Capital Case

Case No. _____

In the
Supreme Court of the United States

CLARENCE ROZELL GOODE, JR.,
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

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APPENDIX

Page(s)

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

CLARENCE ROZELL GOODE, JR.,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
v.	)	No. PCD-2020-530
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION DENYING POST-CONVICTION RELIEF

LEWIS, JUDGE:

Petitioner Goode has filed with this Court a Successive Application for Post-Conviction Relief. The record reflects Goode was convicted of three counts of first degree murder, in violation of 21 O.S.Supp.2004, § 701.7, and one count of first degree burglary, in violation of 21 O.S.2001, § 1431, in Tulsa County District Court case number CF-2005-3904, before the Honorable Tom C. Gillert, District Judge. The jury assessed punishment at death on each of the three first degree murder convictions, after finding the existence of two aggravating circumstances in all three murders.[1] The jury assessed

[1] (1) The defendant knowingly created a great risk of death to more than one person; and (2) there exists a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. 21

punishment at twenty (20) years imprisonment and a $10,000.00 fine on the first degree burglary count. Judge Gillert formally sentenced Goode in accordance with the jury verdict on January 7, 2008.

Goode is now before this Court with his third subsequent application for post-conviction relief and a motion for evidentiary hearing. The Capital Post-Conviction Procedure Act, specifically, 22 O.S.2011, § 1089(D)(8), provides for the filing of successive post-conviction applications.

Goode now claims the State of Oklahoma lacked jurisdiction to prosecute, convict and sentence him for the crimes committed in Indian Country. Petitioner argues that he is a citizen of the Muscogee (Creek) Nation and the crimes occurred within the boundaries of the Cherokee Nation Reservation. Petitioner relies on *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020).[2]

O.S.2001, § 701.12 (2) and (7).

[2] This Court remanded the case to the district court because we determined that his issue required fact-finding on the question of Goode's Indian status and whether the crime occurred in Indian Country. An evidentiary hearing was timely held before the Honorable Tracy Priddy, District Judge, and *Findings of Fact and Conclusions of Law* were timely filed with this Court. The trial court determined that the crime in this case occurred within the geographical area set out as a reservation for the Cherokee Nation and that Goode is an Indian as defined by federal statutory and case law.

Petitioner's claim in this subsequent application for post-conviction relief is controlled by this Court's recent decision in *State ex rel. Matloff v. Wallace,* 2021 OK CR 21, ¶ 15, ___P.3d___. In *Matloff,* this Court held 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 Goode's state convictions were long final when *McGirt* was decided,[3] his case is controlled by our decision in *Matloff* and he is not entitled to post-conviction relief based upon his jurisdictional challenge.

DECISION

Petitioner Goode's Successive Application for Post-Conviction Relief is **DENIED**. All pending motions regarding this post-conviction proceeding are **DENIED**. The Clerk of this Court is directed to return all tendered pleadings to the respective parties. Pursuant to Rule

[3] Goode filed a direct appeal of his convictions and sentences, which was affirmed by this Court in *Goode v. State,* 2010 OK CR 10, 236 P.3d 671, *cert. denied, Goode v. Oklahoma,* 562 U.S. 1231. Goode's original application for post-conviction relief was denied on September 7, 2010. *Goode v. State,* Case No. PCD-2008-211 (Okl.Cr., Sept. 7, 2010) (unpublished). Goode filed two subsequent applications for post-conviction relief, which were denied on September 28, 2010, and May 2, 2012, respectively. *Goode v. State,* Case Nos. PCD-2010-661 and PCD-2012-261, both unpublished.

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.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE TRACY PRIDDY, DISTRICT JUDGE

APPEARANCES AT EVIDENTIARY HEARING

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ATTORNEYS FOR RESPONDENT

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

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

CLARENCE ROZELLE GOODE, Jr.,	)	
Petitioner,	)	Tulsa County District Court Case No. CF-2005-3904
vs.	)	
STATE OF OKLAHOMA,	)	Court of Criminal Appeals Case No. PCD-2020-530
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before the Court on October 15, 2020, in accordance with the remand order of the Oklahoma Court of Criminal Appeals issued on August 24, 2020. The State appeared by and through Assistant Attorney General Julie Pittman. Defendant, who is incarcerated, appeared by and through Assistant Federal Public Defenders Thomas D. Hird and Michael W. Lieberman. The Court makes its findings based upon the stipulations and evidence presented by the parties, review of the pleadings and attachments in this Court and the Oklahoma Court of Criminal Appeals, and the briefs and argument of counsel.

In the August 24, 2020, Order Remanding for Evidentiary Hearing, the Oklahoma Court of Criminal Appeals directed this Court as follows:

> The District Court shall address only the following issues:
>
> First, the Petitioner's status as an Indian. The District Court must determine whether (1) Petitioner has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.

Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt* [*v. Oklahoma*, 140 S. Ct. 2452 (2020)], determining (1) whether Congress established a reservation for the Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation.[1]

The parties stipulated and agreed as follows:[2]

1. As to the location of the crime:

   a. The crime in this case occurred at 9707 N.112th E. Ave. Owasso, OK. This address is within the geographic area set out in the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612.

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

2. As to the status of Mr. Goode:

   a. Mr. Goode is and has been recognized as a Citizen of the Creek Nation since January 1, 1981. The attached memo from the (Muscogee) Creek Nation of Oklahoma Citizenship Board is admissible in evidence.

   b. Mr. Goode has 1/128 Creek blood quantum.

   c. The Creek Nation is a federally recognized tribe.

Additionally, Petitioner moved to admit Exhibits 2-12. The State objected to Exhibit 2 as to the specific portion of the exhibit which states, "location located within the

[1] Order Remanding for Evidentiary Hearing at 4-5
[2] Exhibit 1, Stipulations filed September 25, 2020.

Cherokee Nation Reservation" on the basis that this is a legal conclusion regarding the status of the land upon which the crime occurred. Exhibit 2 was admitted over the State's objection. With regard to Exhibit 3, the State objected on the basis that it had not been authenticated. The objection was sustained and Exhibit 3 was not admitted.

I. Defendant/Petitioner's Status as an Indian.

The State of Oklahoma and Defendant/Petitioner have stipulated to Defendant/Petitioner's Indian status by virtue of his tribal membership and proof of blood quantum. Based upon the stipulations provided, the Court specifically finds Defendant/Petitioner (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government. Defendant/Petitioner is an Indian.

II. Whether the Crime Occurred in Indian Country.

The State of Oklahoma and Defendant/Petitioner stipulated that the crime occurred within the historical boundaries of the Cherokee Nation. The State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation.

In regard to whether Congress established a reservation for the Cherokee Nation, the Court finds as follows:

1. Cherokee Nation is a federally recognized Indian tribe. 84 C.F.R. § 1200 (2019).
2. The current boundaries of Cherokee Nation encompass lands in a fourteen-county area within the borders of the State of Oklahoma (Oklahoma), including all of Adair, Cherokee, Craig, Nowata, Sequoyah, and Washington Counties, and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Tulsa, and Wagoner Counties.

3. The Cherokee Nation's treaties must be considered on their own terms, in determining reservation status. *McGirt*, 140 S. Ct. at 2479.

4. In *McGirt*, the United States Supreme Court noted that Creek treaties promised a "permanent home" that would be "forever set apart," and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. *McGirt*, 140 S.Ct. at 2461-62. As such, the Supreme Court found that, "Under any definition, this was a [Creek] reservation." *Id.* at 2461.

5. The Cherokee treaties were negotiated and finalized during the same period as the Creek treaties, contained similar provisions that promised a permanent home that would be forever set apart, and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state.

6. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokees on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414.

7. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of the new Cherokee lands, and provided that a patent would issue as soon as reasonably practical. Art. 1, 7 Stat. 414.

8. The 1835 Cherokee treaty was ratified two years later "with a view to re-unite their people in one body and to secure to them a permanent home for themselves and their posterity," in what became known as Indian Territory, "without the territorial limits of the state sovereignties," and "where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be consonant with their views, habits and condition." Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 and *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872).

9. Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." Art. 2, 7 Stat. 478.

10. The 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation of the new lands in Indian Territory as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right

by their national councils to make and carry into effect all such laws as they may deem necessary for the government...within their own country," so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Arts. 1, 5, 8, 19, 7 Stat. 478.

11. On December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new lands in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The title was held by Cherokee Nation "for the common use and equal benefit of all the members." *Cherokee Nation v. Hitchcock*, 187 U.S. at 307; *See also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894). Fee title is not inherently incompatible with reservation status, and establishment of a reservation does not require a "particular form of words." *McGirt*, 140 S. Ct. at 2475 (citing *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)).

12. The 1846 Cherokee treaty required federal issuance of a deed to the Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the "Neutral Lands") and the "outlet west." Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871.

13. The 1866 treaty resulted in Cherokee cessions of lands in Kansas and the Cherokee Outlet and required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council." Treaty with the Cherokee, July 19, 1866, art. 21, 14 Stat. 799.

14. The 1866 Cherokee treaty "re-affirmed and declared to be in full force" all previous treaty provisions "not inconsistent with the provisions of" the 1866 treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. Art. 31, 14 Stat. 799.

15. Under *McGirt*, the "most authoritative evidence of [a tribe's] relationship to the land...lies in the treaties and statutes that promised the land to the Tribe in the first place." *McGirt*, 140 S. Ct. at 2475-76.

As a result of the treaty provisions referenced above and related federal statutes, this Court hereby finds Congress did establish a Cherokee reservation as required under the analysis set out in *McGirt*.

Regarding whether Congress specifically erased the boundaries or disestablished the Cherokee Reservation, the Court finds as follows:

1. The current boundaries of Cherokee Nation are as established in Indian Territory in the 1833 and 1835 Cherokee treaties, diminished only by two express cessions.

2. First, the 1866 treaty expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. Art. 17, 14 Stat. 799.

3. Second, the 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet); and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country...until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." Art. 16, 14 Stat. 799.

4. The Cherokee Outlet cession was finalized by an 1891 agreement ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43.

5. The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906).

6. The 1893 statute that ratified the 1891 Agreement required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. 27 Stat. 612, 640-43; *United States v. Cherokee Nation*, 202 U.S. at 112.

7. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time.

8. The original 1839 Cherokee Constitution established the boundaries as described in the 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may be made necessary" by the 1866 treaty. 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, reprinted in Volume I of West's Cherokee Nation Code Annotated (1993 ed.).

9. Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." 1999 Cherokee Constitution, art. 2.

The State has argued the burden of proof regarding whether Congress specifically erased the boundaries or disestablished the reservation rests solely with Defendant/Petitioner. The State also made clear that the State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation. No evidence or argument was presented by the State specifically regarding disestablishment or boundary erasure of the Cherokee Reservation. The Order Remanding for Evidentiary Hearing states, "Upon Petitioner's presentation of *prima facie* evidence as to the Petitioner's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction."[3]

On this point, *McGirt* provides that once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S. Ct. at 2468. Reading the order of remand together with *McGirt*, regardless of where the burden of production is placed, no evidence was presented to this Court to establish Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma has jurisdiction in this matter. As a result, the Court finds Defendant/Petitioner is an Indian and that the crime occurred in Indian Country.

[3] Order Remanding for Evidentiary Hearing at 4.

IT IS SO ORDERED this 25 day of November, 2020.

Stacy L. Riddel
District Court Judge

I, Don Newberry, Court Clerk, for Tulsa County, Oklahoma, hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears on record in the Court Clerk's Office of Tulsa County, Oklahoma, this

NOV 30 2020

By Deputy

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

CLARENCE ROZELL GOODE, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. PCD-2020-530
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER REMANDING FOR EVIDENTIARY HEARING

Petitioner has filed with this Court a Successive Application for Post-Conviction Relief. The record reflects Petitioner was convicted of three counts of first degree murder, in violation of 21 O.S.Supp.2004, § 701.7, and one count of first degree burglary, in violation of 21 O.S.2001, § 1431, in Tulsa County District Court case number CF-2005-3904, before the Honorable Tom C. Gillert, District Judge. The jury assessed punishment at death on each of the three first degree murder convictions, after finding the existence, in each of the three murders, of the two alleged aggravating circumstances: (1) the defendant knowingly created a great risk of death to more than one person; and (2) there exists a probability that the defendant would commit criminal acts of violence that would constitute a continuing

threat to society. 21 O.S.2001, § 701.12 (2) and (7). The jury assessed twenty (20) years imprisonment and a $10,000 fine on the first degree burglary count. Judge Gillert formally sentenced Goode in accordance with the jury verdict on January 7, 2008.

Thereafter, Goode filed a direct appeal of his convictions and sentences, which was affirmed by this Court in *Goode v. State*, 2010 OK CR 10, 236 P.3d 671, *cert. denied, Goode v. Oklahoma*, 562 U.S. 1231. Goode's original application for post-conviction relief was denied by unpublished Opinion on September 7, 2010.[1] Goode filed subsequent applications for post-conviction relief, which were denied on September 28, 2010, and May 2, 2012, respectively.[2] Goode is now before this Court with another subsequent application for post-conviction relief and a motion for evidentiary hearing.

The Capital Post-Conviction Procedure Act, specifically, 22 O.S.2011, § 1089(D)(8), provides as follows regarding successive post-conviction applications:

> if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based

[1] *Goode v. State*, Case No. PCD-2008-211 (unpublished OK CR Sept 7, 2010)
[2] *Goode v. State*, Case Nos. PCD-2010-661 and PCD-2012-261, both unpublished.

> on the subsequent application unless the application contains sufficient specific facts establishing that the current claims and issues have not been and could not have been presented previously in a previously considered application filed under this section, because the factual or legal basis for the claim was unavailable.

The Act additionally provides a legal basis of a claim is unavailable if the legal basis:

> a. was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or
>
> b. is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

22 O.S.2011, § 1089(D)(9).

Petitioner now claims the State of Oklahoma lacked jurisdiction to prosecute, convict and sentence him for the crimes committed in Indian Country. Petitioner argues that he is a citizen of the Muscogee (Creek) Nation and the crime[s] occurred within the boundaries of the Cherokee Nation. Petitioner relies on *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020). We find that the issues raised are issues which fall under the parameters of section 1089(D), and this issue is properly before this Court.

We find that this issue requires fact finding on two separate questions: (a) Petitioner's Indian status and (b) whether the crime occurred in Indian Country. We therefore **REMAND** this case to the District Court of Tulsa County, for an evidentiary hearing to be held within sixty (60) days from the date of this Order.

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

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

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

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

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record, to the Clerk of this Court, and counsel for Petitioner, within five (5) days after the District Court has filed its findings of fact and conclusions of law. Upon receipt thereof, the Clerk of this Court shall

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[3] *See e.g Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116; *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Drewry*, 365 F.3d 957, 960-61 (10th Cir.2004); *United States v. Prentiss*, 273 F.2d 1277, 1280-81 (10th Cir. 2001).

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

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

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit copies of the following, with this Order, to the District Court of Tulsa County: Petitioner's Successive Application for Post-Conviction Relief and associated filings filed on August 12, 2020.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 24th day of August, 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

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN - 9 2020

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

CLARENCE ROZELL GOODE, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PCD-2020-333**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DISMISSING SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF AND DENYING MOTION TO HOLD SUCCESSIVE APPLICATION IN ABEYANCE

Petitioner has filed with this Court a Successive Application for Post-Conviction Relief. The record reflects Petitioner was convicted of three counts of first degree murder, in violation of 21 O.S.Supp.2004, § 701.7, and one count of first degree burglary, in violation of 21 O.S.2001, § 1431, in Tulsa County District Court case number CF-2005-3904, before the Honorable Tom C. Gillert, District Judge. The jury assessed punishment at death on each of the three first degree murder convictions, after finding the existence, in each of the three murders, of the two alleged aggravating circumstances: (1) the defendant knowingly created a great risk of death to more than one

person; and (2) there exists a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.2001, § 701.12 (2) and (7). The jury assessed twenty (20) years imprisonment and a $10,000 fine on the first degree burglary count. Judge Gillert formally sentenced Goode in accordance with the jury verdict on January 7, 2008.

Thereafter, Goode filed a direct appeal of his convictions and sentences, which were affirmed by this Court in *Goode v. State*, 2010 OK CR 10, 236 P.3d 671, *cert. denied, Goode v. Oklahoma*, 562 U.S. 1231. Goode's original application for post-conviction relief was denied by unpublished Opinion on September 7, 2010.[1] Goode filed a subsequent applications for post-conviction relief, which were denied on September 28, 2010, and May 2, 2012, respectively.[2] Goode is now before this Court with another subsequent application for post-conviction relief and a motion for evidentiary hearing.

[1] *Goode v. State*, Case No. PCD-2008-211 (unpublished OK CR Sept 7, 2010)
[2] *Goode v. State*, Case Nos. PCD-2010-661 and PCD-2012-261, both unpublished.

The Capital Post-Conviction Procedure Act, specifically, 22 O.S.2011, § 1089(D)(8), provides as follows regarding successive post-conviction applications:

> if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that the current claims and issues have not been and could not have been presented previously in a previously considered application filed under this section, because the factual or legal basis for the claim was unavailable.

The Act additionally provides a legal basis of a claim is unavailable if the legal basis:

> a. was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or
>
> b. is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

22 O.S.2011, § 1089(D)(9).

Petitioner now claims the State of Oklahoma lacked jurisdiction to prosecute, convict and sentence him for the crimes committed in Indian Country. He relies upon the Tenth Circuit's opinion in *Murphy*

v. Royal, 875 F.3d 896 (10th Cir. 2017). The Court held that Oklahoma lacked jurisdiction to prosecute Murphy, an Indian, for a crime which occurred in Indian Country. *Id.* at 966. Petitioner acknowledges that opinion is not final as the case is pending before the United States Supreme Court.[3] He further seeks to rely upon another case pending and recently argued before the Supreme Court, *McGirt v. Oklahoma*, Supreme Court Case No. 18-9526.

Because neither *Murphy* nor *McGirt* is a final opinion, Petitioner's successive post-conviction application seeking relief based upon those cases is premature and this successive post-conviction application is **DISMISSED**. His motion to hold this successive post-conviction application in abeyance is therefore **DENIED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 9th **day of** June **, 2020.**

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

[3] *Carpenter v. Murphy*, Supreme Court Case No. 17-1107.

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:
John D. Hadden
Clerk

ORIGINAL

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

PCD 2020 530

CLARENCE ROZELL GOODE, JR.,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 12 2020

JOHN D. HADDEN
CLERK

Tulsa County District Court Case No.: CF-2005-3904

Court of Criminal Appeals Direct Appeal Case No.: D-2008-43

Court of Criminal Appeals Original Post-Conviction Case No.: PCD-2008-211

Successive Post-Conviction Case No.: PCD-2010-661

Successive Post-Conviction Case No.: PCD-2012-261

Successive Post-Conviction Case No.: PCD-2020-333

Successive Post-Conviction Case No.:

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF
- DEATH PENALTY -

PART A: PROCEDURAL HISTORY

Petitioner, Clarence Rozell Goode, Jr., through undersigned counsel, submits this successive application for post-conviction relief pursuant section 1089 of Title 22. This is the fifth application for post-conviction relief to be filed.[1]

[1] Pursuant to Rule 9.7(A)(3)(d), attached hereto are copies of Mr. Goode's prior applications in case nos.: PCD-2008-211, PCD-2010-661, and PCD-2012-261. *See* Appendix ("App.") at 48, Attachment ("Att.") 12; App. at 84, Att. 13; and App. at 102, Att. 14. Mr. Goode remains indigent. *See* App. at 151, Att.15 (certified determination of trial indigency); App. at 162, Att. 16 (determination of federal court indigency). Mr. Goode is represented in this matter by undersigned counsel, Tom Hird, Emma Rolls, and Patti Palmer Ghezzi, appearing with permission of the federal district court in *Goode v. Sharp*, Case No. 11-CV-150-GKF-FHM, Dkt. 69.

The sentence from which relief is sought is: Death Sentence

1. a. Court in which sentence was rendered: Tulsa County District Court

   b. Case Number: CF-2005-3904

2. Date of Sentence: January 7, 2008

3. Terms of Sentence: Mr. Goode received three sentences of death for three counts (Counts I, II and III) of first degree malice aforethought murder.

4. Name of Presiding Judge: Honorable Tom C. Gillert

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

   Where? Oklahoma State Penitentiary

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

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

I. CAPITAL OFFENSE INFORMATION

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

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

   Aggravating factors alleged:

   a. Mr. Goode knowingly created a great risk of death to more than one person; and,

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

   The jury found the presence of both of the alleged aggravating circumstances.

   Mitigating factors listed in jury instructions:

   a. Mr. Goode had a secure and healthy attachment with both parents during infancy and early childhood;

   b. Mr. Goode lived in the same home from birth to age 18 years;

c. Mr. Goode had only one sibling;

d. Mr. Goode's parents presented good role models, strong work ethic, and strong family ties;

e. Mr. Goode attended Sunday School and church and participated in choir;

f. Mr. Goode has four children who love him. He continues to be in contact with them and their families;

g. Mr. Goode has continued support from his mother, family, girlfriends and mother of his children;

h. Mr. Goode took a leading role in helping his family after his father's death;

i. Mr. Goode was a responsible father to his daughter, Marquisha, and wants to continue a positive relationship with his children;

j. Mr. Goode was very caring and helpful with seniors in the nursing home where he worked;

k. Mr. Goode was gainfully employed for 5-1/2 years prior to his arrest; and

l. Mr. Goode was 29 years old at the time of the homicides.

Victim impact testimony was presented during the trial's penalty phase.

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

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

9. The sentence imposed was recommended by the jury.

II. NON-CAPITAL OFFENSE INFORMATION

10. Mr. Goode was also convicted of one count (Count IV) of first-degree burglary in violation of 21 O.S. § 1431, after a former conviction of a felony. He received a sentence of 20 years imprisonment.

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

12. The sentence imposed was recommended by the jury.

III. CASE INFORMATION

13. Trial Counsel:

Larry Edwards
601 S. Boulder, Suite 1305
Tulsa, Oklahoma 74119

Stanley D. Monroe
15 West Sixth, Suite 2112
Tulsa, Oklahoma 74119

14. Counsel were appointed by the court.

15. The conviction and sentence were appealed to the Oklahoma Court of Criminal Appeals.

Date Brief In Chief filed: February 2, 2009
Date Response filed: June 11, 2009
Date Reply Brief filed: July 8, 2009
Date of Oral Argument (if set): January 12, 2010
Date of Petition for Rehearing (if appeal has been decided): June 29, 2010 (denied)

The case was not remanded for an evidentiary hearing.

16. Appellate Counsel:

James H. Lockard
Janet Chesley
Capital Direct Appeals Division
Oklahoma Indigent Defense System
PO Box 926
Norman, Oklahoma 73070-0926

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

If "yes," give citations if published: *Goode v. State*, 2010 OK CR 10, 236 P.3d 671.

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

Goode v. State, Case No.: PCD-2008-211, Order Denying Application for Post-Conviction Relief (Sept. 7, 2010) (unpub).

Goode v. Oklahoma, 131 S. Ct. 1497 (Feb. 22, 2011) (certiorari denied).

Goode v. State, Case No.: PCD-2010-661, Order Denying Application for Post-Conviction Relief (Sept. 28, 2010) (unpub).

Goode v. Workman, Case No.: 11-CV-150 (N.D Okla. July 11, 2016) (unpub) (denying federal habeas relief).

Goode v. State, Case No.: PCD-2012-261, Order Denying Application for Post-Conviction Relief (May 2, 2012) (unpub).

Goode v. Carpenter, 922 F.3d 1136 (10th Cir. 2019) (denying federal habeas relief).

Goode v. Sharp, 140 S. Ct. 1145 (Feb. 24, 2020) (certiorari denied).

Goode v. State, Case No.: PCD-2020-333, Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance (June 9, 2020).

PART B: GROUNDS FOR RELIEF

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

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

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

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

PROPOSITION

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

A. The Legal Basis for Mr. Goode's Subsequent Application for Post-conviction Relief Was Unavailable Until *McGirt* and *Murphy* Became Final.

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

C. Crimes by Indians Within Cherokee Nation Reservation Boundaries Are Subject to Federal Jurisdiction Under the Major Crimes Act.

D. *McGirt* Controls Reservation Status of the Cherokee Nation and Federal Criminal Jurisdiction.

E. Indian Country Includes All Fee Lands Within Cherokee Reservation Boundaries.

F. The Cherokee Reservation Was Established by Treaty, and its Boundaries Have Been Altered Only by Express Cessions in 1866 and 1891.

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

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

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

4. **The Cherokee Reservation Has Been Diminished Only by Express Cessions of Portions of the Reservation in Its 1866 Treaty and Its 1891 Agreement.**

G. Congress Has Not Disestablished the Cherokee Reservation.

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

2. **Allotment of Cherokee Land Did Not Disestablish the Cherokee Reservation.**

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

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

PART C: FACTS

Petitioner's request for post-conviction relief presents the sole issue of whether Oklahoma had jurisdiction to prosecute, convict, and sentence Mr. Goode to death for murders that occurred within the boundaries of the Cherokee reservation – boundaries that have not been disestablished by Congress. Facts that relate to the offense have limited value regarding the jurisdictional issue and will only be addressed briefly.

FACTS RELATING TO THE OFFENSE

The bodies of Mitch Thompson, Tara Burchett-Thompson, and Kayla Burchett were found shot to death on the morning of August 26, 2005, in their home in Owasso, Oklahoma. Tr. Vol. III

at 579-84[2]. Goode was convicted on the testimony of a co-defendant, a fellow suspect, a jailhouse informant, and a corrupt police officer now known to have been a prolific case fixer.

FACTS RELATING TO THE CHEROKEE NATION AND INDIAN COUNTRY JURISDICTION

Cherokee Nation is a federally recognized Indian tribe. It is one of five tribes that are often treated as a group for purposes of federal legislation (Cherokee, Muscogee (Creek), Choctaw, Chickasaw, and Seminole Nations, historically referred to as the "Five Civilized Tribes" or "Five Tribes"). The Cherokee Reservation boundaries encompass lands in a fourteen-county area, including all of Adair, Cherokee, Craig, Nowata, and Washington Counties and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Sequoyah, Tulsa, and Wagoner Counties, within the borders of the State of Oklahoma.[3] The Nation's government, headquartered in Tahlequah, consists of executive, legislative, and judicial branches, including an active district and appellate court.[4] The Cherokee Nation provides law enforcement through its Marshal Service,

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[2] References to the trial record will be the preliminary hearing transcript ("Prel. Hrg. Tr."), trial transcript by volume ("Tr. Vol.__"), and Original Record ("O.R."). Additional supporting documents are cited to as attachments ("Att."), provided in the separately bound and sequentially numbered appendix ("App.").

[3] The following interactive link can be used to determine if a specific address is located on the Cherokee Reservation: http://geodata.cherokee.org/CherokeeNation/ (user directions are displayed on the upper-right corner of the screen; ensure Adobe Flash Player version 11.1.0 or greater is installed)(last visited August 3, 2020).

[4] *See* "*Rising Together, 2018 Annual Report to the Cherokee People*" (FY 2018 Rep.) and "*Popular Annual Financial Report for FY 2019, Cherokee Nation*" (FY 2019 Rep.). These reports are available at https://www.cherokee.org/media/lufhr5rp/fy2018-annual-report-_final-online.pdf; https://www.cherokee.org/media/gaahnswb/pafr-fy19-final-v-2.pdf (last visited August 3, 2020).

and maintains cross-deputation agreements with state, county, and city law enforcement agencies to ensure protection of citizens and non-citizens.[5]

Cherokee Nation maintains a significant and continuous presence in the Cherokee Reservation. There are approximately 139,000 Cherokee citizens residing within the reservation. The Nation provides extensive services to communities throughout the reservation, including, among others: health and medical centers, veteran's center, employment, housing, bus transit, waterlines, sewers, water treatment, bridge and road construction, parks, food distribution, child support services, child welfare, youth shelter, victim services, donations to public schools and local fire departments, and charitable contributions. The Nation's activities, including its business operations, resulted in a statewide $2.17 billion favorable economic impact in 2019.[6]

The homicides occurred at 9707 N. 112 Ave. E. in Owasso, Oklahoma. O.R. at 68, 532, 648; Prel. Hrg. Tr. at 17; and Tr. Vol. III at 513, 518-19, 547, 574; Tr. Vol. IX at 1815. The home is located on fee land within the Cherokee Nation Reservation. App. at 166, Att. 17 (Cherokee Nation Real Estate Services Memo). Mr. Goode is an enrolled member of the Muscogee (Creek) Nation. App. at 168, Att. 18 (Muscogee (Creek) Nation citizenship board letter).

There are also historical facts relevant in determining whether Oklahoma had jurisdiction to prosecute, convict, and sentence Mr. Goode on the Cherokee Nation Reservation. These historical facts are discussed below in part D and documented in the attachments, which are incorporated herein by reference. *See* App. 1-169, Atts. 1-18.

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[5] *See* Appendix ("App.") at 1, Attachment ("Att.") 1 (Cherokee Nation Cross-Deputization Agreements (1992-2019)).

[6] *See* FY 2018 Rep. and FY 2019 Rep., *supra* n.1; *see also* App. at 4, Att. 2 (Cherokee Nation Service Area Maps).

PART D: ARGUMENTS AND AUTHORITIES

PROPOSITION

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

A. The Legal Basis for Mr. Goode's Subsequent Application for Post-conviction Relief Was Unavailable Until *McGirt* and *Murphy* Became Final.

Mr. Goode recognizes Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, and Okla. Stat. tit. 22 § 1089(D) typically apply to the filing and review of subsequent applications for post-conviction relief in capital cases. Indeed, this Court recently dismissed Mr. Goode's subsequent application which raised the same fundamental constitutional question raised here – does Oklahoma have subject-matter jurisdiction to prosecute Mr. Goode and sentence him to death? It concluded Mr. Goode's claim was "premature" because *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) *(McGirt)* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (*Murphy*) were not final decisions. *Goode v. State,* PCD-2020-332, Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance. (June 9, 2020). As the Supreme Court has issued mandates in both cases, *Murphy* and *McGirt* are now final decisions.

Under § 1089(D)(9) the legal basis for this application was unavailable until the mandates issued. In dismissing Mr. Goode's recent application as premature, this Court acknowledged the legal basis for the claim "was not recognized by or could not have been reasonably formulated from a *final* decision of the United States Supreme Court [or the Tenth Circuit Court of Appeals]." Okla. Stat. tit. 22 § 1089(D) (emphasis added). Now that the legal basis is available, this Court should decide the federal claim on the merits and grant Mr. Goode relief, dismiss the cases, and

vacate the convictions and sentences. By faithfully applying *McGirt* and *Murphy*, this Court will be convinced the Cherokee Nation Reservation is intact and Oklahoma had no jurisdiction to try, convict, and sentence Mr. Goode to death.

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

Even if successive post-conviction applications were not allowed in this unique situation, subject-matter jurisdiction is a fundamental issue that can be raised at any time. And, Oklahoma does not have subject-matter jurisdiction under the Major Crimes Act (MCA) over the crimes that arose on the Cherokee Nation Reservation.

"[L]ack of jurisdiction" is a constitutional right which is "never finally waived." *Johnson v. State*, 1980 OK CR 45, ¶ 30, 611 P.2d 1137, 1145. In three capital cases in which Indian country jurisdictional issues were raised belatedly, this Court repeatedly confirmed such a fundamental jurisdictional issue can be raised at any time. *See Cravatt v. State*, 1992 OK CR 6 at ¶ 3, 825 P.2d 277, 278 (deciding Indian country jurisdictional question though raised for first time on the day appellate oral argument was set); *Murphy v. State*, 2005 OK CR 25, ¶ 2, 124 P.2d 1198 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue though raised for first time in successor post-conviction relief action); and *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue even though issue was not raised in the trial court where appellant pled guilty and waived his appeal). This Court's decisions that jurisdiction can be raised at any time rest on bedrock principles which have existed for nearly a century. *See Armstrong v. State*, 1926 OK CR 259, 35 Okla. Crim. 116, 118, 248 P. 877, 878.

Such respect for jurisdictional claims is proper. The Supreme Court defines jurisdiction as "the courts' statutory and constitutional *power* to adjudicate the case." *United States v. Cotton*,

535 U.S. 625, 630 (2002). *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Because subject-matter jurisdiction involves a court's power to act, the Supreme Court concludes "it can never be forfeited or waived." *Cotton*, 535 U.S. at 630. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised. This concept is so grounded in law that defects in jurisdiction cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U.S. 413, 421 (1911). Likewise, the Tenth Circuit in *Murphy v. Royal,* 875 F.3d 896, 907 n.5 (10th Cir. 2017) recognized issues of subject-matter jurisdiction in Oklahoma are "never waived" and can "be raised on a collateral appeal." Similarly, Oklahoma's Solicitor General acknowledges "Oklahoma allows collateral challenges to subject-matter jurisdiction *at any time*." *McGirt v. Oklahoma*, Supreme Court Case No. 18-9526 (Mar 13, 2020), Brief of Respondent at 43 (emphasis added).[7]

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

C. Crimes by Indians Within Cherokee Nation Reservation Boundaries Are Subject to Federal Jurisdiction Under the Major Crimes Act.

In *McGirt,* the Supreme Court decided the only question before it. It determined that the Muscogee (Creek) Nation's 1866 reservation had not been disestablished, that the reservation was

[7] Petitioner is aware Oklahoma now unapologetically retreats from this statement when it no longer serves its purpose. *See Bosse v. State*, PCD-2019-124, Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), Aug. 4, 2020 (*Bosse* Response). Without fully acknowledging Oklahoma's century-long precedent that an issue of subject-matter jurisdiction is never waived and can be raised on collateral appeal, the State now speculates that in *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198 and *Wackerly v. State*, 2010 OK CR 16, 237 P.3d 795, this Court did not "consider" whether its long-standing precedent "squared" with the post-conviction procedures which had existed for over a decade when this Court considered Mr. Murphy and Mr. Wackerly's jurisdictional claims on the merits. *Bosse* Response at 31.

"Indian country" under 18 U.S.C. § 1551(a), and that Oklahoma had no jurisdiction to prosecute Mr. McGirt, an Indian, for a major crime committed within Creek reservation borders. Noting that "each tribe's treaties must be considered on their own terms," the analysis in *McGirt* extends to other Five Tribes reservations, as portended by the dissent. *McGirt*, 140 S. Ct. at 2479 (Roberts, J., dissenting).

The Cherokee and Creek are connected by more than their shared tragedy of the Trail of Tears. They share a common legal history and similarities in the terms of their treaty-created reservations. By applying the decision in *McGirt* to the Cherokee reservation, this Court must find that it too has not been disestablished by Congress, is "Indian country" under 18 U.S.C. §1151(a), and that Oklahoma has no jurisdiction to prosecute, convict, and sentence Mr. Goode to death.

The jurisdictional parameters for criminal jurisdiction in Indian country are clearly defined by federal law. *See* Att. 3 (Indian Country Criminal Jurisdictional Chart), App. at 11. *McGirt* addressed jurisdiction of crimes under the Major Crimes Act, 18 U.S.C. § 1153 (MCA) which applies to Mr. Goode, a Creek citizen, as it did to Mr. McGirt (Seminole) and Mr. Murphy (Creek). Mr. Goode's crime was committed on fee land within the Cherokee Nation Reservation. Congress never disestablished this treaty-created reservation and Oklahoma has no jurisdiction.

D. *McGirt* Controls Reservation Status of the Cherokee Nation and Federal Criminal Jurisdiction.

As recognized by this Court more than thirty years ago, Oklahoma failed to assume criminal and civil jurisdiction under Public Law 280 before it was amended to require tribal consent; and Oklahoma "does not have jurisdiction over crimes committed by or against an Indian in Indian Country;" *See Cravatt*, 825 P.2d at 279 (citing *State v. Klindt*, 1989 OK CR 75, 782 P.2d

401, 403).[8] *Klindt* did not address whether all lands within Cherokee Nation boundaries constitute a reservation under 18. U.S.C. § 1151(c).

The United States Supreme Court likewise had not addressed reservation status as to any of the Five Tribes, until July 9, 2020, when it decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). In *McGirt*, the Court ruled that the Muscogee (Creek) Reservation was established by treaty; Congress never disestablished the reservation; all land, including fee land, within the reservation is Indian country under 18 U.S.C. § 1151(a); federal statutes concerning the Five Tribes near the time of statehood did not grant jurisdiction to Oklahoma over crimes committed by Indians on the reservation; the Major Crimes Act, 18 U.S.C. § 1153 (MCA), applies to certain listed crimes committed by Indians on the reservation; and Oklahoma had no jurisdiction to prosecute a Seminole citizen for crimes committed on fee lands within the reservation under the MCA. *Id.*

On the same date, the Supreme Court not only affirmed the Tenth Circuit's 2017 ruling in *Murphy v. Royal*, 875 F. 3d 896 (10th Cir. 2017), *aff'd, Sharp v. Murphy*, 591 U.S. ___, 140 S. Ct. 2412 (2020) (*Murphy),* determining that Oklahoma had no jurisdiction over the murder of an Indian by another Indian on the Creek Reservation under the MCA, it also remanded four pending cases involving other reservations in Oklahoma, in light of *McGirt.*[9]

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[8] In *Klindt*, this Court correctly overruled *Ex parte Nowabbi*, 1936 OK CR 123, 61 P.2d 1139, 1154, finding Oklahoma had no jurisdiction over crimes committed on restricted Choctaw allotments. *See also Cravatt,* 825 P.2d at 278-79 n.3 (stating there was no foundation in the statutes for the United States' position that the Five Tribes should receive different judicial treatment).

[9] *See Bentley v. Oklahoma*, OCCA No. C-2016-699, U.S. Sup. Ct. No. 19-5417, Judgment Vacated and Case Remanded, July 9, 2020 (Citizen Band Potawatomi reservation); *Johnson v. Oklahoma*, OCCA No. PC-2018-343, U.S. Sup. Ct. No. 18-6098, Judgment Vacated and Case Remanded, July 9, 2020 (Seminole Reservation); *Terry v. Oklahoma*, OCCA No. PC-2018-1076, U.S. Sup. Ct. No. 18-8801, Judgment Vacated and Case Remanded, July 9, 2020 (Quapaw/Modoc/Ottawa

The *McGirt* decision laid to rest Oklahoma's position that the MCA and GCA do not apply in Oklahoma. The Court noted that even the dissent declined "to join Oklahoma in its latest twist." *See McGirt,* 140 S. Ct. at 2476. The Court found no validity to Oklahoma's argument that the MCA was rendered inapplicable by three statutes that were passed prior to statehood: Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 (granting federal courts in Indian Territory[10] "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense"); Act of June 28, 1898, ch. 517, § 28, 30 Stat. 495, 504-505 (Curtis Act) (abolishing Creek Nation courts and transferring pending criminal cases to federal courts in Indian Territory); and the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267, as amended by the Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286) (concerning transfer of cases upon statehood).[11] *McGirt,* 140 S. Ct. at 2477. The Court noted that

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Reservations); and *Davis v. Oklahoma*, OCCA No. PC-2019-451, U.S. Sup. Ct. No. 19-6428, Judgment Vacated and Case Remanded, July 9, 2020 (Choctaw Reservation).

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

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

Oklahoma was formed from Oklahoma Territory in the west and Indian Territory in the east,[12] and that criminal prosecutions in Indian Territory were split between tribal and federal courts, citing Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81, 94.[13] *Id.* at 2476. The Court held that Congress "abolished that [Creek tribal/federal court split] scheme" with the 1897 act, but "[w]hen Oklahoma won statehood in 1907, the MCA applied immediately according to its plain terms." *Id.* The Enabling Act sent federal-law cases to federal court in Oklahoma, and crimes arising under the federal MCA "belonged in federal court from day one, wherever they arose within the new state." *Id.* at 2477.

E. Indian Country Includes All Fee Lands Within Cherokee Reservation Boundaries.

The Cherokee Reservation includes individual restricted and trust Cherokee allotments that constitute Indian country under 18 U.S.C. § 1151(c) for purposes of application of the MCA and GCA ("all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same"). *See United States v. Ramsey*, 271 U.S. 467, 469, 472 (1926) (GCA applies to murder of Indian by non-Indian on restricted Osage allotment); *United States v. Sands*, 968 F.2d 1058, 1061-62 (10th Cir. 1992) (MCA applies to murder of Indian by Indian on restricted Creek allotment, and allotment era statutes "did not abrogate the federal

[12] No territorial government was ever created in the reduced Indian Territory, and it remained directly subject to tribal and federal governance until statehood. *See* App. at 17, Att. 5 (Map of Indian Territory); and App. at 19, Att. 6 (Map of Oklahoma and Indian Territories).

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

government's authority and responsibility, nor allow jurisdiction by the State of Oklahoma" over those allotments); *Klindt*, 782 P.2d at 403 (no state jurisdiction over assault with dangerous weapon by or against Indian on Cherokee trust allotment).

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

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

F. The Cherokee Reservation Was Established by Treaty, and its Boundaries Have Been Altered Only by Express Cessions in 1866 and 1891.

1. The Creek Reservation Was Established by Treaty.

In *McGirt,* the Court discussed Creek treaties in detail, before concluding that they established the Creek Reservation. The Court noted that the 1832 and 1833 Creek removal treaties "solemnly guarantied" the land; established boundary lines to secure "a country and permanent home;" stated the United States' desire for Creek removal west of the Mississippi River; included Creek Nation's express cession of their lands in the East; confirmed the treaty obligation of the parties upon ratification; required issuance of a patent, in fee simple, to Creek Nation for the new land, which was formally issued in 1852; and guaranteed Creek rights "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them." *McGirt*, 140 S. Ct. at 2461, *citing* Treaty with the Creeks, arts. I, XII, XIV, XV, Mar. 24, 1832, 7 Stat. 366-368, and Treaty with the Creeks, preamble, arts. III, IV, IX, Feb. 14, 1833, 7 Stat. 417, 419.

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

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

In sum, the Court stressed in *McGirt* that the Creek treaties promised a "permanent home" that would be "forever set apart," and the Creek were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. The Court concluded that "[u]nder any definition, this was a reservation." *McGirt*, 140 S. Ct. at 2461-2462.

2. The Cherokee Treaties Contain Same or Similar Provisions as Creek Treaties.

"Each tribe's treaties must be considered on their own terms," in determining reservation status. *Id.* at 2479. The approval of Creek and Cherokee treaties during the same period of time, and the similarity of Creek treaties described in *McGirt* and Cherokee treaties, conclusively demonstrate that the Cherokee Reservation was established by treaty.

Cherokee Nation was originally located in what are now the states of Georgia, Alabama, Tennessee, South Carolina, North Carolina, and Kentucky. Wilkins, Thurman, *Cherokee Tragedy: The Ridge Family and the Decimation of a People* 22, 91, 209, 254 (rev. 2d ed. 1986) (*Cherokee Tragedy*). Like the Creeks, the Cherokees exchanged lands in the Southeast for new lands in Indian Territory in the 1830s under pressure of the national removal policy. The Indian Removal Act of 1830, Act of May 28, 1830, ch. 148, 4 Stat. 411, which implemented this policy, authorized the President to divide public domain lands into defined "districts" for tribes removing west of the Mississippi River. *Id.* at § 1. It also provided that the United States would "forever secure and guaranty" such lands to the removed tribes, "and if they prefer it . . . the United States will cause a patent . . . to be made and executed to them for the same[.]" *Id.* at § 3.

In 1831 and 1832, the Supreme Court issued two seminal decisions in cases involving Cherokee Nation resistance to Georgia citizens' trespasses on Cherokee lands. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), the Supreme Court held that Cherokee Nation was a

"domestic dependent nation." The following year, the Supreme Court held that Indian tribes were "'distinct political communities, having territorial boundaries, within which their authority is exclusive . . . which is not only acknowledged, but guarantied by the United States,' a power dependent on and subject to no state authority." *McGirt*, 140 S. Ct. at 2477, *citing Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). Despite these decisions, President Jackson persisted in efforts to remove Cherokee citizens from Georgia.

The Cherokee Reservation in Indian Territory was finally established by 1833 and 1835 treaties. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokees on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of those lands, and provided that "a patent" would issue as soon as reasonably practical. *Id.* at art. 1. It confirmed the treaty obligation of the parties upon ratification. *Id.* at art. 7.

However, there were internal disputes within Cherokee Nation, and the 1833 treaty failed to achieve removal of the majority of Cherokee citizens. Two Cherokee groups represented divisive viewpoints of what was best for the Cherokee people. The group led by John Ross, who represented a majority of Cherokee citizens, opposed removal. The other group, led by John Ridge, supported removal, fearing that tribal citizens would quickly lose their lands if conveyed to them individually in the southeastern states. *Cherokee Tragedy* at 266-68.

Almost three years after the 1833 treaty, members of the Ridge group signed the treaty at New Echota. Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478. Containing language similar to wording in the 1832 and 1833 Creek treaties, the 1835 Cherokee treaty was ratified "with a view to re-unite their people in one body and to secure to them a *permanent home* for themselves and their posterity," in what became known as Indian Territory, "*without the territorial limits of*

the state sovereignties, and "*where they could establish and enjoy a government of their* choice, and perpetuate such a state of society as might be consonant with their views, habits and condition." *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872) (emphasis added).

Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." *Id.* at art. 2. Like Creek treaties the 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government . . . within their own country," so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians; and provided that it would be "obligatory on the contracting parties" after ratification by the Senate and the President. *Id.* at arts. 1, 5, 8; art. 19, 7 Stat. 478.

As of January 1838, approximately 2,200 Cherokees had removed to Indian Territory, and around 14,757 remained in the east. *See The Western Cherokee Indians v. United States*, 27 Ct. Cl. 1, 3, 1800 WL 1779 (1891). That spring, the army rounded up most of the remaining Cherokees who had refused to remove within the time allotted. "They were seized as they worked in their farms and fields . . . They remained in captivity for months while hundreds died from inadequate and unaccustomed rations. The debilitation of others contributed to deaths during the removal

march." Rogin, Michael Paul, *Fathers & Children: Andrew Jackson and the Subjugation of the American Indian* 241 (1991).

After removal, on December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new reservation in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The patent recited the United States' treaty commitments to convey these lands to the Nation. *Id.* at 307. The title, like that of the Creek, was held by Cherokee Nation "for the common use and equal benefit of all the members." *Id.* at 307; *see also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894). A few years later, an 1846 treaty between Cherokee Nation and the United States also required federal issuance of a deed to the Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the "Neutral Lands") and the "outlet west." Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871.

Like Creek Nation, Cherokee Nation negotiated a treaty with the United States after the Civil War. Treaty with the Cherokee, July 19, 1866, art. 4, 14 Stat. 799. The 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet), Treaty with the Cherokee, *id.* at art. 16, and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country . . . until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." It also expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. ("The Cherokee Nation hereby cedes . . . to the United States, the tract of land in the State of Kansas which was sold to the Cherokees . . . and also that strip of the land ceded to the nation . . . which is included in the State of Kansas, and the Cherokees consent that said lands

may be included in the limits and jurisdiction of the said State"). *Id.* at art. 17. None of the other provisions of the 1866 treaty affected Cherokee Nation's remaining reservation lands. Instead, the treaty required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council." *Id.* at art. 21.

The 1866 treaty recognized the Nation's control of its reservation, by expressly providing: "*Whenever the Cherokee national council shall request it*, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States." *Id.* at art. 20 (emphasis added). It also guaranteed "to the people of the Cherokee Nation the quiet and peaceable possession of their country," and promised federal protection against "intrusion from all unauthorized citizens of the United States" and removal of persons not "lawfully residing or sojourning" in Cherokee Nation. *Id.* at arts. 26, 27. It "*re-affirmed and declared to be in full force*" all previous treaty provisions "not inconsistent with the provisions of" the 1866 treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. *Id.* at art. 31 (emphasis added).

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

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

In *McGirt*, the Court rejected Oklahoma's newly minted argument that Creek treaties did not establish a reservation and instead created a dependent Indian community, as defined by 18 U.S.C. § 1151(b) ("all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state"). *McGirt*, 140 S. Ct. at 2475-76. Oklahoma based this claim on the tribal fee ownership of the reservation, and the absence of the words "reserved from sale" in the Creek treaties. *Id.* at 2475. The "entire point" of this reclassification attempt was "to avoid *Solem's* rule that only Congress may disestablish a reservation."[14] *Id.* at 2474.

The Court was not persuaded by Oklahoma's argument that, due to tribal fee ownership of the Creek lands, a reservation could not be created in the absence of the words "reserved from sale." The Court recognized that fee title is not inherently incompatible with reservation status, and that the establishment of a reservation does not require a "particular form of words." *McGirt*, 140 S. Ct. at 2475, *citing Maxey v. Wright,* 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902). The Court also noted that the Creek land was reserved from sale in the "very real sense" and that the United States could not give the tribal lands to others or appropriate them to its own purposes, without engaging in "an act of confiscation." *McGirt*, 140 S. Ct. at 2475, *citing United States v. Creek Nation*, 295 U.S. 103, 110 (1935).

[14] In *Murphy*, Oklahoma did "not dispute that the [Creek] reservation was intact in 1900." *Murphy*, 875 F.3d at 954. In *McGirt*, the Court noted that the United States and the dissent did not make any arguments supporting Oklahoma's novel dependent Indian community theory. *McGirt*, 140 S. Ct. at 2474.

The "most authoritative evidence of [a tribe's] relationship to the land" does not lie in scattered references to "stray language from a statute that does not control here, a piece of congressional testimony there, and the scattered opinions of agency officials everywhere in between." *McGirt,* 140 S. Ct. at 2475. "[I]t lies in the treaties and statutes that promised the land to the Tribe in the first place." *Id.* at 2476. As previously noted, the 1830 Indian Removal Act promised issuance of fee patents upon removal of tribes affected by its implementation, which were granted to Creek Nation and Cherokee Nation. The treaties for both tribes contain extensive evidence of their relationships with their respective lands in Indian Territory. The Cherokee Reservation was established by treaty, just as Creek treaties established the Creek Reservation. *McGirt*, 140 S. Ct. at 2460-61. Later federal statutes also recognized the Cherokee Reservation as a distinct geographic area.[15]

4. The Cherokee Reservation Has Been Diminished Only by Express Cessions of Portions of the Reservation in Its 1866 Treaty and Its 1891 Agreement.

The current boundaries of Cherokee Nation are as established in Indian Territory in the 1833 and 1835 treaties, diminished only by the express cessions in the 1866 treaty and by an 1891 agreement ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, ch. 209, § 10, 27

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[15] *See* Act of June 21, 1906, ch. 3504, 34 Stat. 325, 342-43 (drawing recording districts in the Indian Territory, including district 27, with boundaries along the northern and western "boundary line[s] of the Cherokee Nation," and district 28, described as "lying within the boundaries of the Cherokee Nation"); § 6, 34 Stat. 277 ("the third district for the House of Representatives must (with the exception of that part of recording district numbered twelve, which is in the Cherokee and Creek nations) comprise all the territory now constituting the Cherokee, Creek, and Seminole nations and the Indian reservations lying northeast of the Cherokee Nation, within said State"); Act of June 30, 1913, ch. 4, § 18, 38 Stat. 77, 95 ("common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations"); and the Oklahoma Indian Welfare Act, Act of June 26, 1936, ch. 831, 49 Stat. 1967, codified at 25 U.S.C. §§ 5201-5210 (authorizing Secretary of the Interior to acquire land "within or without existing Indian reservations" in Oklahoma).

Stat. 612, 640-43. The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906).[16] The 1893 ratification statute required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. *Id.* at 112. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time.

The original 1839 Cherokee Constitution established the boundaries as described in its 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may be made necessary" by the 1866 treaty.[17] Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." 1999 Cherokee Constitution, art. 2.

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[16] *See* App. at 14, Att. 4 (Goins, Charles Robert, and Goble, Danney, "Historical Atlas of Oklahoma" at 61 (4th Ed. 2006), showing the Cherokee Outlet ceded by the 1891 Agreement, as well as the Kansas lands, known as the Neutral Lands, and the Cherokee Strip ceded by the 1866 Treaty.

[17] 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, *reprinted in* Volume I of West's Cherokee Nation Code Annotated (1993 ed.).

G. Congress Has Not Disestablished the Cherokee Reservation.

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

Congress has not disestablished the Cherokee Reservation as it existed following the last express Cherokee cession in the 1891 Agreement ratified in 1893. All land within reservation boundaries, including fee land, remains Indian country under 18 U.S.C. § 1151(a). Courts do not lightly infer that Congress has exercised its power to disestablish a reservation. *McGirt*, 140 S. Ct. at 2462, *citing Solem,* 465 U.S. at 470. Once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S. Ct. at 2469. Congressional intent to disestablish a reservation "must be clear and plain." *Id.*, *citing South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Congress must clearly express its intent to disestablish, commonly by "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt*, 140 S. Ct. at 2463, *citing Nebraska v. Parker*, 577 U.S. 481, __, 136 S. Ct. 1072, 1079 (2016).

This Court's analysis must focus on the statutory text that allegedly resulted in reservation disestablishment. The only "step" proper for a court of law is "to ascertain and follow the original meaning of the law" before it. *McGirt*, 140 S. Ct. at 2468. Disestablishment has never required any particular form of words. *Id.* at 2463, *citing Hagen v. Utah*, 510 U.S. 399, 411 (1994). A statute disestablishing a reservation may provide an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land." *McGirt,* 140 S. Ct. at 2462, *citing Solem*, 465 U.S. at 470. It may direct that tribal lands be "restored to the public domain," *McGirt*, 140 S. Ct. at 2462, *citing Hagen,* 510 U.S. at 412, or state that a reservation is "'discontinued,' 'abolished,' or 'vacated.'" *McGirt*, 140 S. Ct. at 2463, *citing Mattz v. Arnett*, 412

U.S. 481, 504 n.22 (1973); *See also DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 439–40 n.22 (1975).

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

In 1893, in the same statute ratifying the Cherokee 1891 Agreement, Congress established the Dawes Commission to negotiate agreements with the Five Tribes for "the extinguishment of the national or tribal title to any lands" in Indian Territory "either by cession," by allotment, or by such other method as agreed upon. § 16, 27 Stat. 612, 645–646.[18] The Commission reported in 1894 that the Creek Nation "would not, under any circumstances, agree to cede any portion of their lands." *McGirt*, 140 S. Ct. at 2463, *citing* S. Misc. Doc. No. 24, 53d Cong., 3d Sess., 7 (1894).[19] The Cherokee Nation resisted allotment for almost a decade longer, but finally ratified an agreement in 1902. Act of July 1, 1902, ch. 1375, 32 Stat. 716 (Cherokee Agreement). Like the Creek Allotment Agreement, Act of Mar. 1, 1901, ch. 676, 31 Stat. 861 (Creek Agreement) the Cherokee Agreement contained no cessions of land to the United States, and did not disestablish

[18] Congress clearly knew how to use explicit language to diminish reservations. In the 1893 Act, which also ratified the 1891 Agreement, Cherokee Nation agreed to "cede" Cherokee Outlet lands to the United States in exchange for payment.

[19] Although *McGirt* referenced only Creek Nation in this statement, the 1894 report reflects that each of the Five Tribes refused to cede tribal lands to the United States. App. at 21, Att. 7 (Ann. Rept. of the Comm. Five Civ. Tribes of 1894, 1895, and 1896 at 14 (1897). This refusal is also reflected in the Commission's 1900 annual report: "Had it been possible to secure from the Five Tribes a *cession to the United States of the entire territory at a given price*, . . . the duties of the commission would have been immeasurably simplified . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty . . . *it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment*, no matter how simple its evolutions." App. at 32, Att. 9 (Seventh Ann. Rept. of the Comm. Five Civ. Tribes at 9 (1900) (emphasis added).

the Cherokee Reservation, which also "survived allotment." *See McGirt*, 140 S. Ct. at 2464.[20] Where Congress contemplates, but fails to enact, legislation containing express disestablishment language, the statute represents "a clear retreat from previous congressional attempts to vacate the . . . Reservation in express terms [.]" *DeCoteau*, 420 U.S. at 448.

The central purpose of the 1902 Cherokee Agreement, like that of the Creek Agreement, was to facilitate transfer of title from the Nation of "allottable lands" (defined in § 5, 32 Stat. 716, as "all the lands of the Cherokee tribe" not reserved from allotment)[21] to tribal citizens individually. With exceptions for certain pre-existing town sites and other special matters, the Cherokee Agreement established procedures for conveying allotments to individual citizens who could not sell, transfer, or otherwise encumber their allotments for a number of years (5 years for any portion, 21 years for the designated "homestead" portion). §§ 9-17, 32 Stat. at 717; *see also McGirt*, 140 S. Ct. at 2463, *citing* Creek Agreement, §§ 3, 7, 31 Stat. 861, at 862-64.

The restricted status of the allotments reflects the Nation's understanding that allotments would not be acquired by non-Indians, would remain in the ownership of tribal citizens, and would be subject to federal protection. Tribal citizens were given deeds that conveyed to them "all the right, title, and interest" of the Cherokee Nation. § 58, 32 Stat. at 725; *see also McGirt*, 140 S. Ct. at 2463, *citing* Creek Agreement, § 23, 31 Stat. at 867-68. As of 1910, 98.3% of the lands of

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

[21] Lands reserved from allotment "in the Cherokee Nation" included schools, colleges, and town sites "in Cherokee Nation," cemeteries, church grounds, an orphan home, the Nation's capital grounds, its national jail site, and the newspaper office site. §§ 24, 49, 32 Stat. at 719-20, 724; *see also* Creek Agreement, § 24, 31 Stat. at 868-69.

Cherokee Nation (4,348,766 acres out of 4,420,068 acres) had been allotted to tribal citizens, and an additional 21,000 acres were reserved for town sites, schools, churches, and other uses.[22] Only 50,301 acres scattered throughout the nation remained unallotted in 1910 – approximately one percent of the nation's reservation area. *Id.* Later federal statutes relaxed restrictions on conveyances and encumbrance of allotments in various ways and contributed to the loss of individual Indian ownership of allotments over time.[23]

"Missing in all this, however, is a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands" required for disestablishment. *McGirt*, 140 S. Ct. at 2464. Allotment alone does not disestablish a reservation. *Id.*, *citing Mattz*, 412 U.S. at 496-97 (explaining that Congress's expressed policy during the allotment era "was to continue the reservation system," and that allotment can be "completely consistent with continued reservation status"); and *Seymour*, 364 U.S. at 356-58 (allotment act "did no more than open the way for non-Indian settlers to own land on the reservation").

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[22] App. at 43, Att. 11 (Ann. Rept. of the Comm. Five Civ. Tribes at 169, 176 (1910)).

[23] *See McGirt*, 140 S. Ct. at 2463, *citing* Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312, *see also* Act of Apr. 26, 1906, ch. 1876, §§ 19, 20, 34 Stat. 137 (Five Tribes Act); Act of Aug. 4, 1947, ch. 458, 61 Stat. 731; Act of Aug. 11, 1955, ch. 786, 69 Stat. 666; Act of Dec. 31, 2018, Pub. L. No. 115-399, 132 Stat. 5331; *see* "Fatally Flawed: State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform," Vollmann, Tim, and Blackwell, M. Sharon, 25 Tulsa Law Journal 1 (1989). Congress has also recognized Cherokee Nation's reversionary interest in restricted lands. *See* Act of May 7, 1970, Pub. L. No. 91-240, 84 Stat. 203 (requiring escheat to Cherokee Nation, as the tribe from which title to the restricted interest derived, to be held in trust for the Nation).

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

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

The Act of June 28, 1898, ch. 517, 30 Stat. 495 (Curtis Act), provided "for forced allotment and termination of tribal land ownership without tribal consent unless the tribe agreed to allotment," *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988)). "[P]erhaps in an effort to pressure the Tribe to the negotiating table," the Curtis Act included provisions for termination of tribal courts. *McGirt*, 140 S. Ct. at 2465, *citing* § 28, 30 Stat. 495, 504–505. A few years later, the 1901 Creek Allotment Act expressly provided that it did not "revive" Creek courts.[24] Nevertheless, the Curtis Act's abolishment of Creek courts did not result in reservation disestablishment. *McGirt*, 140 S. Ct. at 2466. This Court need not determine whether Cherokee courts were abolished.[25] But, there are ample grounds to conclude the Cherokee Agreement

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

[25] The Cherokee and Creek Nations operated their court systems years before the Department of the Interior's 1992 establishment of Courts of Indian Offenses in eastern Oklahoma for those tribes that had not yet developed tribal courts. "Law and Order on Indian Reservations," 57 Fed. Reg. 3270-01 (Jan. 28, 1992), and continue to do so. The Courts of Indian Offenses serving the Choctaw, Chickasaw, and Seminole Nations have also been replaced with tribal courts.

superseded the Curtis Act's abolishment of Cherokee courts. While earlier unratified versions of the Cherokee Agreement contained provisions expressly validating the Curtis Act's abolishment of tribal courts, the final version, ratified in 1902, did not.[26] Instead, section 73 of the Cherokee Agreement recognized that treaty provisions not inconsistent with the Agreement remained in force.[27] § 73, 32 Stat. at 727. These treaty protections included the 1866 Treaty provision that Cherokee courts would "retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." Art. 13, 14 Stat. 799. It is also noteworthy that the Curtis Act recognized the continuation of the Cherokee Reservation boundaries by expressly referencing a "permanent settlement in the Cherokee Nation" and "lands in the Cherokee Nation." §§ 21, 25, 30 Stat. at 502, 504.

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[26] Unratified agreements that predate the Cherokee Agreement demonstrate that Cherokees ensured that tribal court abolishment was not included in the final Agreement. The unratified January 14, 1899 version stated that the Cherokee "consents" to "extinguishment of Cherokee courts, as provided in section 28 of the [1898 Curtis Act]." App. at 26, Att. 8 (Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899), Appendix No. 2, § 71 at 49, 57). The unratified April 9, 1900 version provided that nothing in the agreement "shall be construed to revive or reestablish the Cherokee courts abolished by said last mentioned act of Congress [the 1898 Curtis Act]." App. at 32, Att. 9 (Seventh Ann. Rept. of the Comm. Five Civ. Tribes at 13 (1900), Appendix No. 1, § 80 at 37,45); *see also* Act of Mar. 1, 1901, ch. 675, pmbl. and § 72, 31 Stat. 848, 859 (version of Cherokee allotment agreement approved by Congress but rejected by Cherokee voters). The Five Tribes Commission's early efforts to conclude an agreement with Cherokee Nation were futile, "owing to the disinclination of the Cherokee commissioners to accede to such propositions as the Government had to offer." App. at 26, Att. 8 (Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899 at 9-10). The tribal court provisions in the unratified agreements were eliminated from the Cherokee Agreement as finally ratified. The Commission's discussion of the final agreement, before tribal citizen ratification, reflects that allotment was the "paramount aim" of the agreement, App. at 40, Att. 10 (Ninth Ann. Rept. of the Comm. Five Civ. Tribes at 11 (1902)), not erosion of Cherokee government.

[27] Treaty protections also included the Nation's 1835 treaty entitlement "to a Delegate in the House of Representatives when Congress may provide for the same." Art. 7, 7 Stat. 478.

Another "serious blow" to Creek governmental authority was a provision in the Creek Agreement that conditioned the validity of Creek ordinances "affecting the lands of the Tribe, or of individuals after allotment, or the moneys or other property of the Tribe, or of the citizens" thereof, on approval by the President. *McGirt*, 140 S. Ct. at 2466, *citing* § 42, 31 Stat. at 872. There is no similar limitation on Cherokee legislative authority in the Cherokee Agreement. Even if there had been, such provision did not result in reservation disestablishment, in light of the absence of any of the hallmarks for disestablishment in the Cherokee Agreement, such as cession and compensation. *See McGirt*, 140 S. Ct. at 2465 n.5.

Like the Creek Agreement, § 46, 31 Stat. 872, the Cherokee Agreement provided that tribal government would not continue beyond March 4, 1906. § 63, 32 Stat. at 725. Before that date, Congress approved a Joint Resolution continuing Five Tribes governments "in full force and effect" until distribution of tribal property or proceeds thereof to tribal citizens. Act of Mar. 2, 1906, 34 Stat. 822. The following month, Congress enacted the Five Tribes Act, which expressly continued the governments of all of the Five Tribes "in full force and effect for all purposes authorized by law, until otherwise provided by law." *McGirt,* 140 S. Ct. at 2466, *citing* § 28, 34 Stat. at 148. The Five Tribes Act included a few incursions on Five Tribes' autonomy. *McGirt*, 140 S. Ct. at 2466. It authorized the President to remove and replace their principal chiefs, instructed the Secretary of the Interior to assume control of tribal schools, and limited the number of tribal council meetings to no more than 30 days annually. *Id.*, *citing* §§ 6, 10, 28, 34 Stat. 139–140, 148. The Five Tribes Act also addressed the handling of the Five Tribes' funds, land, and legal liabilities in the event of dissolution. *Id.*, *citing* §§ 11, 27, 34 Stat. at 141, 148.

"Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land." *McGirt*, 140 S. Ct. at 2466. Instead, Congress

left the Five Tribes "with significant sovereign functions over the lands in question." *Id.* For example, Creek Nation retained the power to collect taxes; to operate schools; and to legislate through tribal ordinances (subject to Presidential approval of certain ordinances as required by the Creek Agreement, § 42, 31 Stat. 872). *Id., citing* §§ 39, 40, 42, 31 Stat. at 871–872. The Cherokee Agreement also recognized continuing tribal government authority. As previously noted, it did not require Presidential approval of any ordinance, did not abolish tribal courts, and confirmed treaty rights. § 73, 32 Stat. at 727. It also required that the Secretary operate schools under rules "in accordance with Cherokee laws;" required that funds for operating tribal schools be appropriated by the Cherokee National Council; and required the Secretary's collection of a grazing tax for the benefit of Cherokee Nation. §§ 32, 34, 72, 32 Stat. at 721. "Congress never withdrew its recognition of the tribal government, and none of its [later] adjustments would have made any sense if Congress thought it had already completed that job." *McGirt*, 140 S. Ct. at 2466.

Instead, Congress changed course in a shift in policy from assimilation to tribal self-governance. *See McGirt*, 140 S. Ct. at 2467. The 1934 Indian Reorganization Act (IRA) officially ended the allotment era for all tribes. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101, *et seq.*)[28] In 1936, Congress enacted the OIWA, which included a section concerning tribal constitutions and corporate charters, and repealed all acts or parts of acts inconsistent with the OIWA. 25 U.S.C. §§ 5203, 5209. Cherokee Nation's government, like those of other tribes, was strengthened later by the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975. Act of January 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203 *(codified* at 25

[28] The IRA excluded Oklahoma tribes from applicability of five IRA sections, 25 U.S.C. § 5118, but all other IRA sections applied to Oklahoma tribes, including provisions ending allotment and authorizing the Secretary to acquire lands for tribes.

U.S.C. §§ 5301, *et seq.*). The ISDEAA enables Cherokee Nation to utilize federal funds in accordance with multi-year funding agreements after government-to-government negotiations with the Department of the Interior. Congress, for the most part, has treated the Five Tribes in a manner consistent with its treatment of tribes across the country.

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

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

There is no ambiguous language in any of the relevant allotment-era statutes applicable to Creek and Cherokee Nations, including their separate allotment agreements, "that could plausibly be read as an Act of disestablishment." *McGirt*, 140 S. Ct. at 2468. Events contemporaneous with the enactment of relevant statutes, and even later events and demographics, are not alone enough to prove disestablishment. *Id.* A court may not favor contemporaneous or later practices *instead of* the laws Congress passed. *Id.* There is "no need to consult extratextual sources when the meaning

of a statute's terms is clear," and "extratextual sources [may not] overcome those terms." *Id.* at 2469. The only role that extratextual sources can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning. *Id.*

The "perils of substituting stories for statutes" were demonstrated by the "stories" that Oklahoma claimed resulted in disestablishment in *McGirt*. *Id.* at 2470. Oklahoma's long-historical practice of asserting jurisdiction over Indians in state court, even for serious crimes on reservations, is "a meaningless guide for determining what counted as Indian country." *Id.* at 2471. Historical statements by tribal officials and others supporting an idea that "everyone" in the late nineteenth and twentieth centuries believed the reservation system and Creek Nation would be disbanded, without reference to any ambiguous statutory direction, were merely prophesies that were not self-fulfilling. *Id.* at 2472. Finally, the "speedy and persistent movement of white settlers" onto Five Tribes land throughout the late nineteenth and early twentieth centuries is not helpful in discerning statutory meaning. *Id.* at 2473. It is possible that some settlers had a good faith belief that Five Tribes lands no longer constituted a reservation, but others may not have cared whether the reservations still existed or even paused to think about the question. *Id.* Others may have been motivated by the discovery of oil in the region during the allotment period, as reflected by Oklahoma court "sham competency and guardianship proceedings that divested" tribal citizens of oil rich allotments. *Id.* Reliance on the "practical advantages of ignoring the written law" would be "the rule of the strong, not the rule of law." *Id.*

CONCLUSION

Congress had no difficulties using clear language to diminish reservation boundaries in the 1866 treaty and 1891 Agreement provisions for Cherokee Nation's cessions of land in Indian Territory in exchange for money and promises. There are no other statutes containing any of the

hallmark language altering the Cherokee Reservation boundaries as they existed after the 1891 Agreement's cession of the Cherokee Outlet. Clear language of disestablishment was available to Congress when it enacted laws specifically applicable to the Five Tribes as a group and to Cherokee Nation individually, but it did not use it. The Cherokee Reservation boundaries as established by treaty and as defined in the Cherokee Constitution have not been disestablished. Oklahoma has no jurisdiction over crimes, like that of Mr. Goode's, that are covered by the MCA when committed on the Reservation.

Respectfully Submitted,

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VERIFICATION

State of Oklahoma)
) ss:
County of Oklahoma)

Thomas H. Hird, being first duly sworn upon oath, states he signed the above pleading as attorney for CLARENCE ROZELL GOODE, JR., and that the statements therein are true to the best of his knowledge, information, and belief.

THOMAS D. HIRD

Subscribed and sworn to before me this 12th day of August, 2020.

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

Notary Public

Commission Number: _____

My commission expires: _____

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2020, a true and correct copy of the foregoing Subsequent Application for Post-Conviction Relief, along with a separately bound Appendix of Attachments were delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9(B), Rules of the Court of Criminal Appeals.

THOMAS D. HIRD

INDEX OF ATTACHMENTS
(FILED IN SEPERATELY BOUND APPENDIX)

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

CLARENCE ROZELL GOODE, JR.,	***Tulsa County District Court Case No.: CF-2005-3904***
Petitioner,	***Court of Criminal Appeals Direct Appeal Case No.: D-2008-43***
-vs-	***Court of Criminal Appeals Original Post-Conviction Case No.: PCD-2008-211***
THE STATE OF OKLAHOMA,	***Successive Post-Conviction Case No.: PCD-2020-530***
Respondent.	

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

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December 22, 2020

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

CLARENCE ROZELL GOODE, JR., ***Petitioner*,** ***-vs-*** **THE STATE OF OKLAHOMA,** ***Respondent*.**	***Tulsa County District Court*** ***Case No.: CF-2005-3904*** ***Court of Criminal Appeals*** ***Direct Appeal Case No.: D-2008-43*** ***Court of Criminal Appeals Original*** ***Post-Conviction Case No.: PCD-2008-211*** ***Successive Post-Conviction Case No.:*** ***PCD-2020-530***

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December 22, 2020

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

Petitioner Clarence Rozell Goode, Jr. submits this post-hearing supplemental brief in support of his successive (i.e., subsequent) application for post-conviction relief ("Successive APCR") in accordance with this Court's Order Remanding for Evidentiary Hearing filed August 24, 2020.

I. Background.

On May 18, 2020, Mr. Goode filed a successive application for post-conviction relief raising the same fundamental issues raised here, and the Court concluded Mr. Goode's claim was "premature" because *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (*McGirt*) and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (*Murphy*) were not final decisions. Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance, *Goode v. State,* PCD-2020-333 (Okla. Crim. App. June 9, 2020). After *Murphy* and *McGirt* became final decisions, Mr. Goode filed the instant Successive APCR on August 12, 2020.

In his sole proposition, Mr. Goode argued *McGirt* confirms the State did not have jurisdiction to prosecute, convict, and sentence him for murders that occurred within the boundaries of the Cherokee Nation Reservation. On August 24, 2020, this Court remanded Mr. Goode's case to the District Court of Tulsa County for an evidentiary hearing. In its remand order, this Court asked for fact finding on "two separate questions: (a) Petitioner's Indian status and (b) whether the crime occurred in Indian Country." Order Remanding for Evidentiary Hearing at 4.

On September 4, 2020, Tulsa County District Court Judge Tracy Priddy set a status conference for September 25, 2020. *See*

https://www.oscn.net/dockets/GetCaseInformation.aspx?db=tulsa&number=CF-2005-3904. At the status conference Judge Priddy set the following dates: October 2 – Petitioner/Defendant Clarence Goode's trial brief due; October 9 – Plaintiff/Respondent State of Oklahoma's trial brief due (if it chooses to file one); October 15, 9:30 AM – evidentiary hearing. Mr. Goode filed his Trial Brief Regarding Evidentiary Hearing on October 2, 2020 (filed in this Court on December 2, 2020). The State did not file a trial brief.

On October 15, 2020, the District Court held an evidentiary hearing to answer the two questions posed by this Court. Petitioner/Defendant Clarence Goode presented evidence and argument. *See* Transcript of Proceedings Held October 15, 2020, and Petitioner's Evidentiary Hearing Exhibits, filed in this Court on December 2, 2020. Plaintiff/Respondent State of Oklahoma chose to present no evidence and made no argument. *See* Transcript of Proceedings Held October 5, 2020.

On December 2, 2020, the District Court filed with this Court a certified copy of its Findings of Fact and Conclusions of Law, a copy of Mr. Goode's Trial Brief Regarding Evidentiary Hearing, a copy of the evidentiary hearing transcript, and a copy of Mr. Goode's bound evidentiary hearing exhibits in accordance with this Court's Order Remanding for Evidentiary Hearing. In its remand order, the Court provided that "[a] supplemental brief, addressing only those issues pertinent to the evidentiary hearing and limited to twenty (20) pages in length, may be filed by either party within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed in this Court." Order Remanding for Evidentiary Hearing at 6. Accordingly, Mr. Goode submits this brief for the Court's consideration.

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

In its remand order, this Court directed, "Upon Petitioner's presentation of *prima facie* evidence as to the Petitioner's legal status as Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction." Order Remanding for Evidentiary Hearing at 4. While Mr. Goode has presented more than sufficient evidence, the State has failed to meet its burden. Following the hearing, the District Court answered both of this Court's questions in the affirmative: "[T]he Court finds Defendant/Petitioner is an Indian and that the crime occurred in Indian Country." Findings of Fact and Conclusions of Law at 7. Under *McGirt*, the State does not have subject matter jurisdiction over Mr. Goode's case.

A. Mr. Goode is Indian.

The Court's remand order states that to determine Mr. Goode's status the District Court must determine whether "(1) Petitioner has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government." Order Remanding for Evidentiary Hearing at 5. The test comes from *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012) and *United States v. Prentiss*, 273 F.3d 1277, 1279 (10th Cir. 2001). Although the Tenth Circuit has approved a "totality-of-the-evidence approach to determining Indian status," the test is satisfied when a person "has an Indian tribal certificate that includes the degree of Indian blood." *Diaz*, 679 F.3d at 1187.

Prior to the evidentiary hearing, the parties stipulated as follows:

a. Mr. Goode is and has been recognized as a Citizen of the Creek Nation since January 1, 1981. The attached memo from the (Muscogee) Creek Nation of Oklahoma Citizenship Board is admissible in evidence.

b. Mr. Goode has 1/128 Creek blood quantum.

c. The Creek Nation is a federally recognized tribe.

See Stipulations filed in the District Court September 25, 2020, which are also attached to Mr. Goode's trial brief and were introduced into evidence at the evidentiary hearing, *see* Petitioner's Evidentiary Hearing Exhibits, filed in this Court on December 2, 2020, Exhibit 1. Given the memo from the (Muscogee) Creek Nation of Oklahoma Citizenship Board certifying Mr. Goode's Indian status, verified and stipulated to by the parties, the District Court found "Defendant/Petitioner (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government. Defendant/Petitioner is an Indian." Findings of Fact and Conclusions of Law at 3.

B. The Crime Occurred in Indian Country.

This Court directed the District Court to address: "Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation." Order Remanding for Evidentiary Hearing at 5.

The State of Oklahoma and Mr. Goode stipulated the crime occurred within the historical boundaries of the Cherokee Nation, as follows:

> a. The crime in this case occurred at 9707 N. 112th E. Ave. Owasso, OK. This address is within the geographic area set out in the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612.
>
> b. If the Court determines that those treaties established a reservation, and if the court further concludes that Congress never explicitly erased those boundaries and disestablished that reservation, then the crime occurred within Indian Country as defined by 18 U.S.C. § 1151(a).

Stipulations filed September 25, 2020, and admitted at the evidentiary hearing as Defendant's Exhibit 1.

1. Congress Established a Reservation for the Cherokee Nation.

The District Court determined that Congress established a reservation for the Cherokee Nation. *See* Findings of Fact and Conclusions of Law at 3-5. In doing so, the District Court made the following findings:

1. Cherokee Nation is a federally recognized Indian tribe. 84 C.F.R. § 1200 (2019).
2. The current boundaries of Cherokee Nation encompass lands in a fourteen-county area within the borders of the State of Oklahoma (Oklahoma), including all of Adair, Cherokee, Craig, Nowata, Sequoyah, and Washington Counties, and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Tulsa, and Wagoner Counties.
3. The Cherokee Nation's treaties must be considered on their own terms, in determining reservation status. *McGirt*, 140 S. Ct. at 2479.
4. In *McGirt*, the United States Supreme Court noted that Creek treaties promised a "permanent home" that would be "forever set apart," and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. *McGirt*, 140 S. Ct. at 2461-62. As such, the Supreme Court found that, "Under any definition, this was a [Creek] reservation." *Id.* at 2461.
5. The Cherokee treaties were negotiated and finalized during the same period as the Creek treaties, contained similar provisions that promised a permanent home that would be forever set apart, and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state.
6. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokees on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414.
7. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of the new Cherokee lands, and provided that a patent would issue as soon as reasonably practical. Art. 1, 7 Stat. 414.
8. The 1835 Cherokee treaty was ratified two years later "with a view to re-unite their people in one body and to secure to them a permanent home for themselves and their posterity," in what became known as Indian Territory, "without the territorial limits of the state sovereignties," and "where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be consonant with their views, habits and condition." Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 and *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872).

9. Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." Art. 2, 7 Stat. 478.

10. The 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation of the new lands in Indian Territory as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government…within their own country," so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Arts. 1, 5, 8, 19, 7 Stat. 478.

11. On December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new lands in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The title was held by Cherokee Nation "for the common use and equal benefit of all the members." *Cherokee Nation v. Hitchcock*, 187 U.S. at 307; *See also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894). Fee title is not inherently incompatible with reservation status, and establishment of a reservation does not require a "particular form of words." *McGirt*, 140 S. Ct. at 2475 (citing *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)).

12. The 1846 Cherokee treaty required federal issuance of a deed to the Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the "Neutral Lands") and the "outlet west." Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871.

13. The 1866 treaty resulted in Cherokee cessions of lands in Kansas and the Cherokee Outlet and required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council." Treaty with the Cherokee, July 19, 1866, art. 21, 14 Stat. 799.

14. The 1866 Cherokee treaty "re-affirmed and declared to be in full force" all previous treaty provisions "not inconsistent with the provisions of" the 1866 treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. Art. 31, 14 Stat. 799.

15. Under *McGirt*, the "most authoritative evidence of [a tribe's] relationship to the land…lies in the treaties and statutes that promised the land to the Tribe in the first place." *McGirt*, 140 S. Ct. at 2475-76.

Findings of Fact and Conclusions of Law at 3-5. The District Court concluded "As a result of the treaty provisions referenced above and related federal statutes, this Court hereby finds Congress did establish a Cherokee reservation as required under the analysis set out in *McGirt*." *Id.* at 5.

2. Congress Never Specifically Erased the Boundaries of the Cherokee Nation Reservation and Disestablished the Reservation.

In regard to whether Congress specifically erased the boundaries or disestablished the Cherokee Reservation, the District Court found as follows:

1. The current boundaries of Cherokee Nation are as established in Indian Territory in the 1833 and 1835 Cherokee treaties, diminished only by two express cessions.
2. First, the 1866 treaty expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. Art. 17, 14 Stat. 799.
3. Second, the 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet); and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country…until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." Art. 16, 14 Stat. 799.
4. The Cherokee Outlet cession was finalized by an 1891 agreement ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43.
5. The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906).
6. The 1893 statute that ratified the 1891 Agreement required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees

farming the lands. 27 Stat. 612, 640-43; *United States v. Cherokee Nation*, 202 U.S. at 112.

7. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time.

8. The original 1839 Cherokee Constitution established the boundaries as described in the 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may be made necessary" by the 1866 treaty. 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, reprinted in Volume I of West's Cherokee Nation Code Annotated (1993 ed.).

9. Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." 1999 Cherokee Constitution, art. 2.

Findings of Fact and Conclusions of Law at 6-7. In concluding Congress never disestablished the Cherokee Nation and the crime occurred in Indian Country, the District Court stated:

> The State also made clear that the State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation. No evidence or argument was presented by the State specifically regarding disestablishment or boundary erasure of the Cherokee Reservation. The Order Remanding for Evidentiary Hearing states, "Upon Petitioner's presentation of *prima facie* evidence as to the victim's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction." [Order Remanding for Evidentiary Hearing at 4].
>
> On this point, *McGirt* provides that once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S. Ct. at 2468. Reading the order of remand together with *McGirt*, regardless of where the burden of production is placed, no evidence was presented to this Court to establish Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma has jurisdiction in this matter. As a result, the Court finds Defendant/Petitioner is an Indian and that the crime occurred in Indian Country.

Findings of Fact and Conclusions of Law at 7.

C. This Court Should Adopt the District Court's Findings and Conclusions.

This Court "afford[s] the trial court's findings on factual issues great deference and will review its findings applying a deferential abuse of discretion standard." *Young v. State*, 2000 OK CR 17, 12 P.3d 20, 48 (citations omitted). The District Court correctly determined Mr. Goode's status as Indian, and meticulously following the analysis set out in *McGirt*, found that the crime occurred in Indian Country. This Court should now conclude the State lacks subject matter jurisdiction over Mr. Goode's case.

III. Any Further Issues the State May Raise Have Been Forfeited/Waived and Are Not Properly Before this Court.

To be sure, the State has not challenged Mr. Goode's claim in any way, for any reason, or in any court. The State has thus forfeited/waived any potential issue it might now attempt to raise (to include any argument that Mr. Goode is not Indian or that the crime did not occur in Indian country).

In cases where a party has raised an issue for the first time in a supplemental brief, this Court has held, "Supplemental briefs are intended to be limited to supplementation of recent authority bearing on the issues raised in the brief in chief, or on issues specifically directed to be briefed as ordered by this Court. Therefore, we do not believe that this issue is properly before this Court." *Castro v. State*, 1987 OK CR 182, 745 P.2d 394, 404. *See Brown v. State*, 1994 OK CR 12, 871 P.2d 56, 68; Rules 3.4(F)(2), 9.3(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). Any issue the State might now try to raise in a supplemental brief would not fit either of these categories. First, the brief would not provide "recent authority bearing on the issues raised in the brief in chief," *Castro*, 745 P.2d at 404, as the State did not file a response to Mr. Goode's Successive APCR, despite having done so (upon permission) in similar cases. *See,*

e.g., Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), *Bosse v. State,* No. PCD-2019-124 (Okla. Crim. App. Aug. 4, 2020). Having not filed anything previously, the State has no "issues raised" that could possibly require supplementation.

Second, any new issue raised is not an "issue[] specifically directed to be briefed as ordered by this Court." *Castro*, 745 P.2d at 404. In fact, this Court made clear the permissible scope of the supplemental briefing. The Court directed that the District Court "shall address *only*" the two issues specified, and then directed that following the evidentiary hearing, each party could file "[a] supplemental brief, addressing *only those issues pertinent to the evidentiary hearing*." Order Remanding for Evidentiary Hearing at 4, 6 (emphasis added).

The State has presented no evidence, argument, or issues. In short, it has forfeited/waived review of any issues in this case, and the Court accordingly should not consider any arguments raised for the first time in the State's supplemental brief.

Despite the State's forfeiture/waiver, Mr. Goode nonetheless is aware the State has presented arguments outside the law of the case and the scope of the Court's directives in other post-*McGirt* Indian Country cases—namely arguments regarding procedural defenses and blood quantum. Although these issues are forfeited/waived, he briefly addresses their merits below out of an abundance of caution. Should the Court for some reason wish to go beyond the law established in the remand order, and scope specified in the remand order, Mr. Goode should be given the opportunity to respond.

IV. In Addition to Not Being Properly Before the Court, Any State Argument Regarding Procedural Defenses Fails on the Merits.

Even if this Court somehow finds the State's putative procedural arguments are not waived, they fail on the merits. In his Successive APCR, Mr. Goode explained why this matter is properly before the Court. He argued that under § 1089(D), the legal basis for his jurisdictional claim was unavailable until *McGirt* and *Sharp v. Murphy* became final, and that subject matter jurisdiction can be raised at any time:

A. The Legal Basis for Mr. Goode's Subsequent Application for Post-conviction Relief Was Unavailable Until *McGirt* and *Murphy* Became Final.

> Mr. Goode recognizes Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, and Okla. Stat. tit. 22 § 1089(D) typically apply to the filing and review of subsequent applications for post-conviction relief in capital cases. Indeed, this Court recently dismissed Mr. Goode's subsequent application which raised the same fundamental constitutional question raised here – does Oklahoma have subject-matter jurisdiction to prosecute Mr. Goode and sentence him to death? It concluded Mr. Goode's claim was "premature" because *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) *(McGirt)* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (*Murphy*) were not final decisions. *Goode v. State,* PCD-2020-332, Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance. (June 9, 2020). As the Supreme Court has issued mandates in both cases, *Murphy* and *McGirt* are now final decisions.
>
> Under § 1089(D)(9) the legal basis for this application was unavailable until the mandates issued. In dismissing Mr. Goode's recent application as premature, this Court acknowledged the legal basis for the claim "was not recognized by or could not have been reasonably formulated from a *final* decision of the United States Supreme Court [or the Tenth Circuit Court of Appeals]." Okla. Stat. tit. 22 § 1089(D) (emphasis added). Now that the legal basis is available, this Court should decide the federal claim on the merits and grant Mr. Goode relief, dismiss the cases, and vacate the convictions and sentences. By faithfully applying *McGirt* and *Murphy*, this Court will be convinced the Cherokee Nation Reservation is intact and Oklahoma had no jurisdiction to try, convict, and sentence Mr. Goode to death.

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

> Even if successive post-conviction applications were not allowed in this unique situation, subject-matter jurisdiction is a fundamental issue that can be raised at any time. And, Oklahoma does not have subject-matter jurisdiction under

the Major Crimes Act (MCA) over the crimes that arose on the Cherokee Nation Reservation.

"[L]ack of jurisdiction" is a constitutional right which is "never finally waived." *Johnson v. State*, 1980 OK CR 45, ¶ 30, 611 P.2d 1137, 1145. In three capital cases in which Indian country jurisdictional issues were raised belatedly, this Court repeatedly confirmed such a fundamental jurisdictional issue can be raised at any time. *See Cravatt v. State*, 1992 OK CR 6 at ¶ 3, 825 P.2d 277, 278 (deciding Indian country jurisdictional question though raised for first time on the day appellate oral argument was set); *Murphy v. State*, 2005 OK CR 25, ¶ 2, 124 P.2d 1198 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue though raised for first time in successor post-conviction relief action); and *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue even though issue was not raised in the trial court where appellant pled guilty and waived his appeal). This Court's decisions that jurisdiction can be raised at any time rest on bedrock principles which have existed for nearly a century. *See Armstrong v. State*, 1926 OK CR 259, 35 Okla. Crim. 116, 118, 248 P. 877, 878.

Such respect for jurisdictional claims is proper. The Supreme Court defines jurisdiction as "the courts' statutory and constitutional *power* to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002). *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Because subject-matter jurisdiction involves a court's power to act, the Supreme Court concludes "it can never be forfeited or waived." *Cotton*, 535 U.S. at 630. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised. This concept is so grounded in law that defects in jurisdiction cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U.S. 413, 421 (1911). Likewise, the Tenth Circuit in *Murphy v. Royal,* 875 F.3d 896, 907 n.5 (10th Cir. 2017) recognized issues of subject-matter jurisdiction in Oklahoma are "never waived" and can "be raised on a collateral appeal." Similarly, Oklahoma's Solicitor General acknowledges "Oklahoma allows collateral challenges to subject-matter jurisdiction *at any time*." *McGirt v. Oklahoma*, Supreme Court Case No. 18-9526 (Mar 13, 2020), Brief of Respondent at 43 (emphasis added).

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

Successive APCR at 1-3. For the reasons explained, this Court's consideration of the merits of Mr. Goode's claim is appropriate. *See also McGirt*, 140 S. Ct. at 2501 n.9 (Roberts, J., dissenting) (citing *Murphy*, 875 F.3d 697, 907 n.5 (10th Cir. 2017); *Wallace v. State*, 1997 OK CR 18, 935 P.2d 366, 372) ("[U]nder Oklahoma law, it appears that there may be little bar to state habeas relief

because 'issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal").

Moreover, this Court has repeatedly found the legal basis for such a jurisdictional claim was not available until *McGirt* and *Murphy* were final (including repeatedly in Mr. Goode's case). *See, e.g.,* Order Remanding for Evidentiary Hearing at 2, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Aug. 12, 2020) (citing 22 O.S. §§ 1089(D)(8)(a), (9)(a)) (finding "[t]he issue could not have been previously presented because the legal basis for the claim was unavailable"); Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance at 4, *Goode v. State*, No. PCD-2020-333 (Okla. Crim. App. June 9, 2020) (dismissing successive APCR as premature "[b]ecause neither *Murphy* nor *McGirt* is a final opinion"); Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance at 4, *Cole v. State,* No. PCD-2020-332 (Okla. Crim. App. May 29, 2020) (dismissing successive APCR as premature "[b]ecause neither *Murphy* nor *McGirt* is a final opinion").

Again, this Court has specifically found as a matter of law the legal basis for Mr. Goode's claim was not available until *McGirt* and *Murphy* became final, and his claim is properly before the Court. *See* Order Remanding for Evidentiary Hearing at 3 (finding "the issues raised are issues which fall under the parameters of section 1089(D), and this issue is properly before this Court"). In fact, when Mr. Goode filed his claim prior to the date *McGirt* and *Murphy* became final, this Court dismissed it as premature. *Goode v. State*, No. PCD-2020-333 (Okla. Crim. App. June 9, 2020) (dismissing successive APCR as premature "[b]ecause neither *Murphy* nor *McGirt* is a final opinion"). Mr. Goode's claim is properly before this Court.

V. In Addition to Not Being Properly Before The Court, Any State Arguments Regarding Blood Quantum Fail on the Merits.

For the reasons fully described in section III, *supra,* at 9-10, any argument regarding blood quantum the State might raise in its supplemental brief is forfeited/waived. Mr. Goode incorporates the argument above without repeating it. In addition, even if this Court somehow finds the State's argument is not waived, it fails on the merits.

Throughout the pendency of this case, as well as numerous other remanded *McGirt* evidentiary hearings, the State has taken varying positions (including no position at all) on the issue of blood quantum and whether some threshold other than "some" Indian blood should be appended to the law. Because Petitioner does not know what the State's current position will be on this issue, he addresses it briefly.

Because the term "Indian" is not defined in statutes addressing criminal jurisdiction in Indian Country, courts have adopted a two-part test to determine whether a person is Indian for purposes of federal law. *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss,* 273 F.3d 1277, 1279 (10th Cir. 2001). Under that test, to be considered "Indian," a person must (1) have "some Indian blood" and (2) be "recognized as an Indian by a tribe or by the federal government." *Diaz*, 679 F.3d at 1187; *Prentiss*, 273 F.3d at 1280.

In its Order Remanding for Evidentiary Hearing, this Court clearly set forth the inquiry the District Court was to undertake. The Court ordered the District Court to decide "Petitioner's status as an Indian. The District Court must determine whether (1) Petitioner has *some* Indian blood, and (2) is recognized as an Indian by a tribe or by the federal government." Order Remanding for Evidentiary Hearing at 5 (emphasis added).

There are many reasons the settled law requiring only "some blood" is proper. First, proper respect for tribal sovereignty means according deference to the Tribe's determination of who is—and who is not—a citizen of their sovereign. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) ("tribes retain power . . . to determine tribal membership").

Second, focusing the inquiry more on tribal membership and less on how much Indian blood someone has before deciding what laws apply to them avoids the constitutional pitfalls of giving the term "Indian" a racial definition that could run afoul of the Equal Protection Clause. *See United States v. Bruce*, 394 F.3d 1215, 1233-34 (9th Cir. 2005) (Rymer, J., dissenting). The Constitution permits the government to enact laws treating Indians differently precisely because Indians are treated "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *See Morton v. Mancari*, 417 U.S. 535, 554 (1974). It is important to avoid constitutional prohibitions on race discrimination in treating Indians differently only because of their membership in the tribe. *See Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000) (finding unconstitutional a statute treating native Hawaiians differently based on race rather than membership in a quasi-sovereign).

Finally, the two-part test discussed above traces its origins to *United States v. Rogers*, 45 U.S. 567 (1846). There, the Supreme Court was considering the case of a non-Indian who killed another non-Indian on an Indian reservation. The defendant sought to defeat the court's jurisdiction by claiming he had renounced his United States citizenship and had been adopted by the Cherokee Tribe. He had no Indian blood at all. In rejecting his argument that he should be considered Indian, the Supreme Court reached the unremarkable conclusion that a person with absolutely no Indian blood cannot qualify as Indian for purposes of determining where jurisdiction over crimes committed by that person should lie. *Id.* at 571-73. Thus, from *Rogers* comes the long-standing

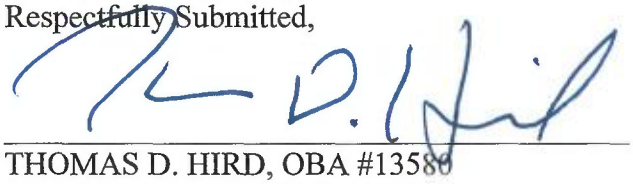
requirement that a person claiming Indian status must at least have *some* Indian blood. Any putative attempt to impose a higher burden to establish one's Indian status is contrary to law and should be rejected.

Congress recently rejected the notion that any minimum blood quantum is required to be entitled to the benefits that come along with citizenship in one of the Five Tribes. *See* Stigler Act Amendments of 2018, P.L. 115–399 (extending restrictions on alienation of property for any citizen of the Five Tribes "of whatever degree of Indian blood"). *See also* Statement of Rep. Tom Cole upon passage of the Stigler Act Amendments, *available at* https://cole.house.gov/media-center/press-releases/cole-and-mullin-praise-final-passage-stigler-act-amendments (last visited Dec. 21, 2020) ("Without question and especially in Oklahoma, Native American heritage is something to be celebrated. But that special heritage must also be protected, preserved and passed on. Land ownership is part of that unique inheritance for many tribal citizens and their descendants, and over the years, the Stigler Act has unfortunately diminished that rightful inheritance *due to an unfair blood quantum requirement*") (emphasis added). For many reasons, only "some blood" is required.

VI. Conclusion.

The Court "[r]ecogniz[ed] the historical and specialized nature of this remand for evidentiary hearing" and directed the District Court to address the only two issues relevant to this Court's analysis under *McGirt*. Order Remanding for Evidentiary Hearing at 4. Following that hearing, the District Court carefully considered and clearly answered those questions, concluding that Mr. Goode is Indian and the crime occurred in Indian country. By faithfully applying *McGirt*, this Court must conclude the State of Oklahoma had no jurisdiction to try, convict, and sentence Mr. Goode.

Respectfully Submitted,



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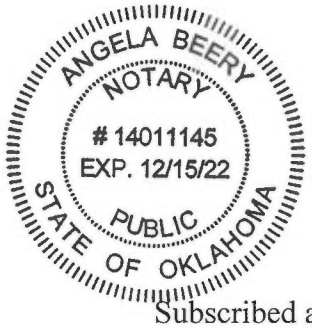
VERIFICATION

State of Oklahoma)
) ss:
County of Oklahoma)

Thomas D. Hird, being first duly sworn upon oath, states he signed the above pleading as attorney for Clarence Rozell Goode, Jr., and that the statements therein are true to the best of his knowledge, information, and belief.



THOMAS D. HIRD

Subscribed and sworn to before me this 22 day of December, 2020.

Notary Public

Commission Number: 14011145

My commission expires: 12/15/22

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2020, a true and correct copy of the foregoing Petitioner's Post-Hearing Supplemental Brief in Support of Successive Application for Post-Conviction Relief was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant to Rule 1.9(B), Rules of the Court of Criminal Appeals.

THOMAS D. HIRD

No. PCD-2020-530

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CLARENCE ROZELL GOODE, JR.,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT AFTER REMAND

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DECEMBER 22, 2020

TABLE OF AUTHORITIES

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CLARENCE ROZELL GOODE, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. PCD-2020-530**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

SUPPLEMENTAL BRIEF OF RESPONDENT AFTER REMAND

Clarence Rozell Goode, Jr., hereinafter the Petitioner, was convicted of three counts of First Degree Murder, and one count of First Degree Burglary, in Tulsa County District Court Case No. CF-2005-3904. *Goode v. State*, 2010 OK CR 10, ¶ 1, 236 P.3d 671, 674. In accordance with the jury's recommendations, the Honorable Tom C. Gillert, District Judge, sentenced the Petitioner to death on each of the three First Degree Murder convictions and to twenty-years imprisonment and a $10,000.00 fine as to the First Degree Burglary conviction. *Id.* at ¶ 2.

On July 9, 2020, the United States Supreme Court held in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020), that the Creek Nation's Reservation had not been disestablished. On the same day, and for the reasons stated in *McGirt*, the Court also affirmed the Tenth Circuit's decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). *Sharp v. Murphy*, 140 S. Ct. 2412 (2020).

On August 12, 2020, the Petitioner filed with this Court a successive application for post-conviction relief in Case No. PCD-2020-530 ("App.").[1] In his sole proposition of error, the Petitioner claimed the District Court of Tulsa County did not have jurisdiction to try him, arguing he is a member of the Muscogee (Creek) Nation and murdered his victims on the Cherokee Nation Reservation (App., at v-28).

On August 24, 2020, this Court remanded this case for an evidentiary hearing ("Order"), directing the district court to hold a hearing to determine the "Petitioner's Indian status" and "whether the crime occurred in Indian Country" (Order at 4). This Court advised that the parties could "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" (Order at 6).

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[1] Before filing a successive post-conviction application, the Petitioner was denied direct appeal relief by this Court in *Goode*, 2010 OK CR 10, 236 P.3d 671, *cert. denied, Goode v. Oklahoma*, 562 U.S. 1231 (2011). The Petitioner's first three requests for post-conviction relief were denied by this Court in unpublished opinions. *See Goode v. State*, Case Nos. PCD-2008-211, slip op. (Okla. Crim. App. Sept. 7, 2010) (unpublished) (first post-conviction); PCD-2010-661 (Okla. Crim. App. Sept. 28, 2010) (unpublished) (second post-conviction); and, PCD-2012-261 (Okla. Crim. App. May 2, 2012) (unpublished) (third post-conviction). The Petitioner was then denied habeas relief in federal court. *Goode v. Duckworth*, No. 11-CV-150-GKF-FHM, 2016 WL 3748279 (N.D. Okla. July 11, 2016) (unpublished) (federal habeas petition); *Goode v. Carpenter*, 922 F.3d 1136 (10th Cir. 2019) (federal habeas appeal). On February 24, 2020, the United States Supreme Court denied the Petitioner's petition for writ of certiorari seeking review of the Tenth Circuit's ruling affirming the denial of federal habeas relief. *Goode v. Sharp*, Case No. 19-6857, 2020 WL 873000 (U.S. Feb. 24, 2020). On May 18, 2020, the Petitioner filed a successive application for post-conviction relief and request to hold the application in abeyance which was denied by this Court. *See Goode v. State*, No. PCD-2020-333 (Okla. Crim. App. June 9, 2020).

I. Evidentiary Hearing and Subsequent Findings of Fact and Conclusions of Law

On October 15, 2020, counsel for the Petitioner and the Respondent appeared before the Honorable Tracy Priddy, District Judge of Tulsa County, for an evidentiary hearing (Findings and Conclusions at 1).[2] At the hearing, the parties presented the court with stipulations (Findings and Conclusions at 1). On November 30, 2020, the district court filed its Findings of Fact and Conclusions of Law with this Court (Findings and Conclusions).

The parties stipulated that the Petitioner "has 1/128 Creek blood quantum" and "has been recognized as a Citizen of the Creek Nation since January 1, 1981" (Findings and Conclusions at 2, Ex. 1). The parties further stipulated that the location of the crime was "within the geographic area" of Cherokee Reservation as set forth in various historical treaties (Findings and Conclusions, Ex. 1).

As to Indian status, the district court found that based on the stipulations, the Petitioner "has some Indian blood" and "is recognized as an Indian by a tribe or the federal government" (Findings and Conclusions at 3). As a result, the district court concluded that the Petitioner "is an Indian" (Findings and Conclusions at 3). As to the Indian Country issue, the district court concluded based on the stipulations reached by the parties, historical treaties between the Cherokee Nation and the United States, and the holding in *McGirt*, "the crime occurred in Indian Country" (Findings and Conclusions at 7).

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[2] Citations to the district court's Findings of Fact and Conclusions of Law filed with this Court on November 30, 2020, will be "Findings and Conclusions at __."

At the evidentiary hearing, the Respondent did not preserve its position that this matter was waived as the Petitioner failed to raise it before his successive post-conviction application. Granted, this Court directed the district court to answer only the two (2) aforementioned questions regarding Indian status and Indian Country (Order at 3). Thus, the district court understandably did not address the State's waiver argument in its subsequent Order. Now, however, this Court has allowed the Petitioner and the Respondent to file supplemental briefs covering "those issues pertinent to the evidentiary hearing" (Order at 4).

II. Procedural Defenses

In deciding *McGirt*, the Supreme Court expressly invited this Court to apply procedural bars to the jurisdictional challenges that would proliferate in the wake of its decision. *McGirt*, 140 S. Ct. at 2479, n. 15. This Court should accept that invitation here, as two procedural bars apply to the Petitioner's jurisdictional claim. First, this Court should refuse to consider the Petitioner's jurisdictional challenge because he did not raise it until his fourth post-conviction application such that it is procedurally barred. Second, this Court should refuse to consider the jurisdictional claim based on the doctrine of laches.

A. Bar on Successive Capital Post-Conviction Applications

The Petitioner did not raise his jurisdictional claim in either his direct appeal or his first three post-conviction applications. *See generally Goode*, 2010 OK CR 10, 236 P.3d 671; *Goode*, No. PCD-2008-211; *Goode*, No. PCD-2010-661, *Goode*, PCD-2012-261. Rather, he first raised the claim in his fourth post-

conviction application. *Goode*, No. PCD-2020-333. After this Court dismissed the Petitioner's jurisdictional claim in his fourth post-conviction application—PCD-2020-333—he filed a fifth application for post-conviction relief and reasserted the claim in PCD-2020-530. *See Goode*, No. PCD-2020-530.

Section 1089 of Title 22 provides exceptions for filing an untimely claim; however, the Petitioner has made no showing that his jurisdictional claim falls within any of the exceptions that would allow its consideration in this successive post-conviction proceeding. 22 O.S.2011, § 1089(D)(8). Accordingly, this Court should find the claim waived.

i. The Petitioner cannot meet the requirements of § 1089(D)(8) for a successive capital post-conviction application

Under § 1089(D)(8)(a), the Petitioner cannot show that the legal basis of this claim was previously unavailable. *See* 22 O.S.2011, § 1089(D)(8)(a) (providing that a subsequent application is not untimely if "the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable").[3] Section 1089(D)(9) further explains that "a legal basis of a claim is unavailable on or before a date described by this subsection if the legal basis . . . was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court . . . ," or "is a new rule of

[3] Respondent recognizes, and discusses below, this Court's recent contrary conclusion in an unpublished order that a jurisdictional claim under *Murphy/McGirt* was not previously available.

constitutional law that was given retroactive effect by the United States Supreme Court . . . ." 22 O.S.2011, § 1089(D)(9)(a)-(b). Thus, there are two ways in which the Petitioner can show a previously unavailable legal basis—he satisfies neither way.

Under § 1089(D)(9)(a), the Petitioner could reasonably have formulated the legal basis for his jurisdictional claim years prior to either the Tenth Circuit's decision in *Murphy* or the Supreme Court's decision in *McGirt*. Specifically, at the time of his direct appeal and first post-conviction application, the Petitioner could have raised this claim based on the Major Crimes Act and *Solem v. Bartlett*, 465 U.S. 463 (1984).[4] Both *Murphy* and *McGirt* concluded that the Creek Reservation had not been disestablished primarily based on the application of *Solem* and an examination of statutes enacted in the late 1800s and early 1900s. *McGirt*, 140 S. Ct. at 2460-2475; *Murphy*, 875 F.3d at 937-54. The Petitioner, too, bases his jurisdictional claim on *McGirt*, an application of *Solem*, and treaties and laws from the 1800s. App. at 9-27. Clearly, his claim was previously available. *See Walker v. State*, 1997 OK CR 3, ¶ 33, 933 P.2d 327, 338, *superseded by statute on other grounds*, 22 O.S.Supp.2004, § 1089(D)(4) (concluding that the legal basis for Walker's claim "was recognized by and could have reasonably been formulated from a final decision of this Court" in light of "the decades-old Oklahoma case and statutory law upholding the presumption of innocence instruction").

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[4] Indeed, Murphy himself raised his jurisdictional challenge based on the Major Crimes Act in 2004. *Murphy*, 2005 OK CR 25, ¶ 6, 124 P.3d at 1200.

In addition, under § 1089(D)(9)(b), the Petitioner's jurisdictional claim does not implicate any new, retroactive rule of constitutional law announced by the Supreme Court or this Court. "[A] case announces a 'new' rule when it 'breaks new ground or imposes a new obligation' or if its result 'was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *Walker*, 1997 OK CR 3, ¶ 38, 933 P.2d at 338 (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989) (alteration adopted, emphasis supplied by *Teague*)). A case does "not announce a new rule" when it is "merely an application of the principle that governed [an earlier] decision." *Teague*, 489 U.S. at 307. As already shown above, *McGirt* was a mere application of and was dictated by, *Solem.*[5] Further, the decision did not break new ground or impose a new obligation on the State—even prior to this decision, under the relevant federal statutes, the State did not have jurisdiction to prosecute an Indian who committed a major crime in Indian Country. *McGirt* simply held that the original Creek Reservation was still Indian Country for purposes of these statutes. For all these reasons, *McGirt* did not announce a new rule, let alone a retroactive one. *See Walker*, 1997 OK CR 3, ¶¶ 34-38, 933 P.2d at 338-39 (concluding that Supreme Court cases did not announce new rules under *Teague* where one "simply reiterated and enforced long standing case law and statutory rules" and the other "simply applied well

[5] And the Tenth Circuit's decision in *Murphy* was not a decision of the Supreme Court or this Court. To the extent that the Petitioner relies on the Supreme Court's *Murphy* decision, such simply affirmed the Tenth Circuit's decision for the reasons stated in *McGirt*. *Murphy*, 140 S. Ct. at 2412. Thus, the Supreme Court's *Murphy* decision no more announced a new rule than did *McGirt*.

established constitutional principles to facts generated by a rather new state statute").

Nor can the Petitioner meet the restrictions of § 1089(D)(8)(b). First, § 1089(D)(8)(b)(1) requires that the factual basis of the Petitioner's jurisdictional claim have not been previously ascertainable through reasonable diligence. The factual bases for the Petitioner's jurisdictional claim consist of the location of the murders and his alleged Indian status—all facts that were known or could have been determined through reasonable diligence—at the time of the crimes, let alone by the time of direct appeal or his first post-conviction application.

For starters, based on the evidence in this case, the exact location of the three murders has never been in question. *See Goode*, 2010 OK CR 10, ¶¶ 3-17, 236 P.3d at 675-677 (summarizing the evidence). As to the Petitioner's alleged status as an Indian, he supplies a letter from the Muscogee (Creek) Nation Citizenship Board dated February 26, 2018, purporting to verify his Muscogee (Creek) Nation citizenship. App., Attachment 7. Although this letter was apparently obtained in 2020, the Petitioner is listed as having been a member of the Muscogee (Creek) Nation since January 1, 1981. App., Attachment 18. The Petitioner does not allege any "specific facts establishing that" this citizenship verification was not previously "ascertainable through the exercise of reasonable diligence," 22 O.S.2011, § 1089(D)(8)(b)(1), and in any event, it is clear the Petitioner's alleged Indian status could have been verified decades ago. The factual basis for the Petitioner's jurisdictional claim was not previously unavailable. *See Smith v. State*, 2010 OK CR 24, ¶ 7, 245 P.3d 1233,

1236 (concluding that expert's report was not previously unavailable where, although it was dated after Smith's first post-conviction application, it was derived from information that was available at the time of trial and first post-conviction).

Second, in addition to satisfying § 1089(D)(8)(b)(1)—which he has not done—the Petitioner must, but fails to, meet the requirements of § 1089(D)(8)(b)(2). Under the latter provision, he must demonstrate that "the facts underlying the claim . . . would be sufficient to establish . . . [that] no reasonable fact finder would have found [him] guilty of the underlying offense or would have rendered the penalty of death." 22 O.S.2011, § 1089. This Court has indicated that this standard requires a showing of actual, factual innocence and that a showing of legal innocence is insufficient. *See Braun v. State*, 1997 OK CR 26, ¶ 28 n. 15, 937 P.2d 505, 514 n. 15.[6] The Petitioner's claim—that

[6] *Braun* was discussing § 1089(C)(2), which requires that a claim raised in any post-conviction application, even a first application, "[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." 22. O.S.2011, § 1089(C)(2). However, despite the difference in wording between § 1089(C)(2) and § 1089(D)(8)(b)(2), it is clear that the latter provision still requires a showing of factual innocence of the crime or the death penalty. The language of § 1089(D)(8)(b)(2), enacted in 2006, mirrors the Supreme Court's well-established actual innocence standard. *Compare* 22 O.S.2011, § 1089(D)(8)(b)(2) (". . . no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death"), *with Schlup v. Delo*, 513 U.S. 298, 327 (1995) ("To satisfy the [actual innocence] gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."), *and Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) (a prisoner can claim to be "actually innocent" of the death penalty if he can show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."). And, as this Court recognized in *Braun*, the Supreme Court's standard "is applicable only to factual innocence" and is "not applicable to legal innocence." *Braun*, 1997 OK CR 26, ¶ 28 n. 15, 937 P.2d at 514 n. 15. Thus, in using language that mirrored the

the State of Oklahoma lacked jurisdiction to try or sentence him to death—is at most a claim of legal innocence. *See Jones v. Warden*, 683 F. App'x 799, 801 (11th Cir. 2017) (unpublished) (state court prisoner's attempt to claim actual innocence to avoid time bar failed because his claim that the state court lacked jurisdiction was "at most, a claim of legal innocence, not factual innocence"). Accordingly, the Petitioner has not demonstrated that he can satisfy § 1089(D)(8)(a) or § 1089(D)(8)(b), and his jurisdictional claim cannot be considered.

ii. The Petitioner's challenge to jurisdiction should not allow him to escape the provisions of § 1089(D)(8)

Not only does the Petitioner allege that his jurisdictional claim satisfies the requirements of § 1089(D)(9), he further contends that "subject-matter jurisdiction is a fundamental issue that can be raised at any time." App. at 2. Although this argument finds some support in this Court's decisions in *Murphy v. State*, 2005 OK CR 25, ¶¶ 2, 6, 124 P.3d 1198, 1199-1200, and *Wackerly v. State*, 2010 OK CR 16, ¶¶ 1, 3, 5, 237 P.3d 795, 796-97, this Court should clarify that, in light of the Oklahoma Legislature's intent in enacting § 1089, it will enforce the requirements of § 1089(D)(8) according to that statute's plain language, and find the Petitioner's claim to be waived and barred. In particular, § 1089(D)(8) is materially indistinguishable from 28 U.S.C. § 2244(b)(2), and federal courts have repeatedly determined that jurisdictional claims are subject

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Supreme Court's standard, it is clear the Oklahoma Legislature intended for § 1089(D)(8)(b)(2) to require actual, not legal, innocence.

to § 2244(b)(2)'s restrictions. There is no reason to think that the Oklahoma Legislature intended § 1089 to be any less restrictive than § 2244 when it comes to jurisdictional challenges.[7] Giving § 1089 its proper narrow construction, it is clear the statute does not allow jurisdictional claims to escape its restrictions. A contrary interpretation contravenes legislative intent. *Cf. Prost v. Anderson*, 636 F.3d 578, 589 (10th Cir. 2011) ("The simple fact is that Congress decided that, unless subsection (h)'s requirements are met, finality concerns trump and the litigation must stop after a first collateral attack. Neither is this court free to reopen and replace Congress's judgment with our own.").

Beyond the plain language of § 1089, there are good policy reasons for not exempting jurisdictional challenges from its requirements. As this Court recognized in *Walker*, "'[o]ne of the law's very objects is the finality of its judgments.'" *Walker*, 1997 OK CR 3, ¶ 5 n. 16, 933 P.2d at 331 n. 16 (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)). Therefore, this Court should find the Petitioner's jurisdictional challenge to be waived and barred by § 1089(D)(8).

B. The Doctrine of Laches

Alternatively, this Court should refuse to consider the Petitioner's jurisdictional challenge based on the doctrine of laches. Indeed, the *McGirt*

[7] In fact, the Oklahoma Legislature did provide an exception to the bar on successive capital post-conviction applications that has no parallel in § 2244: where the legal basis for a claim "was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state . . . ." 22 O.S.2011, § 1089(D)(9)(a). Thus, with that provision, the Legislature made clear its desire to carve out an exception beyond those provided in the AEDPA. Its failure to do so as to jurisdictional claims speaks volumes.

Court, tacitly recognizing that its decision would open the floodgates to jurisdictional challenges, encouraged this Court to consider applying laches to such challenges. *McGirt*, 140 S. Ct. at 2481. Here, the Petitioner committed these crimes in August 2005, *fifteen years* ago. Furthermore, as previously discussed, all of the facts underlying his jurisdictional claim—that is, his evidence that the Cherokee Reservation has allegedly not been disestablished and that he is a member of the Muscogee (Creek) Nation—were available to him at every prior stage of this criminal case, including at the time of the crimes and trial. Yet, the Petitioner did not bring this jurisdictional claim until nearly fifteen years after his crimes. This Court has repeatedly found laches to bar collateral attacks in cases with delays similar in length to the present one. *See, e.g.*, *Thomas v. State*, 1995 OK CR 47, ¶ 7, 903 P.2d 328, 332 (fifteen years); *Ex parte French*, 1952 OK CR 13, 240 P.2d 818 (almost fifteen years); *Ex parte Workman*, 1949 OK CR 68, 207 P.2d 361 (eight years). Under these circumstances, it is grossly inequitable and unjust to reward the Petitioner with consideration of his belated jurisdictional claim. Therefore, this Court should find the Petitioner's jurisdictional claim to be barred by laches.

III. August 12, 2020, Order in *Bosse v. State*, No. PCD-2019-124

Lastly, the Respondent recognizes this Court's recent order in *Bosse v. State*, No. PCD-2019-124, order at 2 (Okl. Cr. Aug. 12, 2020) (unpublished attached as Exhibit A), which, referring to a jurisdictional claim like that raised by the Petitioner, determined that "[t]he issue could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S.

§§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)." However, the *Bosse* order is unpublished and not binding. *See* Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2019) ("In all instances, an unpublished decision is not binding on this Court.").

Moreover, the Respondent respectfully submits that this Court's order in *Bosse* is in error. Jurisdictional claims such as the Petitioner's were available long prior to *McGirt*. The Major Crimes Act was enacted in **1885**. *See* https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153. In **1962**, the Supreme Court reversed the judgment of the Washington Supreme Court affirming the conviction of an Indian on a reservation which the Washington Supreme Court had erroneously determined to be disestablished. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). This is just one of a number of cases in which the Supreme Court has considered such claims in the decades preceding *McGirt*. *See e.g., Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *see also Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (although not a criminal case, applying prior Supreme Court cases on reservation diminishment to the facts of a particular reservation).

In addition, this Court has been called upon to determine whether a crime took place in Indian country many times in the history of the state. *See, e.g., Eaves v. State*, 1990 OK CR 42, ¶ 2, 795 P.2d 1060, 1061 (determining whether the crime took place within a dependent Indian community because the parties agreed there was no question as to a restricted allotment or reservation); *C.M.G.*

v State, 1979 OK CR 39, ¶ 9, 594 P.2d 798, 801 (agreeing with the State that the land in question was not a reservation and thus, proceeding to determine whether it was a dependent Indian community). In **1963**, an inmate sought a writ of habeas corpus, alleging the crime was committed on an Indian reservation. *Ellis v. State*, 1963 OK CR 88, 386 P.2d 326. This Court held that the reservation was disestablished. *Id.*, 1963 OK CR 88, ¶¶ 18-24, 386 P.2d at 330-31. Therefore, the legal basis for a post-conviction applicant's challenge to jurisdiction based on an argument that a crime occurred on an Indian reservation could have been formulated as early as 1885 and was recognized by the Supreme Court as early as 1962, and by this Court in 1963. Moreover, as also shown above, *McGirt* is not a new rule of constitutional law.

In addition, the Respondent respectfully submits that this Court's contrary conclusion violates the plain language of § 1089(D)(9), legislative intent, and its own precedent. Based on the plain language of § 1089, claims that could have been raised on direct appeal, but were not, are barred, and the statute provides no exception to claims based on subject matter jurisdiction. Further, as this Court recognized after the Legislature amended the capital post-conviction review procedures, the changes "reflect the legislature's intent to honor and preserve the legal principle of finality of judgment, and we will narrowly construe these amendments to effectuate that intent." *Walker*, 1997 OK CR 3, ¶ 5, 933 P.2d at 331 (internal footnote omitted). As such, this Court should find that the Petitioner's jurisdictional claim is barred by § 1089 as the unpublished order in

Bosse contradicts published decisions by this Court and the plain language of § 1089(d).

IV. Conclusion

Respondent has asserted two procedural bars which bar review of the Petitioner's claim. Should this Court find, however, that the Petitioner is entitled to relief based on the district court's findings, the Respondent respectfully requests this Court stay any order reversing the convictions in this case for thirty days to allow the United States Attorney's Office for the Northern District of Oklahoma to secure custody of the defendant. *Cf.* 22 O.S.2011, § 846 (providing that "[i]f the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as it deems reasonable to await a warrant from the proper county for his arrest").

Respectfully submitted,

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No. PCD-2020-530

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CLARENCE ROZELL GOODE, JR.,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

STATE'S SUPPLEMENTAL BRIEF REGARDING WHETHER *McGIRT* WAS PREVIOUSLY AVAILABLE FOR PURPOSES OF BARRING CLAIMS

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TABLE OF AUTHORITIES

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CLARENCE ROZELL GOODE, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. PCD-2020-530**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

STATE'S SUPPLEMENTAL BRIEF REGARDING WHETHER *McGIRT* WAS PREVIOUSLY AVAILABLE FOR PURPOSES OF BARRING CLAIMS

Petitioner was sentenced to death for the murders of Mitch Thompson, Tara Burchett-Thompson, and Ms. Thompson's ten-year-old-daughter, K.B. *Goode v. State*, 2010 OK CR 10, ¶¶ 1-2, 13, 236 P.3d 671, 674-76.

On July 9, 2020, the United States Supreme Court held in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020), that the Creek Nation's Reservation had not been disestablished. On August 12, 2020, the Petitioner filed with this Court a successive application for post-conviction relief in Case No. PCD-2020-530 ("App.").[1] In his sole proposition of error, the Petitioner claimed the District

[1] Before filing a successive post-conviction application, the Petitioner was denied direct appeal relief by this Court in *Goode*, 2010 OK CR 10, 236 P.3d 671, *cert. denied, Goode v. Oklahoma*, 562 U.S. 1231 (2011). The Petitioner's first three requests for post-conviction relief were denied by this Court in unpublished opinions. *See Goode v. State*, Case Nos. PCD-2008-211, slip op. (Okla. Crim. App. Sept. 7, 2010) (unpublished) (first post-conviction); PCD-2010-661 (Okla. Crim. App. Sept. 28, 2010) (unpublished) (second post-conviction); and, PCD-2012-261 (Okla. Crim. App. May 2, 2012) (unpublished) (third post-conviction). The Petitioner was then denied habeas relief in federal court. *Goode v. Duckworth*, No. 11-CV-150-GKF-FHM, 2016 WL 3748279 (N.D. Okla. July 11, 2016) (unpublished) (federal habeas petition); *Goode v. Carpenter*, 922 F.3d 1136 (10th Cir. 2019) (federal habeas appeal). On February 24, 2020, the United States Supreme Court denied the Petitioner's petition for writ of certiorari seeking review

Court of Tulsa County did not have jurisdiction to try him, arguing he is a member of the Muscogee (Creek) Nation and murdered his victims on the Cherokee Nation Reservation (App., at v-28). On August 24, 2020, this Court remanded this case for an evidentiary hearing ("Order"), directing the district court to hold a hearing to determine the "Petitioner's Indian status" and "whether the crime occurred in Indian Country" (Order at 4).

In its post-hearing brief, the State encouraged this Court to accept the Supreme Court's express invitation in *McGirt* to apply procedural bars to the jurisdictional challenges that would proliferate in the wake of its decision. *McGirt*, 140 S. Ct. at 2479, n. 15. The State first asked this Court to refuse to consider the Petitioner's jurisdictional challenge because he did not raise it until his fourth post-conviction application such that it is procedurally barred. State's Supp. Br. at 4. The State then asked this Court to refuse to consider the jurisdictional claim based on the doctrine of laches. State's Supp. Br. at 4. In support of these arguments, the State detailed the origins of Petitioner's claim and showed that the claim was available long before *McGirt* was decided. State's Supp. Br. 6-9, 11-12. The State also noted how the Supreme Court relied on established law as *McGirt* was a mere application of and was dictated by, *Solem.*

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of the Tenth Circuit's ruling affirming the denial of federal habeas relief. *Goode v. Sharp*, Case No. 19-6857, 2020 WL 873000 (U.S. Feb. 24, 2020). On May 18, 2020, the Petitioner filed a successive application for post-conviction relief and request to hold the application in abeyance which was denied by this Court. *See Goode v. State*, No. PCD-2020-333 (Okla. Crim. App. June 9, 2020).

State's Supp. Br. at 6-7. *See also McGirt*, 140 S. Ct. at 2464 (acknowledging that the *McGirt* decision "say[s] nothing new"). The Tenth Circuit agrees.

In *In re: David Brian Morgan*, the petitioner sought permission to file a second or successive federal habeas petition. *In re: David Brian Morgan*, Tenth Circuit No. 20-6123 (unpublished and attached as Exhibit A). Petitioner relied in part on a statute which permits successive habeas petitions which rely on "a new rule of constitutional law[.]" *Id.* at 2 (quoting 28 U.S.C. § 2244(b)(2)(A)). The three-judge panel denied the motion. Regarding the application of 28 U.S.C. § 2244(b)(2)(A), the court held as follows:

> In *McGirt*, the Court noted that the "appeal rest[ed] on the federal Major Crimes Act" and that application of the statute hinged on whether the Creek Reservation remained "Indian country" under the MCA. *McGirt*, 140 S. Ct. at 2459. Based on decades-old decisions, including *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), and *Solem v. Bartlett*, 465 U.S. 463 (1984), the Court explained that "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt*, 140 S. Ct. at 2462. In other words, the Court cited well-established precedent and reviewed Congressional action to determine whether a federal statute applied. That hardly speaks of a "new rule of constitutional law," 28 U.S.C. § 2244(b)(2)(A).

Id. at 4 (alterations adopted).[2]

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[2] *In re: Morgan* was decided on September 18, 2020, admittedly prior to the filing of the State's first supplemental brief. However, Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), does not require that newly proffered authority also be newly decided. In any event, Respondent did not learn of *In re: Morgan*'s existence until recently, well after the filing of its first supplemental brief. The Tenth Circuit does not provide its unpublished orders for inclusion on legal databases such as Westlaw, so Respondent learned of *In re: Morgan* only serendipitously after it was cited by a federal district court in denying relief in a habeas case in which counsel for Respondent here represented the Warden.

The State recognizes that the Tenth Circuit's decision is not binding upon this Court. However, the Tenth Circuit was interpreting a statute that is very similar to the one at issue in this case. Section 1089 explains that the legal basis for a claim was previously unavailable if it "was not recognized by or could not have been reasonably formulated from a final decision of," in relevant part, the Supreme Court or this Court, or is based on "a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state." 22 O.S.2011, § 1089(D)(9). As Petitioner's *McGirt* claim was based on well-established precedent, it could have been reasonably formulated (and, in fact, was formulated in his fourth post-conviction application filed in May 2020, before *McGirt* was decided) and is not based on a new rule of constitutional law. The State respectfully requests that this Court adopt the reasoning of the Tenth Circuit, and adhere to the plain language of section 1089(D)(8) which expressly prohibits this Court from considering claims that do not fall within its parameters. *See* 22 O.S.2011, § 1089(D)(8) ("if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent or untimely application unless . . . .") (emphasis added). Petitioner's claim is procedurally barred.

Respectfully submitted,

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CERTIFICATE OF MAILING

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FILED
United States Court of Appeals
Tenth Circuit

September 18, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: DAVID BRIAN MORGAN, Petitioner.	No. 20-6123 (D.C. No. 5:19-CV-00929-R) (W.D. Okla.)

ORDER

Before **BRISCOE**, **KELLY**, and **CARSON**, Circuit Judges.

David Brian Morgan, an Oklahoma prisoner proceeding pro se,[1] moves for authorization to file a second or successive habeas application under 28 U.S.C. § 2254. We deny the motion for authorization.

BACKGROUND

In 2011, Morgan pleaded guilty to charges of rape, molestation, kidnapping, and weapons possession. The district court sentenced him to life in prison. Three years later, he filed his first § 2254 habeas application. The district court dismissed the application as time-barred, and we denied a certificate of appealability. Morgan has continued to challenge his convictions in district court and this court, and we twice have denied him authorization to file a second or successive habeas application.

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[1] Because Morgan is pro se, we liberally construe his filings but will not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

EXHIBIT
A

In his current motion, Morgan seeks authorization to file a § 2254 application claiming: (1) the state court lacked jurisdiction because his crimes "occurred within the boundaries of the Indian reservation of the Choctaw and Chickasaw Nations," Mot. at 17, and therefore are subject to exclusive federal jurisdiction under the Major Crimes Act (MCA), 18 U.S.C. § 1153(a); (2) he received ineffective assistance of counsel (IAC) because his attorney failed to raise such jurisdictional objections; and (3) an unidentified state statute provides that his sentence was deemed to have expired once he was transferred to a private prison.

DISCUSSION

Morgan's second or successive habeas application cannot proceed in the district court without first being authorized by this court. *See* 28 U.S.C. § 2244(b)(3). We therefore must determine whether his "application makes a prima facie showing that [it] satisfies the requirements of" subsection (b). *Id.* § 2244(b)(3)(C). In particular, we must dismiss any claim not raised in a prior application unless the claim: (1) "relies on a new rule of constitutional law" that the Supreme Court has "made retroactive to cases on collateral review," *id.* § 2244(b)(2)(A); or (2) relies on facts that could not have been discovered through due diligence and that establish the petitioner's innocence by clear and convincing evidence, *id.* § 2244(b)(2)(B). "If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application." *Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013) (internal quotation marks omitted).

Morgan seeks authorization to proceed under § 2244(b)(2)(A) and contends his jurisdictional and IAC claims rely on a new retroactive rule of constitutional law—specifically, the Supreme Court's recent decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and our decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), which the Supreme Court summarily affirmed in *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), for the reasons stated in *McGirt*.[2] In *Murphy*, we held that Congress had not disestablished the Creek Reservation in Oklahoma and that the state court therefore lacked jurisdiction over the petitioner, a Creek citizen, for a murder he committed on the Creek reservation. 875 F.3d at 904. In *McGirt*, the Supreme Court similarly concluded that the territory in Oklahoma reserved for the Creek Nation since the 19th century remains "'Indian country'" for purposes of exclusive federal jurisdiction over "'certain enumerated offenses'" committed "within 'the Indian country'" by an "'Indian.'" 140 S. Ct. at 2459 (quoting 18 U.S.C. § 1153(a)). Morgan's motion for authorization fails for several reasons.

First, Morgan has not shown his claim actually "relies on" *McGirt*. 28 U.S.C. § 2244(b)(2)(A). Although we do not consider the merits of a proposed second or successive application in applying § 2244(b)(2), *see Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (per curiam), neither is it sufficient to merely provide a citation to a new rule in the abstract. Instead, the movant must make a prima facie showing that the claim

[2] For his conclusory claim that his sentence expired once he was transferred to a private prison, Morgan relies on an unidentified "Oklahoma statute," Mot. at 9, and not a new rule of constitutional law under § 2244(b)(2)(A).

is based on the new rule. *See* 28 U.S.C. § 2244(b)(2)(A), (3)(C). And here, Morgan has not alleged that he is an Indian or that he committed his offenses in the Indian country addressed in *McGirt*, such that the MCA might apply.

Moreover, even if Morgan had adequately alleged reliance on *McGirt*, he has failed to establish that the decision presented a new rule of constitutional law. In *McGirt*, the Court noted that the "appeal rest[ed] on the federal Major Crimes Act" and that application of the statute hinged on whether the Creek Reservation remained "Indian country" under the MCA. *McGirt*, 140 S. Ct. at 2459. Based on decades-old decisions, including *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), and *Solem v. Bartlett*, 465 U.S. 463 (1984), the Court explained that "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt*, 140 S. Ct. at 2462. In other words, the Court cited well-established precedent and reviewed Congressional action to determine whether a federal statute applied. That hardly speaks of a "new rule of constitutional law," 28 U.S.C. § 2244(b)(2)(A).

Finally, even if *McGirt* did present a new rule of constitutional law, the Court did not explicitly make its decision retroactive. "[T]he only way [the Supreme Court] could make a rule retroactively applicable is through a holding to that effect." *Cannon v. Mullin*, 297 F.3d 989, 993 (10th Cir. 2002) (internal quotation marks omitted). It is not sufficient that lower courts have found the rule retroactive or that the rule might be retroactive based on "the general parameters of overarching retroactivity principles." *Id.* Because the Supreme Court has not held that *McGirt* is retroactive, Morgan cannot satisfy this requirement for authorization under § 2244(b)(2)(A).

CONCLUSION

Because Morgan has not satisfied the requirements for authorization in § 2244(b)(2), we deny his motion. The denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." *Id.* § 2244(b)(3)(E).

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

CLARENCE ROZELL GOODE, JR.,	
Petitioner,	
-vs-	**Case No.: PCD-2020-530**
THE STATE OF OKLAHOMA,	
Respondent.	

PETITIONER'S RESPONSE TO STATE'S SUPPLEMENTAL BRIEF REGARDING WHETHER *McGIRT* WAS PREVIOUSLY AVAILABLE FOR PURPOSES OF BARRING CLAIMS

In the State's Supplemental Brief Regarding Whether *McGirt* was Previously Available for Purposes of Barring Claims ("State's Supplemental Brief") tendered for filing on January 22, 2021, the State presents "an unpublished decision in which the United States Court of Appeals for the Tenth Circuit held that *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) did not announce a new rule of constitutional law." State's Motion to File Supplemental Brief at 1. However, the unpublished Tenth Circuit decision the State presents – *In re: David Brian Morgan*, No. 20-6123 (10th Cir. Sept. 18, 2020) – has no bearing on Mr. Goode's case.

In *In re: Morgan*, the petitioner sought authorization to file a second or successive habeas application with various claims, including a claim that the state court lacked jurisdiction because his crimes occurred on an Indian reservation and were subject to exclusive federal jurisdiction under the Major Crimes Act. *In re: Morgan*, slip op. at 2. The Tenth Circuit explained that in determining whether to authorize the second or successive habeas application,

> we must dismiss any claim not raised in a prior application unless the claim: (1) "relies on a new rule of constitutional law" that the Supreme Court has "made retroactive to cases on collateral review," *id.* [28 U.S.C.] § 2244(b)(2)(A); or (2) relies on facts that could not have been discovered through due diligence and that

> establish the petitioner's innocence by clear and convincing evidence, *id.* § 2244(b)(2)(B).

Id. The Tenth Circuit explained that the petitioner argued his jurisdictional claim

> rel[ied] on a new retroactive rule of constitutional law – specifically, the Supreme Court's recent decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 2020), and our decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), which the Supreme Court summarily affirmed in *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), for the reasons stated in *McGirt*.

The court found that the petitioner "has failed to establish that the decision presented a new rule of constitutional law."[1] *Id.* at 4.

The State argues that while it "recognizes that the Tenth Circuit's decision is not binding upon this Court[,] . . . the Tenth Circuit was interpreting a statute that is very similar to the one at issue in this case[]" – that is, 22 O.S. § 1089. Although the State correctly indicates there is a section of § 1089 that is similar to § 2244(b)(2)(A), this is not the section of § 1089 that is relevant to Mr. Goode's case.

Under 22 O.S. § 1089(D)(8), this Court may "consider the merits of or grant relief based on" an untimely or successive application for post-conviction relief if "the legal basis for the claim was [previously] unavailable." Section 1089(D)(9) explains:

> For purposes of this act, a legal basis of a claim is unavailable . . . if the legal basis:
>
> a. was not recognized or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or
>
> b. is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

[1] The Court found "even if *McGirt* did present a new rule of constitutional law, the Court did not explicitly make its decision retroactive." *In re: Morgan*, slip op. at 4.

As the State indicates, § 1089(D)(9)(b) ("section (b)") is similar to the statute applied in *In re: Morgan*, § 2244(b)(2)(A); both require "a new rule of constitutional law" that a court has made retroactive. However, Mr. Goode's position is not that *McGirt* announced "a new rule of constitutional law that was given retroactive effect" and therefore his jurisdictional claim is properly before this court under section (b). Instead, Mr. Goode's claim is properly before this court under § 1089(D)(9)(a) ("section (a)"); that is, the legal basis "was not recognized or could not have been reasonably formulated from a final decision."

This Court has already concluded as much. In its post-hearing supplemental brief, the State acknowledged, "[T]he Respondent recognizes this Court's recent order in *Bosse v. State*, No. PCD-2019-124, order at 2 . . . which, referring to a jurisdictional claim like that raised by Petitioner, determined that '[t]he issue could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).'" Supplemental Brief of Respondent After Remand at 12-13.[2] The State is correct; in *Bosse*, the Court determined that Mr. Bosse's claim – included in his Successive Application for Post-Conviction Relief – was properly before this Court under section (a). In its Order Remanding for Evidentiary Hearing at 2, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Aug. 12, 2020), the Court found, "Petitioner's claim is properly before this court. The issue could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)."[3] Thus, this Court

[2] The State argued that "the *Bosse* order is unpublished and not binding" and that it was "in error." Supplemental Brief of Respondent After Remand at 13 (citation omitted).

[3] Prior to the *Bosse* remand, the State devoted twenty-seven pages of its response brief to procedural defense arguments. *See* Response to Petitioner's Proposition I in Light of the Supreme Court's

specifically cited section (a) in explaining why Mr. Bosse's claim was properly before the court. It did not cite section (b) or otherwise suggest that *McGirt* announced a new rule of constitutional law made retroactive by a court.

Consistent with this Court's *Bosse* finding, in Mr. Goode's Successive Application for Post-Conviction Relief, he argued:

> [T]his Court recently dismissed Mr. Goode's subsequent application which raised the same fundamental constitutional question raised here – does Oklahoma have subject-matter jurisdiction to prosecute Mr. Goode and sentence him to death? It concluded Mr. Goode's claim was "premature" because *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) *(McGirt)* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (*Murphy*) were not final decisions. *Goode v. State,* PCD-2020-332, Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance. (June 9, 2020). As the Supreme Court has issued mandates in both cases, *Murphy* and *McGirt* are now final decisions.
>
> Under § 1089(D)(9)[a], the legal basis for this application was unavailable until the mandates issued. In dismissing Mr. Goode's recent application as premature, this Court acknowledged the legal basis for the claim "was not recognized by or could not have been reasonably formulated from a *final* decision of the United States Supreme Court [or the Tenth Circuit Court of Appeals]." Okla. Stat. tit. 22 § 1089(D)[(9)(a)] (emphasis added). Now that the legal basis is available, this Court should decide the federal claim on the merits and grant Mr. Goode relief, dismiss the cases, and vacate the convictions and sentences.

Successive Application for Post-Conviction Relief at 1-2 (Aug. 12, 2020). *See also* Petitioner's Post-Hearing Supplemental Brief in Support of Successive Application for Post-Conviction Relief at 9-13. Thus, Mr. Goode's argument has been – and remains – that his Successive Application for Post-Conviction Relief is properly before this court under section (a).

Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) at 22-49, *Bosse v. State,* No. PCD-2019-124 (Okla. Crim. App. Aug. 4, 2020). In its post-hearing supplemental brief in *Bosse*, the State "respectfully urge[d] the Court to reconsider its rejection of the State's procedural defenses." State's Supplemental Brief Following Remand for Evidentiary Hearing from McClain County District Court Case No. CF-2010-213 at 16, *Bosse v. State,* No. PCD-2019-124 (Okla. Crim. App. Nov. 4, 2020).

Mr. Goode does not dispute the State's position or the Tenth Circuit's finding in *In re: Morgan* that *McGirt* did not announce a new rule of constitutional law made retroactive by the Supreme Court. Instead, *McGirt* clarified the framework for determining whether a reservation has been disestablished and, applying this framework, determined that the Creek reservation remained Indian Country for purposes of the Major Crimes Act. *See Oneida v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) ("We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation.").[4] Thus, as this Court has already found, *McGirt* recognized a new legal basis for Mr. Goode's claim (pursuant to section (a)).[5] But that new legal basis is not

[4] The *McGirt* Court also held that the Major Crimes Act applied in Oklahoma "according to its usual terms," 140 S. Ct. 2452 at 2478, and that the potential for "transformative effects" was an insufficient justification to find the Creek Reservation was disestablished, *id.* at 2478-81 (brackets omitted).

[5] This Court's treatment of claims raised prior to the *McGirt* decision – in Mr. Goode's case and others – supports its finding that the legal basis was previously unavailable. On May 18, 2020, Mr. Goode filed a Successive Application for Post-Conviction Relief, No. PCD-2020-333, while *Murphy* was pending in the Supreme Court. This Court stated the application was "premature" and ordered it dismissed, "[b]ecause neither *Murphy* nor *McGirt* [was] a final opinion." Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance at 4 (Okla. Crim. App. June 9, 2020). *See, e.g.,* Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance at 3-4, *Cole v. State*, No. PCD-2020-332 (Okla. Crim. App. May 29, 2020); Order Holding Case in Abeyance and Directing Attorney General to Provide Status Update at 2-3, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Mar. 22, 2019).

The State's recent argument in a separate case also supports this Court's finding that the legal basis was previously unavailable. In *Deerleader v. Crow*, No. 20-CV-172 (N.D.O.K. December 14, 2020), the petitioner, like Mr. Goode, filed an application for post-conviction relief before the Supreme Court decided *Murphy* and *McGirt*. While the State insisted on federal habeas that "*McGirt* did not establish a new rule or right, and Indian Country claims were previously available," it also argued, "this significant change in Oklahoma's precedent warrants re-exhaustion of Petitioner's *Murphy* claim in the state courts post-*McGirt*." Brief in Support of Motion to Stay Federal Habeas Proceedings for Petitioner to Re-Exhaust His *Murphy* Claim in State Court in Light of the United States Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) at 2, 6 n.3, *Deerleader v. Crow*, No. 20-CV-172 (N.D.O.K. Aug. 24, 2020). The State explained:

> At the time the OCCA entertained Petitioner's post-conviction appeal and the *Murphy*

a new rule of constitutional law (pursuant to section (b)), and neither Mr. Goode nor this Court has ever claimed it is.

This Court has made clear that "some constitutional rights . . . are never finally waived. Lack of jurisdiction, for instance, can be raised at any time." *Johnson v. State*, 1980 OK CR 45, 611 P.2d 1137, 1145. In three capital cases in which Indian country jurisdictional issues were raised belatedly, this Court repeatedly confirmed such a fundamental jurisdictional issue can be raised at any time. *See Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277, 278 (deciding Indian country jurisdictional question though raised for first time on the day appellate oral argument was set); *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198, 1199 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue though raised for first time in successor post-conviction relief action); and *Magnan v. State*, 2009 OK CR 16, 207 P.3d 397, 402 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue even though issue was not raised in the trial court where appellant pled guilty and waived his appeal). This Court's decisions permitting jurisdiction to be raised at any time rest on bedrock principles that have existed for nearly a century. *See Armstrong v. State*, 1926 OK CR 259, 35 Okla. Crim. 116, 118, 248 P. 877, 878.

> claim as raised in Ground Four of his habeas petition, the *Murphy/McGirt* litigation was still pending. Due to the pending litigation, although the OCCA admittedly denied Petitioner's *Murphy* claim on its merits, **the claim was governed by the OCCA's previous ruling in *Murphy v. State*, where the OCCA held that the Creek Nation had been disestablished.** *See* 124 P.3d 1198, 1207-08 (2005). Although not directly cited below, **this holding was binding as a matter of state law on both the state district court and the OCCA unless and until it was overruled by the OCCA or the United States Supreme Court. Now that *McGirt* has been decided, and *Murphy v. State* has been expressly overruled,** the OCCA should be afforded a full and fair opportunity to address Petitioner's *Murphy* claim.

Id. at 8-9 (emphasis added).

The Supreme Court defines jurisdiction as "the courts' statutory and constitutional *power* to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002). *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Because subject matter jurisdiction involves a court's power to act, the Supreme Court concludes "it can never be forfeited or waived." *Cotton*, 535 U.S. at 630. Defects in jurisdiction cannot be overlooked by a court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U.S. 413, 421 (1911).

In *McGirt*, Oklahoma's Solicitor General acknowledged, "Oklahoma allows collateral challenges to subject-matter jurisdiction at any time." Brief of Respondent at 43, *McGirt*, 140 S. Ct. 2452 (2020) (No. 18-9526). The dissent explained, "[U]nder Oklahoma law, it appears that there may be little bar to state habeas relief because 'issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal.'" 140 S. Ct. at 2501 n.9 (Roberts, J., dissenting) (citing *Murphy*, 875 F.3d at 907 n.5 (quoting *Wallace v. State*, 1997 OK CR 18, 935 P.2d 366, 372)).

This Court has already decided Mr. Goode's claim is properly before it. *See* Order Remanding for Evidentiary Hearing at 3. Even had the Court not already decided that question, the authority presented by the State has no bearing on Mr. Goode's claim before this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2021, a true and correct copy of the foregoing document was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9 (B), *Rules of the Court of Criminal Appeals*.

EMMA V. ROLLS

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB - 2 2021

JOHN D. HADDEN
CLERK

CLARENCE ROZELL GOODE, JR.,	)	
	)	
Petitioner,	)	
v.	)	No. PCD-2020-530
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DENYING MOTION TO FILE SUPPLEMENTAL BRIEF

Respondent seeks to file a supplemental brief in the above entitled appeal pursuant to Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). Respondent points out that Rule 3.4 provides that a supplemental brief may be filed if granted leave of this Court when necessary to present new authority on issues previously raised. Respondent has tendered the supplemental brief with the new authority attached.

This post-conviction appeal is based on issues concerning the authority of the State of Oklahoma to prosecute members of a recognized Indian tribe when a crime is committed on tribal land. The appeal is based, in part, on *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020). The new authority relied upon by the State, *In re: Morgan*, Tenth Circuit No. 20-6123 (unpublished Sept. 18, 2020), is an

unpublished Tenth Circuit Court of Appeals order regarding the filing of second or successive habeas applications in the federal courts.

We find that the proposed "new authority" holds no precedential value and is not relevant to our consideration of the case at hand. We, therefore, **DENY** respondent's motion to file a supplemental brief.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 2nd day of February, 2021.

DANA KUEHN, Presiding Judge

SCOTT ROWLAND, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

ROBERT L. HUDSON, Judge

ATTEST:
John D. Hadden
Clerk

2021 WL 958412
Court of Criminal Appeals of Oklahoma.

Travis John HOGNER, Appellant
v.
STATE of Oklahoma, Appellee.

No. F-2018-138
|
FILED MARCH 11, 2021

Synopsis

Background: Defendant was convicted in the District Court, Craig County, Harry M. Wyatt, J., of possession of a firearm after conviction of a felony and two additional felonies and was sentenced to 50 years' imprisonment. Defendant appealed. On remand for evidentiary hearing on defendant's contention that the District Court lacked jurisdiction to try him, the District Court, Shawn S. Taylor, J., determined that defendant was an Indian and the crime occurred in Indian Country.

[Holding:] The Court of Criminal Appeals, Lumpkin, J., held that evidence supported that defendant was an Indian and that defendant's crime occurred in Indian Country, and thus, the State did not have jurisdiction to try defendant.

Reversed and remanded.

Hudson, J., specially concurred with opinion.

Kuehn, V.P.J., concurred with opinion.

Rowland, J., concurred with opinion.

Lewis, P.J., concurred with opinion.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (4)

[1] **Indians** State court or authorities
Indians Presumptions and burden of proof

Upon a defendant's presentation of prima facie evidence as to his legal status as an Indian and as to the location of the crime as Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

3 Cases that cite this headnote

[2] **Criminal Law** Scope of Inquiry

Court of Criminal Appeals reviews a trial court's conclusions of law for abuse of discretion.

2 Cases that cite this headnote

[3] **Courts** Abuse of discretion in general

An "abuse of discretion" is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue.

[4] **Indians** State court or authorities
Indians Weight and sufficiency

Evidence supported trial court's finding that defendant was an Indian and that defendant's crime occurred in Indian Country, and thus, the State did not have jurisdiction to try defendant; defendant and the State stipulated that defendant had 1/4 degree Indian blood and was a member of a federally-recognized Indian tribe on the date of the crime, and no evidence was presented showing that the boundaries of the tribe's reservation were ever explicitly erased or disestablished.

4 Cases that cite this headnote

AN APPEAL FROM THE DISTRICT COURT OF CRAIG COUNTY; THE HONORABLE SHAWN S. TAYLOR, DISTRICT JUDGE

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OPINION

LUMPKIN, JUDGE: [1]

¶1 Appellant Travis John Hogner was charged and tried by jury for Feloniously Pointing a Firearm (21 O.S.Supp.2012, § 1289.16) or in the alternative Domestic Assault with a Dangerous Weapon (21 O.S.Supp.2014, § 644) (Count I); Possession of a Firearm, After Former Conviction of a Felony (21 O.S. Supp.2014, § 1283) (Counts II and III); Kidnapping (21 O.S.Supp.2012, § 751 (Count V); Interference with Emergency Telephone Call, misdemeanor (21 O.S.2011, § 1211.1) (Count VIII); and Domestic Assault and Battery, Second or Subsequent Offense (21 O.S.Supp.2014, § 644) (Count IX), all felonies were After Former Conviction of Two or More Felonies, in the District Court of Craig County, Case No. CF-2015-263. [2] In the first stage of trial, the jury found Appellant not guilty in Counts I, V, VIII, and IX. In the second stage of trial, the jury found Appellant guilty in Count II but not guilty in Count III. In the third stage of trial, the jury found Appellant guilty of two or more prior felony convictions and recommended a sentence of fifty (50) years imprisonment. The Honorable H.M. Wyatt, III, Associate District Judge, sentenced Appellant in accordance with the jury's recommendation. [3]

¶2 In Proposition I, Appellant claims the District Court lacked jurisdiction to try him. Appellant argues that he is a citizen of the Miami Tribe of Oklahoma and the crime occurred within the boundaries of the Cherokee Nation.

¶3 Pursuant to *McGirt v. Oklahoma*, —— U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020) Appellant's claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore remanded this case to the District Court of Craig County for an evidentiary hearing.

[1] ¶4 Recognizing the historical and specialized nature of this remand for evidentiary hearing, we requested the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Appellant's presentation of *prima facie* evidence as to his legal status as an Indian and as to the location of the crime as Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction. The District Court was ordered to determine whether Appellant has some Indian blood and is recognized as an Indian by a tribe or the federal government. The District Court was also directed to determine whether the crime occurred in Indian Country. The District Court was directed to follow the analysis set out in *McGirt* to determine: (1) whether Congress established a reservation for the Cherokee Nation; and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In so doing, the District Court was directed to consider any evidence the parties provided, including but not limited to treaties, statutes, maps, and/or testimony.

***2** ¶5 We also directed the District Court that in the event the parties agreed as to what the evidence would show with regard to the questions presented, the parties may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. The District Court was also ordered to file written findings of fact and conclusions of law with this Court.

¶6 An evidentiary hearing was timely held before the Honorable Shawn S. Taylor, District Judge, and an Order on Remand from that hearing was timely filed with this

Court. The record indicates that appearing before the District Court were attorneys from the office of the Attorney General of Oklahoma, the Craig County District Attorney's Office, appellate defense counsel, and the office of the Attorney General of the Cherokee Nation.

¶7 In its Order on Remand, the District Court stated that the State of Oklahoma and Appellant stipulated to Defendant/Appellant's "Indian status by virtue of his tribal membership and proof of blood quantum." Further, "based upon the stipulations provided", the Court "specifically finds Defendant/Appellant (1) has some Indian blood and (2) is recognized as an Indian by a tribe or federal government. The Defendant/Appellant is an Indian."

¶8 Regarding whether the crime occurred in Indian country, the Order states that the "State of Oklahoma and Defendant/Appellant stipulated that the crime occurred within the historical boundaries of the Cherokee Nation. The State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation."

¶9 In determining whether Congress established a reservation for the Cherokee Nation, the District Court stated that it considered the following:

1. The Cherokee Nation is a federally recognized Indian tribe. 84 C.F.R. § 1200 (2019).

2. The current boundaries of the Cherokee Nation encompass lands in a fourteencounty area within the borders of the State of Oklahoma, including all of Adair, Cherokee, Craig, Nowata, Sequoyah, and Washington Counties, and portions of Delaware, Mayes, McIntosh, Muscogee, Ottawa, Rogers, Tulsa and Wagoner Counties as indicated in Combined Hearing Exhibit 1, tab 3.

3. The Cherokee Nation's treaties are to be considered on their own terms, in determining reservation status. *McGirt v. Oklahoma,* —— U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020).

4. In *McGirt* the United States Supreme Court noted that Creek treaties promised a "permanent home" that would be "forever set apart" and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. *McGirt,* 140 S.Ct. at 2461-62. As such, the Supreme Court found that "Under any definition, this was a [Creek] reservation." *McGirt,* 140 S.Ct. at 2461.

5. The Cherokee treaties were negotiated and finalized during the same period of time as the Creek treaties, contained similar provisions that promised a permanent home that would be forever set apart, and assured a right to self-government on lands that lie outside both the legal jurisdiction and geographic boundaries of any state.

6. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokee on new lands in the West "forever". Treaty with the Western Cherokee Preamble, Feb. 14 1833, 7 Stat. 414

7. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of the new Cherokee lands, and provided that a patent would issue as soon as reasonably practical. Art. 1, 7 Stat. 414.

***3** 8. The 1835 Cherokee treaty was ratified two years later "with a view to re-unite their people in one body and to secure to them a permanent home for themselves and their posterity". In what became known as Indian Territory, "without the territorial limits of the state sovereignties," and "where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be consonant with their views, habits and condition." Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 and *Holden v. Jay,* 84 U.S. (17 Wall.) 211, 237-38, 21 L.Ed. 523 (1872).

9. Like the Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S.Ct. at 2460. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." Art. 2, 7 Stat. 478.

10. The 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation of the new lands in Indian territory as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits

or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government...within their own country," so as long as they were consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Arts. 1, 5, 8, 19, 7 Stat. 478.

11. On December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new lands in Indian Territory. *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 297, 23 S.Ct. 115, 47 L.Ed. 183 (1902). The title was held by the Cherokee Nation "for the common use and equal benefit of all the members." *Cherokee Nation v. Hitchcock,* 187 U.S. at 307, 23 S.Ct. 115; *see also* *Cherokee Nation v. JourneyCake,* 155 U.S. 196, 207, 15 S.Ct. 55, 39 L.Ed. 120 (1894). Fee title is not inherently incompatible with reservation status, and establishment of a reservation does not require a "particular form of words." *McGirt,* 140 S.Ct. at 2475, citing *Maxey v. Wright,* 54 S.W. 807, 810 (Indian Ter. 1900) and *Minnesota v. Hitchcock,* 185 U.S. 373, 390, 22 S.Ct. 650, 46 L.Ed. 954 (1902).

12. The 1846 Cherokee treaty required federal issuance of a deed to the Cherokee Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the Neutral Lands) and the "outlet west." *Treaty with the Cherokee,* Aug. 6, 1846, art. 1, 9 Stat. 871.

13. The 1866 Cherokee treaty resulted in Cherokee cessions of lands in Kansas and the Cherokee Outlet and required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments by two commissioners one of whom be designated by the Cherokee nation council." *Treaty with the Cherokee*, July 19, 1866, art. 21, 14, Stat. 799.

14. The 1866 Cherokee treaty "re-affirmed and declared to be in full force" all previous treaty provisions "not inconsistent with the provisions of" the 1866 treaty and provided that nothing in the 1866 treaty "shall be constructed as an acknowledgment by the United States or as relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. Art. 31, 14 Stat. 799.

***4** 15. Under *McGirt* the "most authoritative evidence of [a tribe's] relationship to the land....lies in the treaties and statutes that promised the land to the Tribe in the first place." *McGirt*, 140 S.Ct. at 2475-76.

¶10 The District Court found that "as result of the treaty provisions referenced above and related federal statutes ... Congress did establish a Cherokee Reservation as required under the analysis set out in *McGirt v. Oklahoma*."

¶11 Further, regarding whether Congress specifically erased the boundaries or disestablished the Cherokee Reservation, the District Court considered:

1. The current boundaries, indicated on the map found at tab 3 of the Combined Hearing Exhibit 1, are the boundaries established of the Cherokee Reservation by the 1833 and 1835 Cherokee treaties, diminished only by two express cessions.

2. First the 1866 treaty expressly ceded the Nation's patented lands in Kansas, consisting of a two and one half mile wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. Art. 17, 14 Stat. 799.

3. Second the 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet) and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and the jurisdiction over all said country... until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." Art. 16, 14 Stat. 799.

4. The Cherokee Outlet cession was finalized by an 1891agreement and ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, Ch.209, § 10, 27, Stat. 612, 640-43.

5. The 1891 Agreement provided that the Cherokee nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and the Creek Nation on the

south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). *See United States v. Cherokee Nation,* 202 U.S. 101, 105-106, 26 S.Ct. 588, 50 L.Ed. 949 (1906).

6. The 1893 federal statute that ratified the 1891 agreement required payment of a sum certain to the Cherokee Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. 27 Stat. 612, 640-43; *United States v. Cherokee Nation*, 202 U.S. at 112, 26 S.Ct. 588.

7. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement. No evidence was presented that any other cession has occurred since that time.

8. The original 1839 Cherokee Constitution established boundaries as described in the 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may made necessary" by the 1866 treaty. 1839 Cherokee Constitution, art., 1, § 1, reprinted in Volume 1 of West's Cherokee Nation Code Annotated.

***5** 9. Cherokee Nation's most recent Constitution, a 1999 provision of its 1975 Constitution was ratified by Cherokee citizens in 2003 and provides: The boundaries of the Cherokee Nation territory shall be those described by the patents of 1893 and 1846 diminished only by the Treaty of July 19, 1866 and the act of Mar. 3, 1893. 1999 Cherokee Constitution. Art.2.

¶12 The District Court also noted that the State "made it clear through argument and briefing" that the "State of Oklahoma takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Reservation" and that "no evidence or argument was presented by the State specifically regarding disestablishment or boundary erasure of the Cherokee Reservation."

¶13 The District Court concluded its order by stating, "regardless of where the burden of production is placed, no evidence was presented to this Court to establish Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma has jurisdiction in this matter. As a result, the Court finds the Defendant/Appellant is an Indian and that the crime occurred in Indian Country."

¶14 Both Appellant and the State were given the opportunity to file response briefs addressing issues from the evidentiary hearing. Appellant argues that "since the Indian status was dealt with entirely by stipulation" his brief concerns only "the issue of whether the crime occurred in Indian Country". Appellant asserts the parties agreed that the crimes occurred "within the historical boundaries of the Cherokee Nation" and therefore, "the only questions before the district court were whether a reservation had ever been established for the Cherokees and whether it still exists today."

¶15 Reviewing the treaties presented at the evidentiary hearing under the standard of review set forth in *McGirt*, Appellant argues this Court should adopt the findings of the District Court in holding that Congress created a reservation for the Cherokees and that the Cherokee Reservation was never disestablished. Appellant asserts that just like with the Creek Reservation, "there is no statute evincing anything like the present and total surrender of all tribal interests in the affected lands", citing *McGirt,* 140 S.Ct. at 2464. Appellant concludes that as the State cannot, and did not, point to any such language regarding the Cherokee Reservation, this Court should find that Congress did not disestablish the reservation for the Cherokees.

¶16 In its response brief, the State acknowledges the District Court accepted the parties' stipulation to Appellant's Indian status based on documentation showing Appellant had ¼ degree Indian blood and was a member of the Miami Tribe of Oklahoma on the date of the crime. The State also asserts the District Court applied *McGirt* and found Congress did establish a Cherokee Reservation and that "no evidence was presented ... to establish Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma had jurisdiction in this matter...and that the crime occurred in Indian Country." The State contends that should this Court find Appellant is entitled to relief based on the District Court's findings, this Court should stay any order reversing the conviction for thirty (30) days so that the appropriate authorities can review the case and determine whether it is appropriate to file charges and take custody of Appellant. *Cf.* 22 O.S. 2011, § 846.

***6** **[2]** **[3]** ¶17 After thorough consideration of this proposition and the entire record before us on appeal

including the original record, transcripts, and briefs of the parties, we find that under the law and the evidence relief is warranted. While the State stipulated to Appellant's status as an Indian, the State did not join in the defense's proposed stipulation regarding the existence of the Cherokee Reservation and that it has not been disestablished. The State simply took no position and presented no argument or evidence regarding the defense evidence. This acquiescence has created a legal void in this Court's ability to adjudicate properly the facts underlying Appellant's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

[4] ¶18 Based upon the record before us, the District Court's Order is supported by the evidence presented at the evidentiary hearing. We therefore find Appellant has met his burden of establishing his status as an Indian, having ¼ degree Indian blood and being a member of the Miami Tribe of Oklahoma on the date of the crime. We also find the District Court appropriately applied *McGirt* to determine that Congress did establish a Cherokee Reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Cherokee Reservation or that the State of Oklahoma had jurisdiction in this matter. We find the State of Oklahoma did not have jurisdiction to prosecute Appellant in this matter. The Judgments and Sentences in this case are hereby reversed and the case remanded to the District Court of Craig County with instructions to dismiss the case. [4]

DECISION

¶19 The **JUDGMENTS and SENTENCES are REVERSED AND REMANDED with instructions to Dismiss.** The **MANDATE** is not to be issued until twenty (20) days from the delivery and filing of this decision. [5]

KUEHN, P.J.: Concur in Results

ROWLAND, V.P.J.: Concur in Results

LEWIS, J.: Concur in Results

HUDSON, J.: Specially Concur

HUDSON, J., SPECIALLY CONCURRING:

¶1 Today's decision applies *McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020) to the facts of this case. I fully concur in the majority's opinion based on the stipulations below concerning Appellant's Indian status and the location of these crimes within the historic boundaries of the Cherokee Reservation. Under *McGirt*, the State cannot prosecute Appellant because of his Indian status and the location of this crime within Indian Country as defined by federal law. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶2 I further agree that the State's failure to take a position in this case on whether the Cherokee Nation ever had, or has, a reservation prevents us from definitively resolving that issue here. The State's tactic of passivity has created a legal void in this Court's ability to adjudicate properly the facts underlying Appellant's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. Today's decision correctly finds no abuse of discretion based on the record evidence presented. But we should not establish as binding precedent that the Cherokee Reservation was never disestablished based on this record.

***9** ¶3 I also join Judge Rowland's observation in his special writing that the Major Crimes Act does not affect the State of Oklahoma's subject matter jurisdiction in criminal cases but, rather, involves the exercise of federal criminal jurisdiction to effectively preempt the exercise of similar state authority.

¶4 Finally, I write separately to note that *McGirt* resurrects an odd sort of Indian reservation. One where a vast network of cities and towns dominate the regional economy and provide modern cultural, social, educational and employment opportunities for all people on the reservation. Where the landscape is blanketed by modern roads and highways. Where non-Indians own property (lots of it), run businesses and make up the vast majority of inhabitants. On its face, this reservation looks like any other slice of the American heartland--one dotted with large urban centers, small rural towns and suburbs all linked by a modern infrastructure that connects its inhabitants, regardless of race (or creed), and drives a surprisingly diverse economy. This is an impressive place--a modern marvel in some ways--where Indians and non-Indians have lived and worked together since at least statehood, over a century.

¶5 *McGirt* orders us to forget all of that and instead focus on whether Congress expressly disestablished the reservation. We are told this is a cut-and-dried legal matter. One resolved by reference to treaties made with the Five Civilized Tribes dating back to the nineteenth century. Ignore that Oklahoma has continuously asserted jurisdiction over this land since statehood, let alone the modern demographics of the area.

¶6 The immediate effect under federal law is to prevent state courts from exercising criminal jurisdiction over a large swath of Greater Tulsa and much of eastern Oklahoma. Yet the effects of *McGirt* range much further. Crime victims and their family members in a myriad of cases previously prosecuted by the State can look forward to a do-over in federal court of the criminal proceedings where *McGirt* applies. And they are the lucky ones. Some cases may not be prosecuted at all by federal authorities because of issues with the statute of limitations, the loss of evidence, missing witnesses or simply the passage of time. All of this foreshadows a hugely destabilizing force to public safety in eastern Oklahoma.

¶7 *McGirt* must seem like a cruel joke for those victims and their family members who are forced to endure such extreme consequences in *their* case. One can certainly be forgiven for having difficulty seeing where--or even when--the reservation begins and ends in this new legal landscape. Today's decision on its face does little to vindicate tribal sovereignty and even less to persuade that a reservation in name only is necessary for anybody's well-being. The latter point has become painfully obvious from the growing number of cases that come before this Court where non-Indian defendants are challenging their state convictions using *McGirt* because *their victims* were Indian.

¶8 Congress may have the final say on *McGirt*. In *McGirt*, the court recognized that Congress has the authority to take corrective action, up to and including disestablishment of the reservation. We shall see if any practical solution is reached as one is surely needed. In the meantime, cases like Appellant's remain in limbo until federal authorities can work them out. Crime victims and their families are left to run the gauntlet of the criminal justice system once again, this time in federal court. And the clock is running on whether the federal system can keep up with the large volume of new cases undoubtedly heading their way from state court.

KUEHN, PRESIDING JUDGE, CONCURRING IN RESULT:

¶1 I agree with the Majority that the State of Oklahoma had no jurisdiction to try Appellant, and his case must be dismissed. First, I want to commend all the attorneys and the trial court for the care and thought with which they have approached this -- for Oklahoma -- unprecedented situation. All parties thoroughly researched the issue, brought to the trial court the relevant facts and law, and carefully considered their positions. The trial court provided this Court with thoughtful, detailed findings of fact and conclusions of law.

¶2 For this reason I cannot agree with the Majority's characterization of the State's position as "acquiescence." In the Order remanding the case for an evidentiary hearing, this Court left open the possibility that the parties would enter into stipulations of fact or law. The parties did so here. In addition to those stipulations, the State chose to take no position on the establishment or disestablishment of the Cherokee Reservation. I believe that decision reflected the State's best legal assessment of the situation, given the clear ruling in *McGirt* and the treaty law surrounding the Cherokee Reservation. The State should be thanked for conserving judicial resources and entering into the spirit of our Order.

¶3 Nor do I agree that the State's position left a "void" in the record. In any adversarial proceeding, a party may choose to present evidence and give argument. Here, as our Order remanding made clear, Appellant had the burden to show by *prima facie* evidence his Indian status and that the crime was committed in Indian Country. Once Appellant made this minimal showing, the burden was on the State to show that it had jurisdiction. To aid the trial court, the Appellant and the Cherokee Nation, acting as amicus, provided the court with maps, treaties and other law relevant to the jurisdictional issue. In fulfilling its burden, the State chose not to augment or contest this law and evidence. As I explain above, that was a responsible choice, and one entirely consistent with effective representation. There was a full record below and a full record on appeal. The trial court's findings and conclusions clearly set forth the details of the evidence it used to make its decisions.

*7 ¶4 I agree that the trial court's findings of fact were supported by the record, and there is no abuse of discretion. I would adopt the conclusions of law. Finding that Appellant is Indian, the Cherokee Reservation was not disestablished, and the crime was committed within reservation boundaries, I agree the case must be reversed with instructions to dismiss.

ROWLAND, VICE-PRESIDING JUDGE, CONCURRING IN RESULT:

¶1 I agree with nearly every word in the majority's opinion, including its holding that existing law compels a conclusion that the lands comprising the Cherokee Nation in Oklahoma constitute an Indian reservation. I do not join, however, in the view that the position the State has taken leaves a legal void or negatively affects the standard of review by which we are to judge this case.

¶2 The State has agreed that Hogner is an Indian for purposes of federal criminal law, and that the crimes here took place on lands within the historical boundaries of the Cherokee Nation. The State took no position as to whether those lands ever have or still do constitute a reservation, and offered no evidence or argument to rebut Hogner's claim that a Cherokee Reservation remains intact today. Clearly, the State is aware that the reasoning of *McGirt v. Oklahoma*, 591 U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), involving the Muscogee Creek Reservation, likely applies to the Cherokee lands as well. The Court, in *McGirt,* found the existence of a Muscogee Creek Reservation in a large part of eastern Oklahoma, even though neither the tribe, local governmental units in that part of the state, nor the State of Oklahoma, had ever behaved since statehood as though they believed a reservation still existed. It seems to me the State is consistent in its long-held position, effectively standing mute and leaving it to the district court to expand *McGirt* to the Cherokee lands. This is a reasonable position to take and one that litigants in criminal cases take from time to time.

¶3 Nor do I find that the State's position negatively affects our standard of review or ability to decide this case. Had the State taken the position that no Cherokee Reservation exists today, and had the district court nonetheless ruled against the State, we would still have that ruling in the district court's order to adjudicate.

¶4 Finally, I wish to make clear that our decision today, consistent with *McGirt*, finds the existence of the Cherokee Reservation only for purposes of federal versus state jurisdiction in criminal law. I also point out, consistent with my separate writing in *Bosse v State*, 2021 OK CR 3, —— P.3d ——, that the Major Crimes Act does not affect the State of Oklahoma's subject matter jurisdiction, but rather allows the exercise of federal criminal jurisdiction to effectively preempt the exercise of similar state authority.

¶5 Accordingly, I concur in the result.

LEWIS, JUDGE, CONCURRING IN RESULTS:

¶1 I write separately to address the notion that *McGirt v. Oklahoma*, —— U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), addresses something less than subject matter jurisdiction over an Indian who commits a crime in Indian Country or over any person who commits a crime against an Indian in Indian Country. *McGirt*, of course, serves as the latest waypoint for our discussion on the treatment of criminal cases arising within the historic boundaries of Indian reservations which were granted by the United States Government many years ago. *McGirt*, 140 S.Ct. at 2460, 2480. The main issue in *McGirt* was whether those reservations were disestablished by legislative action at any point after being granted.

*8 ¶2 *McGirt* deals specifically, and exclusively, with the boundaries of the reservation granted to the Muscogee (Creek) Nation. *McGirt*, 140 S.Ct. at 2459, 2479. However, the other Indian Nations comprising the Five Civilized Tribes have historical treaties with language indistinct from the treaty between the Muscogee (Creek) Nation and the federal government. Therefore, this case involving a crime occurring within the historical boundaries of the Cherokee Nation Reservation must be analyzed in the same manner as the boundaries of the Muscogee (Creek) Nation Reservation. The District Court below conducted a thorough analysis and concluded that the reservation was not disestablished. I agree with this conclusion. [1]

¶3 *McGirt* was also clear that if the reservation was not disestablished by the U.S. Congress, Oklahoma has no right to prosecute Indians for crimes committed within the historical boundaries of the Indian reservation. *McGirt*, 140 S.Ct. at 2460. Therefore, because the Cherokee Nation

Reservation was not disestablished, the State of Oklahoma has no authority to prosecute Indians for crimes committed within the boundaries of the Cherokee Nation Reservation as was the case here, nor does Oklahoma have jurisdiction over any person who commits a crime against an Indian within the boundaries of the Cherokee Nation Reservation. The federal government has exclusive jurisdiction over those cases. 18 U.S.C. § 1153(a).

¶4 A lack of subject matter jurisdiction leaves a court without authority to adjudicate a matter. This Court has held that subject matter jurisdiction cannot be conferred by consent, nor can it be waived, and it may be raised at any time. *Armstrong v. State*, 1926 OK CR 259, 35 Okla.Crim. 116, 248 P. 877, 878; *Cravatt v. State*, 1992 OK CR 6, ¶ 7, 825 P.2d 277, 280; *Magnan v. State*, 2009 OK CR 16, ¶¶ 9 & 12, 207 P.3d 397, 402 (holding that jurisdiction over major crimes in Indian Country is exclusively federal).

¶5 Because the issue in this case is one of subject matter jurisdiction, I concur that this case must be reversed and remanded with instructions to dismiss.

All Citations

--- P.3d ----, 2021 WL 958412, 2021 OK CR 4

Footnotes

1 As stated in my separate writing in Bosse v. State, 2021 OK CR 3, —— P.3d —— (Lumpkin, J., concurring in result), I am bound by my oath and adherence to the Federal-State relationship under the U.S. Constitution to apply the edict of the majority opinion in McGirt v. Oklahoma, —— U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). However, I continue to share the position of Chief Justice Roberts' dissent in McGirt, that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed.

2 A demurrer to Counts IV, VI, and VII, three misdemeanor counts of Threatening to Perform Act of Violence (21 O.S.2011, § 1378), was granted before the case was sent to the jury.

3 Appellant must serve 85% of his sentence before becoming eligible for parole consideration. 21 O.S.2011, § 13.1.

4 This resolution renders the other seven (7) propositions of error raised in Appellant's brief moot.

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

1 The Opinion indicates that there is some “legal void” because the State acquiesced to the District Court's findings, thus we are limited to review for abuse of discretion. Where there is arbitrary or unreasonable action by a District Court, this Court has the power to intervene. Here, there simply is no evidence that Congress disestablished the Cherokee Nation Reservation by clearly expressed intent as required by *McGirt*. *McGirt*, 140 S.Ct. at 2463; *see* *Nebraska v. Parker*, —— U.S. ——, 136 S.Ct. 1072, 1079, 194 L.Ed.2d 152 (2016).

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.