

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

Previously: No. 18-8801

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*IN THE  
SUPREME COURT OF THE UNITED STATES*

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**PATRICK JOSEPH TERRY - Petitioner**

**-vs-**

**THE STATE OF OKLAHOMA - Respondent**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE OKLAHOMA COURT OF CRIMINAL APPEALS**

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**APPENDIX OF PETITIONER**

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**Patrick Joseph Terry, *pro se*  
1011 S. Muskogee Avenue  
Tahlequah OK 74464**

**March 5, 2022**

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G	10/6/21	Court of Criminal Appeals of Oklahoma: <i>Patrick Joseph Terry v Oklahoma</i> , Case No. PC-2018-1076; <i>Order Affirming Denial of Post-Conviction Relief</i>	2
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J	01/04/22	Letter from Clerk of Court SCOUS per Application No. 21A290 Order of Justice Gorsuch, directing that an extension of time of sixty (60) days Had been granted to file, or, Until March 5, 2022.	2

Supreme Court of the United States

No. 18-8801

PATRICK JOSEPH TERRY,

Petitioner

v.

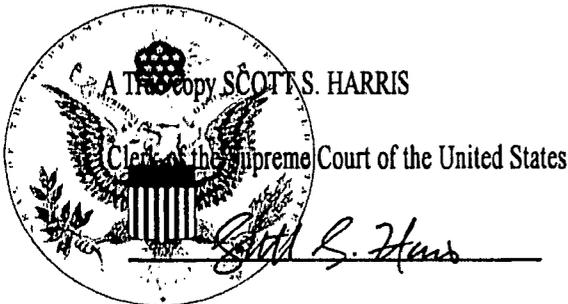
OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of Oklahoma.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the above court in this cause is vacated, and the case is remanded to the Court of Criminal Appeals of Oklahoma for further consideration in light of *McGirt v. United States*, 591 U. S. \_\_\_ (2020).

July 9, 2020



A True copy SCOTT S. HARRIS

Test:

Clerk of the Supreme Court of the United States

By Donny Beahm

Deputy

Petitioner's  
Appendix A

**United States of America, ss:**

**THE PRESIDENT OF THE UNITED STATES OF AMERICA**

No. 18-8801

**PATRICK JOSEPH TERRY,**

Petitioner

v.

**OKLAHOMA**

To the Honorable the Judges of the Court of Criminal Appeals of Oklahoma.

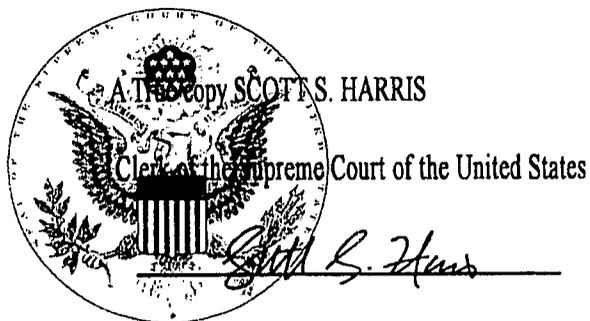
**GREETINGS:**

Court of Criminal Appeals of Oklahoma case, PATRICK JOSEPH TERRY, Petitioner v. OKLAHOMA, Respondent, No. PC-2018-1076, was submitted to the **SUPREME COURT OF THE UNITED STATES** on the petition for writ of certiorari and the response thereto; and the Court Having granted the petition.

It is ordered and adjudged on July 9, 2020, by this Court that the judgment of the above court in this cause is vacated, and the case remanded to the Court of Criminal Appeals of Oklahoma for further consideration in light of *McGirt v. Oklahoma*, 591 U. S. \_\_\_ (2020).

**THIS CAUSE IS REMANDED** to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and Laws of the United States.

Witness the Honorable **JOHN G. ROBERTS, JR.**, Chief Justice of the United States, the 9<sup>th</sup> day of July, in the year Two Thousand and Twenty.



A True copy SCOTT S. HARRIS  
Test:  
Clerk of the Supreme Court of the United States  
By *Wannet Seale*  
Deputy

**Petitioner's  
Appendix B**

**ORIGINAL**



**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA** **FILED** **IN COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA**

OCT 14 2020

JOHN D. HADDEN  
CLERK

**PATRICK JOSEPH TERRY,** )  
 )  
 **Petitioner,** )  
 )  
 **v.** )  
 )  
 **STATE OF OKLAHOMA,** )  
 )  
 **Respondent.** )

**No. PC-2018-1076**

**ORDER REMANDING FOR EVIDENTIARY HEARING**

The Petitioner has appealed to this Court from an order of the District Court of Ottawa County denying his application for post-conviction relief in Case No. CF-2012-242. Petitioner was found guilty following a non-jury trial and convicted of Manufacturing a Controlled Dangerous Substance Within 2,000 Feet of a School, in violation of 63 O.S. § 2-401 (Count 1), Possession of a Controlled Dangerous Substance, in violation of 63 O.S. § 2-402(A) (Count 2), and Unlawful Possession of Drug Paraphernalia, in violation of 63 O.S. § 2-405 (Count 3). He was sentenced to thirty years imprisonment on Count 1, six years imprisonment on Count 2, and one year imprisonment on Count 3. The sentences were ordered to be served concurrently. Petitioner's convictions were affirmed by this Court. *See Terry v. State*, 2014 OK CR 14, 334 P.3d 953.

**Petitioner's  
Appendix C**

**REMAND** this case to the District Court of Ottawa County, for an evidentiary hearing to be held within sixty (60) days from the date of this Order.

We request the Oklahoma Attorney General and Ottawa County District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Petitioner's presentation of prima facie evidence as to the Petitioner's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

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

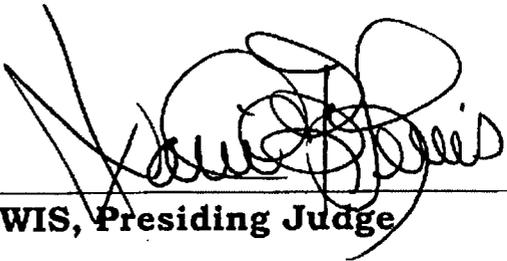
the Clerk of this Court within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed in this Court.

Provided however, if the parties agree 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 Ottawa County: Petitioner's Appeal of Order Denying Application for Post-Conviction Relief Post-Conviction Petition in Error and Brief in Support filed with the Clerk of this Court on October 22, 2018.

**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 14<sup>th</sup> day of October, 2020.

  
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**DAVID B. LEWIS, Presiding Judge**

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IN THE DISTRICT COURT OF OTTAWA COUNTY  
STATE OF OKLAHOMA

PATRICK JOSEPH TERRY,  
Petitioner,

vs No. CF-2012-242

THE STATE OF OKLAHOMA,  
Respondent.

HEARING  
BEFORE THE HONORABLE JUDGE BARRY DENNEY  
Held on January 19, 2021 in Miami, Oklahoma

APPEARANCES

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On behalf of the AMICI OTTAWA TRIBE, MIAMI TRIBE,  
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REPORTED BY: Mary K. Beckham, CSR, RPR

Petitioner's  
Appendix D

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On behalf of the MIAMI TRIBE OF OKLAHOMA:  
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1 THE COURT: We will go on the record on  
2 Ottawa County Case Number CF-12-242. This is also  
3 the Court of Criminal Appeals matter PC-18-1076,  
4 Patrick Joseph Terry vs. The State of Oklahoma. He  
5 had filed a motion for post-conviction relief. The  
6 court has received an order from the Oklahoma Court  
7 of Criminal Appeals directing me to conduct this  
8 evidentiary hearing regarding the aspect of  
9 Mr. Terry's motion claiming the State of Oklahoma  
10 lacked jurisdiction to try him in that particular  
11 case number. We have present here in the courtroom  
12 Mr. Kenny Wright here, the district attorney for  
13 Ottawa County, and --

14 MS. HUNT: Good morning, Your Honor.  
15 Caroline Hunt from the Oklahoma Attorney General's  
16 Office, also on behalf of the State.

17 THE COURT: Thank you, Ms. Hunt.

18 I believe Mr. Terry is with us by video;  
19 correct, Mr. Terry?

20 MR. TERRY: Yes.

21 THE COURT: Okay. All right. That's you,  
22 sir. All right. Patrick Terry is also present.

23 Then we also have Mr. Joe Halloran here;  
24 correct, sir?

25 MR. HALLORAN: Yes, Your Honor, good

1 morning.

2 THE COURT: You are here on behalf of?

3 MR. HALLORAN: So, Your Honor, I'm here on  
4 behalf of the Amici Ottawa Tribe, Miami Tribe.

5 THE COURT: All right.

6 MR. HALLORAN: Eastern Shawnee Tribe and  
7 Shawnee Tribe, and with me here today are Attorney  
8 Katie Klass, Michael McMahan and William Norman who  
9 represent the Amici Wyandotte Nation, who joined in  
10 the joint brief that we filed --

11 THE COURT: Okay.

12 MR. HALLORAN: -- with the court. I'm  
13 sorry, Your Honor, also with me is the general  
14 counsel, Robin Lash, for the Miami Tribe of  
15 Oklahoma.

16 THE COURT: I think that you've named  
17 everybody that's on the screen then. Okay.

18 So I think we're ready to go. Is there  
19 anybody else that anyone is aware of that needs to  
20 be attending this hearing, whether in person or by  
21 Zoom or Skype that is not -- has not been  
22 recognized?

23 MR. GRIFFIN: Your Honor, my name is Peter  
24 Griffin. I'm an attorney with the Jacobson Law  
25 Group, Mr. Halloran's firm. I do not have an

1 appearance in, but I am appearing just as a member  
2 of the public, if that's all right.

3 THE COURT: That's fine. Sure. It's an  
4 open proceeding.

5 MR. BUZZARD: Yes, Your Honor. My name is  
6 Greg Buzzard. I represent the Peoria Tribe of  
7 Indians of Oklahoma. We did make an appearance, but  
8 the Tribe elected not to join the Amici brief, and  
9 I'm also here as a member of the public, if that's  
10 all right with the court.

11 THE COURT: Certainly. Certainly. All  
12 right. Anybody else that we don't have down on our  
13 record yet?

14 Hearing none, I think we're good to go  
15 here. All right. Let me just inquire first of all,  
16 is there any stipulations to be made here before we  
17 begin, or are we just waiting for Mr. Terry to make  
18 his prima facie case here?

19 MR. WRIGHT: I think we do have some  
20 stipulations to enter into.

21 THE COURT: Mr. Wright, if you could --

22 MR. WRIGHT: Either one.

23 THE COURT: Your name again, ma'am?

24 MS. HUNT: Caroline Hunt.

25 THE COURT: Ms. Hunt, you have some

1 stipulations to offer here?

2 MS. HUNT: Yes, Your Honor. I don't have  
3 it prepared in the form of stipulations, but there  
4 are a number of matters we agree on, and  
5 documentation in support of those undisputed facts  
6 are included in an exhibit packet I prepared for the  
7 court. I mailed a copy to Mr. Terry. Hopefully, he  
8 can confirm whether he received that.

9 THE COURT: Okay.

10 MS. HUNT: But as far as the stipulated  
11 facts, we agree that he does have an Indian blood  
12 quantum and we have a letter, a tribal membership  
13 verification letter reflecting that, and also that  
14 he was a registered citizen of the Cherokee Nation  
15 at the time of the crimes.

16 THE COURT: Okay.

17 MS. HUNT: So as in other McGirt cases,  
18 the State takes no position legally on Indian  
19 status, but we do agree that these are all the facts  
20 Your Honor needs to decide Indian status, which is a  
21 two-part showing of some Indian blood and whether  
22 he's recognized as an Indian by a tribe or the  
23 federal government.

24 THE COURT: Okay. Any other stipulations  
25 to offer?

1 MS. HUNT: We do -- we do also agree, Mr.  
2 Wright has confirmed, that the crimes occurred  
3 within the historical boundaries of the Ottawa  
4 Nation.

5 THE COURT: Okay.

6 MS. HUNT: So as far as location, that is  
7 agreed as well. The dispute here does come down to  
8 current status as a reservation.

9 THE COURT: All right. Mr. Terry, you  
10 heard Ms. Hunt's offering of those stipulations.  
11 Mr. Terry, are you in agreement with those facts  
12 that she's offered to the court?

13 MR. TERRY: Yes, Your Honor. I am  
14 agreeable to the fact that they have determined that  
15 I'm a citizen of the Cherokee Nation, that I have a  
16 quantum of blood pursuant to the Bureau of --  
17 Department of Interior, Bureau of Indian Affairs. I  
18 also agree with the State's Exhibit 2, which shows  
19 the outline of the Ottawa Nation, pursuant to the  
20 Treaty of 1867, which was the argument that  
21 ultimately got us here today. It shows clearly in  
22 her exhibit that I am well within the boundaries of  
23 the Ottawa Nation where the search incident to  
24 arrest occurred, prior to the crime and prosecution  
25 for these events.

1 I hope Your Honor has the motions that I  
2 filed. One of them is to adopt the joint appendix,  
3 the exhibits packet that the State submitted,  
4 because use of that exhibit packet will clearly lead  
5 you to the conclusion that this was Indian country,  
6 based on the Brief of Amici, that was filed on  
7 January 6th, and the brief I filed on October 18th,  
8 2018, in the Court of Criminal Appeals.

9 If your judge -- as Your Honor is aware,  
10 the remand from the Court of Criminal Appeals on  
11 October 14th, 2020, specifically detailed that the  
12 clerk of the appellate courts would forward both my  
13 petition in error with Judge Haney's order attached,  
14 as well as my appeal of order denying  
15 post-conviction relief. These will be the two  
16 documents that I would have submitted on my behalf,  
17 as well as the motions that I filed subsequent to  
18 that order.

19 Your Honor has a motion showing my degree  
20 of Indian blood, which the State's attorney has  
21 already stipulated to. As for me, I want to  
22 stipulate to the authenticity of the State's  
23 exhibits. I would like to use them as joint  
24 exhibits when you review the briefs. I would also  
25 like to stipulate to the facts presented in the

1 Amicus brief that was filed on January 18 -- I mean,  
2 January 6, 2021. So as far as that is concerned, I  
3 am in agreement so far with everything that has  
4 happened, Your Honor.

5 THE COURT: All right. So, obviously, you  
6 did receive that packet of exhibits that Ms. Hunt  
7 spoke about, correct?

8 MR. TERRY: I'm sorry, Your Honor, I have  
9 a sketchy connection here. I didn't understand you.

10 THE COURT: You did receive then the  
11 packet of exhibits that Ms. Hunt sent to you?

12 MR. TERRY: Yes, ma'am -- yes, sir, I  
13 mean. I'm sorry. Excuse me.

14 THE COURT: All right. So he's accepted  
15 the stipulations that Ms. Hunt has offered here, in  
16 addition to offering some other stipulations, I  
17 believe. Ms. Hunt, did you care to speak to those?

18 MS. HUNT: Yes, Your Honor. I think I  
19 covered all of the stipulated, undisputed facts. I  
20 was going to ask permission to approach and provide  
21 you the packet, if that's okay.

22 THE COURT: That would be great, as I  
23 believe Mr. Terry has stipulated to the admission of  
24 that document.

25 MS. HUNT: Okay.

1 THE COURT: We are marking that as what?

2 MS. HUNT: Well, I have them individually  
3 numbered as State Respondent exhibits, if that  
4 works.

5 THE COURT: Let's just go ahead and show  
6 them that way.

7 MS. HUNT: Okay.

8 THE COURT: So, Mr. Terry, the State has  
9 offered Exhibits 1 through 18 in the packet of  
10 exhibits that you received from Ms. Hunt. Are you  
11 in agreement --

12 MR. TERRY: Yes, sir.

13 THE COURT: Are you in agreement with  
14 admitting those Exhibits 1 through 18 into the  
15 evidence here?

16 MR. TERRY: Yes, Your Honor, I am.

17 THE COURT: All right. We'll show then  
18 State's Exhibits 1 through 18 are admitted.

19 (Exhibits 1 through 18 admitted into  
20 evidence.)

21 THE COURT: Anything else, Ms. Hunt?

22 MS. HUNT: Yes, Your Honor. The remainder  
23 of my presentation is really more in the form of an  
24 oral argument, and so if it pleases Your Court, I'd  
25 like to come to the podium and offer some argument

1 based on the admitted exhibits.

2 THE COURT: All right. Would you agree,  
3 Ms. Hunt, that at this point Mr. Terry has made a  
4 prima facie case for his admission for Indian blood,  
5 that he does have Indian blood as well as the  
6 membership in the Cherokee Tribe and that the crime,  
7 again, prima facially occurred within the boundaries  
8 of Ottawa Nation?

9 MS. HUNT: Agreed, Your Honor.

10 THE COURT: All right. So with that being  
11 the case, it now goes to the State here has the  
12 burden of proving that, in fact, the State does have  
13 jurisdiction of this matter. So, Ms. Hunt, go ahead  
14 and proceed there at the podium.

15 MS. HUNT: Thank you, Your Honor. Before  
16 I turn to the disestablishment issue, I would like  
17 to say, for the record, for preservation purposes,  
18 it is the State's position that Petitioner Terry's  
19 jurisdictional claim is waived for his failure to  
20 raise it until a second post-conviction application  
21 and by the doctrine of latches; however, we  
22 acknowledge this is beyond the scope of the remand  
23 order and the determinations this court has  
24 specifically been instructed to make.

25 So turning to the Indian country issue,

P- Bar: 2nd (OSO App), Leebos

1 the State's position is simple. The Ottawa  
2 reservation was disestablished when in 1956 federal  
3 supervision of the Tribe was terminated, thereby  
4 removing federal superintendence, which is a  
5 necessary element of reservation status. And as I  
6 said before -- we've already gone over the things --  
7 we agreed to the location within the historical  
8 boundaries.

9 Then the question I'll spend the most time  
10 on is disestablishment. That is covered -- so that  
11 brings us to Exhibit 3 in the packet. That is  
12 Section 1151 of Title 18. It provides the  
13 definition of Indian country that's relevant here.  
14 Under Subsection A, Indian country includes, "all  
15 land within the limits of any Indian reservation  
16 under the jurisdiction of the United States  
17 Government, notwithstanding the issuance of any  
18 patent, and, including rights-of-way running through  
19 the reservation." A portion of that definition,  
20 "under the jurisdiction of the United States  
21 Government," is very important in this case as I  
22 will explain.

23 Continuing on, as far as the definition of  
24 a reservation, Exhibit 4 in the packet, the Supreme  
25 Court case, United States vs. John, a Major Crimes

1 Act case, the court said, The question as to  
2 reservation status is "whether the land in question  
3 'had been validly set apart for the use of the  
4 Indians as such, under the superintendence of the  
5 Government.'" That's on page 649 of John. So as we  
6 see in the Supreme Court's plain language, a  
7 necessary element --

8 THE COURT: Excuse me, what page did you  
9 say that is on?

10 MS. HUNT: 649, Your Honor.

11 THE COURT: Okay.

12 MS. HUNT: So as we see in that language  
13 from John, a necessary element of reservation status  
14 is federal superintendence. So turning to the  
15 Ottawa Indians in particular, as I've gone over this  
16 morning and in the Attorney General's Office brief  
17 in opposition before the Supreme Court, which is  
18 Exhibit 5 in the packet, we've previously admitted  
19 that there was at one point a reservation. I'm not  
20 disputing that this morning, but I have included the  
21 historical documents for Your Honor's reference.

22 As I said, Exhibit 5 is our brief in  
23 opposition, filed before the Supreme Court while the  
24 Murphy -- McGirt litigation was still pending. It  
25 goes over a lot of that history. Exhibits 6 through

1 8 are some cases that provide helpful history on the  
2 Ottawas, and then Exhibits 9 through 11 are the  
3 operative treaties, as far as originally  
4 establishing the reservation.

5 Continuing on to disestablishment, prior  
6 to the 1956 termination of the Tribe, the Ottawa  
7 faced a similar fate as the five tribes, being  
8 subjected to allotment and various other measures.  
9 However, in light of the Supreme Court's decision in  
10 *McGirt*, I'll be clear that the State is not relying  
11 on allotment or statehood to argue disestablishment  
12 here; rather, the engine of disestablishment in this  
13 case is the Act of August 3rd, 1956 titled, "An Act  
14 to provide for the termination of federal  
15 supervision over the property of the Ottawa Tribe of  
16 Indians in the State of Oklahoma and the individual  
17 members thereof, and for other purposes." This is  
18 Exhibit 12 in the packet.

19 This court previously found that this Act,  
20 Public Law 943, which I'll refer to as the  
21 Termination Act, disestablished the reservation, and  
22 that's from this Court's September 2018 order, pages  
23 5 through 7. But for purposes of the record and in  
24 light of the intervening law in *McGirt*, I will  
25 explain the effect of the Termination Act and why

1 McGirt does not change this Court's earlier  
2 conclusion that the reservation was, in fact,  
3 disestablished.

4           As way of background, this Termination Act  
5 was not limited to the Ottawa. It was part of the  
6 so-called termination era starting in 1953 and  
7 lasting through the mid 1960s, in which Congress  
8 adopted a policy of terminating the trust  
9 relationship between some Indian tribes and the  
10 federal government and, in furtherance of that  
11 policy, passed a series of acts severing the trust  
12 relationship with more than 100 Indian tribes or  
13 bands. And the Termination Act here provided a  
14 number of provisions typical of such acts and that  
15 are relevant to the question before this court with  
16 regard to disestablishment.

17           The opening act -- excuse me, the opening  
18 clause of the Act provides that its purpose "is to  
19 provide for the termination of Federal supervision  
20 over the trust and restricted property of the Ottawa  
21 Tribe of Indians," and I'm jumping forward a little,  
22 "and for a termination of Federal services furnished  
23 to such Indians because of their status as Indians."  
24 Under Section 2 the Secretary of the Interior was  
25 directed to transfer to each member of the Ottawa

1 Tribe unrestricted title to funds or other personal  
2 property then being held in trust by the federal  
3 government. Also under that section, all  
4 restrictions on the land were lifted and the members  
5 received unrestricted title to their land.

6 Section 8A is also very important. "The  
7 Federal trust relationship," and I'm quoting "to the  
8 affairs of the Ottawa Tribe and its members shall  
9 terminate three years after the date of this Act,  
10 and thereafter individual members of the tribe shall  
11 not be entitled to any of the services performed by  
12 the United States for Indians because of their  
13 status as Indians. All statutes of the United  
14 States which affect Indians because of their status  
15 as Indians shall no longer be applicable to the  
16 members of the tribe, and the laws of the several  
17 States shall apply to the tribe and its members in  
18 the same manner as they apply to other citizens or  
19 persons within their jurisdiction." After  
20 litigation in the Indian Court of Claims, Congress  
21 at last provided for the final payments to the  
22 tribes -- excuse me, to the Tribe in the Act of  
23 1967, which is Exhibit 13 in the packet.

24 So when we look at the plain language of  
25 the Termination Act, the Ottawa Tribe lost its

1 federal supervision, and, as I discussed, that's a  
 2 necessary element to reservation status. We find  
 3 that both in Section 1151 and in the Supreme Court's  
 4 opinion in John. And so when that element, federal  
 5 superintendence, was terminated here, so was any  
 6 reservation status. In fact, the Tribe's Amicus  
 7 brief essentially admits this point.

8 On page 20 the Tribe's brief admits  
 9 repeatedly that the termination statute ended the  
 10 federal government's relationship with the Ottawa  
 11 Tribe. Another example, on page 22, "The  
 12 termination statute ended federal supervision of the  
 13 Ottawa Tribe." And that is exactly why the  
 14 Termination Act disestablished the reservation,  
 15 because federal superintendence is a necessary  
 16 element. *B5*

17 The Court of Criminal Appeals, of course,  
 18 asks this court, in its remand order, to apply the  
 19 analysis in McGirt, which I've included for Your  
 20 Honor's convenience as Exhibit 14 in the packet.  
 21 While McGirt is relevant, it is like comparing  
 22 apples and oranges, because the State is taking a  
 23 very different position as to disestablishment here.  
 24 As I've already said, we're not pointing to the  
 25 allotment or statehood era legislation, but

1 termination of the federal supervision of the Tribe.  
2 That's something that did not happen with the Creeks  
3 in McGirt.

4 In fact, one of the arguments that the  
5 State made in McGirt that was rejected is that the  
6 first -- allotment was often the first step in a  
7 plan ultimately aimed at disestablishment. The  
8 Supreme Court agreed, that is often a first step.  
9 Congress' policy at the time of the allotment era  
10 was to -- for a time to continue the reservation  
11 system and trust status of Indian lands, but to  
12 allot tracts to individual Indians for agriculture  
13 and grazing; thus, once all the lands had been  
14 allotted and the trust expired, the reservation  
15 could be abolished.

16 The problem for the State in the case of  
17 the Creek Nation, however, is that while this plan  
18 was set in motion with the General Allotment Act,  
19 Congress never followed through, and that's where  
20 the Supreme Court in McGirt said, "Just as wishes  
21 are not laws, future plans aren't either. Congress  
22 may have passed allotment lands to create the  
23 conditions for disestablishment, but to equate  
24 allotment with disestablishment would confuse the  
25 first step of a march with arrival at its

1 destination."

2           That's the difference here. We don't have  
3 just a first step towards disestablishment. We have  
4 arrival at that destination with the Termination  
5 Act. That history, as far as the various treaties  
6 and legislation regarding the Ottawa Tribe that were  
7 passed in the years prior to termination, are set  
8 out in more detail in the brief in opposition, but  
9 all of that, ultimately, culminated with  
10 disestablishment and termination in the 1954  
11 Termination Act.

12           There's another point I'd like to make  
13 about McGirt. McGirt held that "to disestablish a  
14 reservation, Congress must express" -- excuse me,  
15 "clearly express its intent to do so, commonly with  
16 an explicit reference to session or other language  
17 evidencing the present and total surrender of all  
18 tribal interests." This is language that the  
19 Tribe's brief repeatedly relies on to argue that  
20 there are no words similar to this in the  
21 Termination Act. But I would have two responses to  
22 that.

23           First, we have to look at the context of  
24 McGirt. Again, this is a case that was deciding  
25 whether allotment and statehood era legislation

1 disestablished a reservation, and so the State was  
2 arguing, look at all these things that were taken  
3 from the Tribe, and all the land was passed into  
4 private hands, and so it's in that context that the  
5 Supreme Court is saying, yes, but we still need this  
6 language with the -- you know, present and total  
7 surrender of all tribal interests. Again, here,  
8 it's really a different kind of case, because it's  
9 this federal superintendence element that Congress  
10 is clearly expressing its disestablishment of the  
11 reservation through.

12           The second thing I would add is in the  
13 same breath as that quoted language, the McGirt  
14 court said that "Disestablishment has never required  
15 any particular form of words." So we don't need  
16 magic words. We do need words that clearly express  
17 Congress' intent, but here Congress did that.  
18 Another source the McGirt court used is looking at  
19 language from other statutes to decide what Congress  
20 meant as far as the statutes aimed at the Creeks.  
21 So we can do that here as well.

22           As I said before, there were many other  
23 tribes and bands subject to the termination era, and  
24 one such example, that I've included as Exhibit 15  
25 in the packet, is the Termination Act for the

1 Menominee Tribe, which was very similar to the  
2 Ottawas. Then Exhibit 16 in the packet is a Supreme  
3 Court case, Menominee Tribe of Indians vs. United  
4 States. And the Supreme Court in that case was  
5 examining a claim regarding the Menominee's fishing  
6 rights in a prior reservation, and they never  
7 questioned whether the reservation was  
8 disestablished because of the Termination Act. The  
9 dissent expressly says more than once that the  
10 reservation was terminated and the majority never  
11 disagrees with that. So it is admittedly dicta, but  
12 it is telling that there was no question among any  
13 of the justices that the Termination Act had  
14 disestablished the reservation, and so it provides  
15 persuasive authority here where we have a very  
16 similar Termination Act with the Ottawa.

17           And the Menominee Tribe case also  
18 forecloses another argument relied on by the Tribe.  
19 On page 22 of their brief they argue that because  
20 the Termination Act preserved the Tribe's water  
21 rights, it must have not terminated the reservation,  
22 but this is nearly identical to the issue in  
23 Menominee Tribe. The Supreme Court held that the  
24 Tribe still had fishing rights in the prior  
25 reservation, but it never held that there was a

1 reservation. So, in other words, if the Tribe's  
2 theory there -- here, excuse me, were correct, that  
3 water rights equal continuing reservation, the  
4 Menominee Tribe would have turned out differently.  
5 The Supreme Court would have necessarily found  
6 there's still a reservation when it found there were  
7 water rights.

8           The final thing I need to discuss is the  
9 1978 Act that restored federal recognition of the  
10 Ottawa Tribe, included as Exhibit 17 in your packet.  
11 And among other tribes at issue in that act, this  
12 act reinstated the Ottawa Tribe as a federally  
13 supervised and recognized Indian Tribe; however,  
14 nothing in the Restoration Act mentioned the former  
15 lands of the Ottawa Tribe, and it certainly didn't  
16 recreate or reestablish a reservation for them.  
17 Going back to McGirt, the Supreme Court says that  
18 Congress doesn't have to use the word, reservation,  
19 or any particular language, but it must evidence  
20 some kind of set-aside for a Tribe, as examples  
21 where land is either held in trust for the benefit  
22 of the Tribe or owned by the Tribe in fee simple, as  
23 was the case of the Creeks.

24           Here, when we look at the Reinstatement  
25 Act for the Ottawa, we don't have any kind of

1 set-aside, and so even if you've got federal  
2 supervision, again, you don't have a set-aside of  
3 the land for the Tribe. And practically speaking,  
4 this outcome makes sense as well, as far as the  
5 conclusion, there's no recreation of the  
6 reservation, because to do so -- to recreate it  
7 would have been very complicated. This underscores  
8 the fact that Congress would have done so expressly.  
9 The Tribe's original lands had been allotted as the  
10 brief in op covers. It had no recognized land base  
11 by the time of the Termination Act, all restrictions  
12 on the original land had been removed, land has  
13 passed into non-Indian hands, and so if Congress  
14 were to restore that reservation and backtrack on  
15 decades of settled expectations, it would have made  
16 it clear that's what it's doing. And again, we can  
17 look at contemporaneous acts of Congress to discern  
18 its meaning, and, here again, the Tribe's brief --  
19 I'll rely on their own example. They point to the  
20 Restoration Act of the Menominee Tribe and I  
21 believe -- I did not have this. I prepared my  
22 exhibit packet before I got their brief, but I  
23 believe Mr. Wright has this Act, if we may approach  
24 and give that to Your Honor.

25 THE COURT: All right.

1 MR. WRIGHT: What was our last number we  
2 had on the exhibits, Judge?

3 THE COURT: Eighteen.

4 MR. WRIGHT: So if it pleases the court,  
5 I'll mark this State's 19.

6 THE COURT: You are offering that as an  
7 exhibit at this time?

8 MR. WRIGHT: Yes, sir.

9 MS. HUNT: Thank you.

10 THE COURT: All right. Mr. Terry, do you  
11 have any objection to State's 19, which is the  
12 Restoration of Federal Supervision, Section 903 of  
13 the -- that's the best I can do.

14 Has this been forwarded to Mr. Terry?

15 MS. HUNT: It hasn't.

16 THE COURT: Okay. Mr. Terry, do you have  
17 any objection to State's Exhibit 19 as I've  
18 described it? I can have Ms. Hunt further describe  
19 it if that might help you.

20 MS. HUNT: Yes.

21 MR. TERRY: I'm not quite sure, Judge. Do  
22 I have an objection to the State's argument or --  
23 absolutely, I have objection to the argument if the  
24 State believes that the Termination Act dissolved  
25 the treaty.

1 THE COURT: Okay. What I'm --

2 MR. TERRY: What happened to the  
3 reservation.

4 THE COURT: What I'm asking is, they have  
5 offered another exhibit besides 1 through 18 that  
6 you've earlier agreed could be admitted.

7 Ms. Hunt, if you would --

8 MS. HUNT: Sure.

9 THE COURT: -- more descriptively explain  
10 for Mr. Terry, since he doesn't have a copy of this,  
11 for him what this is?

12 MR. WRIGHT: If you don't mind, Judge,  
13 since I've got it right in front of me.

14 THE COURT: Sure.

15 MR. WRIGHT: If that would be okay.

16 THE COURT: Mr. Wright is going to  
17 explain.

18 MR. WRIGHT: So, Patrick, what we're  
19 offering is -- I mean, for the record, Title 25 of  
20 the U.S. Code, Sections 903 et seq, which is the  
21 Menominee Restoration Act. So this is from 1973  
22 when the Menominee Tribe regained their federal  
23 recognition. So these were the laws --

24 MR. TERRY: Okay.

25 MR. WRIGHT: -- that Congress passed in

1 relation to their regaining recognition. We're  
2 offering it to the court to show how this is  
3 slightly different than the Ottawa Tribe's  
4 restoration.

5 MR. TERRY: Correct.

6 MR. WRIGHT: Okay.

7 MR. TERRY: This is different. I will  
8 stipulate to the accuracy and veracity of that Act.  
9 Thank you.

10 MR. WRIGHT: Thanks, Patrick.

11 THE COURT: All right. So you're agreeing  
12 to the admission of that statute then?

13 MR. TERRY: I agree that that statute is  
14 valid, yes, sir, it is, and you can receive it.

15 THE COURT: All right. I'm going to go  
16 ahead and admit State's Exhibit 19, which is the  
17 statute Mr. Wright just spoke about.

18 (Exhibit 19 admitted into evidence.)

19 THE COURT: All right. Ms. Hunt, go ahead  
20 and continue.

21 MS. HUNT: Yes. So I'm going to find the  
22 relevant section I was going to talk about, so I can  
23 direct Your Honor to that.

24 THE COURT: Yes, if you would.

25 MS. HUNT: Okay. So the part I'm going to

1 talk about is under Section 903d, Subsection C.

2 THE COURT: Okay.

3 MS. HUNT: So again, the Tribe's brief  
4 points to both this Restoration -- excuse me,  
5 Restoration Act and to a Wisconsin case, holding  
6 that it recreated the Menominee reservation, but I  
7 disagree with the Tribe's assertion that this  
8 Restoration Act is nearly identical -- that is the  
9 phrase they used on page 26 of the brief -- to the  
10 Restoration Act we have here with the Ottawa. This  
11 section I've directed Your Honor to is exactly the  
12 important distinction. In particular, this  
13 subsection deals with property, and the sentence  
14 almost all the way down, I would direct the court  
15 to, talks about the transfer of land stating, "The  
16 land transfer shall be taken in the name of the  
17 United States in trust for the Tribe and shall be  
18 their reservation." So that is a clear set-aside,  
19 you know, Congress is even using the word,  
20 restoration, and we have no comparable language in  
21 the Ottawa's Restoration Act, so, in fact, this  
22 underscores the fact that Congress did not clearly  
23 express its intent to recreate any reservation with  
24 the Ottawa's Restoration Act.

25 We have another example of this explained

1 in the brief in opposition, and that's discussed on  
 2 pages 11 and 20 of the brief in opposition. Then  
 3 I've included the Restoration Act as Exhibit 18, and  
 4 that involves a different band of Ottawas not  
 5 included here -- excuse me, not involved here. And,  
 6 again, Congress used very specific language as far  
 7 as the set-aside stating, "The land acquired by or  
 8 transferred to the Secretary under or pursuant to  
 9 this section shall be taken in the name of the  
 10 United States in trust for the bands and shall be  
 11 part of the respective band's reservation."

12 THE COURT: Which exhibit were you just  
 13 reading from?

14 MS. HUNT: Exhibit 18. So that is a  
 15 different band of Ottawa, in which their Restoration  
 16 Act expressed clear intent by Congress to recreate a  
 17 reservation. So again, using the kind of statutory  
 18 analysis in McGirt where we compare acts of Congress  
 19 to determine whether its words intend to reestablish  
 20 a reservation, we have no similar language of  
 21 set-aside in the Ottawa's Restoration Act. Congress  
 22 knows how to disestablish a reservation and used  
 23 language evidencing that. Likewise, it knows how to  
 24 recreate a reservation, as shown in these examples,  
 25 and it did not do that here.

1 I have nothing further. I know I've  
2 covered a lot of information, and so I'm happy to  
3 provide briefing or proposed findings of fact and  
4 conclusions of law to this court, if that would be  
5 helpful.

6 THE COURT: Okay. Thank you, Ms. Hunt.

7 MS. HUNT: Thank you, Your Honor.

8 THE COURT: Be seated for the moment.

9 Mr. Terry, the State has indicated, other  
10 than the exhibits that they have offered here and  
11 that have been admitted, that they are offering no  
12 further evidence as far as their argument here that  
13 they do have jurisdiction, so let me address that  
14 issue first. I've heard, of course, also from  
15 Ms. Hunt her argument here, but do you have any  
16 evidence that you wish to present to the court,  
17 whether it's by testimony or exhibits to contradict  
18 what the State is asserting here, the evidence that  
19 they have put forward regarding their contention to  
20 still have jurisdiction of this case or did at the  
21 time this was tried?

22 MR. TERRY: Yes, Your Honor, thank you.

23 THE COURT: Go ahead. Take it pretty  
24 slow. It's a little harder with this Zoom to  
25 understand everybody than the people that are right

1 here in court. So if you will, kind of go slow for  
2 us; okay?

3 MR. TERRY: That will be fine, sir. Thank  
4 you.

5 Your Honor, I would point out to the  
6 State's last statement indicated that Congress knows  
7 how to disestablish a reservation. The State's  
8 reliance on the 1956 Termination Act is a poor  
9 window in which to drive the sovereignty truck  
10 through. There is nowhere in the language of the  
11 1956 Termination Statute that expressly repeals or  
12 disestablishes any reservation boundary, whether it  
13 be for the Ottawas or the Peoria or the Wyandotte  
14 who had similar termination statutes entered around  
15 approximately the same time by Congress.

16 One thing, the Termination Statute ended  
17 the federal supervision of the tribal property,  
18 which is true, it ended certain federal services  
19 available to individual Indians, and it made state  
20 law applicable to tribal members; however, nothing  
21 in the Termination Statute showed an unequivocal  
22 intent to disestablish the Ottawa reservation. The  
23 applicable laws that the Termination Statute may  
24 have been beside -- which that means that's sales  
25 tax and property tax, but it certainly did not

1 discuss tribal boundaries or tribal properties.

2 While the Termination Statute ended the  
3 federal government's relationship with the Ottawa  
4 Tribe, an examination of the language of that Act  
5 reveals nothing in it that evinces explicit  
6 Congressional intent to disestablish the Ottawa  
7 reservation, and that is required by McGirt.

8 Now, Justice Gorsuch was very clear in  
9 McGirt. In all this history, there simply was at no  
10 moment when any act of Congress dissolved the Creek  
11 Tribe or disestablished its reservation, and this is  
12 the same year. This is the truth in this case.  
13 While there were a number of statutes enacted, the  
14 State of Oklahoma asserted sovereignty over the  
15 Indians of -- in a tribe, there never was an act by  
16 Congress that clearly disestablished the reservation  
17 boundaries. We want to ascertain and follow the  
18 original meaning in the law. And the law was clear  
19 in the 1956 Act that the Tribe's formal relationship  
20 with the government would be severed. But,  
21 specifically, in Section 11, I believe, of that Act,  
22 the federal government discusses that no language  
23 within this Act shall ever break the water rights of  
24 the Ottawa Indian Tribe.

25 Now, that language is significant, Your

1 Honor, because it indicates very clearly that the  
2 federal government continues to view the land as  
3 being reservation land and that the Ottawas retain  
4 their water rights. Why would they say that they  
5 have water rights to anything if they were not bound  
6 by treaty? And that is correct, Section 11.

7 "Nothing in this act shall ever break any water  
8 rights of the Ottawa Tribe or its members." We can  
9 see clearly, here, Your Honor, that Congress'  
10 subsequent treatment of the Tribe, even as time  
11 progressed, clearly recognized that they had water  
12 rights within the reservation boundaries established  
13 under the 1867 Act.

14 While the State's argument is very  
15 powerful regarding the Menominee Tribe, it falls  
16 flat here with regard to the Ottawa, members of the  
17 Tribe and their sovereign status. The Termination  
18 Statute, of course, as you know, has been argued and  
19 was repealed, and when it was repealed, it was clear  
20 that Congress at that time did not wish to reinstate  
21 their former relations and the -- excuse me.

22 THE COURT: You might let us know, Mr.  
23 Terry. Mr. Terry, just a moment. Mr. Terry.

24 MR. TERRY: Pardon me?

25 THE COURT: Would you let us know what

1 exhibit that you're referring to? Could you do that  
2 for our record?

3 MR. TERRY: That exhibit, the State's  
4 exhibit is Number 12, and then it is on page one,  
5 two -- three of Number 12, Section 11 of 70  
6 Statutes. It's on 965 as they list it, your Exhibit  
7 12, 965. This is the 1956 Termination Statute that  
8 the State finds so compelling. I point to the fact  
9 that Section 11 clearly indicates that Congress is  
10 aware of the rights of the Ottawa Tribe, because  
11 water rights are an integral part of any executive  
12 decision by the President or the Congress to allot  
13 land or to reserve land for a specific use by a  
14 specific tribal sovereign.

15 Okay. So -- here we go. The Restoration  
16 Act, I would like to point to, Your Honor --

17 THE COURT: Which is exhibit?

18 MR. TERRY: State's Exhibit -- let me get  
19 it. I believe it's a little bit -- I'm sorry, Your  
20 Honor, I'm a little bit --

21 MS. HUNT: Exhibit 17.

22 MR. TERRY: Okay. Let's go to Exhibit 17,  
23 is the act to reinstate Wyandotte and Peoria and  
24 Ottawa Indian Tribes as federally supervised. In  
25 that 17, a review would indicate that there is

1 language that clearly revokes any implication that  
2 the Termination Statute might have imposed. The  
3 termination of the federal Ottawa Tribe does not  
4 serve as an explicit expression by Congress of its  
5 intent to disestablish the Ottawa reservation and  
6 that the 1978 Act would clearly indicate, the  
7 reservation statute expressly repeals the 1956  
8 Termination Statute and, otherwise, reinstated any  
9 treaty rights that may have been diminished by the  
10 Termination Statute.

11 Any legal relevance of the 1956 statute  
12 was divested in 1978. It did not provide a savings  
13 clause, similar to what our state constitution has,  
14 to address changes in statutory authority. You know  
15 our state savings clause provides if you're  
16 convicted today of a crime under the law before a  
17 bench of competent jurisdiction and you receive a  
18 sentence of incarceration or a fine and then 10 days  
19 later that law is repealed and is decriminalized,  
20 under our state savings clause, the conviction  
21 standing on the first day cannot be repealed by  
22 intent.

23 Congress is very clear when it wants to  
24 address issues like this, and it also would include  
25 language pertinent to that fact. Not only did

1 Congress not provide language in the 1956  
2 Termination Act regarding reservation  
3 disestablishment, the fact is, even if they had,  
4 they repealed it in the 1978 statute. It was  
5 divested. Everything in 1956 was divested. It was  
6 as if it never happened. There was no indication  
7 that Congress at all wished to do anything but  
8 correct an injustice by implicating -- by passing  
9 the 1978 statute.

10 I would point out that Congress knows how  
11 to take its land back. They are not unfamiliar with  
12 that. There have been historical references  
13 throughout the 20th century that Congress has moved  
14 to take back land, but not in this instance. The  
15 area of land in question was so small and seemingly  
16 insignificant to the power of the federal government  
17 that they just didn't think to take it back, and  
18 there is no Act that can be pointed to by the State  
19 or the respondent that clearly shows that the land  
20 was dissolved or disestablished.

21 Furthermore, Your Honor, as you well know,  
22 the Ottawa Indian Tribe, as well as the other eight  
23 tribes or the nine tribes reaching out there, all  
24 have a robust relationship with one another and with  
25 other sovereigns and the State of Oklahoma. They

1 have never stopped living. And simply by passing,  
2 by saying, oh, we're not going to provide you  
3 federal assistance anymore, that in no way says  
4 we're taking your land back, and they didn't. They  
5 haven't, and they won't now.

6 As far as Tribal sovereignty is there, I  
7 believe the State has not made its case that  
8 anything has occurred that would indicate that the  
9 discretion of the Congress has been reversed. As  
10 I'm going to point out in McGirt, "once a lot of  
11 land is set aside for an Indian reservation," as is  
12 the case here for the Ottawa Indian Tribe in 1867,  
13 "no matter what happens to the title of that  
14 individual plot within the area, the entire block  
15 retains its reservation status until Congress  
16 explicitly indicates otherwise."

17 Now, Your Honor, I know you have a lot of  
18 material to go through up there before you enter  
19 your order, and I would urge you to review it  
20 seriously, but the reservation statute was  
21 established in the 1867 Treaty, which is marked as  
22 People's Exhibit 11. People's Exhibit 11, Section  
23 16 clearly points to the fact that Congress  
24 satisfied this land -- oh, my Lord. She got -- I'm  
25 sorry, I'm sorry, Your Honor, I misspoke. That is

1 Exhibit 11, I'm sorry, Article 16 provides clearly  
2 that "The west part of the Shawnee reservation,  
3 ceded to the United States by the third article, is  
4 hereby sold to the Ottawas at one dollar per acre;  
5 and for the purpose of paying for said reservation  
6 the United States shall take the necessary amount,"  
7 then it gives the physical parameters, the  
8 geographic location of the reservation, which the  
9 State has kindly enough provided in the map, which  
10 is Exhibit Number 2.

11 Exhibit Number 2 clearly shows the  
12 boundaries of the Ottawa reservation as established  
13 under Article 16 of the 1867 Act, and there has been  
14 nothing since regarding this land or the language  
15 establishing this reservation that has been enacted  
16 by any act of Congress, who has the only authority  
17 to take away that reservation boundary.

18 The court in McGirt said that unlawful  
19 acts committed with sufficient vigor over a  
20 sufficiently long period of time are not enough to  
21 justify the unlawful acts. And simply because the  
22 infrastructure in Miami, Oklahoma, has grown up  
23 within the historical boundaries of the Ottawa  
24 reservation does not in any way displace or  
25 disestablish those boundaries.

1           While the State's vigorous argument  
2 regarding the 1956 Act appears to lay itself down in  
3 credibility to the conclusion that perhaps the  
4 relationship of the members of the Tribe was  
5 formally terminated with the Bureau of Indian  
6 Affairs and the Department of Interior, there is  
7 nothing in that act or any other legislation that  
8 indicates that the boundaries established under  
9 Article 16 of the 1867 Act have been disestablished.

10           What they did with the Menominee tribes in  
11 Wisconsin or what they did with the Mohawk Tribe in  
12 Nebraska or in any of the hundreds of various tribes  
13 around the country, that's moot. It's nothing but  
14 smoke and mirrors. The fact is, the Treaty of 1867,  
15 Article 16 established the reservation, and it said  
16 so by name, and nothing since has occurred that  
17 would in any way effectively disestablish or  
18 terminate those reservation boundaries.

19           Your Honor, as to this point I am no  
20 expert in Tribal law, but I think that the evidence  
21 is very, very clear that the Treaty was established  
22 in 1867, the reservation boundaries were set, there  
23 were many subsequent acts and incidents, not only by  
24 the State of Oklahoma but by the federal Congress,  
25 regarding the Tribe and tribal members, but once

1 again, there is nothing that can be pointed to that  
2 clearly contains language disestablishing this  
3 reservation boundary.

4 As such, given the fact that the State has  
5 stipulated that I'm an American Indian, that I'm a  
6 member of a Tribe and that I have a quantum of  
7 Indian blood, that has appeared to satisfy the first  
8 prong of the two prong McGirt litmus test.

9 The only other prong left as a question of  
10 fact for you to decide, Your Honor, is whether the  
11 boundary still exists, it still survives. I would  
12 ask you to look to the Brief of Amicus that was  
13 filed on January 6th, 2021, on behalf of the --  
14 Joseph Halloran, who is a member attending these  
15 proceedings. The brief clearly discusses all of the  
16 aspects of the establishment and the history of the  
17 Tribe, up to and including the date where the search  
18 incident to my arrest occurred, July 12th, 2012.

19 Having said that, I hope I've made it  
20 clear, I hope you could hear me clearly. I'm having  
21 a little trouble hearing you, but I think I've made  
22 the case, and other courts seem to agree, that as  
23 far as under McGirt, this treaty boundary for the  
24 reservation of the Ottawa Indian Tribe still exists  
25 even today. I would ask you, Your Honor, if counsel

1 for the Ottawa have a moment or two to argue before  
2 you, I think perhaps they can make it more clear  
3 about how this boundary remains intact, and I would  
4 ask that you would allow them to have five minutes,  
5 if possible.

6 THE COURT: All right.

7 MR. TERRY: Having said that, that's my  
8 statement to the court for now.

9 THE COURT: All right.

10 MR. TERRY: The introduction of the other  
11 evidence by the State that I haven't seen, but which  
12 I stipulate to, may indicate that I should have  
13 maybe ten more days to brief, if necessary, but it  
14 doesn't seem like they have put much of a defense  
15 up, based on the fact that they have relied on the  
16 Menominee Tribe relationship with Wisconsin and not  
17 on the Ottawa Tribe's relationship with Oklahoma. I  
18 just don't think they have met their burden.

19 THE COURT: All right.

20 MR. TERRY: Having said that, Your Honor,  
21 I hope I was clear enough, and I would refer you to  
22 my brief filed October 18th, 2018, before the Court  
23 of Criminal Appeals, which was remanded back to this  
24 court on October 14th, 2020, as one of the review  
25 instruments available to the court in making its

1 determination as to the veracity of my claim, and I  
2 would refer you also to the brief of Amici, that was  
3 filed January 6th, 2021, as far as establishing the  
4 real time relationship with the Ottawas, the State  
5 of Oklahoma, and the federal government. Their  
6 evidence, too, concludes clearly, under even a  
7 cursory review of the statutes, there has been  
8 nothing said by Congress to disestablish the  
9 reservation boundaries or to take away the  
10 reservation or Indian country status of the land.  
11 Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Terry. I've  
13 heard you very well. You've very eloquently made  
14 your position known here. I take it you don't have  
15 any other evidence actually to offer, you primarily  
16 offered argument referring to the exhibits that were  
17 already admitted here; am I correct there? Am I  
18 correct that there's no other evidence, Mr. Terry?

19 MR. TERRY: No -- yeah, there is. That is  
20 correct. I've already submitted a couple of motions  
21 to you, Your Honor, and you should have one today  
22 that states it's a reference to another Indian  
23 sovereignty case that was decided on December 9th,  
24 and I filed a motion with you today that is asking  
25 you to review this in your discussion. This is the

1 case of Keith Davis vs. the State of Oklahoma and  
2 this is a -- oh, Lord. Here we go. Davis vs.  
3 Oklahoma. It was decided on December 9th, and it  
4 talks about a similar case remanded back, but it is  
5 talking about the Choctaw Nation. Do you happen to  
6 have that motion yet, Judge?

7 THE COURT: I don't have the file here in  
8 front of me.

9 MR. TERRY: Okay. Well, I sent this to  
10 the court this morning, the court clerk's office.

11 THE COURT: Okay.

12 MR. TERRY: I was asking you to take  
13 judicial notice of Davis vs. Oklahoma. And in  
14 Davis, on December the 9th, as filed with the Court  
15 of Criminal Appeals, they had the same dilemma.  
16 They had the same fact question before them, if the  
17 petitioner is recognized as an Indian and whether he  
18 has Indian blood, and second, whether the crime  
19 occurred within the boundaries of Indian country.

20 Using the analysis set forth in McGirt, a  
21 judge down in Latimer County, Oklahoma, entered an  
22 order determining that the reservation boundary of  
23 the Choctaw Nation is alive and well today, as a  
24 sovereign termination and other statutes, and that  
25 it completely encompasses Latimer, Pittsburg and

1 Haskell Counties. I'm just asking Your Honor to  
2 review this motion as compelling evidence showing  
3 what other judges in courts of common jurisdiction  
4 throughout our great state have decided regarding  
5 the McGirt question that is before them. And I  
6 spoke to, maybe, Brittany this morning in the  
7 court's clerk's office, and I believe they received  
8 my fax. And if they didn't, I will send it again,  
9 and I've asked them to put it in the court file for  
10 you to review when you are making your judicial  
11 determination as to the question that's been posed.

12 THE COURT: Okay. I'll certainly look  
13 into it. Did you say that's --

14 MR. TERRY: I have not submitted any other  
15 evidence that has not already been stipulated to by  
16 the State.

17 THE COURT: All right. Thank you. Did  
18 you say that was out of Latimer County?

19 MR. TERRY: Thank you, Your Honor.

20 THE COURT: Sir, did you say that was out  
21 of Latimer County? Mr. Terry?

22 MR. TERRY: Yes, sir.

23 THE COURT: Did you say that decision was  
24 out of Latimer County --

25 MR. TERRY: Latimer County.

1 THE COURT: Latimer?

2 MR. TERRY: Latimer County, L-A-T-I-M-E-R,  
3 that is Case Number CF-04-05, and it's also at the  
4 Court of Criminal Appeals under PC-2019-451.

5 THE COURT: Okay. Thank you.

6 MR. TERRY: You're welcome, sir. Thank  
7 you.

8 THE COURT: Now, I do want to get back --  
9 or get on to Mr. Mallory or other tribal individuals  
10 that have filed Amicus briefs. I certainly will  
11 allow to you present argument today. Are you ready  
12 to do so?

13 MR. HALLORAN: Yes, Your Honor.

14 THE COURT: All right. You are  
15 Mr. Halloran, correct?

16 MR. HALLORAN: Mr. Halloran, yes, Your  
17 Honor. Thank you.

18 THE COURT: Go ahead with your argument,  
19 sir.

20 MR. HALLORAN: I think at this point, Your  
21 Honor, I probably ought to defer all of my time to  
22 Mr. Terry. He did such a fine job, but I will  
23 proceed -- I'll proceed to provide the highlights of  
24 the brief that we submitted with Your Honor. I will  
25 walk you, Your Honor, through the history backwards,

1 because I think what we need to do is we need to  
2 determine what the law is today, what the law was in  
3 2012, in 2017 when Judge Haney considered this  
4 matter, and today.

5           The law applicable today, Your Honor, is  
6 the law that fully reinstated all rights and  
7 privileges and expressly repealed the Termination  
8 Act of 1959. What that means, Your Honor, is that  
9 the Ottawa Tribe was, following restoration, a tribe  
10 that had continued to exist through the time of  
11 termination as a sovereign and had been returned to  
12 a full relationship with the United States. I think  
13 it's also important, Your Honor, to consider that  
14 following restoration, whatever the State might  
15 suggest the Termination Act did, the effect of the  
16 law as an express repeal -- the effect that the  
17 restoration order as an express legislative appeal  
18 of the Termination Act means that the court must  
19 proceed as though that law never existed. It is a  
20 legal nullity in any statutory language, legislative  
21 history. Any material related to that legislation  
22 is an empty set from the perspective of the court's  
23 consideration of jurisdiction.

24           We cite case law to Your Honor, that was  
25 not responded to by the State, regarding the effect

1 of an express repeal, and the effect of the express  
2 repeal, as I've indicated, is that the repealed  
3 statute is to be treated as though it never existed.  
4 That's significant, Your Honor. That's significant  
5 with respect to the Ottawa Tribe's treaty  
6 established reservation boundaries, among other  
7 rights.

8           It's interesting to consider, Your Honor,  
9 what the termination period was intended to affect  
10 and what it was not intended to affect. And the  
11 termination period represented a very short period  
12 of time of roughly 20 years where the United States  
13 decided that it was going to get out of the Indian  
14 business, and what I mean by that is it was going to  
15 get out of the responsibility to engage in a  
16 government-to-government relationship to provide  
17 services and to provide supervision over Indian  
18 lands; okay? Case law has demonstrated what is --  
19 what logically follows from that, which is what the  
20 termination period did not do. You might be  
21 confused by that, given the argument of the State  
22 which would imply to the contrary.

23           Termination period policy did not end the  
24 existence of the Tribe and, in fact, could not end  
25 the existence of the Tribe as an independent

1 sovereign exercising its own constitutional rights.  
2 In addition, the termination period policy has been  
3 interpreted by the United States Supreme Court in  
4 the Menominee decision and its progeny that the  
5 termination era policy had no intention to and did  
6 not affect the true rights of tribes terminated.

7           Contrary to the State's representation,  
8 the court in Menominee did reach a decision with  
9 respect to whether the Menominee tribal -- Tribe and  
10 its members continue to benefit from treaty  
11 protected rights following its termination, and it  
12 said that it would -- it was its conclusion that it  
13 would not interpret the abrogation of treaty rights  
14 in a back-handed way, that the abrogation of treaty  
15 rights has to be clear and it was clearly not the  
16 intention of termination period legislation to do  
17 that. In fact, the primary sponsor of the  
18 termination legislation was quoted at the time that  
19 it was enacted for the Menominee Tribe that the  
20 enactment in no way affected any treaty reserved  
21 rights of the Tribe and its members.

22           THE COURT: Now, you were referring to  
23 which exhibit, sir? You were referring to which  
24 exhibit there you just read from a moment ago?

25           MR. HALLORAN: The Menominee -- the United

1 States versus -- Menominee vs. The United States.

2 I'm not sure what exhibit.

3 THE COURT: I think that was --

4 MR. HALLORAN: It is United States Supreme  
5 Court 1968 decision at 391 U.S. 404.

6 THE COURT: Yes. Okay. That was Exhibit  
7 16, I believe. Okay. Go ahead.

8 MR. HALLORAN: So the issue, Your Honor,  
9 of the implication of termination era legislation is  
10 an empty set. It is a distinction between Tribe --  
11 the tribes of the 1867 Treaty is different, and that  
12 is because in the 1980 (inaudible) --

13 THE COURT: Mr. Halloran, I've lost --

14 MR. HALLORAN: (Audio distortion).

15 THE COURT: Mr. Halloran, could you back  
16 up just --

17 MR. HALLORAN: (Audio distortion).

18 THE COURT: Mr. Halloran? Can you hear  
19 me, Mr. Halloran? Can you hear me? If you would  
20 back up just a moment, we've lost our connection  
21 there for just a short time. If you could back up  
22 just a few sentences to what you were saying because  
23 we lost you there a little bit.

24 MR. HALLORAN: Are you hearing me now,  
25 Your Honor?

1 THE COURT: Yeah, we hear you now, but  
2 there was a few sentences there that you were trying  
3 -- that you were saying but just weren't coming  
4 through on this side. You were referring, I  
5 believe, to the Menominee vs. U.S., Section -- or  
6 the Exhibit 16 had mentioned that in there, that  
7 quoted, I believe, that the federal government would  
8 not in a back-handed way, that that particular --  
9 you may remember that that you quoted from that.

10 MR. HALLORAN: Yes.

11 THE COURT: From there forward, we were  
12 losing you.

13 MR. HALLORAN: So, Your Honor, that  
14 decision has been followed by a number of courts in  
15 the Ninth Circuit and including in the Tenth  
16 Circuit, in United States vs. Felter, where the  
17 court, applying Menominee, determined that a Ute  
18 tribal member continued to benefit from treaty  
19 rights reserved by the Ute Tribe even after the Ute  
20 Tribe Termination Act.

21 I think it's important, Your Honor, for  
22 this purpose. The Termination Act, in applicability  
23 to treaty rights, is relevant because the Ottawa  
24 Tribe's reservation is established by Article 16 of  
25 the 1867 Treaty. It is a treaty right that a

1 reservation exists irrespective of the landholding  
2 within its boundaries. So reliance on the  
3 Termination Act -- while ignoring the effect of the  
4 express repeal, reliance on the Termination Act does  
5 not get the court to the answer that it needs  
6 because the Termination Act, even if it existed with  
7 any legal effect, has been interpreted by the courts  
8 not to adversely affect treaty rights, and the  
9 Ottawa reservation is a treaty right established  
10 under Article 16 of the 1867 Treaty.

11 I think, Your Honor, that it is also  
12 important to note that -- so we're walking back in  
13 time, right? Let's deal with what the law is right  
14 now, and the law right now is there is no  
15 Termination Act to interpret. There is (Zoom froze,  
16 inaudible) -- even if it did apply, it did not  
17 affect treaty rights reserved under the 1867 Treaty.

18 Moreover, it's important to take a look at  
19 what the Restoration Act did. In addition to its  
20 express repeal language, it was very clear that the  
21 restoration order reversed any diminishment or loss  
22 of treaty or other rights of the inherent rights of  
23 the Tribe that were affected by the Termination Act.  
24 The statute says that it will -- that any -- "that  
25 the statute reinstated all rights and privileges of

1 each of the tribes restored and their members under  
2 federal treaty, statute, or otherwise, which may  
3 have been diminished or lost pursuant to the Act to  
4 them which is hereby repealed."

5 I don't know how or why we would need to  
6 look at implications of other tribes' termination  
7 and restoration legislation when the Ottawa  
8 restoration legislation is so crystal clear. It  
9 restored all treaty rights and privileges that may  
10 have been affected by the termination statute. So  
11 not only did the restoration statute expressly  
12 vacate, expressly repeal the termination statute,  
13 but it went a step further and said all rights that  
14 may have been diminished are restored.

15 Now, the State argues to you, flipping the  
16 burden, flipping the legal analysis on its head,  
17 suggesting, well, we don't see any language that  
18 expressly says that the reservation continues to  
19 exist, and without that language, the United States  
20 didn't intend to create a reservation, but, Your  
21 Honor, that's not the test. That's not the test.  
22 We're not establishing a reservation. What the  
23 restoration statute does is make clear that all  
24 rights that existed in 1959 exist today, period,  
25 fully.

1                   So the question is, did the Ottawa  
2 reservation exist before the Termination Act?  
3 There's been no dispute or argument to the court  
4 that the Ottawa reservation boundaries did not exist  
5 at the time of the Termination Act. The State can't  
6 turn legislative analysis on its head and suggest  
7 that an express repeal and restoration of rights is  
8 somehow inadequate because it doesn't spell out  
9 every single right restored and that those rights  
10 would be excluded if not expressed. The entire  
11 repeal of the statute speaks to the legal undoing of  
12 the nefarious effects, all effects of the  
13 termination statute.

14                   So, Your Honor, I think that it's  
15 important to read the law and interpret the law and  
16 apply the law as it exists today, and understanding  
17 what law is effective and valid and what isn't.

18                   THE COURT: Anything else, Mr. Halloran?

19                   MR. HALLORAN: Yes, Your Honor, I'm just  
20 reviewing my notes.

21                   THE COURT: That's fine. Take your time.

22                   MR. HALLORAN: So I think, Your Honor,  
23 that it's important that following the 1978  
24 Restoration Act that the Ottawa Tribe which, as I've  
25 indicated, continued doing business as a sovereign

1 tribe exercising authority over its people and any  
2 of its lands, was restored to a full  
3 intergovernmental relationship. More importantly,  
4 any rights that were lost, be they federal  
5 supervision of land that the Tribe might acquire on  
6 its reservation, health care, other benefits that  
7 come from that intergovernmental relationship, those  
8 are enormously important to the Tribe, and the Tribe  
9 is a thriving, growing, self-determined tribal  
10 government today.

11 But let's not mistake the fact that the  
12 United States determining to restore that  
13 relationship is -- is in any way limiting to what  
14 the restoration statute did against any other  
15 argument, and that it was to restore all rights and  
16 privileges under any treaty or otherwise, and that  
17 includes, in the event there's any question about  
18 the status of the Ottawa reservation following the  
19 Termination Act, it restored all rights under the  
20 treaty, the applicable treaty, the 1867 Treaty, and  
21 the applicable article is Article 16, which  
22 establishes the boundaries.

23 So here now in the 21st century, it  
24 happens that Mr. Terry was engaged in unlawful  
25 conduct on an Indian reservation established nearly

1 two centuries earlier, and, as a result, his conduct  
2 was subject to prosecution by the feds and, yes,  
3 even the Tribe, if it were to choose to exercise its  
4 jurisdiction, but not the State of Oklahoma, because  
5 the land within the boundaries of the Ottawa  
6 reservation constitutes Indian country under 1153,  
7 and the jurisdiction of the State does not extend to  
8 conduct -- criminal conduct within Indian country.

9 I want to review, Your Honor, a couple of  
10 additional matters with respect to the State's  
11 argument. In discussing -- in discussing language  
12 regarding the Ottawa Termination Act and other  
13 tribal termination acts, the State suggests that the  
14 court must consider the "context" and that there are  
15 no magic words for disestablishing a reservation.  
16 Now, that is language that you may have seen argued  
17 to a court before McGirt.

18 Matter of fact, it was an argument made in  
19 McGirt based on the test -- the announced -- the  
20 three-part test announced in Solem vs. Bartlett, but  
21 McGirt made very clear that its test, the three-part  
22 test is not a balancing test, and the court was very  
23 clear that any language regarding the  
24 disestablishment of a reservation must be a clear  
25 expression of Congress on the face of the statute.

1 Legislative history, contemporaneous facts, facts  
2 after the fact, cannot be used to create an  
3 ambiguity where Congress has either clearly spoken  
4 or Congress has either -- as Congress has clearly  
5 not spoken. And in this instance, you are obligated  
6 to review not just the allotment history, which  
7 you've addressed in the Leopard case and the court  
8 addressed in the Leopard case, you look at the  
9 Termination Act to determine whether the Act  
10 expressly terminated or disestablished the  
11 reservation. There is no such language.

12 I think it's also important to note, with  
13 respect to Mr. Terry's argument and our argument  
14 about water rights that were left undiminished by  
15 the Termination Act, that really, Your Honor, gets  
16 to the fact that treaty protected rights weren't  
17 intended to be undone by the Termination Act, and  
18 among those would be water rights, because the  
19 reservation boundary is relevant as to the exercise  
20 of those water rights, just as it would have been  
21 relevant if, like in the Ute case, an Ottawa tribal  
22 member, let's say in the 1960s, was hunting on the  
23 Ottawa reserve. There would have been a case that  
24 arose about those reserve rights, and the fact that  
25 the legislation expressly tipped its hat to reserved

1 treaty rights of the Ottawa indicates (audio  
2 distortion, inaudible) --

3 THE COURT: Okay. We lost you there.

4 MR. HALLORAN: Let's talk about also  
5 briefly about the State's position with --

6 THE COURT: Mr. Halloran, I'm sorry.  
7 There just for about 30 seconds we didn't hear you.

8 MR. HALLORAN: Okay. Am I back?

9 THE COURT: Yes, you are back. I think  
10 you were just finishing your context argument, I  
11 believe, and about the rights, the water rights  
12 being restored.

13 MR. HALLORAN: Yes, the water rights were  
14 specifically called out by Congress as not affected  
15 by termination, which is an acknowledgment that  
16 those treaty rights and the exercise of those treaty  
17 rights within the treaty established reservation  
18 boundary were unaffected. That is the point of  
19 mentioning that language, and that language is  
20 supported by the case law that you see developed in  
21 the Menominee case in 1968 and its progeny which  
22 say, yes, that wasn't the intent of the Termination  
23 Act to adversely affect the treaty rights.

24 I want to also return to the State's  
25 comment regarding the Restoration Act. It was, I

1 think, the height of -- height of disestablishment  
2 by implication, because it suggests that unlike some  
3 other restoration statutes, not the Ottawa  
4 restoration statute, the Ottawa restoration statute  
5 didn't mention the reestablishment of a reservation  
6 land base. I don't know what to make of that, other  
7 than what we've already spoken about, Your Honor,  
8 which is the restoration statute in the Ottawa case  
9 is actually more precise and more wide ranging than  
10 any other restoration statute that would have  
11 qualifications of that sort. It reverses all  
12 effects of the Termination Act and expressly  
13 repealed it. The fact that the court didn't -- that  
14 the Congress didn't talk about the reacquisition of  
15 lost land is really of no moment, because that isn't  
16 determinative of the existence of a reservation in  
17 any event.

18 But what we do know, Your Honor, is that  
19 following reinstatement, about 27 acres of land was  
20 restored to Tribal trust status. Up to that point  
21 it had been -- prior to the termination, it had been  
22 allotted status, as a result of the General  
23 Allotment Act. So there was a restoration of land  
24 and within the reservation boundaries, as part of  
25 the Tribe's reacquisition of its lost land base,

1 that had really been lost over the course of 230  
2 years. They continue that effort to restore that  
3 lost land base. Whether or not there was a  
4 restoration of trust land within the boundaries, as  
5 a result of the Restoration Act, really is  
6 immaterial to the effect of the Restoration Act and  
7 the existence of the boundaries.

8 It would appear that in order to -- in the  
9 State's view of what was required, this sort of  
10 rights not restored unless they were expressed, it  
11 would appear as though that the State wouldn't  
12 acknowledge the Ottawa reservation unless they went  
13 back and ratified and re-executed the 1867 Treaty,  
14 but we know that isn't necessary, Your Honor. Your  
15 Honor has already ruled in the Leopard case that  
16 these reservations were established, that they  
17 existed, and with respect to the Tribes that were  
18 not subject to termination, continue to exist today,  
19 that there has not been any expression of Congress  
20 -- clear expression of Congress in any statute that  
21 disestablishes the reservation.

22 So we come back to the question of the law  
23 as applicable to the Ottawa Tribe of Oklahoma. Is  
24 there any clear expression that the court can  
25 consider that the reservation was disestablished,

1 and, Your Honor, there just isn't any indication of  
2 Congress. And to the contrary, the indication of  
3 Congress was that the Ottawa Tribe was to be  
4 restored to its full status as it existed before the  
5 ill-conceived and misguided policies of the  
6 termination period.

7 Finally, there was a fair bit of  
8 conversation about the John case, Your Honor, and,  
9 frankly, it is an apposite to this case. The John  
10 case was not a disestablishment case. The John case  
11 related to and addressed whether the United States  
12 could recognize and the Tribe could exercise -- the  
13 Choctaw could exercise sovereign authority over a  
14 reservation that lacks supervision, and that really  
15 doesn't have anything to do with this case, and  
16 that's why it wasn't addressed in our brief.

17 So again in closing, Your Honor, the law  
18 right now, the law as it exists today with respect  
19 to the status of the Ottawa Tribe of Oklahoma and  
20 its reservation, the law that applied at the time of  
21 the investigation and arrest and charging of  
22 Mr. Terry is clear. The Ottawa Tribe of Oklahoma  
23 exists, and its reservation boundaries that were  
24 never diminished exist today and that the conduct  
25 that formed the basis of the criminal charge

1 occurred in Indian country and is beyond the  
2 jurisdiction of the State of Oklahoma to prosecute.

3 THE COURT: All right. Thank you, Mr.  
4 Halloran.

5 MR. HALLORAN: Thank you, Your Honor.

6 THE COURT: Is there anybody else that's  
7 with this, excluding those that are just here  
8 watching, that had any other statements to make to  
9 the court?

10 Mr. Halloran, can I safely assume that you  
11 pretty much summarized the Amicus briefs that were  
12 submitted?

13 Anyone else? Hearing none, Ms. Hunt or  
14 Mr. Wright, do either of you -- since you carry the  
15 burden of proof here, I'm going to give you the last  
16 shot, if you wish to make any further argument.

17 MR. WRIGHT: I would, Judge, just a few  
18 things.

19 THE COURT: You might step -- yeah, if you  
20 will. Go ahead.

21 MR. WRIGHT: Thank you, Judge. We've  
22 heard talk about a whole bunch of different things.  
23 We've talked about individual rights, individual  
24 privileges, group rights, group privileges, the  
25 existence of a tribe, but really what we're here to

1 talk about is a reservation, and that's it. So  
2 that's what I would urge the court to focus on is  
3 the reservation itself and the status of that  
4 reservation as of today. When we look at the 1956  
5 Act, what we see there is a whole handful of things,  
6 and I would urge the court to read that Act in its  
7 entirety to understand overall what was happening  
8 there.

9           So as part of the loss of federal  
10 recognition, it's necessary for all of the tribal  
11 assets to be resolved, and the Act of '56 begins  
12 that process. So one of the things it does is say  
13 that "any land held on behalf of the Tribe by the  
14 United States is going to be sold and those assets  
15 are going to go back to the tribal members." In  
16 addition, "any land that's individually held by a  
17 tribal member, that is somehow restricted by virtue  
18 of it being Indian land is no longer restricted."

19           So what Congress is doing is taking care  
20 of all the land associated with the Ottawa Tribe at  
21 that particular point in time, so that when we get  
22 to the effective date of that Act in 1959, there  
23 isn't any Indian land left. So specifically when we  
24 look at Section 8, which is the big one, and this is  
25 of the 1956 Act, "federal trust relationship to the

1 affairs of the Ottawa Tribe and its members shall  
2 terminate three years after the date of this Act  
3 and, thereafter, individual members of the Tribe  
4 shall not be entitled to any of the services  
5 performed by the United States for Indians because  
6 of their status as Indians." So that's a loss of  
7 rights and privileges that the United States accords  
8 to individuals as Indians.

9           In addition, Congress states that "all  
10 statutes of the United States which affect Indians  
11 because of their status as Indians shall no longer  
12 be applicable to the members of the Tribe. The laws  
13 of the several states shall apply to the Tribe and  
14 its members in the same manner as they apply to  
15 other citizens or persons within their  
16 jurisdiction."

17           If Congress intended the reservation to  
18 continue in perpetuity at that point, they could not  
19 have written Section 8. It is incompatible with the  
20 idea that a reservation was going to continue after  
21 1959 for the Ottawa Tribe. When we look at -- I  
22 mean, there's no -- I think everybody would agree  
23 that from 1959, at least until 1978, nobody is going  
24 to claim a reservation existed during that time. I  
25 mean, you don't -- you don't have any relationship

1 with the federal government, and the existence of a  
2 reservation is 100 percent contingent upon that  
3 relationship. It's not a thing that exists  
4 naturally. It is a pure creation of the United  
5 States Congress, and without that relationship  
6 between the federal government, Congress and the  
7 Tribe, there can be no reservation. It absolutely  
8 can't exist, at least in the sense that we're  
9 talking about today in relation to criminal  
10 jurisdiction, which is really one of the important  
11 points.

12           We're talking about reservations --  
13 whether reservations exist for the purposes of  
14 establishing criminal jurisdiction and allotting  
15 that jurisdiction between the State, the federal  
16 government and the tribes. We know that Congress'  
17 intent was not for that -- was not for that  
18 reservation to exist anymore, because they say  
19 specifically "that the laws of the State will apply  
20 to the former members, just as they apply to anyone  
21 else," and that includes criminal. So the Major  
22 Crimes Act was already in existence at this point in  
23 time. So for the laws of the State to apply to  
24 those former Indians, there has to not be a  
25 reservation anymore.

1           Now, what probably makes all this a little  
2 bit more difficult, looking back in time, is that I  
3 would offer to the court that no one in 1956 or 1978  
4 believed that the Ottawa Tribe or any other Indians  
5 in Oklahoma had reservations. So when Congress is  
6 crafting these acts, again, I would submit that they  
7 weren't thinking in the back of their minds, gee,  
8 what do we do with this reservation, because the  
9 common -- the common perception in 1956 was that  
10 there weren't any reservations in Oklahoma, maybe  
11 with the exception of the Osage, but probably not  
12 even them. Again, in 1978, the legal understanding  
13 was, there aren't any reservations in Oklahoma.

14           So, you know, that's one thing to consider  
15 when we look at the Restoration Act is -- and I know  
16 this is probably arguing more on the Tribe's behalf,  
17 but it may have been that it didn't occur to  
18 Congress to include reservation in that particular  
19 restoration piece of legislation, because they  
20 didn't really think that the Ottawa Tribe ever had a  
21 reservation to begin with, and then in Oklahoma  
22 there aren't any reservations. Now, that's probably  
23 going to be important in our review of all this  
24 because, as Justice Gorsuch instructs us in *McGirt*  
25 is that we really need to put aside common sense and

1 practical understanding of what's happened.

2 THE COURT: Mr. Wright, if you need a  
3 moment, there's water right there in the jury room.

4 MR. WRIGHT: Thank you.

5 THE COURT: Let's go off the record just a  
6 moment.

7 (A discussion was had.)

8 THE COURT: Back on the record on the  
9 Terry vs. Oklahoma matter. Mr. Wright, we  
10 interrupted you there. We'll let you continue with  
11 your final argument.

12 MS. HUNT: Thank you, Judge. I appreciate  
13 that opportunity for me to get a drink of water  
14 there. That seems to have helped out.

15 Basically, what I was trying to talk about  
16 was the idea that when we look at the 1956 Act that  
17 completely severs the federal government's  
18 relationship with the Ottawa Tribe and results in  
19 their loss of recognition as a tribe, that doesn't  
20 mean the Tribe ceases to exist; okay? What a lot of  
21 these tribes did was form nonprofit organizations or  
22 collectives of tribes, much like our Intertribal  
23 Council here in Miami, which is a product of those  
24 times. The tribes transferred a lot of their assets  
25 into those nonprofits, but the reservation, which

1 was established in 1867, had to have been  
2 disestablished in 1956, because there's no way --  
3 there's no way to end that relationship and leave a  
4 giant piece of property recognized by the federal  
5 government as an Indian reservation. It just  
6 doesn't make any sense at all.

7 Now, when we look at the '78 Act, the  
8 Restoration Act, the Tribe talks a little bit about  
9 the express repeal and that through that express  
10 repeal it's like the 1956 Act didn't exist at all.  
11 That's probably a little bit of an  
12 oversimplification. I would urge the court to read  
13 the entire Restoration Act. It's not particularly  
14 long. But just for one example of how the express  
15 repeal didn't completely get rid of the 1956 Act  
16 altogether, all we have to do is look at Subsection  
17 D, which Mr. Terry mentioned is the subsection that  
18 talks about water rights, is that -- well, again,  
19 we've got to read that in context a little bit with  
20 what comes above. So that's that "the following  
21 acts are repealed from 1956," and then we get to D,  
22 which says, "Except as specifically provided in this  
23 Act, nothing contained in this Act shall alter any  
24 property rights or obligations, any contractual  
25 rights or obligations, including existing fishing or

1 any obligation for taxes already levied."

2 So what we see is Congress' explicit  
3 intent in the Restoration Act that it not change any  
4 property rights or obligations in any way, shape or  
5 form from the way they existed prior to 1978, and  
6 the State's position is that with the reservation  
7 having been disestablished in 1956, when we get to  
8 1978, certainly a reservation -- that's property  
9 rights. That's property rights obligations. In the  
10 Restoration Act, it appears to specifically except  
11 those types of issues from -- from the repealer  
12 that's built into the '78 Act.

13 I think it's also important, when we're  
14 talking water rights -- that was something that  
15 Mr. Terry focused on a fair bit -- what we're really  
16 dealing with is individual property owner's water  
17 rights, not the Tribe as a whole, because the Tribe  
18 ceased to exist in the eyes of the federal  
19 government in 1959. So when they talk about water  
20 rights in the Restoration Act, what they're really  
21 talking about is individual water rights, whether  
22 that be held by an entity or an organization, but  
23 that this somehow recreated.

24 So I think Mr. Perry -- Terry has two  
25 potential arguments; one, that it was never

1 disestablished. We've talked about how the 1956 Act  
2 did, in fact, disestablish the reservation. The  
3 second argument is that if it was disestablished in  
4 1956, it was re-established by the Restoration Act  
5 in 1978. Again, that can't be the case either,  
6 first of all, because of the wording in D and,  
7 second of all, because every other Tribe that  
8 Congress restored status to, if it was going to have  
9 a reservation, they put specific language in those  
10 restoration acts about reservation, whether it's set  
11 aside for the use of the Tribe forever and ever,  
12 some of the words that we're really familiar with.  
13 That's why we encourage the court to look at the  
14 Menominee Tribe, as well as the other two that are  
15 cited in the State's materials, so we could see that  
16 the Ottawa Tribe is different than some of these  
17 other tribes, where they did specifically include  
18 language about restoring a reservation, and that is  
19 completely absent from the '78 Act.

20           So, Judge, for those reasons we would urge  
21 the court to make a finding that although the Tribe  
22 initially had a reservation pursuant to the 1867  
23 Act, that that reservation was disestablished in the  
24 1956 Act, and that nothing in the Restoration Act of  
25 '78 did anything to change that position and that as

1 of today the Ottawa reservation is still  
2 disestablished.

3 THE COURT: All right. Thank you, Mr.  
4 Wright. I think that concludes both the evidence  
5 and the argument.

6 Ms. Beckham, our reporter, is directed  
7 here by the Court of Criminal Appeals to prepare a  
8 transcript --

9 MR. TERRY: Your Honor --

10 THE COURT: -- of this proceeding and get  
11 that to the -- have that ready within 20 days. This  
12 court, of course, is going to go through all of the  
13 evidence and the exhibits, including the exhibits  
14 that have been put forth today, and will render some  
15 findings of fact and conclusions of law.

16 Mr. Terry, you were trying to get the  
17 attention of the court?

18 MR. TERRY: Yes. Your Honor, I'd like to  
19 say one thing. Although the State's attorney has  
20 made an eloquent plea, the fact is, there's no  
21 language in that 1956 statute -- or it was 1959 that  
22 ever disestablished the reservation formally.

23 THE COURT: Okay.

24 MR. TERRY: And under McGirt, which relies  
25 on a host of Supreme Court case law, there are three

1 principles. Congress' intent is paramount, and  
2 statutory text is the only unfailing evidence of  
3 Congress' intent. And Congress never intended to  
4 disestablish that reservation in the 1956 Act. They  
5 merely mention terminate formal relations with the  
6 Tribe. It's just like saying, oh, we're going to  
7 pass a law, you don't exist anymore. That's not the  
8 case here, and it can't be relied on. The State has  
9 made a couple of large statements to the effect that  
10 this 1956 Act disestablished the reservation  
11 boundaries, and I would urge Your Honor to read that  
12 Act clearly and closely. There's no language in  
13 there that does that.

14 THE COURT: I will be doing --

15 MR. TERRY: That --

16 THE COURT: -- doing -- Mr. Terry --

17 (Simultaneous speakers)

18 MR. TERRY: -- statutory interpretation is  
19 in the text.

20 THE COURT: Mr. Terry, I will --

21 Mr. Terry -- Mr. Terry, let me stop you there. I've  
22 heard the arguments at this point. You very  
23 eloquently, as I said earlier, made this argument.  
24 I will be reading those, both the '56 and the '78  
25 Acts, as well as many of the other cases here, that

1 were referenced. Believe me, I will be doing that.

2 MR. TERRY: Okay, Your Honor. I'm sorry.

3 I'm sorry. I didn't mean to step in or get rude.

4 THE COURT: No, you --

5 MR. TERRY: I just had a comment. Thank  
6 you so much for your patience.

7 THE COURT: All right. Before we go off  
8 the record, is there anything else that anyone -- I  
9 know I've got to get my findings of fact and  
10 conclusions of law out. The first thing I'm going  
11 to need is that transcript Ms. Beckham is going to  
12 prepare for us. Anything else that anyone has to  
13 say to the court before we adjourn this hearing?

14 Ms. Hunt?

15 MS. HUNT: I don't believe --

16 MR. TERRY: Your Honor, I ask Your Honor  
17 to be sure that I get copies of all that material.

18 THE COURT: Yes, we will.

19 MR. TERRY: Thank you, sir. I appreciate  
20 you.

21 THE COURT: Thank you.

22 Ms. Hunt?

23 MS. HUNT: Other than, Your Honor, to ask  
24 you whether you wanted any proposed findings of fact  
25 and conclusions of law, the State has nothing else.

1           THE COURT: The only thing I was concerned  
2 about there is just the time period that we've been  
3 allowed here. Is that something -- if Ms. Beckham  
4 is able to get you a transcript sometime in the next  
5 couple of weeks or so, is that something you believe  
6 you could do relatively quickly?

7           MS. HUNT: Yes, Your Honor. And we've  
8 done them in a number of our other McGirt cases, so  
9 that is something I could turn around quickly, if  
10 that would be helpful to Your Honor.

11           THE COURT: I see. All right. I would  
12 certainly allow you, Mr. Terry and Mr. Halloran, to  
13 also present proposed findings of fact and  
14 conclusions of law. Ms. Beckham is to have that  
15 transcript done within 20 days, hopefully, maybe a  
16 little quicker. And then if counsel then -- and Mr.  
17 Terry, believe that you could have those -- once you  
18 have received the transcript of this proceeding, if  
19 you believe you could have those presented within a  
20 couple of weeks, that might get us within our time  
21 frame.

22           MS. HUNT: Yes.

23           THE COURT: I think --

24           MR. WRIGHT: I was going to say, when we  
25 extended that, when did they get extended to?

1 THE COURT: I think to like February the  
2 15th.

3 MS. HUNT: Yes, that's correct, and I will  
4 say, that deadline was actually for us to hold the  
5 evidentiary hearing, and then the subsequent  
6 deadlines run from that. So, thankfully, it builds  
7 that in --

8 THE COURT: That's true, and I'm sorry, I  
9 was overly concerned about that date.

10 MS. HUNT: No. I understand.

11 THE COURT: All right. Then just to be  
12 clear, yes, once Ms. Beckham -- she does have a full  
13 20 days to get that done under the Court's order --

14 MS. HUNT: Yes.

15 THE COURT: -- gets that transcript  
16 prepared and presented to counsel and to Mr. Terry,  
17 you would each have -- is there any issue with  
18 getting those proposed findings of fact and  
19 conclusions of law to the court within two weeks  
20 after you've received the transcript of this  
21 proceeding?

22 Ms. Hunt?

23 MS. HUNT: No, Your Honor.

24 THE COURT: Mr. Terry, would that work for  
25 you? Mr. Terry, would that work for you?

1 MR. TERRY: Yes, Your Honor.

2 THE COURT: All right. Mr. Halloran, will  
3 that work for you?

4 MR. HALLORAN: Yes, Your Honor. Your  
5 Honor, I did want to note -- not to drag this out,  
6 but I did want to note that, you know, the State's  
7 last position really was not in the form of a reply  
8 or response to the previous arguments, and it is our  
9 position and argument in very broad statements or  
10 assertions of law that the Amici would like an  
11 opportunity to respond to, but I would request Your  
12 Honor's permission to submit a letter reply -- to  
13 reply within the next five days, certainly within  
14 the time of the drafting and review of the proposed  
15 order and the transcript.

16 THE COURT: Is that something you would be  
17 able to, if I allowed you today, to make by oral  
18 argument, or do you need that time to address that  
19 issue? If I allow you to make that by oral argument  
20 today, can you do so, or do you need the five days  
21 to actually put your brief together?

22 MR. HALLORAN: I think, Your Honor, we can  
23 address it orally. I'm fine proceeding, if you  
24 would like to consider it.

25 THE COURT: You understand, though, that I

1 will give the State then the opportunity to respond  
2 to that?

3 MR. HALLORAN: That's fine, Your Honor.

4 THE COURT: All right. I'll allow it  
5 then. Go ahead.

6 MR. HALLORAN: If it would be more  
7 efficient, Your Honor, I'd be happy to put together  
8 a letter of submission and have it to you in the  
9 next three business days.

10 THE COURT: That would be Friday? Of  
11 course, I'm going to give the State -- as I said, I  
12 give them -- since they're the ones with the burden  
13 of proof here, I give them the last shot. So if  
14 there's anything in that that they care to respond  
15 to, I would give them an opportunity to do so.

16 Are you understanding what Mr. Halloran is  
17 saying?

18 MR. WRIGHT: Yes. My only -- if we could  
19 proceed orally today, I think that would be a little  
20 bit better. I'm afraid if Mr. Halloran files a  
21 reply letter for the court to consider, depending on  
22 the context or the content of that letter, it might  
23 be necessary for the State to then write some form  
24 of a reply letter, again, with us carrying the  
25 burden, and I don't know that we want to get into

1 chasing competing letters down the road when we  
2 probably could just hash it out today.

3 THE COURT: I get that.

4 Mr. Halloran, if you can make your  
5 argument today orally, I would appreciate doing it  
6 that way, and then, like I say, I'll give --

7 MR. HALLORAN: That's fine, Your Honor.

8 THE COURT: All right. Go ahead.

9 MR. HALLORAN: I'll be happy to. So there  
10 were several assertions that I think need to be  
11 pinned back to what the law actually provides.  
12 Specifically, the existence of treaty rights, and  
13 let's be clear, the Ottawa's reservation is a  
14 treaty-established right. Whether or not there's  
15 any land within the boundary that is owned by the  
16 Tribe, the reservation is a treaty right, and the  
17 suggestion that the withdrawal of federal  
18 supervision over allotted land or tribal trust land,  
19 the withdrawal of rights to tribal members is an  
20 abrogation of treaty rights is simply unsupported by  
21 law. There is no law in the body of law in the  
22 United States that stands for that proposition. So  
23 the United States absolutely can get out of the  
24 Indian business and withdraw its supervision, and  
25 that is not an abrogation of the treaty-established

1 right of the Ottawa to its 1867 reservation.

2 The State also suggests that when the  
3 Termination Act occurred or was enacted, state  
4 criminal law extended to the reservation, and that  
5 couldn't occur -- to the divestiture of the United  
6 States, that couldn't occur if there was an Indian  
7 reservation. That also is not true. There's no law  
8 for that proposition, and, in fact, the law is  
9 contrary to that proposition.

10 The Ninth Circuit Court of Appeals  
11 addressed that in Kimball vs. Callahan, the 1974  
12 decision, where it discussed the Menominee court, re  
13 the termination act and Public Law 280 in pari  
14 materia, meaning together with one another, to  
15 interpret what rights are affected as a result of  
16 the Termination Act.

17 Now, that is significant, Your Honor,  
18 because up here in Minnesota, all of the tribes,  
19 except Red Lake, were subjected to Public Law 280.  
20 It extended the criminal jurisdiction in the state  
21 of Minnesota to the reservation. The statute has  
22 never been interpreted by that extension of criminal  
23 law to have resulted in a diminishment,  
24 disestablishment or abdication of a Tribe's  
25 reservation. There simply is no law that

1 suggests that suggestion, that argument, and, in  
2 fact, the law is absolutely to the contrary.

3           The State would suggest that we would all  
4 agree, therefore, that there was no Ottawa  
5 reservation between 1959 and 1978. I raise my hand.  
6 I absolutely disagree. That's why we're here. We  
7 are applying the McGirt decision. We are not  
8 arguing in a vacuum as though McGirt didn't exist.  
9 We are looking for express language that  
10 disestablished the Ottawa reservation, and we can't  
11 make the ruling regarding the status of that  
12 reservation based on what someone suggests we all  
13 knew, because we don't know that. We are learning  
14 that right now, through the application of  
15 established law to the Tribe's rights.

16           Finally, Your Honor, the State would  
17 suggest that the tribe reservation -- or that the  
18 Restoration Act did additional things so that it  
19 didn't completely repeal the 1956, effective in  
20 1959, Termination Act. I would direct you to the  
21 statutory language (audio distortion) --

22           THE COURT: We lost you.

23           MR. HALLORAN: (audio distortion) --  
24 Subdivision 3, the Act of August 3rd, 1956, relating  
25 to the Ottawa Tribe --

1 THE COURT: Hold on. Hold on. If you  
2 would start your argument again on the -- referring  
3 to the 1978 specific language in that Restoration  
4 Act, because we lost you there for about 40 seconds.

5 MR. HALLORAN: Oh, boy. Okay, Your Honor.  
6 Thanks. So the State has suggested that because --  
7 because there's some language in the Restoration Act  
8 that does other things, that it implies that the  
9 effects of the Termination Act were not complete,  
10 that it was not a complete repeal. The statute --  
11 the language of the statute, Your Honor, is  
12 relevant, Subdivision B of PL 95 281 says, "The  
13 following Acts are hereby repealed, Subdivision 3,  
14 the Act of August 3, 1956, relating to the Ottawa  
15 Tribe." Period. The Termination Act was repealed.

16 Now, the language in Subsection C then  
17 makes even more clear that any rights or privileges  
18 affected by that statute that was repealed are  
19 reinstated. So if we go to Subdivision D, which is  
20 what the State is speaking about, the -- essentially  
21 what we call the status quo language has nothing to  
22 do with the repealer of the Termination Act, except,  
23 as we call it, to maintain the status quo to the  
24 extent there were contracts, there was non-Indian  
25 land ownership, there were taxes that had accrued

1 and then become due during the effective time of the  
2 statute. That's fine. That's fine. That's not a  
3 limitation on the repealer. That is a clarification  
4 of the status quo.

5 So, again, statutory language does  
6 clearly, expressly and completely repeal the  
7 Termination Act, period. There may be other  
8 provisions for third parties that it provided for,  
9 but there is no qualification on the repeal. The  
10 Termination Act is a legal nullity. It does not  
11 exist in the eyes of the law; its legislative  
12 history doesn't exist, and it can't be used as a  
13 basis for arguing in futuro that the Ottawa Tribe's  
14 rights are somehow limited by it not having -- by  
15 remnants of it surviving. We know that they did. I  
16 think that's it, Your Honor. Thank you very much.

17 THE COURT: All right. Now, I will give  
18 Mr. Wright or Ms. Hunt, either one, if you wish to  
19 address those specific issues that Mr. Halloran  
20 requested to be able to address.

21 Go ahead, Ms. Hunt.

22 MS. HUNT: Thank you, Your Honor. I'll  
23 try to make this brief. I'll respond to Mr.  
24 Halloran's first point, his assertion that there is  
25 no law requiring federal superintendence for

1 reservation status.

2 First, to the extent he's suggesting that  
3 this was a new point on our reply, I strongly  
4 disagree with that. In fact, this is the heart of  
5 our argument that has gone entirely unaddressed up  
6 until now, and his only response is to say, that's  
7 not the law, but, in fact, that is the law. As I  
8 said, John is entirely relevant. It's a Major  
9 Crimes Act case. It tells us that federal  
10 superintendence is a necessary element, and then,  
11 even setting John aside, we have the definition of a  
12 reservation in Section 1151, referring to under the  
13 jurisdiction of the United States.

14 As far as his point regarding express  
15 language again, what I'll say here, and it's the  
16 crux of our case, is that express language is  
17 removing the federal superintendence. Congress  
18 knows that's an element required for a reservation,  
19 and so that's how it expressly affected  
20 disestablishment here.

21 Finally, as to the Restoration Act, I  
22 disagree with Mr. Halloran's point that there were  
23 no qualifications on that repeal. There were. All  
24 of the subsections thereafter, after it stated --  
25 the Act stated that the Rest- -- excuse me, the

1 Termination Act was repealed. And again, as far as  
2 the law governing how a reservation is created,  
3 McGirt tells us there has to be a set-aside. And if  
4 we look at the other acts of Congress with other  
5 statutes where they did recreate a reservation,  
6 that's what they could have done here. Again, this  
7 is exactly the type of analysis McGirt applied,  
8 looking at other acts of Congress to see what type  
9 of language could create a reservation.

10 THE COURT: Okay. Thank you.

11 MS. HUNT: Thank you, Your Honor.

12 THE COURT: That's going to conclude our  
13 argument.

14 Let me go back to my original question to  
15 you, Mr. Halloran. Will you be able to present any  
16 proposed findings of fact and conclusions of law  
17 within two weeks of receiving the transcript of this  
18 proceeding from Ms. Beckham?

19 MR. HALLORAN: Yes, Your Honor.

20 THE COURT: Great. I think that then  
21 gives us our time limits here, and I believe we can  
22 conclude the hearing at this point. Thank you all  
23 very much, very well presented to the court. Thank  
24 you.

25 (HEARING CONCLUDED AT 11:37 A.M.)

CERTIFICATE

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STATE OF OKLAHOMA )  
 ) SS:  
COUNTY OF TULSA )

I, Mary K. Beckham, Certified Shorthand Reporter within and for the State of Oklahoma, do hereby certify that the above and foregoing hearing was by me taken in shorthand and thereafter transcribed; that the same was taken, pursuant to stipulations hereinbefore set out; and that I am not an attorney for nor relative of any of said parties or otherwise interested in the event of said action.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 19th day of January, 2021.

*Mary Beckham*

Mary K. Beckham, CSR, RPR  
CSR No. 01053



**CHEROKEE NATION**  
**OFFICE OF THE ATTORNEY GENERAL**

Sara Hill  
Attorney General

P.O. Box 1533  
Tahlequah, OK 74465  
918-453-5000

October 14, 2020

To Whom It May Concern:

This letter shall verify that Patrick Joseph Terry, born February 9, 1956, is a registered citizen of the Cherokee Nation as of January 6, 2011. His blood quantum is 1/32, dated August 26, 2011.

The response in this letter is based on information exactly as provided by the requesting party. Any incorrect or incomplete information may invalidate the above determination. Cherokee Nation can only confirm citizenship and blood degree for Cherokees. It is possible for the individual to be a member of another tribe and/or to have some degree of Indian blood from another tribe.

This letter does not reflect a finding of eligibility under the Federal Indian Child Welfare Act, 25 U.S.C. §1901 *et seq.*, ("ICWA"). Per 25 U.S.C. §1912(a) legal notice regarding an Indian child under ICWA must be sent to Cherokee Nation Indian Child Welfare, PO Box 948, Tahlequah, OK 74465.

If you have questions regarding this determination, please email [CNOAG@cherokee.org](mailto:CNOAG@cherokee.org) or call the Cherokee Nation Office of the Attorney General at (918) 453-5262.

**Petitioner's**  
**Appendix E**



ORIGINAL



IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

OCT - 6 2021

JOHN D. HADDEN  
CLERK

No. PC-2018-1076

PATRICK JOSEPH TERRY, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 STATE OF OKLAHOMA, )  
 )  
 Respondent. )

**ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF**

Petitioner, pro se, appealed to this Court from an order of the District Court of Ottawa County in Case No. CF-2012-242 denying his request for post-conviction relief.<sup>1</sup> Petitioner's post-conviction application asserted the same issues ultimately addressed in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). This Court affirmed the District Court's ruling and denied Petitioner's post-conviction appeal. *Terry v. State*, PC-2018-1076 (Okl.Cr. February 25, 2019) (unpublished). In *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, \_\_\_ P.3d \_\_\_, his Court determined that the United States Supreme Court decision in *McGirt*, because it is a new procedural rule, is not retroactive and does not void final state convictions. *See Matloff*, 2021

<sup>1</sup> Petitioner sought review of our decision by the United States Supreme Court and that Court vacated our judgment and remanded this case to this Court for further consideration in light of *McGirt*. *Terry v. Oklahoma*, 141 S.Ct. 191 (2020).

OK CR 21, ¶¶ 27-28, 40.

The conviction in this matter was final before the July 9, 2020 decision in *McGirt*, and the United States Supreme Court's holding in *McGirt* does not apply. Therefore, the trial court's denial of post-conviction relief is **AFFIRMED**. The Respondent's Motion to File a Supplemental Brief filed with this Court's Clerk on September 2, 2021, is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

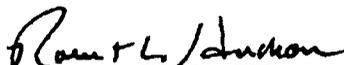
**IT IS SO ORDERED.**

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

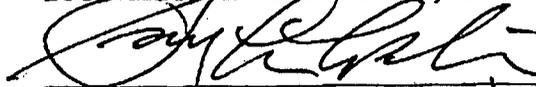
6<sup>th</sup> day of October, 2021.



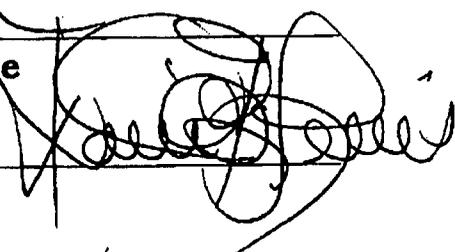
**SCOTT ROWLAND, Presiding Judge**



**ROBERT L. HUDSON, Vice Presiding Judge**



**GARY L. LUMPKIN, Judge**



**DAVID B. LEWIS, Judge**

ATTEST:

John D. Hadden

Clerk

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA



Patrick Joseph Terry,  
Petitioner,  
v.  
STATE OF OKLAHOMA,  
Respondent,

OCT 12 2021

Case Number: PC-2018-1076

JOHN D. HADDEN  
CLERK

TCC Number(s): CF-2012-242

RETURN OF THE COURT CLERK

To the Court of Criminal Appeals of the State of Oklahoma:

On the 8<sup>th</sup> day of October, 2021, I received the mandate issued in case number: PC-2018-1076, Terry, Patrick Joseph; appellant v. STATE OF OKLAHOMA; appellee, with a copy of the Order in the same. I have stamped, filed, and spread of record the mandate on the day I received same.

On the 8<sup>th</sup> day of October, 2021, I issued appropriate process -- i.e. a certified copy of the Judgment and Sentence as affirmed by the mandate -- to the appropriate officer of County of OTTAWA, State of Oklahoma, as required by 22 O.S. 2001 §978 who then made return to my office as follows:

1. Use this space if the punishment assessed was solely confinement in state penitentiary. See 22 O.S. 2004 §980. Count 1 30 Yrs. DOC / Count 2 6 Yrs. DOC
2. Use this space if the punishment assessed was solely confinement in the County Jail. See 22 O.S. 2005 §979. Count 3 — 1 Yr. county jail.
3. Use this space if the punishment assessed was confinement, due to failure to pay, in whole, or in part, a fine. See 22 O.S. 2001 §§ 979 and 983.
4. Use this space if the case was Reversed and Remanded for a New Trial. See 22 O.S. 2001 §1066.

Witness my hand this 8 day of October, 2021.

*Carrie Do*

Court Clerk

Ottawa County

OTTAWA County, Oklahoma

By: Sam Blalock

Deputy

(seal)

Petitioner's  
Appendix H



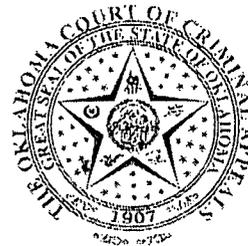
**STATE v. LAWHORN**

2021 OK CR 37

Case Number: **S-2020-858**

Decided: 10/21/2021

**THE STATE OF OKLAHOMA, Appellant v. JEREMY LAWHORN, Appellee**



Cite as: 2021 OK CR 37, \_\_\_

**OPINION**

**ROWLAND, PRESIDING JUDGE:**

¶1 The State of Oklahoma charged Appellee Jeremy Lawhorn in the District Court of Ottawa County, Case No. CF-2020-189, with one count of Lewd or Indecent Acts with a Child Under 16, in violation of 21 O.S. Supp. 2018, § 1123 (A)(2). Lawhorn filed a motion to dismiss, asserting that the State of Oklahoma lacked jurisdiction over the matter because he is an Indian and the offense occurred in Indian Country, specifically the Quapaw Nation Reservation. The district court held a hearing and concluded, based upon the stipulations and exhibits, that Lawhorn is an Indian for purposes of federal criminal law and that the crime occurred in Indian Country, namely within the historic boundaries of the Quapaw Nation Reservation. The district court granted Lawhorn's Motion to Dismiss, quashed the Information, and dismissed the case for lack of jurisdiction. The State announced its intent to appeal the ruling in open court to settle the status of the Quapaw Reservation and ultimately perfected the instant appeal. We exercise jurisdiction under 22 O.S. 2011, § 1053. The sole issue for review is whether the Quapaw Nation Reservation is Indian Country. Because the answer is yes, we affirm the district court's order for the reasons discussed below.

**DISCUSSION**

**A. The Major Crimes Act**

¶2 The federal Major Crimes Act (MCA) grants exclusive federal jurisdiction to prosecute certain enumerated offenses committed by Indians within Indian Country. *Sizemore v. State*, 2021 OK CR 6, ¶ 6, 485 P.3d 867, 869; 18 U.S.C. § 1153(a) (2013). There is no dispute that the crime charged against Lawhorn fits squarely within the MCA and its exclusive federal jurisdiction provided he is an Indian and the crime occurred in Indian Country. See *State v. Klindt*, 1989 OK CR 75, ¶ 3, 782 P.2d 401, 403 ("[T]he State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.")

**B. *McGirt v. Oklahoma***

¶3 In *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), the Supreme Court held the reservation Congress established for the Muscogee (Creek) Nation remains in existence today because Congress has never explicitly disestablished it. That ruling meant Oklahoma lacked jurisdiction to prosecute McGirt, an Indian, because he committed his crimes on the Creele Reservation, i.e., in Indian Country, and the federal government has jurisdiction of such criminal matters under the MCA. Although the case now before us involves the lands of the Quapaw Nation, we find *McGirt's* reasoning controlling.

**C. Status of Quapaw Reservation**

¶4 The parties stipulated that the charged crime occurred within the historic geographic boundaries of the Quapaw Nation as designated by various treaties. The district court admitted, without objection, two treaties purportedly establishing a Quapaw Reservation, namely, the 1833 Treaty with the Quapaw, 7 Stat. 424 (May 13, 1833) and the 1867 Treaty with the Seneca, Mixed Seneca and Shawnee, Quapaw, etc., 15 Stat. 513 (Feb. 23, 1867). (Defense Exhibits 2 and 3).

¶5 The district court accepted the stipulation and concluded, without any opposition from the State, that the land set aside for the Quapaw Nation in the 1833 Treaty, as reaffirmed and modified by the 1867 Treaty, established a Quapaw Reservation. This finding is consistent with *McGirt*, and we adopt the district court's conclusion that Congress established a Quapaw Nation Reservation in the 1800s.

¶6 "To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt*, 140 S.Ct. at 2462. While no particular words or verbiage are required to disestablish a reservation, evidence of a clear expression of congressional intent to terminate the reservation is required. *Sizemore*, 2021 OK CR 6, ¶ 13, 485 P.3d at 870.

¶7 The record before the district court in this case, similar to that in *McGirt*, showed Congress, through a treaty, removed the Quapaws from one area of the United States to another where they were promised certain lands. A subsequent treaty redefined the geographical boundaries of those lands, but nothing in any of the documents showed a congressional intent to erase the boundaries of the Reservation and terminate its existence. Congress, and Congress alone, has the power to abrogate those treaties, and "this Court [will not] lightly infer such a breach once Congress has established a reservation." *McGirt*, 140 S.Ct. at 2462 (citing *Solem v. Bartlett*, 465 U.S. 463, 470, (1984)).

¶8 The District Attorney informed the district court that he and the Attorney General's Office conducted "extensive research" and found no evidence that Congress disestablished the Quapaw Nation Reservation. Noting that the State of Oklahoma presented no evidence to show Congress erased or disestablished the boundaries of the Quapaw Reservation, and citing *McGirt*, the district court concluded that the Quapaw Nation Reservation remains in existence and is Indian Country and that the State had no jurisdiction in this matter. This finding is supported by the record and we adopt it.

¶9 For these reasons, we hold, for purposes of federal criminal law, the land upon which the parties agree Lawhorn allegedly committed this crime is within the Quapaw Nation Reservation and is Indian Country. The ruling in *McGirt* governs this case and requires us to find the State of Oklahoma is without jurisdiction to prosecute Lawhorn.

### DECISION

¶10 The ruling of the district court dismissing the case against Lawhorn based upon lack of jurisdiction is **AFFIRMED**. 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.

### **AN APPEAL FROM THE DISTRICT COURT OF OTTAWA COUNTY THE HONORABLE BECKY BAIRD, ASSOCIATE DISTRICT JUDGE**

#### **APPEARANCES IN DISTRICT COURT**

KENNY WRIGHT  
DISTRICT ATTORNEY OF  
OTTAWA COUNTY  
102 E. CENTRAL AVE.  
SUITE 201  
MIAMI, OK 74354  
ATTORNEY FOR STATE

#### **APPEARANCES ON APPEAL**

KENNY WRIGHT  
DISTRICT ATTORNEY OF  
OTTAWA COUNTY  
102 E. CENTRAL AVE.  
SUITE 201  
MIAMI, OK 74354  
ATTORNEY FOR APPELLANT

## LUMPKIN, JUDGE: CONCURRING IN RESULTS:

<sup>1</sup> Senator Elmer Thomas, D-Oklahoma, was a member of the Senate Committee on Indian Affairs. After hearing the Commissioner's speech regarding the Indian Reorganization Act (IRA) in 1934, Senator Thomas opined as follows:

I can hardly see where it (the IRA) could operate in a State like mine where the Indians are all scattered out among the whites and **they have no reservation**, and they could not get them into a community without you would go and buy land and put them on it. Then they would be surrounded very likely with thickly populated white sections with whom they would trade and associate. I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly-settled population. (emphasis added).

John Collier, Commissioner of Indian Affairs, *Memorandum of Explanation* (regarding S. 2755), p. 145, hearing before the United States Senate Committee on Indian Affairs, February 27, 1934. Senator Morris Sheppard, D-Texas, also on the Senate Committee on Indian Affairs, stated in response to the Commissioner's speech that in Oklahoma, he did not think "we could look forward to building up huge reservations such as we have granted to the Indians in the past." *Id.* at 157. In 1940, in the Foreword to Felix S. Cohen, *Handbook of Federal Indian Law* (1942), Secretary of the Interior Harold Ickes wrote in support of the IRA, "[t]he continued application of the allotment laws, **under which Indian wards have lost more than two-thirds of their reservation lands**, while the costs of Federal administration of these lands have steadily mounted, must be terminated." (emphasis added).

### Citationizer<sup>®</sup> Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Court of Criminal Appeals Cases	
Cite	Name
<u>2021 OK CR 38,</u>	<u>MCCLAIN v. STATE</u>
	Level
	Cited

### Citationizer: Table of Authority

Cite Name	Level
Oklahoma Court of Criminal Appeals Cases	
Cite	Name
<u>1989 OK CR 75, 782 P.2d 401,</u>	<u>STATE v. KLINDT</u>
	Level
	Discussed
<u>2021 OK CR 4,</u>	<u>HOGNER v. STATE</u>
	Level
	Discussed
<u>2021 OK CR 6, 485 P.3d 867,</u>	<u>SIZEMORE v. STATE</u>
	Level
	Discussed at Length
<u>2021 OK CR 27,</u>	<u>ROTH v. STATE</u>
	Level
	Discussed at Length
<u>1998 OK CR 74, 973 P.2d 330, 70 OBJ</u>	<u>Hanes v. State</u>
<u>535,</u>	
	Level
	Discussed
Title 21. Crimes and Punishments	
Cite	Name
<u>21 O.S. 1123,</u>	<u>Lewd or Indecent Proposals or Acts to Child Under 16</u>
	Level
	Cited
Title 22. Criminal Procedure	
Cite	Name
<u>22 O.S. 1053,</u>	<u>State or Municipality May Appeal in What Cases</u>
	Level
	Cited

ANDREW MELOY  
ATTORNEY AT LAW  
103 E. CENTRAL  
SUITE 250  
MIAMI, OK 74354  
ATTORNEY FOR DEFENDANT

MARK P. HOOVER  
OKLAHOMA INDIGENT  
DEFENSE SYSTEM  
P. O. BOX 926  
NORMAN, OK 730704106  
ATTORNEY FOR APPELLEE

WILSON PIPESTEM  
MARY KATHRYN NAGLE  
ABI FAIN  
PIPESTEM & NAGLE, P.C.  
401 S. BOSTON AVE.  
SUITE 2200  
TULSA, OK 74103  
AMICUS CURIAE  
FOR QUAPAW NATION

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

HUDSON, V.P.J.: Specially Concur

LUMPKIN, J.: Concur in Results

LEWIS, J.: Concur

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**HUDSON, VICE PRESIDING JUDGE: SPECIALLY CONCURS**

¶1 Today's decision dismisses a felony charge of Lewd or Indecent Acts With a Child Under 16 from the District Court of Ottawa County based on the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The Ottawa County District Attorney commendably acknowledges that, after conducting his own extensive research, he has found no evidence showing the Quapaw Reservation was ever disestablished by Congress. Based upon the District Court's findings that Appellee is an Indian for purposes of federal criminal law, and that the crime in this case occurred within the historic boundaries of the Quapaw Reservation, we have no choice but to dismiss this case for lack of jurisdiction. Under *McGirt*, the State has no jurisdiction to prosecute Appellee for the crime in this case. Instead, Appellee must be prosecuted in federal court where the exclusive jurisdiction for this crime lies. See *Roth v. State*, 2021 OK CR 27, \_\_\_ P.3d \_\_\_. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶2 I write separately to re-urge my previous views on the need for a practical solution by Congress concerning criminal jurisdiction in eastern Oklahoma. With each passing day, more state criminal cases are dismissed pursuant to *McGirt* while more counties in Oklahoma are transformed into jurisdictional mine fields for the bench, bar and public. Ottawa County, nestled in Oklahoma's far northeastern corner, presents an extreme example. The county is famously known for being the boyhood home of baseball great Mickey Mantle (from Commerce).<sup>1</sup> Many Oklahomans, however, are less familiar with the vast tribal presence in this part of the state. They will soon be hearing much more about it.

¶3 The federal government utilized much of present-day Ottawa County to resettle smaller tribes from around the country starting in the 1830s.<sup>2</sup> See *Hanes v. State*, 1998 OK CR 74, ¶¶ 15-16, 973 P.2d 330, 335. Today, Ottawa County is home to ten separate tribes--the Cherokee, Quapaw, Peoria, Ottawa, Miami, Modoc, Seneca-Cayuga, Wyandotte, Shawnee and Eastern Shawnee. According to the U.S. Department of Justice,<sup>3</sup> these Tribes' historic reservation lands cover the entire land mass of Ottawa County, an area consisting of roughly 485 square miles<sup>4</sup> and 30,000 residents.<sup>5</sup> One could easily mistake the map showing these historic tribal territories for a jigsaw puzzle with nine<sup>6</sup> pieces of varying shapes and sizes dividing up the puzzle board.

¶4 Since *McGirt*, we have recognized the existence of Indian country criminal jurisdiction within the historical reservation boundaries of the Cherokee Nation which covers a substantial portion of Ottawa County. See *Hogner v. State*, 2021 OK CR 4 ¶ 9, \_\_\_P.3d\_\_\_. Today's decision recognizes the ongoing vitality of a *second* reservation in Ottawa County--this one associated with the Quapaw Tribe--because there is no evidence showing it was ever disestablished by Congress. Other jurisdictional challenges to State authority to prosecute crimes in Ottawa County involving Indian defendants or victims are sure to follow concerning the other tribes. Some have already made their way to this Court and are in the process of being briefed. See e.g., *State v. Dixon*, No. S-2021-205 (Ottawa); *State v. Lee*, No. S-2021-206 (Peoria and Miami).

¶5 Meanwhile, Congress neglects the practical effects of the *McGirt* decision on the local community and the cycle repeats: more reservations are recognized, more state criminal cases get dismissed and the public holds its breath wondering what will happen next. The failure of Congress to provide a practical solution to criminal jurisdiction in eastern Oklahoma in the post-*McGirt* universe has a real impact on real people--Indians and non-Indians alike--living on a reservation. Recently, we reversed a conviction for first degree manslaughter from Wagoner County involving an Indian child victim killed on the Creel Reservation by a non-Indian defendant. See *Roth*, 2021 OK CR 27, ¶¶ 2-3. That case is particularly tragic because there is a serious question whether it will be prosecuted in federal court due to issues surrounding the statute of limitations. *Id.*, 2021 OK CR 27, ¶ 17. Local authorities too must run the gauntlet of performing routine law enforcement matters that may now involve one or more sovereigns depending upon the location of a crime and the status of the parties involved. And this is just the tip of the iceberg. See *Hogner v. State*, 2021 OK CR 4, \_\_\_P.3d\_\_\_ (Hudson, J., Specially Concurring) (discussing the practical problems associated with *McGirt*).

¶6 Congress has the ultimate authority to provide practical solutions in the post-*McGirt* world. It takes little imagination to understand how the most basic elements of law enforcement, from toll collection to traffic enforcement, are implicated by *McGirt*. The wholesale redistribution from state to federal court of a large number of criminal cases involving Indian defendants or victims highlights the extraordinary strain placed on the criminal justice system and presents its own set of problems. The post-*McGirt* fallout becomes more apparent with each passing day and deserves the attention of our elected representatives in Congress.

¶7 Recently, the Judicial Conference of the United States recommended that Congress add three new federal judgeships for the U.S. District Court sitting in Muskogee along with two new federal judgeships for the U.S. District Court sitting in Tulsa to handle the skyrocketing caseloads in both federal districts stemming from the filing of Indian country cases. The Conference reported a 400 percent increase in the number of criminal cases filed in the Eastern District of Oklahoma from 2020 to 2021 and a nearly 200 percent increase in the number of criminal cases filed in the Northern District of Oklahoma during the same time period.<sup>7</sup> According to local media reports, federal prosecutors from across America have volunteered to assist locally with these burgeoning caseloads after *McGirt*.<sup>8</sup>

¶8 None of this is a surprise. Sadly, I am pessimistic the matter will be addressed by our elected representatives in Washington for the benefit of all. At this point, the clock is ticking. As *Roth* shows, both Indians and non-Indians alike have a vested interest in how the criminal justice system is administered in the post-*McGirt* world. The consequences of failure, however, are shockingly real and these issues should be tackled sooner rather than later.

---

**WUMPKIN, JUDGE: CONCURRING IN RESULTS:**

¶1 Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 2452 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt*, I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas, I was forced to conclude the Majority had totally failed to

follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

¶2 My quandary is one of ethics and morality. One of the first things I was taught when I began my service in the Marine Corps was that I had a duty to follow lawful orders, and that same duty required me to resist unlawful orders. Chief Justice Roberts's scholarly and judicially penned dissent, actually following the Court's precedents and required analysis, vividly reveals the failure of the majority opinion to follow the rule of law and apply over a century of precedent and history, and to accept the fact that no Indian reservations remain in the State of Oklahoma.<sup>1</sup> The result seems to be some form of "social justice" created out of whole cloth rather than a continuation of the solid precedents the Court has established over the last 100 years or more.

¶3 The question I see presented is should I blindly follow and apply the majority opinion or do I join with Chief Justice Roberts and the dissenters in *McGirt* and recognize "the emperor has no clothes" as to the adherence to following the rule of law in the application of the *McGirt* decision?

¶4 My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.

¶5 This particular case is further evidence of the error in analysis in the *McGirt* decision's failure to apply the Supreme Court's past precedents and analysis. Using the prior method of analysis of precedent set out by the dissent it would be readily recognized the Quapaw reservation was disestablished at Oklahoma statehood. Had Congress intended a different result, it surely would have expressly stated such intentions in the Enabling Act. Upon passage of the Enabling Act, Congress joined the former Indian Territory and Oklahoma Territory into one new state of Oklahoma and its sovereignty was established. The *McGirt* decision seeks to overrule an Act of Congress by eroding the State's sovereignty piecemeal, recognizing reservations long extinguished under the criteria set forth in *Solem v. Bartlett*. Tragically, this erosion of state sovereignty is being accomplished through this 5-4 decision in *McGirt*.

## FOOTNOTES

### HUDSON, VICE PRESIDING JUDGE: SPECIALLY CONCURS

<sup>1</sup> See <http://mickeymantle.com/bio/>

<sup>2</sup> See also <https://www.okhistory.org/publications/enc/entry.php?entry=OT003>

<sup>3</sup> See <https://www.justice.gov/usao-wdok/page/file/1303046/download>

<sup>4</sup> See <https://www.okhistory.org/publications/enc/entry.php?entry=OT003>

<sup>5</sup> See <https://www.census.gov/quickfacts/fact/table/ottawacountyoklahoma/POP060210>

<sup>6</sup> The territory for the Shawnee and Eastern Shawnee tribes are shown as a single unit on the map used by the Department of Justice.

<sup>7</sup> <https://www.uscourts.gov/news/2021/09/28/judiciary-supplements-judgeship-request-prioritizes-courthouse-projects> (posted September 28, 2021)

Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

Scott S. Harris  
Clerk of the Court  
(202) 479-3011

January 4, 2022

Mr. Patrick Joseph Terry  
1011 S. Muskogee Avenue  
Tahlequah, OK 74464

Re: Patrick Joseph Terry  
v. Oklahoma  
Application No: 21A290

Dear Mr. Terry:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Gorsuch, who on January 4, 2022, extended the time to and including March 5, 2021.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

  
Claude Alde  
Case Analyst

Petitioner's  
Appendix

