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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DELILA PACHECO, Petitioner

v.

STATE OF OKLAHOMA, Respondent.

Case No. PC-2020-635

Filed September 21, 2021

**ORDER LIFTING STAY AND AFFIRMING
DENIAL OF POST-CONVICTION RELIEF**

Petitioner Pacheco appealed to this Court from an order of the District Court of Cherokee County, Case No. CF-2013-535, denying her request for post-conviction relief pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). The District Court of Cherokee County, the Honorable Douglas Kirkley, District Judge, found the *McGirt* decision was not applicable to Pacheco's case, despite claims that Pacheco is an Indian and her allegation that her offense was committed on Indian land. The matter was remanded for an evidentiary hearing and Judge Kirkley determined that Pacheco was an Indian and her crime was committed in Indian country. The matter was remanded for a second hearing directing the District Court to specifically address Pacheco's application for post-conviction relief. That hearing was to be concluded on or before July 15, 2021. On July 8, 2021, Pacheco's post-conviction appeal was stayed pending further order of this Court.

In *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, _ P.3d _, this 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 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, making Pacheco's claims that she is an Indian and that her offense was committed in Indian country **MOOT**. The District Court's Order denying relief is hereby **AFFIRMED**.

The stay in this matter is **LIFTED**.

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 21st day of September, 2021.

/s/

SCOTT ROWLAND, Presiding
Judge

/s/

ROBERT L. HUDSON, Vice
Presiding Judge

/s/

GARY L. LUMPKIN, Judge

3a

/s/
DAVID B. LEWIS, Judge

ATTEST:

/s/ John D. Hadden
Clerk
PA

APPENDIX B

IN THE DISTRICT COURT OF CHEROKEE
COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff

Vs.

DELILA PACHECO, Respondent.

District Court Case No. CF-2013-535

COCA No. PC-2020-635

Filed December 11, 2020

**FINDINGS OF FACTS AND CONCLUSIONS OF
LAW**

COMES NOW on this 10th day of December, 2020 the District Court makes the following findings of facts and conclusions of law based upon an order remanding for evidentiary hearing:

FINDINGS OF FACTS

1. The Defendant/Petitioner has ½ Indian Blood and is a recognized member of the Keetoowah Band of the Cherokee Nation.
2. The crime did occur within the boundary of the Cherokee Nation Reservation.

CONCLUSIONS OF LAW

3. The Defendant/Petitioner meets the two-part evidentiary test to determine whether a person is an Indian for the purposes of federal law. *United States v. Prentiss*, 273 F.3d 1277, 1279 (10th Cir.2001). The Court finds that the Defendant/Petitioner is an Indian as she has "some

Indian blood" and, second, that she is "recognized as an Indian by a tribe or by the federal government" pursuant to *United States vs Diaz*, 679 F.3d 1183.

4. The Crime did occur within the boundaries of a recognized Indian Reservation as outlined in *McGirt vs. Oklahoma*, 140 S.Ct.2452 (2020).

CONCLUSION

WHEREFORE, The Defendant/Petitioner is recognized as an Indian and a member of an Indian Tribe. The crime did occur within the boundaries of the Cherokee Nation Reservation.

/s/

District Judge Douglas Kirkley

6a

APPENDIX C

IN THE DISTRICT COURT OF CHEROKEE
COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA, Petitioner

Vs.

DELILA PACHECO, Defendant.

Case No. CF-13-535

Filed August 21, 2020

ORDER

COMES NOW on this 20 day of August, 2020 the Court holds the Defendant's Motion/Application for Post-Conviction Relief as the issue of the Court lacking Subject Matter Jurisdiction is denied based upon the doctrine of ripeness. The Defendant claims membership of a Federally recognized Indian Tribe and the crime occurred within the boundaries of the Cherokee Nation Reservation; therefore, this Court lacks jurisdiction to convict the Defendant.

Pursuant to the recent decision of *McGirt v Oklahoma*, No. 18-9526 (U.S. July 9, 2020) the United States Supreme Court only addressed crimes committed by Tribal Members within the boundaries of the Creek Nation Reservation. The Oklahoma Court of Criminal Appeals is currently considering whether the United States Congress established a reservation for the Cherokee Nation; and if so, whether Congress specially erased those boundaries and disestablished the reservation. *See, Hagner vs. State*, Case No. F-18-138 (Craig County) attached.

Wherefore, as the Motion/ Application for post-

7a

conviction relief is not ripe for decision and is therefore denied.

IT IS SO ORDERED.

/s/

Judge of the District Court

Cc: Jack Thorp, District Attorney

Delila Pacheco, Pro Se
Mabel Bassett Correctional
29501 Kickapoo Rd.
McCloud, OK 74851

APPENDIX D

The Indian Commerce Clause provides:

The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

The Supremacy Clause to the U.S. Constitution provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides:

No state shall . . . deprive any person of life, liberty, or property, without due process of law.

Section 1151 of Title 18 of the United States Code provides:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any

patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Section 1152 of Title 18 of the United States Code provides:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Section 22-1080 of Title 22 of the Oklahoma Code provides in relevant part:

Any person who has been convicted of, or sentenced for, a crime and who claims:

- (a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;
- (b) that the court was without jurisdiction to impose sentence;
- (c) that the sentence exceeds the maximum authorized by law;

(d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.