

Capital Case

Case No. \_\_\_\_\_

---

---

In the  
Supreme Court of the United States

---

---

JEMAINÉ CANNON,  
*Petitioner,*  
v.  
THE STATE OF OKLAHOMA,  
*Respondent*

---

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

---

**APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI  
Appendices A through E  
(Pet. App. 1 through Pet. App. 38)**

---

EMMA V. ROLLS, OBA # 18820\*  
Assistant Federal Public Defender  
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)  
Emma\_Rolls@fd.org

ATTORNEY FOR PETITIONER,  
JEMAINÉ CANNON

\* Counsel of Record

**APPENDIX TO PETITION FOR WRIT OF CERTIORARI**

**APPENDIX TABLE OF CONTENTS**

**Page No.**

**APPENDIX A: . . . . . Pet. App. 1-3**

*Cannon v. State*, Order Denying Successive Application for Capital Post-Conviction Relief, No. PCD-2020-620 (Okla. Crim. App. Sept. 16, 2021)

**APPENDIX B: . . . . . Pet. App. 4-9**

*Cannon v. State*, Order Remanding for Determination of Counsel and Evidentiary Hearing, No. PCD-2020-620 (Okla. Crim. App. Sept. 25, 2020)

**APPENDIX C: . . . . . Pet. App. 10-17**

*Pro Se* Application for Post-Conviction Relief, Death Penalty, *Cannon v. State*, PCD-2020-620 (Okla. Crim. App. Sept. 11, 2020)

**APPENDIX D: . . . . . Pet. App. 18-27**

*Cannon v. Sirmons*, Case No. CIV-99-297-TCK-PJC, Order, (N.D. Okla. Dec. 6, 2007) (Docket Entry No. 209)

**APPENDIX E: . . . . . Pet. App. 28-38**

*State ex rel. Matloff v. Wallace*, 497 P.3d 686 (Okla. Crim. App. 2021)



IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

JEMAINÉ MONTEIL CANNON,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

Case No. PCD-2020-620

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

SEP 16 2021

JOHN D. HADDEN  
CLERK

OPINION DENYING SUCCESSIVE APPLICATION  
FOR CAPITAL POST-CONVICTION RELIEF

**ROWLAND, PRESIDING JUDGE:**

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

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

---

<sup>1</sup> The district court had yet to conduct an evidentiary hearing at the time the Court stayed the proceedings on remand.

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

## DECISION

Petitioner Cannon's Successive Application for Post-Conviction Relief is **DENIED**. The Stay entered on June 11, 2021 is **LIFTED** and the Remand Order of September 25, 2020 is **MOOT**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

### APPEARANCES ON APPEAL

JEMAINÉ MONTEIL CANNON  
# 201615  
OK STATE PENITENTIARY  
H UNIT SW4J  
P.O. BOX 97  
MCALESTER, OK 74502  
PRO SE

### APPEARANCES ON REMAND

BRIAN J. BOEHEIM  
ALISON R. HAUSNER  
BOEHEIM FREEMAN, P.L.L.P.  
616 S. BOSTON AVE.,  
SUITE 307  
TULSA, OK 74119  
COUNSEL FOR PETITIONER

JOHN O'CONNOR  
ATTY. GENERAL OF OKLAHOMA  
RANDALL YOUNG  
ASST. ATTORNEY GENERAL  
15 W. SIXTH STREET  
SUITE 1000  
TULSA, OK 74119  
COUNSEL FOR RESPONDENT

### OPINION BY: ROWLAND, P.J.

HUDSON, V.P.J.: Concur  
LUMPKIN, J.: Concur  
LEWIS, J.: Concur



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED IN COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA

SEP 25 2020

JEMAINÉ MONTEIL CANNON,

JOHN D. HADDEN, CLERK

Petitioner,

v.

Case No. PCD-2020-620

THE STATE OF OKLAHOMA,

Respondent.

ORDER REMANDING FOR DETERMINATION OF COUNSEL AND EVIDENTIARY HEARING

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

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

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

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

---

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

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

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

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

---

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

make written findings of fact and conclusions of law, to be submitted to this Court within twenty (20) days after the filing of the transcripts in the District Court. The District Court shall address only the following issues:

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

Second, whether the crime occurred within the boundaries of the Creek Reservation. In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony.

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record, to the Clerk of this Court, and Cannon or his counsel, within five (5) days after the District Court has filed its findings of fact and conclusions of law. Upon receipt thereof, the Clerk of this Court shall promptly deliver a copy of that record to the Attorney General. A

---

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

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

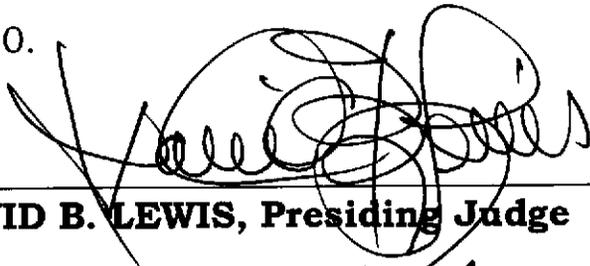
Provided however, in the event the parties agree as to what the evidence will show with regard to the questions presented, they may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court.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

**IT IS FURTHER ORDERED** that the Clerk of this Court shall transmit copies of the following, with this Order, to the District Court of Tulsa County: Cannon's *Pro Se* Application for Post-Conviction Relief and Motion for Evidentiary Hearing filed September 11, 2020.

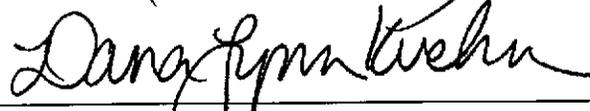
**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this

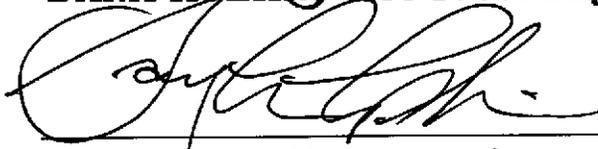
25<sup>th</sup> day of September, 2020.



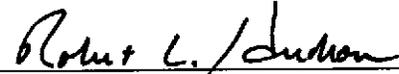
**DAVID B. LEWIS, Presiding Judge**



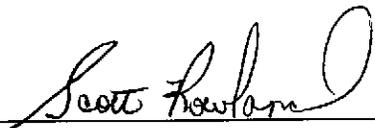
**DANA KUEHN, Vice Presiding Judge**



**GARY L. LUMPKIN, Judge**



**ROBERT L. HUDSON, Judge**



**SCOTT ROWLAND, Judge**

ATTEST:

*John D. Hadden*

\_\_\_\_\_  
Clerk

**ORIGINAL**

IN THE COURT OF CRIMINAL APPEALS

THE STATE OF OKLAHOMA

FILED

IN COURT OF CRIMINAL APPEALS TULSA CO. DISTRICT COURT  
STATE OF OKLAHOMA CASE NO. CRF-95-727



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

SEP 11 2020

JOHN D. HADDEN  
CLERK

COURT OF CRIMINAL APPEALS  
DIRECT APPEAL CASE NO. 96-369  
FIRST POST CONVICTION CASE NO. 98-174  
SECOND POST CONVICTION CASE NO.

**PCD 2020 620**

VERIFIED

PRO SE APPLICATION FOR POSTCONVICTION RELIEF  
DEATH PENALTY

PART A-PROCEDURAL HISTORY

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

DEATH

1. (a) COURT IN WHICH SENTENCE WAS RENDERED:  
DISTRICT COURT OF TULSA COUNTY, TULSA, OKLAHOMA  
(b) CASE NUMBER: CRF-95-727, STATE OF OKLAHOMA V. JEMAINÉ CANNON
2. DATE OF SENTENCE: MARCH 26, 1996.
3. TERMS OF SENTENCE:  
DEATH BY LETHAL INJECTION FOR FIRST DEGREE MALICE AFORETHOUGHT MURDER.
4. NAME OF PRESIDING JUDGE:  
CLIFFORD HOPPER
5. IS PETITIONER CURRENTLY IN CUSTODY? YES  
WHERE? OKLAHOMA STATE PENITENTIARY  
DOES PETITIONER HAVE CRIMINAL MATTERS PENDING IN OTHER COURTS? NO

**I**

CAPITAL OFFENSE INFORMATION

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

AGGRAVATING FACTORS ALLEGED:

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

- (b) THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, 21 O.S. § 701.12 (4).
- (c) THE MURDER WAS COMMITTED BY A PERSON WHILE SERVING A SENTENCE OF IMPRISONMENT ON CONVICTION OF A FELONY, 21 O.S. § 701.12 (5).
- (d) THE EXISTENCE OF A PROBABILITY THAT THE DEFENDANT WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY, 21 O.S. § 701.12 (7).

AGGRAVATING FACTORS FOUND:

- (a) THE DEFENDANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON, 21 O.S. § 701.12 (1)
- (b) THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, 21 O.S. § 701.12 (4)
- (c) THE MURDER WAS COMMITTED BY A PERSON WHILE SERVING A SENTENCE OF IMPRISONMENT ON CONVICTION OF A FELONY, 21 O.S. § 701.12 (5)
- (d) THE EXISTENCE OF A PROBABILITY THAT THE DEFENDANT WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY, 21 O.S. § 701.12 (7)

MITIGATING FACTORS LISTED IN JURY INSTRUCTIONS:

- a. THAT JEMAZNE MONTELL CANNON IS TWENTY FOUR (24) YEARS OLD.
  - b. THAT HE HAS A FAMILY WHO LOVES HIM AND WOULD BE SEVERELY IMPACTED IF HE WAS PUT TO DEATH.
  - c. THAT JEMAZNE CANNON SUFFERED AS A CHILD DUE TO PHYSICAL, MENTAL, AND EMOTIONAL ABUSE.
  - d. THAT JEMAZNE'S MOTHER FAILED TO PROTECT HIM WHICH TRANSCENDED INTO UNCONTROLLABLE RAGE AGAINST WOMEN WITH WHOM HE DEVELOPED RELATIONSHIPS.
  - e. THAT SUCH TRAUMA HAD A LONG TERM IMPACT ON JEMAZNE CANNON'S LIFE WHICH CONTRIBUTED TO THE MURDER OF THE DECEASED.
  - f. THAT JEMAZNE MONTELL CANNON HAS POSED NO THREAT TO SOCIETY WHILE INCARCERATED IN THE PENITENTIARY OR THE TULSA COUNTY JAIL AND WILL LIKELY POSE NO THREAT IN THE PENITENTIARY IF GIVEN A SENTENCE LESS THAN DEATH.
- WAS VICTIM IMPACT EVIDENCE INTRODUCED AT TRIAL? YES
- 7. CHECK WHETHER THE FINDING OF GUILTY WAS MADE: AFTER PLEA OF NOT GUILTY (X)
  - 8. IF FOUND GUILTY AFTER PLEA OF NOT GUILTY, CHECK WHETHER THE FINDING WAS MADE BY: A JURY (X)
  - 9. WAS THE SENTENCE DETERMINED BY: (X) A JURY

II

NON-CAPITAL OFFENSE INFORMATION

SECTION A (II) (11-12) OF THIS FORM ARE NOT APPLICABLE TO THIS POST-CONVICTION APPLICATION

III

CASE INFORMATION

13. NAME AND ADDRESS OF LAWYER IN TRIAL COURT:

520 CONWAY  
ASST. TULSA COUNTY PUBLIC DEFENDER  
PITHAN BLDG.  
423 S. BOULDER AVE., SUITE 300  
TULSA, OK 74103-3805  
918-596-5530

NAME AND ADDRESS OF ALL CO-COUNSEL IN THE TRIAL COURT:

JULIA O'CONNELL  
ASST. TULSA COUNTY PUBLIC DEFENDER  
PITHAN BLDG  
423 S. BOULDER AVE. SUITE 300  
TULSA, OK 74103-3805  
918-596-5530

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

15. WAS THE CONVICTION APPEALED? YES (X)

TO WHAT COURT? THE OKLAHOMA COURT OF CRIMINAL APPEALS

DATE BRIEF IN CHIEF FILED: MAY 28<sup>th</sup>, 1997

DATE RESPONSE FILED: SEPTEMBER 23<sup>rd</sup>, 1997

DATE REPLY BRIEF FILED: DECEMBER 2, 1997

DATE OF ORAL ARGUMENT: FEBRUARY 10<sup>th</sup>, 1998

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

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

16. NAME AND ADDRESS OF LAWYER FOR APPEAL:

BARRY DERRYBERRY  
ASST. TULSA COUNTY PUBLIC DEFENDER  
PITHAN BLDG.  
423 S. BOULDER AVE., SUITE 300  
TULSA, OK 74103-3805  
918-596-5530

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

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

IF NOT PUBLISHED, GIVE APPELLATE CASE NO.: F-96-369

18. WAS FURTHER REVIEW SOUGHT? NO (X)

PART B: GROUNDS FOR RELIEF

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

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

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

22. LIST PROPOSITIONS RAISED:

PROPOSITION 1,

JURISDICTION

BASED UPON THE SUPREME COURT DECISION IN MCGIRT V. OKLAHOMA, 541 U.S. \_\_\_ (2000), PETITIONER ALLEGES THE STATE OF OKLAHOMA LACKED JURISDICTION TO PROSECUTE HIM BECAUSE HE IS AN INDIAN, THE ALLEGED CRIME OCCURRED ON THE CREEK RESERVATION IN INDIAN COUNTRY, AND THE ALLEGED CRIME INVOLVED AN INDIAN DEFENDANT IN INDIAN COUNTRY SUBJECTING IT TO THE MAJOR CRIMES ACT AND JURISDICTION IS EXCLUSIVELY FEDERAL.

#### PART C: STATEMENT OF FACTS AND PROCEDURAL HISTORY

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

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

#### PART D - PROPOSITIONS - ARGUMENTS AND AUTHORITIES

PROPOSITION 1

JURISDICTION

BASED UPON THE SUPREME COURT DECISION IN MCGIRT V. OKLAHOMA, 541 U.S. \_\_\_ (2000), PETITIONER ALLEGES THE STATE OF OKLAHOMA LACKED JURISDICTION TO PROSECUTE HIM BECAUSE HE IS AN INDIAN; THE ALLEGED CRIME OCCURRED ON THE CREEK RESERVATION IN INDIAN COUNTRY, AND THE ALLEGED CRIME INVOLVED AN INDIAN DEFENDANT IN INDIAN COUNTRY SUBJECTING IT TO THE MAJOR CRIMES ACT AND JURISDICTION IS EXCLUSIVELY FEDERAL.

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

"INDIAN COUNTRY" INCLUDES "ALL LAND WITHIN THE LIMITS OF ANY INDIAN RESERVATION UNDER THE JURISDICTION OF THE UNITED STATES GOVERNMENT." § 1151

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

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

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

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

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

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

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

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

PETITIONER EVIDENCE THAT HE IS AN INDIAN!

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

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

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

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

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

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

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

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

"SOCIAL AND LEGAL RECOGNITION"

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

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

3. PETITIONER'S MATERNAL 2<sup>ND</sup> GREAT-GRANDMOTHER MARY FRANCIS THOMPSON WAS A CHEROKEE INDIAN.

4. PETITIONER'S MATERNAL 2<sup>ND</sup> GREAT-GRANDFATHER HALLIE TAYLOR WAS A CHOCTAW INDIAN.

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

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

7. PETITZNER HAS ATTENDED RELIGIOUS CEREMONIES FUNERALS FOR AND WITH INDIANS, PETITZNER EVIDENCE THAT THE ALLEGED CRIME OCCURRED ON THE CREEK RESERVATION AND IN INDIAN COUNTRY.

1. THE ALLEGED CRIME OCCURRED AT NORMANDY APARTMENTS, 6221 E. 38<sup>TH</sup> STREET, TULSA, OKLAHOMA 74135. (SEE EXHIBIT 6)

2. PETITZNER SUBMITS A LETTER WITH EXHIBITS FROM THE MUSCOGEE CREEK NATION THAT STATES THE DESCRIBED PROPERTY IS WITHIN THE MUSCOGEE (CREEK) NATION (M.C.N.) BOUNDARIES. (SEE EXHIBIT 6)

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

1. PETITZNER HAS INDIAN BLOOD

2. PETITZNER HAS RECOGNITION AS INDIAN AND LIVED ALMOST ENTIRE LIFE ON RESERVATION.

3. THE ALLEGED CRIME IS ENUMERATED UNDER THE MAJOR CRIMES ACT.

4. THE ALLEGED CRIME OCCURRED ON THE CREEK RESERVATION IN INDIAN COUNTRY.

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

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

CERTIFICATE OF SERVICE

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

Jeanette Cannon  
JEANETTE MONTGOMERY CANNON  
#201615  
HUNT  
P.O. BOX 97  
MALESTER, OKLAHOMA 74602

VERIFICATION

STATE OF OKLAHOMA

)

COUNTY OF PITTSBURG

)

ss.

)

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

- 1. That I am Jemaine Monteil Cannon in this Petition;
- 2. That I have read the Petition and am familiar with its contents; and
- 3. That the statements and facts contained in the Petition are true and correct to the best of my knowledge and belief.

Jemaine Monteil Cannon  
 Jemaine Monteil Cannon

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

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

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

NOTICE OF HEARING

This Petition has been scheduled for hearing before the Honorable \_\_\_\_\_  
 in courtroom \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 2020.

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

<b>JEMAINÉ MONTEIL CANNON,</b>	)	
	)	
<b>Petitioner</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. 99-CV-297-TCK-PJC</b>
	)	
<b>MARTY SIRMONS, Warden,</b>	)	
<b>OKLAHOMA STATE PENITENTIARY,</b>	)	
	)	
<b>Respondent</b>	)	

**ORDER**

The Court has for consideration the Report and Recommendation (the “Report”) of the United States Magistrate Judge (Dkt. # 204), entered on May 30, 2007, in this 28 U.S.C. § 2254 habeas corpus action filed by death row inmate Jemaine Monteil Cannon. Respondent filed his objections to the Report on June 13, 2007 (Dkt. # 205). Petitioner has filed a response to Respondent’s objections (Dkt. # 208). In accordance with Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed *de novo* those portions of the Report to which Respondent has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed over Respondent’s objections. The Court will also address the series of steps needed to complete review of the issues on remand from the Tenth Circuit, and the appointment of counsel for the remainder of these remanded proceedings.

***BACKGROUND***

Petitioner initiated the instant habeas corpus action on April 22, 1999. By Order entered December 9, 2002 (Dkt. # 81), this Court denied Petitioner’s request for a writ of habeas corpus. Petitioner appealed to the United States Court of Appeals. The appellate court affirmed the decision of this Court to deny habeas corpus relief, with the exception of three (3) ineffective assistance of

counsel issues: (1) Ineffective assistance of trial counsel for failure to notify the trial court of alleged improper contacts between prosecution witnesses and jurors during trial recesses; (2) Ineffective assistance of trial counsel for preventing Mr. Cannon from testifying in his own behalf at trial; and (3) Ineffective assistance of appellate counsel for failing to raise the above ineffective assistance of trial counsel claims on direct appeal. Cannon v. Mullin, 383 F.3d 1152 (2004). The appellate court did not direct this Court to grant relief on these issues, but gave instructions for further review in the manner this Court determines to be most effective. Id. at 1178.

By Order entered January 13, 2005 (Dkt. # 108), this Court determined that the best method for conducting its mandated review would be to address the issues in phases. It was determined that the first review phase (“Phase I”) was limited to consideration of whether Petitioner’s appellate counsel and trial counsel were “separate” under the standards delineated in Kimmelman v. Morrison, 477 U.S. 365 (1986), and English v. Cody, 146 F. 3d 1257 (10th Cir. 1998). The Court also terminated Petitioner’s self-representation for Phase I and appointed attorneys to represent Petitioner for Phase I. All remanded issues, other than the Phase I issue, were stayed pending resolution of the Phase I issue. The case was referred to the Magistrate Judge for Phase I discovery issues and for an evidentiary hearing. The evidentiary hearing was conducted on June 14-16, 2006. See Dkt. #s 174-176. Additional briefing was provided by the parties following the hearing (Dkt. #s 187, 189). In his thorough Report, the Magistrate Judge recommends a finding by the District Court that, for purposes of procedural bar analysis, Petitioner’s trial and appellate counsel were not “separate.” See Dkt. # 204 at 44. Respondent objects to the Magistrate Judge’s Report in its entirety (Dkt. # 205).

## *DISCUSSION*

### **1. Respondent's Objections to Report**

As summarized above, the Magistrate Judge recommends the following:

In sum, the Court finds that the State failed to provide sufficient evidentiary basis for the Court to depart from the Tenth Circuit's conclusion that Cannon's appellate and trial counsel were not "separate" under the first prong of the test set forth in *Kimmelman* and *English*. A state rule is not adequate to procedurally bar a claim of ineffective assistance of trial counsel unless the state procedures satisfy both of the following requirements: (1) the procedures allow a petitioner an opportunity to consult with separate counsel on appeal in order to obtain an objective assessment of trial counsel's performance and (2) the state provides a procedural mechanism on direct appeal whereby a petitioner can adequately develop the factual basis of his ineffectiveness claim. *See Cannon*, 383 F.3d at 1172-1174 (citing *English*, 146 F.3d at 1263). Because the Court finds and concludes that Petitioner's appeal and trial counsel were not "separate," the first of the requirements for adequacy is not satisfied, and the state procedural bar rule is not adequate to bar his ineffective assistance of counsel claims that have been remanded to this Court. (Dkt. # 204 at 21).

Citing instructions from the Tenth Circuit found in *Cannon*, 383 F.3d at 1173-74, Respondent sets forth his objections by evaluating three factors: (1) the physical separation of the trial and appellate counsel officers; (2) the culture of the office; and (3) the history of raising ineffective assistance of counsel claims.

The Circuit Court noted that two attorneys who work in the same Public Defender's office may not be "separate" within the meaning of *English* because "appellate counsel's assessment of trial counsel's performance may be less than completely objective." *Cannon*, 383 F.3d at 1174. The Magistrate Judge heard testimony from witnesses for both parties and concluded that, in the specific circumstances surrounding Petitioner's state court appeal, appellate counsel was not "separate" for purposes of procedural bar analysis. After reviewing the record and evidence presented at the evidentiary hearing, the Court agrees with the Magistrate Judge's conclusions.

Petitioner was represented by Julia O’Connell and Sid Conway at trial, and Barry Derryberry on direct appeal. All three attorneys worked for the Tulsa County Office of the Public Defender (“TCPD”). The Magistrate Judge noted, and Respondent concedes, that the lawyers shared office space and were not physically separated from one another.<sup>1</sup> There was no appellate office which was separate and distinct from the trial attorneys’ offices. Respondent argues that although not physically separated, the lawyers in the TCPD office always had distinct areas of practice. The duties of the attorneys, however, does not alter the conclusion that the physical setting in the TCPD office was not divided into distinct trial and appellate offices. The Magistrate Judge’s factual finding that Petitioner’s appellate and trial attorneys in the TCPD office were neither physically, nor in many ways, operationally distinct is not in error.

Respondent next asserts that the Magistrate Judge erroneously concluded that the culture in the TCPD office did not support a finding that the attorneys were separate. Noting, among other factors, that Petitioner’s appellate counsel testified there were “certainly no Chinese walls” separating trial and appellate counsel, and that there was a sense of camaraderie among the employees, the Magistrate Judge specifically found that the operation of the trial and appellate divisions were commingled (Dkt. # 204 at 5). The record supports the Magistrate Judge’s findings that (1) the trial and appellate lawyers at the TCPD had no separate supervisory oversight, (2) the TCPD staff of paralegals, investigators, and administrative personnel were shared by both trial and appellate lawyers, and (3) the files in the office were generally available to anyone, whether trial or

---

<sup>1</sup> The Magistrate Judge specifically found that trial and appellate lawyers’ offices in the TCPD were not physically segregated within the TCPD office. Respondent does not contest that fact, or any other of the Magistrate Judge’s findings of fact relating to the physical space in which the TCPD attorneys worked.

appellate counsel. See Dkt. # 204 at 5. Respondent’s objections to the Magistrate Judge’s findings and conclusions regarding the office culture are unpersuasive.

As the third part of his objection to the Report, Respondent contends that TCPD appellate attorneys clearly operated as “separate” counsel because they often raised ineffective assistance of counsel claims against trial attorneys in the same office. However, the testimony and records reveal that Petitioner’s appellate attorney had never raised an ineffective assistance of counsel claim against Sid Conway, and had raised only one such claim against Julia O’Connell prior to Petitioner’s case, which Ms. O’Connell characterized as “soft” treatment of the issue (Dkt. # 204 at 14). The Magistrate Judge’s careful analysis of the testimony presented at the hearing and his findings of facts and conclusions of law in this regard are not in error.

After reviewing the record and Report in light of Respondent’s objections, the Court finds that Respondent’s arguments are without merit. The Court agrees that Respondent failed to provide sufficient evidentiary basis to depart from the Tenth Circuit’s conclusion that Petitioner’s appellate and trial counsel were not “separate” under the test set forth in Kimmelman and English. The Report shall be adopted and affirmed, and Respondent’s objections shall be overruled.

## **2. Procedural Bar**

Having found that trial and appellate counsel were not “separate” for establishing the adequacy of Oklahoma’s procedural bar in this instance, it is not necessary to address whether there existed at the time of the direct appeal an adequate procedure to remand specific claims to the district court for supplementation of the record. See English, 146 F.3d at 1263-64. Finding that the procedural bar was not adequate, however, does not end the analysis. As noted by the Tenth Circuit, “[E]ven if the district court determines on remand that Mr. Cannon’s claims are not procedurally

barred, he is not necessarily entitled to relief. A finding of no procedural bar means only that his claims are properly before the court. He must still prove that the claims are meritorious.” Cannon, 383 F.3d 1152. The Court will look at the merits of the underlying issues of ineffective assistance of trial counsel to determine whether appellate counsel was ineffective for failing to raise the issues on direct appeal. The next step is to determine “whether Petitioner is entitled to an evidentiary hearing to establish the truth of his allegations.” Id.

### **3. Remaining issues on remand**

In light of the findings discussed herein, the Court finds that the previous order establishing three phases for this Court’s review of remanded issues will be modified. The Tenth Circuit determined that, “All but two of Mr. Cannon’s claims of ineffective trial counsel are clearly without merit, so we will dispose of them without regard to procedural bar.” Cannon, 383 F.3d at 1159. The two remaining issues are whether trial counsel was ineffective for (1) failure to notify the trial court of alleged improper contacts between prosecution witnesses and jurors during trial recesses; and (2) for preventing Mr. Cannon from testifying in his own behalf at trial. Petitioner also claimed his appellate counsel was ineffective for failing to raise these two issues on direct appeal.

#### *Appointment of Counsel and Lifting of Stay*

In its Order filed January 13, 2005 (Dkt. # 108), this Court appointed counsel to represent Petitioner during Phase I, and stayed all issues other than the “separateness” of counsel issue, pending resolution of Phase I. Because the entry of this Order concludes all Phase I matters, the stay imposed by previous order shall be lifted. Further, the Court finds that it is necessary and appropriate for further appointment of counsel in this matter. Accordingly, attorneys John E. Dowdell and Christine Little shall be appointed to continue as attorneys for Petitioner during the remainder of this

remanded proceeding. Interim payment of fees and expenses for counsel is expressly authorized, when approved by the Court. Counsel for Petitioner are directed to the Order of this Court entered on May 3, 1999 (Dkt. # 3) for guidelines regarding requests for expert or investigative funds and payment standards and procedures.

*Entitlement to Evidentiary Hearing*

Petitioner seeks an evidentiary hearing to provide information in support of his ineffective assistance of trial counsel claims. See Dkt. # 9. The Tenth Circuit agreed with this Court's previous finding (see Dkt. # 81 at 35-6) that Petitioner has not satisfied the AEDPA requirements for an evidentiary hearing set forth in § 2254(e)(2)(A) or (B). Id. at 1176. Using pre-AEDPA standards, the Court must determine whether Petitioner was "diligent in trying to develop the factual record in state court." Id. The Circuit Court stated, "The federal district court should not be required to conduct an evidentiary hearing on a claim when the applicant for relief has not presented evidence that would be readily available if the claim were true." Id. at 1177.

Insofar as Petitioner requests an evidentiary hearing on the issue whether his trial attorney was ineffective for failing to inform the court of improper juror contact, the appellate Court observed that this Court did not "make an explicit finding of fact regarding Mr. Cannon's diligence" in developing the facts underlying his juror-contact claim. Id. Accordingly, the Court must first address Petitioner's diligence in presenting evidence to this Court to support the request.<sup>2</sup> In accordance with the suggestion from the Tenth Circuit, Petitioner shall submit a brief addressing his

---

<sup>2</sup> The Tenth Circuit advised that, "The court may take further evidence and may, in its discretion, conduct a hearing on the matter. If the district court determines that Mr. Cannon was diligent, he should be granted an evidentiary hearing on the merits of his juror-contact claim (if it is not procedurally barred)." Cannon, 383 F.3d at 1177.

diligence in pursuing an evidentiary hearing on the issue of whether his trial attorney was ineffective for failing to inform the court of improper juror contact. Within forty-five (45) days of the entry of this Order, Petitioner shall file his brief limited to the diligence issue described herein, giving consideration to the discussion contained in the Circuit Court's Order. Respondent shall file a responsive brief within thirty (30) days of the filing of the brief by Petitioner. Upon review of the briefs, this Court will determine whether Petitioner is entitled to an evidentiary hearing on the merits of his juror-contact claim.

Insofar as Petitioner requests an evidentiary hearing on his ineffective assistance of trial counsel claim for preventing Mr. Cannon from testifying in his own behalf at trial, the Tenth Circuit found that Petitioner satisfied the diligence requirement. Cannon, 383 F.3d 1177. Accordingly, Petitioner is entitled to an evidentiary hearing on that issue. In the event the Court finds that Petitioner is also entitled to a hearing on his improper juror-contact claim, the two issues will be addressed in one evidentiary hearing. Once the Court determines the scope of the evidentiary hearing, the Court will conduct a Status Conference to discuss with counsel for the parties any proposed discovery needs, the anticipated length of the evidentiary hearing, whether Petitioner's trial counsel will be available to testify, whether the prosecuting attorney will be available to testify, the number of witnesses reasonably anticipated to be called, and possible dates for the evidentiary hearing.

### ***CONCLUSION***

The Court has reviewed *de novo* those portions of the Report to which the Respondent has objected, see Rule 8(b), Rules Governing Section 2254 Cases, and 28 U.S.C. § 636(b)(1)(C), and concludes that the Report and Recommendation of the United States Magistrate Judge should be

adopted and affirmed. Respondent's objections are overruled.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. The Report and Recommendation of the United States Magistrate Judge (Dkt. # 204) is **adopted and affirmed**. Respondent's objections (Dkt. # 205) are overruled.
2. The Court hereby **appoints** John E. Dowdell and Christine Little, to continue as counsel for Petitioner during the remainder of these remanded proceedings.
3. The stay imposed by previous Order (Dkt. # 108) **is lifted**.
4. Petitioner shall submit a brief addressing his diligence in pursuing an evidentiary hearing on the issue of whether his trial attorney was ineffective for failing to inform the court of improper juror contact. Within forty-five (45) days of the entry of this Order, Petitioner shall file his brief limited to the diligence issue described herein, giving consideration to the discussion contained in the Circuit Court's Order. Respondent shall file a responsive brief within thirty (30) days of the filing of the brief by Petitioner. Upon review of the briefs, this Court will determine whether Petitioner is entitled to an evidentiary hearing on the merits of his juror-contact claim.
5. Per the mandate of the Circuit Court, Petitioner is entitled to an evidentiary hearing on his claim of ineffective assistance of counsel for preventing Mr. Cannon from testifying in his own behalf at trial. Once the Court determines the scope of the evidentiary hearing, the Court will conduct a Status Conference to discuss with counsel for the parties any proposed discovery needs, the anticipated length of the evidentiary hearing, whether Petitioner's trial counsel will be available to testify, whether the prosecuting attorney will be available to

testify, the number of witnesses reasonably anticipated to be called, and possible dates for the evidentiary hearing.

**IT IS SO ORDERED** this 6th day of December, 2007.

A handwritten signature in cursive script that reads "Terence Kern". The signature is written in black ink and is positioned above a horizontal line.

TERENCE KERN  
UNITED STATES DISTRICT JUDGE

497 P.3d 686

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** ➡ Effect of change in law or facts

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] **Courts** ➡ In general; retroactive or prospective operation

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

[2 Cases that cite this headnote](#)

[3] **Courts** ➡ In general; retroactive or prospective operation

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.

[1 Cases that cite this headnote](#)

[4] **Criminal Law** ➡ Change in the 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.

1 Cases that cite this headnote

[5] **Courts**  In general; retroactive or prospective operation

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.

1 Cases that cite this headnote

[6] **Courts**  In general; retroactive or prospective operation

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.

2 Cases that cite this headnote

[7] **Criminal Law**  Change in the law  
**Prohibition**  Criminal prosecutions

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.

**\*687 OPINION**

LEWIS, JUDGE:

¶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 (OkI.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.<sup>1</sup>

¶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 \*688 final when *McGirt* and *Sizemore* were announced?

¶6 The parties and *amici curiae*<sup>2</sup> 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 \*689 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).

¶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.<sup>3</sup>

¶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<sup>4</sup> 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.

¶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 \*690 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.*

¶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 \*691 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,<sup>5</sup> redefined the [Muscogee (Creek)] Reservation boundaries ... and conclusively settled the question.” *Cuch*, 79 F.3d at 989.

¶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.<sup>6</sup> 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.<sup>7</sup>

¶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.<sup>8</sup> Chief Justice Roberts's dissent raised a host of reasonable doubts about the majority's adherence to precedent,<sup>9</sup> arguing \*693 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,<sup>10</sup> “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.

¶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 \*694 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.

¶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 \*695 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.<sup>1</sup> 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.

¶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.<sup>2</sup> In doing so, the majority \*696 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

497 P.3d 686, 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, 492 P.3d 11; *Ryder v. State*, 2021 OK CR 11, 489 P.3d 528, *Bench v. State*, 2021 OK CR 12, 492 P.3d 19. 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. Simmons*, 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. Simmons*, 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.