Capital Case

Case No. ________________________________

In the
Supreme Court of the United States

JOHN FITZGERALD HANSON,
Petitioner,
v.
THE STATE OF OKLAHOMA,
Respondent

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
Appendices A through O
(Pet. App. 1 through Pet. App. 164)

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November 22, 2021

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
Hanson v. Oklahoma

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FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP - 9 2021

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,	)	
	)	
Petitioner,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. PCD-2020-611**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION DENYING SUCCESSIVE APPLICATION FOR CAPITAL POST-CONVICTION RELIEF

ROWLAND, PRESIDING JUDGE:

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

retroactive application to otherwise final state convictions.[1] We have since decided *State ex rel. Matloff v. Wallace,* 2021 OK CR 21, ¶ 15, ___P.3d___, unanimously holding that the new rule of criminal procedure concerning Indian Country jurisdiction announced in *McGirt* would not be applied retroactively to void a state conviction that was final when *McGirt* was decided. Because Hanson's state convictions were long final when *McGirt* was decided,[2] his case is

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[1] Although the district court went ahead and concluded the evidentiary hearing in this matter and filed Findings of Fact and Conclusions of Law as previously ordered, we make no decision on those findings as part of our ruling today. We observe that the district court found Hanson has some Indian blood and that the crimes were committed in Indian Country. It concluded, however, that Hanson failed to prove that he was recognized as Indian by a federally recognized tribe or the federal government and therefore Hanson was not an Indian for purposes of federal criminal jurisdiction under the Major Crimes Act.

[2] *Hanson v. State,* 2003 OK CR 12, 72 P.3d 40 (affirming Hanson's Tulsa County convictions for one count of First Degree Malice Aforethought Murder (Count 1) and one count of First Degree Felony Murder as well as his sentence of life imprisonment without the possibility of parole on Count 2, but vacating his death sentence and remanding Count 2 for resentencing); *Hanson v. State,* 2009 OK CR 13, 206 P.3d 1020 (affirming Hanson's death sentence following resentencing); *Hanson v. Oklahoma,* 558 U.S. 1081 (2009) (denying certiorari from resentencing direct appeal); *Hanson v. State,* Case No. PCD-2006-614, (Okl.Cr. June 2, 2009) (unpublished) (denying post-conviction relief); *Hanson v. State,* Case No. PCD-2011-58, (Okl.Cr. March 22, 2011) (unpublished) (denying successive application for post-conviction relief); *Hanson v. Sherrod,* Case No. 10-CV-113-CVE-TLW (N.D. Okla July 1, 2013) (unpublished) (denying federal habeas relief); *Hanson v. Sherrod,* 797 F.3d 810 (10th Cir.2015) (affirming denial of federal habeas relief); *Hanson v. Sherrod,* 136 S.Ct. 2013 (2016) (denying certiorari from affirmance of denial of federal habeas relief).

controlled by our decision in *Matloff* and he is not entitled to post-conviction relief based upon his jurisdictional challenge.

DECISION

Petitioner Hanson's Successive Application for Post-Conviction Relief 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 delivery and filing of this decision.

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

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP - 8 2020

JOHN D. HADDEN
CLERK

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

PCD 2020 611

JOHN FITZGERALD HANSON, *Petitioner,* *-vs-* **THE STATE OF OKLAHOMA,** *Respondent.*	**Tulsa County District Court** **Case No. CF-1999-4583** **Court of Criminal Appeals** **Direct Appeal Case No. D-2006-126** **Court of Criminal Appeals Prior Post-Conviction Case Nos. PCD-2002-628; PCD-2006-614; PCD-2011-58** **Successive Post-Conviction Case No.:**

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF -- DEATH PENALTY -

PART A: PROCEDURAL HISTORY

Petitioner, John Fitzgerald Hanson, through undersigned counsel, submits this successive application for post-conviction relief pursuant section 1089 of Title 22. This is the fourth application for post-conviction relief to be filed.[1]

The sentences from which relief is sought are: Death Sentence and Life Sentence.

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

   b. Case Number: CF-1999-4583

2. Date of resentencing: February 7, 2006 (originally sentenced June 8, 2001)

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[1] Pursuant Rule 9.7(A)(3)(d), attached hereto are copies of Mr. Hanson's prior applications in Case Nos. PCD-2002-628; PCD-2006-614; and PCD-2011-58. *See* Attachment ("Att.") 12, Appendix ("App.") at 48; Att. 13, App. at 95; and Att. 14, App. at 145, respectively. Mr. Hanson remains indigent. *See* Att. 15, App. at 176 (certified determination of trial indigency) and Att. 16, App. at 184 (determination of federal court indigency). Mr. Hanson is represented in this matter by undersigned counsel, Sarah Jernigan, Meghan LeFrancois, Patti Palmer Ghezzi, and Michael Lieberman, appearing with permission of the United States District Court for the Northern District of Oklahoma in *Hanson v. Sherrod, et al.*, CIV-10-113, Dkt. 56, Order, entered Aug. 27, 2020.

3. Terms of Sentence: Mr. Hanson received a sentence of death for one count of first-degree murder (Count I) and a sentence of life without the possibility of parole for a separate count of first degree felony murder (Count II).

4. Name of Presiding Judge: Honorable Caroline E. Wall (resentencing); Honorable Linda G. Morrissey (original trial)

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

   Where? United States Penitentiary, Pollock, Louisiana

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

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

   Petitioner is serving a federal sentence of life plus 984 years for multiple crimes ranging from conspiracy to bank robbery, Case No. CR-99-125-C, United States District Court for the Northern District of Oklahoma. He is currently in the custody of the United States Penitentiary in Pollock, Louisiana.

I. CAPITAL OFFENSE INFORMATION

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

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

   Aggravating circumstances alleged:

   a. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

   b. The defendant knowingly created a great risk of death to more than one person;

   c. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and

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

Aggravating circumstances found:

a. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

b. The defendant knowingly created a great risk of death to more than one person;

c. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

Mitigating factors listed in jury instructions:

a. The defendant's emotional history;

b. The defendant's family history;

c. The defendant's life history while incarcerated;

d. The defendant has an eleven-year-old son;

e. The defendant has never taken another person's life;

f. No direct evidence other than Rashad Barnes has been presented that the defendant ever pulled the trigger on any gun the day that Mrs. Bowles was killed;

g. Direct evidence has been presented that Victor Miller was the person who shot Mrs. Bowles and not the defendant;

h. The defendant is currently serving a life sentence in federal prison;

i. A sentence of life without parole is a significant punishment;

j. The defendant was dominated by Victor Miller; and

k. The defendant was a follower.

Victim impact testimony was not presented at the resentencing trial.

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

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

9. The sentences imposed were recommended by the jury.

II. NON-CAPITAL OFFENSE INFORMATION

10. Mr. Hanson was also convicted of one count (Count II) of first-degree felony murder. He received a sentence of life without parole.

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

12. The sentence imposed was recommended by the jury.

III. CASE INFORMATION

13. Trial Counsel:

    Jack Gordon (original trial and resentencing)
    111 S. Muskogee
    Claremore, Oklahoma 74017

    Steven M. Hightower (co-counsel resentencing)
    2 West Sixth St.
    Tulsa, Oklahoma 74119

    Eric Stall (co-counsel original trial)
    1924 S. Utica
    Tulsa, Oklahoma 74104

14. Counsel were appointed by the court.

15. Mr. Hanson's death sentence was vacated and a resentencing was authorized in *Hanson v. State*, 2003 OK CR 12, 72 P.3d 40. After being resentenced to death, Mr. Hanson appealed to the OCCA. The death sentence was affirmed on April 13, 2009. *Hanson v. State*, 2009 OK CR 13, 206 P.3d 1020.

16. Appellate Counsel:

    James H. Lockard (original appeal)
    Jamie D. Pybas (original and resentencing appeal)
    Kathleen M. Smith (resentencing appeal)
    Capital Direct Appeals Division
    Oklahoma Indigent Defense System
    P.O. Box 926
    Norman, Oklahoma 73070-0926

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

If "yes," give citations if published:
Hanson v. State, 2003 OK CR 12, 72 P.3d 40 (original appeal)
Hanson v. State, 2009 OK CR 13, 206 P.3d 1020 (resentencing appeal)

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

Hanson v. State, Case No. PCD-2002-628, Order Dismissing Application for Post-Conviction Relief as mooted by resolution of first direct appeal (June 17, 2003) (unpub).

Hanson v. Oklahoma, 130 S. Ct. 808 (Dec. 7, 2009) (certiorari denial from resentencing direct appeal).

Hanson v. State, Case No.: PCD-2006-614, Order Denying Application for Post-Conviction Relief (June 2, 2009) (unpub).

Hanson v. State, Case No.: PCD-2011-58, Order Denying Application for Post-Conviction Relief (March 22, 2011) (unpub).

Hanson v. Sherrod, Case No. 10-CV-113-CVE-TLW (N.D. Okla. July 1, 2013) (unpub) (denying federal habeas relief).

Hanson v. Sherrod, 797 F.3d 810 (10th Cir. Aug. 13, 2015) (denying federal habeas relief).

Hanson v. Sherrod, 136 S. Ct. 2013 (May 16, 2016) (certiorari denied).

PART B: GROUNDS FOR RELIEF

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

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

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

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

PROPOSITION

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

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

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

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

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

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

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

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

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

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

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

G. Congress Has Not Disestablished the Cherokee Reservation.

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

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

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

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

PART C: FACTS

Petitioner's request for post-conviction relief presents the sole issue of whether Oklahoma, had jurisdiction to prosecute, convict, and sentence Mr. Hanson to death and life without parole for the murders that occurred within the boundaries of the Cherokee reservation – boundaries that have not been disestablished by Congress. Facts that relate to the offense have limited value regarding the jurisdictional issue and will only be addressed briefly.

FACTS RELATING TO THE OFFENSE

On August 31, 1999, Mr. Jerald Thurman was found unconscious and dying, having sustained gunshot wounds. Tr. VI 1262, 1268, 1272.[2] He later died at the hospital, never having gained consciousness. One week later, Ms. Mary Bowles's body was found, close to where Mr. Thurman had been shot, alongside a neighboring road. She too died from gunshot wounds. Tr. VIII 1565, 1585. Victor Miller and John Hanson were charged with the murders of both of the victims.

Though originally charged jointly, Mr. Hanson and Victor Miller's cases were eventually severed. Victor Miller was sentenced to death for the murder of Jerald Thurman. The jury imposed a non-death sentence against Mr. Hanson for Mr. Thurman's murder. However, Mr. Hanson was sentenced to death for the murder of Mary Bowles.

[2] References to the trial transcript will be by volume ("Tr. Vol._"). Additional supporting documents are cited to as attachments ("Att."), provided in the separately bound and sequentially numbered appendix ("App.").

FACTS RELATING TO THE CHEROKEE NATION AND INDIAN COUNTRY JURISDICTION

Cherokee Nation is a federally recognized Indian tribe. It is one of five tribes that are often treated as a group for purposes of federal legislation (Cherokee, Muscogee (Creek), Choctaw, Chickasaw, and Seminole Nations, historically referred to as the "Five Civilized Tribes" or "Five Tribes"). The Cherokee Reservation boundaries encompass lands in a fourteen-county area, including all of Adair, Cherokee, Craig, Nowata, and Washington Counties and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Sequoyah, Tulsa, and Wagoner Counties, within the borders of the State of Oklahoma.[3] The Nation's government, headquartered in Tahlequah, consists of executive, legislative, and judicial branches, including an active district and appellate court.[4] The Cherokee Nation provides law enforcement through its Marshal Service, and maintains cross-deputization agreements with state, county, and city law enforcement agencies to ensure protection of citizens and non-citizens.[5]

Cherokee Nation maintains a significant and continuous presence in the Cherokee Reservation. There are approximately 139,000 Cherokee citizens residing within the reservation. The Nation provides extensive services to communities throughout the reservation, including,

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

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

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

among others: health and medical centers, veteran's center, employment, housing, bus transit, waterlines, sewers, water treatment, bridge and road construction, parks, food distribution, child support services, child welfare, youth shelter, victim services, donations to public schools and local fire departments, and charitable contributions. The Nation's activities, including its business operations, resulted in a statewide $2.17 billion favorable economic impact in 2019.[6]

The homicides occurred a short distance away from each other in the vicinity of a dirt pit outside of Owasso, Oklahoma. Tr. VII 1100, 1108, 1127. Both occurred on fee land within the Cherokee Nation Reservation. Att. 17, App. at 188-191. Mr. Hanson is an Indian with 1/32 Creek blood with the Muscogee (Creek) Nation ("MCN"), a federally-recognized tribe, and is eligible for enrollment as a citizen of the same. He is currently awaiting official, approved documentation of his enrollment as a citizen of the MCN; the documentation is expected to be produced by the MCN within the next thirty (30) days. Att. 18, App. at 193 (Affidavit of Brandi Harris). Mr. Hanson has blood-relatives who are recognized as Indians and enrolled as MCN citizens. Specifically, Mr. Hanson's paternal great-grandmother is Lilia Taylor Quapaw Hanson. Under Dawes Census Card No. 1147 (Creek by Blood), Lilia Taylor Quapaw Hanson was enrolled with Dawes Roll No. 3709. Att. 18, App. at 196. Mr. Hanson's father, Elmer Hanson, and Elmer's full biological sister, Flossie Arnita Hanson, are the grandchildren of Lilia Taylor Quapaw Hanson, as established in Okmulgee County Probate Case No. 7394. Att. 18, App. at 197. Elmer's sister, Flossie Arnita Hanson, is an enrolled citizen of the MCN, Roll No. 46137, as is her daughter, Donna Joe Hatcher, Roll No. 46213, and her daughter's children. Mr. Hanson's full biological

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

sister, Charmyn Denise Clariett (Hanson), is also an enrolled citizen of the MCN with 1/32 degree Creek blood and Roll No. 76869. Att. 18, App. at 200-202.

There are also historical facts relevant in determining whether Oklahoma had jurisdiction to prosecute, convict, and sentence Mr. Hanson on the Cherokee Nation Reservation. These historical facts are discussed below in part D and documented in the attachments, which are incorporated herein by reference. *See* Atts. 1-18, App. at 1-202.

PART D: ARGUMENTS AND AUTHORITIES

PROPOSITION

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

The direct holding in *McGirt* is elegantly simple. The Government promised the Muscogee (Creek) Nation (MCN) a reservation in present-day Oklahoma. Only Congress can break such a promise and only by using explicit language that provides for the "'present and total surrender of tribal interests' in the affected lands." *McGirt v. Oklahoma*, 140 S. Ct 2452, 2464 (2020). Congress never, in any of the laws Oklahoma relied on, used "anything like" such language. *Id.* Therefore, the MCN reservation is intact; Oklahoma has no criminal jurisdiction over Mr. McGirt, a Seminole, whose crimes occurred within the boundaries of the MCN reservation. *McGirt* also established a methodical analysis of what standard courts must apply in determining whether any given reservation has been diminished or disestablished by Congress. *See Oneida v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) ("We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation.").

A. The Legal Basis for Mr. Hanson's Subsequent Application for Post-Conviction Relief Was Unavailable until *McGirt* and *Murphy* Became Final.

Mr. Hanson recognizes Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (200) and Okla. Stat. tit. 22, § 1089(D) typically apply to the filing and review of subsequent applications for post-conviction relief in capital cases. Under § 1089(D)(9) the legal basis for this application – does Oklahoma have subject-matter jurisdiction to prosecute Mr. Hanson and sentence him to life without parole and death – was unavailable until mandates issued in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) *(McGirt)* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (*Murphy*). The Supreme Court issued the mandate in *McGirt* on August 10, 2020, and the Tenth Circuit issued the judgment in *Murphy* on August 26, 2020. Both *Murphy* and *McGirt* are final decisions upon which Mr. Hanson may file a subsequent Application for Post-Conviction Relief. This Court recognizes this *McGirt/Murphy* issues fall "under the parameters of section 1089(D)" and thus the issue here is properly before this Court. *See Goode v. State*, PCD-2020-530, Order Remanding for Evidentiary Hearing, Aug. 24, 2020, at 3.

Petitioner requests this Court decide the federal claim on the merits and grant Mr. Hanson relief, dismiss the cases, and vacate the convictions and sentences. By faithfully applying *McGirt* and *Murphy*, this Court will be convinced the Cherokee Nation Reservation is intact and Oklahoma had no jurisdiction to try, convict, and sentence Mr. Hanson.

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

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

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

Such respect for jurisdictional claims is proper. The Supreme Court defines jurisdiction as "the courts' statutory and constitutional *power* to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002). *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Because subject-matter jurisdiction involves a court's power to act, the Supreme Court concludes "it can never be forfeited or waived." *Cotton*, 535 U.S. at 630. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised. This concept is so grounded in law that defects in jurisdiction cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U.S. 413, 421 (1911). Likewise, the Tenth Circuit in *Murphy v. Royal,* 875 F.3d 896, 907 n.5 (10th Cir. 2017) recognized issues of subject-matter jurisdiction in Oklahoma

are "never waived" and can "be raised on a collateral appeal." Similarly, Oklahoma's Solicitor General acknowledges "Oklahoma allows collateral challenges to subject-matter jurisdiction *at any time*." *McGirt v. Oklahoma*, Supreme Court Case No. 18-9526 (Mar 13, 2020), Brief of Respondent at 43 (emphasis added).

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

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

In *McGirt,* the Supreme Court decided the only question before it. It determined that the Muscogee (Creek) Nation's 1866 reservation had not been disestablished, that the reservation was "Indian country" under 18 U.S.C. § 1551(a), and that Oklahoma had no jurisdiction to prosecute Mr. McGirt, an Indian, for a major crime committed within Creek reservation borders. Noting that "each tribe's treaties must be considered on their own terms," the analysis in *McGirt* extends to other Five Tribes reservations, as portended by the dissent. *McGirt*, 140 S. Ct. at 2479; *id.* at 2482 (Roberts, J., dissenting) ("[T]he Court's reasoning portends that there are four more such reservations in Oklahoma.").

The Cherokee and Creek are connected by more than their shared tragedy of the Trail of Tears. They share a common legal history and similarities in the terms of their treaty-created reservations. By applying the decision in *McGirt* to the Cherokee reservation, this Court must find that it too has not been disestablished by Congress, is "Indian country" under 18 U.S.C. §1151(a), and that Oklahoma has no jurisdiction to prosecute, convict, and sentence Mr. Hanson to life without parole and death.

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

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

As recognized by this Court more than thirty years ago, Oklahoma failed to assume criminal and civil jurisdiction under Public Law 280 before it was amended to require tribal consent; and Oklahoma "does not have jurisdiction over crimes committed by or against an Indian in Indian Country"; *see Cravatt*, 825 P.2d at 279 (citing *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 403).[7] *Klindt* did not address whether all lands within Cherokee Nation boundaries constitute a reservation under 18 U.S.C. § 1151(c).

The United States Supreme Court likewise had not addressed reservation status as to any of the Five Tribes, until July 9, 2020, when it decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). In *McGirt*, the Court ruled that the Muscogee (Creek) Reservation was established by treaty; Congress never disestablished the reservation; all land, including fee land, within the reservation is Indian country under 18 U.S.C. § 1151(a); federal statutes concerning the Five Tribes near the time of statehood did not grant jurisdiction to Oklahoma over crimes committed by Indians on the

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[7] In *Klindt*, this Court correctly overruled *Ex parte Nowabbi*, 1936 OK CR 123, 61 P.2d 1139, 1154, finding Oklahoma had no jurisdiction over crimes committed on restricted Choctaw allotments. *See also Cravatt,* 825 P.2d at 279 (stating there was no foundation in the statutes for the United States' position that the Five Tribes should receive different judicial treatment).

reservation; the Major Crimes Act, 18 U.S.C. § 1153 (MCA), applies to certain listed crimes committed by Indians on the reservation; and Oklahoma had no jurisdiction to prosecute a Seminole citizen for crimes committed on fee lands within the reservation under the MCA. *Id.*

On the same date, the Supreme Court not only affirmed the Tenth Circuit's 2017 ruling in *Murphy v. Royal*, 875 F. 3d 896 (10th Cir. 2017), *aff'd, Sharp v. Murphy*, 591 U.S. ___, 140 S. Ct. 2412 (2020) (*Murphy),* determining that Oklahoma had no jurisdiction under MCA over the murder of an Indian by another Indian on the Creek Reservation; it also remanded four pending cases involving other reservations in Oklahoma, in light of *McGirt.*[8]

The *McGirt* decision laid to rest Oklahoma's position that the MCA[9] and Indian Country Crimes Act (ICCA) (also known as General Crimes Act (GCA)) [10]do not apply in Oklahoma. The

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[8] *See Bentley v. Oklahoma*, OCCA No. PC-2018-743, U.S. S. Ct. No. 19-5417, Judgment Vacated and Case Remanded, July 9, 2020 (Citizen Band Potawatomi Reservation); *Johnson v. Oklahoma*, OCCA No. PC-2018-343, U.S. S. Ct. No. 18-6098, Judgment Vacated and Case Remanded, July 9, 2020 (Seminole Reservation); *Terry v. Oklahoma*, OCCA No. PC-2018-1076, U.S. S. Ct. No. 18-8801, Judgment Vacated and Case Remanded, July 9, 2020 (Quapaw/Modoc/Ottawa Reservations); and *Davis v. Oklahoma*, OCCA No. PC-2019-451, U.S. S. Ct. No. 19-6428, Judgment Vacated and Case Remanded, July 9, 2020 (Choctaw Reservation).

[9] The MCA provides in pertinent part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter . . . [and] robbery . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

[10] The ICCA 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. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152.

Court noted that even the dissent declined "to join Oklahoma in its latest twist." *See McGirt,* 140 S. Ct. at 2476. The Court found no validity to Oklahoma's argument that the MCA was rendered inapplicable by three statutes that were passed prior to statehood: Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 (granting federal courts in Indian Territory[11] "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense"); Act of June 28, 1898, ch. 517, § 28, 30 Stat. 495, 504-505 (Curtis Act) (abolishing Creek Nation courts and transferring pending criminal cases to federal courts in Indian Territory); and the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267, as amended by the Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286) (concerning transfer of cases upon statehood).[12] *McGirt,* 140 S. Ct. at 2477.

The Supreme Court noted that Oklahoma was formed from Oklahoma Territory in the west and Indian Territory in the east,[13] and that criminal prosecutions in Indian Territory were split

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

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

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

between tribal and federal courts, *Id.* at 2476 (citing Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81, 94).[14] The Court held that Congress "abolished that [Creek tribal/federal court split] scheme" with the 1897 act, but "[w]hen Oklahoma won statehood in 1907, the MCA applied immediately according to its plain terms." *Id.* at 2477. The Enabling Act sent federal-law cases to federal court in Oklahoma, and crimes arising under the federal MCA "belonged in federal court from day one, wherever they arose within the new State." *Id.* at 2477.

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

The Cherokee Reservation includes individual restricted and trust Cherokee allotments that constitute Indian country under 18 U.S.C. § 1151(c) for purposes of application of the MCA and GCA ("all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same"). *See United States v. Ramsey*, 271 U.S. 467, 469, 472 (1926) (GCA applies to murder of Indian by non-Indian on restricted Osage allotment); *United States v. Sands*, 968 F.2d 1058, 1061-62 (10th Cir. 1992) (MCA applies to murder of Indian by Indian on restricted Creek allotment, and allotment era statutes "did not abrogate the federal government's authority and responsibility, nor allow jurisdiction by the State of Oklahoma" over those allotments); *Klindt*, 782 P.2d at 403 (no state jurisdiction over assault with dangerous weapon by or against Indian on Cherokee trust allotment).

The Cherokee Reservation also includes tribal lands held in trust by the United States and unallotted tribal lands that constitute Indian country under 18 U.S.C. § 1151(a) for jurisdictional

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

purposes ("all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). *See United States v. John*, 437 U.S. 634, 649 (1978) (Mississippi Choctaw tribal trust land); *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990) (Cherokee tribal trust land); *Indian Country, U.S.A. Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) (unallotted Creek land).

Oklahoma has no jurisdiction over crimes covered by the MCA, even when committed on individual fee land within the Cherokee Reservation, rather than on restricted, trust or tribal fee land. Reservations include lands within reservations boundaries owned in fee by non-Indians. "[W]hen Congress has once established a reservation, *all tracts included within it* remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909) (emphasis added). "[T]his Court long ago rejected the notion that the purchase of lands by non-Indians is inconsistent with reservation status." *McGirt*, 140 S. Ct. at 2464 n.3 (citing *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 357-58 (1962)). "'Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.'" *McGirt*, 140 S. Ct. at 2468 (citing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).

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

1. The Creek Reservation Was Established by Treaty.

In *McGirt,* the Court discussed Creek treaties in detail, before concluding that they established the Creek Reservation. The Court noted that the 1832 and 1833 Creek removal treaties

"solemnly guarantied" the land; established boundary lines to secure "a country and permanent home;" stated the United States' desire for Creek removal west of the Mississippi River; included Creek Nation's express cession of their lands in the East; confirmed the treaty obligation of the parties upon ratification; required issuance of a patent, in fee simple, to Creek Nation for the new land, which was formally issued in 1852; and guaranteed Creek rights "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them." *McGirt*, 140 S. Ct. at 2459, 2460, 2461 (citing Treaty with the Creeks, arts. I, XII, XIV, XV, Mar. 24, 1832, 7 Stat. 366-368, and Treaty with the Creeks, preamble, arts. III, IV, IX, Feb. 14, 1833, 7 Stat. 417, 419).

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

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

In sum, the Court stressed in *McGirt* that the Creek treaties promised a "permanent home" that would be "forever set apart," and the Creek were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. The Court concluded that "[u]nder any definition, this was a reservation." *McGirt*, 140 S. Ct. at 2461-62.

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

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

Cherokee Nation was originally located in what are now the states of Georgia, Alabama, Tennessee, South Carolina, North Carolina, and Kentucky. Wilkins, Thurman, *Cherokee Tragedy: The Ridge Family and the Decimation of a People* 22, 91, 209, 254 (rev. 2d ed. 1986) (*Cherokee Tragedy*). Like the Creeks, the Cherokees exchanged lands in the Southeast for new lands in Indian Territory in the 1830s under pressure of the national removal policy. The Indian Removal Act of 1830, Act of May 28, 1830, ch. 148, 4 Stat. 411, which implemented this policy, authorized the President to divide public domain lands into defined "districts" for tribes removing west of the Mississippi River. *Id.* at 412, § 1. It also provided that the United States would "forever secure and guaranty" such lands to the removed tribes, "and if they prefer it . . . the United States will cause a patent . . . to be made and executed to them for the same[.]" *Id.* at 412, § 3.

In 1831 and 1832, the Supreme Court issued two seminal decisions in cases involving Cherokee Nation resistance to Georgia citizens' trespasses on Cherokee lands. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), the Supreme Court held that Cherokee Nation was a "domestic dependent nation[]." The following year, the Supreme Court held that Indian tribes were "'distinct political communities, having territorial boundaries, within which their authority is exclusive . . . which is not only acknowledged, but guarantied by the United States,' a power dependent on and subject to no state authority." *McGirt*, 140 S. Ct. at 2477 (citing *Worcester v.*

Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)). Despite these decisions, President Jackson persisted in efforts to remove Cherokee citizens from Georgia.

The Cherokee Reservation in Indian Territory was finally established by 1833 and 1835 treaties. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokees on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of those lands, and provided that "a patent" would issue as soon as reasonably practical. *Id.* at 415, art. I. It confirmed the treaty obligation of the parties upon ratification. *Id.* at 416, art. VII.

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

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

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

Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478, 479. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." *Id.* at 480, art. 2. Like Creek treaties, the 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government . . . within their own country," so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians; and provided that it would be "obligatory on the contracting parties" after ratification by the Senate and the President. *Id.* at 479, 481, 482, 486, arts. 1, 5, 8, 19.

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

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

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

Like Creek Nation, Cherokee Nation negotiated a treaty with the United States after the Civil War. Treaty with the Cherokee Indians, July 19, 1866, art. IV, 14 Stat. 799, 800. The 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet), Treaty with the Cherokee, *id.* at 804, art. XVI, and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country . . . until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." *Id.* It also expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half-mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. ("The Cherokee nation hereby cedes . . . to the United States, the tract of land in the State of Kansas which was sold to the Cherokees . . . and also

that strip of the land ceded to the nation . . . which is included in the State of Kansas, and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said State"). *Id.* at 804, art. XVII. None of the other provisions of the 1866 treaty affected Cherokee Nation's remaining reservation lands. Instead, the treaty required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council." *Id.* at 805, art. XXI.

The 1866 treaty recognized the Nation's control of its reservation, by expressly providing: "*Whenever the Cherokee national council shall request it*, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States." *Id.* at 805, art. XX (emphasis added). It also guaranteed "to the people of the Cherokee nation the quiet and peaceable possession of their country," and promised federal protection against "intrusion from all unauthorized citizens of the United States" and removal of persons not "lawfully residing or sojourning" in Cherokee Nation. *Id.* at 806, arts. XXVI and XXVII. It "*reaffirmed and declared to be in full force*" all previous treaty provisions "not inconsistent with the provisions of" the 1866 treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by the Cherokee nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. *Id.* at 806, art. XXXI (emphasis added).

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

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

In *McGirt*, the Court rejected Oklahoma's newly minted argument that Creek treaties did not establish a reservation and instead created a dependent Indian community, as defined by 18 U.S.C. § 1151(b) ("all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state"). *McGirt*, 140 S. Ct. at 2475-76. Oklahoma based this claim on the tribal fee ownership of the reservation, and the absence of the words "reserved from sale" in the Creek treaties. *Id.* at 2475. The "entire point" of this reclassification attempt was "to avoid *Solem's* rule that only Congress may disestablish a reservation."[15] *Id.* at 2474.

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

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

The "most authoritative evidence of [a tribe's] relationship to the land" does not lie in scattered references to "stray language from a statute that does not control here, a piece of congressional testimony there, and the scattered opinions of agency officials everywhere in between." *McGirt,* 140 S. Ct. at 2476, 2475. "[I]t lies in the treaties and statutes that promised the land to the Tribe in the first place." *Id.* at 2476. As previously noted, the 1830 Indian Removal Act promised issuance of fee patents upon removal of tribes affected by its implementation, which were granted to Creek Nation and Cherokee Nation. The treaties for both tribes contain extensive evidence of their relationships with their respective lands in Indian Territory. The Cherokee Reservation was established by treaty, just as Creek treaties established the Creek Reservation. *McGirt*, 140 S. Ct. at 2460-61. Later federal statutes also recognized the Cherokee Reservation as a distinct geographic area.[16]

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

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

[16] *See* Act of June 21, 1906, ch. 3504, 34 Stat. 325, 342-43 (drawing recording districts in the Indian Territory, including district 27, with boundaries along the northern and western "boundary line[s] of the Cherokee Nation," and district 28, described as lying within the boundaries of the Cherokee Nation); Act of June 16, 1906, § 6, 34 Stat. 267, 271-72 (the third district for the House of Representatives must (with the exception of that part of recording district numbered twelve, which is in the Cherokee and Creek nations) comprise all the territory now constituting the Cherokee, Creek, and Seminole nations and the Indian reservations lying northeast of the Cherokee Nation, within said State); Act of June 30, 1913, ch. 4, § 18, 38 Stat. 77, 95 ("common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations"); and the Oklahoma Indian Welfare Act (OIWA), Act of June 26, 1936, ch. 831, 49 Stat. 1967, codified at 25 U.S.C. §§ 5201-5210 (authorizing Secretary of the Interior to acquire land "within or without existing Indian reservations" in Oklahoma).

Stat. 612, 640-43. The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the north and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906).[17] The 1893 ratification statute required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become, and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. *Id.* at 112. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time.

The original 1839 Cherokee Constitution identified the boundaries as described in its 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may be made necessary" by the 1866 treaty.[18] Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of March 3, 1893." 1999 Cherokee Constitution, art. 2.

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

[18] 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, *reprinted in* Volume I of West's Cherokee Nation Code Annotated (1993 ed.).

G. Congress Has Not Disestablished the Cherokee Reservation.

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

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

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

reservation is "'discontinued,' 'abolished,' or 'vacated.'" *McGirt*, 140 S. Ct. at 2463 (citing *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973)); *see also DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 439–40 n.22 (1975).

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

In 1893, in the same statute ratifying the Cherokee 1891 Agreement, Congress established the Dawes Commission to negotiate agreements with the Five Tribes for "the extinguishment of the national or tribal title to any lands" in Indian Territory "either by cession," by allotment, or by such other method as agreed upon. § 16, 27 Stat. 612, 645–646.[19] The Commission reported in 1894 that the Creek Nation "would not, under any circumstances, agree to cede any portion of their lands." *McGirt*, 140 S. Ct. at 2463 (citing S. Misc. Doc. No. 24, 53d Cong., 3d Sess., 7 (1894)).[20] The Cherokee Nation resisted allotment for almost a decade longer, but finally ratified an agreement in 1902. Act of July 1, 1902, ch. 1375, 32 Stat. 716 (Cherokee Agreement). Like the Creek Allotment Agreement, Act of Mar. 1, 1901, ch. 676, 31 Stat. 861 (Creek Agreement), the Cherokee Agreement contained no cessions of land to the United States, and did not disestablish

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

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

the Cherokee Reservation, which also "survived allotment." *See McGirt*, 140 S. Ct. at 2464.[21] Where Congress contemplates, but fails to enact legislation containing express disestablishment language, the statute represents "a clear retreat from previous congressional attempts to vacate the . . . Reservation in express terms[.]" *DeCoteau*, 420 U.S. at 448.

The central purpose of the 1902 Cherokee Agreement, like that of the Creek Agreement, was to facilitate transfer of title from the Nation of "allottable lands" (defined in § 5, 32 Stat. 716, as "all the lands of the Cherokee tribe" not reserved from allotment)[22] to tribal citizens individually. With exceptions for certain pre-existing town sites and other special matters, the Cherokee Agreement established procedures for conveying allotments to individual citizens who could not sell, transfer, or otherwise encumber their allotments for a number of years (5 years for any portion, 21 years for the designated "homestead" portion). §§ 9-17, 32 Stat. 716, 717; *see also McGirt*, 140 S. Ct. at 2463 (citing Creek Agreement, §§ 3, 7, 31 Stat. 861, 862-64).

The restricted status of the allotments reflects the Nation's understanding that allotments would not be acquired by non-Indians, would remain in the ownership of tribal citizens, and would be subject to federal protection. Tribal citizens were given deeds that conveyed to them "all the right, title, and interest" of the Cherokee Nation. § 58, 32 Stat. 716, 725; *see also McGirt*, 140 S. Ct. at 2463 (citing Creek Agreement, § 23, 31 Stat. 861, 867-68). As of 1910, 98.3% of the lands of Cherokee Nation (4,348,766 acres out of 4,420,068 acres) had been allotted to tribal citizens,

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

[22] Lands reserved from allotment "in the Cherokee Nation" included schools, colleges, and town sites "in Cherokee Nation," cemeteries, church grounds, an orphan home, the Nation's capital grounds, its national jail site, and the newspaper office site. §§ 24, 49, 32 Stat. 716, 719-20, 724; *see also* Creek Agreement, § 24, 31 Stat. 861, 868-69.

and an additional 21,000 acres were reserved for town sites, schools, churches, and other uses.[23] Only 50,301 acres scattered throughout the nation remained unallotted in 1910 – approximately one percent of the nation's reservation area. *Id.* Later, federal statutes relaxed restrictions on conveyances and encumbrance of allotments in various ways and contributed to the loss of individual Indian ownership of allotments over time.[24]

"Missing in all this, however, is a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands" required for disestablishment. *McGirt*, 140 S. Ct. at 2464. Allotment alone does not disestablish a reservation. *Id.* (citing *Mattz*, 412 U.S. at 496-97) (explaining that Congress's expressed policy during the allotment era "was to continue the reservation system," and that allotment can be "completely consistent with continued reservation status"); and *Seymour*, 368 U.S. at 356-58 (allotment act "did no more than open the way for non-Indian settlers to own land on the reservation")).

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

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

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

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

applicability of relevant statutes to both the Creek and Cherokee Nations, and similarities in the Cherokee and Creek Agreements.

The Act of June 28, 1898, ch. 517, 30 Stat. 495 (Curtis Act), provided "for forced allotment and termination of tribal land ownership without tribal consent unless the tribe agreed to allotment," *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988). "[P]erhaps in an effort to pressure the Tribe to the negotiating table," the Curtis Act included provisions for termination of tribal courts. *McGirt*, 140 S. Ct. at 2465 (citing § 28, 30 Stat. 495, 504–505. A few years later, the 1901 Creek Allotment Act expressly provided that it did not "revive" Creek courts.[25] Nevertheless, the Curtis Act's abolishment of Creek courts did not result in reservation disestablishment. *McGirt*, 140 S. Ct. at 2466. This Court need not determine whether Cherokee courts were abolished.[26] But, there are ample grounds to conclude the Cherokee Agreement superseded the Curtis Act's abolishment of Cherokee courts. While earlier unratified versions of the Cherokee Agreement contained provisions expressly validating the Curtis Act's abolishment of tribal courts, the final version, ratified in 1902, did not.[27] Instead, section 73 of the Cherokee

[25] The Creek Agreement provided that nothing in that agreement "shall be construed to revive or reestablish the Creek courts which have been abolished" by former laws. 31 Stat. 861, 873, § 47. The 1936 OIWA, 25 U.S.C. § 5209, impliedly repealed this limitation on Creek courts. *Muscogee (Creek) Nation,* 851 F.2d at 1446-47.

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

[27] Unratified agreements that predate the Cherokee Agreement demonstrate that Cherokees ensured that tribal court abolishment was not included in the final Agreement. The unratified January 14, 1899 version stated that the Cherokee "consents" to "extinguishment of Cherokee courts, as provided in section 28 of the [1898 Curtis Act]." Att. 8, App. at 26 (Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899), Appendix No. 2, § 71 at 49, 57). The unratified April 9, 1900

Agreement recognized that treaty provisions not inconsistent with the Agreement remained in force.[28] § 73, 32 Stat. 716, 727. These treaty protections included the 1866 Treaty provision that Cherokee courts would "retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." Art. 13, 14 Stat. 799, 803. It is also noteworthy that the Curtis Act recognized the continuation of the Cherokee Reservation boundaries by expressly referencing a "permanent settlement in the Cherokee Nation" and "lands in the Cherokee Nation." §§ 21, 25, 30 Stat. 495, 502, 504.

Another "serious blow" to Creek governmental authority was a provision in the Creek Agreement that conditioned the validity of Creek ordinances "affecting the lands of the Tribe, or of individuals after allotment, or the moneys or other property of the Tribe, or of the citizens" thereof, on approval by the President. *McGirt*, 140 S. Ct. at 2466 (citing § 42, 31 Stat. 861, 872).

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

[28] Treaty protections also included the Nation's 1835 treaty entitlement "to a delegate in the House of Representatives whenever Congress shall make provision for the same." Treaty with the Cherokees, Art. 7, 7 Stat. 478, 482.

There is no similar limitation on Cherokee legislative authority in the Cherokee Agreement. Even if there had been, such provision did not result in reservation disestablishment, in light of the absence of any of the hallmarks for disestablishment in the Cherokee Agreement, such as cession and compensation. *See McGirt*, 140 S. Ct. at 2465 n.5.

Like the Creek Agreement, § 46, 31 Stat. 861, 872, the Cherokee Agreement provided that tribal government would not continue beyond March 4, 1906. § 63, 32 Stat. 716, 725. Before that date, Congress approved a Joint Resolution continuing Five Tribes governments "in full force and effect" until distribution of tribal property or proceeds thereof to tribal citizens. Act of Mar. 2, 1906, 34 Stat. 822. The following month, Congress enacted the Five Tribes Act, which expressly continued the governments of all of the Five Tribes "in full force and effect for all purposes authorized by law, until otherwise provided by law." *McGirt,* 140 S. Ct. at 2466 (citing § 28, 34 Stat. 137, 148). The Five Tribes Act included a few incursions on Five Tribes' autonomy. *McGirt*, 140 S. Ct. at 2466. It authorized the President to remove and replace their principal chiefs, instructed the Secretary of the Interior to assume control of tribal schools, and limited the number of tribal council meetings to no more than 30 days annually. *Id.* (citing §§ 6, 10, 28, 34 Stat. 137, 139–140, 148). The Five Tribes Act also addressed the handling of the Five Tribes' funds, land, and legal liabilities in the event of dissolution. *Id.* (citing §§ 11, 27, 34 Stat. 137, 141, 148).

"Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land." *McGirt*, 140 S. Ct. at 2466. Instead, Congress left the Five Tribes "with significant sovereign functions over the lands in question." *Id.* For example, Creek Nation retained the power to collect taxes; to operate schools; and to legislate through tribal ordinances (subject to Presidential approval of certain ordinances as required by the Creek Agreement, § 42, 31 Stat. 861, 872). *Id.* (citing §§ 39, 40, 42, 31 Stat. 861, 871–872). The

Cherokee Agreement also recognized continuing tribal government authority. As previously noted, it did not require Presidential approval of any ordinance, did not abolish tribal courts, and confirmed treaty rights. § 73, 32 Stat. 716, 727. It also required that the Secretary operate schools under rules "according to Cherokee laws"; required that funds for operating tribal schools be appropriated by the Cherokee National Council; and required the Secretary's collection of a grazing tax for the benefit of Cherokee Nation. §§ 32, 34, 72, 32 Stat.716, 721, 716-27. "Congress never withdrew its recognition of the tribal government, and none of its [later] adjustments would have made any sense if Congress thought it had already completed that job." *McGirt*, 140 S. Ct. at 2466.

Instead, Congress changed course in a shift in policy from assimilation to tribal self-governance. *See McGirt*, 140 S. Ct. at 2467. The 1934 Indian Reorganization Act (IRA) officially ended the allotment era for all tribes. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101, *et seq.*).[29] In 1936, Congress enacted the OIWA, which included a section concerning tribal constitutions and corporate charters, and repealed all acts or parts of acts inconsistent with the OIWA. 25 U.S.C. §§ 5203, 5209. Cherokee Nation's government, like those of other tribes, was strengthened later by the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975. Act of January 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 5301, *et seq.*). The ISDEAA enables Cherokee Nation to utilize federal funds in accordance with multi-year funding agreements after government-to-government negotiations

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

with the Department of the Interior. 25 U.S.C. § 5363. Congress, for the most part, has treated the Five Tribes in a manner consistent with its treatment of tribes across the country.

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

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

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

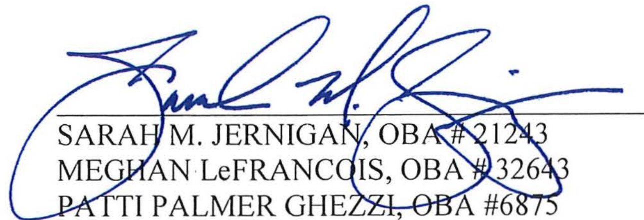
2469. The only role that extratextual sources can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning. *Id.*

The "perils of substituting stories for statutes" were demonstrated by the "stories" that Oklahoma claimed resulted in disestablishment in *McGirt*. *Id.* at 2470. Oklahoma's long-historical practice of asserting jurisdiction over Indians in state court, even for serious crimes on reservations, is "a meaningless guide for determining what counted as Indian country." *Id.* at 2471. Historical statements by tribal officials and others supporting an idea that "everyone" in the late nineteenth and twentieth centuries believed the reservation system and Creek Nation would be disbanded, without reference to any ambiguous statutory direction, were merely prophesies that were not self-fulfilling. *Id.* at 2472. Finally, the "speedy and persistent movement of white settlers" onto Five Tribes land throughout the late nineteenth and early twentieth centuries is not helpful in discerning statutory meaning. *Id.* at 2473. It is possible that some settlers had a good faith belief that Five Tribes lands no longer constituted a reservation, but others may not have cared whether the reservations still existed or even paused to think about the question. *Id.* Others may have been motivated by the discovery of oil in the region during the allotment period, as reflected by Oklahoma court "sham competency and guardianship proceedings that divested" tribal citizens of oil rich allotments. *Id.* Reliance on the "'practical advantages' of ignoring the written law" would be "the rule of the strong, not the rule of law." *Id.* at 2474.

CONCLUSION

Congress had no difficulties using clear language to diminish reservation boundaries in the 1866 treaty and 1891 Agreement provisions for Cherokee Nation's cessions of land in Indian Territory in exchange for money and promises. There are no other statutes containing any of the hallmark language altering the Cherokee Reservation boundaries as they existed after the 1891 Agreement's cession of the Cherokee Outlet. Clear language of disestablishment was available to Congress when it enacted laws specifically applicable to the Five Tribes as a group and to Cherokee Nation individually, but it did not use it. The Cherokee Reservation boundaries as established by treaty and as defined in the Cherokee Constitution have not been disestablished. Oklahoma has no jurisdiction over crimes, like that of Mr. Hanson's, that are covered by the MCA when committed on the Reservation.

Respectfully Submitted,



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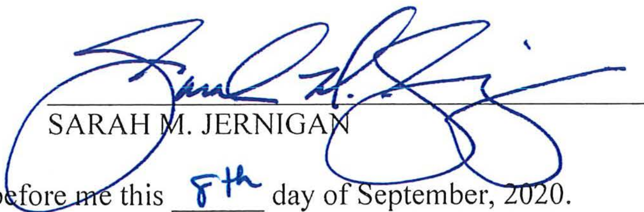
COUNSEL FOR PETITIONER,
JOHN FITZGERALD HANSON

Dated: September 8, 2020

VERIFICATION

State of Oklahoma)
) ss:
County of Oklahoma)

Sarah M. Jernigan, being first duly sworn upon oath, states he signed the above pleading as attorney for JOHN FITZGERALD HANSON, and that the statements therein are true to the best of his knowledge, information, and belief.



SARAH M. JERNIGAN

Subscribed and sworn to before me this 8th day of September, 2020.

Notary Public

Commission Number: 10006999

My commission expires: 08/25/22

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2020, a true and correct copy of the foregoing Subsequent Application for Post-Conviction Relief, along with a separately bound Appendix of Attachments were delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9(B), Rules of the Court of Criminal Appeals.

SARAH M. JERNIGAN

INDEX OF ATTACHMENTS
(FILED IN SEPERATELY BOUND APPENDIX)

Appendix Page	Attachment Number	Document
001	1	Cherokee Nation Cross-Deputization Agreements List (1992-2019)
004	2	Cherokee Nation Boundaries and Service Area Maps
011	3	Indian Country Criminal Jurisdictional Chart
014	4	Cherokee Cessions Map, Goins and Goble, *"Historical Atlas of Oklahoma"*
017	5	Map of Indian Territory
019	6	Map of Oklahoma and Indian Territories
021	7	Ann. Rept. of the Comm. Five Civ. Tribes of 1894, 1895, and 1896 (1897)
026	8	Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899) (Excerpts)
032	9	Seventh Ann. Rept. of the Comm. Five Civ. Tribes (1900) (Excerpts)
040	10	Ninth Ann. Rept. of the Comm. Five Civ. Tribes (1902) (Excerpts)
043	11	Ann. Rept. of the Comm. Five Civ. Tribes (1910) (Excerpts)
048	12	Application for Post-Conviction Relief PCD-2002-628
095	13	Application for Post-Conviction Relief PCD-2006-614
145	14	Application for Post-Conviction Relief PCD-2011-58
176	15	Certified Determination of Trial Indigency
184	16	Determination of Federal Court Indigency
188	17	Cherokee Nation Real Estate Services Memos
192	18	Documents Establishing Muscogee (Creek) Nation Citizenship Status

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

JOHN FITZGERALD HANSON, *Petitioner,* *-vs-* **THE STATE OF OKLAHOMA,** *Respondent.*	**Tulsa County District Court** **Case No. CF-1999-4583** **Court of Criminal Appeals** **Direct Appeal Case No. D-2006-126** **Court of Criminal Appeals Prior Post-Conviction Case Nos. PCD-2002-628** **PCD-2006-614, PCD-2011-58**
	Successive Post-Conviction Case No. **PCD-2020-611**

UNOPPOSED MOTION TO SUPPLEMENT PETITIONER'S SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF
- DEATH PENALTY -

Petitioner, Mr. John Fitzgerald Hanson, through undersigned counsel, respectfully moves this Court to supplement his Successive Application for Post-Conviction Relief (PCD-2020-611) with the attached document. In support of same, Petitioner states as follows:

1. On September 8, 2020, Mr. John Hanson filed a Successive Application for Post-Conviction Relief ("Application") in this Court, wherein he argues the State of Oklahoma did not have jurisdiction to prosecute, convict, and sentence him for the murders that occurred within the boundaries of the Cherokee Nation Reservation. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

2. Mr. Hanson's proposition rests on the fact that crimes committed by Indians within the Cherokee Nation Reservation boundaries are subject only to federal jurisdiction under the Major Crimes Act, not state court jurisdiction.

Subject To Acceptance Or Rejection By the Court
Of Criminal Appeals Of the State Of Oklahoma
This Instrument is Accepted As Tendered For
Filing This ___ Day Of ___ 20___
COURT CLERK
COURT OF CRIMINAL APPEALS
BY___
DEPUTY CLERK

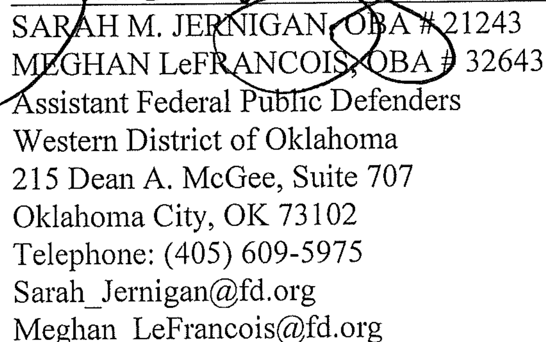
3. In Mr. Hanson's Application, Mr. Hanson alleges he is an Indian with 1/32 Creek blood with the Muscogee (Creek) Nation ("MCN"), a federally-recognized tribe.

4. While facts sufficient to establish his status as an Indian were alleged in his Application, at the time of the filing of the Application, final, approved documentation of Mr. Hanson's enrollment status as a citizen of the MCN was not yet available. The same has now been obtained and is produced here for the Court's consideration. *See* Attachment 1 (Muscogee (Creek) Nation Enrollment Verification).

5. Counsel for Respondent has been contacted and does not object to this Motion.

WHEREFORE, Mr. Hanson respectfully moves for the supplementation of his Application to include the attached documentation for the Court's consideration. In so doing, Mr. Hanson maintains and reasserts all facts, arguments, and authority previously asserted in his Successive Application for Post-Conviction Relief.

Respectfully Submitted,



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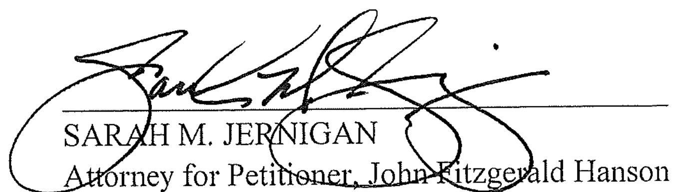
COUNSEL FOR PETITIONER,
JOHN FITZGERALD HANSON

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on this 30 day of October, 2020, a true and correct copy of the foregoing Motion to Supplement Petitioner's Application for Post-Conviction Relief was served on the Office of the Attorney General by delivering a copy with the Clerk of the Oklahoma Court of Criminal Appeals.



SARAH M. JERNIGAN
Attorney for Petitioner, John Fitzgerald Hanson

Director
Nathan Wilson

Managers
Allan Colbert Jr.
Andy Proctor

Board Members
Joan Henson
Elizabeth Yahola
Clarence Johnson
LeAnn Nix
Jason Nichols

Muscogee (Creek) Nation
Enrollment Verification

RE: Name: **George John Fitzgerald Hanson**
Address: **USP Pollock 1000 Airbase Rd**
Pollock LA 71467

Birthdate: 04/08/1964
Enrollment Date: October 28, 2020
Roll Number: 114364
Degree of Creek Blood: 1/32

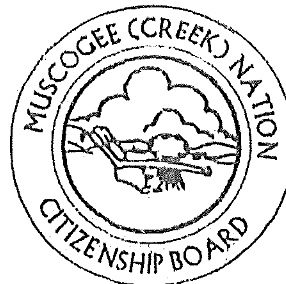
I hereby certify that George John Fitzgerald Hanson, DOB: 04/08/1964 is enrolled with the Muscogee (Creek) Nation. Enrollment Date: 10/28/2020 Roll Number: 114364, Degree of Creek Blood: 1/32.

I attest and certify that the above information is a correct compilation of official records of the Muscogee (Creek) Nation filed and recorded with the Muscogee (Creek) Nation Citizenship Office, the public office responsible for keeping records of enrolled citizens, and that I am an authorized custodian of said records.

Executed this 29th day of October, 2020.

Nathan Wilson

Nathan Wilson - Director
Muscogee (Creek) Nation Citizenship Office



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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR - 2 2021
JOHN D. HADDEN
CLERK

JOHN FITZGERALD HANSON,	)	
Petitioner,	)	
v.	)	**Case No. PCD-2020-611**
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

ORDER REMANDING FOR EVIDENTIARY HEARING

Before the Court is John Fitzgerald Hanson's successive application for post-conviction relief and motion for evidentiary hearing. He was tried by jury in the District Court of Tulsa County, Case No. CF-1999-4583, and convicted of one count of First Degree Malice Aforethought Murder (Count 1) and one count of First Degree Felony Murder, in violation of 21 O.S.Supp.1998, §§ 701.7(A) and (B), respectively. The district court sentenced Hanson in accordance with the jury's verdict to death on Count 1 and life imprisonment without the possibility of parole on Count 2. Hanson appealed and we affirmed each of Hanson's convictions and his sentence on Count 2. We, however, vacated his death sentence and remanded the matter

for resentencing. *Hanson v. State,* 2003 OK CR 12, 72 P.3d 40. Hanson's resentencing jury again fixed punishment at death on Count 1, and the Honorable Caroline E. Wall sentenced him accordingly. We affirmed his death sentence in *Hanson v. State,* 2009 OK CR 13, 206 P.3d 1020. He subsequently exhausted his appeals.[1]

Hanson now claims that the district court lacked jurisdiction to try him based on *McGirt v. Oklahoma,* 591 U.S. ___, 140 S.Ct. 2452 (2020) and *Sharp v. Murphy,* 591 U.S. ___, 140 S.Ct. 2412 (2020). Hanson argues that he is a citizen of the Muscogee (Creek) Nation and that the crime occurred within the boundaries of the Cherokee Nation Reservation.

Hanson's claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Tulsa County, for an evidentiary hearing to be held

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[1] *Hanson v. Oklahoma,* 558 U.S. 1081 (2009) (denying certiorari from resentencing direct appeal); *Hanson v. State,* Case No. PCD-2006-614, (Okl.Cr. June 2, 2009) (unpublished) (denying post-conviction relief); *Hanson v. State,* Case No. PCD-2011-58, (Okl.Cr. March 22, 2011) (unpublished) (denying successive application for post-conviction relief); *Hanson v. Sherrod,* Case No. 10-CV-113-CVE-TLW (N.D. Okla July 1, 2013) (unpublished) (denying federal habeas relief); *Hanson v. Sherrod,* 797 F.3d 810 (10th Cir.2015) (affirming denial of federal habeas relief); *Hanson v. Sherrod,* 136 S.Ct. 2013 (2016) (denying certiorari from affirmance of denial of federal habeas relief).

within sixty (60) days from the date of this Order. On November 2, 2020, Hanson tendered for filing a motion to supplement his successive application for post-conviction relief with evidence of his tribal enrollment. Appellate counsel states the motion is unopposed. Because this matter is being remanded for an evidentiary hearing where all relevant evidence can be admitted and considered by the District Court, the motion is **DENIED**. The Clerk of this Court is ordered to file the tendered motion to supplement.

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

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

in the District Court. The District Court shall address only the following issues:

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

Second, whether the crime occurred in Indian Country. In *Spears v. State,* 2021 OK CR 7, ¶¶ 11-15, ___P.3d___, we held that Congress established a reservation for the Cherokee Nation and that Congress had not erased those boundaries and disestablished the reservation. Hence, the Cherokee Nation Reservation remains intact and is Indian country for purposes of federal criminal law. *Id.,* 2021 OK CR 7, ¶ 16. The District Court must decide whether the crimes in this case occurred on the Cherokee Nation Reservation.

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record, to the Clerk of this Court, and counsel for Hanson, within five (5) days

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

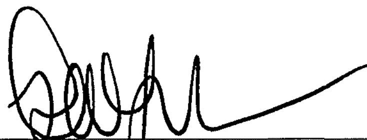
after the District Court has filed its findings of fact and conclusions of law. Upon receipt thereof, the Clerk of this Court shall promptly deliver a copy of that record to the Attorney General. A supplemental brief, addressing only those issues pertinent to the evidentiary hearing and limited to twenty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

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

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit copies of the following, with this Order, to the District Court of Tulsa County: Hanson's Successive Application for Post-Conviction Relief and Appendix filed September 8, 2020.

IT IS SO ORDERED.

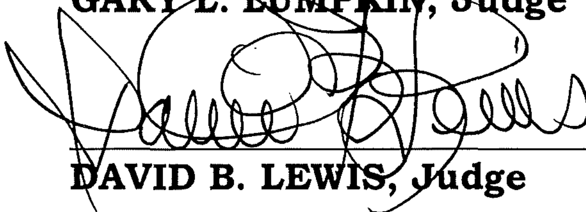
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 2nd day of April, 2021.



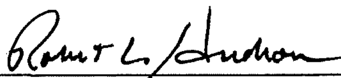
DANA KUEHN, Presiding Judge

SCOTT ROWLAND, Vice Presiding Judge

GARY L. LUMPKIN, Judge

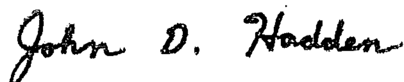


DAVID B. LEWIS, Judge



ROBERT L. HUDSON, Judge

ATTEST:



Clerk

IN THE DISTRICT COURT OF TULSA COUNTY

STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,	
Petitioner,	**Tulsa County Case No. CF-1999-4583**
-vs-	**Oklahoma Court of Criminal Appeals Case No. PCD-2020-611**
THE STATE OF OKLAHOMA,	**(Capital Case)**
Respondent.	

DISTRICT COURT
FILED
MAY 25 2021
DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

PETITIONER JOHN FITZGERALD HANSON'S REMANDED EVIDENTIARY HEARING BRIEF

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May 25, 2021

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Quintin Cushner & Jon M. Sands, *Blood Should Not Tell: The Outdated "Blood" Test Used to Determine Indian Status in Federal Criminal Prosecution*, 59 Fed. Law. 31, 35 (Apr. 2012) 10

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,	)	
	)	
Petitioner,	)	**Case No. CF-1999-4583**
	)	
v.	)	**Oklahoma Court of Criminal**
	)	**Appeals Case No. PCD-2020-611**
THE STATE OF OKLAHOMA,	)	
	)	**(Capital Case)**
Respondent.	)	

PETITIONER'S REMANDED
EVIDENTIARY HEARING BRIEF

COMES NOW Petitioner, John Fitzgerald Hanson,[1] through undersigned counsel, to address the two questions posed to this Court by the Oklahoma Court of Criminal Appeals (OCCA). Order Remanding for Evidentiary Hearing at 4, *Hanson v. State*, No. PCD-2020-611 (Okla. Crim. App. April 2, 2021). Specifically, the OCCA has directed this Court to answer:

> First, Hanson's status as an Indian. The District Court must determine whether (1) Hanson has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.
>
> Second, whether the crime occurred in Indian Country. In *Spears v. State*, 2021 OK CR 7 ¶¶ 11-15, ___ P.3d ___, we held that Congress established a reservation for the Cherokee Nation and that Congress had not erased those boundaries and disestablished the reservation. Hence, the Cherokee Nation Reservation remains intact and is Indian country for purposes of federal criminal law. *Id.*, 2021 OK CR 7, ¶ 16. The District Court must decide whether the crimes in this case occurred on the Cherokee Nation Reservation.

Id. (footnote omitted).

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[1] Although referenced at times as simply John Hanson or John Fitzgerald Hanson, Mr. Hanson's full legal name is George John Fitzgerald Hanson.

Under controlling law and the facts of this case, this Court should conclude Mr. Hanson is Indian and that the crimes occurred in Indian country, leaving jurisdiction to rest with the federal courts.

ARGUMENT AND AUTHORITIES

I. OKLAHOMA HAS NO CRIMINAL JURISDICTION OVER CRIMES COMMITTED BY OR AGAINST INDIANS IN INDIAN COUNTRY.

The State lacks jurisdiction to prosecute certain crimes committed by or against Indians in Indian country. *See McGirt v. Oklahoma,* 140 S. Ct. 2452, 2459 (2020). *See also* 18 U.S.C. § 1152, § 1153(a). *St. Cloud v. United States,* 702 F. Supp. 1456 (D. S.D. 1988) speaks to this rule:

> It is axiomatic that the federal government has a special trust relationship with Native Americans under which the United States bears a particular responsibility for preserving and protecting the Indian people. To sustain these obligations, Congress has "plenary power" over Native Americans, though the tribes constitute separate sovereigns from the federal government. In pursuance of its responsibilities and power, Congress has passed several laws establishing a jurisdictional framework for crimes involving Native Americans in Indian country.
>
> . . . .
>
> A broad construction of "Indian" to extend federal criminal jurisdiction in Indian country benefits Native Americans . . . . Moreover, a broad construction of statutes like 18 U.S.C. §§ 13, 1152, and 1153 is consistent with the maxim that statutes should be construed to favor Native Americans.

Id. at 1459, 1462 (internal citations omitted).

Mr. Hanson asserts the State of Oklahoma lacked subject matter jurisdiction over the prosecution of his crimes because he is Indian and his crimes occurred within the Cherokee Nation Reservation.

II. THE EVIDENCE SUBSTANTIATES MR. HANSON'S CLAIM.

The OCCA remanded the case back to this Court for an evidentiary hearing on the two questions posed above; namely, whether Mr. Hanson is Indian and whether the crimes occurred in Indian country. On May 4, 2021, the Honorable Dawn Moody called the case for status conference at which time the parties agreed to enter evidence into the record and reserve further argument for the instant briefing. Mr. Hanson entered two exhibits into the record. Exhibit 1 is Mr. Hanson's Muscogee (Creek) Nation Enrollment Verification, wherein Mr. Hanson is certified as an enrolled member of the Muscogee (Creek) Nation with 1/32 degree of Creek blood. *See* Exhibit 1, attached. And, three memos from the Cherokee Nation Real Estate Services were entered as Exhibit 2, each verifying the crimes' locations as being located within the Cherokee Nation Reservation. *See* Exhibit 2, attached. The State presented no evidence and did not object to either of Mr. Hanson's exhibits or contents thereof.

Instead, the State asserted only that Mr. Hanson, although an enrolled member of a federally recognized tribe,[2] was not an enrolled member at the time of the crime,

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[2] The State does not dispute the Muscogee (Creek) Nation is a federally recognized Indian tribe. It is one of five tribes often treated as a group for purposes of federal legislation (Cherokee, Muscogee (Creek), Choctaw, Chickasaw, and Seminole Nations historically have been referred to as the "Five Civilized Tribes" or "Five Tribes"). *See generally* Five Tribes Act of 1906, ch. 1876, 34 Stat. 137.

and thus, jurisdiction remains with the State. Mr. Hanson maintains his enrollment date is not relevant under a *McGirt* analysis and the OCCA's directive for fact-finding from this Court.

Because the OCCA's second question is uncontested, Mr. Hanson's Indian status remains the only disputed issue before this Court.[3] Yet, based on the evidence before this Court – without objection from the State – there should be no dispute. This Court should answer the OCCA's questions in the affirmative. Yes, Mr. Hanson "has some Indian blood"; yes, he "is recognized as an Indian by a tribe or the federal government"; and yes, the crimes "occurred in Indian Country." Order Remanding for Evidentiary Hearing at 4. *See also* Exhibits 1 & 2. The State's additional requirement – that Mr. Hanson had to be an enrolled tribal member at the time of the crime – is not dictated by controlling authority or the OCCA's order. This Court should stay the course and answer the OCCA's questions in the affirmative based on the uncontested facts before it.

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[3] The crimes occurred a short distance away from each other in the vicinity of a dirt pit outside of Owasso, Oklahoma. More specifically, the crimes occurred in or around Section 6, Township 20 North, Range 14 East, Tulsa County, OK; 8800 East 66th St. North, Owasso, Oklahoma; and 9000 East 66th St. North, Owasso, Oklahoma. Each of these locations is within the Cherokee Nation Reservation boundaries as verified by the Cherokee Nation Real Estate Services. *See* Exhibit 2. The OCCA has held "Congress established a reservation for the Cherokee Nation and [] Congress had not erased those boundaries and disestablished the reservation. Hence, the Cherokee Nation Reservation remains intact and is Indian country for purposes of federal criminal law." Order Remanding for Evidentiary Hearing at 4 (citing *Spears v. State*, 2021 OK CR 7 ¶¶ 11-16, ___ P.3d ___). The State does not dispute the crimes occurred in Indian country.

III. BURDEN OF PROOF.

The OCCA made clear the burden of proof in this case: "Upon Hanson's presentation of *prima facie* evidence as to his legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has jurisdiction." Order Remanding for Evidentiary Hearing at 3. The OCCA has defined "prima facie case" to "suffice until contradicted and overcome by other evidence." *Hill v. State*, 1983 OK CR 161 ¶3, 672 P.2d 308, 310 (citing Black's Law Dictionary, Fourth Revised Edition (1968)). *See also Malone v. Royal*, No. CIV-13-1115-D, Memorandum Opinion, 2016 WL 6956646, at *15 (W.D. Okla. Nov. 28, 2016) (describing prima facie case as a "low threshold" to meet).

By way of evidence submitted to the Court on May 4, 2021, Mr. Hanson established himself as Indian with 1/32 Creek blood quantum, who is an enrolled member of a federally recognized tribe. *See* Exhibit 1. Therefore, Mr. Hanson has met his burden of presenting prima facie evidence as to his Indian status. The burden now "shifts to the State to prove it has jurisdiction." Order Remanding for Evidentiary Hearing at 3. *See also Sweden v. State*, 83 Okla. Crim. 1, 6, 172 P.2d 432, 435 (noting the State always has the burden to prove jurisdiction).

The State's burden of proof is "beyond a reasonable doubt." To show it has subject matter jurisdiction, the State must show that Mr. Hanson is not Indian. This is the equivalent of a jurisdictional element or a rebuttal of an affirmative defense, both of which must be proved beyond a reasonable doubt. *See generally Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016) ("[T]he substantive elements of a federal statute describe

the evil Congress seeks to prevent; the jurisdictional element connects the law to one of Congress's enumerated powers, thus establishing legislative authority. Both kinds of elements must be proved to a jury beyond a reasonable doubt." (internal citation omitted)). *See also Hogan v. State,* 2006 OK CR 19, 41, 139 P.3d 907, 924 (internal citation omitted) ("Once a[n] [affirmative] defense is raised the defendant is entitled to an instruction on his theory of defense and the burden of persuasion never shifts to the defendant. The burden of persuasion remains on the State to prove each element of the crime charged beyond a reasonable doubt and thus to prove beyond a reasonable doubt the absence of any affirmative defense raised.") The State is unable to meet this burden here.

IV. INDIAN STATUS.

Although "Indian" is a term of art in the context of criminal jurisdiction, 18 U.S.C. §§ 1152, 1153, Congress has not defined that term. Instead, that task has been left to the courts, with *United States v. Rogers*, 45 U.S. 567, 573 (1846) becoming the general test for Indian status. The *Rogers* test requirements are whether the defendant (1) has some Indian blood/descent, and (2) is recognized as Indian by a tribe or the federal government or both. *Id. See also United States v. Diaz,* 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss,* 273 F.3d 1277, 1279-80 (10th Cir. 2001); *Goforth v. State*, 1982 OK CR 48 ¶ 6, 644 P.2d 114, 116.[4]

[4] The OCCA relied on these same cases in its directive to "determine whether (1) Hanson has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government." Order Remanding for Evidentiary Hearing at 4 n.2.

The Tenth Circuit, applying a "totality-of-the-evidence approach to determining Indian status," has found *Rogers* satisfied when a person "has an Indian tribal certificate that includes the degree of Indian blood." *Diaz*, 679 F.3d at 1187. *See also United States v. Lossiah*, 537 F.2d 1250, 1251 (4th Cir. 1976) (finding tribal enrollment certificate showing defendant possessed some Indian blood was "adequate proof").

A. Some Indian Blood.

"There is no specific percentage of Indian ancestry required to satisfy the 'descent' prong of this test." *Cohen's Handbook of Federal Indian Law* § 3.03[4], at 177 (Nell Jessup Newton ed., 2012) [hereinafter *Cohen's Handbook*]. Indeed, "to require a specific blood quantum would be out of step with other recent developments." *Bosse v. Oklahoma*, 2021 OK CR 3 ¶ 16 n.7, 484 P.3d 286, 292 n.7 (discussing amendment of Stigler Act to allow for "whatever degree of Indian blood"). To this end, the OCCA has made clear that the first prong "may be proved by a variety of evidence," which is in alignment with the Tenth Circuit's "totality-of-the-evidence approach," *Id.* at ¶ 15, 484 P.3d at 292 (citing *Diaz*, 679 F.3d at 1187).

As documented by his tribal enrollment verification, Mr. Hanson has a verified 1/32 degree of Creek blood. Exhibit 1. The State does not contest Mr. Hanson readily meets the first prong of the *Rogers* test.

B. Recognized by a Tribe or the Federal Government.

1. *Enrolled or Eligible to Be Enrolled.*

The second prong of the *Rogers* test asks whether an individual is recognized as Indian by either a tribe or the federal government. *United States v. Bruce,* 394 F.3d 1215, 1224-25 (9th Cir. 2005) (noting this prong is disjunctive: If recognized by a tribe, recognition by the federal government is not required). Enrolled members of a federally recognized tribe should automatically satisfy the recognition prong. *See generally Diaz,* 679 F.3d at 1187; *Lossiah,* 537 F.2d at 1251; *United States v. Torres,* 733 F.2d 449, 455 (7th Cir. 1984); *St. Cloud,* 702 F. Supp. at 1461; *United States v. Nowlin,* 555 F. App'x 820, 823 (10th Cir. 2014) (noting enrollment, though not exclusive means of establishing status, is "dispositive"). *See also McGirt v. Oklahoma,* 140 S. Ct. 2452, 2459 (2020) (no further inquiry into Indian status where McGirt was an "enrolled member of the Seminole Nation"); *Murphy v. Royal,* 875 F.3d 896, 926-28 (10th Cir. 2017), *aff'd sub. nom. Sharp v. Murphy,* 140 S. Ct. 2412 (2020) (agreeing defendant and victim, "both members of the Muscogee (Creek) Nation, were Indians").

The State does not contest Mr. Hanson has been recognized as Indian by the Muscogee (Creek) Nation. Exhibit 1. However, the State argues enrollment at the time of the crime is essential. According to the State, because Mr. Hanson was not an enrolled tribal member at the time of the subject crimes, he is not recognized as Indian for the inquiry before this Court.

At the evidentiary hearing on May 4, before this Court, the State relied on the OCCA's opinion in *Ryder v. State*, 2021 OK CR 11 ¶ 10, ___ P.3d ___ for this proposition. Its reliance on *Ryder* is misplaced though. The OCCA made no requirement for the timing of an individual's enrollment status in *Ryder*. In fact, the sole reference as to enrollment status is a recitation that "[i]n its Order to this Court, the District Court stated in pertinent part that the parties had entered into a stipulation that each of the victims . . . was enrolled as a Choctaw Nation citizen at the time of the crimes." *Id.* The State can point to no discussion, no holding, and no law from the OCCA – other than its mere recitation of a stipulation – to substantiate the State's position that Mr. Hanson had to have been enrolled at the time of the crime in order to now be recognized as Indian for purposes of this Court's analysis.

Notably, neither *Rogers* nor the OCCA makes time of enrollment a determining factor. Indeed, the OCCA recently granted post-conviction relief in a case where the victim was posthumously enrolled as a tribal member. *Cole v. State*, 2021 OK CR 10 ¶¶ 15, 19, ___ P.3d ___. *See also* Order Granting Defendant's Application for Post-Conviction Relief, *State v. Gore*, No. CF-2001-126 (Pontotoc County District Court March 17, 2021) (granting post-conviction relief and finding Defendant "enrolled as a member or eligible for enrollment as a member in a federally recognized Indian tribe" despite not being enrolled at time of crime). In alignment with this holding, the OCCA has asked this Court only to determine whether Mr. Hanson "*is* recognized as an Indian by a tribe or the federal government," not whether he was recognized at a

previous point in time. Order Remanding for Evidentiary Hearing at 4 (emphasis added).

While there is case law from other circuits suggesting a defendant must be an enrolled member of a tribe at the time of the offense, *see, e.g.*, *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015), this position is certainly not widespread.[5] Indeed, lacking specific guidance from the Supreme Court on how to establish "tribal recognition," courts have struggled to achieve consistency. *Cohen's Handbook* at § 3.03[4] at 178. And, inconsistent methods of determining Indian status have created situations where a defendant is classified as Indian in some jurisdictions, but a non-Indian in others. To this end, Indian scholars have advocated for a single bright-line test for Indian status: If a person is enrolled or eligible for citizenship, then the person is Indian. If not, the person is not Indian. Quintin Cushner & Jon M. Sands, *Blood Should Not Tell: The Outdated "Blood" Test Used to Determine Indian Status in Federal Criminal Prosecution*, 59 Fed. Law. 31, 35 (Apr. 2012). Under this test, enrolled or not, one who was eligible as a citizen at the time of the crime would be considered Indian, thus making it an immutable status.[6] The OCCA's decision in

[5] "[T]he question of who is an Indian has not captured the attention of the Supreme Court since the Antebellum Period, fostering circuit splits and biting dissents during the 21st century." Daniel Donovan & John Rhodes, *To Be or Not to Be: Who Is an "Indian Person"?*, 73 Mont. L. Rev. 61, 64 (2012).

[6] Ignoring enrollments subsequent to the time of the crime would encroach upon tribal sovereignty. "[O]ne of an Indian tribe's most basic powers is the authority to determine questions of its own membership." *United States v. Bruce*, 394 F.3d 1215, 1225 (9th Cir. 2005). *See also Bosse v. State*, 2021 OK CR 3 ¶ 19, 484 P.3d 286, 293 ("As sovereigns, tribes have the authority to determine tribal citizenship. . . . [T]his Court need not second-guess."). Not only that, where a person becomes a tribal member at a later date, it

Cole embraces this approach, recognizing the victim as Indian despite posthumous enrollment. *Cole*, 2021 OK CR at ¶¶ 15, 19.

Eligibility for membership at the time of the crime appears critical. A common theme in cases where an individual failed the recognition prong is that he was *ineligible* for full membership at the time of the offense. *See United States v. Cruz*, 554 F.3d 840, 847 (9th Cir. 2009) ("As to the first and most important factor, it is undisputed that Cruz is not an enrolled member of the Blackfeet Tribe or any other tribe. In fact, Cruz is not even eligible to become an enrolled member."); *United States v. Maggi*, 598 F.3d 1073, 1082 (9th Cir. 2010), *overruled on other grounds by United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (finding unenrolled defendant was also "ineligible to be a member"); *United States v. Lawrence*, 51 F.3d 150, 152-53 (8th Cir. 1995) (emphasizing that at time of offense "the alleged victim was not an enrolled member of any tribe and was not eligible for tribal enrollment"); *State v. LaPier*, 790 P.2d 983, 987 (Mont. 1990) (finding defendant "is not eligible for enrollment in the tribe which is federally recognized").

The enrolled or eligible-to-enroll test is consistent with Indian recognition in other contexts as well. While Congress does not define the term "Indian" in the criminal jurisdiction statutes, the term is defined elsewhere in the federal code and includes persons eligible for membership. *See* 25 U.S.C. § 2201(2)(A) (concerning

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demonstrates the individual was at least eligible for formal membership at the time of the crime, assuming the tribe has an ancestry requirement.

Indian land consolidation, "'Indian' means any person who is a member of any Indian tribe [or] is eligible to become a member of any Indian tribe. . . .").

Mr. Hanson is enrolled with a federally recognized tribe and indeed was eligible for enrollment at the time of the crimes. He has presented prima facie evidence on this issue. As discussed, the State now has the burden to show, beyond a reasonable doubt, he is not Indian. Mr. Hanson is unaware of any authority, and believes there to be none, holding that an enrolled member of a federally recognized tribe does not satisfy the second *Rogers* prong, regardless of the date of enrollment. The State cannot meet its burden to show it has jurisdiction.

2. *Recognition Beyond Enrollment.*

While Mr. Hanson maintains he has presented the prima facie evidence necessary to establish his Indian-recognition status, it is important to note that "enrollment on a formal tribal membership list is not required in order to satisfy the 'tribal recognition' component." *Cohen's Handbook* at § 3.03[4] at 177. "Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative."[7] *United States v. Broncheau,* 597 F.2d 1260, 1263 (9th Cir. 1979). *See also State v. Salazar,* 461 P.3d 946, 949-50 (N.M. Ct. App. 2020) ("[T]he State has not cited – and our independent research has not

[7] If subsequent enrollment is not dispositive, it is nonetheless a significant factor in a totality-of-the-circumstances review. *See State v. Perank*, 858 P.2d 927, 933 (Utah 1992) (finding defendant established recognition where, although not formally enrolled at the time of the offense, "the Tribe formally recognized [defendant] as an Indian and as a member of the Tribe by his enrollment in the Tribe at a later date").

unearthed – precedent from any jurisdiction treating lack of enrollment as dispositive.").

So, even if this Court deems the date of Mr. Hanson's enrollment relevant, Mr. Hanson can and should still be recognized as Indian. *United States v. Stymiest,* 581 F.3d 759, 764 (8th Cir. 2009). Indeed, state courts should be slow to label someone of Indian ancestry who a tribe considers Indian to be a non-Indian. *See Bosse v. State,* 2021 OK CR 3 ¶ 19, 484 P.3d 286, 293 ("[W]e find it inappropriate for this Court to be in the business of deciding who is an Indian").

Courts need only examine tribal "affiliation" factors where tribal "membership" is lacking. *State v. Sebastian,* 701 A.2d 13, 24-25 (Conn. 1997). In such circumstances, courts analyze recognition primarily on four factors:

> This Court . . . has gleaned from case law several factors to evaluate whether a person satisfies the second prong of *Rogers.* In declining order of importance, these factors are: 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life.

St. Cloud, 702 F. Supp. at 1461. *See Sebastian,* 701 A.2d at 24 ("factors enumerated in *St. Cloud* have emerged as a widely accepted test for Indian status"); *United States v. Drewry,* 365 F.3d 957, 961 (10th Cir. 2004); *United States v. Bruce,* 394 F.3d 1215, 1224 (9th Cir. 2005). This is in alignment with the Tenth Circuit's "totality-of-the-

evidence approach."[8] *United States v. Diaz,* 679 F.3d 1183, 1187 (10th Cir. 2012).

Notably, however, despite a referenced "order of importance," later cases have clarified that the *St. Cloud* factors are not exclusive and need not be tied to any specific order of importance. In fact, the *St. Cloud* court itself went on to state: "These factors do not establish a precise formula for determining who is an Indian. Rather, they merely guide the analysis of whether a person is recognized as an Indian." *St. Cloud*, 702 F. Supp. at 1461. *See also Stymiest,* 581 F.3d at 764 ("[T]he *St. Cloud* factors may prove useful, depending upon the evidence, but they should not be considered exhaustive. Nor should they be tied to an order of importance, unless

[8] If this Court were to adopt a different test than the Tenth Circuit's totality-of-the-evidence test, a federal court on post-conviction may find Mr. Hanson is Indian and vacate his convictions.

> Say this Court were to adopt a particular blood quantum number. A defendant could be a member of a federally recognized tribe, with Indian blood less than that quantum. He would not be Indian in state court, and the State would retain jurisdiction. However, when the convicted defendant filed a writ of habeas corpus in federal court, because he had some Indian blood, he would meet the *Rogers* test. The federal court would find that the State had no jurisdiction, and the defendant should have been tried in federal court to begin with – just like *McGirt*. Consistency and economy of judicial resources compel us to adopt the same definition as that used by the Tenth Circuit.

Bosse v. State, 2021 OK CR 3 ¶ 18, 484 P.3d 286, 293, as corrected (Mar. 19, 2021). The OCCA in *Bosse* rejected such an approach. "The State of Oklahoma is within the jurisdictional boundaries of the Tenth Circuit. . . . There is simply no rhyme nor reason to require a test for Indian status in our Oklahoma state courts that is significantly different from that used in comparable federal courts." *Id.* at ¶ 16.

the defendant is an enrolled tribal member, in which case that factor becomes dispositive."); *United States v. Juvenile Male*, 666 F.3d 1212, 1215 (9th Cir. 2012).

Under a totality-of-the-evidence analysis and evaluating relevant factors, Mr. Hanson should be recognized as Indian regardless of his enrollment date.[9] Mr. Hanson comes from an Indian family with a long line of enrolled tribal members. Amongst other family members, his great-grandmother, aunt, cousins, and sister are all enrolled members, as set forth in his post-conviction application currently before the OCCA. Successive Application for Post-Conviction Relief, *Hanson v. State*, No. PCD-2020-611 (Okla. Crim. App. Sept. 8, 2020). Specifically, Mr. Hanson's paternal great-grandmother is Lilia Taylor Quapaw Hanson. Under Dawes Census Card No. 1147 (Creek by Blood), Lilia Taylor Quapaw Hanson was enrolled in 1890 with Dawes Roll No. 3709. *Id.* at Att. 18, App. at 196. Mr. Hanson's father, Elmer Hanson, and Elmer's full biological sister, Flossie Arnita Hanson, are the grandchildren of Lilia Taylor Quapaw Hanson, as established in Okmulgee County Probate Case No. 7394. *Id.* at Att. 18, App. at 197. Elmer's sister, Flossie Arnita Hanson, is an enrolled citizen of the MCN, Roll No. 46137, year of enrollment 1991, as is her daughter, Donna Joe Hatcher, Roll No. 46213, year of enrollment 1991, and her daughter's children. *Id.* at Att. 18, App. at 200, 202. Mr. Hanson's full biological sister, Charmyn Denise Clariett (Hanson), is also an enrolled citizen of the MCN with 1/32

[9] As set forth herein, the term "Indian" in 18 U.S.C. §§ 1152, 1153, is entitled to "broad construction" as set forth in *St. Cloud,* 702 F. Supp. at 1462.

degree Creek blood and Roll No. 76869, year of enrollment 2006. *Id.* at Att. 18, App. at 201.

Mr. Hanson's Indian blood, his eligibility for membership at the time of the crime, his actual membership in the Muscogee (Creek) Nation now, and his long family history of Indian blood and tribal enrollment dictate he be recognized as Indian regardless of the State's arguments. Court have recognized as much in similar cases. *See, e.g., United States v. Drewry,* 365 F.3d 957, 961 (10th Cir. 2004), *vacated on other grounds in Drewry v. United States,* 543 U.S. 1103 (*mem.*) (2005) (recognizing Indian status of unenrolled victims after noting blood quantum, amongst other factors); *United States v. Keys,* 103 F.3d 758, 761 (9th Cir. 1996) (recognizing Indian status after noting unenrolled victim's blood quantum and victim's mother's tribal membership). This Court should find Mr. Hanson satisfies the recognition prong and is, therefore, "Indian" for the purpose of criminal jurisdiction.

CONCLUSION

Upon consideration of the evidence submitted to this Court and after applying the analysis set forth in *McGirt* and other controlling law to answer the OCCA's specific questions, this Court should conclude Mr. Hanson is Indian and that the crimes occurred in Indian country.

Respectfully Submitted,

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COUNSEL FOR JOHN FITZGERALD HANSON

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2021, a true and correct copy of the foregoing *Petitioner's Remanded Hearing Brief* was served via email to:

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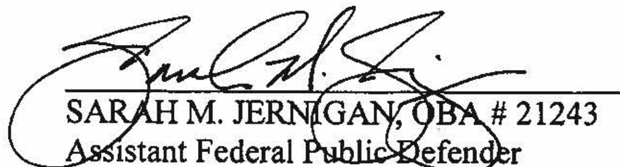

SARAH M. JERNIGAN, OBA # 21243
Assistant Federal Public Defender

Director
Nathan Wilson

Managers
Allan Colbert Jr.
Andy Proctor

Board Members
Joan Henson
Elizabeth Yahola
Clarence Johnson
LeAnn Nix
Jason Nichols

Muscogee (Creek) Nation
Enrollment Verification

RE: Name: George John Fitzgerald Hanson
Address: USP Pollock 1000 Airbase Rd
Pollock LA 71467

Birthdate: 04/08/1964
Enrollment Date: October 28, 2020
Roll Number: 114364
Degree of Creek Blood: 1/32

I hereby certify that George John Fitzgerald Hanson, DOB: 04/08/1964 is enrolled with the Muscogee (Creek) Nation. Enrollment Date: 10/28/2020 Roll Number: 114364, Degree of Creek Blood: 1/32.

I attest and certify that the above information is a correct compilation of official records of the Muscogee (Creek) Nation filed and recorded with the Muscogee (Creek) Nation Citizenship Office, the public office responsible for keeping records of enrolled citizens, and that I am an authorized custodian of said records.

Executed this 29th day of October, 2020.

Nathan Wilson

Nathan Wilson - Director
Muscogee (Creek) Nation Citizenship Office

Muscogee (Creek) Nation ~ Citizenship Office ~ P.O. Box 580 ~ Okmulgee, OK 74447
You may contact our office at 1-800-482-1979 or (918) 756-8700 ext. 7940/7941/7942/7943

TB

P.O. Box 948
Tahlequah, OK 74465-0948
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CHEROKEE NATION
Real Estate Services

To: **Brandi Harris, Office of the Federal Public Defender**

From: **Lane Kindle, Realty Specialist II, Real Estate Services**

Thru: **Ginger Reeves, Director, Cherokee Nation Real Estate Services**

Subject: **Jet Trucking**

Date: **February 25, 2020**

Legal Description: Section 6, Township 20 North, Range 14 East
Tulsa County, OK

Finding Directions: None Given

Type of Property: Fee Property

Location: Located within the Cherokee Nation Reservation

Should you have further questions or if I may be of further assistance, please contact me at (918) 453-5350.

CHEROKEE NATION
Real Estate Services

MEMORANDUM

To:	**Brandi Harris**
From:	**Lane Kindle, Realty Specialist, Real Estate Services**
Thru:	**Ginger Reeves, Director, Cherokee Nation Real Estate Services**
Subject:	**8800 East 66th St. North Owasso, Oklahoma**
Date:	**August 6, 2020**

Legal Description:	None Given
Finding Directions/Street Address:	8800 East 66th St. North Owasso, Oklahoma
Type of Property:	Fee Property
Location:	Located within the Cherokee Nation Reservation, boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893. 1999 Cherokee Constitution, art. 2

Should you have further questions or if I may be of further assistance, please contact me at (918) 453-5350.

CHEROKEE NATION
Real Estate Services

MEMORANDUM

To:	**Brandi Harris**
From:	**Lane Kindle, Realty Specialist, Real Estate Services**
Thru:	**Ginger Reeves, Director, Cherokee Nation Real Estate Services**
Subject:	**9000 East 66th St. North Owasso, Oklahoma**
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Should you have further questions or if I may be of further assistance, please contact me at (918) 453-5350.

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

DISTRICT COURT
FILED
MAY 25 2021
DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

JOHN FITZGERALD HANSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Nos. PCD-2020-611**
	)	**CF-1999-4583**
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

RESPONDENT'S EVIDENTIARY HEARING BRIEF

The State of Oklahoma, by and through Mike Hunter, Attorney General for the State of Oklahoma, and Assistant Attorney General Randall Young, submits the Respondent's Evidentiary Hearing Brief. Responsive to this Court's directions, this brief outlines how Petitioner's lack of enrollment at the time of the offense is fatal to his jurisdictional claim, and dispositive to this Court's inquiry. Based upon the proceeding analysis, the State respectfully asks this Court to find that Petitioner was not an Indian at the time of the offense and therefore fails to set forth a *prima facie* jurisdictional claim.

STATEMENT OF THE CASE

A Tulsa County jury convicted Petitioner of (Count One) First Degree Malice Murder, in violation of 21 O.S.1991, § 701.7(A); and (Count Two) First Degree Felony Murder, in violation of 21 O.S.1991, § 701.7(B). *Hanson v. State*, 2003 OK CR 12, ¶ 1, 72 P.3d 40, 45. The Oklahoma Court of Criminal Appeals ("OCCA") described the facts underlying Petitioner's convictions in his first direct appeal:

> Hanson and Victor Miller took Mary Agnes Bowles from the Promenade Mall in Tulsa sometime between 4:15 p.m. and 5:50 p.m. on August 31, 1999. They had already robbed two liquor stores, and wanted to use Bowles's car in another robbery. Hanson held Bowles down in the back seat while Miller drove to an isolated area near Owasso. He turned down a road leading to a dirt pit. The pit's owner, Mr. Thurman, was there loading a dump truck for a delivery. While speaking to his nephew, Jim Moseby, on his cell phone, Thurman said he saw a car circling through the pit. After this conversation, Miller shot Thurman four times with a chrome .380 revolver. Miller drove a short distance away. He stopped at an overgrown roadside. Hanson got out with Bowles and, using a 9mm semiautomatic pistol, shot her between four and six times as she lay on the ground. Before leaving the scene, they partially covered her with branches. Neighbors heard several shots coming from the pit area and saw an unfamiliar car drive by. They found Thurman lying near his dump truck at the entrance to the road. Thurman was taken to the hospital; he never regained consciousness and died on September 14. Bowles's decomposed body was found on September 7.

Hanson, 2003 OK CR 12, ¶ 2, 72 P.3d at 45. The jury also found three aggravating circumstances for Count One, and two aggravating circumstances for Count Two. *Hanson*, 2003 OK CR 12, ¶ 1, 72 P.3d at 45. The Honorable Linda G. Morrissey, District Court Judge, fixed punishment in accordance with the jury's recommendation, sentencing Petitioner to death for Count One and life without the possibility of parole for Count Two. *Id.* The OCCA found "error in jury selection and second stage" and remanded Count One for resentencing. *Id.*

The Honorable Caroline E. Wall, District Court Judge, called Petitioner's case for resentencing on January 9-24, 2006. *Hanson v. State*, 2009 OK CR 13, ¶ 1, 206 P.3d 1020, 1024. Again, the jury found three aggravating circumstances and sentenced Petitioner to death. *Id.* This time, the OCCA affirmed Petitioner's sentence. *Id.* Petitioner has since failed to obtain further relief in both state and federal courts. *See Hanson v. Oklahoma*, 558 U.S. 1081 (2009)(denying

certiorari); *Hanson v. State*, PCD-2006-614 (Okla. Crim. App. June 2, 2009)(unpublished); Hanson v. State, PCD-2011-58 (Okla. Crim. App. March 22, 2011)(unpublished); *Hanson v. Sherrod*, 10-CV-113-CVE-TLW (N.D. Okla. July 1, 2013)(unpublished), *affirmed by Hanson v. Sherrod*, 797 F.3d 810 (10th Cir. Aug., 13, 2015), *cert. denied*, 136 S. Ct. 2013 (2016). Not once in the twenty-one years between the murders and the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) did Petitioner allege the State lacked jurisdiction over his crimes.

Petitioner filed the instant successive application seeking post-conviction relief on September 8, 2020 ("Application"). His sole proposition is that the State of Oklahoma lacked jurisdiction to prosecute him because he is an Indian who committed his murders in the Cherokee Nation Reservation. Application at 6. The OCCA issued its Order Remanding for Evidentiary Hearing on April 2, 2020 ("Order Remanding"), directing this Court to address "(a) [Petitioner's] Indian status; and (b) whether the crime[s] occurred in Indian Country." Order Remanding at 2. Specific to Petitioner's status, the OCCA tasked this Court with determining "whether (1) Hanson has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government." Order Remanding at 4.

This Court called Petitioner's case for status on May 4, 2021. There, the parties agreed to admit an enrollment verification from the Muscogee Nation, Petitioner's Exhibit 1, as well as a set of documents from the Cherokee Nation Real Estate Services, Petitioner's Exhibit 2, while reserving argument for briefing.

This Court accordingly directed the parties to submit briefing on or before May 25, 2021, and tentatively set an argument date for June 3, 2021.

Additional Facts will be provided as necessary.

ARGUMENT AND AUTHORITY[1]

The State does not contest Petitioner's Indian blood. Order Remanding at 4; Petitioner's Exhibit 1. Nor is there any disagreement that he is now an enrolled member of the Muscogee Nation, more than twenty years after his crimes. Petitioner's Exhibit 1. The State also respectfully submits that this Court possesses sufficient evidence to rule on Petitioner's claim that his crimes occurred in Indian Country.[2] Order Remanding at 4; Petitioner's Exhibit 2. He nevertheless fails to set forth a *prima facie* case. Order Remanding at 3.

Petitioner's lack of recognition at the time of the offense is relevant to this Court's inquiry, and fatal to his jurisdictional claim. The State respectfully contends that this Court must fix its inquiry regarding his status on August 31,

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[1] Petitioner's lack of Indian status at the time of the offense is dispositive of his Indian County jurisdictional claim, and the purpose of this brief is to emphasize why this Court cannot find him an Indian for the purposes of 18 U.S.C. § 1153. However, the State further maintains that 22 O.S.2011, § 1089's prohibition against waived claims and the doctrine of laches also preclude consideration of his jurisdictional claim. The State intends to seek *certiorari* review of the OCCA's decision in *Bosse v. State*, 2021 OK CR 3, ¶¶ 20-22, 484 P.3d at 293-94 (holding no procedural bar applied to petitioner's Indian County jurisdiction claim).

[2] The State of Oklahoma strenuously argued before the United States Supreme court in both *Sharp v. Murphy*, 140 S. Ct. 2412 (2020)(Mem.) and *McGirt* that the reservations in Oklahoma were disestablished. The State maintains that *McGirt* was wrongly decided. However, the State recognizes binding authority of the Supreme Court's decision on lower courts, including this Court, and that only the United States Supreme Court can overruled itself. *Cf. Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016). Thus, the OCCA had little recourse but to recognize the Cherokee Nation's Reservation under *Hogner*, using the analysis set forth in *McGirt*. *Hogner v. State*, 2021 OK CR 4, ¶ 15, ___ P.3d ___.

1999, not the present day. Because Petitioner cannot show recognition at the time of the offense, he fails to set forth a *prima facie* jurisdictional claim. *See* 18 U.S.C. §§ 1151-1153. The State therefore respectfully asks this Court to find that Petitioner was not an Indian at the time of the offense and, therefore, is not Indian for purposes of jurisdiction over these crimes.

I. Petitioner was not an Indian, for purposes of the Major Crimes Act, at the time of the offense, and therefore cannot prove his Indian status at the relevant time.

This Court must look to the date of the offense in figuring Petitioner's Indian status. This Court should first look to binding and persuasive authority from the OCCA, holding that defendants must prove Indian status at the time of the offenses. Then, this Court should consider the rationale for fixing status at the time of the offense, as articulated by the Ninth Circuit. Finally, this Court should consider the myriad of prudential considerations which further support framing this Court's inquiry to the time of the offense. Looking to these sources, this Court should determine that Petitioner was not an Indian, for purposes of the Major Crimes Act, at the time of the murders.

For Petitioner to prove his status as an Indian, this Court must determine that he (1) has some Indian blood; and (2) is recognized as an Indian by a tribe or the federal government. Order Remanding at 4 (citing *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001); and *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116). *See Bosse*, 2021 OK CR 3, ¶ 15, 484 P.3d at 292 (holding those "references clearly state the test to be used in determining Indian status."). *See*

also United States v. Rogers, 45 U.S. 4 (1846)(setting forth two-prong test). But none of these authorities speak to where in time Oklahoma's courts should focus the inquiry. After all, someone's Indian status for jurisdictional purposes is not immutable. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008); *see also United States v. Antelope*, 430 U.S. 641, 646 (1977)(Indian status determined through recognition by tribe acting as separate sovereign, not by racial classification); *cf.* Goforth, 1982 OK CR 48, ¶ 6, 644 P.2d at 116 ("Absent such recognition, we cannot hold that the appellant is an Indian under federal law, since such a determination at this point would allow the appellant to assert Indian heritage only when necessary to evade a state criminal action.").[3] Ultimately, because Indian status for jurisdictional purposes is more than a racial classification, this Court must fix the locus of its analysis at *some* point in time, whether as of the time of hearing or at the time of the offense.

Binding precedent requires this Court to look to Petitioner's status on August 31, 1999. In *Ryder*, the OCCA affirmatively held[4] that the petitioner had "met his burden of establishing the status of his victims as Indian *on the date of the crime*." 2021 OK CR 11, ¶ 29 (emphasis added). This holding comports with

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[3] The instant case illustrates that someone can go more than 55 years of life without recognition as an Indian, only to obtain full citizenship in the Muscogee Nation through a simple application process. *See* Petitioner's Exhibit 1.

[4] The State emphasizes that this statement was essential to the determination of the issue at bar, and therefore constitutes a binding holding. *Cf. Brown v. State*, 2018 OK CR 3, ¶ 47, 422 P.3d 155, 167 (contrasting "dicta" as "words of an opinion which are entirely unnecessary for the decision of the case, and, therefore, not precedential.").

an earlier concurring opinion expressing the importance of fixing status at the time of the offense:

> However, it appears this [tribal enrollment] card was issued some ten years after the crime of which he stands convicted. The mere fact of having this card does not satisfy both prongs of proving his Indian status. It will therefore be of paramount importance during the evidentiary hearing for the district court to determine whether, at the time of this crime, he was recognized as an Indian by his tribe or the federal government.

Cody Allen Bruner v. State, PC-2020-843, (Okla. Crim. App. Mar. 4, 2021)(Rowland, V.P.J., specially concurring)(attached as Respondent's Exhibit 1). The State respectfully contends that this Court need look no further than *Ryder* in discerning the parameters of its inquiry. Similarly, the OCCA made precisely the same finding in *Hogner*, granting relief because the appellant "met his burden of establishing his status as an Indian, having 1/4 degree Indian blood and being a member of the Miami Tribe of Oklahoma *on the date of the crime*." *Hogner v. State*, 2021 OK CR 4, ¶ 18, ___ P.3d ___ (emphasis added). The OCCA has unequivocally fixed the relevant inquiry of a criminal defendant's status to the time of his offenses.

Ryder, *Hogner*, and Vice-Presiding Judge Rowland's concurring opinion square with the Ninth Circuit's holding that Indian status must be fixed at the time of the crime. In *Zepeda*, the Ninth Circuit explained[5] the necessity of showing Indian status at the time of the offense:

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[5] The Supreme Court of Utah has issued a similar holding, albeit with less analysis than *Zepeda*. *See State v. Perank*, 858 P.2d 927, 933 (Utah 1992). The Eighth Circuit has also fixed the status of the land at the time of the offense for the purposes of determining Indian County jurisdiction. *See Lufkins v. United States*, 542 F.2d 476, 477 (8th Cir. 1976)(holding federal government had jurisdiction under Indian Major

> In a prosecution under the IMCA, the government must prove that the defendant was an Indian at the time of the offense with which the defendant is charged. If the relevant time for determining Indian status were earlier or later, a defendant could not "predict with certainty" the consequences of his crime at the time he commits it. *Apprendi v. New Jersey*, 530 U.S. 466, 478, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Moreover, the government could never be sure that its jurisdiction, although proper at the time of the crime, would not later vanish because an astute defendant managed to disassociate himself from his tribe. This would, for both the defendant and the government, undermine the "notice function" we expect criminal laws to serve. *United States v. Francisco*, 536 F.2d 1293, 1296 (9th Cir.1976).

United States v. Zepeda, 792 F.3d 1103, 1113 (9th Cir. 2015)(*en banc*). These are deeply-rooted principles which underlie the entire field of criminal law, and should be afforded due consideration. And *Zepeda*'s latter point is especially true here, where the State, which has expended tremendous resources convicting Petitioner and defending that conviction for more than twenty years, is at risk of having its jurisdiction stripped away simply because Petitioner astutely managed to associate himself with the Muscogee Nation more than twenty years after his crimes.

But to find that the State lacked jurisdiction due to Petitioner's *later* recognition as an Indian (i.e., his enrollment as a tribal member in 2020), would create a jurisdictional gap. Imagine that it was known in 1999 that these crimes occurred in the Muscogee Reservation. As in any other federal prosecution based on 18 U.S.C. § 1153, the federal government would be required to establish

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Crimes Act where there was no "dispute that the described [land] was allotted to an Indian in 1888 and that, *as of the date of the offense*, the Indian title had not been extinguished" (emphasis added)).

Indian status to have jurisdiction. In fact, Indian status is an essential element that must be alleged in the indictment, submitted to the jury, and proven at trial by the government beyond a reasonable doubt. *United States v. Prentiss*, 206 F.3d 960, 974-80 (10th Cir. 2000). *See United States v. Langford*, 641 F.3d 1195, 1196 (10th Cir. 2011)("The Indian/non-Indian statuses of the victim and the defendant are essential elements of any crime charged under 18 U.S.C. § 1152" (quotation marks omitted)(alteration adopted)). But here, the federal government would not have been able to do so in 1999, as there would have been no proof that Petitioner was *at the time* recognized as an Indian. So, at that time, the federal government could not have predicted, much less proved, that Petitioner would later become a member of a tribe. And, to entertain any argument that his 2020 membership retroactively satisfies the recognition prong for his crimes, committed in 1999, means that the federal government would somehow have had to prove beyond a reasonable doubt that he *would become* a tribal member at some point in the future. Obviously, this would have been impossible in 1999.

Similarly, to allow *later* recognition as an Indian to control jurisdiction would make it nearly impossible for law enforcement in Oklahoma to determine who has jurisdiction over certain crimes in Indian Country. As previously noted, Petitioner did not become an enrolled member of the Muscogee Nation until twenty years after his crimes. If he was not an enrolled member of the Muscogee Nation or otherwise sufficiently affiliated with the Nation at the time of his crimes, then officials investigating his crimes certainly could not have determined whether he was Indian for purposes of criminal jurisdiction. State or

federal officials would have been tasked with investigating whether Petitioner planned, *in the future*, to seek membership and affiliation with a tribe. This is preposterous. Thus, it must be that recognition is determined at the time of the crime. Any other rule is completely unworkable.

Absent fixing status at the time of the offense, the potential for jurisdictional gamesmanship is immense. With limited exceptions, the statute of limitations for most non-capital crimes under federal law is five years. 18 U.S.C. § 3282(a). While Oklahoma law provides varied limitations on numerous crimes, most range between three and seven years. 22 O.S.Supp.2017, § 152. Similarly, the Cherokee Nation's code generally provides that prosecutions must begin within five to seven years of the crime's commission. 22 CNCA § 152. So, most[6] astute criminal defendants enrolled or eligible to be enrolled with a federally-recognized tribe would need only serve five to seven years of any sentence—no matter the seriousness of the offense—before enrolling with or disassociating from a tribe to evade justice. *Cf. Bosse v. State*, 2021 OK CR 3, ¶ 7, 484 P.3d at 297 (Rowland, J., concurring in result)(expressing concern that the jurisdictional implications of a *McGirt* claim could allow a defendant to forum shop for the best outcome); and *See Goforth v. State*, 1982 OK CR 48, ¶ 7, 644 P.2d 114, 116 ("Absent such recognition, we cannot hold that the appellant is an Indian under federal law, since such a determination at this point would allow the appellant to assert Indian heritage only when necessary to evade a state criminal action.").

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[6] None of these three jurisdictions limit the time for the prosecution of first degree murder. 18 U.S.C. § 3281; 22 O.S.2011, § 151; 22 CNCA § 151.

The parties here agree that Petitioner became an enrolled member of the Muscogee Nation on October 28, 2020—more than twenty years after his crimes, but less than four months after the United States Supreme Court decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Petitioner's Exhibit 1. Petitioner failed to present this Court with any other evidence supporting his status at the time of the offense. So, all the Petitioner can show this Court in support of his claimed status is a document showing post-offense enrollment twenty years after his crimes. He therefore cannot show that he was an Indian, for purposes of the Major Crimes Act, at the time of the offense.

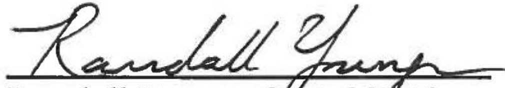
This Court should not indulge Petitioner's attempt to evade his judgment and sentence, especially where the OCCA has clearly spoken to this issue, and deep-rooted principles of criminal law require fixing analysis of Petitioner's status at the time of the offense. Because he cannot show recognition at the time of the offense, Petitioner fails to show Indian status at the relevant time.

CONCLUSION

It is ultimately not a matter of whether this Court fixes a specific place in time to determine his Indian status, it is simply a matter of *where* in time this Court fixes its analysis. Petitioner cannot show that he was recognized at the time of the offense, and therefore was not an Indian at the relevant time. Accordingly, this Court should find that he fails to set out a *prima facie* jurisdictional claim, or alternatively, that the State has shown that it properly exercised jurisdiction.

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA



Randall Young, OBA 33646
Assistant Attorney General
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Criminal Appeals Division
15 West 6th Street, Suite 1000
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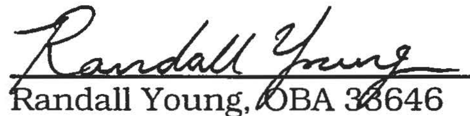
CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the above Entry of Appearance was delivered on the filing date to:

Sarah M. Jernigan
Meghan LeFrancois
Patti Palmer Ghezzi
Michael W. Lieberman

Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Ste. 707
Oklahoma City, Oklahoma 73102

Attorneys for Petitioner



Randall Young, OBA 33646

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR - 4 2021
JOHN D. HADDEN
CLERK

CODY ALLEN BRUNER,	)	
Petitioner,	)	
v.	)	**No. PC-2020-843**
STATE OF OKLAHOMA,	)	
Respondent.	)	

ORDER REMANDING FOR EVIDENTIARY HEARING

On November 19, 2020, Petitioner Bruner, pro se, appealed to this Court from an order of the District Court of Tulsa County, Case No. CRF-2010-2636, denying Bruner's application for post-conviction relief.

On December 17, 2010, Bruner was convicted of Robbery with a Firearm pursuant to a plea of no contest. Bruner did not appeal his conviction nor did he attempt to withdraw his plea. This is Bruner's first application for post-conviction relief filed in this matter.

Bruner argues that the trial court erred in denying his request for relief because he presented sufficient evidence to show that he is an Indian and the crime he is accused of committing was committed in Indian Country, and that the State lacked jurisdiction to charge, try

and convict him. These claims are based upon the decision in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), which was affirmed by the United States Supreme Court in *Sharp v. Murphy*, 591 U.S. ___, 140 S.Ct. 2412 (2020) for the reasons stated in *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020). Bruner seeks remand of the District Court's order with instructions to dismiss the charges against him.

In an order entered October 8, 2020, filed October 9, 2020, the District Court of Tulsa County, the Honorable Dawn Moody, District Judge, denied Bruner's application for post-conviction relief. In pertinent part, Judge Moody's order stated that Bruner "has not presented this Court with any affirmative evidence that he has any significant degree of Indian blood and that he is recognized as an Indan by the federal government or by some tribe or society of Indians."

A review of the appeal record in this matter reveals that Bruner's post-conviction application filed in the District Court included a copy of Bruner's Bureau of Indian Affairs Card – Certificate of Degree of Indian Blood, indicating that he is 7/32 degree Indian Blood of the Creek Tribe. Bruner's claim raises two separate questions: (a) his Indian status, and (b) whether the crime occurred in Indian Country. Based on the evidence submitted to the District Court, these issues

require fact-finding.

We therefore **REMAND** this case to the District Court of Tulsa County, the Honorable Dawn Moody, District Judge, for an evidentiary hearing to be held within sixty (60) days from the date of this Order.

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

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

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

Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020). In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony.

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

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

limited to twenty (20) pages in length, may be filed by either party within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed in this Court.

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

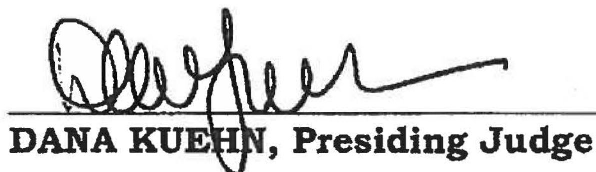
The District Court, upon making its determination as to Bruner's Indian status and whether the crime occurred in Indian Country, shall then address the claims presented in Bruner's application for post-conviction relief, specifically his claim that the State lacked jurisdiction to charge, try and convict him because the crime occurred in Indian Country and that he is an Indian. The District Court, pursuant to this Court's Rule 5.4(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), shall

then make written findings of fact and conclusions of law, a certified copy of which shall be forwarded to this Court, Petitioner and all counsel of record. Petitioner shall be allowed thirty (30) days from the date the order is filed in the District Court to file a supplemental application and brief for post-conviction relief with this Court, using this Court's Case No. PC-2020-843. If no supplemental brief is filed Petitioner's application will be decided based upon his application and brief filed with this Court on November 19, 2020.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit copies of this Order to the District Court of Tulsa County with a copy of Petitioner's November 19, 2020 post-conviction Petition in Error and brief in support filed in this Court, Case No. PC-2020-843.

IT IS SO ORDERED.

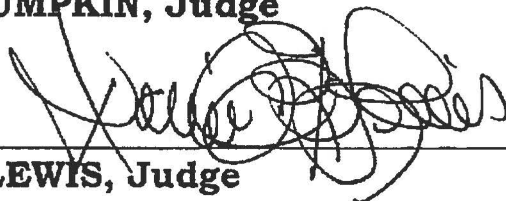
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 4th day of March, 2021.

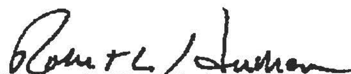


DANA KUEHN, Presiding Judge

Scott Rowland, Specially Concurring w/writing
SCOTT ROWLAND, Vice Presiding Judge

GARY L. LUMPKIN, Judge


DAVID B. LEWIS, Judge


ROBERT L. HUDSON, Judge

ATTEST:

John D. Hadden
Clerk

NF

ROWLAND, VICE PRESIDING JUDGE, SPECIALLY CONCURRING:

I concur with remanding this case to the district court for an evidentiary hearing, because the Petitioner did include with his original application for post-conviction relief a card from the Bureau of Indian Affairs showing some degree of Indian blood. However, it appears this card was issued some ten years after the crime of which he stands convicted. The mere fact of having this card does not satisfy both prongs of proving his Indian status. It will therefore be of paramount importance during the evidentiary hearing for the district court to determine whether, at the time of this crime, he was recognized as an Indian by his tribe or the federal government.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 11 2021

JOHN D. HADDEN
CLERK

JOHN FITZGERALD HANSON,)
)
Petitioner,)
)
v.) **Case No. PCD-2020-611**
)
THE STATE OF OKLAHOMA,)
)
Respondent.)

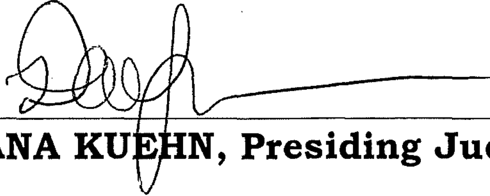
ORDER STAYING EVIDENTIARY HEARING

The parties have filed a joint request for an enlargement of time in which to complete the remanded evidentiary hearing on Petitioner's jurisdictional claim. This Court remanded the case to the District Court of Tulsa County to take evidence and make conclusions concerning Petitioner's Indian status and the location of his crime based on *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020).

In light of this Court's request for further briefing concerning *McGirt's* retroactive application to final convictions in *State ex rel. Matloff v. Wallace,* Case No. PR-2021-366, the Order remanding this matter for evidentiary hearing is hereby stayed pending resolution of the retroactivity issue.

IT IS SO ORDERED.

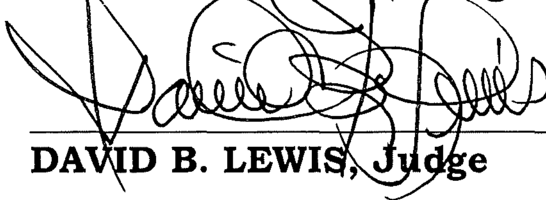
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 11th day of June, 2021.



DANA KUEHN, Presiding Judge

SCOTT ROWLAND, Vice Presiding Judge

GARY L. LUMPKIN, Judge



DAVID B. LEWIS, Judge

ROBERT L. HUDSON, Judge

ATTEST:

John D. Hadden

Clerk

2021 WL 3578089
Court of Criminal Appeals of Oklahoma.

STATE EX REL. Mark MATLOFF,
District Attorney, Petitioner
v.
The Honorable Jana WALLACE,
Associate District Judge, Respondent.

Case No. PR-2021-366
|
FILED AUGUST 12, 2021

Synopsis
Background: State petitioned for a writ of prohibition, seeking to vacate a post-conviction order by the District Court, Pushmataha County, Jana Kay Wallace, J., that vacated and dismissed defendant's second degree murder conviction, which was committed in the Choctaw Reservation, in light of Supreme Court's decision in *McGirt v. Oklahoma*, U.S. 140 S.Ct. 2452.

Holdings: The Court of Criminal Appeals, Lewis, J., held that:

[1] rule in *McGirt v. Oklahoma* did not apply retroactively to convictions that were final at the time it was decided, overruling *Bosse v. State*, 484 P.3d 286, *Cole v. State*, 492 P.3d 11, *Ryder v. State*, 489 P.3d 528, and *Bench v. State*, 492 P.3d 19;

[2] rule announced in *McGirt* was procedural;

[3] rule announced in *McGirt* was new; and

[4] trial court judge could not apply rule in *McGirt* retroactively.

Petition granted; order granting postconviction relief reversed.

Hudson, J., filed a specially concurring opinion.

Lumpkin, J., filed a specially concurring opinion.

Procedural Posture(s): Appellate Review; Post-Conviction Review; Petition for Writ of Prohibition.

West Headnotes (7)

[1] Criminal Law

New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law.

[2] Criminal Law

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

[3] Criminal Law

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, did not apply retroactively to void a conviction that was final when *McGirt* was decided; overruling *Bosse v. State*, 484 P.3d 286, *Cole v. State*, 492 P.3d 11, *Ryder v. State*, 489 P.3d 528, and *Bench v. State*,492 P.3d 19. 18 U.S.C.A. § 1153.

[4] Criminal Law

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, was only a procedural change in the law, and thus, did not constitute a substantive or watershed rule that would permit retroactive collateral attacks. 18 U.S.C.A. § 1153.

[5] Criminal Law

For purposes of retroactivity analysis, a case announces a "new rule" when it breaks new ground, imposes new obligation on the state or federal government, or in other words, result was not dictated by precedent when defendant's conviction became final.

[6] **Criminal Law**

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, was new, and thus, did not apply retroactively to convictions that were final at the time it was decided, since the rule imposed new and different obligations on the state and federal government, and rule also broke new legal ground in the sense that it was not dictated by Supreme Court precedent. 18 U.S.C.A. § 1153.

[7] **Criminal Law**

Trial court judge could not retroactively apply rule in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, to defendant's petition for post-conviction relief, and thus, issuance of a writ of prohibition to vacate trial court's order vacating and dismissing defendant's final second degree murder conviction was warranted, since trial court judge was unauthorized take such action under state law. 18 U.S.C.A. § 1153.

OPINION

LEWIS, JUDGE:

***1** ¶1 The State of Oklahoma, by Mark Matloff, District Attorney of Pushmataha County, petitions this Court for the writ of prohibition to vacate the Respondent Judge Jana Wallace's April 12, 2021 order granting post-conviction relief. Judge Wallace's order vacated and dismissed the second degree murder conviction of Clifton Merrill Parish in Pushmataha County Case No. CF-2010-26. Because the Respondent's order is unauthorized by law and prohibition is a proper remedy, the writ is **GRANTED**.

FACTS

¶2 Clifton Parish was tried by jury and found guilty of second degree felony murder in March, 2012. The jury sentenced him to twenty-five years imprisonment. This Court affirmed the conviction on direct appeal in *Parish v. State*, No. F-2012-335 (Okl.Cr., March 6, 2014) (unpublished). Mr. Parish did not petition for rehearing, and did not petition the U.S. Supreme Court for *certiorari* within the allowed ninety-day time period. On or about June 4, 2014, Mr. Parish's conviction became final. [1]

¶3 On August 17, 2020, Mr. Parish filed an application for post-conviction relief alleging that the State of Oklahoma lacked subject matter jurisdiction to try and sentence him for murder under the Supreme Court's decision in *McGirt v. Oklahoma*, ––– U.S. ––––, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). Judge Wallace held a hearing and found that Mr. Parish was an Indian and committed his crime within the Choctaw Reservation, the continued existence of which was recently recognized by this Court, following *McGirt*, in *Sizemore v. State*, 2021 OK CR 6, ¶ 16, 485 P.3d 867, 871.

¶4 Because the Choctaw Reservation is Indian Country, Judge Wallace found that the State lacked subject matter jurisdiction to try Parish for murder under the Major Crimes Act. 18 U.S.C. § 1153. Applying the familiar rule that defects in subject matter jurisdiction can never be waived, and can be raised at any time, Judge Wallace found Mr. Parish's conviction for second degree murder was void and ordered the charge dismissed.

¶5 Judge Wallace initially stayed enforcement of the order. The State then filed in this Court a verified request for a stay and petitioned for a writ of prohibition against enforcement of the order granting post-conviction relief. In *State ex rel. Matloff v. Wallace*, 2021 OK CR 15, ––– P.3d ––––, this Court stayed all proceedings and directed counsel for the interested parties to submit briefs on the following question:

> In light of *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113, *United States v. Cuch,* 79 F.3d 987 (10th Cir. 1996), *Edwards v. Vannoy* (No. 19-5807), 593 U.S. —— [141 S.Ct. 1547, 209 L.Ed.2d 651] (May 17, 2021), cases cited therein, and related authorities, should the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* be applied retroactively to void a state conviction that was final when *McGirt* and *Sizemore* were announced?

***2** ¶6 The parties and *amici curiae* [2] subsequently filed briefs on the question presented. For reasons more fully stated below, we hold today that *McGirt v. Oklahoma* announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction. The writ of prohibition is therefore **GRANTED** and the order granting post-conviction relief is **REVERSED**.

ANALYSIS

¶7 In state post-conviction proceedings, this Court has previously applied its own non-retroactivity doctrine—often drawing on, but independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus—to bar the application of new procedural rules to convictions that were final when the rule was announced. *See Ferrell v. State*, 1995 OK CR 54, ¶¶ 5-9, 902 P.2d 1113, 1114-15 (citing *Teague, supra*) (finding new rule governing admissibility of recorded interview was not retroactive on collateral review); *Baxter v. State*, 2010 OK CR 20, ¶ 11, 238 P.3d 934, 937 (noting our adoption of *Teague* non-retroactivity analysis for new rules in state post-conviction review); and *Burleson v. Saffle*, 278 F.3d 1136, 1141 n.5 (10th Cir. 2002) (noting incorporation "into state law the Supreme Court's *Teague* approach to analyzing whether a new rule of law should have retroactive effect," citing *Ferrell*, *supra*).

[1] **[2]** ¶8 New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law. *See Carter v. State*, 2006 OK CR 42, ¶ 4, 147 P.3d 243, 244 (citing *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)) (applying new instructional rule of *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 to case tried before the rule was announced, but pending on direct review). But new rules generally do *not* apply retroactively to convictions that are final, with a few narrow exceptions. *Ferrell,* 1995 OK CR 54, ¶ 7, 902 P.2d at 1114-15; *Thomas v. State*, 1994 OK CR 85, ¶ 13, 888 P. 2d 522, 527 (decision requiring that prosecution file bill of particulars no later than arraignment did not apply to convictions already final).

¶9 Following *Teague* and its progeny, we would apply a new *substantive* rule to final convictions if it placed certain primary (private) conduct beyond the power of the Legislature to punish, or categorically barred certain punishments for classes of persons because of their status (capital punishment of persons with insanity or intellectual disability, or juveniles, for example). *See, e.g., Pickens v. State*, 2003 OK CR 16, ¶¶ 8-9, 74 P.3d 601, 603 (retroactively applying *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) because *Atkins* barred capital punishment for persons with intellectual disability).

¶10 Under *Ferrell*, we also would retroactively apply a new "watershed" procedural rule that was essential to the accuracy of trial proceedings, but such a rule is unlikely ever to be announced. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1115; *see Beard v. Banks,* 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (identifying *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) as the paradigmatic watershed rule, and likely the only one ever announced by the Supreme Court); *Edwards v. Vannoy*, —— U.S. ——, 141 S.Ct. 1547, 1561, 209 L.Ed.2d 651 (2021) (acknowledging the "watershed" rule concept was moribund and would no longer be incorporated in *Teague* retroactivity analysis).

***3** ¶11 Like the Supreme Court, we have long adhered to the principle that the narrow purposes of collateral review, and the reliance, finality, and public safety interests in factually accurate convictions and just punishments, weigh strongly against the application of new procedural rules to convictions already final when the rule is announced. Applying new procedural rules to final convictions, after a trial or guilty plea and appellate review according to then-existing

procedures, invites burdensome litigation and potential reversals unrelated to accurate verdicts, undermining the deterrent effect of the criminal law. *Ferrell*, 1995 OK CR 54, ¶¶ 6-7, 902 P.2d at 1114-15.

¶12 Just as *Teague*'s doctrine of non-retroactivity "was an exercise of [the Supreme Court's] power to interpret the federal habeas statute," *Danforth v. Minnesota*, 552 U.S. 264, 278, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008), we have barred state post-conviction relief on new procedural rules as part of our independent authority to interpret the remedial scope of state post-conviction statutes. *Smith v. State*, 1994 OK CR 46, ¶ 3, 878 P.2d 375, 377-78 (declining to apply rule on flight instruction to conviction that was final six years earlier); *Thomas*, 1994 OK CR 85, ¶ 13, 888 P.2d at 527 (declining to apply rule on filing bill of particulars at arraignment to conviction that was final when rule was announced).

¶13 Before and after *McGirt*, this Court has treated Indian Country claims as presenting non-waivable challenges to criminal subject matter jurisdiction. *Bosse v. State*, 2021 OK CR 3, ¶¶ 20-21, 484 P.3d 286, 293-94; *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (both characterizing claim as subject matter jurisdictional challenge that may be raised at any time). After *McGirt* was decided, relying on this theory of non-waivability, this Court initially granted post-conviction relief and vacated several capital murder convictions, and at least one non-capital conviction (Jimcy McGirt's), that were final when *McGirt* was announced. [3]

¶14 We acted in those post-conviction cases without our attention ever having been drawn to the potential non-retroactivity of *McGirt* in light of the Court of Appeals' opinion in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *cert. denied*, 519 U.S. 963, 117 S.Ct. 384, 136 L.Ed.2d 301 (1996) and cases discussed therein, which we find very persuasive in our analysis of the state law question today. *See also, e.g., Schlomann v. Moseley*, 457 F.2d 1223, 1227, 1230 (10th Cir. 1972) (finding Supreme Court's "newly announced jurisdictional rule" restricting courts-martial in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969) had made a "clear break with the past;" retroactive application to void final convictions was not compelled by jurisdictional nature of *O'Callahan*; and *O'Callahan* would not be applied retroactively to void court-martial conviction that was final when *O'Callahan* was decided).

[3] ¶15 After careful examination of the reasoning in *Cuch*, as well as the arguments of counsel and *amici curiae*, we reaffirm our recognition of the Cherokee, Choctaw, and Chickasaw Reservations [4] in those earlier cases. However, exercising our independent state law authority to interpret the remedial scope of the state post-conviction statutes, we now hold that *McGirt* and our post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided. Any statements, holdings, or suggestions to the contrary in our previous cases are hereby overruled.

***4** ¶16 In *United States v. Cuch, supra*, the Tenth Circuit Court of Appeals held that the Supreme Court's Indian Country jurisdictional ruling in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) was not retroactive to convictions already final when *Hagen* was announced. In *Hagen*, the Supreme Court held that certain lands recognized as Indian Country by *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir.1985) (en banc) were not part of the Uintah Reservation; and that Utah, rather than the federal government, had subject matter jurisdiction over crimes committed in the area. *Cuch*, 79 F.3d at 988.

¶17 Cuch and Appawoo, defendants who pled guilty and were convicted of major crimes (sexual abuse and second degree murder respectively) in the federal courts of Utah, challenged their convictions in collateral motions to vacate pursuant to 28 U.S.C. § 2255. They argued the subject matter jurisdiction defect recognized in *Hagen* voided their federal convictions. *Cuch,* 79 F.3d at 989-90. The federal district court found *Hagen* was not retroactive to collateral attacks on final convictions under section 2255. *Id.* at 990. The Tenth Circuit affirmed.

¶18 The Court of Appeals noted that the Supreme Court had applied non-retroactivity principles to new rules that alter subject matter jurisdiction. *Id.* at 990 (citing *Gosa v. Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973)) (refusing to apply new jurisdictional limitation on military courts-martial retroactively to void final convictions). The policy of non-retroactivity was grounded in principles of finality of judgments and fundamental fairness: *Hagen* had been decided after the petitioners' convictions were final; it was not dictated by precedent; and the accuracy of the underlying convictions weighed against the disruption and costs of retroactivity. *Id.* at 991-92.

¶19 The Court of Appeals found non-retroactivity of the *Hagen* ruling upheld the principle of finality and foreclosed the harmful effects of retroactive application, including

> the prospect that the invalidation of a final conviction could well mean that the guilty will go unpunished due to the impracticability of charging and retrying the defendant after a long interval of time. Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Furthermore, retroactive application would surely visit substantial injustice and hardship upon those litigants who relied upon jurisdiction in the federal courts, particularly victims and witnesses who have relied on the judgments and the finality flowing therefrom. Retroactivity would also be unfair to law enforcement officials and prosecutors, not to mention the members of the public they represent, who relied in good faith on binding federal pronouncements to govern their prosecutorial decisions. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered.

79 F.3d at 991-92 (citing and quoting from *Gosa*, 413 U.S. at 685, 93 S.Ct. 2926, and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (internal citations, quotation marks, brackets, and ellipses omitted)).

¶20 The Court of Appeals found that no questions of innocence arose from the jurisdictional flaw in the petitioners' convictions. Their conduct was criminal under both state and federal law. The question resolved in *Hagen* was simply "*where* these Indian defendants should have been tried for committing major crimes." 79 F.3d at 992 (emphasis in original). The petitioners did not allege unfairness in the processes by which they were found guilty. *Id.*

***5** ¶21 The Court of Appeals reasoned that a jurisdictional ruling like *Hagen* raised no fundamental questions about the basic truth-finding functions of the courts that tried and sentenced the defendants. *Id.* The legal processes resulting in those convictions had "produced an accurate picture of the conduct underlying the movants' criminal charges and provided adequate procedural safeguards for the accused." *Id.*

¶22 The Court of Appeals also noted that the chances of successful state prosecution were slim after so many years. "The evidence is stale and the witnesses are probably unavailable or their memories have dimmed." *Id.* at 993. The Court also considered the "violent and abusive nature" of the underlying convictions, and the burdens that immediate release of these prisoners would have on victims, many of whom were child victims of sexual abuse. *Id.*

¶23 The Court of Appeals distinguished two lines of Supreme Court holdings that retroactively invalidated final convictions. The first involved the conclusion that a court lacked authority to convict or punish a defendant in the first place. But in those cases, the bar to prosecution arose from a constitutional immunity against punishment for the conduct in *any* court, or prohibited a trial altogether. The defendants in *Cuch* could hardly claim immunity for acts of sexual abuse and murder. The only issue touched by *Hagen* was the federal court's exercise of jurisdiction. *Id.* at 993.

¶24 The second line of Supreme Court cases retroactively invalidating final convictions involved holdings that narrowed the scope of a penal statute defining elements of an offense, and thus invalidated convictions for acts that Congress had never criminalized. *Hagen*, on the other hand, had not narrowed the scope of *liability* for conduct under a statute, it had modified the extent of Indian Country jurisdiction, and thus altered the *forum* where crimes would be prosecuted. *Id.* at 994.

¶25 Finding neither of the exceptional circumstances that might warrant retroactive application of *Hagen's* jurisdictional ruling to final convictions, the Court of Appeals found "the circumstances surrounding these cases make prospective application of *Hagen* unquestionably appropriate in the present context." *Id.* Prior federal jurisdiction was well-established before *Hagen*; the convictions were factually accurate; the procedural safeguards and truth-

finding functions of the courts were not impaired; and retroactive application would compromise both reliance and public safety interests that legitimately attached to prior proceedings.

[4] ¶26 We find *Cuch*'s analysis and authorities persuasive as we consider the independent state law question of collateral non-retroactivity for *McGirt*. First, we conclude that *McGirt* announced a rule of criminal *procedure*, using prior case law, treaties, Acts of Congress, and the Major Crimes Act to recognize a long dormant (or many thought, non-existent) federal jurisdiction over major crimes committed by or against Indians in the Muscogee (Creek) Reservation. And like *Hagen* before it, "the [*McGirt*] decision effectively overruled the contrary conclusion reached in [the *Murphy*] case,[5] redefined the [Muscogee (Creek)] Reservation boundaries ... and conclusively settled the question." *Cuch,* 79 F.3d at 989.

***6** ¶27 *McGirt* did not "alter[ ] the range of conduct or the class of persons that the law punishes" for committing crimes. *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). *McGirt* did not determine whether specific conduct is criminal, or whether a punishment for a class of persons is forbidden by their status. *McGirt's* recognition of an existing Muscogee (Creek) Reservation effectively decided *which sovereign* must prosecute major crimes committed by or against Indians within its boundaries, crimes which previously had been prosecuted in Oklahoma courts for more than a century. But this significant change to the extent of state and federal criminal jurisdiction affected "only the *manner of determining* the defendant's culpability." *Schriro,* 542 U.S. at 353, 124 S.Ct. 2519 (emphasis in original). For purposes of our state law retroactivity analysis, *McGirt's* holding therefore imposed only *procedural* changes, and is clearly a procedural ruling.

[5] [6] ¶28 Second, the procedural rule announced in *McGirt* was new.[6] For purposes of retroactivity analysis, a case announces a new rule when it breaks new ground, imposes a new obligation on the state or federal government, or in other words, the result was not dictated by precedent when the defendant's conviction became final. *Ferrell,* 1995 OK CR 54, ¶ 7, 902 P.2d at 1114 (finding rule of inadmissibility of certain evidence broke new ground and was not dictated by precedent when defendant's conviction became final).

¶29 *McGirt* imposed new and different obligations on the state and federal governments. Oklahoma's new obligations included the reversal on direct appeal of at least some major crimes convictions prosecuted (without jurisdictional objections at the time, and apparently lawfully) in these newly recognized parts of Indian Country; and to abstain from some future arrests, investigations, and prosecutions for major crimes there. The federal government, in turn, was newly obligated under *McGirt* to accept its jurisdiction over the apprehension and prosecution of major crimes by or against Indians in a vastly expanded Indian Country.

¶30 *McGirt's* procedural rule also broke new legal ground in the sense that it was not dictated by, and indeed, arguably involved controversial innovations upon, Supreme Court precedent. For today's purposes, the holding in *McGirt* was dictated by precedent only if its essential conclusion, i.e., the continued existence of the Muscogee (Creek) Reservation, was "apparent to all reasonable jurists" when Mr. Parish's conviction became final in 2014. *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997).

¶31 In 2005, this Court had declined to recognize the claimed Muscogee (Creek) Reservation, and thus denied the essential premise of the claim on its merits, in *Murphy v. State*, 2005 OK CR 25, ¶¶ 50-52, 124 P.3d at 1207-08. From then until the Tenth Circuit Court of Appeals' 2017 decision in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), no court that had addressed the issue, including the federal district court that initially denied Murphy's habeas claim, had embraced the possibility that the old boundaries of the Muscogee (Creek) Nation remained a reservation.[7]

***7** ¶32 With no disrespect to the views that later commanded a Supreme Court majority in *McGirt*, the dissenting opinion of Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Thomas, whom we take to be "reasonable jurists" in the required sense, certainly did *not* view the holding in *McGirt* as dictated by precedent even in 2020, much less in 2014.[8] Chief Justice Roberts's dissent raised a host of reasonable doubts about the majority's adherence to precedent,[9] arguing at length that it had divined the existence of a reservation only by departing from the governing standards for proof of Congress's intent to disestablish one, *McGirt,* 140 S.Ct. at 2489; and in many other ways besides,[10] "disregarding the 'well settled' approach required by our precedents." *Id.* at 2482 (Roberts, C.J., dissenting). The *McGirt* majority, of course, remains just that, but the Chief Justice's reasoned,

precedent-based objections are additional proof that *McGirt's* holding was not "apparent to all reasonable jurists" when Mr. Parish's conviction became final in 2014.

¶33 Third, our independent exercise of authority to impose remedial constraints under state law on the collateral impact of *McGirt* and post-*McGirt* litigation is consistent with both the text of the opinion and the Supreme Court's apparent intent. As already demonstrated, *McGirt* is neither a substantive rule nor a watershed rule of criminal procedure. The Supreme Court itself has not declared that *McGirt* is retroactive to convictions already final when the ruling was announced.

¶34 *McGirt* was never intended to annul decades of final convictions for crimes that might never be prosecuted in federal court; to free scores of convicted prisoners before their sentences were served; or to allow major crimes committed by, or against, Indians to go unpunished. The Supreme Court's intent, as we understand it, was to fairly and conclusively determine the claimed existence and geographic extent of the reservation.

¶35 The Supreme Court predicted that *McGirt's* disruptive potential to unsettle convictions ultimately would be limited by "other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few," designed to "protect those who have reasonably labored under a mistaken understanding of the law." *McGirt*, 140 S.Ct. at 2481. The Court also well understood that collateral attacks on final state convictions based on *McGirt* would encounter "well-known state and federal limitations on post-conviction review in criminal proceedings." *Id.* at 2479. "[P]recisely because those doctrines exist," the Court said, it felt "free" to announce a momentous holding effectively recognizing a new jurisdiction and supplanting a longstanding previous one, "leaving questions about reliance interests for later proceedings crafted to account for them." *Id.* at 2481 (brackets and ellipses omitted).

¶36 Those questions are now properly before us and urgently demand our attention. Because *McGirt's* new jurisdictional holding was a clear break with the past, we have applied *McGirt* to reverse several convictions for major crimes pending on direct review, and not yet final, when *McGirt* was announced. The balance of competing interests is very different in a final conviction, and the reasons for non-retroactivity of a new *jurisdictional* rule apply with particular force. Non-retroactivity of *McGirt* in state post-conviction proceedings can mitigate some of the negative consequences so aptly described in *Cuch*, striking a proper balance between the public safety, finality, and reliance interests in settled convictions against the competing interests of those tried and sentenced under the prior jurisdictional rule.

***8** ¶37 The State's reliance and public safety interests in the results of a guilty plea or trial on the merits, and appellate review according to then-existing rules, are always substantial. Though Oklahoma's jurisdiction over major crimes in the newly recognized reservations was limited in *McGirt* and our post-*McGirt* reservation rulings, the State's jurisdiction was hardly open to doubt for over a century and often went wholly unchallenged, as it did at Mr. Parish's trial in 2012.

¶38 We cannot and will not ignore the disruptive and costly consequences that retroactive application of *McGirt* would now have: the shattered expectations of so many crime victims that the ordeal of prosecution would assure punishment of the offender; the trauma, expense, and uncertainty awaiting victims and witnesses in federal re-trials; the outright release of many major crime offenders due to the impracticability of new prosecutions; and the incalculable loss to agencies and officers who have reasonably labored for decades to apprehend, prosecute, defend, and punish those convicted of major crimes; all owing to a longstanding and widespread, but ultimately mistaken, understanding of law.

¶39 By comparison, Mr. Parish's legitimate interests in post-conviction relief for this jurisdictional error are minimal or non-existent. *McGirt* raises no serious questions about the truth-finding function of the state courts that tried Mr. Parish and so many others in latent contravention of the Major Crimes Act. The state court's faulty jurisdiction (unnoticed until many years later) did not affect the procedural protections Mr. Parish was afforded at trial. The trial produced an accurate picture of his criminal conduct; the conviction was affirmed on direct review; and the proceedings did not result in the wrongful conviction or punishment of an innocent person. A reversal of Mr. Parish's final conviction now undoubtedly would be a monumental victory for him, but it would not be justice.

[7] ¶40 Because we hold that *McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction, the order vacating Mr. Parish's murder conviction was unauthorized by state law. The State ordinarily may file a regular appeal from an adverse post-

conviction order, but here, it promptly petitioned this Court for extraordinary relief and obtained a stay of proceedings. The time for filing a regular post-conviction appeal (twenty days from the challenged order) has since expired. Rule 5.2(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

¶41 The petitioner for a writ of prohibition must establish that a judicial officer has, or is about to, exercise unauthorized judicial power, causing injury for which there is no adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). There being no adequate remedy by appeal, the injury caused by the unauthorized dismissal of this final conviction justifies the exercise of extraordinary jurisdiction. The writ of prohibition is **GRANTED**. The order granting post-conviction relief is **REVERSED**.

ROWLAND, P.J.: CONCURS

HUDSON, V.P.J.: SPECIALLY CONCURS

LUMPKIN, J.: SPECIALLY CONCURS

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCUR:

¶1 I commend Judge Lewis for his thorough discussion of the retroactivity principles governing this case. I write separately to summarize my understanding of today's holding. Today's ruling holds that *McGirt v. Oklahoma*, ––– U.S. ––––, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020) does not apply retroactively on collateral review to convictions that were final before *McGirt*. We apply on state law grounds the retroactivity principles from *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) in reaching this conclusion because the United States Supreme Court has not previously ruled on the retroactivity of *McGirt*. We hold that *McGirt* is a new rule of criminal procedure not dictated by precedent, that represents a clear break with past law and that imposes a new obligation on the State. The Supreme Court recently acknowledged there is no longer an exception in its *Teague* jurisprudence for watershed procedural rules to be applied retroactively and we incorporate this ruling in today's decision. *See Edwards v. Vannoy*, ––– U.S. ––––, 141 S. Ct. 1547, 1561, 209 L.Ed.2d 651 (2021). Today's decision is also based on *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996) which addressed a similar situation. We overrule our previous decisions in which we have applied *McGirt* on post-conviction review. Today's decision, however, reaffirms our previous recognition of the existence of the various reservations in those cases.

***9** ¶2 Based on this understanding of our holding, I fully concur in today's decision. While this decision resolves one aspect of the post-*McGirt* jurisdictional puzzle, many challenges remain for which there are no easy answers. So far, Congress has missed the opportunity to implement a practical solution which, at this point, seems unlikely. It is now up to the leaders of the State of Oklahoma, the Tribes and the federal government to address the jurisdictional fallout from the *McGirt* decision. Only in this way, with all of these parties working together, can public safety be ensured across jurisdictional boundaries in the historic reservation lands of eastern Oklahoma. It will require this type of cooperation in the post-*McGirt* world to ensure that stability is restored to Oklahoma's criminal justice system.

LUMPKIN, JUDGE, SPECIALLY CONCURRING:

¶1 I compliment my colleague on a well-researched opinion which accurately sets out the decisions of the U.S. Supreme Court and the Tenth Circuit Court of Appeals regarding giving retroactive effect to Supreme Court decisions. I especially compliment him for recognizing the scholarly analysis of Chief Justice Roberts in the *McGirt* dissent which shows by established precedent that the *McGirt* majority was not fully analyzing and applying past precedent of the Court in its decision.

¶2 I join this opinion based on the precedent set by the United States Supreme Court and the Tenth Circuit Court of Appeals. In doing so I cannot divert from basic principles of stating the obvious. In recognizing that the federal precedents set forth in the opinion and this writing are binding on this Court, I cannot overlook the legal fact that each of them applied a policy relating to collateral attacks on judgments rendered by courts lacking jurisdiction to render those judgments. When those courts found the lower courts rendering the subject judgments had no jurisdiction to render them, the result of this finding should have been to render the judgments void. Rather than declaring those judgments void, the courts instead formulated a policy limiting the retroactive application of their decisions, thereby preserving from collateral attack final judgments preceding them.

¶3 Keeping the policy decisions reflected in those opinions in mind, I do diverge from the court in labeling the *McGirt* ruling as procedural. When the federal government pre-empts a field of law, the legal effect is to deprive states of their jurisdiction

in that area of the law. If a court lacks jurisdiction to act then any rulings and judgments would appear to be void when rendered.[1] As the opinion notes, this Court since statehood has recognized and honored federal jurisdiction as to Indian allotments and dependent Indian communities. Those areas are subject to federal jurisdiction and that jurisdiction is recognized by the federal government, the tribes and the State of Oklahoma. There was no question Oklahoma had jurisdiction over the rest of the state and this Court, as the court with exclusive jurisdiction in criminal cases, faithfully honored those jurisdictional claims.

***10** ¶4 Regardless, a 5-4 majority of the Supreme Court disregarded the precedent set out by Chief Justice Roberts in his dissent to *McGirt*, and for the first time in legal history determined the existence of a reservation in Oklahoma based on "magic words" rather than historical context.[2] In doing so, the majority in *McGirt* declared this reservation has always been in existence, even after Oklahoma became a state. This operative wording in the opinion creates a legal conundrum in that *McGirt* states that legally Oklahoma never had jurisdiction on this newly identified Indian reservation. This holding creates a question as to every criminal judgment entered by a state court regarding its validity. If all courts involved in this issue held themselves to the legal effect of this holding then those judgments would be void.

¶5 However both the Supreme Court and the Tenth Circuit have shown us by their precedents that courts have an option other than the legal one in cases of this type and that is the application of legal policy. As set out in the opinion, each of those courts has applied policy regarding retroactive application of cases based on the chaos, confusion, harm to victims, *etc*., if retroactive application occurred. The *McGirt* decision is the *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), decision in reverse. In upholding the state court conviction, the Court held in *Hagen* that Congress had disestablished the Uintah reservation; therefore, the federal district court did not have jurisdiction to decide the subject case. In a later case involving the same land area, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), the Tenth Circuit found that although the federal district court lacked jurisdiction to try the subject cases, there was no need to vacate the judgments for lack of jurisdiction because of the harm it would cause and because those defendants were given a fair trial and made no complaints regarding the fairness. Thus the court applied policy rather than the law which would have rendered the judgments void due to lack of subject matter jurisdiction.

¶6 The legal effect of the *McGirt* decision, finding Oklahoma lacked jurisdiction to try cases by or against Indians in Indian Country due to federal preemption through the Major Crimes Act, would be to declare the associated judgments void. However, we now adopt the federal policy and established precedent of selective retroactive application in these type of cases due to the ramifications retroactive application would have on the criminal justice system and victims. This is hard to explain in an objective legal context but provides a just and pragmatic resolution to the *McGirt* dilemma.

All Citations

--- P.3d ----, 2021 WL 3578089, 2021 OK CR 21

Footnotes

1 *Teague v. Lane*, 489 U.S. 288, 295, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (defining a final conviction as one where judgment was rendered, the availability of appeal exhausted, and the time to petition for certiorari had elapsed).

2 The Cherokee, Chickasaw, Choctaw, and Muscogee (Creek) Nations filed a joint brief as *amici curiae* in response to our invitation. The Acting Attorney General of Oklahoma, counsel from the Capital Habeas Unit of the Federal Public Defender's Office for the Western District of Oklahoma, and the Oklahoma Criminal Defense Lawyer's Association also submitted briefs as *amicus curiae.* We thank counsel for their scholarship and vigorous advocacy.

3 *Bosse, supra*; *Cole v. State*, 2021 OK CR 10, ––– P.3d ––––, 2021 WL 1727054; *Ryder v. State*, 2021 OK CR 11, 489 P.3d 528, *Bench v. State*, 2021 OK CR 12, ––– P.3d ––––, 2021 WL 1836466. We later stayed the mandate in these capital post-conviction cases pending the State's petition for certiorari to the Supreme

Court. We have also granted *McGirt*-based relief and vacated many convictions in appeals pending on direct review. *E.g., Hogner v. State*, 2021 OK CR 4, ––– P.3d ––––, 2021 WL 958412; *Spears v. State*, 2021 OK CR 7, 485 P.3d 873; *Sizemore v. State, supra*.

4 We first recognized the Seminole Reservation in the post-*McGirt* direct appeal of *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250, and have no occasion to revisit that decision today.

5 *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198 (denying post-conviction relief on claim that Muscogee (Creek) Reservation was Indian Country and jurisdiction of murder was federal under the Major Crimes Act).

6 *McGirt's* recognition of the entire historic expanse of the Muscogee (Creek) Nation as a reservation was undoubtedly new in the *temporal* sense. We take it as now well-established that "Oklahoma exercised jurisdiction over all of the lands of the former Five [ ] Tribes based on longstanding caselaw from statehood until the Tenth Circuit in *Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967 (10th Cir.1987) found a small tract of tribally-owned treaty land existed along the Arkansas River in Tulsa County, Oklahoma." *Murphy v. Sirmons*, 497 F. Supp.2d 1257, 1288-89 (E.D. Okla. 2007). Until *McGirt*, this Court, and Oklahoma law enforcement officials generally, declined to recognize the historic boundaries of *any* Five Tribes reservation, *as such*, as Indian Country. *See, e.g.,* 11 Okla. Op. Att'y. Gen. 345 (1979), available at 1979 WL 37653, at *8-9 (stating the Attorney General's opinion that "there is no 'Indian country' in said former 'Indian Territory' over which tribal and thus federal jurisdiction exists").

7 *McGirt*, 140 S.Ct. at 2497 (Roberts, C.J., dissenting). In *Murphy v. Sirmons*, 497 F.Supp.2d 1257, 1289-90 (E.D. Okla. 2007), the federal habeas court held thus:

> While the historical boundaries of once tribally owned land within Oklahoma may still be determinable today, there is no question, based on the history of the Creek Nation, that Indian reservations do not exist in Oklahoma. State laws have applied over the lands within the historical boundaries of the Creek nation for over a hundred years.

The federal district court found "no doubt the historic territory of the Creek Nation was disestablished as a part of the allotment process." *Id.*, at 1290. The court concluded that our 2005 decision "refusing to find the crime occurred on an Indian 'reservation' [was] not 'contrary to nor an unreasonable application of Federal law as determined by the United States Supreme Court.' " *Id.*

8 The mere existence of a dissent does not establish that a rule is new, but a 5-4 split among Justices on whether precedent dictated a holding is strong evidence of a novel departure from precedent. *Beard*, 542 U.S. at 414-15, 124 S.Ct. 2504 (finding that the four dissents in *Mills v. Maryland* [486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)] strongly indicated that the rule announced was not dictated by *Lockett v. Ohio* [438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)]).

9 Principally *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), and *Nebraska v. Parker,* 577 U.S. 481, 136 S.Ct. 1072, 194 L.Ed.2d 152 (2016).

10 *See generally*, *McGirt*, 140 S.Ct. at 2485-2489 (Roberts, C.J., dissenting).

1 I realize courts in the past have engaged in legal gymnastics to keep from voiding judgments rendered by a court without jurisdiction by finding that a court's judgment must be void on its face before it can be held void. *Springer v. Townsend*, 336 F.2d 397, 401 (10th Cir. 1964) (in deciding whether a probate decree was void, the Court stated "our scope of review is limited to determining whether a lack of jurisdiction in the approval proceeding affirmatively appears from the record."; "[a] judgment will not be held to be void on its face unless an inspection will affirmatively disclose that the court had no jurisdiction of the person, no jurisdiction of the subject matter, or had no judicial power to render the particular judgment." *Clay v. Sun River Mining Co.*, 302 F.2d 599, 601 (10th Cir. 1962); "[a]s long as the supporting record does not reflect the district court's lack of authority, the district court order cannot be declared "void." Such an order is instead only "voidable." *Bumpus v. State*, 1996 OK CR 52, ¶ 7, 925 P.2d 1208, 1210; "[t]his Court has held in numerous cases that in order for a judgment to be void as provided in the Statute just quoted, it must be void on the face of the record, and that extrinsic evidence is not admissible to show judgment is void on the face of the record." *Scoufos v. Fuller*, 1954 OK 363, 280 P.2d 720, 723. However, logic and common sense dictate that if a court

had no authority to act then any actions would be a nullity. Regardless, I apply the precedent cited in the opinion and specially concur.

2 In *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), the Court enunciated several factors which must be considered in determining whether a reservation has been disestablished. Those factors are: the explicit language of Congress evincing intent to change boundaries; events surrounding the passage of surplus land acts which "reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation ..."; Congress's subsequent treatment of the subject areas; identity of who moved onto the affected land; and the subsequent demographic history of those lands. *Id.* at 470-72, 104 S.Ct. 1161.

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

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IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
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CLERK

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

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

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June 24, 2021

Subject To Acceptance Or Rejection By the Court Of Criminal Appeals Of the State Of Oklahoma.
This Instrument is Accepted As Tendered For Filing This 24th Day Of June 20 21
COURT CLERK
COURT OF CRIMINAL APPEALS
BY Cynde Hannebaum
DEPUTY CLERK

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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

<u>*AMICUS CURIAE* BRIEF OF THE CAPITAL HABEAS UNIT OF THE FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF OKLAHOMA IN SUPPORT OF RESPONDENT</u>

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

> In light of *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *Edwards v. Vannoy* (No. 19-5807), 593 U.S. __ (May 17, 2021), cases cited therein, and related authorities, should the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* be applied retroactively to void a state conviction that was final when *McGirt* and *Sizemore* were announced?

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 930 n.36.

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

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

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

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

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

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

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

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

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

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

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

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

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[5]The cases discussed below involve application of Okla. Stat. tit. 22, § 1089, the capital post-conviction statute. Specifically, § 1089(D)(8) permits subsequent applications for post-conviction relief when the legal basis for the claim was unavailable. Under § 1089(D)(9)(a)-(b), a legal basis for a claim is unavailable if the legal basis:

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

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

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

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

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

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

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

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

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

> At the time the OCCA entertained Petitioner's post-conviction appeal and the *Murphy* claim as raised in Ground Four of his habeas petition, the *Murphy/McGirt* litigation was still pending. Due to the pending litigation, although the OCCA

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

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

Id. at 8-9.

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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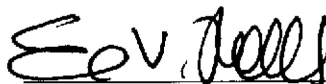

EMMA V. ROLLS

ORIGINAL

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IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

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JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. PCD-2020-611**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

RESPONDENT'S MOTION TO FILE A SUPPLEMENTAL BRIEF IN LIGHT OF *STATE EX REL. DISTRICT ATTORNEY V. WALLACE*

Comes now, Respondent, the State of Oklahoma, by and through John M. O'Connor, Attorney General of the State of Oklahoma, and respectfully seeks leave to file an approximately three-page supplemental brief regarding the application of *State ex rel. District Attorney v. Wallace*, 2021 OK CR 15, __ P.3d ___ to bar Petitioner's claim.

According to Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App., "A supplemental brief, if necessary to present new authority on issues previously raised, may be filed if granted leave of court."[1]

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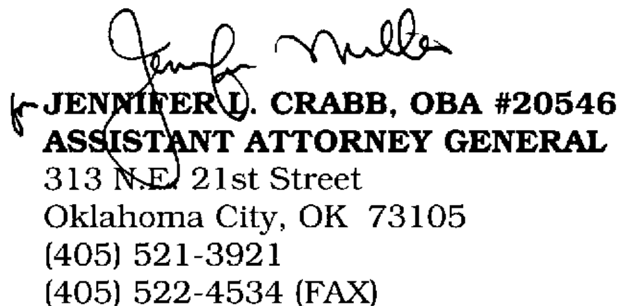
[1] Although Respondent has not previously argued in this case the retroactivity question decided in *Wallace*, Respondent has argued that Petitioner is not entitled to relief on collateral review. Further, the language in Rule 3.4(F)(2)—"issues previously raised"—refers to the claims at issue, and not the arguments in support of (or opposition to) the claims. This is clear from the next section of the rule, which sets forth when it is (and is not) appropriate to bring a new "proposition[] of error" in a supplemental brief. Accordingly, this request falls within the scope of Rule 3.4(F)(2)'s provision for supplemental briefs regarding new authority. *Cf. King v. State*, 2008 OK CR 13, ¶ 7, 182 P.3d 842, 844 ("To determine legislative intent we may look to each part of the statute . . . ."); *Murphy v. State*, 2012 OK CR 8, ¶ 23, 281 P.3d 1283, 1291 (applying Rule 3.5 in a post-conviction appeal); *Braun v. State*, 1997 OK CR 26, ¶ 6, 937 P.2d 505, 515 (same).

The rule provides that the supplemental brief shall be filed within fifteen days after this Court grants the motion for leave. However, for the Court's convenience, a copy of the proposed supplemental brief is being tendered for filing contemporaneously with this motion.

For the reasons therein, Respondent respectfully requests that this Court grant Respondent's motion and dismiss Petitioner's pending post-conviction proceedings as barred by *Wallace*.

Respectfully submitted,

JOHN M. O'CONNOR
ATTORNEY GENERAL OF OKLAHOMA



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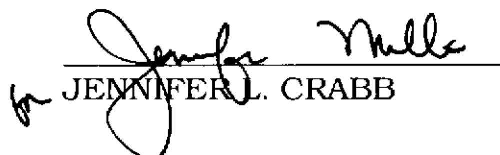
(405) 522-4534 (FAX)

ATTORNEYS FOR APPELLEE

CERTIFICATE OF MAILING

On this 2nd day of September, 2021, a true and correct copy of the foregoing was mailed *via* United States Postal Service to:

Meghan LeFrancois
Sarah M. Jernigan
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102



JENNIFER L. CRABB

No. PCD-2020-611

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

STATE'S SUPPLEMENTAL BRIEF IN LIGHT OF *STATE EX REL. DISTRICT ATTORNEY V. WALLACE*

JOHN M. O'CONNOR
ATTORNEY GENERAL OF OKLAHOMA

JENNIFER L. CRABB, OBA #20546
ASSISTANT ATTORNEY GENERAL

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

ATTORNEYS FOR RESPONDENT

SEPTEMBER 2, 2021

Subject To Acceptance Or Rejection By the Court
Of Criminal Appeals Of the State Of Oklahoma.
This Instrument is Accepted As Tendered For
Filing This 2nd Day Of Sept 2021
COURT CLERK
COURT OF CRIMINAL APPEALS
BY Cyndi Hannebaum
DEPUTY CLERK

TABLE OF AUTHORITIES

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2021 OK CR 15, ___ P.3d ___ 2

State ex rel. Matloff v. Wallace,
2021 OK CR 21, ___ P.3d ___ 2, 3

STATUTES

18 U.S.C. § 1153 1

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. PCD-2020-611**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

STATE'S SUPPLEMENTAL BRIEF IN LIGHT OF *STATE EX REL. DISTRICT ATTORNEY V. WALLACE*

Petitioner was sentenced to death for the murder of Mary Bowles in Tulsa County District Court Case No. CF-1999-4583.[1] *Hanson v. State*, 2009 OK CR 13, ¶ 1, 206 P.3d 1020, 1024. Now before this Court on his third application for post-conviction relief, Petitioner claims the State lacked prosecutorial authority to try him pursuant to 18 U.S.C. § 1153. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020) (holding the Muscogee (Creek) Nation's Reservation had not been disestablished for purposes of the Major Crimes Act, 18 U.S.C. § 1153). Petitioner's third post-conviction application alleged he is eligible to become a member of the Creek Nation and murdered his victims on the Cherokee Nation's alleged reservation (App., at 8-37).

At the direction of this Court, this matter was remanded to the district court for an evidentiary hearing to determine "Hanson's status as an Indian" and "whether the crime[s] occurred in Indian Country." 4/2/2021 Order Remanding

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[1] Petitioner was also convicted of murdering Jerald Thurman, but was sentenced to life without parole for that crime.

for Evidentiary Hearing (OCCA No. PCD-2020-611), at 4. An evidentiary hearing was held on May 25, 2021 and June 3, 2021.

Before the district court issued findings of fact and conclusions of law, this Court *sua sponte* stayed the matter pending its decision in *State ex rel. District Attorney v. Wallace*, 2021 OK CR 15, __ P.3d __. Nevertheless, the district court entered findings of fact and conclusions of law. The court found, pursuant to the stipulations entered into by the parties and the evidence presented at the hearing, that Petitioner is not Indian, but that, based on *McGirt* and *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___, the crimes did occur in Indian Country. 6/29/2021 Findings of Fact and Conclusions of Law on Remand (Tulsa County Dist. Ct. No. CF-1999-4583), at 3-22.

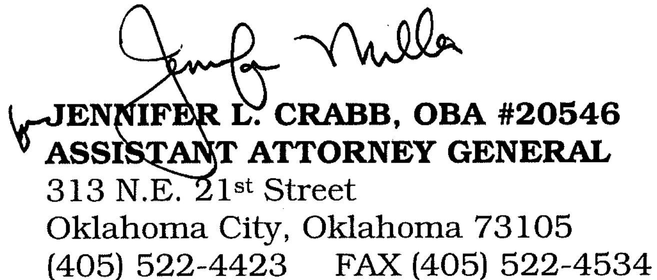
This Court need not further consider Petitioner's third request for post-conviction relief in light of this Court's August 12, 2021, decision in *Wallace*. *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___. There, this Court held that, as a matter of state law, post-conviction claims based on *McGirt* are barred in cases in which the conviction became final on direct review before July 9, 2020—the day *McGirt* was decided. *See Wallace*, 2021 OK CR 21, ¶ 2 n.1 (noting that a conviction is final "where judgment was rendered, the availability of appeal exhausted, and the time to petition for certiorari had elapsed"). Petitioner's convictions were final on December 7, 2009, when the United States Supreme Court denied his petition for writ of certiorari. *Hanson v. Oklahoma*,

558 U.S. 1081 (2009). Pursuant to *Wallace*, Petitioner is not entitled to post-conviction relief.[2]

Respondent asks that, in light of *Wallace*, this Court dismiss Petitioner's pending post-conviction application as barred by *Wallace*.

Respectfully submitted,

JOHN M. O'CONNOR
ATTORNEY GENERAL OF OKLAHOMA



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ATTORNEYS FOR RESPONDENT

[2] In making this request, Respondent does not abandon any other claims or defenses.

CERTIFICATE OF MAILING

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Sarah M. Jernigan
Office of the Federal Public Defender
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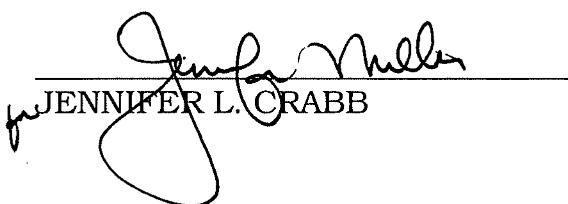


JENNIFER L. CRABB

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 7 2021

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,	
Petitioner,	
-vs-	**Case No. PCD-2020-611**
THE STATE OF OKLAHOMA,	
Respondent.	

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO FILE SUPPLEMENTAL BRIEF IN LIGHT OF *STATE EX REL. DISTRICT ATTORNEY V. WALLACE*

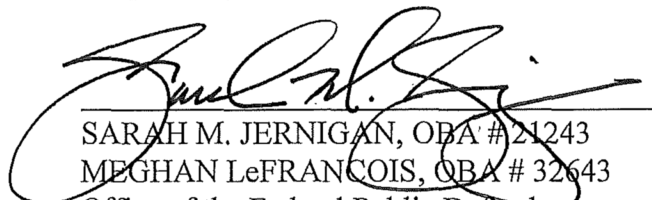
Respondent filed its motion to file supplemental briefing in light of *State ex re. Matloff v. Wallace*, 2021 OK CR 21. *Hanson v. State*, No. PCD-2020-611 (Okla. Crim. App. September 2, 2021). However, the State has waived and/or forfeited the argument it now proposes. Not once has the State argued in Mr. Hanson's case that *McGirt* announced a new rule that could not be retroactively applied in this case. In fact, in Respondent's Motion to File a Supplemental Brief in Light of *State ex rel. District Attorney v. Wallace*, the State specifically acknowledges it "has not previously argued in this case the retroactivity question decided in *Wallace*."[1] *Hanson v. State*, No.

[1]Debra Hampton, counsel for Clifton Parish, party-in-interest in *Matloff* "intend[s] to appeal the Oklahoma Court of Criminal Appeals decision in *Matloff v. Wallace* to the United States Supreme Court in a petition for writ of certiorari." She has "engaged the services of Michael R. Dreeben and Kendall Turner from the O'Melve[n]y & Myers law firm in Washington[,] D.C., who are experienced Supreme Court practitioners, to represent Mr. Parish." *See* Exhibit A. This Court has indicated it may decide this case based, at least in part, on *State ex rel. Matloff v. Wallace*, 2021 OK CR 21. Order Staying Evidentiary Hearing, *Hanson v. State*, No. PCD-2020-611 (Okla. Crim. App. June 11, 2021). Given that the United States Supreme Court will be presented with the very issue at hand in *Matloff* – whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) is retroactively applicable to void a state conviction that was final when *McGirt* was announced – any proposed supplemental

PCD-2020-611 (Okla. Crim. App. September 2, 2021). Indeed, the State did not make this argument during the evidentiary hearing before the Tulsa County district court, the continued evidentiary hearing – where the district court heard oral argument from both parties – or in the briefing submitted to the district court in advance of the oral argument. Under this Court's rules and precedent, the State has waived and/or forfeited its newly minted argument that *McGirt* announced a new rule and cannot be applied retroactively. *See, e.g.,* Rule 3.5(C)(6), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2019) ("Failure to present relevant authority in compliance with [the Court's] requirements will result in the issue being forfeited on appeal."); *Gilbert v. State*, 1998 OK CR 17, 955 P.2d 727, 732 & n.3.

Wherefore, Petitioner John Hanson requests that Respondent's motion to file supplemental briefing be denied.

Respectfully submitted,



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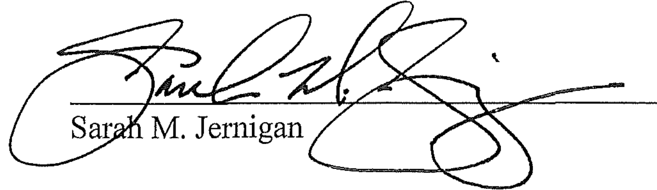
---

briefing on the applicability of *Matloff* now is premature. *See* Motion to Continue Stay of Proceedings and Brief in Support, filed simultaneously herein.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2021, a true and correct copy of the foregoing document was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant to Rule 1.9 (B), Rules of the Court of Criminal Appeals.



Sarah M. Jernigan

DECLARATION OF DEBRA K. HAMPTON

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

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

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

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

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

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

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FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 7 2021

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

JOHN FITZGERALD HANSON, *Petitioner,* -*vs*- **THE STATE OF OKLAHOMA,** *Respondent.*	**Case No. PCD-2020-611**

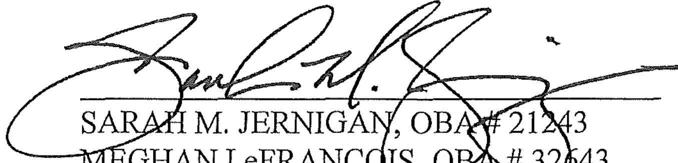
PETITIONER'S MOTION TO CONTINUE STAY OF PROCEEDINGS

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

Pursuant to Rule 3.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), undersigned counsel has simultaneously filed a brief in support of this motion.

For the reasons stated in Mr. Hanson's brief in support, filed simultaneously with this motion, Mr. Hanson requests this Court stay his post-conviction action.

Respectfully submitted,



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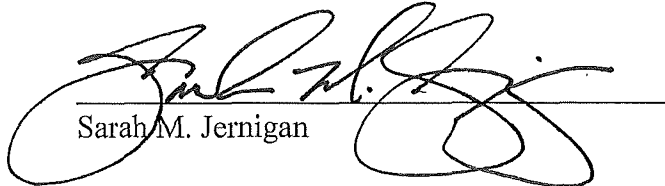

Sarah M. Jernigan

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SEP 7 2021

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,	
***Petitioner*,**	
-vs-	**Case No. PCD-2020-611**
THE STATE OF OKLAHOMA,	
Respondent.	

PETITIONER'S BRIEF IN SUPPORT OF
MOTION TO CONTINUE STAY OF PROCEEDINGS

Petitioner, John Fitzgerald Hanson, through undersigned counsel, provides this brief in support of his Motion to Stay Proceedings. Mr. Hanson's post-conviction action should be stayed because this Court has indicated it may decide his case based on an issue that will be litigated in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21 before the Supreme Court:[1] whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) is retroactively applicable to void a state conviction that was final when *McGirt* was announced. Accordingly, because the ensuing litigation in *Matloff* affects Mr. Hanson's case, this Court should stay these proceedings immediately to conserve judicial resources. In support, Mr. Hanson states as follows:

---

[1]Debra Hampton, counsel for Clifton Parish, party-in-interest in *Matloff* "intend[s] to appeal the Oklahoma Court of Criminal Appeals decision in *Matloff v. Wallace* to the United States Supreme Court in a petition for writ of certiorari." She has "engaged the services of Michael R. Dreeben and Kendall Turner from the O'Melve[n]y & Myers law firm in Washington[,] D.C., who are experienced Supreme Court practitioners, to represent Mr. Parish." *See* Exhibit A.

I. Procedural History.

On September 8, 2020, Mr. Hanson filed a Successive Application for Post-Conviction Relief challenging the State's jurisdiction to prosecute him under *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) and *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (July 9, 2020) (mem).[2] Specifically, Mr. Hanson asserted exclusive jurisdiction rests with the federal courts because he is Indian and the crimes occurred within the boundaries of the Cherokee Nation Reservation.

On April 2, 2021, this Court remanded this case to the District Court of Tulsa County for an evidentiary hearing. Order Remanding for Evidentiary Hearing, *Hanson v. State*, No. PCD-2020-611 (Okla. Crim. App. April 2, 2021). This Court's order directed the district court to answer two separate questions. First, the district court was asked to "determine whether (1) Hanson has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government." *Id.* at 4. Second, the district court was asked to "decide whether the crimes in this case occurred on the Cherokee Nation Reservation," this Court having already held that Congress had not disestablished that reservation. *Id.*

After holding an evidentiary hearing, the district court concluded Mr. Hanson established he had some Indian blood, but that – although an enrolled tribal member now – he was not recognized as Indian at the time of the offense. *See* Findings of Fact and Conclusions of Law on Remand, *Hanson v. State*, No. CF-1999-4583 (Tulsa Co. Dist. Ct. June 29, 2021). The district court further concluded the land upon which the crimes occurred was on the Cherokee Nation Reservation. *Id.*

---

[2]In *McGirt* and *Murphy*, the Supreme Court reversed rulings of this Court, concluding Congress never disestablished the Creek Reservation. The crimes in *Murphy* and *McGirt* occurred in Indian Country, thus depriving the Oklahoma courts of jurisdiction.

On June 11, 2021, this Court entered an order staying the evidentiary hearing. "In light of this Court's request for further briefing concerning *McGirt*'s retroactive application to final convictions in *State ex rel. Matloff v. Wallace*, Case No. PR-2021-366, the Order remanding this matter for evidentiary hearing is hereby stayed pending resolution of the retroactivity issue." Order Staying Evidentiary Hearing, *Hanson v. State*, No. PCD-2020-611 (Okla. Crim. App. June 11, 2021).

Notably, the State never argued in this case that *McGirt* announced a new rule that could not be retroactively applied. In fact, on September 2, 2021, Respondent filed its Motion to File a Supplemental Brief in Light of *State ex rel. District Attorney v. Wallace*, wherein it acknowledges it "has not previously argued in this case the retroactivity question decided in *Wallace*." *Hanson v. State*, No. PCD-2020-611 (Okla. Crim. App. September 2, 2021). Under this Court's rules and precedent, the State has waived and/or forfeited any argument *McGirt* announced a new rule that cannot be applied retroactively. *See, e.g.,* Rule 3.5(C)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019) ("Failure to present relevant authority in compliance with [the Court's] requirements will result in the issue being forfeited on appeal"); *Gilbert v. State*, 1998 OK CR 17, 955 P.2d 727, 732 & n.3.[3]

[3]In *Matloff*, this Court held *McGirt* "announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction." *Matloff* at ¶ 6. This Court further stated, "We acted in [other] post-conviction cases without our attention ever having been drawn to the potential non-retroactivity of *McGirt* in light of the . . . opinion in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996)." *Matloff*, at ¶ 14. Relevant to the waiver argument raised herein, the State failed to draw the Court's attention to *Cuch*, which was issued almost 25 years ago.

II. A Continued Stay of the Proceedings Is Warranted.

Mr. Hanson recognizes this Court's decision in *Matloff*.[4] However, as Ms. Hampton's declaration proves, Exhibit A, the precise issue that premised this Court's order staying these proceedings will be litigated before the Supreme Court. As the history of the *McGirt* litigation demonstrates, requests for stays pending Supreme Court litigation of potentially dispositive[5] issues are appropriate requests. This Court's practice in other cases supports Mr. Hanson's request for a continued stay of these proceedings pending resolution of *Matloff* in the United States Supreme Court. *See, e.g.,* Order Staying Issuance of Mandate, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Apr. 15, 2021) (recalling mandate pending the State's certiorari appeal to the Supreme Court); Order Staying Issuance of Mandate Indefinitely, *Bench v. State*, No. PCD-2015-698 (Okla. Crim. App. May 28, 2021); Order Staying Issuance of Mandate Indefinitely, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. May 28, 2021); Order Staying Issuance of Mandate Indefinitely, *Castro-Huerta v. State*, No. F-2017-1203 (Okla. Crim. App. June 2, 2021); Order Staying Issuance of Mandate Indefinitely, *McDaniel v. State*, No. F-2017-357 (Okla. Crim. App. June 2, 2021); Order Granting Appellee's Motion to Stay Briefing Schedule, *Leathers v. State*, No. F-2019-962 (Okla. Crim. App. Nov. 13, 2020) (granting stay of briefing schedule until this Court determined whether

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[4]For the reasons set forth in the *Amicus Curiae* Brief of the Capital Habeas Unit of the Federal Public Defender for the Western District of Oklahoma in Support of Respondent, filed June 24, 2021, in *State ex rel. Matloff v. Wallace*, Case No. PR-2021-366, Mr. Hanson maintains this Court incorrectly decided *McGirt* is a new rule of criminal procedure that cannot be retroactively applied to cases with final convictions.

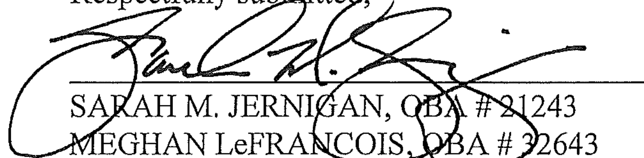
[5]To be clear, Mr. Hanson is *not* conceding that *Matloff* is dispositive in his case. As demonstrated above, the State has waived any argument that *McGirt* is a new rule of criminal procedure.

Cherokee Nation had been disestablished).

Further, there is no federal statute of limitations on first-degree murder. *See United States v. Gallaher*, 624 F.3d 934 (9th Cir. 2010) (holding first-degree murder is a capital offense for which there is no statute of limitations under 18 U.S.C. § 3281 – even for a defendant charged with murder in Indian Country who may not be eligible for the death penalty). Accordingly, a continued stay will not impact the ability of the federal government to prosecute Mr. Hanson should he be granted post-conviction relief in this case.

For the foregoing reasons, this Court should continue the stay of this post-conviction action as a result of the ensuing Supreme Court litigation in *Matloff*. The instant motion is made in good faith and not for the purpose of delay.

Respectfully submitted,



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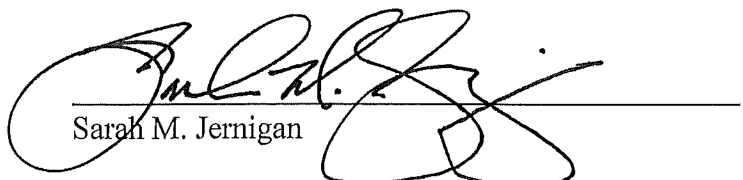


Sarah M. Jernigan

DECLARATION OF DEBRA K. HAMPTON

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

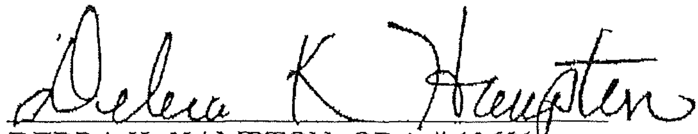
I, Debra K. Hampton, of lawful age, being first duly sworn, on oath state:

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

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

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

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



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ORIGINAL

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP - 9 2021

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

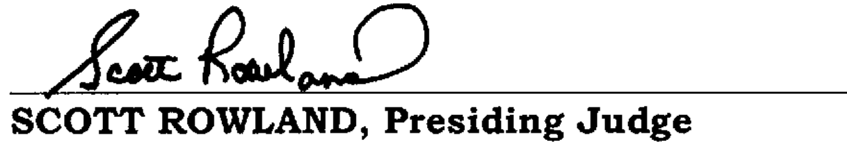
JOHN FITZGERALD HANSON,	)	
Petitioner,	)	
v.	)	**Case No. PCD-2020-611**
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

ORDER DENYING PETITIONER'S REQUEST TO CONTINUE STAY OF PROCEEDINGS

Before the Court is Petitioner Hanson's motion to stay the instant successive capital post-conviction proceedings based upon anticipated litigation in the United States Supreme Court involving our recent decision in *State ex rel Matloff v. Wallace,* 2021 OK CR 21, ___P.3d___ (holding new rule of criminal procedure concerning Indian Country jurisdiction announced in *McGirt v. Oklahoma* would not be applied retroactively to void final state conviction). *Matloff* is a final decision and we find no good cause to stay this matter pending an appeal in *Matloff* to another court. Hanson's motion for a stay is **DENIED.**

IT IS SO ORDERED.

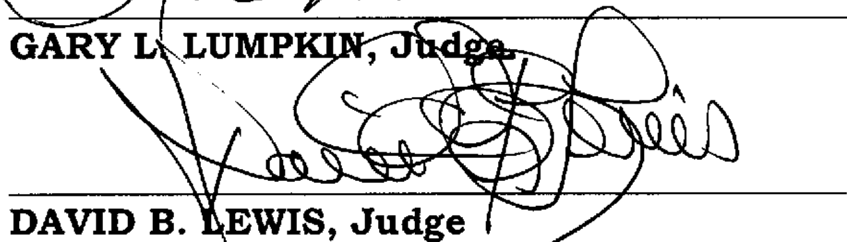
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 9th day of September, 2021.



SCOTT ROWLAND, Presiding Judge

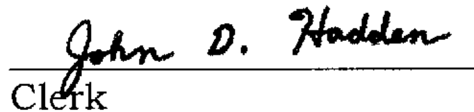
ROBERT L. HUDSON, Vice Presiding Judge

GARY L. LUMPKIN, Judge



DAVID B. LEWIS, Judge

ATTEST:



Clerk

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,
Petitioner,

SERVICE COPY

v.
STATE OF OKLAHOMA,
Respondent,

Case Number: PCD-2020-611

TCC Number(s): CF-99-4583

MANDATE

To the Honorable Judge of the District Court in and for the County of TULSA, State of Oklahoma, Greetings:

Whereas, the Court of Criminal Appeals of the State of Oklahoma has rendered its decision in the above styled and numbered case on the 9th day of September, 2021, resolving the appeal from the District Court in Case Number CF-99-4583.

DENIED

Now, therefore, you are hereby commanded to cause such Decision to be filed and spread of record in your court and to issue such process (see 22 O.S. 2001, §§ 978 & 979, and 22 O.S. 2004 §980) and to take such other action as may be required by said Opinion (see 22 O.S. 2001 §§ 1066 and 1072). You shall then make due and prompt return to this court showing ultimate disposition of the above case.

Witness, the Honorable Scott Rowland, Presiding Judge of the Court of Criminal Appeals of the State of Oklahoma, State Capitol Building, Oklahoma City, this 9th day of September, 2021 .

JOHN D. HADDEN
Clerk

(seal)

By: Cynde Hannebaum
Deputy

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SEP 10 2021

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

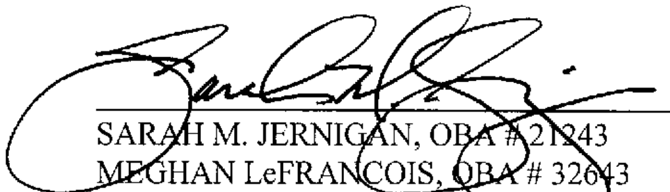
Case No. PCD-2020-611

PETITIONER'S MOTION TO RECALL MANDATE

Mr. Hanson, by and through undersigned counsel, moves to recall the mandate issued in his post-conviction action due to anticipated Supreme Court litigation in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21. *See* Exhibit A (declaration from Debra Hampton, attorney for Clifton Parish, party-in-interest in *Matloff*). The mandate should be recalled because this Court decided Mr. Hanson's case based on one of the precise issues that will be litigated before the Supreme Court in *Matloff:* whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) is retroactively applicable to void a state conviction that was final when *McGirt* was announced. Accordingly, because the ensuing litigation in *Matloff* affects Mr. Hanson's case, this Court should recall the mandate pending the resolution of *Matloff* in the Supreme Court.

Pursuant to Rule 3.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), undersigned counsel has simultaneously filed a brief in support of this motion. For the reasons stated therein, Mr. Hanson requests this Court recall the mandate issued in his post-conviction action.

Respectfully submitted,



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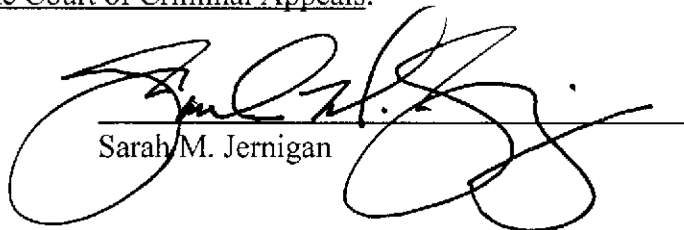
Facsimile: (405) 609-5976
sarah_jernigan@fd.org
meghan_lefrancois@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2021, a true and correct copy of the foregoing document was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant to Rule 1.9 (B), Rules of the Court of Criminal Appeals.



Sarah M. Jernigan

DECLARATION OF DEBRA K. HAMPTON

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

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

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

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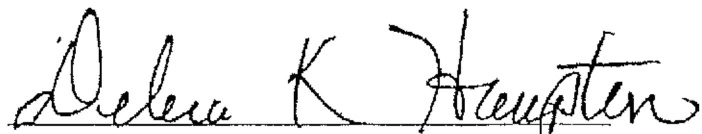

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JOHN FITZGERALD HANSON,	
Petitioner,	
-vs-	**Case No. PCD-2020-611**
THE STATE OF OKLAHOMA,	
Respondent.	

PETITIONER'S BRIEF IN SUPPORT OF MOTION TO RECALL MANDATE

Petitioner, John Fitzgerald Hanson, through undersigned counsel, provides this brief in support of his Motion to Recall Mandate. This Court should recall the mandate because this Court decided his case based on an issue that will be litigated in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21 before the Supreme Court:[1] whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) is retroactively applicable to void a state conviction that was final when *McGirt* was announced. Accordingly, because the ensuing litigation in *Matloff* affects Mr. Hanson's case, this Court should recall the mandate immediately. In support, Mr. Hanson states as follows:

I. Procedural History.

On September 8, 2020, Mr. Hanson filed a Successive Application for Post-Conviction Relief challenging the State's jurisdiction to prosecute him under *McGirt v. Oklahoma*, 140 S. Ct.

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[1]Debra Hampton, counsel for Clifton Parish, party-in-interest in *Matloff* "intend[s] to appeal the Oklahoma Court of Criminal Appeals decision in *Matloff v. Wallace* to the United States Supreme Court in a petition for writ of certiorari." She has "engaged the services of Michael R. Dreeben and Kendall Turner from the O'Melve[n]y & Myers law firm in Washington[,] D.C., who are experienced Supreme Court practitioners, to represent Mr. Parish." *See* Exhibit A.

2452 (2020) and *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (July 9, 2020) (mem).[2] Specifically, Mr. Hanson asserted that exclusive jurisdiction rests with the federal courts because he is Indian and the crimes occurred within the boundaries of the Cherokee Nation Reservation.

On April 2, 2021, this Court remanded this case to the District Court of Tulsa County for an evidentiary hearing. Order Remanding for Evidentiary Hearing, *Hanson v. State*, No. PCD-2020-611 (Okla. Crim. App. April 2, 2021). This Court's order directed the district court to answer two separate questions. First, the district court was asked to "determine whether (1) Hanson has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government." *Id.* at 4. Second, the district court was asked to "decide whether the crimes in this case occurred on the Cherokee Nation Reservation," this Court having already held that Congress had not disestablished that reservation. *Id.*

After holding an evidentiary hearing, the district court concluded Mr. Hanson established he had some Indian blood, but that – although an enrolled tribal member now – he was not recognized as Indian at the time of the offense. *See* Findings of Fact and Conclusions of Law on Remand, *Hanson v. State*, No. CF-1999-4583 (Tulsa Co. Dist. Ct. June 29, 2021).[3] The district court further

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[2]In *McGirt* and *Murphy*, the Supreme Court reversed rulings of this Court, concluding Congress never disestablished the Creek Reservation. The crimes in *Murphy* and *McGirt* occurred in Indian Country, thus depriving the Oklahoma courts of jurisdiction.

[3]Notably, the State never argued in this case that *McGirt* announced a new rule that could not be retroactively applied. Under this Court's rules and precedent, the State has waived and/or forfeited any argument *McGirt* announced a new rule that cannot be applied retroactively. *See, e.g.,* Rule 3.5(C)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019) ("Failure to present relevant authority in compliance with [the Court's] requirements will result in the issue being forfeited on appeal"); *Gilbert v. State*, 1998 OK CR 17, 955 P.2d 727, 732 & n.3.

concluded the land upon which the crimes occurred was on the Cherokee Nation Reservation. *Id.*

On June 11, 2021, this Court entered an order staying the evidentiary hearing. "In light of this Court's request for further briefing concerning *McGirt*'s retroactive application to final convictions in *State ex rel. Matloff v. Wallace*,[4] Case No. PR-2021-366, the Order remanding this matter for evidentiary hearing is hereby stayed pending resolution of the retroactivity issue." Order Staying Evidentiary Hearing, *Hanson v. State*, No. PCD-2020-611 (Okla. Crim. App. June 11, 2021).

On September 2, 2021, the State filed a Supplemental Brief in Light of *State ex rel. District Attorney v. Wallace*, asking this Court "dismiss Petitioner's pending post-conviction proceedings as barred by *Wallace*."[5] Respondent's Motion to File a Supplemental Brief in Light of *State ex. rel. District Attorney v. Wallace* at 2, *Hanson v. State*, No. PCD-2020-611 (Okla. Crim. App. September 2, 2021). On September 7, 2021, Mr. Hanson filed a Motion to Continue Stay of Proceedings, Brief in Support of Motion to Continue Stay of Proceedings, and Response to Respondent's Motion to File Supplemental Brief in Light of *State ex. rel. District Attorney v. Wallace*. On September 9, 2021, this Court issued its Opinion Denying Successive Application for Capital Post-Conviction Relief. The Court held, "Because Hanson's state convictions were long final when *McGirt* was decided, his case is controlled by our decision in *Matloff* and he is not entitled to post-conviction relief based upon

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[4]In *Matloff*, this Court held *McGirt* "announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction." *Matloff* at ¶ 6. This Court further stated, "We acted in [other] post-conviction cases without our attention ever having been drawn to the potential non-retroactivity of *McGirt* in light of the . . . opinion in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996)." *Matloff*, at ¶ 14. Relevant to the waiver argument raised herein, the State failed to draw the Court's attention to *Cuch*, which was issued almost 25 years ago.

[5]The State acknowledged it "has not previously argued in this case the retroactivity question decided in *Wallace*." Respondent's Motion to File a Supplemental Brief in Light of *State ex. rel. District Attorney v. Wallace* at 1 n. 1.

his jurisdictional challenge." Opinion Denying Successive Application for Capital Post-Conviction Relief at 2-3, *Hanson v. State*, No. PCD-2020-611 (Okla. Crim. App. September 9, 2021). On the same day, this Court issued a mandate to the Tulsa County District Court.

II. A Recall of the Mandate Is Warranted.

Mr. Hanson recognizes this Court's decision in *Matloff*.[6] However, as Ms. Hampton's declaration proves, Exhibit A, the precise issue that premised this Court's order staying these proceedings will be litigated before the Supreme Court. As the history of the *McGirt* litigation demonstrates, requests for recalls or stays of mandates pending Supreme Court litigation of potentially dispositive[7] issues are appropriate requests. This Court's practice in other cases supports Mr. Hanson's request for a recall of the mandate pending resolution of *Matloff* in the United States Supreme Court. *See, e.g.,* Order Staying Issuance of Mandate, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Apr. 15, 2021) (recalling mandate pending the State's certiorari appeal to the Supreme Court); Order Staying Issuance of Mandate Indefinitely, *Bench v. State*, No. PCD-2015-698 (Okla. Crim. App. May 28, 2021); Order Staying Issuance of Mandate Indefinitely, *Cole v. State*, No. PCD-2020-529 (Okla. Crim. App. May 28, 2021); Order Staying Issuance of Mandate Indefinitely, *Castro-Huerta v. State*, No. F-2017-1203 (Okla. Crim. App. June 2, 2021); Order Staying Issuance

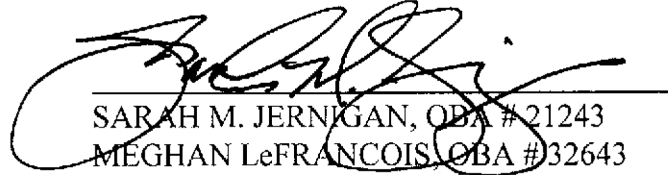
[6]For the reasons set forth in the *Amicus Curiae* Brief of the Capital Habeas Unit of the Federal Public Defender for the Western District of Oklahoma in Support of Respondent, filed June 24, 2021, in *State ex rel. Matloff v. Wallace*, Case No. PR-2021-366, Mr. Hanson maintains this Court incorrectly decided *McGirt* is a new rule of criminal procedure that cannot be retroactively applied to cases with final convictions.

[7]To be clear, Mr. Hanson is *not* conceding that *Matloff* is dispositive in his case. As demonstrated above, the State has waived any argument that *McGirt* is a new rule of criminal procedure.

of Mandate Indefinitely, *McDaniel v. State*, No. F-2017-357 (Okla. Crim. App. June 2, 2021); Order Granting Appellee's Motion to Stay Briefing Schedule, *Leathers v. State*, No. F-2019-962 (Okla. Crim. App. Nov. 13, 2020) (granting stay of briefing schedule until this Court determined whether Cherokee Nation had been disestablished).

For the foregoing reasons, this Court should recall the mandate in this post-conviction action pending the ensuing Supreme Court litigation in *Matloff*. The instant motion is made in good faith and not for the purpose of delay.

Respectfully submitted,



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sarah_jernigan@fd.org
meghan_lefrancois@fd.org

CERTIFICATE OF SERVICE

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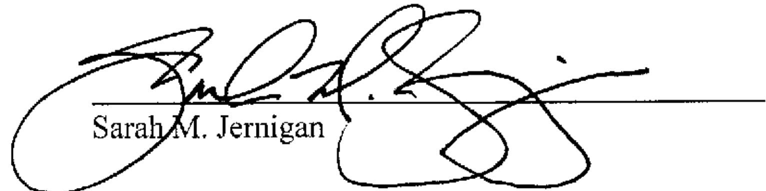

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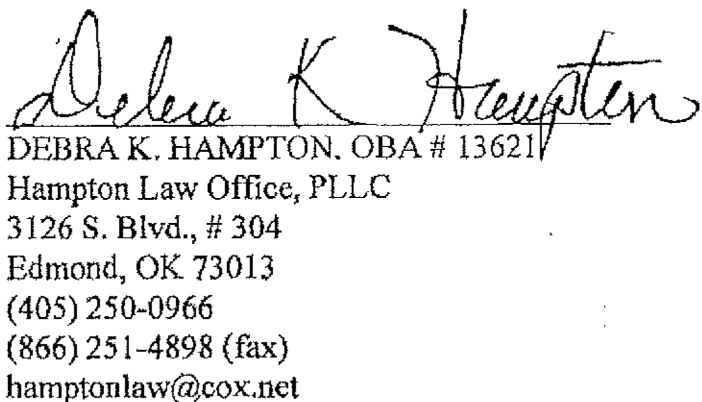

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

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	)	
Petitioner,	)	
	)	
v.	)	**Case No. PCD-2020-611**
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THE STATE OF OKLAHOMA,	)	
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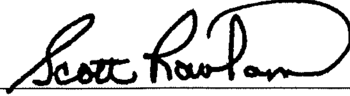
ORDER DENYING PETITIONER'S REQUEST TO RECALL THE MANDATE

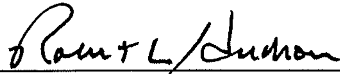
Before the Court is Petitioner Hanson's motion to recall the mandate in his successive capital post-conviction case based upon anticipated litigation in the United States Supreme Court involving our recent decision in *State ex rel Matloff v. Wallace,* 2021 OK CR 21, ___P.3d___ (holding new rule of criminal procedure concerning Indian Country jurisdiction announced in *McGirt v. Oklahoma* would not be applied retroactively to void final state conviction). *Matloff* is a final decision and we find no good cause to recall the mandate—that issued in this case on September 9, 2021—while an appeal in *Matloff* is pursued in another court. Hanson's motion to recall the mandate in this case is **DENIED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 20th day of September, 2021.



SCOTT ROWLAND, Presiding Judge



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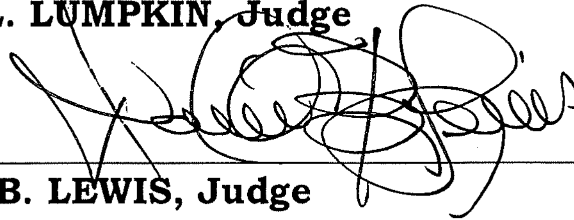

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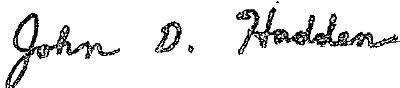

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