IMPORTANT . . . , THE LACK OF ANY SUCH ACTIVITIES DOES NOT PRECLUDE A REASONABLE INFERENCE OF SOCIAL RECOGNITION, ESPECIALLY WHERE THE DEFENDANT HAS LIVED HIS ENTIRE LIFE ON THE RESERVATION. U.S. V. LABUFF 658 F.3d 873 (9TH CIR. 2011).

IN A CASE UNDER THE INDIAN MAJOR CRIMES ACT (IMCA), EVIDENCE OF A PARENT, GRANDPARENT, OR GREAT-GRANDPARENT WHO IS CLEARLY IDENTIFIED AS AN INDIAN IS GENERALLY SUFFICIENT TO PROVIDE THAT THE DEFENDANT HAS SOME QUANTUM OF INDIAN BLOOD. 18 U.S.C.A. § 1153.

* THE DETERMINATION OF WHETHER ONE IS SUBJECT TO § 1153 IS ONE OF FEDERAL LAW. SCRIVNER V. TANSY, 68 F.3d 1234, 1241 (10TH CIR. 1995)

IN U.S. V. PRENTISS, (CA. 10 (N.M.) 273 F.3d 1277, 2001, THE 10TH CIRCUIT STATED "IN THE ABSENCE OF A STATUTORY DEFINITION, THIS CIRCUIT HAS APPLIED A TWO-PART TEST FOR DETERMINING WHETHER A PERSON IS AN INDIAN FOR THE PURPOSE OF ESTABLISHING FEDERAL JURISDICTION OVER CRIMES IN INDIAN COUNTRY. WE HAVE CONCLUDED THAT, "[F]OR A CRIMINAL DEFENDANT TO BE SUBJECT TO § 1153, THE COURT MUST MAKE FACTUAL FINDINGS THAT THE DEFENDANT (1) HAS SOME INDIAN BLOOD; AND (2) IS RECOGNIZED AS AN INDIAN BY A TRIBE OR BY THE FEDERAL GOVERNMENT," SCRIVNER V. TANSY, 68 F.3d 1234, 1241 (10TH CIR. 1995)

"[T]HE INQUIRY IN ALL CASES WHERE INDIAN STATUS IS AN ISSUE FOR JURISDICTIONAL PURPOSES SHOULD BE WHETHER THE PERSON HAS SOME DEMONSTRABLE BIOLOGICAL IDENTIFICATION AS AN INDIAN AND HAS BEEN SOCIALLY OR LEGALLY RECOGNIZED AS AN INDIAN.

THE TWO-PART TEST IS DERIVED FROM U.S. V. ROGERS, 45 U.S. (4 How.) 567, 11 L.Ed. 1105 (1846). SEE ROGERS AT 573 (STATING THAT THE TERM "INDIAN" "DOES NOT SPEAK OF MEMBERS OF THE TRIBE, BUT OF THE RACE GENERALLY".

PETITIONER EVIDENCE THAT HE IS AN INDIAN:

"DEMONSTRABLE BIOLOGICAL IDENTIFICATION AS AN INDIAN AND PROOF OF SOME INDIAN BLOOD"

1. PETITIONER SUBMITS HIS ANCESTRY COMPOSITION AS A RESULT OF GENETIC DNA TESTING CONDUCTED BY 23andME. (SEE EXHIBIT 1) (PROOF OF INDIAN BLOOD)
THESE RESULTS CLEARLY PROVIDE PROOF OF PETITIONER'S NATIVE AMERICAN ANCESTRY AND DNA.
GENETIC AND DNA TESTING HAS BEEN UTILIZED, RECOGNIZED, AND ACCEPTED IN STATE AND FEDERAL COURT AND GOVERNMENT PROCESSES TO IDENTIFY, RECOGNIZE, ARREST, PROSECUTE, AND CONVICT PERSONS THROUGHOUT THE UNITED STATES.
TO MAINTAIN CONTINUITY AND GENERALLY ACCEPTED PRACTICE, THIS COURT SHOULD RECEIVE THIS EVIDENCE AS PROOF OF INDIAN BLOOD AND LEGAL RECOGNITION AS AN INDIAN.

2. PETITIONER SUBMITS THAT HE IS $\frac{1}{32}$ CHEROKEE INDIAN AS BOTH OF HIS PATERNAL 4th GREAT-GRANDPARENTS, SAMUEL "SAM" SMITH AND ELIZA SMITH ARE FULL BLOODED CHEROKEE INDIANS. (SEE EXHIBIT 2) - (PROOF OF LINEAL CONNECTION)

3. ELIZA SMITH IS LISTED AS AN ORIGINAL ENROLLEE ON THE DAWES FINAL ROLL AS CHEROKEE BY BLOOD IN THE CHEROKEE TRIBE. (SEE EXHIBIT 3)

4. THE PROOF OF HEIRSHIP ON FILE WITH THE DEPARTMENT OF THE INTERIOR (FIVE CIVILIZED TRIBES) LISTS ELIZA SMITH AS A CITIZEN OF THE CHEROKEE NATION, ROLL NO. 27467. AS A FULL BLOOD. (SEE EXHIBIT 4)

5. DUE TO THE CITIZENSHIP STATUS AND ROLL NUMBER OF ELIZA SMITH, PETITIONER AS HER DIRECT LINEAL DECENDANT IS ELIGIBLE FOR CITIZENSHIP WITH CHEROKEE NATION.

6. ELIZA SMITH'S PROOF OF HEIRSHIP LISTS SAM SMITH, HER DECEASED HUSBAND WHO DIED BEFORE ENROLLMENT AS A FULL BLOOD CHEROKEE. (SEE EXHIBIT 4)

7. WITH PETITIONER'S PATERNAL 4th GREAT-GRANDPARENTS CLEARLY IDENTIFIED AS INDIAN, THIS PROVIDES PROOF OF INDIAN BLOOD AND RECOGNITION AS AN INDIAN. (SEE EXHIBIT 5)

"SOCIAL AND LEGAL RECOGNITION"

1. SINCE PETITIONER'S ARRIVAL IN OKLAHOMA IN AUGUST 1979, PETITIONER HAS LIVED, GREW UP ON, ATTENDED SCHOOL, WORKED, AND SOCIALIZED ON RESERVATION LAND IN INDIAN COUNTRY WITH OTHER INDIANS, TO THIS PRESENT DAY.

2. PETITIONER WAS RECOGNIZED AND COUNTED IN THE SCHOOL LUNCH PROGRAM AS NATIVE AMERICAN IN 1979.

3. PETITIONER'S MATERNAL 2nd GREAT-GRANDMOTHER MARY FRANCIS THOMPSON WAS A CHEROKEE INDIAN.

4. PETITIONER'S MATERNAL 2nd GREAT-GRANDFATHER MALLIE TAYLOR WAS A CHOCTAW INDIAN.

5. DUE TO MULTIPLE TIES TO INDIAN HERITAGE, PETITIONER AND HIS FAMILY HAD KNOWLEDGE OF AND CLAIMED INDIAN BLOOD AND ANCESTRY PRIOR TO AND AFTER COMING TO INDIAN COUNTRY IN OKLAHOMA. ALL OF WHOM WILL TESTIFY TO THAT.

6. PETITIONER'S IN LAWS ARE ENROLLED MEMBERS OF MUSCOGEE CREEK NATION AND CHEROKEE NATION WHO HAVE SOCIALIZED AND IDENTIFIED WITH PETITIONER AS AN INDIAN

7. PETITIONER HAS ATTENDED RELIGIOUS CEREMONIES FUNERALS FOR AND WITH INDIANS.

PETITIONER EVIDENCE THAT THE ALLEGED CRIME OCCURRED ON THE CREEK RESERVATION AND IN INDIAN COUNTRY.

1. THE ALLEGED CRIME OCCURRED AT NORMANDY APARTMENTS, 6221 E. 38th STREET, TULSA, OKLAHOMA 74135. (SEE EXHIBIT 6)
2. PETITIONER SUBMITS A LETTER WITH EXHIBITS FROM THE MUSCOGEE CREEK NATION THAT STATES THE DESCRIBED PROPERTY IS WITHIN THE MUSCOGEE (CREEK) NATION (MCN) BOUNDARIES. (SEE EXHIBIT 6)

PETITIONER EVIDENCE THE ALLEGED CRIME INVOLVED AN INDIAN DEFENDANT AND OCCURRED IN INDIAN COUNTRY, AND THE ALLEGED CRIME IS SUBJECT TO THE MAJOR CRIMES ACT AND JURISDICTION IS EXCLUSIVELY FEDERAL.

1. PETITIONER HAS INDIAN BLOOD
2. PETITIONER HAS RECOGNITION AS INDIAN AND LIVED ALMOST ENTIRE LIFE ON RESERVATION.
3. THE ALLEGED CRIME IS ENUMERATED UNDER THE MAJOR CRIMES ACT.
4. THE ALLEGED CRIME OCCURRED ON THE CREEK RESERVATION IN INDIAN COUNTRY.

EVERYDAY PETITIONER SITS IN AN OKLAHOMA STATE PRISON IS ONE MORE DAY HE IS UNLAWFULLY CONFINED BECAUSE THE STATE OF OKLAHOMA HAD NO POWER TO PROSECUTE AND CONVICT HIM.

WHEREFORE, PETITIONER RESPECTFULLY ASKS THIS COURT TO VACATE HIS CONVICTION AND REMAND HIS CASE TO THE DISTRICT COURT OF TULSA COUNTY WITH INSTRUCTIONS TO DISMISS ALL STATE CHARGES AGAINST HIM.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THE 9th DAY OF SEPT 2020, A TRUE AND CORRECT COPY OF THE FOREGOING WAS CAUSED TO BE MAILED, VIA U.S. POSTAL SERVICE, POSTAGE PREPAID, TO BE SERVED UPON THE ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA BY CLERK OF THE COURT OF CRIMINAL APPEALS, AT THE OKLAHOMA COURT OF CRIMINAL APPEALS.

JEMARVE MONTELL CANNON
#201615
HUNTI
P.O. BOX 97
MCALESTER, OKLAHOMA 74502

VERIFICATION

STATE OF OKLAHOMA)
) ss.
COUNTY OF PITTSBURG)

I, Jemaine Monteil Cannon, of lawful age, being first duly sworn upon my oath state:

1. That I am Jemaine Monteil Cannon in this Petition;

2. That I have read the Petition and am familiar with its contents; and

3. That the statements and facts contained in the Petition are true and correct to the best of my knowledge and belief.

Jemaine Monteil Cannon

Subscribed and sworn on the 9th day of SEPTEMBER, 2020, at the Oklahoma State Penitentiary in McAlester, Oklahoma.

Wherefore, Jemaine Monteil Cannon prays for the requested Court Order he may be entitled to.

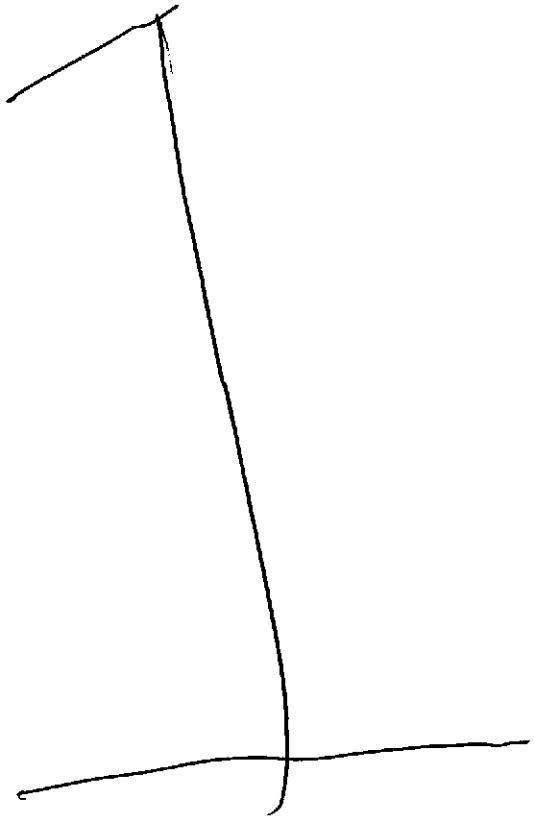
Jemaine Monteil Cannon, #201615
Oklahoma State Penitentiary: H Unit, SW
P.O. Box 97
McAlester, OK 74502

NOTICE OF HEARING

This Petition has been scheduled for hearing before the Honorable _____

in courtroom _____ on the _____ day of _____ 2020.

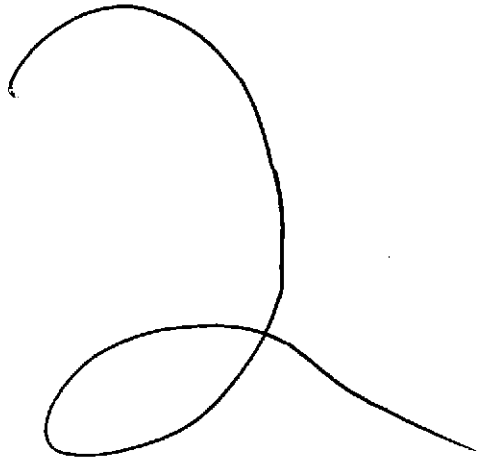
EXHIBIT



Ancestry Composition	
Sub-Saharan African	**75.2%**
Nigerian	27.7%
Ghanaian, Liberian & Sierra Leonean	10.8%
Senegambian & Guinean	9.3%
Congolese	6.3%
Southern East African	1.4%
African Hunter-Gatherer	0.2%
Broadly West African	13.6%
Broadly Congolese & Southern East African	1.5%
Broadly Northern East African	Less than 0.1%
Broadly Sub-Saharan African	4.3%
European	**22.9%**
British & Irish	10.4%
Scandinavian	0.9%
Spanish & Portuguese	0.3%
Broadly Northwestern European	7.3%
Broadly Southern European	1.5%
Broadly European	2.5%
East Asian & Native American	**1.2%**
Native American	0.5%
Indonesian, Thai, Khmer & Myanma	0.4%
Broadly Chinese & Southeast Asian	Less than 0.1%
Broadly East Asian & Native American	0.2%
Unassigned	**0.7%**
Maternal Haplogroup	L1c1'2'4'6
Neanderthal Ancestry	Fewer Neanderthal variants than 99% of customers
Paternal Haplogroup	R-L46
Your DNA Family	1073 DNA Relatives

J C's Reports Summary, printed on 2019-02-21 UTC

EXHIBIT

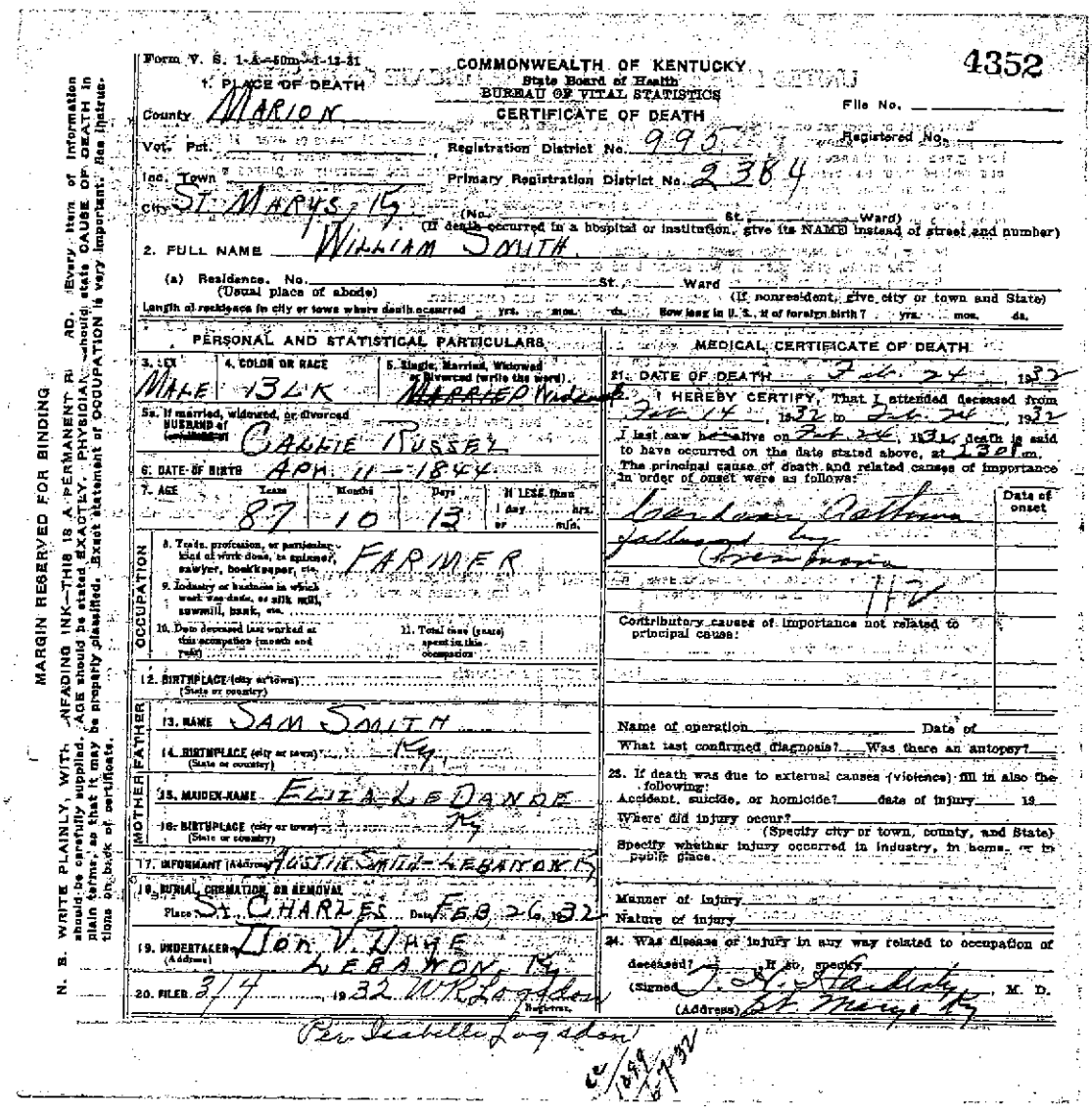


COMMONWEALTH OF KENTUCKY

REGISTRAR OF VITAL STATISTICS

5540318

CERTIFIED COPY



Form V. S. 1-A-50m-1-12-31 — COMMONWEALTH OF KENTUCKY — 4352

State Board of Health
BUREAU OF VITAL STATISTICS
CERTIFICATE OF DEATH

File No. _____

1. PLACE OF DEATH
County MARION — Reg. No. 995 — Registered No. _____
Vol. Pct. _____ Registration District No. _____
Inc. Town _____ Primary Registration District No. 2364
City ST. MARYS, KY. (No. _____ St. _____ Ward) (If death occurred in a hospital or institution, give its NAME instead of street and number)

2. FULL NAME WILLIAM SMITH

(a) Residence. No. _____ St. _____ Ward _____ (If nonresident, give city or town and State)
(Usual place of abode)
Length of residence in city or town where death occurred _____ yrs. _____ mos. _____ ds. How long in U. S., if of foreign birth? _____ yrs. _____ mos. _____ ds.

PERSONAL AND STATISTICAL PARTICULARS

3. SEX: MALE
4. COLOR OR RACE: WHITE
5. Single, Married, Widowed or Divorced (write the word): MARRIED Widowed
5a. If married, widowed, or divorced — HUSBAND of (or WIFE of): CARRIE RUSSELL
6. DATE OF BIRTH: APR. 11 — 1844
7. AGE: Years 87 Months 10 Days 13 If LESS than 1 day: hrs. or min.

OCCUPATION
8. Trade, profession, or particular kind of work done, as spinner, sawyer, bookkeeper, etc.: FARMER
9. Industry or business in which work was done, as silk mill, sawmill, bank, etc.
10. Date deceased last worked at this occupation (month and year)
11. Total time (years) spent in this occupation

12. BIRTHPLACE (City or town) (State or country)

FATHER
13. NAME: SAM SMITH
14. BIRTHPLACE (City or town) (State or country): KY.

MOTHER
15. MAIDEN NAME: ELIZABETH DAVIS
16. BIRTHPLACE (City or town) (State or country): KY.

17. INFORMANT (Address): JUSTICE SMITH — LEBANON, KY.

18. BURIAL, CREMATION, OR REMOVAL
Place: ST. CHARLES Date: FEB 26, 1932

19. UNDERTAKER (Address): JOHN V. WAGE — LEBANON, KY.

20. FILED 2/4 1932 W. R. Logsdon Registrar
Per Isabelle Logsdon

MEDICAL CERTIFICATE OF DEATH

21. DATE OF DEATH: FEB. 24 1932
I HEREBY CERTIFY, That I attended deceased from FEB 14 1932 to FEB. 24 1932
I last saw he alive on FEB. 24 1932, death is said to have occurred on the date stated above, at 1:30 p.m.
The principal cause of death and related causes of importance in order of onset were as follows:

	Date of onset
Contributory causes of importance not related to principal cause:	

Name of operation _____ Date of _____
What test confirmed diagnosis? _____ Was there an autopsy? _____

23. If death was due to external causes (violence) fill in also the following:
Accident, suicide, or homicide? _____ date of injury _____ 19__
Where did injury occur? _____ (Specify city or town, county, and State)
Specify whether injury occurred in industry, in home, or in public place.
Manner of injury _____
Nature of injury _____

24. Was disease or injury in any way related to occupation of deceased? _____ If so, specify _____

(Signed) J. H. Stanley M. D.
(Address) St. Marys Ky

N. B. WRITE PLAINLY, WITH INDELIBLE INK—THIS IS A PERMANENT RECORD. Every item of information should be carefully supplied. AGE should be stated EXACTLY. PHYSICIAN should state CAUSE OF DEATH in plain terms, so that it may be properly classified. Exact statement of OCCUPATION is very important. See instructions on back of certificate.

MARGIN RESERVED FOR BINDING

This is to certify that this is a true and correct copy of the certificate of birth, death, marriage or divorce of the person therein named, and that the original certificate is registered at the Kentucky Office of Vital Statistics under the file number shown.

DATE ISSUED MAR 1 1 2019

Christina S. Stewart
STATE REGISTRAR

COMMONWEALTH OF KENTUCKY — UNITED WE STAND DIVIDED WE FALL

COMMONWEALTH OF KENTUCKY

REGISTRAR OF VITAL STATISTICS

CERTIFIED COPY

5582081

25571

Form V. S. 1-A—50m—11-1-29

COMMONWEALTH OF KENTUCKY
State Board of Health
BUREAU OF VITAL STATISTICS
CERTIFICATE OF DEATH

File No. 3515

Registered No.

1 PLACE OF DEATH

County Marion

Vot. Pct. # 17

Registration District No. 995

Inc. Town St. Mary Ky

Primary Registration District No. 214

City

(No. St., Ward)
(If death occurred in a hospital or institution, give its NAME instead of street and number)

2 FULL NAME Mary Catherine Smith Clements

(a) Residence. No. St., Ward
(Usual place of abode) (If nonresident, give city or town and State)

Length of residence in city or town where death occurred yrs. mos. ds. How long in U. S., if of foreign birth? yrs. mos. ds.

PERSONAL AND STATISTICAL PARTICULARS

3. SEX: Female
4. COLOR OR RACE: Black
5. Single, Married, Widowed or Divorced (write the word): married

5a. If married, widowed, or divorced HUSBAND of (or) WIFE of: Bernard Clements

6. DATE OF BIRTH (month, day, and year): 12-27-1875

7. AGE: Years 62 | Months 9 | Days 28 | If LESS than 1 day hrs. or min.

OCCUPATION

8. Trade, profession, or particular kind of work done, as spinner, sawyer, bookkeeper, etc.: Housewife

9. Industry or business in which work was done, as silk mill, saw mill, bank, etc.: Ky.

10. Date deceased last worked at this occupation (month and year)

11. Total time (years) spent in this occupation

12. BIRTHPLACE (city or town) (State or country): Kentucky

FATHER

13. NAME: Wm Smith

14. BIRTHPLACE (city or town) (State or country): Ky.

MOTHER

15. MAIDEN NAME: Callie Russell

16. BIRTHPLACE (city or town) (State or country): Ky

17. INFORMANT (Address): Benedict Clements Ky

18. BURIAL, CREMATION, OR REMOVAL
Place St Charles Cemetery Date 10-27-1938

19. UNDERTAKER (Address): Dant T Drye Company Lebanon Ky

20. FILED 10-26, 1938 C O Barr Registrar.

MEDICAL CERTIFICATE OF DEATH

21. DATE OF DEATH (month, day, and year) 10-25, 1938

22. I HEREBY CERTIFY, That I attended deceased from 10-18, 1938 to 10-25, 1938

I last saw her alive on 10-25, 1938, death is said to have occurred on the date stated above, at 3:10 P. m.

The principal cause of death and related causes of importance in order of onset were as follows:

	Date of onset
Cerebral Hemorrhage	
Hypertension	

Contributory causes of importance not related to principal cause:

Name of operation Date of

What test confirmed diagnosis? Was there an autopsy? No

23. If death was due to external causes (violence) fill in also the following:
Accident, suicide, or homicide? Date of injury 19

Where did injury occur?
(Specify city or town, county, and State)

Specify whether injury occurred in industry, in home, or in public place.

Manner of injury

Nature of injury

24. Was disease or injury in any way related to occupation of deceased? No If so, specify

(Signed) S. Cooper Clarkson M. D.

(Address) Lebanon, Ky.

MARGIN RESERVED FOR BINDING

N. B.—WRITE PLAINLY, WITH UNFADING INK—THIS IS A PERMANENT RECORD. Every item of information should be carefully supplied. AGE should be stated EXACTLY. PHYSICIAN should state CAUSE OF DEATH in plain terms, so that it will be properly classified. Exact statement of OCCUPATION is very important. See instructions on back of certificate.

This is to certify that this is a true and correct copy of the certificate of birth, death, marriage or divorce of the person therein named, and that the original certificate is registered at the Kentucky Office of Vital Statistics under the file number shown.

DATE ISSUED

MAR 2 8 2019

Christina S. Stewart
State Registrar

COMMONWEALTH OF KENTUCKY — UNITED WE STAND — DIVIDED WE FALL

LF 1663

CF

0392205 B

STATE OF MICHIGAN
DEPARTMENT OF PUBLIC HEALTH

D260 328
STATE FILE NUMBER

CERTIFICATE OF DEATH

DECEDENT

1. DECEDENT NAME (First, Middle, Last): Charles B. Clements
2. SEX: Male
3. DATE OF DEATH (Mo., Day, Yr.): June 26, 1985
4. RACE (e.g. White, Black, American Indian, etc.) (Specify): Black
5a. AGE – Last Birthday (Yrs.): 80
5b. UNDER 1 YEAR – MOS / DAYS:
5c. UNDER 1 DAY – HOURS / MINS.:
6. DATE OF BIRTH (Mo., Day, Yr.): Dec. 18, 1904
7a. COUNTY OF DEATH: Genesee
7b. LOCATION OF DEATH (Check one and specify): [X] INSIDE CITY LIMITS OF [ ] INSIDE VILLAGE LIMITS OF [ ] TWP OF: Flint
7c. HOSPITAL OR OTHER INSTITUTION – Name (If not in either, give street and number): Hurley Medical Center
8. STATE OF BIRTH (If not in U.S.A. name country): Kentucky
9. CITIZEN OF WHAT COUNTRY: U.S.A.
10. MARRIED, NEVER MARRIED, WIDOWED, DIVORCED (Specify): Widowed
11. SURVIVING SPOUSE (If wife, give maiden name):
12. WAS DECEDENT EVER IN U.S. ARMED FORCES? (Specify Yes or No): No
13. SOCIAL SECURITY NUMBER: 405-26-9881
14a. USUAL OCCUPATION (Give kind of work done during most of working life, even if retired): Production
14b. KIND OF BUSINESS OR INDUSTRY: Automobile Industry
15a. CURRENT RESIDENCE – STATE: Michigan
15b. COUNTY: Genesee
15c. LOCALITY (Check one and specify): [X] INSIDE CITY LIMITS OF [ ] INSIDE VILLAGE LIMITS OF [ ] TWP. OF: Flint
15d. STREET AND NUMBER: 6721 Sally Court

IF DEATH OCCURRED IN INSTITUTION, SEE MANUAL REGARDING COMPLETION OF RESIDENCE ITEMS

PARENTS

16. FATHER – NAME (First, Middle, Last): Bernard Clements
17. MOTHER – MAIDEN NAME (First, Middle, Last): Kate Smith

INFORMANT

18a. (Signature): Louise Purvis
18b. MAILING ADDRESS (Street or R.F.D. No., City or Town, State, Zip): 6721 Sally Court, Flint, Michigan 48505

CAUSE OF DEATH

CONDITIONS IF ANY WHICH GAVE RISE TO IMMEDIATE CAUSE STATING THE UNDERLYING CAUSE LAST.

19. IMMEDIATE CAUSE (ENTER ONLY ONE CAUSE PER LINE FOR (a), (b), AND (c).)
PART I
(a) Pulmonary Edema and Renal Failure — Interval between onset and death: 36 hours or less
DUE TO, OR AS A CONSEQUENCE OF:
(b) Carcinoma of the prostate & metastasis — Interval between onset and death: 16 months
DUE TO, OR AS A CONSEQUENCE OF:
(c) — Interval between onset and death:

PART II OTHER SIGNIFICANT CONDITIONS – Conditions contributing to death but not related to cause given in PART I

20. AUTOPSY (Specify Yes or No): No
21. WAS CASE REFERRED TO MEDICAL EXAMINER? (Specify Yes or No): No

CERTIFIER

22a. PLACE OF DEATH (Home, Nursing Home, Hospital, Ambulance) (Specify): Hospital (Hurley)
22b. IF HOSP. OR INST., Indicate DOA, OP/Emer. Rm., Inpatient (Specify): Inpatient

CERTIFYING PHYSICIAN

23a. To the best of my knowledge, death occurred at the time, date and place and due to the cause(s) stated.
(Signature and Title): William H Moore
23b. DATE SIGNED (Mo., Day, Yr.): 6-27-85
23c. HOUR OF DEATH: 7:50 A.M.
23d. NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER (Type or Print): P. E. Solik 1201 Flushing Rd., Flint, MI

MEDICAL EXAMINER

24a. (Check one) [ ] This case reviewed and determined not to be a medical examiner's case. [ ] On the basis of examination and/or investigation, in my opinion, death occurred at the time, date and place and due to the cause(s) stated.
(Signature and Title):
24b. DATE SIGNED (Mo., Day, Yr.):
24c. HOUR OF DEATH: M
24d. PRONOUNCED DEAD (Mo., Day, Yr.) DN:
24e. PRONOUNCED DEAD (Hour) AT: M

25. NAME AND ADDRESS OF CERTIFIER (PHYSICIAN OR MEDICAL EXAMINER) (Type or Print): William H. Moore M.D., 1201 Flushing Rd., Flint, MI 48503

26a. ACC., SUICIDE, HOM., NATURAL OR PENDING INVEST. (Specify): Natural
26b. DATE OF INJURY (Mo., Day, Yr.):
26c. HOUR OF INJURY:
26d. DESCRIBE HOW INJURY OCCURRED:
26e. INJURY AT WORK (Specify Yes or No):
26f. PLACE OF INJURY – At home, farm, street, factory, office building, etc. (Specify):
26g. LOCATION – Street or R.F.D. No., City, Village, or Township, State:

DISPOSITION

27a. BURIAL, CREMATION, REMOVAL, OTHER (Specify): Burial
27b. CEMETERY OR CREMATORY – NAME: Lovedale Memorial Cemetery
27c. LOCATION – City, Village, or Township, State: Burton, Michigan
27d. DATE (Mo., Day, Yr.): July 1, 1985
28a. NAME OF FACILITY: Greene Home for Funerals
28b. ADDRESS OF FACILITY: 2210 Detroit St., Flint, MI 48503
28c. FUNERAL SERVICE LICENSEE (Signature): Chas. A. Greene
29a. REGISTRAR (Signature): John H. Trecka
29b. DATE RECEIVED BY REGISTRAR (Mo., Day, Yr.): June 28, 1985

B-36b (4/78)

VOID WITHOUT HEAT SENSITIVE INK UNDER COUNTY CLERK'S NAME

THIS PAGE OF THIS DOCUMENT HAS A MULTICOLORED BACKGROUND ON WHITE PAPER

LF 1853

CF

STATE OF MICHIGAN
DEPARTMENT OF COMMUNITY HEALTH

CERTIFICATE OF DEATH

STATE FILE NUMBER
2052890

TYPE (PRINT IN PERMANENT BLACK INK)

NAME OF DECEDENT FOR USE BY PHYSICIAN OR INSTITUTION

DECEDENT

1 DECEDENT'S NAME (First, Middle, Last)			2 SEX	3 DATE OF DEATH (Month, Day, Year)
LOUISE	MARIE	PURVIS	FEMALE	MAY 21, 2002

4a AGE - Last Birthday (Years)	4b UNDER 1 YEAR: MONTHS / DAYS	4c UNDER 1 DAY: HOURS / MINUTES	5 DATE OF BIRTH (Month, Day, Year)	6 COUNTY OF DEATH
73			FEBRUARY 1, 1929	GENESEE

7a LOCATION OF DEATH (Enter place officially pronounced dead in 7a, 7b, 7c) HOSPITAL OR OTHER INSTITUTION - Name (If not in either, give street and number)	7b IF HOSP OR INST Inpatient Op /Emer Room DOA (Specify)	7c CITY, VILLAGE, OR TOWNSHIP OF DEATH
STONEBRIDGE HOSPICE CENTER	INPATIENT	FLINT TWP.

8 SOCIAL SECURITY NUMBER	9a USUAL OCCUPATION (Give kind of work done during most of working life. Do not use retired)	9b KIND OF BUSINESS OR INDUSTRY
379-30-0127	LABORER	AUTOMOTIVE

10a CURRENT RESIDENCE STATE	10b COUNTY	10c LOCALITY (Check one box and specify)	10d STREET AND NUMBER
MICHIGAN	GENESEE	[X] INSIDE CITY OR VILLAGE OF FLINT; [ ] TWP OF	817 E. PIERSON RD.

10e ZIP CODE	11 BIRTHPLACE (City and State or Foreign Country)	12 MARITAL STATUS Married, Never Married, Widowed, Divorced (Specify)	13 SURVIVING SPOUSE (If wife, give name before first married)	14 WAS DECEDENT EVER IN U.S. ARMED FORCES? (Specify Yes or No)
48505	LEBANON, KY.	MARRIED	MERLAND PURVIS	NO

15 ANCESTRY - Mexican, Puerto Rican, Cuban, Central or South American, Chicano, other Hispanic, Afro-American, Arab, English, French, Finnish, etc (Specify below)	16 RACE - American Indian, Black, White, etc If Asian, give nationality i.e. Chinese, Filipino, Asian Indian, etc (Specify below)	17 DECEDENT'S EDUCATION (Specify only highest grade completed)	
		Elementary/Secondary (0-12)	College (1-4 or 5+)
AFRICAN-AMERICAN	BLACK	12	

PARENTS

18 FATHER'S NAME (First, Middle, Last)	19 MOTHER'S NAME (First, Middle, Surname before first married)
CHARLES BERNARD CLEMENTS	JANIE MARIE PORTER

INFORMANT

20a INFORMANT'S NAME (Type/Print)	20b MAILING ADDRESS (Street and Number or Rural Route Number, City or Village, State, ZIP Code)
MERLAND PURVIS	817 E. PIERSON RD. FLINT, MICHIGAN 48505

DISPOSITION

21 METHOD OF DISPOSITION - Burial, Cremation, Removal, Donation, Other (Specify)	22a PLACE OF DISPOSITION (Name of Cemetery, Crematory or other place)	22b LOCATION - City or Village, State
BURIAL	SUNSET HILLS CEMETERY	FLINT, MICHIGAN

23 SIGNATURE OF FUNERAL SERVICE LICENSEE	24 LICENSE NUMBER (of licensee)	25 NAME AND ADDRESS OF FACILITY
Lawrence E. Moon	005582	LAWRENCE E. MOON FUNERAL HOME 906 W. FLINT PARK BLVD., FLINT, MI. 48505

CAUSE OF DEATH

PART I Enter the diseases, injuries, or complications that caused the death. Do NOT enter the mode of dying such as cardiac or respiratory arrest, shock or heart failure. List only one cause on each line.

		Approximate Interval Between Onset and Death
IMMEDIATE CAUSE (Final disease or condition → resulting in death)	a LUNG CANCER	MONTHS
	DUE TO (OR AS A CONSEQUENCE OF)	
Sequentially list conditions IF ANY, leading to immediate cause. Enter UNDERLYING CAUSE (Disease or injury that initiated events resulting in death) LAST	b DIABETES MELLITUS	YEARS
	DUE TO (OR AS A CONSEQUENCE OF)	
	c RENAL FAILURE	YEARS
	DUE TO (OR AS A CONSEQUENCE OF)	
	d	

PART II Other significant conditions contributing to death but not resulting in the underlying cause given in Part I

27a WAS AN AUTOPSY PERFORMED? (Yes or No)	27b WERE AUTOPSY FINDINGS AVAILABLE PRIOR TO COMPLETION OF CAUSE OF DEATH? (Yes or No)
NO	

CERTIFIER

28 ACTUAL PLACE OF DEATH (Home, Nursing Home, Hospital, Ambulance) (Specify)	29 WAS CASE REFERRED TO MEDICAL EXAMINER? (Specify Yes or No)
NURSING HOME	NO

CERTIFYING PHYSICIAN

30a To the best of my knowledge, death occurred at the time, date and place and due to the cause(s) stated (Signature and Title) Paul A. Musson MD

30b DATE SIGNED (Mo Day Yr)	30c TIME OF DEATH
05 22 02	11:50 P M

30d NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER (Type or Print)

MEDICAL EXAMINER

31a (Check one only) [ ] The case reviewed and determined not to be a medical examiner's case. [ ] On the basis of examination and of investigation, in my opinion death occurred at the time, date and place and due to the cause(s) and manner stated (Signature and Title)

31b DATE SIGNED (Mo Day Yr)	31c CASE NUMBER

31d PRONOUNCED DEAD (Mo Day Yr)	31e TIME OF DEATH
ON	M

MEDICAL EXAMINER

32a NAME AND ADDRESS OF PERSON WHO COMPLETED CAUSE OF DEATH (ITEM 26) (Type or Print)	32b LICENSE NUMBER
Paul A. Musson, M.D. 6-3500 Fluid Dr. Ste. 300 Flint MI 48504	045140

33a ACC, SUICIDE, HOM., NATURAL OR PENDING INVEST (Specify)	33b DATE OF INJURY (Mo Day Yr)	33c TIME OF INJURY M	33d DESCRIBE HOW INJURY OCCURRED

33e INJURY AT WORK (Specify Yes or No)	33f PLACE OF INJURY - At home, farm, street, factory, office building, etc (Specify)	33g LOCATION Street or R.F.D. No. City, Village or Twp. State

34a REGISTRAR'S SIGNATURE Richard J. Chen

34b DATE FILED (Month, Day, Year) MAY 29, 2002

DCH - 0483 10/99 (Formerly B-36)

VOID WITHOUT HEAT SENSITIVE INK UNDER COUNTY CLERK'S NAME

COUNTY OF WAYNE, MICHIGAN

7626
CF 10038

STATE OF MICHIGAN
DEPARTMENT OF COMMUNITY HEALTH
CERTIFICATE OF DEATH

STATE FILE NUMBER
275866

DECEDENT

1. DECEDENT'S NAME (First, Middle, Last)	2. DATE OF BIRTH	3. SEX	4. DATE OF DEATH
Herbert Eugene Clements	October 23, 1949	Male	December 08, 2017

5. NAME AT BIRTH OR OTHER NAME USED FOR PERSONAL BUSINESS	6a. AGE- Last Birthday (Years)	6b. UNDER 1 YEAR MONTHS	DAYS	6c. UNDER 1 DAY HOURS	MINUTES
	68				

7a. LOCATION OF DEATH	7b. CITY, VILLAGE OR TOWNSHIP OF DEATH	7c. COUNTY OF DEATH
Henry Ford Hospital	Detroit	Wayne

8a. CURRENT RESIDENCE - STATE	8b. COUNTY	8c. LOCALITY	8d. STREET AND NUMBER
Michigan	Oakland	White Lake	8090 Mountain View

8e. ZIP CODE	9. BIRTH PLACE	10. SOCIAL SECURITY NUMBER	11. DECEDENT'S EDUCATION
48386	Flint, Michigan	379-50-3351	12th grade

12. RACE	13a. ANCESTRY	13b. HISPANIC ORIGIN	14. EVER IN THE U.S. ARMED FORCES?
Black	African-American	No	Yes

INFORMANT PARENTS

15. USUAL OCCUPATION	16. KIND OF BUSINESS OR INDUSTRY	17. MARITAL STATUS	18. NAME OF SURVIVING SPOUSE (If wife, give name before first marriage)
Laborer	Automotive	Never married	

19. FATHER'S NAME (First, Middle, Last)	20. MOTHER'S NAME BEFORE FIRST MARRIED (First, Middle, Last)
Herbert Ross Hart	Louise Marie Clements

21a. INFORMANT'S NAME	21b. RELATIONSHIP TO DECEDENT	21c. MAILING ADDRESS
Sheila Hart-Nash	Sister	8090 Mountain View, White Lake Township, Michigan 48386

DISPOSITION

22. METHOD OF DISPOSITION	23a. PLACE OF DISPOSITION	23b. LOCATION (City or Village, State)
Burial	Great Lakes National Cemetery	Holly, Michigan

24. SIGNATURE OF MORTUARY SCIENCE LICENSEE	25. LICENSE NUMBER	26. NAME AND ADDRESS OF FUNERAL FACILITY
Alonzo L. Betts	4501006060	Lawrence E Moon Funeral Home, Inc, 906 W Flint Park Blvd, Flint, Michigan 48505

CERTIFICATION

27a. CERTIFIER
☒ Certifying Physician - To the best of my knowledge, death occurred due to the cause(s) and manner stated.
☐ Medical Examiner - On the basis of examination, and/or investigation, in my opinion, death occurred at the time, date, and place, and due to the cause(s) and manner stated.

John Finn, MD

28a. ACTUAL OR PRESUMED TIME OF DEATH	28b. PRONOUNCED DEAD ON	28c. TIME PRONOUNCED DEAD
02:00 PM	December 08, 2017	02:00 PM

27b. DATE SIGNED	27c. LICENSE NUMBER	29. MEDICAL EXAMINER CONTACTED	30. PLACE OF DEATH	31. IF HOSPITAL
December 08, 2017	045058	No	Hospital	Inpatient

32. MEDICAL EXAMINER'S CASE NUMBER	33. NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER

34. NAME AND ADDRESS OF CERTIFYING PHYSICIAN
John Finn, MD, 2799 West Grand Blvd., Suite H122, Detroit, Michigan 48202

35a. REGISTRAR'S SIGNATURE: Cathy M. Garrett

35b. DATE FILED: December 15, 2017

CAUSE OF DEATH

36. PART I. ENTER the chain of events—diseases, injuries, or complications—that directly caused the death. DO NOT enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. Enter only one cause on a line.

		Approximate Interval Between Onset and Death
IMMEDIATE CAUSE (Final disease or condition resulting in death)	a. RUL Pneumonia and Lung Mass	1 week
DUE TO (OR AS A CONSEQUENCE OF)	b. Suspected Bronchogenic Cancer (no tissue dx)	1 week
Sequentially list conditions, if any, leading to the cause on line a. Enter the UNDERLYING CAUSE (disease or injury that initiated the events resulting in death) LAST	c.	
	d.	

PART II. OTHER SIGNIFICANT CONDITIONS contributing to death but not resulting in the underlying cause given in Part I
Debility related to stroke, MI in March

37. DID TOBACCO USE CONTRIBUTE TO DEATH?	38. IF FEMALE
☐ Yes ☒ Probably ☐ No ☐ Unknown	☐ Not pregnant within past year ☐ Pregnant at time of death ☐ Not pregnant, but pregnant within 42 days of death ☐ Not pregnant, but pregnant 42 days to 1 year before death ☐ Unknown if pregnant within the past year

39. MANNER OF DEATH	40a. WAS AN AUTOPSY PERFORMED	40b. WERE AUTOPSY FINDINGS AVAILABLE PRIOR TO COMPLETION OF CAUSE OF DEATH?
Natural	No	Not Applicable

MEDICAL EXAMINER

41a. DATE OF INJURY	41b. TIME OF INJURY	41c. DESCRIBE HOW INJURY OCCURRED

41d. INJURY AT WORK	41e. PLACE OF INJURY	41f. IF TRANSPORTATION INJURY	41g. LOCATION

THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT REPRODUCTION OF THE ORIGINAL RECORD AS RECORDED WITH WAYNE COUNTY. DO NOT ACCEPT UNLESS PREPARED ON APPROVED SECURITY PAPER DISPLAYING THE OFFICIAL SEAL AND SIGNATURE OF THE ISSUING AGENCY. NOT VALID IF PHOTOCOPIED. LAMINATION MAY VOID CERTIFICATE.

294771

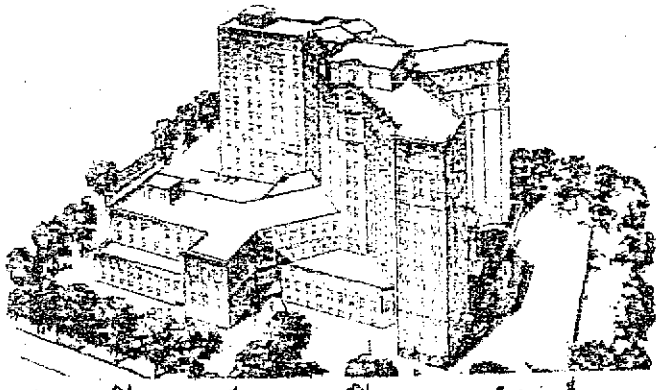
MAR 18 2019
Dated

Cathy M. Garrett
Cathy M. Garrett
WAYNE COUNTY CLERK

Death Records

WARNING: IT IS ILLEGAL TO DUPLICATE THIS DOCUMENT BY PHOTOSTAT OR PHOTOGRAPH

Exhibit 3



Hurley Hospital

FLINT MICHIGAN

This Certifies that Jermaine Montell Lawson

was born to Ruth Lou Lawson in this Hospital

at 7:31 A. m. on Saturday the 13th day of November 1971

In Witness Whereof the said Hospital has caused this Certificate to be signed by its duly authorized officer and its Official Seal to be hereunto affixed.

Milton Roche

DIRECTOR

ATTENDING PHYSICIAN

HOSPITAL SEAL

Baby's left footprint

Mother's left thumbprint

FAMILY HISTORY

Baby's right footprint

Mother's right thumbprint

Father's Full Name Herbert Eugene Clements

Birthplace Michigan Date 10-23-49

Mother's Maiden Name Betty Lou Harriford

Birthplace Michigan Date 9-20-50

Sex of Child Boy Name Cannon, Jemaine Martell

Date of Birth November 13, 1991 Hour 7 31 AM

Weight at Birth 7 pounds 2 ounces, Length 20 inches

Baby's Home Address 1059 E. Philadelphia

Important

This is a memento document, NOT an official birth certificate. As required by law, the official certificate of birth has been filed with the registrar of vital statistics at FLINT, MICHIGAN *and with the Division of Vital Statistics of the State Department of Health. Copies of the original may be obtained through either office.*

EXHIBIT

3

Oklahoma Historical Society
collect, preserve, share

Contact Us | Press Room

Search

Home | Research Center | Records | Territorial | Dawes Search Results

Search the Dawes Final Rolls

Your search returned 21 results.

Name	Age	Sex	Blood	Roll No.	Tribe	Card No.
Elizabeth G. Smith	76	F	1/4	4381	Cherokee by Blood	Search card 1642
Note: Date of death: in Apr. 1904						
Elizabeth Smith	14	F	1/2	4824	Cherokee by Blood	Search card 1819
Note: Date of death: July 31, 1904						
Elizabeth Smith	12	F	5/16	26384	Cherokee by Blood	Search card 1941
Eliza Smith	77	F	Full	27467	Cherokee by Blood	Search card 2556
Elizabeth J. Smith	27	F	5/16	7324	Cherokee by Blood	Search card 2922
Note: See Cherokee by Blood Minor Card #885						
Eliza A. Smith	9	F	5/32	7326	Cherokee by Blood	Search card 2922
Note: Deceased						
Eliza V. Smith	7	F	1/8	7395	Cherokee by Blood	Search card 2965
Elizabeth Smith	15	F	1/8	10210	Cherokee by Blood	Search card 4238
Elizabeth R. Smith	10	F	1/128	11237	Cherokee by Blood	Search card 4689
Eliza Smith	37	F	1/8	11598	Cherokee by Blood	Search card 4856
Note: See Cherokee by Blood Minor Card #649						
Eliza Smith	53	F	3/4	26963	Cherokee by Blood	Search card 628
Note: Duplicate enrollment on Cherokee Card #D1696 (cancelled)						
Eliza Smith	22	F	5/16	17034	Cherokee by Blood	Search card 7156
Elizabeth Smith	63	F	1/4	256	Cherokee by Blood	Search card 78
Eliza Smith	6	F	1/32	21693	Cherokee by Blood	Search card 9582
Elizabeth Smith	24	F		3000	Chickasaw Freedmen	Search card 702
Elizabeth Smith	23	F	1/32	329	Choctaw by Blood	Search card 171
Eliza A. Smith	58	F	1/16	13260	Choctaw by Blood	Search card 4809
Elizabeth J. Smith	65	F	IW	580	Choctaw by Intermarriage	Search card 4776
Eliza Ann Smith	25	F		5363	Choctaw Freedmen	Search card 1470
Eliza Ann Smith	13	F		1846	Choctaw Freedmen	Search card 860
Elizabeth Smith	1	F		282	Creek Freedmen (Minors)	Search card 421

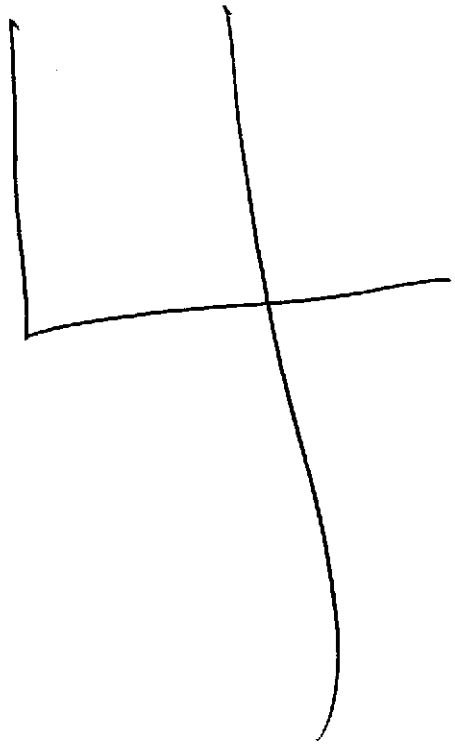
(Page 1 of 1)

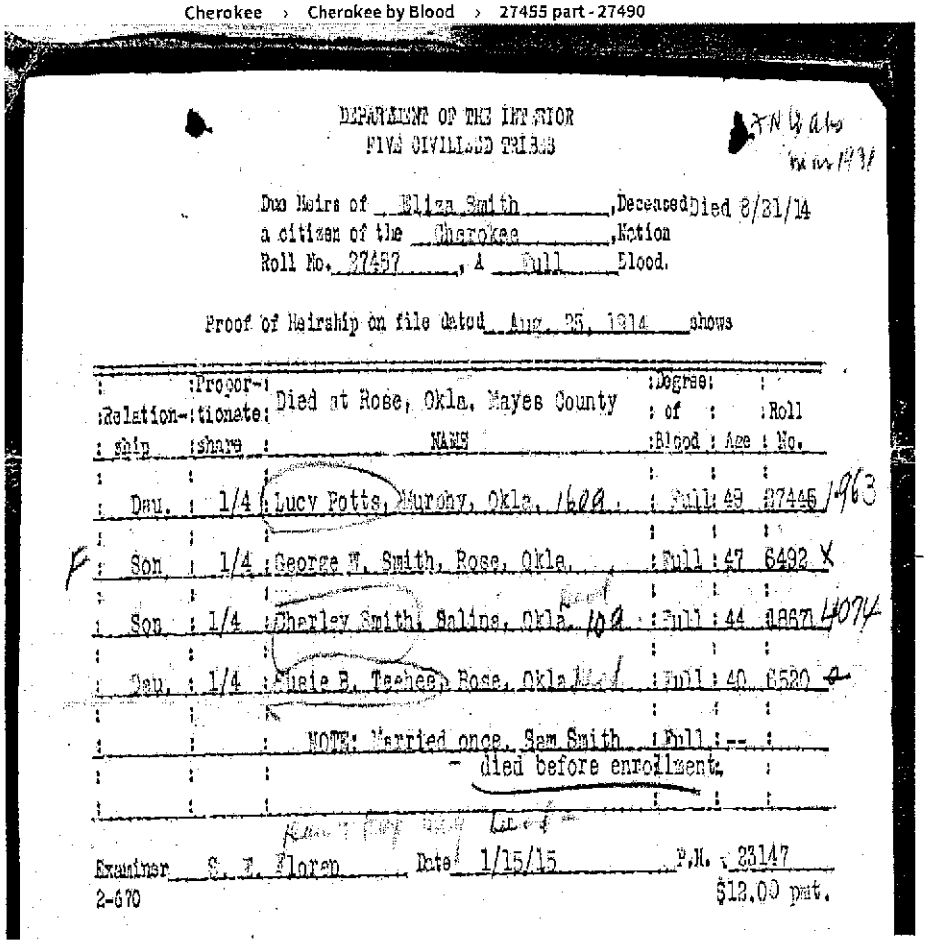
Search

First Name

Last Name

EXHIBIT





DEPARTMENT OF THE INTERIOR
FIVE CIVILIZED TRIBES

Due Heirs of Eliza Smith, Deceased Died 8/31/14
a citizen of the Cherokee, Nation
Roll No. 27457, A Full Blood.

Proof of Heirship on file dated Aug. 25, 1914 shows

Relationship	Proportionate share	Died at Rose, Okla. Mayes County NAME	Degree of Blood	Age	Roll No.
Dau.	1/4	Lucy Potts, Murphy, Okla. /609	Full	49	27446 1963
Son	1/4	George W. Smith, Rose, Okla.	Full	47	6492 X
Son	1/4	Charley Smith, Salina, Okla. 104	Full	44	6867 4074
Dau.	1/4	Susie B. Tesnee, Rose, Okla.	Full	40	6520
		NOTE: Married once, Sam Smith - died before enrollment.	Full	--	

Examiner S. J. Floren Date 1/15/15 P.O. 23147
2-670 $13.00 pmt.

6492

Exhibit A

EXHIBIT

5

Eliza Smith
in the U.S., Native American Applications for Enrollment in Five Civilized Tribes, 1898-1914

Name:	Eliza Smith
Application Date:	12 Sep 1900
Place:	Muskogee, Indian Territory, USA
Tribe:	Cherokee
Enrollment Category:	Cherokee by Blood
Census Card Number:	2556

Source Information

Ancestry.com. *U.S., Native American Applications for Enrollment in Five Civilized Tribes, 1898-1914* [database on-line]. Provo, UT, USA: Ancestry.com Operations, Inc., 2013.

Original data:

Applications for Enrollment of the Commission to the Five Civilized Tribes, 1898–1914. Microfilm M1301, 468 rolls. NAI: 617283. Records of the Bureau of Indian Affairs, Record Group 75. The National Archives at Washington, D.C.

Description

Was your ancestor a member of one of the Five Civilized Tribes? Find out if his or her accepted application is among those in this collection. Learn more...

EXHIBIT

6

THE
MUSCOGEE (CREEK) NATION

Sonya McIntosh | Realty Officer
Office of the Principal Chief | Branch of Realty
Main (918) 732-7713 | Fax (918) 758-0745
P.O. Box 580 | Okmulgee, OK 74447

JAMES R. FLOYD
PRINCIPAL CHIEF

LOUIS A. HICKS
SECOND CHIEF

May 23, 2019

Office of the Federal Public Defender
Western District of Oklahoma
Attn: Julie Gardner, Investigator
215 Dean A McGee, Ste. 707
Oklahoma City, OK 73102

Ms. Gardner:

The following described property is within the Muscogee (Creek) Nation (MCN) boundaries:

Lot 2, Block 1, in Section 22, Township 19 North, Range 13 East, Wilmot Addition, Tulsa County, Oklahoma containing 12.3178 acres more or less

aka

Normandy Apartments Holdings, LLC
6221 E. 38th Street
Tulsa, OK 74135

Be advised there has not been a ruling in the Murphy Case and the Creek Nation boundaries have not been determined as a reservation. The property is fee land and not restricted or held U.S.A. in Trust. Therefore, the Bureau of Indian Affairs and the MCN Realty Department do not have any jurisdiction or trust responsibilities concerning said land.

Should you have any questions, please feel free to contact Danielle Moss, Asst. Realty Manager at 918-732-7656.

Sincerely,

Sonya McIntosh
Realty Manager
SM/dm
cc: outgoing correspondence

www.countyassessor.info

Tulsa County Records [OK]

Owner Information
NORMANDY APARTMENT HOLDINGS LLC
C/O ALLIANCE TAX ADVISORS
433 LAS COLINAS BLVD E STE 300
IRVING, TX 750395522

Property Address
6221 E 38 ST S TULSA 74135

Building No. 1

Account Number R47375932206970

Sub Name: **WILMOT ADDN**
Lot: **2** Block: **1**
Area Name: **TULSA CITY**
Section **22** Township: **19N** Range: **13E**

Taxable Market		Assessed Value
Land	$1609700	$177067
Improved	$5390300	$592933
Mobile	$0	$0
Total	$7000000	$770000
	Exemptions	$0
School District T-1A	Net Assessed	$770000
School Levy $137.34	Estimated Taxes	$105751.8

Sales Information

Sale Date	Sale Price	Book/Page	$/SF
20121218	7000000	0/0	1319.76
Grantor: NORMANDY APARTMENTS LTD			
19901207	0	05292/02267	0
Grantor:			
00000000	0	0/0	0
Grantor:			

Building Elements

Type Multiple Unit
Style Multiple - Residential
Design Apartment <= 3 Stories
Quality Average Interior Finish Drywall
Condition Avg
Roof Gable Composition Shingle
Exterior Wall Frame Masonry Veneer N/A
Foundation Slab Fireplace N/A
Heat Central Air to Air Air N/A
Beds 0 Baths 0 Total Rooms 0
Garage N/A Garage SF 0
Porch N/A Porch SF 0
Basement N/A Basement SF 0
Year Built **1962** Eff Year Built **1962** Year Remodeled **0**
Square Footage **5304**

Land Information
Land Use: Commercial

Lots	Acres	SF	Width	depth
0	12.3178	536565	0	0

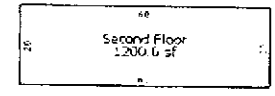
Description N/A

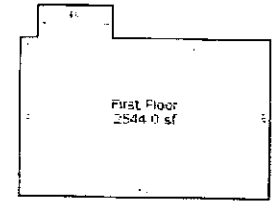
Mobile Home Information
Serial No.
Make
Tag No. LxW 0 x 0

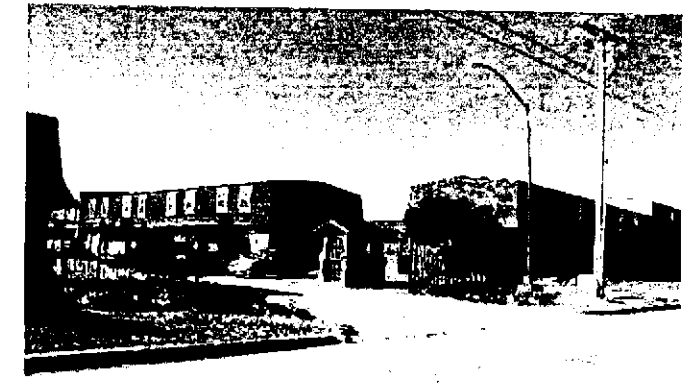
Commercial Elements
Stories N/A Story Height 00 Perimeter 256
Units 8 Rent 000
Class Description N/A

Miscellaneous Structures

Description	Yrblt	LxW	Units
Standard	0	X	24
N/A	0		0
N/A	0		0
N/A	0		0
N/A	0		0
N/A	0		0
N/A	0		0
N/A	0		0
N/A	0		0
N/A	0		0







47375-93-22-06970-001 (9/2010)

Legal Description
LT 2 BK 1

APPENDIX C Pet. App. 36

OCCAOnline Rules of the Court of Criminal Appeals

Form 13.2 Affidavit in Forma Pauperis

The Affidavit in Forma Pauperis must be in the following form:

I, JEMAINE MONTELL CANNON, state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 9th day of SEPTEMBER, 2020 at MCALESTER, PITTSBURG, OKLAHOMA.
(Print City, County, & State)

(Signature of Affiant)

JEMAINE MONTELL CANNON
(Print Name)

RECEIVED

SEP 11 2020

CLERK'S OFFICE

2021 WL 3578089
Court of Criminal Appeals of Oklahoma.

STATE EX REL. Mark MATLOFF,
District Attorney, Petitioner
v.
The Honorable Jana WALLACE,
Associate District Judge, Respondent.

Case No. PR-2021-366
|
FILED AUGUST 12, 2021

Synopsis

Background: State petitioned for a writ of prohibition, seeking to vacate a post-conviction order by the District Court, Pushmataha County, Jana Kay Wallace, J., that vacated and dismissed defendant's second degree murder conviction, which was committed in the Choctaw Reservation, in light of Supreme Court's decision in *McGirt v. Oklahoma*, U.S. 140 S.Ct. 2452.

Holdings: The Court of Criminal Appeals, Lewis, J., held that:

[1] rule in *McGirt v. Oklahoma* did not apply retroactively to convictions that were final at the time it was decided, overruling *Bosse v. State*, 484 P.3d 286, *Cole v. State*, 492 P.3d 11, *Ryder v. State*, 489 P.3d 528, and *Bench v. State*, 492 P.3d 19;

[2] rule announced in *McGirt* was procedural;

[3] rule announced in *McGirt* was new; and

[4] trial court judge could not apply rule in *McGirt* retroactively.

Petition granted; order granting postconviction relief reversed.

Hudson, J., filed a specially concurring opinion.

Lumpkin, J., filed a specially concurring opinion.

Procedural Posture(s): Appellate Review; Post-Conviction Review; Petition for Writ of Prohibition.

West Headnotes (7)

[1] Criminal Law

New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law.

[2] Criminal Law

New rules of criminal procedure generally do not apply retroactively to convictions that are final, with a few narrow exceptions.

[3] Criminal Law

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, did not apply retroactively to void a conviction that was final when *McGirt* was decided; overruling *Bosse v. State*, 484 P.3d 286, *Cole v. State*, 492 P.3d 11, *Ryder v. State*, 489 P.3d 528, and *Bench v. State*,492 P.3d 19. 18 U.S.C.A. § 1153.

[4] Criminal Law

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, was only a procedural change in the law, and thus, did not constitute a substantive or watershed rule that would permit retroactive collateral attacks. 18 U.S.C.A. § 1153.

[5] Criminal Law

For purposes of retroactivity analysis, a case announces a "new rule" when it breaks new ground, imposes new obligation on the state or federal government, or in other words, result was not dictated by precedent when defendant's conviction became final.

[6] Criminal Law

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, was new, and thus, did not apply retroactively to convictions that were final at the time it was decided, since the rule imposed new and different obligations on the state and federal government, and rule also broke new legal ground in the sense that it was not dictated by Supreme Court precedent. 18 U.S.C.A. § 1153.

[7] Criminal Law

Trial court judge could not retroactively apply rule in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, to defendant's petition for post-conviction relief, and thus, issuance of a writ of prohibition to vacate trial court's order vacating and dismissing defendant's final second degree murder conviction was warranted, since trial court judge was unauthorized take such action under state law. 18 U.S.C.A. § 1153.

OPINION

LEWIS, JUDGE:

***1** ¶1 The State of Oklahoma, by Mark Matloff, District Attorney of Pushmataha County, petitions this Court for the writ of prohibition to vacate the Respondent Judge Jana Wallace's April 12, 2021 order granting post-conviction relief. Judge Wallace's order vacated and dismissed the second degree murder conviction of Clifton Merrill Parish in Pushmataha County Case No. CF-2010-26. Because the Respondent's order is unauthorized by law and prohibition is a proper remedy, the writ is **GRANTED**.

FACTS

¶2 Clifton Parish was tried by jury and found guilty of second degree felony murder in March, 2012. The jury sentenced him to twenty-five years imprisonment. This Court affirmed the conviction on direct appeal in *Parish v. State*, No. F-2012-335 (Okl.Cr., March 6, 2014) (unpublished). Mr. Parish did not petition for rehearing, and did not petition the U.S. Supreme Court for *certiorari* within the allowed ninety-day time period. On or about June 4, 2014, Mr. Parish's conviction became final. [1]

¶3 On August 17, 2020, Mr. Parish filed an application for post-conviction relief alleging that the State of Oklahoma lacked subject matter jurisdiction to try and sentence him for murder under the Supreme Court's decision in *McGirt v. Oklahoma*, —— U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). Judge Wallace held a hearing and found that Mr. Parish was an Indian and committed his crime within the Choctaw Reservation, the continued existence of which was recently recognized by this Court, following *McGirt*, in *Sizemore v. State*, 2021 OK CR 6, ¶ 16, 485 P.3d 867, 871.

¶4 Because the Choctaw Reservation is Indian Country, Judge Wallace found that the State lacked subject matter jurisdiction to try Parish for murder under the Major Crimes Act. 18 U.S.C. § 1153. Applying the familiar rule that defects in subject matter jurisdiction can never be waived, and can be raised at any time, Judge Wallace found Mr. Parish's conviction for second degree murder was void and ordered the charge dismissed.

¶5 Judge Wallace initially stayed enforcement of the order. The State then filed in this Court a verified request for a stay and petitioned for a writ of prohibition against enforcement of the order granting post-conviction relief. In *State ex rel. Matloff v. Wallace*, 2021 OK CR 15, —— P.3d ——, this Court stayed all proceedings and directed counsel for the interested parties to submit briefs on the following question:

> In light of *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113, *United States v. Cuch,* 79 F.3d 987 (10th Cir. 1996), *Edwards v. Vannoy* (No. 19-5807), 593 U.S. —— [141 S.Ct. 1547, 209 L.Ed.2d 651] (May 17, 2021), cases cited therein, and related authorities, should the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* be applied retroactively to void a state conviction that was final when *McGirt* and *Sizemore* were announced?

***2** ¶6 The parties and *amici curiae*[2] subsequently filed briefs on the question presented. For reasons more fully stated below, we hold today that *McGirt v. Oklahoma* announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction. The writ of prohibition is therefore **GRANTED** and the order granting post-conviction relief is **REVERSED**.

ANALYSIS

¶7 In state post-conviction proceedings, this Court has previously applied its own non-retroactivity doctrine—often drawing on, but independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus—to bar the application of new procedural rules to convictions that were final when the rule was announced. *See Ferrell v. State*, 1995 OK CR 54, ¶¶ 5-9, 902 P.2d 1113, 1114-15 (citing *Teague, supra*) (finding new rule governing admissibility of recorded interview was not retroactive on collateral review); *Baxter v. State*, 2010 OK CR 20, ¶ 11, 238 P.3d 934, 937 (noting our adoption of *Teague* non-retroactivity analysis for new rules in state post-conviction review); and *Burleson v. Saffle*, 278 F.3d 1136, 1141 n.5 (10th Cir. 2002) (noting incorporation "into state law the Supreme Court's *Teague* approach to analyzing whether a new rule of law should have retroactive effect," citing *Ferrell, supra*).

[1] **[2]** ¶8 New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law. *See Carter v. State*, 2006 OK CR 42, ¶ 4, 147 P.3d 243, 244 (citing *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)) (applying new instructional rule of *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 to case tried before the rule was announced, but pending on direct review). But new rules generally do *not* apply retroactively to convictions that are final, with a few narrow exceptions. *Ferrell,* 1995 OK CR 54, ¶ 7, 902 P.2d at 1114-15; *Thomas v. State*, 1994 OK CR 85, ¶ 13, 888 P. 2d 522, 527 (decision requiring that prosecution file bill of particulars no later than arraignment did not apply to convictions already final).

¶9 Following *Teague* and its progeny, we would apply a new *substantive* rule to final convictions if it placed certain primary (private) conduct beyond the power of the Legislature to punish, or categorically barred certain punishments for classes of persons because of their status (capital punishment of persons with insanity or intellectual disability, or juveniles, for example). *See, e.g., Pickens v. State*, 2003 OK CR 16, ¶¶ 8-9, 74 P.3d 601, 603 (retroactively applying *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) because *Atkins* barred capital punishment for persons with intellectual disability).

¶10 Under *Ferrell*, we also would retroactively apply a new "watershed" procedural rule that was essential to the accuracy of trial proceedings, but such a rule is unlikely ever to be announced. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1115; *see Beard v. Banks,* 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (identifying *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) as the paradigmatic watershed rule, and likely the only one ever announced by the Supreme Court); *Edwards v. Vannoy*, —— U.S. ——, 141 S.Ct. 1547, 1561, 209 L.Ed.2d 651 (2021) (acknowledging the "watershed" rule concept was moribund and would no longer be incorporated in *Teague* retroactivity analysis).

***3** ¶11 Like the Supreme Court, we have long adhered to the principle that the narrow purposes of collateral review, and the reliance, finality, and public safety interests in factually accurate convictions and just punishments, weigh strongly against the application of new procedural rules to convictions already final when the rule is announced. Applying new procedural rules to final convictions, after a trial or guilty plea and appellate review according to then-existing

procedures, invites burdensome litigation and potential reversals unrelated to accurate verdicts, undermining the deterrent effect of the criminal law. *Ferrell*, 1995 OK CR 54, ¶¶ 6-7, 902 P.2d at 1114-15.

¶12 Just as *Teague*'s doctrine of non-retroactivity "was an exercise of [the Supreme Court's] power to interpret the federal habeas statute," *Danforth v. Minnesota*, 552 U.S. 264, 278, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008), we have barred state post-conviction relief on new procedural rules as part of our independent authority to interpret the remedial scope of state post-conviction statutes. *Smith v. State*, 1994 OK CR 46, ¶ 3, 878 P.2d 375, 377-78 (declining to apply rule on flight instruction to conviction that was final six years earlier); *Thomas*, 1994 OK CR 85, ¶ 13, 888 P.2d at 527 (declining to apply rule on filing bill of particulars at arraignment to conviction that was final when rule was announced).

¶13 Before and after *McGirt*, this Court has treated Indian Country claims as presenting non-waivable challenges to criminal subject matter jurisdiction. *Bosse v. State*, 2021 OK CR 3, ¶¶ 20-21, 484 P.3d 286, 293-94; *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (both characterizing claim as subject matter jurisdictional challenge that may be raised at any time). After *McGirt* was decided, relying on this theory of non-waivability, this Court initially granted post-conviction relief and vacated several capital murder convictions, and at least one non-capital conviction (Jimcy McGirt's), that were final when *McGirt* was announced. [3]

¶14 We acted in those post-conviction cases without our attention ever having been drawn to the potential non-retroactivity of *McGirt* in light of the Court of Appeals' opinion in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *cert. denied*, 519 U.S. 963, 117 S.Ct. 384, 136 L.Ed.2d 301 (1996) and cases discussed therein, which we find very persuasive in our analysis of the state law question today. *See also, e.g., Schlomann v. Moseley*, 457 F.2d 1223, 1227, 1230 (10th Cir. 1972) (finding Supreme Court's "newly announced jurisdictional rule" restricting courts-martial in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969) had made a "clear break with the past;" retroactive application to void final convictions was not compelled by jurisdictional nature of *O'Callahan*; and *O'Callahan* would not be applied retroactively to void court-martial conviction that was final when *O'Callahan* was decided).

[3] ¶15 After careful examination of the reasoning in *Cuch*, as well as the arguments of counsel and *amici curiae*, we reaffirm our recognition of the Cherokee, Choctaw, and Chickasaw Reservations [4] in those earlier cases. However, exercising our independent state law authority to interpret the remedial scope of the state post-conviction statutes, we now hold that *McGirt* and our post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided. Any statements, holdings, or suggestions to the contrary in our previous cases are hereby overruled.

***4** ¶16 In *United States v. Cuch, supra*, the Tenth Circuit Court of Appeals held that the Supreme Court's Indian Country jurisdictional ruling in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) was not retroactive to convictions already final when *Hagen* was announced. In *Hagen*, the Supreme Court held that certain lands recognized as Indian Country by *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir.1985) (en banc) were not part of the Uintah Reservation; and that Utah, rather than the federal government, had subject matter jurisdiction over crimes committed in the area. *Cuch*, 79 F.3d at 988.

¶17 Cuch and Appawoo, defendants who pled guilty and were convicted of major crimes (sexual abuse and second degree murder respectively) in the federal courts of Utah, challenged their convictions in collateral motions to vacate pursuant to 28 U.S.C. § 2255. They argued the subject matter jurisdiction defect recognized in *Hagen* voided their federal convictions. *Cuch,* 79 F.3d at 989-90. The federal district court found *Hagen* was not retroactive to collateral attacks on final convictions under section 2255. *Id.* at 990. The Tenth Circuit affirmed.

¶18 The Court of Appeals noted that the Supreme Court had applied non-retroactivity principles to new rules that alter subject matter jurisdiction. *Id.* at 990 (citing *Gosa v. Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973)) (refusing to apply new jurisdictional limitation on military courts-martial retroactively to void final convictions). The policy of non-retroactivity was grounded in principles of finality of judgments and fundamental fairness: *Hagen* had been decided after the petitioners' convictions were final; it was not dictated by precedent; and the accuracy of the underlying convictions weighed against the disruption and costs of retroactivity. *Id.* at 991-92.

¶19 The Court of Appeals found non-retroactivity of the *Hagen* ruling upheld the principle of finality and foreclosed the harmful effects of retroactive application, including

> the prospect that the invalidation of a final conviction could well mean that the guilty will go unpunished due to the impracticability of charging and retrying the defendant after a long interval of time. Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Furthermore, retroactive application would surely visit substantial injustice and hardship upon those litigants who relied upon jurisdiction in the federal courts, particularly victims and witnesses who have relied on the judgments and the finality flowing therefrom. Retroactivity would also be unfair to law enforcement officials and prosecutors, not to mention the members of the public they represent, who relied in good faith on binding federal pronouncements to govern their prosecutorial decisions. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered.

79 F.3d at 991-92 (citing and quoting from *Gosa*, 413 U.S. at 685, 93 S.Ct. 2926, and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (internal citations, quotation marks, brackets, and ellipses omitted)).

¶20 The Court of Appeals found that no questions of innocence arose from the jurisdictional flaw in the petitioners' convictions. Their conduct was criminal under both state and federal law. The question resolved in *Hagen* was simply "*where* these Indian defendants should have been tried for committing major crimes." 79 F.3d at 992 (emphasis in original). The petitioners did not allege unfairness in the processes by which they were found guilty. *Id.*

***5** ¶21 The Court of Appeals reasoned that a jurisdictional ruling like *Hagen* raised no fundamental questions about the basic truth-finding functions of the courts that tried and sentenced the defendants. *Id.* The legal processes resulting in those convictions had "produced an accurate picture of the conduct underlying the movants' criminal charges and provided adequate procedural safeguards for the accused." *Id.*

¶22 The Court of Appeals also noted that the chances of successful state prosecution were slim after so many years. "The evidence is stale and the witnesses are probably unavailable or their memories have dimmed." *Id.* at 993. The Court also considered the "violent and abusive nature" of the underlying convictions, and the burdens that immediate release of these prisoners would have on victims, many of whom were child victims of sexual abuse. *Id.*

¶23 The Court of Appeals distinguished two lines of Supreme Court holdings that retroactively invalidated final convictions. The first involved the conclusion that a court lacked authority to convict or punish a defendant in the first place. But in those cases, the bar to prosecution arose from a constitutional immunity against punishment for the conduct in *any* court, or prohibited a trial altogether. The defendants in *Cuch* could hardly claim immunity for acts of sexual abuse and murder. The only issue touched by *Hagen* was the federal court's exercise of jurisdiction. *Id.* at 993.

¶24 The second line of Supreme Court cases retroactively invalidating final convictions involved holdings that narrowed the scope of a penal statute defining elements of an offense, and thus invalidated convictions for acts that Congress had never criminalized. *Hagen*, on the other hand, had not narrowed the scope of *liability* for conduct under a statute, it had modified the extent of Indian Country jurisdiction, and thus altered the *forum* where crimes would be prosecuted. *Id.* at 994.

¶25 Finding neither of the exceptional circumstances that might warrant retroactive application of *Hagen's* jurisdictional ruling to final convictions, the Court of Appeals found "the circumstances surrounding these cases make prospective application of *Hagen* unquestionably appropriate in the present context." *Id.* Prior federal jurisdiction was well-established before *Hagen*; the convictions were factually accurate; the procedural safeguards and truth-

finding functions of the courts were not impaired; and retroactive application would compromise both reliance and public safety interests that legitimately attached to prior proceedings.

[4] ¶26 We find *Cuch*'s analysis and authorities persuasive as we consider the independent state law question of collateral non-retroactivity for *McGirt*. First, we conclude that *McGirt* announced a rule of criminal *procedure*, using prior case law, treaties, Acts of Congress, and the Major Crimes Act to recognize a long dormant (or many thought, non-existent) federal jurisdiction over major crimes committed by or against Indians in the Muscogee (Creek) Reservation. And like *Hagen* before it, "the [*McGirt*] decision effectively overruled the contrary conclusion reached in [the *Murphy*] case,[5] redefined the [Muscogee (Creek)] Reservation boundaries ... and conclusively settled the question." *Cuch,* 79 F.3d at 989.

***6** ¶27 *McGirt* did not "alter[ ] the range of conduct or the class of persons that the law punishes" for committing crimes. *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). *McGirt* did not determine whether specific conduct is criminal, or whether a punishment for a class of persons is forbidden by their status. *McGirt's* recognition of an existing Muscogee (Creek) Reservation effectively decided *which sovereign* must prosecute major crimes committed by or against Indians within its boundaries, crimes which previously had been prosecuted in Oklahoma courts for more than a century. But this significant change to the extent of state and federal criminal jurisdiction affected "only the *manner of determining* the defendant's culpability." *Schriro,* 542 U.S. at 353, 124 S.Ct. 2519 (emphasis in original). For purposes of our state law retroactivity analysis, *McGirt's* holding therefore imposed only *procedural* changes, and is clearly a procedural ruling.

[5] **[6]** ¶28 Second, the procedural rule announced in *McGirt* was new.[6] For purposes of retroactivity analysis, a case announces a new rule when it breaks new ground, imposes a new obligation on the state or federal government, or in other words, the result was not dictated by precedent when the defendant's conviction became final. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1114 (finding rule of inadmissibility of certain evidence broke new ground and was not dictated by precedent when defendant's conviction became final).

¶29 *McGirt* imposed new and different obligations on the state and federal governments. Oklahoma's new obligations included the reversal on direct appeal of at least some major crimes convictions prosecuted (without jurisdictional objections at the time, and apparently lawfully) in these newly recognized parts of Indian Country; and to abstain from some future arrests, investigations, and prosecutions for major crimes there. The federal government, in turn, was newly obligated under *McGirt* to accept its jurisdiction over the apprehension and prosecution of major crimes by or against Indians in a vastly expanded Indian Country.

¶30 *McGirt's* procedural rule also broke new legal ground in the sense that it was not dictated by, and indeed, arguably involved controversial innovations upon, Supreme Court precedent. For today's purposes, the holding in *McGirt* was dictated by precedent only if its essential conclusion, i.e., the continued existence of the Muscogee (Creek) Reservation, was "apparent to all reasonable jurists" when Mr. Parish's conviction became final in 2014. *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997).

¶31 In 2005, this Court had declined to recognize the claimed Muscogee (Creek) Reservation, and thus denied the essential premise of the claim on its merits, in *Murphy v. State*, 2005 OK CR 25, ¶¶ 50-52, 124 P.3d at 1207-08. From then until the Tenth Circuit Court of Appeals' 2017 decision in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), no court that had addressed the issue, including the federal district court that initially denied Murphy's habeas claim, had embraced the possibility that the old boundaries of the Muscogee (Creek) Nation remained a reservation.[7]

***7** ¶32 With no disrespect to the views that later commanded a Supreme Court majority in *McGirt*, the dissenting opinion of Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Thomas, whom we take to be "reasonable jurists" in the required sense, certainly did *not* view the holding in *McGirt* as dictated by precedent even in 2020, much less in 2014.[8] Chief Justice Roberts's dissent raised a host of reasonable doubts about the majority's adherence to precedent,[9] arguing at length that it had divined the existence of a reservation only by departing from the governing standards for proof of Congress's intent to disestablish one, *McGirt,* 140 S.Ct. at 2489; and in many other ways besides,[10] "disregarding the 'well settled' approach required by our precedents." *Id.* at 2482 (Roberts, C.J., dissenting). The *McGirt* majority, of course, remains just that, but the Chief Justice's reasoned,

precedent-based objections are additional proof that *McGirt's* holding was not "apparent to all reasonable jurists" when Mr. Parish's conviction became final in 2014.

¶33 Third, our independent exercise of authority to impose remedial constraints under state law on the collateral impact of *McGirt* and post-*McGirt* litigation is consistent with both the text of the opinion and the Supreme Court's apparent intent. As already demonstrated, *McGirt* is neither a substantive rule nor a watershed rule of criminal procedure. The Supreme Court itself has not declared that *McGirt* is retroactive to convictions already final when the ruling was announced.

¶34 *McGirt* was never intended to annul decades of final convictions for crimes that might never be prosecuted in federal court; to free scores of convicted prisoners before their sentences were served; or to allow major crimes committed by, or against, Indians to go unpunished. The Supreme Court's intent, as we understand it, was to fairly and conclusively determine the claimed existence and geographic extent of the reservation.

¶35 The Supreme Court predicted that *McGirt's* disruptive potential to unsettle convictions ultimately would be limited by "other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few," designed to "protect those who have reasonably labored under a mistaken understanding of the law." *McGirt*, 140 S.Ct. at 2481. The Court also well understood that collateral attacks on final state convictions based on *McGirt* would encounter "well-known state and federal limitations on post-conviction review in criminal proceedings." *Id.* at 2479. "[P]recisely because those doctrines exist," the Court said, it felt "free" to announce a momentous holding effectively recognizing a new jurisdiction and supplanting a longstanding previous one, "leaving questions about reliance interests for later proceedings crafted to account for them." *Id.* at 2481 (brackets and ellipses omitted).

¶36 Those questions are now properly before us and urgently demand our attention. Because *McGirt's* new jurisdictional holding was a clear break with the past, we have applied *McGirt* to reverse several convictions for major crimes pending on direct review, and not yet final, when *McGirt* was announced. The balance of competing interests is very different in a final conviction, and the reasons for non-retroactivity of a new *jurisdictional* rule apply with particular force. Non-retroactivity of *McGirt* in state post-conviction proceedings can mitigate some of the negative consequences so aptly described in *Cuch*, striking a proper balance between the public safety, finality, and reliance interests in settled convictions against the competing interests of those tried and sentenced under the prior jurisdictional rule.

***8** ¶37 The State's reliance and public safety interests in the results of a guilty plea or trial on the merits, and appellate review according to then-existing rules, are always substantial. Though Oklahoma's jurisdiction over major crimes in the newly recognized reservations was limited in *McGirt* and our post-*McGirt* reservation rulings, the State's jurisdiction was hardly open to doubt for over a century and often went wholly unchallenged, as it did at Mr. Parish's trial in 2012.

¶38 We cannot and will not ignore the disruptive and costly consequences that retroactive application of *McGirt* would now have: the shattered expectations of so many crime victims that the ordeal of prosecution would assure punishment of the offender; the trauma, expense, and uncertainty awaiting victims and witnesses in federal re-trials; the outright release of many major crime offenders due to the impracticability of new prosecutions; and the incalculable loss to agencies and officers who have reasonably labored for decades to apprehend, prosecute, defend, and punish those convicted of major crimes; all owing to a longstanding and widespread, but ultimately mistaken, understanding of law.

¶39 By comparison, Mr. Parish's legitimate interests in post-conviction relief for this jurisdictional error are minimal or non-existent. *McGirt* raises no serious questions about the truth-finding function of the state courts that tried Mr. Parish and so many others in latent contravention of the Major Crimes Act. The state court's faulty jurisdiction (unnoticed until many years later) did not affect the procedural protections Mr. Parish was afforded at trial. The trial produced an accurate picture of his criminal conduct; the conviction was affirmed on direct review; and the proceedings did not result in the wrongful conviction or punishment of an innocent person. A reversal of Mr. Parish's final conviction now undoubtedly would be a monumental victory for him, but it would not be justice.

[7] ¶40 Because we hold that *McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction, the order vacating Mr. Parish's murder conviction was unauthorized by state law. The State ordinarily may file a regular appeal from an adverse post-

conviction order, but here, it promptly petitioned this Court for extraordinary relief and obtained a stay of proceedings. The time for filing a regular post-conviction appeal (twenty days from the challenged order) has since expired. Rule 5.2(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

¶41 The petitioner for a writ of prohibition must establish that a judicial officer has, or is about to, exercise unauthorized judicial power, causing injury for which there is no adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). There being no adequate remedy by appeal, the injury caused by the unauthorized dismissal of this final conviction justifies the exercise of extraordinary jurisdiction. The writ of prohibition is **GRANTED**. The order granting post-conviction relief is **REVERSED**.

ROWLAND, P.J.: CONCURS

HUDSON, V.P.J.: SPECIALLY CONCURS

LUMPKIN, J.: SPECIALLY CONCURS

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCUR:

¶1 I commend Judge Lewis for his thorough discussion of the retroactivity principles governing this case. I write separately to summarize my understanding of today's holding. Today's ruling holds that *McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020) does not apply retroactively on collateral review to convictions that were final before *McGirt*. We apply on state law grounds the retroactivity principles from *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) in reaching this conclusion because the United States Supreme Court has not previously ruled on the retroactivity of *McGirt*. We hold that *McGirt* is a new rule of criminal procedure not dictated by precedent, that represents a clear break with past law and that imposes a new obligation on the State. The Supreme Court recently acknowledged there is no longer an exception in its *Teague* jurisprudence for watershed procedural rules to be applied retroactively and we incorporate this ruling in today's decision. *See Edwards v. Vannoy*, —— U.S. ——, 141 S. Ct. 1547, 1561, 209 L.Ed.2d 651 (2021). Today's decision is also based on *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996) which addressed a similar situation. We overrule our previous decisions in which we have applied *McGirt* on post-conviction review. Today's decision, however, reaffirms our previous recognition of the existence of the various reservations in those cases.

***9** ¶2 Based on this understanding of our holding, I fully concur in today's decision. While this decision resolves one aspect of the post-*McGirt* jurisdictional puzzle, many challenges remain for which there are no easy answers. So far, Congress has missed the opportunity to implement a practical solution which, at this point, seems unlikely. It is now up to the leaders of the State of Oklahoma, the Tribes and the federal government to address the jurisdictional fallout from the *McGirt* decision. Only in this way, with all of these parties working together, can public safety be ensured across jurisdictional boundaries in the historic reservation lands of eastern Oklahoma. It will require this type of cooperation in the post-*McGirt* world to ensure that stability is restored to Oklahoma's criminal justice system.

LUMPKIN, JUDGE, SPECIALLY CONCURRING:

¶1 I compliment my colleague on a well-researched opinion which accurately sets out the decisions of the U.S. Supreme Court and the Tenth Circuit Court of Appeals regarding giving retroactive effect to Supreme Court decisions. I especially compliment him for recognizing the scholarly analysis of Chief Justice Roberts in the *McGirt* dissent which shows by established precedent that the *McGirt* majority was not fully analyzing and applying past precedent of the Court in its decision.

¶2 I join this opinion based on the precedent set by the United States Supreme Court and the Tenth Circuit Court of Appeals. In doing so I cannot divert from basic principles of stating the obvious. In recognizing that the federal precedents set forth in the opinion and this writing are binding on this Court, I cannot overlook the legal fact that each of them applied a policy relating to collateral attacks on judgments rendered by courts lacking jurisdiction to render those judgments. When those courts found the lower courts rendering the subject judgments had no jurisdiction to render them, the result of this finding should have been to render the judgments void. Rather than declaring those judgments void, the courts instead formulated a policy limiting the retroactive application of their decisions, thereby preserving from collateral attack final judgments preceding them.

¶3 Keeping the policy decisions reflected in those opinions in mind, I do diverge from the court in labeling the *McGirt* ruling as procedural. When the federal government pre-empts a field of law, the legal effect is to deprive states of their jurisdiction

in that area of the law. If a court lacks jurisdiction to act then any rulings and judgments would appear to be void when rendered. [1] As the opinion notes, this Court since statehood has recognized and honored federal jurisdiction as to Indian allotments and dependent Indian communities. Those areas are subject to federal jurisdiction and that jurisdiction is recognized by the federal government, the tribes and the State of Oklahoma. There was no question Oklahoma had jurisdiction over the rest of the state and this Court, as the court with exclusive jurisdiction in criminal cases, faithfully honored those jurisdictional claims.

***10** ¶4 Regardless, a 5-4 majority of the Supreme Court disregarded the precedent set out by Chief Justice Roberts in his dissent to *McGirt*, and for the first time in legal history determined the existence of a reservation in Oklahoma based on "magic words" rather than historical context. [2] In doing so, the majority in *McGirt* declared this reservation has always been in existence, even after Oklahoma became a state. This operative wording in the opinion creates a legal conundrum in that *McGirt* states that legally Oklahoma never had jurisdiction on this newly identified Indian reservation. This holding creates a question as to every criminal judgment entered by a state court regarding its validity. If all courts involved in this issue held themselves to the legal effect of this holding then those judgments would be void.

¶5 However both the Supreme Court and the Tenth Circuit have shown us by their precedents that courts have an option other than the legal one in cases of this type and that is the application of legal policy. As set out in the opinion, each of those courts has applied policy regarding retroactive application of cases based on the chaos, confusion, harm to victims, *etc*., if retroactive application occurred. The *McGirt* decision is the *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), decision in reverse. In upholding the state court conviction, the Court held in *Hagen* that Congress had disestablished the Uintah reservation; therefore, the federal district court did not have jurisdiction to decide the subject case. In a later case involving the same land area, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), the Tenth Circuit found that although the federal district court lacked jurisdiction to try the subject cases, there was no need to vacate the judgments for lack of jurisdiction because of the harm it would cause and because those defendants were given a fair trial and made no complaints regarding the fairness. Thus the court applied policy rather than the law which would have rendered the judgments void due to lack of subject matter jurisdiction.

¶6 The legal effect of the *McGirt* decision, finding Oklahoma lacked jurisdiction to try cases by or against Indians in Indian Country due to federal preemption through the Major Crimes Act, would be to declare the associated judgments void. However, we now adopt the federal policy and established precedent of selective retroactive application in these type of cases due to the ramifications retroactive application would have on the criminal justice system and victims. This is hard to explain in an objective legal context but provides a just and pragmatic resolution to the *McGirt* dilemma.

All Citations

--- P.3d ----, 2021 WL 3578089, 2021 OK CR 21

Footnotes

1 *Teague v. Lane*, 489 U.S. 288, 295, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (defining a final conviction as one where judgment was rendered, the availability of appeal exhausted, and the time to petition for certiorari had elapsed).

2 The Cherokee, Chickasaw, Choctaw, and Muscogee (Creek) Nations filed a joint brief as *amici curiae* in response to our invitation. The Acting Attorney General of Oklahoma, counsel from the Capital Habeas Unit of the Federal Public Defender's Office for the Western District of Oklahoma, and the Oklahoma Criminal Defense Lawyer's Association also submitted briefs as *amicus curiae.* We thank counsel for their scholarship and vigorous advocacy.

3 *Bosse*, *supra*; *Cole v. State*, 2021 OK CR 10, —— P.3d ——, 2021 WL 1727054; *Ryder v. State*, 2021 OK CR 11, 489 P.3d 528, *Bench v. State*, 2021 OK CR 12, —— P.3d ——, 2021 WL 1836466. We later stayed the mandate in these capital post-conviction cases pending the State's petition for certiorari to the Supreme

Court. We have also granted *McGirt*-based relief and vacated many convictions in appeals pending on direct review. *E.g., Hogner v. State*, 2021 OK CR 4, —— P.3d ——, 2021 WL 958412; *Spears v. State*, 2021 OK CR 7, 485 P.3d 873; *Sizemore v. State*, *supra*.

4 We first recognized the Seminole Reservation in the post-*McGirt* direct appeal of *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250, and have no occasion to revisit that decision today.

5 *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198 (denying post-conviction relief on claim that Muscogee (Creek) Reservation was Indian Country and jurisdiction of murder was federal under the Major Crimes Act).

6 *McGirt's* recognition of the entire historic expanse of the Muscogee (Creek) Nation as a reservation was undoubtedly new in the *temporal* sense. We take it as now well-established that "Oklahoma exercised jurisdiction over all of the lands of the former Five [ ] Tribes based on longstanding caselaw from statehood until the Tenth Circuit in *Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967 (10th Cir.1987) found a small tract of tribally-owned treaty land existed along the Arkansas River in Tulsa County, Oklahoma." *Murphy v. Sirmons*, 497 F. Supp.2d 1257, 1288-89 (E.D. Okla. 2007). Until *McGirt*, this Court, and Oklahoma law enforcement officials generally, declined to recognize the historic boundaries of *any* Five Tribes reservation, *as such*, as Indian Country. *See, e.g.,* 11 Okla. Op. Att'y. Gen. 345 (1979), available at 1979 WL 37653, at *8-9 (stating the Attorney General's opinion that "there is no 'Indian country' in said former 'Indian Territory' over which tribal and thus federal jurisdiction exists").

7 *McGirt*, 140 S.Ct. at 2497 (Roberts, C.J., dissenting). In *Murphy v. Sirmons*, 497 F.Supp.2d 1257, 1289-90 (E.D. Okla. 2007), the federal habeas court held thus:

> While the historical boundaries of once tribally owned land within Oklahoma may still be determinable today, there is no question, based on the history of the Creek Nation, that Indian reservations do not exist in Oklahoma. State laws have applied over the lands within the historical boundaries of the Creek nation for over a hundred years.

The federal district court found "no doubt the historic territory of the Creek Nation was disestablished as a part of the allotment process." *Id*., at 1290. The court concluded that our 2005 decision "refusing to find the crime occurred on an Indian 'reservation' [was] not 'contrary to nor an unreasonable application of Federal law as determined by the United States Supreme Court.' " *Id*.

8 The mere existence of a dissent does not establish that a rule is new, but a 5-4 split among Justices on whether precedent dictated a holding is strong evidence of a novel departure from precedent. *Beard*, 542 U.S. at 414-15, 124 S.Ct. 2504 (finding that the four dissents in *Mills v. Maryland* [486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)] strongly indicated that the rule announced was not dictated by *Lockett v. Ohio* [438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)]).

9 Principally *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), and *Nebraska v. Parker,* 577 U.S. 481, 136 S.Ct. 1072, 194 L.Ed.2d 152 (2016).

10 *See generally*, *McGirt*, 140 S.Ct. at 2485-2489 (Roberts, C.J., dissenting).

1 I realize courts in the past have engaged in legal gymnastics to keep from voiding judgments rendered by a court without jurisdiction by finding that a court's judgment must be void on its face before it can be held void. *Springer v. Townsend*, 336 F.2d 397, 401 (10th Cir. 1964) (in deciding whether a probate decree was void, the Court stated "our scope of review is limited to determining whether a lack of jurisdiction in the approval proceeding affirmatively appears from the record."; "[a] judgment will not be held to be void on its face unless an inspection will affirmatively disclose that the court had no jurisdiction of the person, no jurisdiction of the subject matter, or had no judicial power to render the particular judgment." *Clay v. Sun River Mining Co.*, 302 F.2d 599, 601 (10th Cir. 1962); "[a]s long as the supporting record does not reflect the district court's lack of authority, the district court order cannot be declared "void." Such an order is instead only "voidable." *Bumpus v. State*, 1996 OK CR 52, ¶ 7, 925 P.2d 1208, 1210; "[t]his Court has held in numerous cases that in order for a judgment to be void as provided in the Statute just quoted, it must be void on the face of the record, and that extrinsic evidence is not admissible to show judgment is void on the face of the record." *Scoufos v. Fuller*, 1954 OK 363, 280 P.2d 720, 723. However, logic and common sense dictate that if a court

had no authority to act then any actions would be a nullity. Regardless, I apply the precedent cited in the opinion and specially concur.

2 In *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), the Court enunciated several factors which must be considered in determining whether a reservation has been disestablished. Those factors are: the explicit language of Congress evincing intent to change boundaries; events surrounding the passage of surplus land acts which "reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation ..."; Congress's subsequent treatment of the subject areas; identity of who moved onto the affected land; and the subsequent demographic history of those lands. *Id*. at 470-72, 104 S.Ct. 1161.