No.

In the Supreme Court of the United States

STATE OF OKLAHOMA, PETITIONER

v.

SHAUN MICHAEL BOSSE

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a State may impose procedural or equitable bars to postconviction relief on the claim that the State lacked prosecutorial authority because the crime of conviction occurred in Indian country.

2. Whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country.

3. Whether *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020), should be overruled.

RELATED PROCEEDINGS

Oklahoma District Court (McClain County):

State v. *Bosse*, No. CF-2010-213 (Dec. 18, 2012)

Oklahoma Court of Criminal Appeals:

Bosse v. *State*, No. D-2012-1128 (Oct. 16, 2015)

Bosse v. *State*, No. PCD-2013-360 (Dec. 16, 2015)

Bosse v. *State*, No. D-2012-1128 (May 27, 2017)

Bosse v. *State*, No. D-2012-1128 (July 24, 2017)

Bosse v. *State*, No. PCD-2019-124 (Mar. 11, 2021)

United States District Court (W.D. Okla.):

Bosse v. *Carpenter*, Civ. No. 18-204 (Apr. 2, 2019)

Supreme Court of the United States:

Bosse v. *Oklahoma*, No. 15-9173 (Oct. 11, 2016)

Bosse v. *Oklahoma*, No. 17-7232 (May 5, 2018)

Oklahoma v. *Bosse*, No. 20A161 (May 26, 2021)

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OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals (App., *infra*, 1a-30a) is reported at 484 P.3d 286. The opinion of the state trial court (App., *infra*, 37a-48a) is unreported.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on March 11, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Title 18 of the United States Code and the Oklahoma Statutes are reproduced in an appendix to this petition.

STATEMENT

No recent decision of this Court has had a more immediate and destabilizing effect on life in an American State than *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020). The Court held in *McGirt* that a large area of Oklahoma, which at one time was within the boundaries of the Creek Nation, qualifies as "Indian country" for purposes of the Major Crimes Act. The Court thereby deprived the State of authority to prosecute Indians who commit serious crimes there. The Oklahoma state courts have since held that *McGirt* compels the same conclusion with respect to the remainder of the Five Tribes in Oklahoma. As a result, almost 2 million Oklahoma residents—nearly 90% of whom are not enrolled members of a federally recognized tribe—suddenly live in Indian country for purposes of federal criminal jurisdiction.

As the Chief Justice predicted in his dissent, the results of this abrupt shift in governance have been calamitous and are worsening by the day. Before *McGirt*, the State exercised criminal jurisdiction over the historical Indian territories within its borders since admission in 1907, without question from the tribes or the federal government. The decision in *McGirt* now drives thousands of crime victims to seek justice from federal and tribal prosecutors whose offices are not equipped to handle those demands. Numerous crimes are going uninvestigated and unprosecuted, endangering public safety. Federal district courts in Oklahoma are completely overwhelmed. Thousands of state prisoners are challenging decades' worth of convictions—many of which involve crimes that cannot be reprosecuted. The effects have spilled into the civil realm as well, jeopardizing hundreds of millions of dollars in state tax revenue and calling into question the State's regulatory authority within its own borders.

The Governor did not mince his words earlier this year when he identified the fallout from *McGirt* as the "most pressing issue" for the future of Oklahoma. Simply put, the fundamental sovereignty of an American State is at stake.

This case presents three exceptionally important questions that have arisen in the wake of *McGirt* and that cry out for the Court's immediate attention. In the decision below, the Oklahoma Court of Criminal Appeals granted postconviction relief to respondent, a non-Indian convicted of brutally murdering an Indian mother and her two young children, on the ground that the crime occurred in Indian country. In reaching that decision, the court held that federal law precluded the application of any state-law procedural or equitable bar that would prevent respondent from challenging his conviction on that ground. The court then extended *McGirt* beyond the confines of the Major Crimes Act to all crimes committed by non-Indians against Indians in Indian country. Both of those rulings were erroneous. They greatly exacerbate the ongoing criminal-justice crisis in Oklahoma, and the Court has already recognized their importance by granting a stay of the mandate.

This case also presents the question whether *McGirt* should be overruled. *McGirt* was wrongly decided for the reasons stated in the Chief Justice's dissent, and its disruptive effects in Oklahoma are unprecedented. While the Court believed that compromise or congressional action could limit the disruption from its decision, it is now clear that neither is forthcoming. The tribes do not agree among themselves, much less with the State, on the proper path forward, and Congress is unlikely to adopt any proposal not supported by all of the parties involved. Only the Court can remedy the problems it has created,

and this case provides it with an opportunity to do so before the damage becomes irreversible. The petition for a writ of certiorari should be granted.

A. Background

1. The authority to prosecute crimes committed in "Indian country," 18 U.S.C. 1151, is governed by a "complex patchwork of federal, state, and tribal law." *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993). By virtue of their admission to the Union, States exercise exclusive authority to prosecute crimes committed by non-Indians against non-Indians in Indian country. See, *e.g.*, *United States* v. *McBratney*, 104 U.S. 621, 622 (1882). By contrast, the Major Crimes Act gives the federal government exclusive authority to prosecute certain enumerated felonies committed by Indians in Indian country. See 18 U.S.C. 1153.

Another federal statute, the General Crimes Act, governs the reach of other federal criminal laws in Indian country. See 18 U.S.C. 1152. Under the first paragraph of the General Crimes Act, "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 for the District of Columbia) extend to Indian country. *Ibid.* Under the second paragraph, however, those federal laws do not extend to offenses committed by one Indian against another. See *ibid.* Accordingly, the General Crimes Act provides the federal government with authority to prosecute violations of general federal criminal law where either the defendant or the victim was an Indian and the other party was not. See *ibid.* But this Court has never squarely addressed the question whether States have concurrent authority to prosecute non-Indians for state-law crimes committed against Indians in Indian country.

2. In 2018, the Court granted certiorari in *Sharp* v. *Murphy*, which presented the question whether the historical territory of the Creek Nation—one of the Five Tribes of Oklahoma—constitutes "Indian country" for purposes of the Major Crimes Act. After receiving briefing, hearing argument, and receiving additional briefing, the Court did not issue a decision in that case. In 2019, the Court granted certiorari in *McGirt* v. *Oklahoma*, which presented the same question as *Murphy*.

On July 9, 2020, the Court issued its decision in *McGirt*. It held that the historical Creek territory constituted Indian country for purposes of the Major Crimes Act, giving the federal government exclusive authority to prosecute the crimes enumerated in that statute. See 140 S. Ct. 2452, 2459 (2020). The Chief Justice dissented in an opinion joined in full by Justices Alito and Kavanaugh and in part by Justice Thomas. See *id.* at 2482-2502. Justice Thomas wrote a separate dissenting opinion. See *id.* at 2502-2504. On the same day, in *Murphy*, the Court issued a per curiam opinion affirming for the reasons stated in *McGirt*. See 140 S. Ct. 2412 (2020).

B. Facts And Procedural History

1. In 2010, respondent Shaun Michael Bosse murdered his girlfriend, Katrina Griffin, and her two children, eight-year-old Christian and six-year-old Chasity, after Ms. Griffin discovered that respondent had stolen some of her family's property. Respondent stabbed Katrina and Christian to death and then locked Chasity in a closet before setting the family's mobile home on fire, burning Chasity alive. The bodies of Katrina, Christian, and Chasity were found the next morning. See 360 P.3d 1203, 1211-1213, 1227-1229 (Okla. Crim. App. 2015).

Respondent was convicted of three counts of murder in Oklahoma state court and sentenced to death. The Oklahoma Court of Criminal Appeals initially affirmed, see 360 P.3d at 1236, but this Court summarily reversed, holding that the trial court erroneously admitted certain victim-impact testimony during the penalty phase of respondent's trial, see 137 S. Ct. 1, 2-3 (2016). The Court remanded so that the Court of Criminal Appeals could address whether the error affected the jury's sentencing determination. See *id.* at 2. On remand, the Court of Criminal Appeals again affirmed, holding that the admission of the victim-impact testimony was harmless beyond a reasonable doubt, see 400 P.3d 834, 855-857 (2017), and this Court denied review, see 138 S. Ct. 1264 (2018). During these direct-review proceedings, respondent never argued that the State lacked authority to prosecute him because the crimes occurred on Indian country and his victims were Indians.

2. In 2013, respondent filed an application for post-conviction relief in state court, challenging his conviction and sentence on a number of grounds. As in his direct appeal, respondent did not argue that his convictions were invalid because the crimes occurred on Indian country and his victims were Indians. The Court of Criminal Appeals denied respondent's application for relief. See No. PCD-2013-360 (Dec. 16, 2015).

3. In 2019, after this Court held oral argument in *Murphy*, respondent filed a second application for post-conviction relief in state court. For the first time, respondent argued that the State lacked authority to prosecute him because his crimes occurred within the borders of the historical Chickasaw territory and the Griffin family qualified as Indians.

After this Court issued its decision in *McGirt*, the Court of Criminal Appeals remanded the case to the trial

court for an evidentiary hearing. On remand, the parties stipulated that the Griffin family were members of the Chickasaw Nation, and the trial court concluded, based on *McGirt*, that the historical Chickasaw territory constituted Indian country. App., *infra*, 37a-48a.

The Court of Criminal Appeals granted postconviction relief, adopting the trial court's conclusions and holding that the federal government had exclusive authority to prosecute respondent for the crimes at issue. App., *infra*, 1a-19a. In so holding, the court rejected the State's arguments that respondent had procedurally defaulted his claim and was precluded from raising it under the doctrine of laches. Citing this Court's decision in *Gonzalez* v. *Thaler*, 565 U.S. 134 (2012), the Court of Criminal Appeals held that federal preemption of state prosecutorial authority in Indian country was jurisdictional in nature, such that the issue "can never be waived or forfeited." App., *infra*, 14a (citation omitted).

The Court of Criminal Appeals then held that the General Crimes Act preempted state prosecutions for crimes committed by non-Indians against Indians in Indian country. App., *infra*, 15a-18a. The court reached that conclusion based on its reading of the text of the General Crimes Act, *id.* at 15a-16a, and on later-enacted statutes that expressly permitted certain States to exercise broad criminal authority in Indian country—which, in the court's view, would have been unnecessary if the General Crimes Act did not otherwise preempt state jurisdiction, *id.* at 17a-18a.

Each of the other four judges wrote separate opinions. App., *infra*, 19a-30a. Judge Lumpkin concurred in the result. *Id.* at 23a-26a. He expressed the opinion that the Court's opinion in *McGirt* "contravened * * * the his-

tory leading to the disestablishment of the Indian reservations in Oklahoma," but concluded that he was bound to follow it. *Id.* at 24a.

Judge Hudson also concurred in the result. App., *infra*, 28a-30a. Like Judge Lumpkin, he concurred "as a matter of *stare decisis*," but he observed that *McGirt* was a "hugely destabilizing force to public safety in eastern Oklahoma." *Id.* at 28a, 29a. He noted that some crime victims and their family members "can look forward to a do-over in federal court of the criminal proceedings where *McGirt* applies," and "[s]ome cases may not be prosecuted at all by federal authorities because of issues with the statute of limitations, the loss of evidence, missing witnesses or simply the passage of time." *Id.* at 29a. "*McGirt* must seem like a cruel joke," he concluded, "for those victims and their family members who are forced to endure such extreme consequences in *their* case." *Id.* at 30a.

4. The State applied to this Court for a stay of the mandate pending a decision on a forthcoming petition for a writ of certiorari. See 20A161 Appl. 1 (Apr. 26, 2021). Justice Gorsuch referred the stay application to the full Court, and the Court granted the stay.

REASONS FOR GRANTING THE PETITION

In the decision below, the Oklahoma Court of Criminal Appeals held that federal preemption of state prosecutorial authority in Indian country is jurisdictional in nature and thus can never be waived or forfeited. The court then expanded the holding of *McGirt* to cover all crimes committed by non-Indians against Indians in Indian country. The court's rulings were erroneous and greatly exacerbate the ongoing crisis in the criminal-justice system in Oklahoma. Both of those questions are extraordinarily important and warrant the Court's review.

At the same time, the foregoing issues are merely symptoms of a deeper problem. In truth, the problem is *McGirt* itself, and the reconsideration of that decision is the only realistic avenue for ending the ongoing chaos affecting every corner of daily life in Oklahoma. The State of Oklahoma respectfully requests that the Court overrule its decision in *McGirt*, which was profoundly flawed and is causing unprecedented disruption. The petition for a writ of certiorari should be granted.

A. Review Is Warranted Regarding The Application Of Procedural And Equitable Bars To Postconviction Relief Under *McGirt* v. *Oklahoma*

The first question presented is whether a State may impose procedural or equitable bars to relief in postconviction proceedings on the claim that the State lacked prosecutorial authority because the crime of conviction occurred in Indian country. The Oklahoma Court of Criminal Appeals held that federal law precluded the application of such bars. That holding is erroneous, and the decision below conflicts in that respect with decisions of other lower courts. This Court's review is urgently needed.

1. In *McGirt*, the Court noted that defendants who attempted to challenge their state convictions in the wake of the Court's decision "may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings." 140 S. Ct. at 2479. In the decision below, however, the Court of Criminal Appeals held that the federal preemption of state prosecutorial authority in Indian country by the General Crimes Act deprived state courts of subject-matter jurisdiction, thereby exempting a challenge on that ground from procedural or equitable bars. That holding is incorrect.

a. "This Court has endeavored in recent years to bring some discipline to the use of the term 'jurisdictional.'" *Gonzalez* v. *Thaler*, 565 U.S. 134, 141 (2012) (internal quotation marks and citation omitted). The word "jurisdictional" is "generally reserved" for statutory provisions "delineating the classes of cases a court may entertain (subject-matter jurisdiction)" and "the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." *Fort Bend County* v. *Davis*, 139 S. Ct. 1843, 1848 (2019) (citation omitted). As the Court has explained, a statutory provision "counts as jurisdictional" only where Congress "clearly states" that fact; otherwise, a court "should treat the restriction as nonjurisdictional in character." *Id.* at 1850 (citation omitted). While Congress need not "incant magic words" to give a statute jurisdictional effect, it usually evidences that intent by using language that speaks in terms of a "court's power." *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 410 (2015).

Neither the Major Crimes Act nor the General Crimes Act speaks in terms of a court's power over a particular subject matter. Instead, those statutes speak in terms of the federal government's authority to define and prosecute crimes in Indian country. See 18 U.S.C. 1152, 1153. That authority refers to the "legislative" jurisdiction of the United States, not "the courts' statutory or constitutional power to adjudicate the case." *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 89 (1998); cf. *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 813 (1993).

Federal courts have recognized as much. As they have explained regarding federal prosecutions for crimes committed in Indian country, the federal government's failure to prove the status of the defendant or the victim as an Indian results in acquittal for failure to prove an element

of the offense, not in dismissal for lack of jurisdiction. See, *e.g.*, *United States* v. *Tony*, 637 F.3d 1153, 1158-1159 (10th Cir. 2011); *United States* v. *White Horse*, 316 F.3d 769, 772 (8th Cir.), cert. denied, 540 U.S. 84 (2003). The power of the federal courts to adjudicate violations of federal criminal law is premised on a separate jurisdictional statute (18 U.S.C. 3231), not on the Major Crimes Act or the General Crimes Act. See *United States* v. *Cotton*, 535 U.S. 625, 630-631 (2002); *Hugi* v. *United States*, 164 F.3d 378, 380-381 (7th Cir. 1999).

That reasoning applies with even greater force to state courts. Unlike the federal courts, state courts exercise inherent and general adjudicatory jurisdiction, "subject only to limitations imposed by the Supremacy Clause" and their own laws. *Tafflin* v. *Levitt*, 493 U.S. 455, 458-459 (1990). Here, Oklahoma state courts have subject-matter jurisdiction over prosecutions for murder under the Oklahoma Constitution. See Okla. Const. art. VII, § 7. While federal Indian law may preempt state criminal law in particular cases, such preemption does not divest state courts of their subject-matter jurisdiction. That is because the Supremacy Clause merely "creates a rule of decision" for courts "not [to] give effect to state laws that conflict with federal laws." *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320, 324 (2015).

Notably, the Tenth Circuit—which has jurisdiction over federal district courts in Oklahoma—has specifically held (albeit in an unpublished opinion) that prisoners seeking postconviction relief under the rule of *McGirt* are subject to the procedural bars applicable to successive federal habeas petitions. See *Dopp* v. *Martin*, 750 Fed. Appx. 754, 756-757 (10th Cir. 2018) (addressing the issue after that court's decision in *Murphy*, *supra*); see also, *e.g.*, *In re Davis*, No. 21-7030, at *1-*2 (10th Cir. July 6, 2021); *In re Morgan*, No. 20-6123, at *1-*5 (10th Cir. Sept.

18, 2020); *Ross* v. *Pettigrew*, Civ. No. 20-396, 2021 WL 1535365, at *3 n.5 (N.D. Okla. Apr. 19, 2021); *Kirk* v. *Oklahoma*, Civ. No. 21-164, 2021 WL 1316075, at *2 (W.D. Okla. Apr. 8, 2021). Accordingly, the ability of an Oklahoma prisoner to obtain relief under *McGirt* through a successive application for postconviction relief may depend on whether the prisoner seeks relief in state or federal court. Similarly, the Tenth Circuit has held that postconviction challenges to the federal government's prosecutorial authority under the Major Crimes Act are subject to procedural and equitable bars. See *Tony*, 637 F.3d at 1158-1159; cf. *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994) (granting review to resolve a disagreement between the Tenth Circuit and the Utah Supreme Court on a matter of federal Indian law).

b. In opposing the State's stay application, respondent did not defend the conclusion in the decision below that the State cannot impose procedural and equitable bars on state postconviction claims seeking relief under *McGirt*. And for good reason: the decision relies on a plainly erroneous reading of this Court's decision in *Gonzalez*, *supra*.

The Court of Criminal Appeals cited *Gonzalez* and two Tenth Circuit cases for the proposition that "[s]ubject-matter jurisdiction can never be waived or forfeited." App., *infra*, 14a (citation omitted). But this Court did not hold in *Gonzalez* that federal law prohibited States from applying procedural or equitable bars to challenges to state prosecutorial authority brought in applications for postconviction relief. Rather, the Court made its general statement about subject-matter jurisdiction in the context of deciding whether 28 U.S.C. 2253(c) is jurisdictional in nature. See *Gonzalez*, 565 U.S. at 141. The two Tenth Circuit cases similarly make general statements about subject-matter jurisdiction in wholly different contexts.

See *United States* v. *Garcia*, 936 F.3d 1128, 1140 (2019), cert. denied, 141 S. Ct. 139 (2020); *United States* v. *Green*, 886 F.3d 1300, 1304 (2018).

Nothing in those decisions supports the decision below, and nothing else in the decision below explains why the State's lack of prosecutorial authority would deprive state courts of subject-matter jurisdiction. The decision below was thus erroneous, and this Court's review is warranted to reverse that holding and resolve the conflict between the Oklahoma courts and the Tenth Circuit.

2. Respondent also argued that the decision below relied entirely on state law in holding that the State cannot impose procedural and equitable bars on state postconviction claims seeking relief under *McGirt*. See 20A161 Opp. 7-10. That argument lacks merit.

Under *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court presumes that a state-court decision rests on federal law for purposes of the adequate-and-independent-state-ground rule when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and when "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Id.* at 1040-1041. The Court thus has jurisdiction over a decision based in part on state law when the state court "treated state and federal law as interchangeable and interwoven." *Florida* v. *Powell*, 559 U.S. 50, 57 (2010).

The decision below rested on federal law and did not clearly rely on an independent and adequate state ground. The Court of Criminal Appeals' discussion began with citations of *Gonzalez* and two Tenth Circuit decisions for the proposition that issues of subject-matter jurisdiction cannot be waived or forfeited. The court did not purport to interpret the limitations on successive applications for postconviction relief under the governing state statute to

contain an exemption for jurisdictional challenges, nor does that statute contain such an exemption. Instead, the statute treats claims that "the court was without jurisdiction to impose" a sentence the same as all other grounds for postconviction relief. Okla. Stat., tit. 22, § 1080(b). All such claims are subject to state-law bars on successive applications for postconviction relief. See *id.* § 1089(D)(8)-(9).

In addition, longstanding precedent from the Court of Criminal Appeals provided that claims related to the State's prosecutorial authority in Indian country are subject to equitable doctrines such as laches. See *Ex parte Wallace*, 162 P.2d 205, 210-211 (1945). That explains why this Court, the Creek Nation, and the respondent in *Murphy* all understood Oklahoma law to subject such claims to procedural and equitable bars. See *McGirt*, 140 S. Ct. at 2479 & n.15; Br. in Opp. at 33, *Murphy*, *supra*; Creek Supp. Br. at 11-12, *Murphy*, *supra*; Resp. Supp. Reply Br. at 11, *Murphy*; Creek Br. at 42-43, *McGirt*, *supra*.

Even if the decision below were read to rest on state law, federal law would still be "interwoven" with the state-law ground for decision. See *Long*, 463 U.S. at 1040. For example, if the Court of Criminal Appeals is understood to have held that state law permits a question of subject-matter jurisdiction to be raised at any time—even in a successive application for postconviction relief—that ruling would necessarily be intertwined with the conclusion that federal law deprives state courts of subject-matter jurisdiction over prosecutions for crimes committed by non-Indians against Indians in Indian country. See App., *infra*, 23a (Rowland, V.P.J., concurring in the result) (interpreting the majority opinion as holding that the General Crimes Act deprives state courts of subject-matter jurisdiction); *id.* at 26a-27a (Lewis, J., specially concurring) (similar). And if the Court of Criminal Appeals is

understood to have applied the state statutory provision permitting a prisoner to raise a previously unavailable legal claim in a successive application for postconviction relief, the applicability of that provision would depend on the state of federal law regarding reservation disestablishment and the General Crimes Act before the decision in *McGirt*. See Okla. Stat., tit. 22, § 1089(D)(9)(A).

As to the first question presented, therefore, the decision below did not clearly rest on an adequate and independent state ground. With thousands of criminal convictions at stake, this Court's review is urgently needed to resolve the conflict between the Oklahoma Court of Criminal Appeals and the Tenth Circuit and reverse the Court of Criminal Appeals' erroneous holding.

B. Review Is Warranted Regarding The Authority Of A State To Prosecute Non-Indians Who Commit Crimes Against Indians In Indian Country

The second question presented is whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country. The Oklahoma Court of Criminal Appeals held that the answer is no, extending *McGirt* beyond the confines of the Major Crimes Act. That holding is incorrect, and it is of paramount importance given the overwhelmingly non-Indian population of eastern Oklahoma. The Court's review is warranted on that question as well.

1. As the Court has explained, "[s]tate sovereignty does not end at a reservation's border." *Nevada* v. *Hicks*, 533 U.S. 353, 361 (2001). "[B]y virtue of [its] statehood," a State has the "right to exercise jurisdiction over Indian reservations within its boundaries." *New York ex rel. Ray* v. *Martin*, 326 U.S. 496, 499-500 (1946).

A State's authority does not recede when a non-Indian commits a crime against an Indian. A State's Indian citi-

zens are entitled to equal protection under the law, including equal access to the resources, protection, and benefits of the State's criminal-justice system. As the Court has instructed, a State has "the power of a sovereign over their persons and property" in Indian territory within state borders as necessary to "preserve the peace" and "protect [Indians] from imposition and intrusion." *New York ex rel. Cutler* v. *Dibble*, 62 U.S. (21 How.) 366, 370 (1859).

"The States' inherent jurisdiction on reservations can of course be stripped by Congress." *Hicks*, 533 U.S. at 365. But "absent a congressional prohibition," a State has the right to "exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-258 (1992); see *United States* v. *McGowan*, 302 U.S. 535, 539 (1938); *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 651 (1930).

2. In the decision below, the Court of Criminal Appeals concluded that the "clear language" of the General Crimes Act confers exclusive federal prosecutorial authority over Indian country, thereby stripping Oklahoma and other States of their authority to prosecute crimes committed by non-Indians against Indians in Indian country. App., *infra*, 15a-16a. That is incorrect.

a. The General Crimes Act states that, "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." 18 U.S.C. 1152. Nothing in that text acts to relieve a State of its prosecutorial authority over non-Indians in Indian country. As the Court has explained, the phrase "sole and exclusive jurisdiction" is used to "describe the laws of the United

States" that extend to Indian country; it does not concern the discrete question of who has prosecutorial authority within Indian country. *Donnelly* v. *United States*, 228 U.S. 243, 268 (1913); accord *Ex parte Wilson*, 140 U.S. 575, 578 (1891).

The phrase "except as otherwise expressly provided by law," in turn, refers to federal laws that exempt Indian country from the reach of federal criminal law in certain circumstances. It does not mean, as the Court of Criminal Appeals concluded, that state criminal law does not apply in Indian country unless Congress expressly provides for that result. See App., *infra*, 15a-16a. The Court of Criminal Appeals erred by resting its decision on that flawed premise.

b. This Court's precedents also do not prohibit States from prosecuting crimes committed by non-Indians against Indians in Indian country. To the contrary, in *Dibble*, *supra*, the Court upheld a state law prohibiting non-Indians from trespassing on Indian lands. The Court reasoned that "a police regulation for the protection of the Indians from intrusion of the white people" was valid because the State had never "surrendered" its sovereign power "over their persons and property" for the purposes of "preserv[ing] the peace" and "protect[ing]" Indians. 62 U.S. (21 How.) at 370. In the absence of any contrary federal legislation, the Court explained, state law extended to protect "Indians and their possessions." *Id.* at 371.

In addition, in *United States* v. *McBratney*, 104 U.S. 621 (1882), the Court held that, under the predecessor statute to the General Crimes Act, the States had exclusive jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian country. The Court reasoned that, "by its admission into the Union by Congress[] upon an equal footing with the original States," a

State "acquire[s] criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits," including Indian country. *Id.* at 624; see *Draper* v. *United States*, 164 U.S. 240, 242-243, 247 (1896). The Court has explained that the prosecutorial authority of States recognized in *McBratney* exists "by virtue of their statehood"—in other words, the authority is inherent in States' power as sovereigns. *Martin*, 326 U.S. at 500.

Because the *McBratney* line of decisions involved crimes committed by non-Indians against non-Indians, they left open the question presented here: whether States have authority to prosecute crimes committed by non-Indians against Indians in Indian country. In *Donnelly*, *supra*, the Court addressed this type of crime—the murder of an Indian by a non-Indian in Indian country—and held that the federal government could prosecute such crimes. See 288 U.S. at 271-272. But the Court stopped there; it did not hold that federal jurisdiction was exclusive or that the predecessor statute to the General Crimes Act deprived States of their own authority to prosecute such crimes.

To be sure, the Court has suggested in dicta that States lack such jurisdiction. See *Williams* v. *United States*, 327 U.S. 711, 714 & n.10 (1946); App., *infra*, 16a. But in those cases, the Court never squarely confronted the issue, examined the text of the General Crimes Act, or explained why States would lack jurisdiction despite the holding in *Dibble* and the reasoning in *McBratney*. Accordingly, several decades ago, the Office of Legal Counsel concluded that States likely have jurisdiction over non-Indian offenders who commit crimes against Indians in Indian country. 3 Op. Off. Legal Counsel 111, 117-120 (1979); accord U.S. Br. at 15 n.8, *Martin*, *supra* (No. 45-158) (noting the possibility of "concurrent federal and

state jurisdiction of some offenses committed by a white against an Indian"). A decade after the OLC opinion, the Justice Department took the contrary position in a brief before this Court, but it recognized that the question was close and that, "[i]f the Court were writing on a clean slate," it might permit the exercise of state prosecutorial authority. U.S. Br. at 3, *Arizona* v. *Flint*, 492 U.S. 911 (1989) (No. 88-603).

In the wake of *McGirt*, determining the answer to that question is now more important than ever. Nearly 90% of the almost 2 million Oklahomans who suddenly live in Indian country are not Indians. The question presented here concerns the allocation of prosecutorial authority over those individuals. There could hardly be a more compelling basis for the Court's review.

3. In opposing the State's stay application, respondent defended the decision below on the ground that the "starting point" for the preemption analysis is that a State presumptively lacks authority to regulate activities involving Indians in Indian country. 20A161 Opp. 19. But this Court has roundly and repeatedly rejected that position. See *Hicks*, 533 U.S. at 361-362; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 141 (1980); *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 72 (1962). Instead, the Court's modern precedents demonstrate that, in the absence of a congressional prohibition, a State's sovereign authority extends to non-Indians in Indian country—including in interactions between non-Indians and Indians. See, *e.g.*, *Department of Taxation & Finance* v. *Milhelm Attea & Brothers, Inc.*, 512 U.S. 61, 73-75 (1994); *County of Yakima*, 502 U.S. at 257-258; *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 187 (1989); *Three Affiliated Tribes of Fort Berthold Reservation* v.

Wold Engineering, P.C., 467 U.S. 138, 148-149 (1984); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 159 (1980); *Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976).

Even when the Court has held that federal law impliedly preempts state law in Indian country, it has done so only after examining "the language of the relevant federal treaties and statutes" to determine whether, in light of "the state, federal, and tribal interests at stake," the exercise of state authority would violate federal law. *Bracker*, 448 U.S. at 144-145; see *Cotton Petroleum*, 490 U.S. at 176-177. But as discussed above, the plain text of the General Crimes Act does not reveal any congressional intent to divest States of their authority to prosecute crimes committed by non-Indians against Indians in Indian country. What is more, no tribal interest is impaired by the exercise of state jurisdiction over crimes committed by non-Indians: Indian tribes generally do not have criminal jurisdiction over non-Indians, see *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978), and the "exercise of state jurisdiction is particularly compatible with tribal autonomy" when "the tribal court lack[s] jurisdiction over the claim." *Three Affiliated Tribes*, 467 U.S. at 149.

By contrast, a State has paramount interests in public safety and criminal justice within its borders. See, *e.g.*, *Kelly* v. *Robinson*, 479 U.S. 36, 49 (1986). Specifically, a State has legitimate interests both in protecting its Indian citizens and in enforcing its criminal laws against non-Indian citizens. And the exercise of state jurisdiction does not impair any federal interest, because a state prosecution will not bar a subsequent federal prosecution of the same defendant for the same conduct. See *Gamble* v.

United States, 139 S. Ct. 1960, 1964 (2019). To the contrary, concurrent federal and state jurisdiction would further federal and tribal interests by enhancing the protection of Indians from the crimes of non-Indians—particularly here, where Oklahoma has protected such interests for over a century and the federal government lacks the capacity and resources to take over that responsibility.

4. The Court of Criminal Appeals also erred by reasoning that certain statutes enacted over a century after the predecessor statute to the General Crimes Act demonstrate the lack of state authority to prosecute non-Indians for crimes committed against Indians in Indian country. See App., *infra*, 17a-18a. Those statutes, which purport to vest specific States with authority to try civil and criminal cases involving Indians, see, *e.g.*, 25 U.S.C. 1321, 1322, are at best overinclusive, because States already possess civil jurisdiction in cases involving non-Indian defendants. See *Three Affiliated Tribes*, 467 U.S. at 149-151. In any event, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Marvin M. Brandt Revocable Trust* v. *United States*, 572 U.S. 93, 109 (2014) (citation omitted).

In the end, neither the Court of Criminal Appeals nor any of the parties provides a compelling justification for claiming that federal law deprives the States of their ability to protect their Indian citizens by prosecuting crimes committed against Indians by non-Indians. This Court should also grant review on the second question presented and reverse the Court of Criminal Appeals' erroneous holding.

C. *McGirt* v. *Oklahoma* Should Be Overruled

Aside from presenting the two questions discussed above, this case also provides the Court with an opportunity to reconsider its decision in *McGirt*. The State

urges the Court to take that opportunity. *McGirt* was wrongly decided, and no recent decision has spurred such instant and sweeping turmoil in an American State. *McGirt* has called into question the fundamental sovereignty of Oklahoma. While the Court identified compromise and congressional action as potential solutions, it has become clear there is no realistic prospect of either. Only this Court can stop the havoc that *McGirt* is wreaking.

1. The decision in *McGirt* was incorrect. As the Chief Justice explained in his dissent, longstanding precedent on the disestablishment of Indian territory required the Court to consider "the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there." 140 S. Ct. at 2485. But those precedents were "not followed by the Court." *Ibid.* Instead, the Court reasoned that "extratextual sources" may be considered in the disestablishment inquiry "only" to "clear up" statutory ambiguity. *Id.* at 2469 (majority opinion). Consideration of history is necessary, however, precisely because it is unclear whether Congress's alienation of Indian lands at the turn of the century changed the status of the land. See *id.* at 2488 (Roberts, C.J., dissenting). Under the correct framework prescribed by this Court's precedent, it is clear that Congress disestablished the Creek territory in Oklahoma, as well as the territories of the four other Oklahoma tribes.

2. As the Chief Justice predicted, the "burdens" of the *McGirt* decision on the State of Oklahoma have already proven to be "extraordinary." 140 S. Ct. at 2500. That decision vastly expanded the number of people living in Indian country for purposes of criminal jurisdiction, and the Oklahoma courts have since extended the decision to the historical territories of the rest of the Five Tribes.

The decision in *McGirt* now applies to approximately 43% of the territory in the State—home to almost 2 million Oklahomans. See App., *infra*, 8a (Chickasaw); *Sizemore* v. *State*, 485 P.3d 867 (Okla. Crim. App. 2021) (Choctaw); *Grayson* v. *State*, 485 P.3d 250 (Okla. Crim. App. 2021) (Seminole); *Hogner* v. *State*, No. F-2018-138, 2021 WL 958412 (Okla. Crim. App. Mar. 11, 2021) (Cherokee).

The challenges from that seismic shift in jurisdiction have rippled through every aspect of life in Oklahoma. As the Governor reported in his State of the State Address earlier this year, the "most pressing issue" for the future of Oklahoma is how to deal with the fallout from *McGirt*. Governor Kevin Stitt, *Press Release: Governor Stitt Delivers 2021 State of the State Address* (Feb. 1, 2021).

a. Most immediately, *McGirt* has pitched Oklahoma's criminal-justice system into a state of emergency.

i. According to the most recent data in the State's possession, over 3,000 applications for postconviction relief have been filed by prisoners seeking to overturn their state convictions based on *McGirt*. That volume of postconviction proceedings will have an "impact upon the administration of [state] criminal law so devastating as to need no elaboration." *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 418-419 (1966). The Oklahoma Department of Corrections has already released over 150 prisoners, who are the first to have successfully completed challenges to their convictions under *McGirt*. Many have been handed into federal custody, but almost half were set free because of a lack of a federal detainer or custody request from the relevant tribe. While the process has slowed in state court since the Court issued its stay in this case, those numbers are bound to increase if the decision below is allowed to stand, because no procedural or equitable bars will be available to prevent such challenges from succeeding.

The combination of *McGirt* and the decision below is a toxic cocktail. It allows an untold number of prisoners to game the system by seeking postconviction relief only after the limitations period for federal reprosecution has ended. See 18 U.S.C. 3282(a) (establishing a five-year limitations period for most federal crimes). Early data showed that approximately a quarter of the postconviction challenges seeking relief under *McGirt* involve underlying crimes that are already beyond the federal statute of limitations; more recent numbers suggest that the proportion is greater. And the crimes of conviction in some of those cases are chilling. See, *e.g.*, 20A161 Appl. 13-14 (recounting, *inter alia*, the grant of postconviction relief under *McGirt* to an individual who had been convicted of multiple counts of rape, kidnapping, and robbery with a firearm).

If any of the released individuals reoffend, the cost to society will be great and the trauma to the victims incalculable. See *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1554 (2021). As one Oklahoma woman has explained, she "lives in fear to this day" that her ex-boyfriend, who shot her twice, will harm her now that his conviction and 18-year sentence have been overturned under *McGirt*. Mike Rogers, *Oklahoma Woman Worried Man Who Tried to Kill Her Could Be Set Free Following Criminal Appeals Court Ruling*, KXII News 12 (Mar. 15, 2021) <tinyurl.com/rogersoklahoma>. He has now been released, and the federal statute of limitations bars his reprosecution.

Even in cases within the applicable limitations period, successful reprosecution by federal or tribal authorities will not be easy. As this Court recently recognized, "conducting scores of retrials years after the crimes occurred would require significant * * * resources." *Edwards*, 141 S. Ct. at 1554. And reprosecution may be impossible

because of "lost evidence, faulty memory, and missing witnesses." *Ibid.* (citation omitted). For example, in the case of Clarence Rozell Goode, Jr.—who murdered a couple and their 10-year-old daughter in a family dispute—a lead detective has died, as well as several witnesses (including a victim's mother, who found the victims' bodies). See Annie Gowen & Robert Barnes, *'Complete, Dysfunctional Chaos': Oklahoma Reels After Supreme Court Ruling on Indian Tribes*, Wash. Post, July 24, 2021, at A1.

Where reprosecution is even possible, conducting retrials will "inflict[] substantial pain on crime victims who must testify again and endure new trials." *Edwards*, 141 S. Ct. at 1554-1555. In the words of one mother who is "devastated" at the prospect of a retrial for her daughter's murderer: "[i]t's an awful feeling that we have to go through this * * * again," and "it's not just me, it's all these families." Ashely Izbicki, *Victim's Family Speaks Out After Convicted Murderer Could Get New Trial Due to Supreme Court's McGirt Decision*, News 9 (Mar. 15, 2021) <tinyurl.com/izbickifamily>.

ii. As the federal and tribal prosecutors are flooded with old cases, they cannot keep up with new ones because of severe resource constraints. The State estimates that defendants in approximately 6,000 pending criminal cases are seeking dismissal under *McGirt*. For its part, the Federal Bureau of Investigation estimates that it will have 7,500 additional cases in 2022 alone because of the decision in *McGirt*. See *Hearing on Federal Bureau of Investigation Budget Request for Fiscal Year 2022 Before the Subcomm. on Commerce, Science, and Related Agencies of the S. Comm. on Appropriations*, 117th Cong. 13 (June 23, 2021) (statement of FBI Director Wray). And the trend is likely to continue: Oklahoma district attorneys have determined that, since 2005, at least 76,000 of the non-traffic criminal cases filed in Oklahoma state

court have involved an Indian perpetrator or victim. Yet the Bureau has stated that it is already in a "constant scramble" in Oklahoma, with the "staggering volume" of new cases creating a "daunting" task at "every federal level" that "poses significant and long-term operational and public safety risks." *Ibid.*; *Oklahoma FBI Case Volume Unprecedented*, FBI News (July 8, 2021) <tinyurl.com/fbioklahoma>.

The tragic consequence is that some crimes are going unprosecuted, with a significant share committed by non-Indians against Indians. After all, "most of those who live on Indian reservations are non-Indians." *United States* v. *Cooley*, 141 S. Ct. 1638, 1645 (2021). The United States Attorneys' Offices in Oklahoma are resorting to unprecedented triage: for example, the Eastern District of Oklahoma has prioritized prosecuting crimes involving serious bodily injury, leaving almost all other crimes unindicted. The State understands that, of the thousands of felonies referred to that office in the last year, only approximately 10% have thus far resulted in federal indictment. Making matters worse, tribes lack the authority to prosecute almost all non-Indian offenders. The combined result is that essentially every non-Indian who victimizes an Indian in the Eastern District—unless the crime involves death or serious bodily injury—remains free and uncharged.

As to non-major crimes committed by Indians in newly recognized Indian country, it is unknown how many of the thousands of cases dismissed from state court in light of *McGirt* are being reprosecuted by tribal authorities. The Creek Nation has declined the State's repeated requests to share a list of criminal cases it is prosecuting. And newly committed crimes are being referred directly to tribal prosecutors; the State is unaware of how many such crimes exist. The full effect of *McGirt* on criminal justice

in Oklahoma could therefore be significantly worse than even the current data show.

Meanwhile, the United States District Court for the Eastern District of Oklahoma has declared a judicial emergency due to the "unprecedented increase in criminal filings" after *McGirt*, invoking the same provision ordinarily used by federal courts in the wake of hurricanes and other natural disasters. See General Order No. 21-10 (invoking 28 U.S.C. 141). As a result, trials have been delayed, and parties in the Eastern District are having to travel to the Western District to litigate their cases. See *ibid.* Similarly, in the Northern District, the combined impact of the COVID-19 pandemic and *McGirt* on criminal trials has meant that "civil cases will most likely not be tried before a district judge in the foreseeable future." *Feenstra* v. *Sigler*, Civ. No. 19-234 (N.D. Okla. July 28, 2021) (minute order).

McGirt is also affecting first responders. As one emergency-response dispatcher in the Creek territory has explained, callers to 911 are now asked if they are members of a federally recognized tribe; if they are, callers are transferred to the Creek Nation, where they are "sometimes met with a hold tone and music because the call volume is so high." Gowen & Barnes A1. The Creek Nation includes much of the Tulsa metropolitan area, including downtown.

b. The effects of *McGirt* on Oklahoma's criminal-justice system are catastrophic enough. But they sweep far more broadly than that. As predicted, the decision has "create[d] significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law" in eastern Oklahoma. *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting). Questions involving the

effect of *McGirt* on the State's civil authority have already arisen in a range of contexts.

One example is that some businesses and individuals in Indian country in Oklahoma are now refusing to pay income and sales taxes—and seeking refunds of prior payments of those taxes within the three-year appeal period. See Okla. Stat., tit. 68, § 2373. Thousands of tribal citizens have filed tax protests or exemption applications. The State estimates that those protests and applications, if successful, could require the payment of hundreds of millions of dollars in refunds. See Oklahoma Tax Commission, *Report of Potential Impact of McGirt v. Oklahoma* 2 (Sept. 30, 2020). And that does not include future lost revenue—potentially amounting to billions of dollars—on which state agencies and programs rely. State property taxes have been challenged as well. See, *e.g.*, *Oneta Power, LLC* v. *Hodges*, No. CJ-2020-193 (Okla. Dist. Ct. Wagoner Cty.).

Other issues potentially affecting the State's civil authority abound. The State's power to regulate oil and gas matters has been challenged. See *Canaan Resources X* v. *Calyx Energy III, LLC*, No. 119,245 (Okla.). Even simple matters such as title insurance and underwriting have been cast into uncertainty. See Sarah Roubidoux Lawson & Megan Powell, *Unsettled Consequences of the McGirt Decision*, The Regulatory Review (Apr. 1, 2021) <tinyurl.com/lawsonandpowell>. Title exceptions are now routinely being placed on title policies in real-estate transactions throughout eastern Oklahoma.

The State's authority under cooperative-federalism programs is also under attack. Citing *McGirt*, the Department of the Interior has moved to seize control over surface coal mining and reclamation in the State. See 86 Fed. Reg. 26,941 (May 18, 2021); *Oklahoma* v. *Depart-*

ment of Interior, Civ. No. 21-719 (W.D. Okla.). And despite the tribes' assurance that the State could retain regulatory primacy over environmental matters, see Boren Br. at 23-24, *Murphy*, *supra* (joined by the Chickasaw and Choctaw Nations); Creek Br. at 33-34, *Murphy*, *supra*, the Environmental Protection Agency appears to be reconsidering the State's authority under pressure from tribal leaders. See, *e.g.*, EPA, *Press Release: EPA Announces Renewed Consultation and Coordination with Oklahoma Tribal Nations* (June 30, 2021); Allison Herrera, *Tribes Sharply Criticize EPA Granting Stitt Environmental Oversight of Tribal Lands*, KOSU (Oct. 7, 2020) <tinyurl.com/herreratribes>.

Questions involving the local court systems are looming too. Some involve the civil jurisdiction of non-Indian municipal courts in eastern Oklahoma under the Curtis Act, ch. 504, § 14, 30 Stat. 499-500 (1898), and the new exercise of long-dormant tribal jurisdiction over civil matters. See *Hooper* v. *City of Tulsa*, Civ. No. 21-165 (N.D. Okla.); cf. *City of Sherrill* v. *Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005). Others involve the authority of tribal courts to adjudicate civil claims against nonmembers—a question that remains unresolved by this Court. See *Dollar General Corp.* v. *Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (per curiam opinion affirming by an equally divided Court).

Civil litigation regarding the collateral consequences of criminal activity has arisen as well. Former prisoners have filed class actions seeking return of the criminal fines, court fees, and restitution paid to victims as a result of conviction, threatening the financial health of the state-court system. See *Pickup* v. *District Court of Nowata County*, Civ. No. 20-346 (N.D. Okla.); *Nicholson* v. *Stitt*, No. 119,270 (Okla.). Individuals convicted of driving while impaired are seeking to recover their driving privileges,

and individuals stripped of their professional licenses are seeking to restore their privilege to practice.

3. As the Court urged in *McGirt*, see 140 S. Ct. at 2481, the State has attempted to reach an agreement with the Five Tribes regarding a solution to the myriad problems discussed above. But negotiations have not borne fruit, and there is no realistic likelihood of success in the foreseeable future.

A week after the decision in *McGirt*, then-Attorney General Hunter and the Five Tribes released an agreement in principle providing recommendations to Oklahoma's congressional delegation for federal legislation to clarify state and tribal prosecutorial authority in the Five Tribes' territories. See Murphy/McGirt Agreement in Principle (July 15, 2020) <tinyurl.com/mcgirtagreement>; Derrick James, *Oklahoma Tribes and AG Reach Agreement in Principle*, McAlester News-Capital (July 16, 2020) <tinyurl.com/mcgirtagmtrelease>. The following day, however, two of the tribes reversed course and announced their opposition to the agreement. See Chris Casteel, *Creek, Seminole Nations Disavow Agreement on Jurisdiction*, Oklahoman (July 18, 2020) <tinyurl.com/tribesdisavowagreement>. A third tribe then declared that "there is no reason to rush" into legislation to resolve the issues created by *McGirt*. Chief Gary Batton, *Choctaw Nation Special Report 7-29*, YouTube (July 29, 2020) <tinyurl.com/choctawreport>. None of those tribes has changed its position over the last year.

In January 2021, the Governor called on the Five Tribes to enter into formal negotiations to address *McGirt*. See Governor Kevin Stitt, *Press Release: Gov. Stitt Calls for Tribes to Enter into Formal Negotiations with the State Regarding McGirt Ruling* (Jan. 22, 2021). But one tribe quickly announced its opposition to such negotiations, and no progress has been made since. See

Kylee Dedmon, *Choctaw Nation Chief Opposes Oklahoma Governor on Tribal Negotiations*, KXII News 12 (Jan. 29, 2021) <tinyurl.com/choctawopposition>.

In May 2021, Representative Tom Cole introduced a bill in the House to clarify the exercise of criminal jurisdiction in the wake of the *McGirt* decision. See H.R. 3091, 117th Cong., 1st Sess. (2021). But that too has stalled: the tribes are deeply divided over the legislation, and Representative Cole has conceded that "a consensus inside of Oklahoma" is necessary for any legislation to proceed. See Chris Casteel, *With Oklahoma Tribes Deeply Divided, Rep. Tom Cole's McGirt Bill Faces Long Road*, Oklahoman (May 16, 2021) <tinyurl.com/mcgirtbill>; Molly Young, *Tribes, State at Odds Over McGirt; SCOTUS Ruling Leaves Chasm Between Them*, Oklahoman, July 18, 2021, at A1. In the absence of any ameliorative legislation, the problems created by *McGirt* are multiplying by the day.

4. This Court has the power to bring an end to the chaos in Oklahoma by overruling *McGirt*. It should do so in this case.

As the Court is well aware, stare decisis is "not an inexorable command." *Franchise Tax Board* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019) (citation omitted). And the situation created by *McGirt* is a paradigmatic example of when stare decisis must yield to the better interpretation of the law. The majority opinion in *McGirt* did not itself adhere to the Court's prior precedents on congressional disestablishment of Indian reservations. See 140 S. Ct. at 2485-2489 (Roberts, C.J., dissenting); cf. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1405 (2020). Developments since *McGirt* have proven the decision fundamentally unworkable. See *Ramos*, 140 S. Ct. at 1405. Any reliance interests that have developed in the short time since *McGirt* pale in

comparison to the century of reliance interests that *McGirt* upset. See *ibid.*; *Janus* v. *State, County & Municipal Employees*, 138 S. Ct. 2448, 2485-2486 (2018). The case was decided by "the narrowest of margins," over a "spirited dissent[] challenging the basic underpinnings" of the majority opinion. *Payne* v. *Tennessee*, 501 U.S. 808, 829 (1991). And the recent nature of the decision entitles it to less stare decisis weight. See *Montejo* v. *Louisiana*, 556 U.S. 778, 793 (2009); cf., *e.g.*, *Payne*, 501 U.S. at 829-830 (overruling, in 1991, *South Carolina* v. *Gathers*, 490 U.S. 805 (1989), and *Booth* v. *Maryland*, 482 U.S. 496 (1987)); *United States* v. *Dixon*, 509 U.S. 688, 704 (1993) (overruling *Grady* v. *Corbin*, 495 U.S. 508 (1990)).

To stop the damage and save the people of Oklahoma from years of hardship to come, the Court should consider overruling *McGirt* in this case. The stakes are simply too high to leave that option off the table. For that reason, the Court should grant review on the third question presented, in addition to the questions regarding procedural and equitable bars to postconviction relief under *McGirt* and the State's authority to prosecute non-Indians who commit crimes against Indians in Indian country.

It is hard to imagine a case in which this Court's review is more desperately needed. The State of Oklahoma respectfully requests that the Court grant certiorari and set this case for oral argument as soon as possible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2021

APPENDIX

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APPENDIX A

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner

v.

STATE OF OKLAHOMA,
Respondent

Filed: March 11, 2021

OPINION GRANTING
POST-CONVICTION RELIEF

KUEHN, Presiding Judge.

¶1 Shaun Michael Bosse was tried by jury and convicted of three counts of First Degree Murder and one count of First Degree Arson in the District Court of McClain County, Case No. CR-2010-213. He was sentenced to death on the murder counts and to thirty-five (35) years imprisonment and a $25,000.00 fine for the arson count.

¶2 On direct appeal, this Court upheld Petitioner's convictions and sentences.[1] Petitioner's first Application for Post-Conviction Relief in this Court was denied.[2] Petitioner filed this Successive Application for Post-Conviction Relief on February 20, 2019. The crux of Petitioner's Application lies in his jurisdictional challenge.

¶3 In Proposition I Petitioner claims the District Court lacked jurisdiction to try him. Petitioner argues that his victims were citizens of the Chickasaw Nation, and the crime occurred within the boundaries of the Chickasaw Nation. He relies on *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) in which the United States Supreme Court reaffirms the basic law regarding federal, state and tribal jurisdiction over crimes, which is based on the location of the crimes themselves and the Indian status of the parties. The Court first determined that Congress, through treaty and statute, established a reservation for the Muscogee Creek Nation. *Id.*, 140 S. Ct. at 2460-62. Having established the reservation, only Congress may disestablish it. *Id.*, 140 S. Ct. at 2463; *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Congress must clearly express its intent to disestablish a reservation, commonly with an "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt*, 140 S. Ct. at 2462 (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016)). The Court concluded that Congress had not disestablished the Muscogee Creek Reservation. *McGirt*, 140 S. Ct. at 2468. Consequently,

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[1] *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834, *reh'g granted and relief denied*, 2017 OK CR 19, 406 P.3d 26, *cert. denied*, 138 S. Ct. 1264 (2018).

[2] *Bosse v. State*, No. PCD-2013-360 (Okl. Cr. Dec.16, 2015) (not for publication).

the federal and tribal governments, not the State of Oklahoma, have jurisdiction to prosecute crimes committed by or against Indians on the Muscogee Creek Reservation. 18 U.S.C. §§ 1152, 1153.

¶4 The question of whether Congress has disestablished a reservation is primarily established by the language of the law—statutes and treaties—concerning relations between the United States and a tribe. *McGirt*, 140 S. Ct. at 2468. "There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms." *McGirt*, 140 S. Ct. at 2469. Neither historical practices, nor demographics, nor contemporary events, are useful measures of Congress's intent unless there is some ambiguity in statute or treaty language. *Id.* at 2468-69; *see also Oneida Nation v. Village of Hobart*, 968 F.3d 664, 675 n.4 (7th Cir. 2020) (*McGirt* "establish[ed] statutory ambiguity as a threshold for any consideration of context and later history."). Thus our analysis begins, and in the case of the Chickasaw Nation, ends, with the plain language of the treaties.

¶5 *McGirt* itself concerns only the prosecution of crimes on the Muscogee Creek Reservation. However, its reasoning applies to every claim that the State lacks jurisdiction to prosecute a defendant under 18 U.S.C. §§ 1152, 1153. Of course, not every tribe will be found to have a reservation; nor will every reservation continue to the present. "Each tribe's treaties must be considered on their own terms. . . . " *McGirt*, 140 S. Ct. at 2479. The treaties concerning the Five Tribes which were resettled in Oklahoma in the mid-1800s (the Muscogee Creek, Cherokee, Chickasaw, Choctaw, and Seminole) have signifi-

cantly similar provisions; indeed, several of the same treaties applied to more than one of those tribes. It is in that context that we review Petitioner's claim.

¶6 On August 12, 2020, this Court remanded this case to the District Court of McClain County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) the victims' status as Indians; and (b) whether the crime occurred in Indian Country, within the boundaries of the Chickasaw Nation Reservation. Our Order provided that the parties could enter into written stipulations. On October 13, 2020, the District Court filed its Findings of Fact and Conclusions of Law in the District Court.

Stipulations regarding victims' Indian status

¶7 The parties stipulated that all three victims of the crime, Katrina and Christian Griffin and Chasity Hammer, were members of the Chickasaw Nation. This stipulation included recognition that the Chickasaw Nation is a federally recognized tribe. The District Court concluded as a matter of law that all three victims had some Indian blood and were recognized as Indian by a tribe or the federal government. We adopt these findings and conclusions, and find that the victims in this case were members of the Chickasaw Nation.

District Court Findings of Fact

¶8 The District Court found that Congress established a reservation for the Chickasaw Nation of Oklahoma. The District Court found these facts:

(1) The Indian Removal Act of 1830 authorized the federal government to negotiate with Native American tribes for their removal to territory west of the Mississippi River in exchange for the tribes'

ancestral lands. Indian Removal Act of 1830, § 3, 4 Stat. 411, 412.

(2) The 1830 Treaty of Dancing Rabbit Creek (1830 Treaty) granted citizens of the Choctaw Nation and their descendants specific land in fee simple, "while they shall exist as a nation and live on it," in exchange for cession of the Choctaw Nation lands east of the Mississippi River. Treaty of Dancing Rabbit Creek, art. 2, Sept. 27, 1830, 7 Stat 333. The Treaty provided that any territory or state should have neither the right to pass laws governing the Choctaw Nation nor embrace any part of the land granted the Choctaw Nation by the treaty. *Id.* art. 4. The land boundaries were:

> [B]eginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork; if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning.

Id. art. 2.

(3) The 1837 Treaty of Doaksville (1837 Treaty) granted the Chickasaw Nation a district within the boundaries of the 1830 Treaty of Dancing Rabbit Creek, to be held by the Chickasaw Nation on the same terms as were granted to the Choctaw Nation. 1837 Treaty of Doaksville, art. 1, Jan. 17, 1837, 11 Stat 573.

(4) Congress modified the western boundary of the Chickasaw Nation in the 1855 Treaty of Washington (1855 Treaty), pledging to "forever secure and

guarantee" the land to those tribes, and reserving them from sale without both tribes' consent. 1855 Treaty of Washington with the Choctaw and the Chickasaw, art. 1, 2, June 22, 1855, 11 Stat. 611. This Treaty also reaffirmed the Chickasaw Nation's right of self-government. *Id.* art. 7.

(5) In 1866, the United States entered into the 1866 Treaty of Washington (1866 Treaty), which reaffirmed both the boundaries of the Chickasaw Nation and its right to self-governance. 1866 Treaty of Washington with the Chickasaw and Choctaw, art. 10, Apr. 28, 1866, 14 Stat. 699.

(6) The parties stipulated that the location of the crime, 15634 212th St., Purcell, OK, is within the boundaries of the Chickasaw Nation set forth in the 1855 and 1866 Treaties.

(7) The property at which the crime occurred was transferred directly in 1905 from the Choctaw and Chickasaw Nations to George Roberts, in a Homestead Patent. Title may be traced directly to the Reservation lands granted the Choctaw and Chickasaw Nations, and subsequently allotted to individuals, and was never owned by the State of Oklahoma.

(8) The Chickasaw Nation is a federally recognized Indian tribe, exercising sovereign authority under a constitution approved by the United States Secretary of the Interior.

(9) No evidence before the District Court showed that the treaties were formally nullified or modified in any way to reduce or cede Chickasaw lands to the United States or to any other state or territory.

(10) The parties stipulated that if the District Court determined the treaties established a reservation, and if the District Court concluded that Congress never explicitly erased the boundaries and disestablished the reservation, then the crime occurred within Indian Country as defined by 18 U.S.C. § 1151(a).

District Court Conclusions of Law

¶9 The District Court first found, and this Court agrees, that the absence of the word "reservation" in the 1855 and 1866 Treaties is not dispositive. *McGirt*, 140 S. Ct. at 2461. The court emphasized the language in the 1830 Treaty that granted the land "in fee simple to them and their descendants, to inure to them while they shall exist as a nation." 1830 Treaty, art. 2. The 1830 Treaty secured rights of self-government and jurisdiction over all persons and property with Treaty territory, promising that no state should interfere with the rights granted under the Treaty. *Id.* art. 4. That treaty applies to the Chickasaw Nation under the 1837 Treaty of Doaksville, which guaranteed the Chickasaw Nation the same privileges, rights of homeland ownership and occupancy granted the Choctaw Nation by the 1830 Treaty. 1837 Treaty, art. 1. In the 1855 Treaty, the United States promised to "forever secure and guarantee" specific lands to the Choctaw and Chickasaw Nations, and reaffirmed those tribes' rights to self-government and full jurisdiction over persons and property within their limits. 1855 Treaty arts. 1, 7. This was reaffirmed in the 1866 Treaty, by which the Chickasaw and Choctaw Nations agreed to cede defined lands to the United States for a sum certain. 1866 Treaty, art. 3. Thus, the District Court concluded, the treaty promises to the Chickasaw Nation were not gratuitous. *McGirt*, 140 S. Ct. at 2460.

¶10 Based on this law, the District Court concluded that Congress established a reservation for the Chickasaw Nation. We adopt this conclusion of law.

¶11 The District Court found that Congress has not disestablished the Chickasaw Nation Reservation. After Congress has established a reservation, only Congress may disestablish it, by clearly expressing its intent to do so; usually this will require "an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt*, 140 S. Ct. at 2463 (quoting *Parker*, 136 S. Ct. at 1079). The District Court found no explicit indication or expression of Congressional intent to disestablish the Chickasaw Reservation. The Court specifically stated, "No evidence was presented that the Chickasaw reservation was 'restored to public domain," discontinued, abolished or vacated.' Without, explicit evidence of a present and total surrender of all tribal interests, the Court cannot find the Chickasaw reservation was disestablished." Findings of Fact and Conclusions of Law, CF-2010-213, PCD-2019-124, Oct. 13, 2020 at 9-10 (internal citations omitted).

¶12 Based on the evidence, the District Court concluded that Congress never erased the boundaries and disestablished the Chickasaw Nation Reservation. The Court further concluded that the crimes at issue occurred in Indian Country. We adopt these conclusions.

The State's Arguments

¶13 After the evidentiary hearing, a supplemental brief was filed on behalf of the State of Oklahoma by the District Attorney for McClain County. The Attorney General and District Attorney ask this Court to find that the State of Oklahoma has concurrent jurisdiction with the

federal and tribal governments where, as here, a non-Indian commits a crime against Indian victims in Indian Country. The Attorney General and the District Attorney suggest that various procedural defenses should apply. The District Attorney also raises a separate claim, arguing that this Court should alter its definition of Indian status, an argument not raised by the Attorney General.

Blood Quantum

¶14 The District Attorney states that the District Judge avoided the issue of blood quantum when making her findings and conclusions.[3] He now requests that this Court require a specific blood quantum to meet the definition of Indian status to avoid a "jurisdictional loophole". In the Remand Order, and in the numerous similar Orders in which we remanded other cases for consideration of the jurisdictional question, this Court clearly set out the definition of Indian it expected lower courts to use. We directed the District Court to "determine whether (1) the victims had some Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government." This test, often referred to as the *Rogers*[4] test, is used in a majority of jurisdictions, including in cases cited by the District Attorney.

¶15 In stating this test we cited two cases from the Tenth Circuit, *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277,

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[3] The Judge did not avoid the issue. She refused to set a quantum amount as requested by the District Attorney and followed this Court's Remand Order directing her to find "some" Indian blood under the definitions recognized by the Tenth Circuit opinions referenced.

[4] *United States v. Rogers*, 45 U.S. 567, 572-73 (1846).

1280-81 (10th Cir. 2001).[5] The references clearly state the test to be used in determining Indian status. *Prentiss* discusses the history, wide acceptance, and application of the *Rogers* test. The opinion notes that the first prong of the test may be proved by a variety of evidence, which may include a certificate of tribal enrollment which sets forth the person's degree of Indian blood, or a listing on a tribal roll which requires a certain degree of Indian blood. *Prentiss*, 273 F.3d at 1282-83. *Diaz* states that the Tenth Circuit uses a "totality-of-the-evidence approach," which may include proof of blood quantum, but only if a particular tribe requires it. *Diaz*, 679 F.3d at 1187.

¶16 The District Attorney correctly observes that a minority of courts have chosen to impose a particular blood quantum, or to state in individual cases whether a specific blood quantum meets the threshold of "some blood." The State of Oklahoma is within the jurisdictional boundaries of the Tenth Circuit. If the jurisdictional test is met and it is determined that a particular case must be prosecuted in a federal district court, the Tenth Circuit definition will govern in that court. There is simply no rhyme nor reason to require a test for Indian status in our Oklahoma state courts that is significantly different from

[5] In support of his claim that more than "some" Indian blood is required, Respondent cites dicta in *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116. With almost a quarter blood quantum, the defendant easily met the requirement of the first prong, and this Court did not further analyze that issue. However, in referring to the two-part test, this Court in a 1982 decision, used the word "significant" rather than "some." *Id.* This single word, describing an issue not the focus of the appeal, does not substitute for the entire body of state and federal jurisprudence correctly stating the test.

that used in the comparable federal courts.[6] Consistency and economy of judicial resources compel us to adopt the same definition as that used by the Tenth Circuit.[7]

¶17 Without any foundation in law, the District Attorney speculates that, without a precise blood quantum requirement, a defendant might claim he is Indian in a state court—thus defeating state court jurisdiction—and yet be found not Indian in federal court, escaping criminal prosecution altogether. He cites no relevant or persuasive law to support this speculation. The District Attorney relies on a single case from the State of Washington, *State v. Dennis*, 840 P.2d 909 (Wash. App. 1992). Blood quantum was not an issue in that case and is not mentioned in the opinion. The defendant, a member of a Canadian tribe, was charged in state court with murdering his wife. In state court, defendant successfully argued that he was an Indian under the Major Crimes Act, Section 1153, and thus not subject to State jurisdiction. Of course, the federal district court found otherwise, since defendant was

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[6] Interestingly, the District Attorney argues instead that a "loophole" will exist if we do not have the same standard as the Tenth Circuit.

[7] In addition, to require a specific blood quantum would be out of step with other recent developments. In 2018, Congress amended the Stigler Act. Enacted in 1947, that Act was one of several Acts restricting the conveyance of lands that were allotted to citizens of the Five Tribes, if the owner had one-half or more of Indian blood. The restrictions on conveyance were designed to protect tribal citizens. As time passed, requiring such a high blood quantum stripped those protections from many owners and reduced the amount of restricted land. The recent amendment struck this provision, replacing it with the phrase "of whatever degree of Indian blood." Stigler Act Amendments of 2018, P.L. 115-399, Sec. 1(a). We will not disregard this clear statement of Congressional intent regarding a blood quantum requirement for the Five Tribes.

not a member of a federally recognized tribe. *Id.*, 840 P.2d at 910. The State never appealed the initial dismissal in state district court. After federal charges were dismissed, the State of Washington attempted to reinstate the charges. The Washington Court of Appeals found that, given the State's failure to appeal the initial state court ruling, the State was precluded by statute from reinstating the case. *Id.* at 910-11. The appellate court specifically noted that the problem in this case was not the defendant's claim, but that the trial court made a mistake of law in concluding defendant was Indian under the Major Crimes Act. *Id.* If anything, this case underscores the utility and flexibility of the *Rogers* test, when correctly applied. It is clear that, using that test, jurisdiction always lay with the State of Washington.

¶18 There simply is no jurisdictional loophole as described by the District Attorney. To cure this non-existent problem, the State would have this Court adopt a test which is different from, and potentially more restrictive than, the test used in our corresponding federal system. This would be far more likely to result in the kind of confusion the District Attorney warns against. 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.

¶19 Furthermore, we find it inappropriate for this Court to be in the business of deciding who is Indian. As sovereigns, tribes have the authority to determine tribal citizenship. *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 by recognition by tribe acting as separate sovereign, not by racial classification). Some tribes have a blood quantum requirement, and some do not. Of those that do, the percentage differs among individual tribes. If a person charged with a crime has some Indian blood, and they are recognized as being an Indian by a tribe or the federal government, this Court need not second-guess that recognition based on an arbitrary mathematical formula. The District Court correctly followed this Court's instructions in the Order remanding this case, determining that the victims had some Indian blood.

Procedural Defenses

¶20 Both the Attorney General and the District Court ask this Court to consider this case barred for a variety of procedural reasons: waiver under the successive capital post-conviction statute, 22 O.S. 2011, § 1089(D), and waiver of the jurisdictional challenge; failure to meet the sixty-day filing deadline to raise a previously unavailable legal or factual basis in subsequent post-conviction applications under Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021); and the doctrine of laches. Through the District Attorney, the State admits that this Court has resolved these issues in this case in our Order remanding for an evidentiary hearing:

> Under the particular facts and circumstances of this case, and based on the pleadings in this case before the

> Court, we find that Petitioner's claim is properly before this court. The issue could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

Bosse v. State, PCD-2019-124, *Order Remanding for Evidentiary Hearing* at 2 (Okl. Cr. Aug. 12, 2020). The State asks us to reconsider this determination, but offers no compelling arguments in support.[8]

¶21 It is settled law that [s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). The District Attorney admits that generally litigants "cannot waive the argument that the district court lacks subject-matter jurisdiction," citing *United States v. Green*, 886 F.3d 1300, 1304 (10th Cir. 2018); *see also United States v. Garcia*, 936 F.3d 1128, 1140-41 (10th Cir. 2019) (parties can neither waive subject-matter jurisdiction nor consent to trial in a court without jurisdiction). This Court has repeatedly held that the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction. *Wackerly v. State*, 2010 OK CR 16, ¶ 4, 237 P.3d 795, 797; *Wallace v. State*, 1997 OK CR 18, ¶ 15, 935 P.2d 366, 372; *see also Murphy v. State*, 2005 OK CR 25, 5-7, 124

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[8] The State argues both that application of *McGirt* will have significant consequences for criminal prosecutions, and that waiver should apply because there is really nothing new about the claim. Taken as a whole, the arguments advanced by the State in both its Response and Supplemental Brief support a conclusion that, although 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).

P.3d 1198, 1200 (recognizing limited scope of post-conviction review, then addressing newly raised jurisdictional claim on the merits). In *Wackerly*, we also held the time limit on newly raised issues in Rule 9.7 did not apply to jurisdictional questions. *Wackerly*, 2010 OK CR 16, ¶ 4, 237 P.3d at 797.[9]

¶22 *McGirt* provides a previously unavailable legal basis for this claim. Subject-matter jurisdiction may—indeed, must—be raised at any time. No procedural bar applies, and this issue is properly before us. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a).

There is no concurrent jurisdiction.

¶23 The General Crimes Act and the Major Crimes Act give federal courts jurisdiction over crimes committed by or against Indians in Indian Country. 18 U.S.C. §§ 1152, 1153. Congress provides that crimes committed in certain locations or under some specific circumstances are within the sole and exclusive jurisdiction of the United States. Section 1152, the General Crimes Act, brings crimes committed in Indian Country within that jurisdiction, unless they lie within the jurisdiction of tribal courts or jurisdiction is otherwise expressly provided by federal law. 18 U.S.C. § 1152; *see also* 18 U.S.C. § 1153 (Major Crimes Act). This gives federal courts jurisdiction over Indians and non-Indians who commit crimes against Indians in Indian Country. By explicitly noting that it may ex-

[9] The principle that subject-matter jurisdiction may not be waived also settles the State's argument based on laches—that Petitioner waited too long to raise his claim, and the passage of time makes resolution of the issue, or a grant of relief, difficult to determine or implement. None of the cases on which the State relies concern a claim of lack of jurisdiction.

pressly provide otherwise, Congress has preempted jurisdiction over these crimes in state courts. Indeed, this Court has held that federal law preempts state jurisdiction over crimes committed by or against an Indian in Indian Country. *Cravatt v. State*, 1992 OK CR 6, ¶ 20, 825 P.2d 277, 280. State courts retain jurisdiction over non-Indians who commit crimes against non-Indians in Indian Country. *Id.; Salem*, 463 U.S. at 465 n.2; *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946).

¶24 The State argues that, despite the clear language of both statute and case law, federal and state courts have concurrent jurisdiction over non-Indians under the General Crimes Act. The law does not support this argument. The Attorney General relies in part on *United States v. McBratney*, 104 U.S. 621 (1881) to support his argument. However, in *McBratney*, a non-Indian murdered another non-Indian within the boundaries of the Ute Reservation. The Supreme Court held that the federal government had no jurisdiction to prosecute a crime committed in Indian Country where neither the perpetrator nor the victim were Indian. *Id.*, 104 U.S. at 624. Nothing in that opinion supports a conclusion that, where federal jurisdiction exists by statute, states have concurrent jurisdiction as well. And the Supreme Court itself later refuted any such interpretation. In *Donnelly v. United States*, the Court held that *McBratney* did not apply to "offenses committed by or against Indians," which were subject to federal jurisdiction. *Donnelly*, 228 U.S. 243, 271-72 (1913). In the context of federal criminal jurisprudence and Indian Country, *Donnelly* reaffirmed Congress's preemption of state jurisdiction over crimes by or against Indians.[10] More recently, the Court has noted that where federal jurisdiction

[10] Respondent also misunderstands the discussion in *Ex parte Wilson*, 140 U.S. 575 (1891). There, the defendant and victim were non-

lies under Section 1153, it preempts state jurisdiction. *United States v. John*, 437 U.S. 634, 651 (1978); *see also Goforth v. State*, 1982 OK CR 48, ¶ 5, 644 P.2d 114, 115-16 (federal jurisdiction under §§ 1152, 1153 preempts state jurisdiction except as to crimes among non-Indians).

¶25 The General Crimes Act provides that federal jurisdiction may be changed by law. 18 U.S.C. § 1152. And Congress has done so, giving the State of Kansas criminal jurisdiction on Indian reservations in that state. The Kansas Act conferred jurisdiction on Kansas courts for offenses of state law committed by or against Indians on reservations in Kansas. 18 U.S.C. § 3243. The Supreme Court determined that this Act confers concurrent jurisdiction on State courts only to the extent that the State of Kansas may prosecute people for state law offenses that are also punishable as offenses under federal law; otherwise, the jurisdiction to prosecute federal crimes committed on Kansas reservations lies with the federal government. *Negonsott v. Samuels*, 507 U.S. 99, 105-106 (1993).

¶26 Congress also created the opportunity for six specific states to exercise jurisdiction over crimes committed in Indian Country by enacting Public Law 280. Act of Aug. 15, 1953, Pub. L. No. 67, Stat. 588, codified at 18 U.S.C. § 1162, 25 U.S.C. § 1321-26; 18 U.S.C. § 1162(a). In a separate provision, P.L. 280 created a framework for other states to assume jurisdiction over crimes committed

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Indian. The defendant argued that the federal government could not retain jurisdiction over crimes committed by and against Indians while allowing state jurisdiction over crimes involving non-Indians committed on a reservation; he claimed that either the federal government had sole and exclusive jurisdiction over every crime, or it had none at all. *Id.* at 577. The Court rejected this argument, noting that Congress had the power to grant and limit jurisdiction in federal courts. *Id.* at 578.

in Indian Country, with the consent of the affected tribe; the state and the federal government may have concurrent jurisdiction if the affected tribe requests it and with the consent of the Attorney General. 25 U.S.C. § 1321(a). Oklahoma has not exercised the options for criminal jurisdiction afforded by P.L. 280. *Cravatt*, ¶ 15, 825 P.2d at 279.

¶27 The Kansas Act and P.L. 280 would have been unnecessary if, as the State argues, state and federal governments already have concurrent jurisdiction over non-Indians who commit crimes in Indian Country. Rather, these Acts are examples of how Congress may implement the provision in Section 1152, allowing for an exception to federal jurisdiction. Congress has written no law similarly conferring jurisdiction on Oklahoma courts, or otherwise modifying the statutory provisions granting jurisdiction for prosecution of crimes in Indian Country to federal courts in Oklahoma. Respondent does not suggest it has.

¶28 Absent any law, compact, or treaty allowing for jurisdiction in state, federal or tribal courts, federal and tribal governments have jurisdiction over crimes committed by or against Indians in Indian Country, and state jurisdiction over those crimes is preempted by federal law. The State of Oklahoma does not have concurrent jurisdiction to prosecute Petitioner.

Conclusion

¶29 Petitioner's victims were Indian, and this crime was committed in Indian Country. The federal government, not the State of Oklahoma, has jurisdiction to prosecute Petitioner. Proposition I is granted. Propositions II and III are moot.

DECISION

¶30 The Judgment and Sentence of the District Court of McClain County is **REVERSED** and the case is **REMANDED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), the **MANDATE** is **STAYED** for twenty (20) days from the delivery and filing of this decision.

ROWLAND, Vice Presiding Judge, concurring in results:

¶1 I concur in the result of the majority opinion, but write separately to relate my views on two of the issues discussed therein, namely the test for Indian status and the use of the term subject matter jurisdiction.

A. The Test for Indian Status

¶2 My first objection with the majority opinion is its dismissal of the thought that this Court should decide who is Indian. Making a finding on the defendant's Indian status is precisely what we must do in order to determine whether the State of Oklahoma has jurisdiction since federal jurisdiction applies only to Indians. One question before us is what test we should employ to decide this particular component of Bosse's claim. In that regard, I agree fully with the majority that our test for Indian status must be identical to that used by the United States Court of Appeals for the Tenth Circuit.

¶3 The Major Crimes Act is pre-emptive of state criminal jurisdiction "**when it applies**. . . ." *United States v. John*, 437 U.S. 634, 651 (1978) (emphasis added). If the Indian Country Crimes Act or Major Crimes Act do not apply, then the State of Oklahoma, as a sovereign with general police powers, has obvious authority to prosecute

and punish crimes within its borders. Adopting a test different from that used by federal courts risks this Court dismissing a case where the crime was committed in Indian country on the basis that a defendant is Indian and the federal court, under a different test, determining the defendant is not Indian and thus there is no federal jurisdiction.[1] That is the type of jurisdictional void this Court warned of in *Goforth v. State*, 1982 OK CR 48, 644 P.2d 114, where we interpreted Article 1, Section 3 of the Oklahoma Constitution to disclaim jurisdiction over Indian lands only when federal jurisdiction is apparent. "[W]here federal law does not purport to confer jurisdiction on the United States courts, the Oklahoma Constitution does not deprive Oklahoma courts from obtaining jurisdiction over the matter." *Id.* 1982 OK CR 48, 118, 644 P.2d at 116.

B. Subject Matter Jurisdiction

¶4 The other portion of today's majority opinion with which I do not agree is that the federal criminal statutes involved here deprive Oklahoma courts of subject matter jurisdiction. "Subject matter jurisdiction defines the court's authority to hear a given type of case." *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009). Our cases recognize three components to jurisdiction: "(1) jurisdiction over the subject matter—the subject matter in this connection was the criminal offense of murder, (2) jurisdiction over the person, and (3) the authority under law to pronounce the particular judgment and sentence herein rendered." *Petition of Dare*, 1962 OK CR 35, ¶5, 370 P.2d 846, 850-51. Like *Dare*, the subject matter in this case is a

[1] Because, as explained later in this writing, I do not think subject matter jurisdiction is implicated, I see no reason the State could not refile its charges in such an instance, but that is, of course, not before the Court at this time.

murder prosecution. The subject matter jurisdiction of Oklahoma courts is established by Article 7 of our State Constitution and Title 20 of our statutes which grant general jurisdiction, including over murder cases, to our district trial courts. Basic rules of federalism dictate that Congress has no power to expand or diminish that jurisdiction except where Congress has created a federal cause of action and allowed state courts to assume jurisdiction. *See Simard v. Resolution Tr. Corp.*, 639 A.2d 540, 545 (D.C. 1994) (noting presumption of concurrent jurisdiction among federal and state courts is rebutted only by a clear expression by Congress vesting federal courts with exclusive jurisdiction). Were it otherwise, Congress could legislatively tinker with the authority of state courts to hear all type of state crimes or civil causes of action.

¶5 What Congress can do and has done is exercise its own territorial jurisdiction over Indians in Indian Country by virtue of its plenary power to regulate affairs with Indian tribes. "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Federal criminal authority over so-called "federal enclaves" is found at 18 U.S.C. § 7, which begins with the words, "The term especial maritime and **territorial jurisdiction** of the United States', as used in this title, includes. . . . " (emphasis added). The Indian Country Crimes Act, 18 U.S.C. § 1152, with exceptions, "extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country. . . . " *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993). Thus a plain reading of *Negonsott* in tandem with Section 7 makes clear that it is territorial jurisdiction, not subject matter jurisdiction, which is at issue. *See also United States v. Smith*, 925 F.3d 410, 415 (9th Cir.), *cert. denied*, 140 S. Ct. 407 (2019) (finding Indian Country is a federal enclave for purposes of 18

U.S.C. § 7). This is likely why none of the cases cited in the majority opinion hold that the state lacks subject matter jurisdiction over crimes by or against Indians in Indian Country. In *United States v. Langford*, 641 F.3d 1195, 1197 n.1 (10th Cir. 2011), the Tenth Circuit stated explicitly that the federal jurisdiction under these statutes is not subject matter jurisdiction:

> When we speak of jurisdiction, **we mean sovereign authority, not subject matter jurisdiction**. *Cf. Prentiss*, 256 F.3d at 982 (disclaiming the application of subject matter jurisdiction analysis to cases involving an inquiry under the ICCA). This is consistent with use of the term in *United States v. McBratney*, 104 U.S. 621, 623-4, 26 L.Ed. 869 (1881).

(Emphasis added).

¶6 This is an important distinction, because as the majority makes clear, the lack of subject matter jurisdiction cannot be waived or forfeited and may be raised at any point in the litigation. Conversely, territorial jurisdiction may be subject to waiver. *See Application of Poston*, 1955 OK CR 39, ¶ 35, 281 P.2d 776, 785 (request for relief on ground that district court did not have territorial jurisdiction was denied; claim was deemed waived because it was not raised below). *See also State v. Randle*, 2002 WI App 116, ¶ 14, 252 Wis. 2d 743, 751, 647 N.W.2d 324, 329 (concluding territorial jurisdiction subject to waiver in some instances); *Porter v. Commonwealth*, 276 Va. 203, 229, 661 S.E.2d 415, 427 (Va. 2008) (territorial jurisdiction is waived if not properly and timely raised); *In re Teagan K.-O.*, 335 Conn. 745, 765 n. 22, 242 A.3d 59, 73 n. 22 (Conn. 2020) (territorial jurisdiction may be subject to waiver). *But see State v. Dudley*, 364 S.C. 578, 582, 614 S.E.2d 623, 625-26 (2005) ("Although territorial jurisdiction is not a component of subject matter jurisdiction, we hold that it

is a fundamental issue that may be raised by a party or by a court at any point in the proceeding. . . . The exercise of extraterritorial jurisdiction implicates the state's sovereignty, a question so elemental that we hold it cannot be waived by conduct or by consent." (Citation and footnote omitted.)).

¶7 Characterizing Sections 1152 and 1153 as implicating subject matter jurisdiction would allow a defendant, knowing he is Indian and that his crimes fall within the Major Crimes Act, to forum shop, by rolling the dice at a state trial and then wiping that slate clean if he receives an unsatisfactory verdict by asserting his Indian status. Viewing it as territorial jurisdiction avoids this absurdity, and would allow the possibility that procedural bars, laches, etc. might preclude some *McGirt* claims.[2]

¶8 In this case, however, I agree with the majority that our earlier ruling in our Remand Order—that Bosse timely met the requirements for raising a claim based on new law under the Capital Post-Conviction Act—resolved any claim that Bosse is procedurally barred from asserting this claim on post-conviction. Accordingly, I concur in the result.

LUMPKIN, Judge, concurring in results:

¶1 Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in

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[2] The *McGirt* opinion tacitly acknowledges potential procedural bars, noting the State of Oklahoma had "put aside whatever procedural defenses it might have." *McGirt*, 140 S. Ct. at 2460. Those defenses would not be relevant if subject matter jurisdiction, which is non-waivable, were concerned.

McGirt v. Oklahoma, U.S. ___, 140 S. Ct. 2452 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt* I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas I was forced to conclude the Majority had totally failed to follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

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

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

> I can hardly see where it (the IRA) could operate in a State like mine where the Indians are all scattered out among the whites

of the solid precedents the Court has established over the last 100 years or more.

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

¶4 My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the

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> and **they have no reservation**, and they could not get them into a community without you would go and buy land and put them on it. Then they would be surrounded very likely with thickly populated white section with whom they would trade and associate. I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly-settled population. (emphasis added).

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

dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.

LEWIS, Judge, specially concurring:

¶1 I write separately to address the notion that *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) addresses something less than subject matter jurisdiction over an Indian who commits a crime in Indian Country or over any person who commits a crime against an Indian in Indian Country. *McGirt*, of course, serves as the latest waypoint for our discussion on the treatment of criminal cases arising within the historic boundaries of Indian reservations which were granted by the United States Government many years ago. *McGirt*, 140 S. Ct. at 2460, 2480. The main issue in *McGirt* was whether those reservations were disestablished by legislative action at any point after being granted.

¶2 *McGirt* deals specifically, and exclusively, with the boundaries of the reservation granted to the Muscogee (Creek) Nation. *McGirt*, 140 S. Ct. at 2459, 2479. However, the other Indian Nations comprising the Five Civilized Tribes have historical treaties with language indistinct from the treaty between the Muscogee (Creek) Nation and the federal government. Therefore, this case involving a crime occurring within the historical boundaries

of the Chickasaw Nation Reservation must be analyzed in the same manner as the boundaries of the Muscogee (Creek) Nation Reservation. The District Court below conducted a thorough analysis and concluded that the reservation was not disestablished. I agree with this conclusion.

¶3 *McGirt* was also clear that if the reservation was not disestablished by the U.S. Congress, Oklahoma has no right to prosecute Indians for crimes committed within the historical boundaries of the Indian reservations. *McGirt*, 140 S. Ct. at 2460. Therefore, because the Chickasaw Nation Reservation was not disestablished, the State of Oklahoma has no authority to prosecute Indians for crimes committed within the boundaries of the Chickasaw Nation Reservation, nor does Oklahoma have jurisdiction over any person who commits a crime against an Indian within the boundaries of the Chickasaw Nation Reservation as was the case here. The federal government has exclusive jurisdiction over those cases. 18 U.S.C. § 1153(a).

¶4 A lack of subject matter jurisdiction leaves a court without authority to adjudicate a matter. This Court has held that subject matter jurisdiction cannot be conferred by consent, nor can it be waived, and it may be raised at any time. *Armstrong v. State*, 1926 OK CR 259, 248 P. 877, 878; *Cravatt v. State*, 1992 OK CR 6, ¶ 7, 825 P.2d 277, 280; *Magnan v. State*, 2009 OK CR 16, ¶¶ 9 8612, 207 P.3d 397, 402 (holding that jurisdiction over major crimes in Indian Country is exclusively federal).

¶5 Because the issue in this case is one of subject matter jurisdiction, I concur that this case must be reversed and remanded with instructions to dismiss.

HUDSON, Judge, concurring in results:

¶1 Today's decision applies *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) to the facts of this case. I concur in the result of the majority's opinion based on the stipulations below concerning the victims' Indian status and the location of these crimes within the historic boundaries of the Chickasaw Reservation. Under *McGirt*, the State cannot prosecute Petitioner because of the Indian status of the victims and the location of this crime within Indian Country as defined by federal law. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶2 I disagree, however, with the majority's adoption as binding precedent of the District Court's finding that Congress never disestablished the Chickasaw Reservation. Here, the State took no position below on whether the Chickasaw Nation has, or had, a reservation. The State's tactic of passivity has created a legal void in this Court's ability to adjudicate properly the facts underlying Petitioner's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. We should find no abuse of discretion based on the record evidence presented. But we should not establish as binding precedent that the Chickasaw Nation was never disestablished based on this record.

¶3 I also fully join Judge Rowland's special writing concerning the test for Indian status and the use of the term subject matter jurisdiction.

¶4 Finally, I write separately to note that *McGirt* resurrects an odd sort of Indian reservation. One where a vast network of cities and towns dominate the regional economy and provide modern cultural, social, educational and employment opportunities for all people on the reservation. Where the landscape is blanketed by modern

roads and highways. Where non-Indians own property (lots of it), run businesses and make up the vast majority of inhabitants. On its face, this reservation looks like any other slice of the American heartland—one dotted with large urban centers, small rural towns and suburbs all linked by a modern infrastructure that connects its inhabitants, regardless of race (or creed), and drives a surprisingly diverse economy. This is an impressive place—a modern marvel in some ways—where Indians and non-Indians have lived and worked together since at least statehood, over a century.

¶5 *McGirt* orders us to forget all of that and instead focus on whether Congress expressly disestablished the reservation. We are told this is a cut-and-dried legal matter. One resolved by reference to treaties made with the Five Civilized Tribes dating back to the nineteenth century. Ignore that Oklahoma has continuously asserted jurisdiction over this land since statehood, let alone the modern demographics of the area.

¶6 The immediate effect under federal law is to prevent state courts from exercising criminal jurisdiction over a large swath of Greater Tulsa and much of eastern Oklahoma. Yet the effects of *McGirt* range much further. The present case illuminates some of that decision's consequences. Crime victims and their family members in this and a myriad of other cases previously prosecuted by the State can look forward to a do-over in federal court of the criminal proceedings where *McGirt* applies. And they are the lucky ones. Some cases may not be prosecuted at all by federal authorities because of issues with the statute of limitations, the loss of evidence, missing witnesses or simply the passage of time. All of this foreshadows a hugely destabilizing force to public safety in eastern Oklahoma.

¶7 *McGirt* must seem like a cruel joke for those victims and their family members who are forced to endure such extreme consequences in **their** case. One can certainly be forgiven for having difficulty seeing where—or even when—the reservation begins and ends in this new legal landscape. Today's decision on its face does little to vindicate tribal sovereignty and even less to persuade that a reservation in name only is necessary for anybody's well-being. The latter point has become painfully obvious from the growing number of cases like this one that come before this Court where non-Indian defendants are challenging their state convictions using McGirt because **their victims** were Indian.

¶8 Congress may have the final say on *McGirt*. In *McGirt*, the court recognized that Congress has the authority to take corrective action, up to and including disestablishment of the reservation. We shall see if any practical solution is reached as one is surely needed. In the meantime, cases like Petitioner's remain in limbo until federal authorities can work them out. Crime victims and their families are left to run the gauntlet of the criminal justice system once again, this time in federal court. And the clock is running on whether the federal system can keep up with the large volume of new cases undoubtedly heading their way from state court.

APPENDIX B

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: March 19, 2021

CORRECTION ORDER

The Opinion in this case, *Bosse v. State*, 2021 OK CR 3, contains a scrivener's error. The first sentence of paragraph 20 of the Opinion should read:

> Both the Attorney General and the District Attorney ask this Court to consider this case barred for a variety of procedural reasons: waiver under the successive capital post-conviction statute, 22 O.S. 2011, § 1089(D), and waiver of the jurisdictional challenge; failure to meet the sixty-day filing deadline to raise a previously unavailable legal or factual basis in subsequent post-conviction applications under Rule 9.7(G)(3), *Rules of*

the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2021); and the doctrine of laches.

IT IS SO ORDERED.

APPENDIX C

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: August 12, 2020

ORDER REMANDING FOR EVIDENTIARY HEARING

Shaun Michael Bosse was tried by jury, convicted of Counts I-III, First Degree Murder, and Count IV, First Degree Arson, and sentenced to death (Counts I-III) and thirty-five (35) years imprisonment and a fine of $25,000.00 (Count IV), in the District Court of McClain County, Case No. CR-2010-213. This Court upheld Petitioner's convictions and sentences in *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834, *reh'g granted and relief denied*, 2017 OK CR 19, 406 P.3d 26, *cert. denied*, 138 S. Ct. 1264 (2018). This Court denied Petitioner's first Application for Post-Conviction Relief. *Bosse v. State*, No. PCD-2013-360

(Okl. Cr. Dec. 16, 2015) (not for publication). Petitioner filed this Successive Application for Post-Conviction Relief on February 20, 2019. In Proposition I, Petitioner challenges the State's jurisdiction to prosecute him.

In Proposition I Petitioner claims the District Court lacked jurisdiction to try him. Petitioner argues that his victims were citizens of the Chickasaw Nation, and the crime occurred within the boundaries of the Chickasaw Nation. Under the particular facts and circumstances of this case, and based on the pleadings in this case before the Court, we find that Petitioner's claim is properly before this court. The issue could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

Appellant's claim raises two separate questions: (a) the status of his victims as Indians, and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of McClain County, for an evidentiary hearing to be held within sixty (60) days from the date of this Order.

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

The hearing shall be transcribed, and the court reporter shall file an original and two (2) certified copies of

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

First, the status as Indians of Appellant's victims. The District Court must determine whether (1) the victims had some Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government.[1]

Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Chickasaw Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps, 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 counsel for Appellant, within five (5) days after the District Court has filed its findings of fact and conclusions of law. Upon receipt thereof, the Clerk of this Court shall promptly deliver a copy of that record to the Attorney General. A supplemental brief, addressing only those issues pertinent to the evidentiary hearing and limited to twenty (20) pages in length, may be filed by either party within twenty (20)

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[1] *See, e.g., 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).

days after the District Court's written findings of fact and conclusions of law are filed in this Court.

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

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

IT IS SO ORDERED.

APPENDIX D

DISTRICT COURT OF MCCLAIN COUNTY
STATE OF OKLAHOMA

No. CF-2010-213, PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: October 13, 2020

FINDING FACTS AND CONCLUSION OF LAW

Before: EDWARDS, District Judge.

This matter came on for hearing the 30th day of September, 2020 pursuant to the remand order of the Oklahoma Court of Criminal Appeals issued August 12, 2020. Petitioner appeared by and through Assistant Federal Public Defenders Michael Lieberman and Sarah Jernigan. Petitioner previously filed a written *Waiver of Right to Appear at Evidentiary Hearing* and this Court approved the same. Respondent appeared by and through Assistant Attorneys General Caroline Hunt and Jennifer Crabb, along with District Attorney Greg Mashburn and

First Assistant District Attorney Travis White. The Chickasaw Nation of Oklahoma appeared as *Amicus Curiae*, pursuant to the agreement of the parties, by and through counsel Debra Gee and Stephen Greetham. A record was taken by Certified Court Reporter Dawn Flick. The parties announced ready for hearing and Respondent asserted full compliance with Okla. Const. art. 2, § 34.

This matter was remanded to the District Court by the Oklahoma Court of Criminal Appeals to address only: (1) the status as Indians of Petitioner's victims; and (2) whether the crime occurred in Indian Country. This Court will address each of the issues separately.

I. The Status as Indians of Petitioner's Victims

The Oklahoma Court of Criminal Appeals (hereinafter referred to as "OCCA") remanded the above-entitled matter to this Court to determine, inter alia, the status as Indians of Petitioner's victims.[1] In making the determination, the OCCA further directed this Court to evaluate whether (1) the victims had some Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government.[2] In complying therewith, the Court undertakes the following analysis:

Findings of Fact

1. Katrina Griffin, Christian Griffin and Chasity Hammer were the named victims in the above-entitled matter.

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[1] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3.

[2] *Id.*

2. The parties stipulated that Katrina Griffin was an Indian for purposes of the General Crimes Act, 18 U.S.C. 1152.[3]

3. The parties stipulated that Christian Griffin had 23/256ths Indian blood quantum and was recognized as a Chickasaw Nation Citizen.[4]

4. The parties stipulated that Chasity Hammer had 23/256ths Indian blood quantum and was recognized as a Chickasaw Nation Citizen.[5]

Conclusions of Law

As set forth above, in assessing the status as Indians of Petitioner's victims, the OCCA ordered this Court to determine whether (1) the victims had some Indian blood and (2) were recognized as an Indian by a tribe or by the federal government.[6] With respect to victim Katrina Griffin, the parties stipulated that she was an Indian for purposes of the General Crimes Act; this Court adopts the parties stipulations and finds that Katrina Griffin was, in fact, an Indian victim.

With regard to victims Christian Griffin and Chasity Hammer, this Court must first consider whether they each had some Indian blood.[7] Respondent noted in the *State's Supplemental Proposed Findings of Fact and Conclusions of Law* that the term 'Indian' is not statutorily defined, but has been previously defined by different

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[3] Pet. Ex. 1, Stipulations (2)(a).

[4] Pet. Ex. 1, Stipulations (2)(b).

[5] Pet. Ex. 1, Stipulations (2)(c).

[6] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3.

[7] *Id.*

courts to require "a significant percentage of"[8], "sufficient"[9], "substantial"[10] or "some"[11] Indian blood. However, the OCCA was clear in its mandate when it ordered this Court to determine "whether the victims had *some* Indian blood."[12] This Court answers this inquiry in the affirmative.

The record before this Court is clear. The parties stipulated that both Christian Griffin and Chasity Hammer had 23/256th Indian blood quantum.[13] This Court adopts the parties' stipulations and, as a result, finds that Christian Griffin and Chasity Hammer both had "some Indian blood."

Likewise, this Court also finds that the second prong of the analysis, recognition as an Indian by a tribe or by the federal government, has been satisfied. Specifically, the parties stipulated that both of these victims were recognized as Chickasaw Nation citizens.[14] This stipulation is further supported by the memoranda of the Chickasaw Nation verifying the tribal enrollment of Christian Griffin and Chasity Hammer.[15] After adopting the stipulations of the parties and answering answered both questions in the

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[8] *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

[9] *United States v. LaBuff*, 658 F.3d 873, 874-75 (9th Cir. 2011).

[10] *Vialpando v. State*, 640 P.2d 77, 79-80 (Wyo. 1982).

[11] *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976).

[12] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3.

[13] Pet. Ex. 1, Stipulations 2(b) and 2(c).

[14] Pet. Ex. 1, Stipulations (2)(c).

[15] Pet. Ex. 1, Stipulations (2)(d).

affirmative, this Court finds that Christian Griffin and Chasity Hammer were, in fact, Indian victims.

WHEREFORE, this Court finds that Katrina Griffin, Christian Griffin and Chasity Hammer were Indian victims.[16]

II. Whether the Crime Occurred in Indian Country

The OCCA further remanded the above-entitled matter for this Court to determine whether the crime occurred in Indian Country.[17] In making the determination, the OCCA directed this Court to ascertain (1) whether Congress established a reservation for the Chickasaw Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation.[18] Therefore, the Court undertakes the following analysis:

Findings of Fact

1. The Indian Removal Act of 1830 authorized the President's representatives to negotiate with Native American tribes for their removal to federal territory west of the Mississippi River in exchange for their ancestral lands.[19]

2. Pursuant to the authority outlined in the Indian Removal Act of 1830, the 1830 Treaty of Dancing Rabbit Creek was entered. Specifically, in the 1830 Treaty of Dancing Rabbit Creek, the United States granted to the

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[16] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3; *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *Untied States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001).

[17] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3.

[18] *Id.* at 3-4.

[19] Indian Removal Act of 1830, Pet. Ex. 7.

Choctaw Nation certain lands "in fee simple to them and their descendants, to insure to them while they shall exist as a nation and live on it" in exchange for the Choctaw Nation ceding their lands east of the Mississippi River.[20] Article 4 granted the Choctaw people "the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State."[21] The land granted to the Choctaw Nation was described as: "beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork; if in the limited of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning."[22]

3. The 1837 Treaty of Doaksville granted the Chickasaw people a "district within the limits of [the 1830 Treaty of Dancing Rabbit Creek territory] to be held on the same terms that the Choctaws now hold it [. . .]."[23] The 1837 Treaty entered between the Choctaws and Chickasaws made the provisions of the 1830 Treaty of Dancing Rabbit Creek applicable to the Chickasaw Nation.[24]

4. In 1855, the Treaty of Washington reaffirmed the 1837 Treaty of Doaksville and modified the Western

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[20] 1830 Treaty of Dancing Rabbit Creek, Pet. Ex. 8, art. 2.

[21] *Id.* at Pet. Ex. 8, art. 4.

[22] *Id.*

[23] 1837 Treaty of Doaksville, Pet. Ex. 10, art. 1.

[24] *Id.*

boundary of the Chickasaw territory.[25] Congress explicitly asserted that "pursuant to [the Indian Removal Act], the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes" and reserved those lands from sale "without the consent of both tribes."[26] The 1855 Treaty further reaffirmed the Chickasaw Nation's right of self-government.[27]

5. Following the Civil War, the Chickasaw and Choctaw Nations entered into the 1866 Treaty, which did not alter the Chickasaw district but reiterated, once again, the Choctaw and Chickasaw Nations' rights to self-governance and reaffirmed the rights granted under the previous Treaties.[28]

6. The parties stipulated that Petitioner's crime occurred at 15734 212th St., Purcell, OK, and further stipulated that this "address is within the boundaries set forth in the 1855 and 1866 treaties between the Chickasaw Nation, the Choctaw Nation, and the United States."[29]

7. The property on which the crime occurred was originally transferred directly from the Choctaw and Chickasaw Nations in a Homestead Patent to George Roberts in 1905.[30] Title to the property can be traced directly to the Reservation granted to the Choctaw and Chickasaw Nations by the

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[25] 1855 Treaty of Washington, Pet. Ex. 12, art. 2.

[26] *Id.* at art. 1.

[27] *Id.* at art. 7.

[28] 1866 Treaty of Washington, Pet. Ex. 13, art. 10.

[29] Stipulations (1)(a).

[30] Tr. pg. 11, ln. 21-25.

United States and subsequently allotted to individuals, and was never owned by the State of Oklahoma.[31]

8. The Chickasaw nation is a federally recognized Indian tribe that exercised sovereign authority under a constitution approved by the Secretary of Interior.[32]

9. There is absolutely no evidence before the Court that these treaties have been formally nullified or modified in any way to reduce or cede the Chickasaw lands to the United States or to any other state or territory.

10. The parties further stipulated that "[i]f the Court determines that those treaties established a reservation, and if the court further concludes that Congress never explicitly erased those boundaries and disestablished that reservation, then the crime occurred within Indian Country as defined by 18 U.S.C. 1151(a).[33]

Conclusions of Law

First, the Court finds that a reservation was established for the Chickasaw Nation by the treaties discussed above. Title 18 U.S.C. 1151(a) defines "Indian Country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . " As noted by the United States Supreme Court in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2461, "early treaties did not refer to the Creek lands as a 'reservation'—perhaps because that word had not yet acquired such distinctive significance in federal Indian law. But we have found similar language in treaties from the same era sufficient to create a reservation." The Court in *McGirt* stated that the "most authoritative evidence of [a tribe's] relationship to the

[31] Pet. Ex. 2; Tr. pg. 13, ln. 10-16, pg. 14, ln. 14-19.

[32] Constitution of the Chickasaw Nation, Pet. Ex. 5.

[33] Pet. Ex. 1, Stipulations (1)(b).

land . . . lies in the treaties and statutes that promised the land to the Tribe in the first place."[34] It specifically noted that Creek treaties promised a "permanent home" that would be "forever set apart," and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state.[35] As such, the Supreme Court found that, "Under any definition, this was a [ ] reservation."[36] The Chickasaw Nation is subject to the same analysis.

In applying the reasoning the Supreme Court used in *McGirt* to the case at bar, this Court must reach the same conclusion. Specifically, in the 1830 Treaty of Dancing Rabbit Creek, the Choctaw Nation was granted the land in question "in fee simple to them and their descendants, to insure to them while they shall exist as a nation."[37] It secured the rights of self-government and jurisdiction over all persons and property within the Treaty Territory and promised that no state shall interfere with those rights.[38]

These rights applied equally to the Chickasaw Nation under the 1837 Treaty of Doaksville.[39] The Treaty of Doaksville secured to the Chickasaw Nation a "district within the limits of [the Treaty Territory]," and guaran-

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[34] *McGirt*, 140 S. Ct. at 2475-76.

[35] *Id.* at 2461-62.

[36] *Id.* at 2461.

[37] Pet. Ex. 8, art. 2.

[38] *Id.* at art. 4.

[39] Pet. Ex. 10.

teed them the same privileges, rights of homeland ownership and occupancy that the Choctaw held under the 1830 Treaty.[40]

In the 1855 Treaty of Washington, the Choctaw and Chickasaw governments were made independent of each other. The United States promised that it does "hereby *forever secure and guarantee the lands* embraced within the said limits, to the members of the Choctaw and Chickasaw tribes," and explicitly *reserved those lands from sale "without the consent of both tribes.*"[41] It reaffirmed the tribes' rights of self-government, stating "the Choctaws and Chickasaws shall be *secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits . . .* "[42] The aforementioned treaty rights were once again reaffirmed in the 1866 Treaty of Washington, which was entered when the Chickasaw and Choctaw Nations agreed to cede certain defined lands to the United States for a sum of money.[43] Therefore, like the Creek treaty promises, the United States' treaty promises to the Chickasaw Nation were not made gratuitously.[44]

Applying the reasoning used by the United States Supreme Court in *McGirt*, the plain wording of the treaties demonstrate the Chickasaw lands were set aside for the Chickasaw people and their descendants and assured the right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of

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[40] *Id.* art. 1.

[41] Pet. Ex. 12, art. 1.

[42] *Id.* art. 7.

[43] Pet. Ex. 13, art. 2.

[44] *McGirt*, 140 S. Ct. at 2460.

any state.[45] It is, therefore, clear that Congress established a reservation for the Chickasaw Nation.

Upon finding that a reservation was established by Congress for the Chickasaw Nation, this Court must next determine whether Congress has erased those boundaries and disestablished the reservation.[46] As the Supreme Court made clear in *McGirt*, "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress."[47] The constitutional authority to breach a Treaty "belongs to Congress alone," and the Court will not lightly infer such a breach "once Congress has established a reservation."[48] "[On]ce a reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'"[49] While "[d]isestablishment has never required any particular form of words, it does require that Congress clearly express its intent to do so, [c]ommon[ly] with an] [e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests."[50]

The Petitioner and the State disagree where the burden to prove disestablishment should be placed. However, regardless which party bears the burden, no evidence was presented to the Court to establish that Congress explic-

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[45] *McGirt*, 140 S. Ct. at 2461-62.

[46] Order Remanding for Evidentiary Hearing filed August 12, 2020, pg. 3-4.

[47] *McGirt*, 140 S. Ct. at 2462.

[48] *Id.*

[49] *Id.* at 2469 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).

[50] *McGirt*, 140 S. Ct. at 2463 (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016)).

itly erased or disestablished the boundaries of the Chickasaw nation or that the State of Oklahoma has jurisdiction of this matter. No evidence was presented that the Chickasaw reservation was "restored to public domain,"[51] "discontinued, abolished or vacated."[52] Without, explicit evidence of a present and total surrender of all tribal interests, the Court cannot find the Chickasaw reservation was disestablished.[53]

This Court finds that Congress established a reservation for the Chickasaw Nation, and Congress never specifically erased those boundaries and disestablished the reservation. Therefore, the crime occurred in Indian Country.

CONCLUSION

WHEREFORE, this Court finds that Katrina Griffin, Christian Griff and Chasity Hammer were Indians and that the crime for which Petitioner was convicted occurred in Indian Country for purposes of the General Crimes Act, 18 U.S.C. 1152.

IT IS HEREBY ORDERED!

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[51] *Id.* at 2462.

[52] *Mattz v. Arnett*, 412 U.S. 481, 504 (1973).

[53] *McGirt*, 140 S. Ct. at 2463.

APPENDIX E

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: March 31, 2021

ORDER STAYING ISSUANCE OF MANDATE

On March 31, 2021, Respondent filed with this Court a Motion for Leave to File Petition for Rehearing in this capital post-conviction case granting relief, *Bosse v. State*, 2021 OK CR 3. In accordance with Rules 5.5 and 3.15(A), this Court stayed issuance of mandate for twenty days from the filing and delivery of the Opinion. Rule 5.5, 3.15(A), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2021).

Mandate in this case is hereby **STAYED** until this court issues a decision on Respondent's Motion for Leave to File Petition for Rehearing.

IT IS SO ORDERED.

APPENDIX F

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: April 7, 2021

ORDER DENYING MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND DIRECTING COURT CLERK TO RETURN DOCUMENTS

On March 31, 2021, Respondent filed with this Court a Motion for Leave to File Petition for Rehearing in this capital post-conviction case granting relief, *Bosse v. State*, 2021 OK CR 3.

As Respondent admits, this Court's Rule 5.5 prohibits this filing. Rule 5.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). Once this Court has rendered its decision in a post-conviction appeal that

decision shall constitute a final order. A petition for rehearing is not allowed, and we will not review such a request.[1] The Clerk of this Court is directed to return Respondent's documents, and to transmit a copy of this order to the District Court of McLain County, the Honorable Leah Edwards, District Judge; the Court Clerk of McLain County; counsel of record and Respondent.

IT IS SO ORDERED.

[1] The State argues that application of this rule is unfair because it is "seemingly happenstance" that these issues were first raised in a post-conviction proceeding. However, this Court notes that the State, as a party to the case, chose this case in which to raise these issues.

APPENDIX G

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: April 9, 2021

ORDER GRANTING EMERGENCY MOTION TO TEMPORARILY RECALL THE MANDATE PENDING ORAL ARGUMENT

On April 7, 2021, this Court issued the mandate in this capital post-conviction case granting relief, *Bosse v. State*, 2021 OK CR 3. Respondent then filed with this Court a motion to recall the mandate. On April 8, 2021, we set that motion for oral argument on Thursday, April 15, 2021, at 10:00 a.m.

On April 8, 2021, Respondent filed an emergency motion to temporarily recall the mandate pending oral argument in this Court. Respondent's request to temporarily

recall the mandate pending oral argument in this Court is **GRANTED**. The Clerk of this Court is directed to transmit a copy of this order to the District Court of McLain County, the Honorable Leah Edwards, District Judge; the Court Clerk of McLain County; counsel of record, amicus curiae, and Respondent.

IT IS SO ORDERED.

APPENDIX H

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2019-124

SHAUN MICHAEL BOSSE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed: April 15, 2021

ORDER STAYING ISSUANCE OF MANDATE

On April 7, 2021, Respondent filed with this Court a motion to recall the mandate in this capital post-conviction case granting relief, *Bosse v. State*, 2021 OK CR 3. Oral argument was heard on this request on April 15, 2021. Respondent's request is **GRANTED**. This Court hereby stays issuance of the mandate for forty-five (45) days from the date of this Order. Mandate will automatically issue at the end of forty-five days.

IT IS SO ORDERED.

HUDSON, J., concurring in part/dissenting in part

I concur in today's decision to grant a stay of mandate for forty-five days. However, I would go further and continue the stay of mandate for the pendency of the State's certiorari appeal to the United States Supreme Court.

APPENDIX I

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

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

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

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

Section 1089(D) of Title 22 of the Oklahoma Statutes provides:

> 8. If an original application for post-conviction relief is untimely or if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not

consider the merits of or grant relief based on the subsequent or untimely original application unless:

a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable * * * .

9. For purposes of this act, a legal basis of a claim is unavailable on or before a date described by this subsection 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 by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.