Capital Case

Case No. _____

In the
Supreme Court of the United States

BENJAMIN ROBERT COLE, SR.,
Petitioner,
v.
THE STATE OF OKLAHOMA,
Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
VOL. II of II
Appendices J through W
(Pet. App. 156 through Pet. App. 304)

THOMAS D. HIRD, OBA # 13580*
EMMA V. ROLLS, OBA #18820
KATRINA CONRAD-LEGLER, OBA # 16953
Assistant Federal Public Defenders
Office of the Federal Public Defender
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
405-609-5975 (phone)
405-609-5976 (fax)
Tom_Hird@fd.org
Emma_Rolls@fd.org
Katrina_Legler@fd.org

ATTORNEYS FOR PETITIONER,
BENJAMIN ROBERT COLE, SR.

* Counsel of Record

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

VOL. II of II
(Appendices J - W)

ORIGINAL

No. PCD-2020-529

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE, SR.,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT AFTER REMAND

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

RANDALL YOUNG, OBA #33646
ASSISTANT ATTORNEY GENERAL

313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR RESPONDENT

DECEMBER 8, 2020

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE, SR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. PCD-2020-529**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

SUPPLEMENTAL BRIEF OF RESPONDENT AFTER REMAND

A Rogers County jury convicted Benjamin Robert Cole, Sr., hereinafter referred to as Petitioner, of First Degree Murder, in violation of 21 O.S.2011, § 701.7, in Case No. CF-2002-597. *Cole v. State*, 2007 OK CR 27, ¶ 1, 164 P.3d 1089, 1092. The jury sentenced Petitioner to death, and the Honorable J. Dwayne Steidley imposed Petitioner's judgment and sentence accordingly. *Id.* Petitioner seeks post-conviction relief with this Court through a successive application for post-conviction relief ("Successive Application").[1]

The United States Supreme Court held in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2560-82 (2020) that the Creek Nation's Reservation remained intact. That same day, the Court affirmed the Tenth Circuit's holding in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017) for the same reason. *Sharp v. Murphy*,

[1] Petitioner has previously filed, and this Court has denied, post-conviction relief. *See Cole v. State*, PCD-2005-23 (Okl.Cr., Jan. 24, 2008)(unpublished), *cert. denied*, 553 U.S. 1055 (2008); and *Cole v. State*, PCD-2020-332 (Okl.Cr., May 29, 2020)(unpublished). Federal courts have also denied Petitioner habeas relief. *Cole v. Workman*, Case No. 08-CV-0328, 2011 WL 3862143 (N.D. Okla. Sept. 1, 2011) (unpublished); *Cole v. Trammell*, 755 F.3d 1142 (10th Cir. 2014), *cert. denied*, 574 U.S. 891 (2014).

140 S. Ct. 2412 (2020). Petitioner filed the instant Successive Application on August 12, 2020, his sole claim being that the State lacked jurisdiction over his case. Successive Application at 1. He specifically claims that his victim, B.C., was a citizen of the Cherokee Nation at the time of the offense, and he committed his crime within the Cherokee Reservation. Successive Application at vi. Consequently, Petitioner contends that the Major Crimes Act, 18 U.S.C. § 1153, divests the State of jurisdiction. Successive Application at 7. This Court subsequently issued an Order Remanding for Evidentiary Hearing ("Order Remanding") on August 24, 2020. The Order Remanding directed the Rogers County District Court to determine two things: "(a) the Indian status of B.C. and (b) whether the crime occurred in Indian Country." Order Remanding at 2.

I. Evidentiary Hearing and Judge McCoy's Findings of Fact and Conclusions of Law

The Honorable Kassie N. McCoy, District Court Judge, called the case for evidentiary hearing on September 28, 2020. Prior to the hearing, the parties entered into written stipulations ("Stipulations"). The Stipulations included agreements that the crime occurred within the geographic area described in the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified by the Treaty of July 19, 1866, 14 Stat 799, and under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612. Stipulations at 1. The Stipulations also included agreement that the victim in this case, B.C., applied for citizenship with the Cherokee Nation on August 28, 2002; that the application was

pending at the time of her death on December 20, 2002; and that the Cherokee Nation approved her application on June 23, 2003. Stipulations at 1. Additionally, the parties agreed in the Stipulations that B.C. possessed 1/16 Cherokee blood, and that the Cherokee Nation is a federally recognized Indian tribe. Stipulations at 1. At the evidentiary hearing, Judge McCoy accepted exhibits from Petitioner, and the Cherokee Nation, and heard argument on the record.

Judge McCoy issued an Order on Remand on November 12, 2020. The Order on Remand contains findings of fact and conclusions of law relating to (1) B.C.'s status as an Indian; and (2) whether the crime occurred in Indian Country. *Cf.* Order Remanding at 2. Judge McCoy found "B.C. (1) had some Indian blood, and (2) was recognized as an Indian by a tribe or the federal government." Order on Remand at 2. Additionally, Judge McCoy found "the crime occurred within the historical boundaries of the Cherokee Nation." Order on Remand at 2. The Order on Remand then conducts a thorough review of treaties between the Cherokee Nation and the United States, as ratified by Congress, and other relevant documents including iterations of the Cherokee Constitution. Order on Remand at 3-5. Based upon this review, Judge McCoy found that Congress established a reservation for the Cherokee, and that it remained intact. Order on Remand at 4-5. Ultimately, Judge McCoy concluded that "B.C. was an Indian and that the crime occurred in Indian Country." Order on Remand at 6.

II. This Court should find the State maintains concurrent jurisdiction

Concurrent jurisdiction is pertinent to the evidentiary hearing, as "[u]pon 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 at 2. As described above, the district court found that B.C. was an Indian and that the crime occurred in Indian Country. This Court must permit the State to meet its burden of showing it nevertheless had subject matter jurisdiction in this case through concurrent jurisdiction. So, the State respectfully asks this Court to consider—based upon the unanticipated result of *McGirt* and the sheer magnitude of *McGirt*'s impact—the following argument and hold that the State has concurrent jurisdiction in this case.

Petitioner's jurisdictional claim rests on his belief that federal courts have exclusive jurisdiction over his crimes pursuant to 18 U.S.C. § 1152 ("General Crimes Act") because, although he is not an Indian, his victim was. As this Court is aware, although there exists a longstanding assumption about the scope of state jurisdiction, if *McGirt* makes one thing clear, longstanding assumptions cannot substitute for clear text. *See McGirt*, 140 S. Ct. at 2462-63, 2468-74. The relevant text of the General Crimes Act does nothing to preempt state jurisdiction:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United

> States, except the District of Columbia, shall extend to the Indian country.

18 U.S.C. § 1152. While the statute refers to the "exclusive jurisdiction of the United States," it does not confer exclusive jurisdiction on the United States. Rather, it incorporates the body of laws which applies in places where the United States has exclusive jurisdiction into Indian Country. As the Supreme Court has already held, the phrase "within the sole and exclusive jurisdiction of the United States" specifies what law applies (*i.e.* the law that applies to federal enclaves that are within the exclusive jurisdiction of the United States), not that the federal government's jurisdiction is exclusive. *Ex parte Wilson*, 140 U.S. 575, 578 (1891) (under the General Crimes Act "the jurisdiction of the United States courts was not sole and exclusive over all offenses committed within the limits of an Indian reservation" because "[t]he words 'sole and exclusive,' in [the General Crimes Act] do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it"); *see also Donnelly v. United States*, 228 U.S. 243, 268 (1913); *United States v. White*, 508 F.2d 453, 454 (8th Cir. 1974). As *McGirt* said with respect to reservation status, *see McGirt*, 140 S. Ct. at 2462, when Congress seeks to withdraw state jurisdiction, it knows how to do so. *See, e.g.*, 25 U.S.C. § 1911(a) (providing that tribes "shall have jurisdiction, exclusive as to any State, over any child custody proceeding involving an Indian child" on a reservation). Here, the text of the General Crimes Act does not so exclude state

jurisdiction over crimes committed by non-Indians like that perpetrated by Petitioner.

Thus, under the principles firmly established by *McGirt*—where the analysis begins and ends with the text—while the General Crimes Act confers federal jurisdiction over Petitioner's crime, nothing in the text of that law deprives the State of concurrent jurisdiction over the same crime. Under *McGirt*, the inquiry should stop here. This is especially true as there exists a strong presumption against preemption of state law, so "unless that was the clear and manifest purpose of Congress," courts cannot find preemption of state police powers merely because Congress also provided for federal jurisdiction. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted).

Although this Court has sometimes indicated in dicta that the State lacks jurisdiction over non-Indians who victimize Indians, those cases did not involve non-Indian defendants and did not analyze the question presented here, much less issue a binding holding on the matter. *See Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277; *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401. And as *McGirt* noted, such dicta cannot overcome the text of the statute. *McGirt*, 140 S. Ct. at 2473 n.14.[2]

[2] Similarly, although this Court once affirmed dismissal of the prosecution of several individuals, one of whom was not Indian, because the crime occurred on Indian Country, *State v. Burnett*, 1983 OK CR 153, 671 P.2d 1165, that case did not discuss the jurisdictional issues raised here and was later overruled by *Klindt*, which held that "one's status as an Indian is a factor in determining jurisdiction." *Klindt*, 1989 OK CR 75, ¶ 6, 782 P.2d at 403.

To be sure, a handful of state courts have held that states lack jurisdiction over non-Indians who commit crimes against Indians in Indian country. *See, e.g., State v. Larson*, 455 N.W.2d 600 (S.D. 1990); *State v. Flint*, 756 P.2d 324, 327 (Ariz. Ct. App. 1988), *cert. denied*, 492 U.S. 911 (1989); *State v. Greenwalt*, 663 P.2d 1178, 1182-83 (Mont. 1983); *State v. Kuntz*, 66 N.W.2d 531, 532 (N.D. 1954); *but see Greenwalt*, 663 P.2d at 1183-84 (Harrison, J., dissenting); *State v. Schaefer*, 781 P.2d 264 (Mont. 1989). But the reasoning of these decisions lacks merit.

First, these decisions rely on statements from the Supreme Court suggesting that states lack jurisdiction over crimes such as this, but they admit this is mere dicta. *See Larson*, 455 N.W.2d at 601 (citing *Williams v. United States*, 327 U.S. 711, 714 (1946); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979)); *Flint*, 756 P.2d at 325-26. Again, such dicta cannot substitute for the lack of clear statutory text. Indeed, the Supreme Court had earlier stated that by admission into the Union, a state on equal footing with other states "has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, . . . and that [a] reservation is no longer within the sole and exclusive jurisdiction of the United States," unless Congress expressly provides otherwise. *United States v. McBratney*, 104 U.S. 621, 623-24 (1881).

But this statement was in the context of a holding that, despite the General Crimes Act, jurisdiction over crimes between two non-Indians is within the exclusive jurisdiction of the *state*, and that the federal government lacks jurisdiction over such crimes. *Id.*; *see also Draper v. United States*, 164 U.S. 240 (1896). To be sure, these cases were later limited by *Donnelly v. United States*, 228 U.S. 243 (1913), but that case held only that the federal government had jurisdiction over crimes committed by a non-Indian against an Indian, not that such jurisdiction was exclusive or that the state lacked it. There nothing to suggest that, merely because the federal government has jurisdiction over a certain matter, such jurisdiction necessarily precludes concurrent state jurisdiction. Rather, the general rule is that state and federal governments "exercise concurrent sovereignty." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). So, "the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Id.* (citing *United States v. Bank of New York & Tr. Co.*, 296 U.S. 463, 479 (1936) ("It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive.")). Indeed, there is a "'deeply rooted presumption in favor of concurrent state court jurisdiction' over federal claims," and that presumption applies with even more force against arguments attempting to "strip[] state courts of jurisdiction to hear their own *state* claims"—Congress does not "take such an extraordinary step by implication," and to do so Congress must be "[e]xplicit, unmistakable,

and clear." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349-52 (2020) (citation omitted). Such analysis further informs the text of General Crimes Act which, again, does not clearly preclude state jurisdiction over crimes committed by non-Indians against Indians in Indian Country.[3]

Second, some state courts suggest that states lack jurisdiction over crimes by non-Indians against Indians because of the federal government's general control over Indian affairs. *See Flint*, 756 P.2d at 325. But while this means states usually lack jurisdiction over Indians (*e.g.*, states lack jurisdiction over major crimes committed by Indians, *see McGirt*, 140 S. Ct. at 2459), this general presumption says nothing about state jurisdiction over *non-Indians*, including those who commit crimes against Indians. After all, states presumptively have jurisdiction over non-Indians, including on reservations. *See, e.g., Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257–58 (1992) (noting "the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands").

States also have jurisdiction over non-Indians on Indian Country even when they are interacting with Indians, so long as such jurisdiction would not "interfere with reservation self-government or impair a right granted or reserved

[3] *See also Claflin v. Houseman*, 93 U.S. 130, 134 (1876) (although federal bankruptcy courts can exercise jurisdiction over claims against the estate, that does not necessarily preclude concurrent state court jurisdiction over such claims); *Silas Mason Co. v. Tax Comm'n of State of Washington*, 302 U.S. 186, 207 (1937) (upholding concurrent jurisdiction so long as the state's exercise of jurisdiction was "consistent with federal functions").

by federal law"—neither of which is true of concurrent jurisdiction here. *Id.*; *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (upholding concurrent state and tribal jurisdiction to tax non-Indian oil and gas activities on Indian trust land). In the closest analogous civil context, the Supreme Court "repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country," because "tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148-49 (1984).[4]

To hold otherwise, that the State is presumptively preempted from all jurisdiction over non-Indians when interacting with Indians on reservations, would be absurd. Consider the federal government's provision of education, health care, and housing services to Indians on reservations. *See, e.g.*, 25 U.S.C. §§ 1601 *et seq.* But that exercise of federal authority does not preclude the State from treating Indians at state-run hospitals, educating Indians in state schools, or providing housing to Indians who need it. Nor does it mean that the State lacks the ability to license and discipline non-Indian doctors who are treating Indians at private or state-run hospitals. By the same token, federal jurisdiction to protect Indians from non-Indian criminals like Petitioner

[4] This can only be truer in the criminal context where it is the State, not the victim, who brings prosecution. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

does not divest the State from providing the same service of police protection and criminal justice to Indian victims.

Arguments that states lack any authority over non-Indians interacting with Indians ultimately rely on outdated notions that on reservations Congress's purpose is "segregating [Indians] from the whites and others not of Indian blood." *Donnelly*, 228 U.S. at 272. But Congress has long since moved away from the segregationist policies of the early Republic, and the Supreme Court has recognized the significance of that shift for presumptions about state jurisdiction on reservations, especially over non-Indians. *See Organized Vill. of Kake v. Egan*, 369 U.S. 60, 71-74 (1962). Consequently, the Court has held:

> State sovereignty does not end at a reservation's border. Though tribes are often referred to as sovereign entities, it was long ago that the Court departed from Chief Justice Marshall's view that the laws of [a State] can have no force within reservation boundaries. Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State.

Nevada v. Hicks, 533 U.S. 353, 361-62 (2001) (internal citations, quotation marks, and footnote omitted; alteration adopted). For these reasons, nothing in the general policies of Indian law can overcome the clear text of the General Crimes Act, which is *not* exclusive of state jurisdiction, particularly where—as here—the defendant is not an Indian.

Third, courts have noted that some commentators support the idea that states lack jurisdiction over non-Indians who victimize tribal members. *See Larson*, 455 N.W.2d at 602; *Flint*, 756 P.2d at 327. Other commentators, however, recognize that there is no adequate justification for precluding state

jurisdiction over crimes by non-Indian offenders against Indians because (1) "[n]o tribal interest appears implicated by state prosecution of non-Indians for Indian country crimes, since tribes lack criminal jurisdiction over non-Indians," and (2) no federal interest is impaired because "state prosecution of a non-Indian does not bar a subsequent federal prosecution of the same person for the same conduct." Am. Indian Law Deskbook § 4:9 (citing, *inter alia*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Abbate v. United States*, 359 U.S. 187 (1959)). As *McGirt* makes clear, Felix Cohen is not always right. *McGirt*, 140 S. Ct. at 2463.

Fourth, some courts have pointed to Public Law 280, *Flint*, 756 P.2d at 327-28, which allows "any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume" such jurisdiction "with the consent of the Indian tribe," 25 U.S.C. § 1321—with courts implying that the states otherwise lack that jurisdiction over crimes committed "against Indians." But Public Law 280 has nearly the same language with respect to *civil* jurisdiction, allowing "any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe," such civil jurisdiction. 25 U.S.C. § 1322. And yet, as noted above, this language has *not* precluded the Supreme Court from ruling that, even without Public Law 280, states generally have jurisdiction over civil actions with Indians as parties, that is, as plaintiffs.

See Three Affiliated Tribes, 467 U.S. at 148-49. For this reason, mere implications from a later congressional enactment like Public Law 280 cannot overcome the clear text of the General Crimes Act, which does not preclude the exercise of state jurisdiction. *Cf. McGirt*, 140 S. Ct. at 2473 n.14.

Ultimately, state jurisdiction here furthers both federal and tribal interests by providing additional assurance that tribal members who are victims of crime will receive justice, either from the federal government, state government, or both. *Cf. Three Affiliated Tribes*, 467 U.S. at 888 ("tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country"). It minimizes the chances abusers and murderers of Indians will escape punishment and maximizes the protection from violence received by Native Americans. This is especially important because, as commentators have expressed in fear after *McGirt*, federal authorities frequently decline to prosecute crimes on their reservations.[5] While *McGirt* leaves Indians vulnerable under the exclusive federal jurisdiction of the Major Crimes Act, there is no reason to perpetuate that injustice by assuming without textual support exclusive federal jurisdiction over non-Indian on Indian crimes covered by the General Crimes Act. Nor is there reason to believe

[5] *See, e.g.*, David Heska Wanbli Weiden, *This 19th-Century Law Helps Shape Criminal Justice in Indian Country And that's a problem — especially for Native American women, and especially in ape cases*, N.Y. TIMES (July 19, 2020), https://www.nytimes.com/2020/07/19/opinion/mcgirt-native-reservation-implications.html.

the State of Oklahoma will not vigorously defend the rights of Indian victims, as it has for a century. *See Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 608–09 (1943) ("Oklahoma supplies [Indians] and their children schools, roads, courts, police protection and all the other benefits of an ordered society."). In fact, this very case proves it will. To hold otherwise would amount to "disenfranchising" and "closing our Courts to a large number of citizens of Indian heritage who live on a reservation," thereby "denying protection from the criminal element of the state." *Greenwalt*, 663 P.2d at 208-09 (Harrison, J., dissenting).

Thus, the State emphasizes that the *text* of the General Crimes Act controls, and its plain terms do not preclude the State's jurisdiction in this case. Such jurisdiction over non-Indians who victimize Indians does not interfere with the federal government's concurrent jurisdiction over such crimes, nor does it impinge on tribal sovereignty, but instead advances the interests of tribal members in receiving justice. And the contrary conclusion unjustifiably intrudes into state sovereignty. Therefore, even assuming the existence of a Cherokee Reservation,[6] as the district court has now found, the State asserts that it maintained jurisdiction concurrent to the federal government to prosecute Petitioner for the murder of B.C.

[6] The State takes no position as to the existence, or absence, of a Cherokee Reservation.

III. This Court should find Petitioner is barred from relief

The Supreme Court expressly invited this Court 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. This Court should accept that invitation as there are two procedural bars that apply to Petitioner's jurisdictional claim. First, this Court should refuse to consider Petitioner's jurisdictional challenge because he did not raise it until his second 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

Petitioner did not raise his jurisdictional claim in either his direct appeal or his first post-conviction application but first raised the claim in his second post-conviction application. *See generally Cole*, 2007 OK CR 27, 164 P.3d 1089; *Cole*, PCD-2005-23. This Court, therefore, "may not consider the merits of or grant relief based on" this claim. 22 O.S.2011, § 1089(D)(8). Section 1089 of Title 22 provides exceptions for filing an untimely claim; however, 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. Petitioner cannot meet the requirements of § 1089(D)(8) for a successive capital post-conviction application

Under § 1089(D)(8)(a), 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").[7] 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 constitutional law that was given retroactive effect by the United States Supreme Court . . . ." 22 O.S.2011, § 1089(D)(9)(a)-(b). So, there are two ways in which Petitioner can show a previously unavailable legal basis; he satisfies neither.

Under § 1089(D)(9)(a), 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, Petitioner could have raised this claim based on the Major Crimes Act and *Solem v.*

[7] The State 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.

Bartlett, 465 U.S. 463 (1984).[8] Both *Murphy* and *McGirt* concluded that the Creek Reservation had not been disestablished primarily based on 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. Petitioner, too, bases his jurisdictional claim on *McGirt*, an application of *Solem*, and treaties and laws from the 1700s and 1800s. App. at 11-30. 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").

In addition, under § 1089(D)(9)(b), 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

[8] 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.

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*.[9] 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.[10] *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 established constitutional principles to facts generated by a rather new state statute").

Nor can Petitioner meet the restrictions of § 1089(D)(8)(b). First, § 1089(D)(8)(b)(1) requires that the factual basis of Petitioner's jurisdictional claim have not been previously ascertainable through reasonable diligence. The factual bases for Petitioner's jurisdictional claim consist of the location of the murder and the alleged status of B.C. as an Indian—all facts that were known,

[9] And the Tenth Circuit's decision in *Murphy* was not a decision of the Supreme Court or this Court. To the extent that 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*.

[10] McGirt was an Indian, thus, that decision says nothing about whether the State has concurrent jurisdiction over crimes against Indians committed by non-Indians as in this case.

or could have been determined through reasonable diligence—at the time of the crimes, let alone by the time of direct appeal and first post-conviction. For starters, based on the evidence in this case, the exact location of the murders has never been in question. *See Cole*, 2007 OK CR 27, ¶¶ 2-4, 164 P.3d 1092-93 (summarizing the evidence). As to B.C.'s alleged status as an Indian, Petitioner supplies a memorandum on Cherokee Nation letterhead from February 25, 2020 purporting to verify her Cherokee Nation citizenship and Indian blood, along with a similar document for her mother, Susan Young. Pet. Ex. 2-3. Petitioner also supplies a copy of B.C.'s application for Cherokee citizenship, dated August 28, 2002. Pet. Ex. 4. Although these documents were apparently obtained in 2020, Petitioner fails to allege any "specific facts establishing that" these memoranda were 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 that B.C.'s alleged Indian status could have been verified years ago. The factual basis for 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—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.[11] Petitioner's claim—that 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

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

"at most, a claim of legal innocence, not factual innocence"). So, 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. Petitioner's challenge to jurisdiction should not allow him to escape the provisions of § 1089(D)(8)

Not only does Petitioner allege that his jurisdictional claim satisfies the requirements of § 1089(D)(9), he further contends that challenges to subject matter jurisdiction can "be raised at any time" under Oklahoma law. 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 at 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 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 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.[12] Giving § 1089 its proper narrow

[12] 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

construction, it is clear that 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 Petitioner's jurisdictional challenge to be waived and barred by § 1089(D)(8).

B. Laches

Alternatively, this Court should refuse to consider Petitioner's jurisdictional challenge based on the doctrine of laches. The *McGirt* 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. Petitioner murdered B.C. in late December of 2002, *nearly eighteen years ago.* Also, as previously discussed, all

---

its desire to carve out an exception beyond those provided in the federal statutes. Its failure to do so as to jurisdictional claims speaks volumes.

of the facts underlying his jurisdictional claim—that is, his evidence purporting the Cherokee Nation Reservation remains intact and that B.C. was an Indian—were available to him at every prior stage of this criminal case, including at the time of the crimes and trial. Petitioner did not bring this jurisdictional claim until nearly eighteen years after his crime. 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). These circumstances make it is grossly inequitable and unjust to reward Petitioner with consideration of his belated jurisdictional claim. This Court should accordingly find Petitioner's jurisdictional claim is barred by laches.

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

Lastly, the State 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 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 State respectfully submits that this Court's order in *Bosse* is in error. Jurisdictional claims such as 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*, 466 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.

The State further 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. Also, 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 amendment 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 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).

V. Conclusion

For the reasons discussed, the State asks that this Court find it has concurrent jurisdiction under the General Crimes Act and that the trial court had jurisdiction in this case. Alternatively, the State asserts two procedural bars which bar review of Petitioner's claim. Should this Court find, however, Petitioner is entitled to relief based on the district court's findings, the State respectfully requests this Court stay any order reversing the conviction 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,

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA[13]

RANDALL YOUNG, OBA 33646
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 (FAX)
Oklahoma City, Oklahoma 73105

ATTORNEYS FOR THE APPELLEE

[13] An electronic signature is being used due to the current COVID-19 restrictions. A signed original can be provided to this Court upon request once restrictions are eventually lifted

CERTIFICATE OF MAILING

On this 8th day of December, 2020, the undersigned mailed a true and correct copy of the foregoing Supplemental Brief of Respondent After Remand to:

Michael W. Liberman
Thomas D. Hird, and
Patti Palmer Ghezzi
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Ste. 707
Oklahoma City, Oklahoma 73102

Attorneys for Petitioner

Randall Young

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,	)	
	)	NOT FOR PUBLICATION
Petitioner,	)	
vs.	)	No. PCD-2019-124
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER REMANDING FOR EVIDENTIARY HEARING

Shaun Michael Bosse was tried by jury, convicted of Counts I-III, First Degree Murder, and Count IV, First Degree Arson, and sentenced to death (Counts I-III and thirty-five (35) years imprisonment and a fine of $25,000.00 (Count IV), in the District Court of McClain County, Case No. CR-2010-213. This Court upheld Petitioner's convictions and sentences in *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834, *reh'g granted and relief denied*, 2017 OK CR 19, 406 P.3d 26, *cert. denied*, 138 S.Ct. 1264 (2018). This Court denied Petitioner's first Application for Post-Conviction Relief. *Bosse v. State*, No. PCD-2013-360 (Okl.Cr. Dec.16, 2015) (not for publication). Petitioner filed this Successive Application for Post-Conviction Relief on February 20, 2019. In

Proposition I, Petitioner challenges the State's jurisdiction to prosecute him.

In Proposition I Petitioner claims the District Court lacked jurisdiction to try him. Petitioner argues that his victims were citizens of the Chickasaw Nation, and the crime occurred within the boundaries of the Chickasaw Nation. Under the particular facts and circumstances of this case, and based on the pleadings in this case before the Court, we find that 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).

Appellant's claim raises two separate questions: (a) the status of his victims as Indians, and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of McClain 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 legal status as Indians of Petitioner's victims, 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 status as Indians of Appellant's victims. The District Court must determine whether (1) the victims had some Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government.[1]

Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Chickasaw Nation, and (2) if so, whether Congress specifically erased

[1] *See, eg., United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001).

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

Provided however, in the event the parties agree as to what the evidence will show with regard to the questions presented, they may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. In this event, no hearing on the

questions presented is necessary. Transmission of the record regarding the matter, the District Court's findings of fact and conclusions of law and supplemental briefing shall occur as set forth above.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit copies of the following, with this Order, to the District Court of McClain County: Petitioner's Successive Application for Post-Conviction Relief filed February 20, 2019; and Respondent's Response to Petitioner's Proposition 1 in Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), filed August 4, 2020.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 12th 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:

Clerk

No. PCD-2020-529

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE, SR.,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

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

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

RANDALL YOUNG, OBA #33646
ASSISTANT ATTORNEY GENERAL

313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR RESPONDENT

JANUARY 21, 2021

TABLE OF AUTHORITIES

CASES

STATUTES

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE, SR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PCD-2020-529**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

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

A Rogers County jury convicted Benjamin Robert Cole, Sr., hereinafter referred to as Petitioner, of First Degree Murder, in violation of 21 O.S.2011, § 701.7, in Case No. CF-2002-597. *Cole v. State*, 2007 OK CR 27, ¶ 1, 164 P.3d 1089, 1092. The jury sentenced Petitioner to death, and the Honorable J. Dwayne Steidley imposed Petitioner's judgment and sentence accordingly. *Id.* Petitioner seeks post-conviction relief with this Court through a successive application for post-conviction relief ("Successive Application").[1]

The United States Supreme Court held in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2560-82 (2020) that the Creek Nation's Reservation remained intact. That same day, the Court affirmed the Tenth Circuit's holding in *Murphy v. Royal*, 875

[1] Petitioner has previously filed, and this Court has denied, post-conviction relief. *See Cole v. State*, PCD-2005-23 (Okl.Cr., Jan. 24, 2008)(unpublished), *cert. denied*, 553 U.S. 1055 (2008); and *Cole v. State*, PCD-2020-332 (Okl.Cr., May 29, 2020)(unpublished). Federal courts have also denied Petitioner habeas relief. *Cole v. Workman*, Case No. 08-CV-0328, 2011 WL 3862143 (N.D. Okla. Sept. 1, 2011) (unpublished); *Cole v. Trammell*, 755 F.3d 1142 (10th Cir. 2014), *cert. denied*, 574 U.S. 891 (2014).

F.3d 896 (10th Cir. 2017) for the same reason. *Sharp v. Murphy*, 140 S. Ct. 2412 (2020). Petitioner filed the instant Successive Application on August 12, 2020, his sole claim being that the State lacked jurisdiction over his case. Successive Application at 1. He specifically claims that his victim, B.C., was a citizen of the Cherokee Nation at the time of the offense, and he committed his crime within the Cherokee Reservation. Successive Application at vi. Consequently, Petitioner contends that the Indian Country Crimes Act, 18 U.S.C. § 1152, divests the State of jurisdiction. Successive Application at 7. This Court subsequently issued an Order Remanding for Evidentiary Hearing ("Order Remanding") on August 24, 2020. The Order Remanding directed the Rogers County District Court to determine two things: "(a) the Indian status of B.C. and (b) whether the crime occurred in Indian Country." Order Remanding at 2.

In its post-hearing brief, the State contends that Petitioner is barred from relief because he fails to meet the requirements of 22 O.S.2022, § 1089(D)(8). ("State's First Supp. Br.").[2] The State detailed the origins of Petitioner's claim and showed that the claim was available long before *McGirt* was decided. State's First Supp. Br. at 13-15. Petitioner had even filed an identical claim before *McGirt* was decided. *See Cole v. State*, PCD-2020-332 (Okl.Cr., May 29,

[2] The State initially filed a supplemental post-hearing brief that failed to conform with the directives of this Court's Order Remanding due to a formatting error. After Petitioner brought this error to the State's attention by way of his December 9, 2020 Motion to Strike, the State subsequently filed a Response and Motion to Substitute along with a conforming Substitute Supplemental Brief of Respondent on December 15, 2020. The State treats the Substituted Supplemental Brief of Respondent as "State's First Supp. Br.".

2020)(unpublished). Fundamentally, the Supreme Court relied on established law in *McGirt* and "sa[id] nothing new." *McGirt*, 140 S. Ct. at 2464. 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).

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 before *McGirt*) 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,
MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

[3]

RANDALL YOUNG, OBA 33646
ASSISTANT ATTORNEY GENERAL

313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR THE APPELLEE

CERTIFICATE OF MAILING

On this 21st day of January, 2021, a true and correct copy of the foregoing was mailed to:

Michael W. Lieberman
Thomas D. Hird, and
Patti Palmer Ghezzi
Assistant Federal Public Defenders
215 Dean A. McGee, Suite 707
Oklahoma City, Oklahoma 73102

RANDALL YOUNG

[3] This document bears a digital signature due to restrictions following the COVID-19 pandemic. A signed original can be provided to this Court upon request after restrictions are lifted.

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.

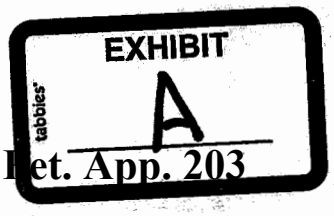
David Brian Morgan, an Oklahoma prisoner proceeding pro se,[1] moves for authorization to file a second or successive habeas application under 28 U.S.C. § 2254. We deny the motion for authorization.

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.

---

[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).



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

BENJAMIN ROBERT COLE, SR.,	
Petitioner,	
-vs-	**Case No.: PCD-2020-529**
THE STATE OF OKLAHOMA,	
Respondent.	

PETITIONER'S OBJECTION TO STATE'S MOTION TO FILE SUPPLEMENTAL BRIEF, MOTION TO STRIKE STATE'S SUPPLEMENTAL BRIEF, AND MOTION TO FILE RESPONSE TO STATE'S SUPPLEMENTAL BRIEF

Petitioner, Benjamin Robert Cole, Sr., objects to the State's Motion to File Supplemental Brief filed on January 21, 2021, and moves to strike the State's Supplemental Brief contemporaneously tendered for filing. In the alternative, Mr. Cole moves to file a Response to the State's Supplemental Brief Regarding Whether *McGirt* was Previously Available for Purposes of Barring Claims ("State's Supplemental Brief").

This Court's rules prohibit the filing of the tendered State's Supplemental Brief. The State seeks to file this supplemental brief under Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). As the State accurately explains, this rule provides: "A supplemental brief, if necessary to present new authority on issues previously raised, may be filed if granted leave of Court." State's Motion to File Supplemental Brief at 2 (quoting Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019)) (internal quotation marks omitted). However, contrary to the State's position, its tendered supplemental brief is not "necessary to present new authority on issues previously raised." *Id.*

The authority the State seeks to present is an unpublished Tenth Circuit decision, *In re: David Brian Morgan*, No. 20-6123 (10th Cir. Sept. 18, 2020). This authority is not new, but was issued more than four months ago, on September 18, 2020. It existed well before December 8, 2020, when both Mr. Cole and the State filed post-hearing supplemental briefs as allowed by this Court's Order Remanding for Evidentiary Hearing.[1]

The State explains that it "recently became aware of" *In re: Morgan*. State's Motion to File Supplemental Brief at 1. But the State's failure to make itself aware of the authority until recently does not render the authority new. This Court's rules emphasize the importance of presenting relevant authority and arguments to avoid waiver or forfeiture. *See* Rule 3.5(C)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019) ("Failure to present relevant authority in compliance with [the Court's] requirements will result in the issue being forfeited on appeal."). The State has waived and forfeited its opportunity to present and make arguments about *In re: Morgan* by failing to do so earlier.[2]

---

[1] Notably, the State's post-hearing supplemental brief filed December 8, 2020, also failed to comply with this Court's rules. *See* Petitioner's Motion to Strike Supplemental Brief of Respondent After Remand filed in this Court on December 9, 2020, at 2:

> In addition to flouting the terms of this Court's remand order, Respondent also ignored this Court's rules and case law. "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(D), (E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019).

The two new claims briefed by Respondent – that the State has concurrent jurisdiction, and that Petitioner's jurisdictional claim should be barred for various reasons – did not meet the criteria for supplementation as specified by this Court in *Castro*.

[2] Although Mr. Cole argues the State should have presented *In re: Morgan* in its post-hearing supplemental brief filed December 8, 2020, this Court's rules seemingly would have prohibited the State's presentation of *In re: Morgan* as "new authority" even then. The Tenth Circuit issued *In re:*

For these reasons, Mr. Cole objects to the State's Motion to File Supplemental Brief and moves to strike the State's Supplemental Brief. In the alternative, should the Court deny such objection and motion, Mr. Cole moves to file a Response to the State's Supplemental Brief. For the Court's convenience, Mr. Cole's Response to the State's Supplemental Brief is tendered for filing contemporaneously with the objection and motions herein.

Respectfully submitted,

MICHAEL W. LIEBERMAN, OBA #32694
THOMAS D. HIRD, OBA #13580
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975
Michael_Lieberman@fd.org
Tom_Hird@fd.org
Attorneys for Petitioner Benjamin Robert Cole, Sr.

Morgan eighty-one days before the State filed its supplemental brief on December 8, 2020. Under Rule 9.3(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), governing supplemental briefs: "In the event there is a substantial change in the law, since the time of the filing of the brief in chief, this Court shall be notified of the change within thirty (30) days after the change of law is published . . . ."). Although Mr. Cole does not believe *In re: Morgan* announced "a substantial change in the law," Rule 9.3(D) suggests the State should have filed a supplemental brief presenting the authority within thirty days of its issuance – that is, by October 18, 2020. *See also* Rule 3.4(F)(2) (application to file supplemental brief containing new proposition of error on issue of first impression "must be filed within thirty (30) days after the issue of first impression is published").

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*.

MICHAEL W. LIEBERMAN

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.

5 Cases that cite this headnote

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

Attorneys and Law Firms

APPEARANCES AT TRIAL

DANNY JOSEPH, NICOLLETTE BRANDT, P.O. BOX 926, NORMAN, OK 73070, COUNSEL FOR DEFENDANT

MATTHEW J. BALLARD, DISTRICT ATTORNEY, BRIAN SURBER, ASST. DISTRICT ATTORNEY, 210 W. DELAWARE, STE. 202, VINITA, OK 74301

MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, CAROLINE E.J. HUNT, HANNAH WHITE, ASST. ATTORNEYS GENERAL, 313 N.E. 21 ST ST. OKLAHOMA CITY, OK 73105, COUNSEL FOR THE STATE

SARA HILL, ATTORNEY GENERAL, CHEROKEE NATION, P.O. BOX 1533, TAHLEQUAH, OK 74465

APPEARANCES ON APPEAL

LISBETH L. McCARTY, DANNY JOSEPH, P.O. BOX 926, NORMAN, OK 73070, COUNSEL FOR APPELLANT

MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, CAROLINE E.J. HUNT, HANNAH WHITE, ASST. ATTORNEYS GENERAL, 313 N.E. 21 ST ST. OKLAHOMA CITY, OK 73105, COUNSEL FOR THE STATE

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).

ORIGINAL

Case. No. PCD-2020-529

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE, SR.,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

BRIEF IN SUPPORT OF MOTION TO STAY THE MANDATE FOR GOOD CAUSE PENDING CERTIORARI REVIEW

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

JENNIFER L. CRABB, OBA #20546
ASSISTANT ATTORNEY GENERAL

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR RESPONDENT

APRIL 29, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES AND RULES

STATE STATUTES AND RULES

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE, SR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PCD-2020-529**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

BRIEF IN SUPPORT OF MOTION TO STAY THE MANDATE FOR GOOD CAUSE PENDING CERTIORARI REVIEW

COMES NOW, the State of Oklahoma, by and through Attorney General Mike Hunter, and in support of its Motion to Stay the Mandate for Good Cause Pending Certiorari Review, filed pursuant to Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), files this brief in support pursuant to Rule 3.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Petitioner is a non-Indian who murdered a child, B.C., who was an enrolled member of the Cherokee Nation. This Court has reversed Petitioner's conviction for first degree murder. The State asks this Court to stay the mandate and preserve that conviction to give the United States Supreme Court the opportunity to determine whether the State properly exercised jurisdiction over Petitioner's capital crime.

A. Background

Petitioner was convicted of murdering B.C. and sentenced to death in Rogers County District Court Case No. CF-2002-597. In his third post-conviction application, filed approximately eighteen years after the murder,

Petitioner argued that the State lacked jurisdiction because B.C. was an Indian, and the crime was committed within the Cherokee Nation Reservation.[1] 8/12/2020 Successive Application for Post-Conviction Relief. This Court remanded the case to the district court for an evidentiary hearing. 8/24/2020 Order Remanding for Evidentiary Hearing. The district court determined that B.C. was an Indian and that the crime was within the Cherokee Nation Reservation. 11/12/2020 Order on Remand at 2-6. The State filed a supplemental brief asserting concurrent jurisdiction over the non-Indian Petitioner, and arguing that the claim should be considered both waived—pursuant to 22 O.S. § 1089(D)—and barred by the doctrine of laches. 12/8/2020 Supplemental Brief of Respondent after Remand.

In *Bosse v. State*, 2021 OK CR 3, ¶¶ 23-28, ___ P.3d ___, this Court held that Oklahoma lacks jurisdiction to prosecute non-Indians who victimize Indians in Indian Country. That decision was based on the General Crimes Act, 18 U.S.C. § 1152, the plain text of which does not strip state courts of their presumptive jurisdiction over crimes committed within their borders. This Court also held that federal law prevents it from applying doctrines such as waiver and laches to Indian Country jurisdictional claims like that raised by Petitioner. *Bosse*, 2021 OK CR 3, ¶¶ 20-22.

[1] Petitioner first raised this claim in his second post-conviction application, which this Court dismissed as premature. 5/29/2020 Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance, Case No. PCD-2020-332.

Following *Bosse*, this Court reversed Petitioner's conviction based on *Bosse*'s rejection of the State's assertion of concurrent jurisdiction and procedural arguments. 4/29/2021 Opinion. This Court ordered the mandate to issue twenty days after its opinion. 4/29/2021 Opinion at 14. The State respectfully asks this Court for a further stay of the mandate, until the Supreme Court denies certiorari in *Bosse* and this case, or makes a ruling on the merits.

B. Good Cause Justifies Stay of the Mandate

Rule 3.15(B) provides for a recall or stay of the mandate where "good cause" is "shown." Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Here, the State shows good cause for staying the mandate in this case: (1) this Court has stayed the mandate in *Bosse* for 45 days, having necessarily found good cause; (2) the State has filed an application in the Supreme Court to further stay the mandate in *Bosse* pending that Court's review of *Bosse*; (3) the arguments the State will present in the *Bosse* certiorari petition, which plainly merit the Supreme Court's review; and (4) the State will also be filing a petition for writ of certiorari in this case. Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

First, upon the State's request, and after hearing oral argument, this Court stayed the mandate in *Bosse* for an additional 45 days, until May 30, 2021. The basis for the State's request was its intent to file a petition for writ of certiorari in the Supreme Court. Thus, although this Court's Order in *Bosse* is summary, this Court must have determined that the State's pursuit of Supreme Court review constitutes good cause. *See* Rule 3.15(B), *Rules of the Oklahoma Court of*

Criminal Appeals, Title 22, Ch. 18, App. (2011) ("The mandate *shall not* be recalled, nor stayed pending an appeal to any other court, . . . unless a majority of the Court, for good cause shown, recalls or stays the mandate.") (emphasis added); *see also Post v. State*, 1986 OK CR 52, ¶ 6, 717 P.2d 1151, 1152 (indicating that the State's identification of a colorable certiorari-worthy issue justified a stay of the mandate pending certiorari review).

Second, on April 26, 2021, the Supreme Court docketed the State's application to further stay the mandate in *Bosse*. On April 27, 2021, Justice Gorsuch—Circuit Justice for the Tenth Circuit—requested a response from Mr. Bosse, which is due on May 7. Thus, based on the arguments in that application justifying further stay of the mandate pursuant to SUP. CT. R. 23, 28 U.S.C. § 2101(f), and *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers), the State expects that the mandate in *Bosse* will remain stayed until the Supreme Court declines to review the case, or renders a decision on the merits.

Third, the State's assertion of concurrent jurisdiction, and procedural arguments, provide very compelling reasons for certiorari review, and it is likely the Supreme Court will grant certiorari. *See* SUP. CT. R. 10 ("[a] petition for a writ of certiorari will be granted only for compelling reasons"). As for concurrent jurisdiction, the impact of *McGirt* on this State is tremendous, with crime victims largely bearing the costs. *See Bosse*, 2021 OK CR 3, ¶¶ 6, 8, (Hudson, J., concurring in results) (noting "the growing number of cases . . . where non-Indian defendants are challenging their state convictions using *McGirt* because *their victims* were Indian" (emphasis in original)); *see also McGirt v. Oklahoma*,

140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting) ("Across this vast area, the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma.").

For example, of the 93 cases this Court has remanded for evidentiary hearings since *McGirt*, 20—or 21%—involve non-Indian defendants who claim their victims were Indian.[2] If this percentage is representative of the state as a whole, such that approximately 21% of *McGirt*-related claims in this state will involve non-Indian defendants, there are likely thousands of convictions at stake.

Not only are there vital interests at stake, but the State's question presented will fall squarely within the universe of cases the Supreme Court is likely to hear. One "compelling reason" the Supreme Court considers in deciding whether to grant certiorari is whether "a state court . . . has decided an important question of federal law that has not been, but should be, settled by [the Supreme Court]." SUP. CT. R. 10(c).

Although the Supreme Court has stated, in dicta, that state jurisdiction in Indian Country is limited to crimes between non-Indians, it has never sought to apply the plain text of the General Crimes Act to a crime committed in Indian Country by a non-Indian. *See Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984). In light of the Court's focus on plain statutory language in *McGirt*, and the

[2] Since oral argument on the motion to stay the mandate in *Bosse*, wherein this Court inquired as to this statistic, the State has calculated this percentage based on the spreadsheet it maintains on this Court's remanded *McGirt* cases.

absence of any such language in the General Crimes Act withdrawing jurisdiction from states over non-Indian offenders, there is a substantial likelihood the Supreme Court will—at the very least—conclude the State's question presented warrants review. *See Post*, 1986 OK CR 52, ¶ 6, 717 P.2d at 1152 (holding that, although "the petition for rehearing should be denied," "[b]ecause the Supreme Court has not addressed this precise issue, we agree that the mandate should be stayed" so that the State "may lodge a petition for writ of certiorari with the United States Supreme Court"); *Murphy v. Royal*, No. 07-7068 & No. 15-7041, Order (Nov. 16, 2017) (staying mandate "until the deadline passes for filing a certiorari petition in the Supreme Court" or if the court "receives notice the respondent has filed a petition the stay will continue until the Supreme Court's final disposition").

In addition, this Court's holding that Indian Country jurisdictional claims "may – indeed, must – be raised at any time", *Bosse*, 2021 OK CR 3, ¶ 22, has consequences at least as grave as the denial of concurrent jurisdiction. Oklahoma's state district courts have hundreds of pending post-conviction applications raising claims that the State lacks jurisdiction under 18 U.S.C. §§ 1151-53. The Wagoner County District Attorney's Office has provided the undersigned with data on its more than 200 Indian Country jurisdictional claims, including both pending prosecutions and post-conviction applications. By the State's estimate, more than 1,890,000 people live in counties that have now been found to be wholly or nearly entirely within a reservation. *See McGirt*, 140 S. Ct. 2452; *Grayson v. State*, 2021 OK CR 8, ___ P.3d ___ (Seminole);

Sizemore v. State, 2021 OK CR 6, ___ P.3d ___ (Choctaw); *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___ (Cherokee); *Bosse*, 2021 OK CR 3 (Chickasaw).

If Wagoner County's rate of post-conviction Indian Country jurisdictional claims is predictive—approximately 50 filings (as of April 23, 2021) for a population of around 80,000, or approximately 0.06%—then overall there are nearly 1,200 pending post-conviction applications raising Indian Country jurisdictional claims in the referenced counties.[3] While the applicants in those cases may have otherwise valid claims under *McGirt*, they are not entitled to relief. *See* 22 O.S.2011, §§ 1086, 1089 (providing that, with limited exceptions, all challenges to a conviction must be raised at the first available opportunity in both capital and non-capital cases); *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973 ("issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review").

This Court's decision in *Bosse* conflicts with *McGirt*, and with decisions from two United States courts of appeals. *See McGirt*, 140 S. Ct. at 2464, 2479 & n.15, 2481 (inviting courts to apply procedural doctrines to lessen the impact of its decision, and acknowledging that, in finding allotment did not disestablish the Creek Reservation, it was saying "nothing new"); *United States v. Tony*, 637 F.3d 1153, 1157–60 (10th Cir. 2011) (holding that Indian Country jurisdictional claim does not implicate subject matter jurisdiction and can be waived); *United States v. Pemberton*, 405 F.3d 656, 659 (8th Cir. 2005); *United States v. White*

[3] These numbers have been updated since the State's motions to stay in *Bosse*, as post-conviction applications continue to be filed.

Horse, 316 F.3d 769, 772 (8th Cir. 2003); *United States v. Prentiss*, 256 F.3d 971, 981-82 (10th Cir. 2001) (en banc), *overruled on other grounds by Cotton*, 535 U.S. at 631; *see also Welch v. United States*, No. 2:05CR8, 2008 WL 4981352, at *2 n. 2 (W.D.N.C. Nov. 19, 2008) (unpublished). The Supreme Court is likely to grant the State's certiorari petition. *See* SUP. CT. R. 10(b), (c) (among the "compelling reasons" the Supreme Court considers in deciding whether to grant certiorari are whether "a state court of last resort has decided an important question of federal law in a way that conflicts with the decision of . . . a United States court of appeals", and whether "a state court . . . has decided an important question of federal law . . . in a way that conflicts with relevant decisions of th[e Supreme] Court").

As a final matter, Petitioner would be hard-pressed to argue any prejudice from a further stay of the mandate. *See Tiger v. State*, 1995 OK CR 59, ¶ 5, 907 P.2d 1075, 1076 (refusing to recall the mandate where the recall would "prejudice the Petitioner"). The claim on which this Court has granted relief is not one of actual innocence, for instance, entitling Petitioner to immediate, permanent release from prison. Rather, Petitioner already is, or will be, transferred to federal custody. *See* Indictment, *United States v. Benjamin Robert Cole, Sr.*, Case No. 21-CR-138-JED (N.D. Okla. Apr. 6, 2021) (attached as Exhibit A); Arrest Warrant, *United States v. Benjamin Robert Cole, Sr.*, Case No. 21-CR-138-JED (N.D. Okla. Apr. 7, 2021) (attached as Exhibit B).

This fact not only dispels any notion of prejudice to Petitioner; it also establishes a significant likelihood that the State will be prejudiced if the

mandate is not stayed. A transfer of custody will likely trigger the Interstate Agreement on Detainers' so-called anti-shuttling provision, thereby preventing the federal government from returning Petitioner to state custody without risking dismissal of its case with prejudice. 18 U.S.C.A. App. 2 § 2 Art. IV(e). The State is further concerned that, if Respondent is convicted in federal court such that the Agreement is no longer implicated, there may be difficulties re-obtaining physical custody of Petitioner for purposes of defending against any additional legal challenges he might pursue, and for carrying out the death sentence when such becomes appropriate. *See Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality op.) (recognizing "the State's legitimate interest in carrying out a sentence of death in a timely manner").

A stay in this case is necessary to prevent the vacatur of Petitioner's convictions unless and until the Supreme Court has, assuming it grants certiorari review, rendered a final decision on the State's assertion of concurrent jurisdiction and procedural bars. Judicial economy and the interests of justice counsel in favor of the State's request. Moreover, the State has shown good cause in light of its compelling case for Supreme Court review.

CONCLUSION

WHEREFORE, the State respectfully requests this Court stay the mandate through the pendency of the State's certiorari petition, and possible merits review by the Supreme Court.

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL

JENNIFER L. CRABB, OBA #20546
ASSISTANT ATTORNEY GENERAL

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 (FAX)
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF MAILING

On this 29th day of April, 2021, a true and correct copy of the foregoing was mailed to:

Michael W. Lieberman
Thomas D. Hird
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102

JENNIFER L. CRABB

* An electronic signature is being used due to the current COVID-19 restrictions. A signed original can be provided to the Court upon request once restrictions are lifted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	Case No. 21 CR 138 JED
Plaintiff,	INDICTMENT
v.	[18 U.S.C. §§ 1151, 1152, and 1111: First Degree Murder in Indian Country]
BENJAMIN ROBERT COLE, SR.,	
Defendant.	

THE GRAND JURY CHARGES:

On or about December 20, 2002, within Indian Country in the Northern District of Oklahoma, the defendant, **BENJAMIN ROBERT COLE, SR.**, a non-Indian male, willfully, deliberately, maliciously, and with premeditation and malice aforethought, did unlawfully kill B.V.C., an Indian infant known to the Grand Jury.

All in violation of Title 18, United States Code, Sections 1151, 1152, and 1111.

CLINTON J. JOHNSON
Acting United States Attorney

JEFFREY A. GALLANT
Assistant United States Attorney

A TRUE BILL

/s/ Grand Jury Foreperson
Grand Jury Foreperson

EXHIBIT
A

UNITED STATES DISTRICT COURT

for the
Northern District of Oklahoma

United States of America)
v.)
) Case No. 21 CR 138 JED
BENJAMIN ROBERT COLE, SR.)
Defendant)

ARREST WARRANT

To: Any authorized law enforcement officer

YOU ARE COMMANDED to arrest and bring before a United States magistrate judge without unnecessary delay
(name of person to be arrested) BENJAMIN ROBERT COLE, SR.,
who is accused of an offense or violation based on the following document filed with the court:

☒ Indictment ☐ Superseding Indictment ☐ Information ☐ Superseding Information ☐ Complaint
☐ Probation Violation Petition ☐ Supervised Release Violation Petition ☐ Violation Notice ☐ Order of the Court

This offense is briefly described as follows:

18 U.S.C. §§ 1151, 1152, and 1111 – First Degree Murder in Indian Country

Date: APR 07 2021

Issuing officer's signature

City and state: Tulsa, Oklahoma

Mark McCartt, Court Clerk
Printed name and title

Return

This warrant was received on *(date)* _____, and the person was arrested on *(date)* _____

At *(city and state)* _____

Date: _____

Arresting officer's signature

Printed name and title

JAG/sc

EXHIBIT B

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

BENJAMIN ROBERT COLE, SR.,	
Petitioner,	
-vs-	**Case No.: PCD-2020-529**
THE STATE OF OKLAHOMA,	
Respondent.	

PETITIONER'S RESPONSE TO STATE'S MOTION TO STAY THE MANDATE FOR GOOD CAUSE PENDING CERTIORARI REVIEW

Respondent has moved this Court to stay the mandate in the above-titled action, citing its intent to seek certiorari review in the United States Supreme Court in *Bosse v. State*, 2021 OK CR 3, __ P.3d __. Mr. Cole does not oppose a stay of the mandate until June 1, 2021, consistent with this Court's grant of a 45-day stay in *Bosse*. Mr. Cole objects to any additional stay by this Court beyond June 1, 2021. Following June 1, 2021, this Court should proceed in accordance with the course taken by the Supreme Court in *Bosse*.[1]

[1] The State's Application to Stay Mandate of the Oklahoma Court of Criminal Appeals Pending Review on Certiorari in *Bosse* is currently pending before the Supreme Court, with a response by Mr. Bosse due May 7, 2021 at 3:00 p.m. *Oklahoma v. Bosse* (No. 20A161).

Respectfully submitted,

MICHAEL W. LIEBERMAN, OBA #32694
THOMAS D. HIRD, OBA #13580
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975
Michael_Lieberman@fd.org
Tom_Hird@fd.org

COUNSEL FOR BENJAMIN ROBERT COLE, SR.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 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.

Thomas D. Hird

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE, Sr.

Petitioner,)
vs.) No. PCD-2020-529
)
THE STATE OF OKLAHOMA,)
)
Respondent.)

JAMES CHANDLER RYDER,

Petitioner,)
vs.) No. PCD-2020-613
)
THE STATE OF OKLAHOMA,)
)
Respondent.)

ORDER STAYING ISSUANCE OF MANDATE

On April 29, 2021, Respondent filed with this Court motions to recall the mandate in each of the above cited capital post-conviction appeals. Counsel for each Petitioner have filed responses indicating they have no objection to staying the mandate until June 1, 2021.

Respondents request is **GRANTED.** The Court hereby stays the issuance of the mandate in each of the above cited cases until June 1, 2021. Mandate will automatically issue on June 1, 2021.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 12 day of May, 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

(ORDER LIST: 593 U.S.)

WEDNESDAY, MAY 26, 2021

ORDER IN PENDING CASE

20A161 OKLAHOMA V. BOSSE, SHAUN M.

The application to stay the mandate of the Court of Criminal Appeals of Oklahoma, case No. PCD-2019-124, presented to Justice Gorsuch and by him referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

ORIGINAL

Case. No. PCD-2020-529

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE, SR.,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

BRIEF IN SUPPORT OF MOTION TO FURTHER STAY THE MANDATE IN LIGHT OF THE UNITED STATES SUPREME COURT'S ORDER STAYING THE MANDATE IN *OKLAHOMA V. BOSSE*

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

CAROLINE E.J. HUNT, OBA #32635
ASSISTANT ATTORNEY GENERAL

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR RESPONDENT

MAY 26, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE RULES

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE, SR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PCD-2020-529**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

BRIEF IN SUPPORT OF MOTION TO FURTHER STAY THE MANDATE IN LIGHT OF THE UNITED STATES SUPREME COURT'S ORDER STAYING THE MANDATE IN *OKLAHOMA V. BOSSE*

COMES NOW, the State of Oklahoma, by and through Attorney General Mike Hunter, and in support of its Motion to Further Stay the Mandate in Light of the United States Supreme Court's Order Staying the Mandate in *Oklahoma v. Bosse*, filed pursuant to Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), files this brief in support pursuant to Rule 3.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). Petitioner's case involves the same two issues being litigated in *Oklahoma v. Bosse* before the Supreme Court, and the State plans to seek certiorari review in this case as it is doing in *Bosse*. Accordingly, the State previously moved this Court for a stay in the instant case, and Petitioner agreed to a stay until June 1, 2021, and stated that, "[f]ollowing June 1, 2021, this Court should proceed in accordance with the course taken by the Supreme Court in *Bosse*." This Court entered an order staying the mandate until June 1, 2021, consistent with the stay it had granted in *Bosse*. The State also filed a protective application at the U.S. Supreme Court for a stay in this case based on the same

reasons offered in *Bosse*, but informed the Supreme Court that if that "Court grants a stay in *Bosse*, applicant will seek a further stay from the OCCA in this case to align with this Court's stay in *Bosse*." Application to Stay Mandate to the Oklahoma Court of Criminal Appeals Pending Review on Certiorari, *Oklahoma v. Cole*, Case. No. 20A167, filed 5/21/2021. The State now respectfully requests that, in light of the Supreme Court's order in *Bosse* and the identical issues the State will raise in this case in seeking certiorari review, this Court further stay the mandate in this case until the Supreme Court either denies certiorari review or issues an opinion in this case.

A. Background

Petitioner is a non-Indian who murdered a child, B.C., who was an enrolled member of the Cherokee Nation. Petitioner was convicted of murdering B.C. and sentenced to death in Rogers County District Court Case No. CF-2002-597. In his third post-conviction application, filed approximately eighteen years after the murder, Petitioner argued that the State lacked jurisdiction because B.C. was an Indian, and the crime was committed within the Cherokee Nation Reservation.[1] 8/12/2020 Successive Application for Post-Conviction Relief. This Court remanded the case to the district court for an evidentiary hearing. 8/24/2020 Order Remanding for Evidentiary Hearing. The district court determined that B.C. was an Indian and that the crime was within the Cherokee

[1] Petitioner first raised this claim in his second post-conviction application, which this Court dismissed as premature. 5/29/2020 Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Successive Application in Abeyance, Case No. PCD-2020-332.

Nation Reservation. 11/12/2020 Order on Remand at 2-6. The State filed a supplemental brief asserting concurrent jurisdiction over the non-Indian Petitioner, and arguing that the claim should be considered both waived—pursuant to 22 O.S. § 1089(D)—and barred by the doctrine of laches. 12/8/2020 Supplemental Brief of Respondent after Remand.

In *Bosse v. State*, 2021 OK CR 3, ¶¶ 20-28, 484 P.3d 286, 293-95, this Court held that Oklahoma lacked jurisdiction to prosecute Mr. Bosse, rejected the State's procedural defenses, and reversed the convictions. Following *Bosse*, this Court reversed Petitioner's conviction based on *Bosse*'s rejection of the State's assertion of concurrent jurisdiction and procedural defenses. *Cole v. State*, 2021 OK CR 10, ¶ 16, ___ P.3d ___, ___. This Court ordered the mandate to issue twenty days after its opinion. *Cole*, 2021 OK CR 10, ¶ 21.

The State then requested this Court to further stay its mandate pending the filing of a petition for writ of certiorari, consistent with its earlier limited stay in *Bosse*. Petitioner did not oppose a stay "until June 1, 2021, consistent with this Court's grant of a 45-day stay in *Bosse*." 5/3/2021 Petitioner's Response to State's Motion to Stay the Mandate for Good Cause Pending Certiorari Review. Petitioner further stated that, "[f]ollowing June 1, 2021, this Court should proceed in accordance with the course taken by the Supreme Court in *Bosse*." *Id.* This Court entered an order staying its mandate until June 1, 2021. 5/12/2021 Order Staying Issuance of the Mandate. The State then filed an application at the U.S. Supreme Court for a further stay in this case to preserve its ability to grant a stay in this case if it grants a stay in *Bosse*, but informed

the Supreme Court that, time permitting, "[i]n the event [the Supreme] Court grants a stay in *Bosse*, applicant will seek a further stay from [the OCCA]." Application to Stay Mandate to the Oklahoma Court of Criminal Appeals Pending Review on Certiorari, *Oklahoma v. Cole*, Case No. 20A167, filed 5/21/2021.

On May 26, 2021, the Supreme Court entered the following order on the State's stay application in *Oklahoma v. Bosse*:

> The application to stay the mandate of the Court of Criminal Appeals of Oklahoma, case No. PCD-2019-124, presented to Justice Gorsuch and by him referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.
>
> Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

Order in Pending Case, *Oklahoma v. Bosse*, Case No. 20A161 (May 26, 2021) (attached as Exhibit A). Because the Supreme Court has granted a stay in *Bosse* with sufficient time for this Court to grant a further stay in this case, the State now respectfully moves for a further stay of the mandate in this case as it stated to the Supreme Court it would.

B. Good Cause Justifies Stay of the Mandate

Rule 3.15(B) provides for a recall or stay of the mandate where "good cause" is "shown." Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). Here, the State shows good cause for staying the mandate in this case: (1) this case involves the same issues as *Bosse*, and the Supreme Court has already determined that those issues in *Bosse* warranted a

stay due to the reasonable probability of a grant of certiorari review and ultimate reversal, as well as the likelihood of irreparable harm to the State absent a stay; and (2) Petitioner previously agreed that this Court should follow the course taken by the Supreme Court in *Bosse*.

First, this case involves the same issues as *Bosse*—it is a capital case reversed on successive post-conviction review, over the State's arguments that it possessed jurisdiction, concurrent with the federal government, over the non-Indian defendant and that the claim was waived and barred. In granting the State's requested stay in *Bosse* pending certiorari review, the Supreme Court has already confirmed that these issues are likely to garner certiorari review and reversal and, assuming a stay is not granted, result in irreparable harm to the State. Specifically, the Supreme Court will not grant a stay of a lower court's mandate pending the Supreme Court's review unless: (1) there is a reasonable probability that four members of this Court will be of the opinion that the issues are sufficiently meritorious to warrant a grant of certiorari, as well as a significant possibility of reversal of the lower court's decision, and (2) it is likely that irreparable harm will result from issuance of the mandate. *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers). Thus, given the identical issues at play in this case, including the potential of irreparable harm, good cause is shown for a stay here.

Second, Petitioner has already agreed that, "[f]ollowing June 1, 2021, this Court should proceed in accordance with the course taken by the Supreme Court in *Bosse*." 5/3/2021 Petitioner's Response to State's Motion to Stay the Mandate

for Good Cause Pending Certiorari Review. This Court has previously found good cause to stay the mandate where both parties were in agreement, as this Court initially stayed the mandate until June 1, 2021, based, at least on part, on the fact that "Counsel for each Petitioner have filed responses indicating they have no objection to staying the mandate until June 1, 2021."[2] 5/12/2021 Order Staying Issuance of the Mandate. Given Petitioner's agreement this Court should follow the course taken by the Supreme Court in *Bosse*, and the Supreme Court's order entered today in *Bosse*, this Court should find good cause here to stay the mandate pending certiorari review.

CONCLUSION

WHEREFORE, the State respectfully requests this Court stay the mandate through the pendency of the State's certiorari petition, and possible merits review by the Supreme Court.

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL

CAROLINE E.J. HUNT, OBA #32635
ASSISTANT ATTORNEY GENERAL

313 N.E. 21st Street
Oklahoma City, OK 73105

[2] This Court entered a combined order staying the mandate in both this case and *Ryder v. State*, Case No. PCD-2020-613.

(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF MAILING

On this 26th day of May, 2021, a true and correct copy of the foregoing was mailed to:

Michael W. Lieberman
Thomas D. Hird
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102

CAROLINE E.J. HUNT

(ORDER LIST: 593 U.S.)

WEDNESDAY, MAY 26, 2021

ORDER IN PENDING CASE

20A161 OKLAHOMA V. BOSSE, SHAUN M.

The application to stay the mandate of the Court of Criminal Appeals of Oklahoma, case No. PCD-2019-124, presented to Justice Gorsuch and by him referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE, SR.
Petitioner,
vs.
THE STATE OF OKLAHOMA,
Respondent,

No. PCD-2020-529

JAMES CHANDLER RYDER,
Petitioner,
vs.
THE STATE OF OKLAHOMA,
Respondent,

No. PCD-2020-613

MILES STERLING BENCH,
Petitioner,
vs.
THE STATE OF OKLAHOMA,
Respondent,

No. PCD-2015-698

ORDER STAYING ISSUANCE OF MANDATES INDEFINITELY

On May 26, 2021, Respondent State of Oklahoma filed with this Court motions to further stay the mandate in light of the United States Supreme Court's order staying the mandate in *Oklahoma v. Bosse*, Case No. 20A161. The mandates in *Cole v. State* and *Ryder v. State*, cited above, are due to automatically issue on June 1, 2021. The mandate in *Bench v. State*, cited above, is due to automatically issue on July 12, 2021.

Pursuant to the United States Supreme Court granting the stay in *Oklahoma v. Bosse*, and in light of this Court's request for further briefing in *State ex rel. Matloff v. Wallace*, Case. No. PR-2021-366, the mandates in the above cited cases are hereby stayed indefinitely.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 28 day of May, 2021.

Dana Lynn Kuehn

DANA KUEHN, Presiding Judge

Scott Rowland

SCOTT ROWLAND, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

Robert L. Hudson

ROBERT L. HUDSON, Judge

ATTEST:

John D. Hadden

Clerk

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.

End of Document

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

STATE ex rel. MARK MATLOFF, DISTRICT ATTORNEY, ***Petitioner,*** ***-vs-*** **THE HONORABLE JANA WALLACE, DISTRICT JUDGE,** ***Respondent.***	**Case No. PR-2021-366**

AMICUS CURIAE BRIEF OF THE CAPITAL HABEAS UNIT OF THE FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF OKLAHOMA IN SUPPORT OF RESPONDENT

EMMA V. ROLLS, OBA #18820
MEGHAN LeFRANCOIS, OBA #32643
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975
Emma_Rolls@fd.org
Meghan_LeFrancois@fd.org

June 24, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT CASES

FEDERAL CIRCUIT COURT CASES

STATE COURT CASES

DOCKETED CASES

FEDERAL STATUTES

STATE STATUTES

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

STATE ex rel. MARK MATLOFF, DISTRICT ATTORNEY,	)	
Petitioner,	)	
v.	)	**Case No. PR-2021-366**
THE HONORABLE JANA WALLACE, DISTRICT JUDGE,	)	
Respondent.	)	

AMICUS CURIAE BRIEF OF THE CAPITAL HABEAS UNIT OF THE FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF OKLAHOMA IN SUPPORT OF RESPONDENT

On May 21, 2021, this Court ordered Petitioner Mark Matloff and Attorney Debra K. Hampton, post-conviction counsel for party-in-interest Clifton Parish, to submit briefs addressing 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. __ (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?

Amicus curiae, the Capital Habeas Unit of the Federal Public Defender for the Western District of Oklahoma ("CHU-FPD"), appears solely to establish that Respondent, Associate District Judge Jana Wallace, correctly applied *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), in *State v. Parish*, to conclude the Choctaw Nation Reservation has not been disestablished. *State v. Parish*, Pushmataha County Case No. CF-2010-26, Order (Apr. 13, 2021). Respondent was correct in finding the State of Oklahoma lacked subject matter jurisdiction to try Parish for murder under the Major Crimes Act, 18 U.S.C. § 1153, because *McGirt* can be applied retroactively to void a state conviction

that was final when *McGirt* was announced.[1]

ARGUMENT

I. *McGIRT* IS RETROACTIVELY APPLICABLE TO VOID A STATE CONVICTION THAT WAS FINAL WHEN *McGIRT* WAS ANNOUNCED.

The recent recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* should be applied retroactively to void a state conviction that was final when those decisions were announced. Based on an accurate interpretation of the rules governing retroactivity, the State of Oklahoma has repeatedly argued *McGirt* did *not* announce a new constitutional rule of criminal procedure. *See infra* Section B. As a result, under this Court's jurisprudence, there is no bar to its retroactive application to cases on collateral review.

Teague v. Lane, 489 U.S. 288 (1989), *overruled in part by Edwards v. Vannoy*, 593 U.S. __, 141 S. Ct. 1547 (2021), remains the bedrock Supreme Court decision on the mandated retroactivity of new, substantive rules of federal constitutional law. *Teague* was concerned with the rules for the relatively small category of new decisions that state courts *must* apply retroactively.

> [W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. This holding is limited to *Teague*'s first exception for substantive rules [].

Montgomery v. Louisiana, 577 U.S. 190, 200 (2016). As with any constitutional rule, beyond this carve-out of mandatory protection, states are free to govern as they see fit. *See, e.g., State v.*

---

[1]In *Sizemore v. State*, 2021 OK CR 6, this Court, applying *McGirt* on state direct appeal, held Congress has never disestablished the Choctaw Reservation. *Id.* at ¶¶ 13-16. The principles supporting the retroactive applicability of *McGirt*, discussed *infra*, apply with equal force to *Sizemore*.

Santiago, 492 P.2d 657, 665 (Haw. 1971) ("Nothing prevents our constitutional drafters from fashioning greater protections for criminal defendants than those given by the United States Constitution."). States can choose whether to give any new state or federal rule retroactive effect. The highest criminal courts of many states have issued their own retroactivity laws. Such laws are not implicated by *Teague* except where, as *Montgomery* explained, "constitutional commands" are at issue. *See, e.g., Witt v. State*, 387 So.2d 922, 926 (Fla. 1980) (announcing "essential considerations" for whether new decision has retroactive state effect); *Phillips v. State*, 299 So.3d 1013, 1021-22 (Fla. 2020) (analyzing whether Supreme Court intellectual disability ruling requires retroactive effect under either *Witt* or *Teague*). *See also Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113 (1995) (this Court's application of *Teague*, see *infra* Section A). Under any principle or law of retroactivity, *McGirt* did not announce a new rule and has no place within this analytical framework.

A. The Principles of *Teague* and Its Progeny, as Well as *McGirt* Itself, Establish *McGirt* Did Not Announce a New Rule; Thus, *McGirt* Retroactively Applies to Cases with Final Convictions on State Collateral Review.

The retroactivity of the Supreme Court's criminal procedure decisions to cases on collateral review depends on whether such decisions announce a new rule. *Teague*, 489 U.S. at 301. When the Supreme Court announces a new constitutional rule of criminal procedure, a person whose conviction is already final may not benefit from that decision in a habeas proceeding. *Chaidez v. United States*, 568 U.S. 342, 347 (2013). "[A] case announces a new rule," *Teague* explained, "when it breaks new ground or imposes a new obligation" on the government.[2] *See also Walker v. State*,

[2] *Teague* included two exceptions: "[W]atershed rules of criminal procedure" and rules placing "conduct beyond the power of the [government] to proscribe." *Teague*, 489 U.S. at 311-12. *Edwards v. Vannoy* explicitly overruled *Teague*'s watershed rule exception. 593 U.S. __, 141 S. Ct.

1997 OK CR 3, ¶38, 933 P.2d 327, 338."*Teague* also made clear that a case does *not* 'announce a new rule, [when] it [is] merely an application of the principle that governed' a prior decision to a different set of facts." *Chaidez*, 568 U.S. at 347-48 (quoting *Teague*, 489 U.S. at 307). "'Where the beginning point'" of the Court's analysis is a rule of "'general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.'" *Chaidez*, 568 U.S. at 348 (quoting *Wright v. West*, 505 U.S. 277, 309 (1992)). The most obvious example of a decision announcing a new rule is a decision that overrules an earlier case. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). If the rule is not new, a petitioner may "avail herself of the decision on collateral review." *Chaidez*, 568 U.S. at 347.

In *McGirt* and *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom, Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (*per curiam*), the Supreme Court and the Tenth Circuit Court of Appeals made clear neither case broke new ground sufficient to trigger a *Teague* bar. In *Murphy*, the Tenth Circuit held Congress has not disestablished the Creek Reservation. 875 F.3d at 937. The court dispelled any notion this holding was subject to a *Teague* bar:

> Mr. Murphy has no need for *Teague*'s exceptions because he does not seek the benefit of a rule that falls within *Teague*'s retroactivity bar. The post-2003 cases we discuss in our de novo analysis are applications of the *Solem* [*v. Bartlett*, 465 U.S. 463 (1984)] framework.

Id. at 930 n.36.

Likewise, the Supreme Court was equally clear *McGirt* did not announce a new constitutional rule of criminal procedure when it held Congress has not disestablished the Creek Reservation.

1547, 1560 (2021) (holding the "watershed exception is moribund").

Applying *Solem* and other precedent, *McGirt* did nothing more than clarify the framework for determining whether a reservation has been disestablished and, applying this framework, determined the Creek Reservation remained Indian country for purposes of the Major Crimes Act. *See Oneida v. Village of Hobart*, 968 F.3d 664, 668 (7th Cir. 2020) ("We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation.").

The recent Supreme Court case *Edwards v. Vannoy* further supports the position *McGirt* did not announce a new rule thereby making the *Teague* framework irrelevant. In *Edwards*, the Supreme Court determined *Ramos v. Louisiana*, 590 U.S. __,140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), which held a state jury must be unanimous to convict a criminal defendant of a serious offense, announced a new constitutional rule of criminal procedure and did not apply retroactively on federal collateral review. *Edwards*, 141 S. Ct. at 1555. In concluding *Ramos* announced a new rule, the Court in *Edwards* reasoned *Ramos*'s jury-unanimity requirement was not dictated by precedent and many courts had interpreted a prior decision, *Apodaca v. Oregon*, 406 U.S. 404 (1972), to permit non-unanimous jury verdicts in state criminal trials. *Edwards*, 141 S. Ct. at 1556. Contrary to *Ramos*, which the *Edwards* Court found was not dictated by precedent, *id.* at 1555-56, *McGirt* simply clarified the existing *Solem* framework to determine the Creek Reservation had not been disestablished. *See Onieida,* 968 F.3d at 668. Further, in concluding the Creek Reservation remained Indian country, *McGirt* did not renounce Supreme Court precedent as in *Ramos*. *See Edwards*, 141 S. Ct. at 1556 ("By renouncing *Apodaca* and expressly requiring unanimous jury verdicts in state criminal trials, *Ramos* plainly announced a new rule for purposes of this Court's retroactivity doctrine.").

United States v. Cuch, 79 F.3d 987 (10th Cir. 1996) also shows *McGirt* did not announce a new constitutional rule of criminal procedure. *Cuch* addressed the retroactive applicability of *Hagen v. Utah*, 510 U.S. 399 (1994), which held the state of Utah had jurisdiction to prosecute Mr. Hagen because Congress had diminished the Uintah Reservation in the early 1900s. *Cuch*, 79 F.3d at 989. In reaching its decision in *Hagen*, the Supreme Court "effectively overruled the contrary conclusion reached in its [*Utah v.*] *Ute Indian Tribe* [, 479 U.S. 994 (1986] case." Reasoning the *Hagen* decision "was not dictated by precedent existing at [that] time," *Cuch* concluded *Hagen*'s "holding should not provide the basis for a collateral attack." *Cuch*, 79 F.3d at 991.[3] Unlike *Hagen*, *McGirt* did not "effectively overrule" any existing precedent of the Supreme Court to conclude the Creek Reservation had not been disestablished. Instead, *McGirt* faithfully applied existing precedent while simultaneously clarifying the *Solem* analysis. *McGirt*, 140 S. Ct. at 2464-65, 2468-69.[4]

While *Teague* and its progeny can only act to bar federal collateral review, in the state context, "[t]his Court has cited with approval [*Teague*'s] precepts" in "determining exactly when a decision constitutes a change in the law." *Ferrell v. State*, 1995 OK CR 54, ¶5, 902 P.2d 1113, 1114.

---

[3]*Cuch* also recognized "The Supreme Court can and does limit the retroactive application of subject matter jurisdiction rulings." *Cuch*, 79 F.3d at 990. Nevertheless, the Tenth Circuit's analysis of the retroactive application of subject matter jurisdiction rulings still turned on whether such rulings announce new rules. *Id.* at 990-91 (applying *Teague* framework). Post-*Teague*, the Supreme Court has never found that a subject matter jurisdictional ruling falls within the ambit of a constitutional rule of criminal procedure. *See also Murphy,* 875 F.3d at 929 n.36 (noting if a case is not "new," there is no need to determine whether a rule resulting therefrom qualifies as "constitutional" or "procedural" under *Teague*).

[4]Further, in *Hagen* the defendant's conviction was not final. The Supreme Court granted certiorari review from the Utah Supreme Court's reinstatement of the defendant's conviction after the Utah Court of Appeals reversed the trial court's denial of defendant's motion to withdraw his guilty plea on the ground the state court lacked jurisdiction. 510 U.S. at 408-09. In contrast, in *McGirt* and *Murphy* the Supreme Court granted certiorari review and relief, despite both cases involving final convictions on collateral review.

Under *Ferrell*, as under *Teague*, any attempt to prevent *McGirt* from taking retroactive effect fails at the threshold. *McGirt* did not announce the new rule of law necessary to render such analysis applicable. In *Ferrell*, this Court found the state law at issue "was not dictated by existing precedent" and therefore announced a new rule. 902 P.2d at 1114. As the State has continuously argued, *McGirt* was dictated by precedent and did not break new ground. *See McGirt*, 140 S. Ct. at 2464; *see infra* Section B. *Ferrell* demonstrates that *McGirt* did not announce a new constitutional rule of criminal procedure. It subsequently cannot be held non-retroactive under this line of precedent.

B. The State Has Repeatedly and Consistently Asserted *McGirt* Is Not New for the Purposes of *Teague*.

In a series of briefings spanning several cases, the State has repeatedly urged this Court to find state prisoners' *McGirt* claims waived. Often citing *Teague* for the proposition, the State has forcefully argued *McGirt* does not, and cannot, represent "new law." Any attempt to now advance the opposite position should not be countenanced.

Soon after *McGirt* was handed down, the State began lodging what it clearly viewed as one of its central procedural defenses against collateral *McGirt* relief: such claims did not arise under new law and therefore had been waived under state statute.[5] *See* Resp. to Pet'r's Proposition I in

---

[5]The cases discussed below involve application of Okla. Stat. tit. 22, § 1089, the capital post-conviction statute. Specifically, § 1089(D)(8) permits subsequent applications for post-conviction relief when the legal basis for the claim was unavailable. Under § 1089(D)(9)(a)-(b), a legal basis for 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 of the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

Although § 1089 does not apply to non-capital cases, the State's repeated argument that *McGirt* did not announce a new rule is relevant here.

Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) at 25-27, *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, No. PCD-2019-124 (Aug. 4, 2020) (hereinafter "*Bosse* Response"). The State sought to ground this argument in the language and reasoning of *McGirt* itself, where the Court characterized its opinion as "say[ing] nothing new" and traced the long line of treaties and cases it had applied to reject disestablishment. Similarly, the State pointed to *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), as a decision recognizing that it "broke no new ground." *Bosse* Response at 26. The State noted the Tenth Circuit had found the petitioner's claim "not *Teague*-barred," as it was not new, but rather, an application of prior case law. *Bosse* Response at 26, citing *Murphy*, 875 F.3d at 930 n.36. The State described the pertinent holding of *Teague* as distinguishing between new rules, which are subject to a collateral review bar, and those applying a prior precedent, which are by definition not new. *Bosse* Response at 26 n.17.

Following district court remand proceedings in Mr. Bosse's case, the State doubled down on its argument that, as *McGirt* did not present a new ground for relief, the claim should be procedurally barred as untimely. *See* State's Supplemental Br. Following Remand For Evidentiary Hr'g at 17-19, *Bosse v. State* (Nov. 4, 2020) (hereinafter "*Bosse* Post-Hearing Brief"). The State listed a number of decisions on the reservation disestablishment issue from the Supreme Court and this Court to demonstrate "[j]urisdictional claims such as the petitioner's were available long prior to *McGirt*." *Bosse* Post-Hearing Brief at 17-18.[6]

The State went on to invoke *Teague*, and this Court's reliance on *Teague* in discussing when

---

[6]One of the citations the State included among the "number of cases in which the Supreme Court has considered such claims in the decades preceding *McGirt*," *Hagen v. Utah*, 510 U.S. 399 (1994), was the decision the Tenth Circuit held non-retroactive in *Cuch*, as discussed *supra*, Section A. *Cuch* based this holding on its conclusion that *Hagen* "'was not dictated by precedent existing at [that] time.'" 79 F.3d at 991 (quoting *Teague*).

a case should be viewed as announcing a new rule in *Walker v. State*, 1997 OK CR 3, ¶38, 933 P.2d 327, 338, in post-remand briefs before this Court in several cases. In addition to arguing that *McGirt* claims could have been formulated previously and therefore do not meet the Okla. Stat. tit. 22 , § 1089(D)(9)(a) exception, the briefing uniformly relied on *Teague* and *Walker* to argue that *McGirt* was not the new constitutional law needed to satisfy § 1089(D)(9)(b). *See* Supplemental Br. of Resp't After Remand at 13-14, *Ryder v. State*, 2021 OK CR 11, No. PCD-2020-613, 2021 WL 1727017 (Nov. 23, 2020); Supplemental Br. of Resp't After Remand at 16-18, *Cole v. State*, 2021 OK CR 10, No. PCD-2020-529 (Dec. 8, 2020); Supplemental Br. of Resp't After Remand at 7-8, *Goode v. State*, No. PCD-2020-530 (Dec. 22, 2020). This Court has granted relief in several of these cases under § 1089(D)(9)(a) with such arguments already before it. In granting post-conviction relief to Mr. Bosse, the Court noted the State had argued "that waiver should apply because there is really nothing new about the claim." *Bosse*, 2021 OK CR 3, ¶20 n.8, 484 P.3d at 293 n.8.[7]

---

[7]While this Court rejected the State's argument that waiver should apply to Mr. Bosse's *McGirt* claim because he could not satisfy the § 1089(D)(9)(b) exception, it simultaneously emphasized why Mr. Bosse satisfied the § 1089(D)(9)(a) exception: "[A]lthough similar claims may have been raised in the past in other cases, the primacy of State jurisdiction was considered settled and those claims had not been expected to prevail. The legal basis for this claim was unavailable under Section 1089(D)." *Bosse*, 2021 OK CR 3, ¶20 n.8, 484 P.3d at 293 n.8.

The State's argument in a separate case also supports this Court's finding the legal basis for *McGirt* claims was previously unavailable. In *Deerleader v. Crow*, No. 20-CV-172 (N.D. Okla. Dec. 14, 2020), the petitioner 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* at 2, 6 n.3, *Deerleader v. Crow*, No. 20-CV-172 (N.D. Okla. Aug. 24, 2020). The State explained:

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

In each of the above cases, the State also attempted to file additional supplemental briefs bringing *In re: David Brian Morgan*, No. 20-6123 (10th Cir. Sept. 18, 2020) to this Court's attention. *See* State's Supplemental Br. Regarding Whether *McGirt* Was Previously Available for Purposes of Barring Claims, *Bosse v. State* (Jan. 7, 2021) (hereinafter "*Bosse* Supplemental Brief); *Cole v. State* (Jan. 21, 2021); *Goode v. State* (Jan. 22, 2021); *Ryder v. State* (Jan. 22, 2021). Pointing to the Tenth Circuit's refusal to allow a *McGirt* claim raised in a second or successive federal habeas petition under 28 U.S.C. § 2244(b)(2)(A), an Anti-Terrorism and Effective Death Penalty Act (AEDPA) provision requiring such petitions be based on a new and explicitly retroactive rule of constitutional law, the State analogized that state collateral relief should therefore be out of *McGirt* petitioners' reach. Quoting *Morgan*'s conclusion that *McGirt* "hardly speaks of a 'new rule of constitutional law,'" the State asserted the Tenth Circuit agreed with *McGirt*'s language of "say[ing] nothing new." *See, e.g.*, *Bosse* Supplemental Brief at 2-3. This Court denied the State permission to raise the "not relevant" authority in *Goode v. State, see* Order Den. Mot. to File Supplemental Br. at 2 (Feb. 2, 2021), and in *Ryder*, it found the analysis "inapposite to the jurisdictional issue," noting that the Tenth Circuit's ruling was premised on its finding that *McGirt* did not create new law, but

---

> admittedly denied Petitioner's *Murphy* claim on the 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.

Hence, this Court was correct to find the legal basis of the claim was unavailable in *Bosse* under § 1089(D)(9)(a). In this case, the *Teague* bar has no application. These conclusions are consistent with each other.

rather, "simply interpreted acts of Congress in order to determine if a federal statute applied to a given situation," *Ryder v. State*, 2021 OK CR 11, ¶12 n.3.

The State has continued to rely on *Morgan* in arguing *McGirt* is not new law in subsequent filings, including as recently as weeks prior to the instant Petition for Writ of Prohibition. *See* Supplemental Br. of Resp't After Remand, *Pitts v. State*, No. PC-2020-885, 2021 WL 2006104 at *7, *7 n.4 (Okla. Crim. App. Apr. 6, 2021) (in arguing *McGirt* claims were previously available, calling issue "settled by *Morgan*" under either § 1089(D)(9) exception ground). The current attempt to cite *Morgan* for the proposition that *McGirt* is not retroactive–ignoring the threshold language in both the *Teague* and AEDPA contexts applying the retroactivity question only to *new* rules, as it logically must be–is inherently inconsistent and incorrect. *See* Pet. for Writ of Prohibition, Designation of R., and Req. for Continued Stay Pending Decision at 2, *State ex. rel. Matloff v. the Honorable Jana Wallace*, 2021 OK CR 15, 2021 WL 2069659, No. PR-2021-366 (Apr. 27, 2021).

The State has argued at every opportunity that *McGirt* is not a new rule of constitutional law. It has spent the better part of the past year trying to convince this Court that § 1089(D)(9) should bar successive petitioners' *McGirt* claims, based in part on such claims not being new under *Teague* principles. Any attempt to now rely on *Teague* and its progeny to argue that *McGirt* is a new constitutional law is disingenuous. Based on the State's extensive past briefing on the question, all parties should now be in agreement that *McGirt* did not announce a new constitutional rule. The *Teague* retroactivity framework, which applies only to new rules, therefore by definition has no bearing.

CONCLUSION

Because *McGirt* did not announce a new constitutional rule of criminal procedure, petitioners with final convictions may avail themselves of the decision on state collateral review.

Respectfully submitted,

EMMA V. ROLLS, OBA #18820
MEGHAN LeFRANCOIS, OBA #32643
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975
Emma_Rolls@fd.org
Meghan_LeFrancois@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June 2021, a true and correct copy of this filing was mailed to each of the following:

The Honorable Jana Wallace
Associate District Judge
302 S.W. B
Antlers, OK 74523

Clifton Parrish, #473315
Mack Alford CC
PO Box 220
Stringtown, OK 74569

Mark Matloff
District Attorney
204 S.W. 4th Street, #6
Antlers, OK 74523

Debra K. Hampton
Attorney at Law
3126 S. Blvd., #304
Edmond, OK 73103

State of Oklahoma
Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105

Jacob Keyes
Choctaw Nation
PO Box 1210
Durant, OK 74702

EMMA V. ROLLS

No. PCD-2020-529

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE SR.,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

NOTICE OF DECISION IN *STATE EX REL. MATLOFF V. WALLACE*, 2021 OK CR 21, ___ P.3d ___, AND REQUEST TO MODIFY THIS COURT'S PRIOR OPINION IN THIS CASE GRANTING POST-CONVICTION RELIEF, OR ALTERNATIVELY REQUEST TO CONTINUE STAY

JOHN M. O'CONNOR
ATTORNEY GENERAL OF OKLAHOMA

CAROLINE E.J. HUNT, OBA # 32635
ASSISTANT ATTORNEY GENERAL

313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR RESPONDENT

AUGUST 26, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BENJAMIN ROBERT COLE SR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PCD-2020-529**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

NOTICE OF DECISION IN *STATE EX REL. MATLOFF V. WALLACE*, 2021 OK CR 21, ___ P.3d ___, AND REQUEST TO MODIFY THIS COURT'S PRIOR OPINION IN THIS CASE GRANTING POST-CONVICTION RELIEF, OR ALTERNATIVELY REQUEST TO CONTINUE STAY

COMES NOW, the State of Oklahoma, by and through Attorney General John M. O'Connor, and hereby provides notice to this Court of *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___. After granting post-conviction relief in this case based on a claim under *McGirt v. Oklahoma*, 140 S. Ct. 2452, (2020), this Court indefinitely stayed the mandate based, *inter alia*, on the briefing ordered in *Wallace*. Then, in *Wallace*, this Court held that, as a matter of state law, post-conviction claims based on *McGirt* are barred in cases in which the conviction became final on direct review before July 9, 2020—the day *McGirt* was decided. *Wallace*, 2021 OK CR 21, ¶ 15. For the reasons below, the State respectfully asks that this Court exercise its inherent power to modify an opinion in light of intervening authority,[1] modify its decision in this case, and deny

[1] As shown below, this is *not* a petition for rehearing. Rather, this Court possesses the inherent power to modify its decisions, irrespective of the rehearing power, and the State asks this Court to exercise that power here.

Petitioner both retroactive application of *McGirt* and post-conviction relief. Alternatively, the State asks that this Court continue the stay in this case pending resolution of the certiorari petition in *Oklahoma v. Bosse*, Case No. 21-186, and the certiorari petition the State will file in this case if the Court declines to modify its decision to deny Petitioner post-conviction relief.

I. BACKGROUND

On December 20, 2002, Petitioner's nine-month-old daughter, B.C., was crying inconsolably. *Cole v. State*, 2007 OK CR 27, ¶ 3, 164 P.3d 1089, 1092. Instead of picking her up, Petitioner grabbed the baby's ankles—she was lying on her back—and folded her legs towards her head, snapping her spine in two and tearing her aorta. *Id.*, 2007 OK CR 27, ¶¶ 2-4, 164 P.3d at 1092-93. Petitioner then went and played video games without the distraction of B.C.'s cries. *Id.*, 2007 OK CR 27, ¶ 4, 164 P.3d at 1092.

Petitioner was convicted by a jury of Murder in the First Degree (Child Abuse) in Case No. CF-2002-597 in the District Court of Rogers County. The jury found the existence of two aggravating circumstances: (1) Petitioner had previously been convicted of a felony involving the use or threat of violence; and (2) the murder was especially heinous, atrocious, or cruel. The jury sentenced Petitioner to death. The district court imposed judgment and sentence in accordance with the jury's verdict. This Court affirmed the judgment and sentence on direct appeal. *Cole*, 2007 OK CR 27, ¶ 66, 164 P.3d at 1102, *cert. denied Cole v. Oklahoma*, 128 S. Ct. 2474 (2008). Petitioner's conviction became

final on May 19, 2008, when the United States Supreme Court denied certiorari review of this Court's direct appeal opinion. *See Wallace*, 2021 OK CR 21, ¶ 2 n. 1.

On August 12, 2020, Petitioner filed the instant application for post-conviction relief ("P.C. App.").[2] For the first time, Petitioner raised a claim that the State lacked prosecutorial authority in his case because, although he is not Indian, B.C. was, and his crime occurred within the boundaries of the alleged Cherokee Nation Reservation (P.C. App. at 3-28).

On July 9, 2020, the Supreme Court held in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020), that the Creek Nation's Reservation had not been disestablished for purposes of 18 U.S.C. § 1153.

In light of *McGirt*, this Court remanded Petitioner's post-conviction proceedings for an evidentiary hearing on his prosecutorial authority claim. Ultimately, the district court found that B.C. was an Indian and that, based on *McGirt*, "the crime occurred in Indian Country." 11/12/2020 Order on Remand at 2-6.[3]

---

[2] Petitioner filed a post-conviction application raising this claim—in Case No. PCD-2020-332—on May 14, 2020, but this Court dismissed it as premature.

[3] The State strongly disagrees with *McGirt*'s conclusion that the Creek Reservation was not disestablished and has asked the Supreme Court to grant certiorari review in *Oklahoma v. Bosse*, Case No. 21-186, and overturn *McGirt*. As Chief Justice Roberts explained in his dissent, longstanding precedent on the disestablishment of Indian reservations required the Court to consider "the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there." *McGirt*, 140 S. Ct. at 2485. But those precedents were "not followed by the Court." *Id.*; *see also Bosse v. State*, 2021 OK CR 3, ¶ 1, 484 P.3d 286, 298 (Lumpkin, J., concurring in results) ("[T]he [*McGirt*] Majority . . . totally failed

On March 11, 2021, this Court decided *Bosse v. State*, holding that *McGirt* claims "can never be waived or forfeited" and that "the limitations of post-conviction or subsequent post-conviction statutes do not apply to [*McGirt* claims]." *Bosse v. State*, 2021 OK CR 3, ¶ 21, 484 P.3d 286, 293-94. *Bosse* rejected the "variety of procedural" defenses raised by the State and applied *McGirt* to the defendant's already final convictions. *See Bosse*, 2021 OK CR 3, ¶¶ 20-22 & nn. 8-9, 484 P.3d at 294.

On April 29, 2021, in this case, this Court granted post-conviction relief, holding based on *Bosse* that "[s]ubject-matter jurisdiction may—indeed, must—be raised at any time," "[n]o procedural bar applies," and that the State lacks "jurisdiction" over crimes committed by non-Indians against Indians in Indian Country. *Cole v. State*, 2021 OK CR 10, ¶ 16, ___ P.3d ___, ___. This Court's opinion rested on the implicit assumption that *McGirt* applies retroactively to final convictions.

On that same date, the State moved this Court to stay its mandate for good cause pending certiorari review in *Bosse* and this case. On May 12, 2021, this Court granted a limited stay until June 1, 2021.

---

to follow the Court's own precedents . . . ."). Instead, the Court reasoned that "extratextual sources" may be considered in the disestablishment inquiry "only" to "clear up" statutory ambiguity. *McGirt*, 140 S. Ct. at 2469 (majority opinion). Consideration of history is necessary, however, precisely because it is unclear whether Congress's alienation of Indian lands at the turn of the century changed the status of the land. *See id.* at 2488 (Roberts, C.J., dissenting). Under the correct framework prescribed by the Supreme Court's pre-*McGirt* precedent, it is clear that Congress disestablished the reservations of the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Tribes in Oklahoma. In any event, as shown below, Petitioner here is not entitled to retroactive application of *McGirt*.

On May 21, 2021, this Court ordered briefing, in *State ex rel. Matloff v. Wallace*, on whether *McGirt* should be applied retroactively to void a conviction that was final before it was announced. *State ex rel. Matloff v. Wallace*, 2021 OK CR 15, ¶ 6, ___ P.3d ___, ___.

Meanwhile, in the *Bosse* certiorari litigation, on May 26, 2021, the Supreme Court granted the State's stay application pending certiorari review. Order in Pending Case, *Oklahoma v. Bosse*, Case No. 20A161 (May 26, 2021).

In this case, on May 28, 2021, this Court stayed the mandate "indefinitely" "[p]ursuant to the United States Supreme Court granting the stay in *Oklahoma v. Bosse*, and in light of this Court's request for further briefing in *State ex rel. Matloff v. Wallace*, Case No. PR-2021-366."[4]

On August 12, 2021, this Court issued its decision in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___. In a change from its earlier applications of *McGirt* to convictions that were final when *McGirt* was decided, *Wallace* held that, as a matter of state law, post-conviction claims based on *McGirt* are not permitted in cases in which the conviction became final on direct review before July 9, 2020—the day *McGirt* was decided. *Wallace*, 2021 OK CR 21, ¶ 15. This Court spoke in mandatory terms: "[E]xercising 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 [the

[4] Pursuant to this Court's order staying the mandate, the district court has not entered any order dismissing the charge or vacating Petitioner's murder conviction and death sentence.

additional] reservations ***shall not*** apply retroactively to void a conviction that was final when *McGirt* was decided." *Id.* (emphasis added). Indeed, this Court held that the district court's reversal in *Wallace* was an "unauthorized dismissal" which "justifie[d] the exercise of extraordinary jurisdiction." *Id.*, 2021 OK CR 21, ¶ 41. This Court further repudiated its earlier cases, including the present one, to the extent they assumed that *McGirt* had retroactive effect. *Id.*

II. IN LIGHT OF THE INTERVENING DECISION IN *WALLACE*, THIS COURT SHOULD EXERCISE ITS INHERENT AUTHORITY TO MODIFY THE DECISION IN THIS CASE

As an initial matter, to be clear, this Notice and Request to Modify is ***not*** an unauthorized petition for rehearing. *See* Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021) ("A petition for rehearing may be filed only in regular appeals, as defined by Rule 1.2."); Rule 5.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021) (in post-conviction appeals, "[a] petition for rehearing is not allowed"). Indeed, the State does not invoke the rehearing rules or the grounds that justify rehearing under the rules, nor does it call upon this Court's rehearing power. *See* Rule 3.14(B)(1)-(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021) ("[s]ome question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court" or "[t]he decision is in conflict with an

express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument"[5]).

Rather, the State requests that this Court exercise its inherent power, irrespective of its rehearing power, to modify its prior decisions. As shown by this Court's rules and past practice, this Court possesses the inherent power to stay and/or recall its mandate and modify its prior decisions. *See, e.g.*, Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021); *Logan v. State*, 2013 OK CR 2, 293 P.3d 969 (issuing corrected post-conviction opinion nearly seven weeks after original opinion); *Frazier v. State*, 2002 OK CR 33, 59 P.3d 512 (issuing corrected post-conviction opinion nearly four months after original opinion). Indeed, "[t]he power of an appellate court to recall its mandate, if the circumstances warrant it, is recognized both in federal courts and state courts across the country." *Robbins v. State*, 114 S.W.3d 217, 221 (Ark. 2003); *cf. also Calderon v. Thompson*, 523 U.S. 538, 549 (1998) ("[T]he courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion.")[6]; *Dye v. Kansas State Supreme Ct.*, 48 F.3d 487, 488-91 (10th Cir. 1995) (rejecting habeas petitioner's procedural due process challenge based on state court's recall of mandate

[5] Obviously the State could not have failed to call this Court's attention to *Wallace*, as same had not been decided—and indeed this Court's briefing order had not even been entered—at the time of this Court's decision here.

[6] The State submits that a state court's power to recall its mandate and modify its decision must be at least as extensive as a federal appellate court's power to do the same, absent some rule or statute to the contrary.

reversing petitioner's convictions and subsequent decision reinstating his convictions).

In *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. State of Utah*, 114 F.3d 1513, 1521-22 (10th Cir. 1997), for instance, the Tenth Circuit recognized an appellate court's "authority to recall or modify a mandate after the time for rehearing has passed":

> In this circuit, as in all circuits that have addressed the issue, an appellate court has power to set aside *at any time* a mandate that was procured by fraud or act to prevent an injustice, or to preserve the integrity of the judicial process. Although the rule is stated in broad terms, the appellate courts have emphasized that the power to recall or modify a mandate is limited and should be exercised only in extraordinary circumstances.

Ute Indian Tribe, 114 F.3d at 1522 (emphasis added, citations and quotation marks omitted). In *Ute Indian Tribe*, the Tenth Circuit recalled the mandate in its earlier decision *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1093 (10th Cir. 1985) (*en banc*)—in which the Tenth Circuit had held that the Uintah Valley Reservation had not been disestablished—in light of the Supreme Court's contrary decision in *Hagen v. Utah*, 510 U.S. 399, 421-22 (1994), holding that the reservation had been diminished. The Tenth Circuit concluded, "in light of the extraordinary circumstances presented": "modification of our earlier judgment is appropriate, not merely because the two decisions are incongruent, but because of the effect of the incongruency on the interests of uniformity and

the integrity of our system of judicial decisionmaking." *Ute Indian Tribe*, 114 F.3d at 1527.[7]

This Court has not hesitated to overturn the erroneous grant of post-conviction relief and reinstate improperly vacated criminal convictions and sentences. *See, e.g., Wallace*, 2021 OK CR 21, ¶¶ 6, 40-41; *Powell v. Dist. Ct. of Seventh Jud. Dist.*, 1970 OK CR 67, ¶ 9, 473 P.2d 254, 257. In *Application of Anderson*, 1990 OK CR 82, ¶ 5, 803 P.2d 1160, 1163, this Court, after finding the district court improperly modified the defendant's sentence based on the erroneous conclusion that indeterminate sentences are impermissible, "reinstate[d] said sentence and direct[ed] the District Court to recommit [the defendant] thereon." In general, the reinstatement of an improperly vacated conviction and sentence does not offend any rights of the defendant. *See United States v. Silvers*, 90 F.3d 95, 99 (4th Cir. 1996) (generally, reinstating a vacated conviction does not violate double jeopardy, as "reinstatement [does] not subject the defendant to a new trial or multiple punishments"); *Dye*, 48 F.3d at 488-91 (rejecting habeas petitioner's procedural due process challenge based on state court's recall of mandate reversing petitioner's convictions and subsequent decision reinstating his convictions).

---

[7] In *Wallace*, this Court—while reaching and basing its decision on independent state law grounds—considered with favor the Tenth Circuit's handling of the shifting jurisdictional understandings regarding the Uintah Valley territory in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996). Here, too, this Court should consider with favor *Ute Indian Tribe* (1997) and its modification of the Tenth Circuit's earlier judgment in light of the extraordinary circumstances presented, including a change in law.

Based on the foregoing, it is clear that this Court has the power and authority to reconsider and modify its decision in this case and issue a new opinion denying Petitioner post-conviction relief. Indeed, in staying the mandate based in part on *Wallace*, this Court has already implicitly recognized this authority, found good cause for staying the mandate, and contemplated modifying its decision in light of its decision on the retroactivity of *McGirt*.

Respectfully, this Court should now exercise that authority. As this Court explained in *Wallace*, declining retroactive application of *McGirt* "can mitigate some of the negative consequences" of that unexpected "jurisdictional"[8] rule and further "public safety, finality, and reliance interests in settled convictions," *Wallace*, 2021 OK CR 21, ¶ 36:

> 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 . . . .
>
> 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

[8] As argued in the *Bosse* litigation, the State does not agree that where the State lacks prosecutorial authority in Indian Country, the state court is thereby deprived of subject matter jurisdiction. *See, e.g., United States v. Tony*, 637 F.3d 1153, 1157-60 (10th Cir. 2011) (defendant waived claim that government failed to plead and prove that crime occurred in Indian Country because "[t]he Indian Country nexus . . . is not jurisdictional in the sense that it affects a court's subject matter jurisdiction"). In any event, regardless of whether the rule in *McGirt* is "jurisdictional," it is clear under *Wallace* that it does not apply retroactively under state law.

> 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.

Id., 2021 OK CR 21, ¶¶ 38-39. "By comparison," this Court reasoned, a defendant's "legitimate interests in post-conviction relief for . . . jurisdictional error [under *McGirt*] are minimal or non-existent." *Id.*, 2021 OK CR 21, ¶ 40. A "state court's faulty jurisdiction (unnoticed until many years later)," did not affect "the truth-finding function of the state court[]" or "the procedural protections [a defendant was] afforded at trial." *Id.*

Even assuming this Court's power to modify its prior decisions should be exercised only in "extraordinary circumstances," *Ute Indian Tribe*, 114 F.3d at 1527, that standard is met. The costs of the retroactive application of *McGirt* are arguably at their apex in a case such as this one. Petitioner is an admitted capital killer. As Justice Scalia recognized, death sentences are costly and time-consuming for the State to secure and defend, given "the proliferation of labyrinthine restrictions on capital punishment" over the foregoing decades. *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring). Here, as in other capital cases, the State expended extraordinary time and resources in securing and defending Petitioner's murder conviction and death sentence at every previous stage of this case under the universally held understanding that the State's prosecutorial authority was uncontested. In the nineteen years since

Petitioner murdered young B.C., her family has been subjected to the trauma of his trial and the appeals that have followed.

Meanwhile, Petitioner can claim no legitimate interest in the retroactive application of *McGirt*. Like the defendant in *Wallace*, Clifton Parish, the criminal conduct of Petitioner here was accurately established by his trial, "the conviction was affirmed on direct review," and "the proceedings did not result in the wrongful conviction or punishment of an innocent person." *Id.*, 2021 OK CR 21, ¶ 40. As this Court poignantly observed, "A reversal of Mr. Parish's final conviction now undoubtedly would be a monumental victory for him, but ***it would not be justice***." *Id.* (emphasis added). In this case, allowing the retroactive application of *McGirt* to Petitioner to stand would be unjust and provide him an entirely unfair windfall based merely on the fact that this Court's opinion was entered prior to its decision on retroactivity in *Wallace*. *Cf. Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993) (refusing to find prejudice from "counsel's failure to make an objection in a state criminal sentencing proceeding—an objection that would have been supported by a decision which subsequently was overruled— . . . [because] [t]o hold otherwise would grant criminal defendants a windfall to which they are not entitled"). For all these reasons, this Court should modify its earlier decision; deny relief on all of Petitioner's post-conviction claims, including his *McGirt* claim; and not allow Petitioner to escape the death penalty for this "heinous murder." *Cole*, 2021 OK CR 10, ¶ 1.

III. CONCLUSION

As then-Presiding Judge Kuehn has recognized, *McGirt* has had "painful" and "unsettling" consequences for the victims of crimes and their families, as well for the communities where crimes occurred. *Bench v. State*, 2021 OK CR 12, ¶¶ 2-3, ___ P.3d ___ (Kuehn, P.J., concurring in result). She continued, "If it were possible to avoid these consequences through my legal analysis, I would." *Id.* In light of *Wallace*, this Court now can avoid those consequences in this case, through the non-retroactivity of *McGirt*. For the above reasons, the State respectfully requests that this Court modify its decision in this case in light of *Wallace*, decline retroactive application of *McGirt* to Petitioner, and deny him post-conviction relief. Alternatively, the State asks that this Court continue the stay in this case pending resolution of the certiorari petition in *Oklahoma v. Bosse*, Case No. 21-186, and the certiorari petition the State will file in this case if the Court declines to modify its decision to deny Petitioner post-conviction relief.

Respectfully submitted,

JOHN M. O'CONNOR
ATTORNEY GENERAL OF OKLAHOMA

CAROLINE E.J. HUNT, OBA #32635
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF MAILING

On this 26th day of August, 2021, a true and correct copy of the foregoing was mailed to:

Thomas D. Hird
Office of the Federal Public Defender
Western District of Oklahoma
Capital Habeas Unit
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102

CAROLINE E.J. HUNT

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

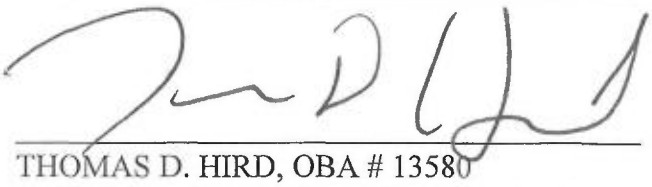
BENJAMIN ROBERT COLE, SR.,	
Petitioner,	
-vs-	**Case No. PCD-2020-529**
THE STATE OF OKLAHOMA,	
Respondent.	

MOTION TO STAY PROCEEDINGS

Mr. Cole, by and through undersigned counsel, moves to stay Mr. Cole's post-conviction action due to anticipated Supreme Court litigation in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21. *See* Exhibit A (declaration from Debra Hampton, attorney for Clifton Parish, party-in-interest in *Matloff*). Mr. Cole's post-conviction action should be stayed because this Court has indicated it will decide his case based on one of the precise issues that will be litigated in *Matloff* before the Supreme Court: Whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) is retroactively applicable to void a state conviction that was final when *McGirt* was announced. Accordingly, because the ensuing litigation in *Matloff* affects Mr. Cole's case, this Court should stay these proceedings immediately to conserve judicial resources. Pursuant to Rule 3.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), undersigned counsel has simultaneously filed a brief in support of this motion.

For the reasons stated in Mr. Cole's brief in support, he requests this Court stay his post-conviction action.

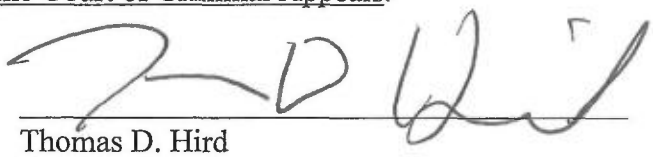
Respectfully submitted,



THOMAS D. HIRD, OBA # 13580
Office of the Federal Public Defender for the
Western District of Oklahoma
Capital Habeas Unit
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975; Fax (405) 609-5976
tom_hird@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 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 to Rule 1.9 (B), Rules of the Court of Criminal Appeals.



Thomas D. Hird

DECLARATION OF DEBRA K. HAMPTON

STATE OF OKLAHOMA)
) **ss.**
COUNTY OF OKLAHOMA)

I, Debra K. Hampton, of lawful age, being first duly sworn, on oath state:

1. I am an attorney licensed to practice in Oklahoma and am in good standing with the Oklahoma Bar Association.

2. I represented Clifton Parish in Oklahoma Court of Criminal Appeals (OCCA) Case No. PR-2021-366, *State ex rel. Mark Matloff, District Attorney v. The Honorable Jana Wallace, Associate District Judge*. The OCCA issued an opinion in this case on August 12, 2021, granting the State's Petition for a Writ of Prohibition, thereby overruling Mr. Parish's previous Order Granting Post-Conviction Relief. *Matloff v. Wallace*, 2021 OK CR 21, _ P.3d _. Mr. Parish is a registered member of the Choctaw Nation whose crime occurred within the boundaries of the Choctaw Reservation, relief on *McGirt v. Oklahoma* issue. In its opinion, the OCCA overruled its recent decision in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, and decades of precedent stating that subject matter jurisdiction cannot be waived.

3. I intend to appeal the OCCA's decision in *Matloff v. Wallace* to the United States Supreme Court in a Petition for Writ of Certiorari. I have engaged the services of Michael R. Dreeben and Kendall Turner from the O'Melvey & Myers law firm in Washington D.C. who are experienced Supreme Court practitioners, to represent Mr. Parish.

Pursuant to Oklahoma Statutes, Title 12, Section 426, I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct. Executed on September 1, 2021, at Edmond, Oklahoma.

Debra K Hampton

DEBRA K. HAMPTON, OBA # 13621
Hampton Law Office, PLLC
3126 S. Blvd., # 304
Edmond, OK 73013
(405) 250-0966
(866) 251-4898 (fax)
hamptonlaw@cox.net