IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PCD-2019-124**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

RESPONSE TO PETITIONER'S PROPOSITION I IN LIGHT OF THE SUPREME COURT'S DECISION IN *MCGIRT V. OKLAHOMA*, 140 S. Ct. 2452 (2020)

On July 9, 2020, the United States Supreme Court in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), held that, for purposes of the Major Crimes Act (18 U.S.C. § 1153), the Creek Nation's Reservation has not been disestablished. The Court also affirmed the Tenth Circuit's decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), for the reasons stated in *McGirt*. *Sharp v. Murphy*, 140 S. Ct. 2412 (2020). On July 16, 2020, this Court granted the State's request to file a response to Petitioner's claim, in Proposition I of this successive post-conviction application, that the State lacked jurisdiction in his case pursuant to 18 U.S.C. §§ 1151-1153. Successive Application for Post-Conviction Relief – Death Penalty (hereinafter, "App.") at 15-33. Specifically, Petitioner alleges that jurisdiction over his crimes rests exclusively in the federal courts because his victims were members of the Chickasaw Tribe and he murdered his victims within the undiminished boundaries of the original Chickasaw Reservation. App. at 17-32.

Pursuant to this Court's July 16, 2020, order, the State hereby files its Response to Petitioner's jurisdictional claim. Given the numerous cases before this Court and Oklahoma district courts potentially affected by *McGirt*, in this Response the State both seeks clarification from this Court on a number of issues left unsettled by *McGirt* relevant to both this case and others,

and offers affirmative arguments for the denial of relief in this case. In Part I, the State offers a brief procedural history of this case. In Parts II-V, the State addresses questions undecided by *McGirt*, including how Indian status is determined for Indian Country jurisdictional claims, which party bears the burden of proof as to such claims, whether the State has concurrent jurisdiction over crimes committed by non-Indians against Indians, and whether an evidentiary hearing is necessary where a reservation of any other Tribe besides the Creek's is involved. The State further takes the position that the State does have concurrent jurisdiction over crimes committed by non-Indians against Indians, such that trial court had jurisdiction in this case. Finally, in Part VI, the State urges this Court to procedurally bar Petitioner's jurisdictional claim and deny relief.

Before proceeding to Part I, an initial matter requires addressing. Although the State requests that Petitioner's claim be barred by this Court, the State respectfully urges this Court to also rule on the merits of the other arguments advanced by the State, thereby offering guidance for the numerous other cases affected by *McGirt*. Furthermore, the State asserts three procedural bars and respectfully asks that this Court rule on all three, as two of the asserted bars are specifically based on the capital post-conviction statute. In ruling on the third asserted bar—laches, a non-statutory bar applicable to capital and non-capital cases alike—this Court will again offer guidance for the many other cases impacted by *McGirt*.

I. Procedural History

Shaun Michael Bosse, hereinafter "Petitioner," was convicted by a jury for Counts 1-3: First Degree Malice Aforethought Murder, in violation of 21 O.S.Supp.2009, § 701.7(A); and Count 4: First Degree Arson, in violation of 21 O.S.2001, § 1401(A), in McClain County District Court, Case No. CF-2010-213, before the Honorable Greg Dixon, District Judge. The jury found the existence of three aggravating circumstances for each murder count, namely: (1) during the

commission of each murder, the defendant knowingly created a great risk of death to more than one person; (2) each murder was especially heinous, atrocious or cruel; and (3) each murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. The jury sentenced Petitioner to Count 1 (murder of Katrina Griffin): death; Count 2 (murder of C.G.): death; Count 3 (murder of C.H): death; Count 4 (arson): 35 years imprisonment and a $25,000.00 fine. On December 18, 2012, the trial court sentenced Petitioner in accordance with the jury's verdicts and ran the sentences for all four counts consecutively.

On October 16, 2015, this Court affirmed the judgment and sentence on direct appeal. *Bosse v. State*, 2015 OK CR 14, 360 P.3d 1203. The United States Supreme Court granted certiorari review and reversed, however, finding that certain victim impact testimony admitted in Petitioner's penalty phase violated the Eighth Amendment. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2-3 (2016). On remand, this Court again affirmed the judgment and sentence on May 25, 2017, finding the victim impact testimony in question was harmless beyond a reasonable doubt. *Bosse v. State*, 2017 OK CR 10, ¶¶ 56-63, 400 P.3d 834, 855-57, *adhered to on reh'g*, 2017 OK CR 19, 406 P.3d 26. This Court also denied Petitioner's first application for post-conviction relief. *Bosse v. State*, No. PCD-2013-360 (Okl. Cr. App. Dec. 16, 2015).

On February 20, 2019, Petitioner filed this successive application for post-conviction relief. On March 22, 2019, this Court abated Petitioner's post-conviction proceeding in light of the ongoing litigation in *Murphy*.[1] As previously noted, following the Supreme Court's decisions in *Murphy* and *McGirt*, this Court granted the State's request to file a Response to Petitioner's jurisdictional claim in Proposition I. On July 21, 2020, Petitioner tendered for filing Petitioner's

[1] Petitioner also has pending a federal petition for habeas corpus relief in *Bosse v. Royal*, Case No. 5:18-cv-00204-JD (W.D. Okla.), which raises his jurisdictional challenge and was also stayed based on *Murphy*.

Supplemental Brief Regarding Ground I of his Second Application for Post-Conviction Relief. On July 22, 2020, Petitioner tendered an Amended Supplemental Brief Regarding Ground I of his Second Application for Post-Conviction Relief ("Pet.'s Amended Supp. Br.").

II. Definition of "Indian"

In order to qualify as an "Indian" for purposes of invoking an exception to state jurisdiction, a defendant must prove two facts: 1) a significant percentage of Indian blood and 2) governmental recognition as an Indian. *Goforth v. State,* 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.[2] The first requirement can be shown by a Certificate of Degree of Indian Blood (CDIB) issued by the U.S. Bureau of Indian Affairs.

In order to satisfy the second requirement, the defendant or victim must be affiliated with a Tribe that is recognized by the federal government.[3] The Supreme Court has never ruled whether any evidence beyond enrollment, citizenship, or membership with a federally-recognized tribe can show this second element of Indian status for purposes of federal criminal law. *See Antelope*, 430 U.S. at 647 n.7 ("Since respondents are enrolled tribal members, we are not called on to decide whether nonenrolled Indians are subject to 18 U.S.C. § 1153, and we therefore intimate no views on the matter."). Other courts are in substantial conflict about the appropriate test, meaning that "case outcomes have not formed a consistent pattern," which has caused "commentators [to] criticize[] these inconsistencies, and urge[] adoption of a single, clearly articulated definition."

[2] The State demonstrates in Part III, *infra*, that the defendant bears the burden to prove Indian status when raising a jurisdictional claim under the Major Crimes Act.

[3] *See United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977) ("members of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act"); *State v. Daniels*, 16 P.3d 650, 654 (Wash. Ct. App. 2001); *see also State v. Sebastian*, 701 A.2d 13, 24 n. 28 (Conn. 1997) ("most recent federal cases consider whether the tribe to which a defendant or victim claims membership or affiliation has been acknowledged by the federal government").

Cohen's Handbook of Federal Indian Law, § 3.03[4]. In our view, proper respect for tribal sovereignty, constitutional considerations, and judicial economy all should mean that *only* those with Indian blood who are enrolled with a federally-recognized Indian tribe should be subject to the provisions of 18 U.S.C. §§ 1152-53. This is so for three reasons.

First, proper respect for tribal sovereignty means according deference to the Tribe's determination of who is—and who is not—a citizen of their sovereign. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) ("tribes retain power . . . to determine tribal membership"). "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community," so "the judiciary should not rush to … intrude on these delicate matters." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 & n. 32 (1978).[4] And because in modern times tribes consistently "keep formal, written rolls," there is no need to resort to older "generalized" tests that focus on uncertain criteria like "retaining tribal relations." *Cohen's*, *supra*, at § 3.03[2]. In the end, "determining whether a specific individual racially belongs to a certain group is not within the province of the courts' expertise and should be left to the Indians or specific tribe. The tribe knows best whether an individual has Indian blood or has been living an Indian-lifestyle. . . . [L]eaving the decision to each particular tribe would allow them to exercise their sovereignty."[5]

Second, ensuring that only those with official political affiliations with the Tribe are accorded the special treatment of federal law avoids the constitutional pitfalls of giving the term "Indian" a racial definition that could run afoul of the Equal Protection Clause. *United States v.*

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[4] *See also United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978) ("unless limited by treaty or statute, a tribe has the power to determine tribe membership"); *Red Bird v. United States*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897).

[5] Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 AM. INDIAN L. REV. 177, 207 (2011).

Bruce, 394 F.3d 1215, 1233-34 (9th Cir. 2005) (Rymer, J., dissenting); Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 AM. INDIAN L. REV. 177, 207-08 (2011). Federal law treats Indians differently from others without engaging in race discrimination because such law treats "Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Morton v. Mancari*, 417 U.S. 535, 554 (1974). Thus, what is important to avoid constitutional prohibitions on race discrimination is treating Indians differently only because of their membership in the tribe. *See Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000) (statute treating Native Hawaiians differently based on race rather than membership in quasi-sovereign unconstitutional). Our proposed bright-line test also respects the individual's choice *not* to enroll in a tribe: such deliberate refusal to officially politically associate with the tribe should be respected, rather than transform the test of Indian status to one that impermissibly wades into racial categorization.

Third, creating a bright-line rule that focuses on tribal enrollment rather than a myriad of pliable factors will promote consistency and ease judicial administration of these new jurisdictional lines over the thousands of cases that are currently pending and will arise in years to come in what-is-now the most populous Indian reservation in the United States. *See* Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Multifactor tests that require fact-finding beyond tribal enrollment only breed confusion, force development of complex jury instructions on Indian-status, and demand largely non-Indian judges and juries to adjudicate whether someone is "Indian enough" for immunity from state jurisdiction.[6]

[6] *See* Troy A. Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1098 (2010) (A lack of clear definition for who is Indian "can result in court challenges causing confusion and delay when a victim or perpetrator initially appears to be a Native American for federal jurisdictional purposes, but is later determined to be a non-Indian or vice-versa. … The variation in jury instructions on Indian status demonstrates the potential confusion of

> How might a court, presumably comprised of non-Indians, know what it means to live an Indian lifestyle? . . . Tribes have already established clear, definite membership requirements, which allows for both consistency and objectivity. There is no new information that would need to be gathered or created. When a court is presented with an individual claiming Indian status, it would simply have to defer to the tribe to determine whether that individual is a member.

Oakley, *supra*, at 207.

For these reasons, this Court should not adopt the fact-intensive inquiry created by other courts, which have relied on four factors, in declining order of significance:

> 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation[7] and participating in Indian social life.

See, e.g., *State v. Nobles*, 838 S.E.2d 373, 377-78 (S.C. 2020); *State v. Salazar*, 461 P.3d 946, 949 (N.M. 2020); *State v. Sebastian*, 701 A.2d 13, 24 (Conn. 1997). Unlike the first factor, the other three factors fail to defer to formal tribal determinations of citizenship and are so malleable that they inhibit efficient judicial administration of jurisdictional boundaries.

For example, focusing on federal assistance *outside* the Major Crimes Act is problematic because "[w]ho counts as an Indian for purposes of federal Indian law varies according to the legal context. There is no universally applicable definition." *Cohen's*, *supra*, at § 3.03[1]; *see also id.* at § 3.03[4]. We cannot simply assume that when Congress classifies a person as an Indian for one purpose, it necessarily classifies that person as an Indian for other purposes, such as the criminal provisions of 18 U.S.C. §§ 1152-53. For example, "a member of a terminated tribe will be considered an Indian for the purposes of federal programs that are available to all Indians,

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asking predominately non-tribal jurors to weigh any number of factors to determine whether the defendant is Indian.")

[7] In light of the vastness of the claimed reservations of the Five Tribes, and the fact that they have not been recognized as such for over 100 years, "living on a reservation" should carry no weight.

including members of terminated tribes," but members of terminated tribes are not considered Indians for purposes of federal criminal law. *Id.* (citing *Antelope*, 430 U.S. at 646-47 n.7). That is why "the federal government increasingly associates being an Indian with being a tribal member according to tribal law." *Id.*

The third and fourth factors are even more problematic. Receiving benefits from the tribe does not help with determining Indian status because tribes, especially those in Oklahoma, offer services such as healthcare to Indians and non-Indians alike. And to the extent someone receives benefits from the Tribe, but is not afforded tribal membership or citizenship, that choice by the Tribe or individual should be respected. The fourth factor, focusing on social ties, both involves adjudication of complex facts and is perilous given the many non-Indians that participate in tribal communities. *Bruce*, 394 F.3d at 1234 (Rymer, J., dissenting) (citing *Duro v. Reina*, 495 U.S. 676, 695 (1990) ("Many non-Indians reside on reservations, and have close ties to tribes through marriage or long employment. Indeed, the population of non-Indians on reservations generally is greater than the population of all Indians.")). All these fact-intensive inquiries will ultimately yield to disparate and unequal determinations of Indian status, as well as unnecessary complexity.

In short, after showing Indian blood, a defendant can meet the second element of Indian status under §§ 1152 and 1153 only through official enrollment with the Tribe. While a tribal enrollment, membership, or citizenship card may be relevant evidence, confirmation should be obtained from the tribal enrollment or citizenship office to determine properly that the state lacks jurisdiction.

Even if this Court allows looking to other factors to determine Indian status, tribal membership must remain the most important factor. *Lewis v. State*, 55 P.3d 875, 878 (Idaho 2002). The second factor is satisfied only if the individual has actually received benefits, and not merely

by the fact that he may be eligible for such benefits. *Nobles*, 838 S.E.2d at 380. The third factor considers benefits beyond government assistance, such as hunting and fishing rights or employment for which only Indians are eligible. *Id*. at 380-81. Regarding the fourth factor,

> courts have determined that this factor weighs against a finding of Indian status under the IMCA [Indian Major Crimes Act] as to defendants who have never been involved in Indian cultural, community, or religious events; never participated in tribal politics; and have not placed any emphasis on their Indian heritage.

Id. at 381.

Finally, regardless of the test employed, the defendant must establish membership in or affiliation with a Tribe as of the time of the offense. *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015); *State v. Perank*, 858 P.2d 927, 932 (Utah 1992). Otherwise, a defendant (or—if this Court holds that the General Crimes Act confers exclusive jurisdiction on federal courts over non-Indian on Indian crimes—a surviving victim) could choose which sovereign has jurisdiction by simply obtaining (or renouncing) tribal membership. *Goforth*, 1982 OK CR 48, ¶ 7, 644 P.2d at 116 ("Absent such recognition, we cannot hold that the appellant is an Indian under federal law, since such a determination at this point would allow the appellant to assert Indian heritage only when necessary to evade a state criminal action.").

III. Burden of Proof

While "[f]ederal criminal jurisdiction is limited by federalism concerns; states retain primary criminal jurisdiction in our system." *United States v. Prentiss*, 206 F.3d 960, 967 (10th Cir. 2000). Thus, the general rule in state prosecutions—including in Oklahoma—is that a state is presumed to have jurisdiction over all crimes committed within its borders. *See* Okla. Const. Art. VII, § 7 ("The District Court[s of Oklahoma] shall have unlimited original jurisdiction of all justiciable matters . . . ."); *State v. L.J.M.*, 918 P.2d 898, 902 (Wash. 1996) (*en banc*); *State v. Verdugo*, 901 P.2d 1165, 1167 (Ariz. Ct. App. 1995); *State v. St. Francis*, 563 A.2d 249, 252 (Vt.

1989); *cf. Oregon v. Hill*, 373 P.3d 162, 173 (Or. Ct. App. 2016) (Indian country jurisdiction is an "exception" to state jurisdiction).

"The majority of other courts addressing this issue have held that a defendant bears the burden to show facts that would establish an exception to the state court's jurisdiction under the Indian Country Crimes Act." *Verdugo*, 901 P.2d at 1168; *see Nobles*, 838 S.E.2d at 375 (analyzing "whether defendant has sufficiently demonstrated that he qualifies as an 'Indian'"); *St. Francis*, 563 A.2d at 252 ("the majority of other states addressing this issue hold that the defendant bears the burden of proof"). This Court aligns with the majority. *See State v. Klindt*, 1989 OK CR 75, ¶ 5, 782 P.2d 401, 403 (rejecting the appellant's argument that "he has no affirmative duty to prove his status as an Indian"); *Goforth*, 1982 OK CR 48, ¶ 7, 644 P.2d at 116 (holding "the appellant failed to establish his status as an Indian under federal law" and denying relief because the "record [wa]s devoid" of any evidence he was an Indian).

The defendant bears this burden even on direct appeal. *See Klindt*, 1989 OK CR 75, ¶ 5, 782 P.2d at 403; *Goforth*, 1982 OK CR 48, ¶ 7, 644 P.2d at 116; *see also State v. Reels*, No. CR 96232040, 1998 WL 440832, *2 (Conn. July 27, 1998) (unpublished) (placing burden of proof on defendant in motion to dismiss); *St. Francis*, 563 A.2d at 251 (placing burden of proof on defendant in interlocutory appeal); *New Mexico v. Begay*, 734 P.2d 278, 281 (N.M. Ct. App. 1987) (placing burden of proof on defendant in interlocutory appeal); *but see Hill*, 373 P.3d at 173 (burden shifts to state after defendant presents evidence of Indian country jurisdiction); *L.J.M.*, 918 P.2d at 902-03 (same); *State v. Smith*, 862 P.2d 1093, 1097 (Idaho Ct. App. 1993) (same).

In this case, Petitioner did not raise a jurisdictional claim until his second post-conviction application. At that point, Petitioner was challenging a presumptively valid judgment. *See Brecht v. Abrahamson*, 507 U.S. 619, 633-37 (1993) (recognizing that convictions are presumed correct

after direct appeal, thus different standards apply on collateral review). In all proceedings after direct appeal, the burden of proving an exception to state jurisdiction belongs with the defendant. *See Stevens v. State*, 2018 OK CR 11, ¶ 26, 422 P.3d 741, 748 ("The petitioner in post-conviction proceedings has the burden of presenting sufficient evidence to rebut this presumption [of regularity in trial proceedings]."); *Tyler v. State*, No. PC-2019-647, slip op. at 2 (Okla. Crim. App. May 7, 2020) (holding, in case alleging Indian country jurisdiction, that "Petitioner has failed to establish entitlement to any relief in this post-conviction proceeding.") (unpublished and attached as Exhibit A); *Russell v. Cherokee Cty. Dist. Court*, 1968 OK CR 45, ¶ 5, 438 P.2d 293, 294 ("It is fundamental that where a . . . . post conviction appeal[] is filed, the burden is upon the petitioner to sustain the allegations of his petition, and that every presumption favors the regularity of the proceedings had in the trial court."); *see also Lewis v. State*, 55 P.3d 875, 877 (Idaho Ct. App. 2002) ("As an applicant for post-conviction relief, Lewis therefore had the burden of proving, by a preponderance of the evidence, the allegations [of Indian country jurisdiction] on which his application was based."); *Primeaux v. Leapley*, 502 N.W.2d 265, 270 (S.D. 1993) (holding state habeas petitioner failed to satisfy his burden of proving Indian country jurisdiction); *Verdugo*, 901 P.2d at 1169 (placing burden of proof on post-conviction petitioner); *cf. Eaves v. Champion*, 113 F.3d 1246, *1 (10th Cir. June 2, 1997) (unpublished) (holding, in an Indian country case arising out of Oklahoma, that "[w]here a state conviction is collaterally attacked in a habeas corpus proceeding under § 2254, the burden of proof is on the petitioner.").

The State recognizes that the Tenth Circuit has held that the State bears the burden of proving that an Indian reservation has been disestablished. *Murphy v. Royal*, 875 F.3d 896, 926-27 (10th Cir. 2017). However, this holding was based on a "'presumption' that an Indian reservation continues to exist until Congress acts to disestablish or diminish it[.]" *Id*. at 926.

Pursuant to *Murphy*, the State should bear the burden with respect to the question of whether a Tribe that once had a reservation, still has a reservation. However, pursuant to the overwhelming authority set out above, Petitioner must prove that his victims were Indians and that the location of the murders fell within the boundaries of the purported reservation.

Here, assuming this Court does not bar Petitioner's jurisdictional claim, *see* Part VI, *infra*, and holds that the state lacks jurisdiction over non-Indians who victimize Indians, *see* Part IV, *infra*, it should hold that his evidence is insufficient on its face to carry his burden on this claim. As to the alleged Indian status of his victims, Petitioner includes memoranda from the Chickasaw Nation purporting to verify the victims' possession of CDIB cards and enrollment in the Tribe. App., Attachments 3-5. But he does not include an affidavit from a Tribal official confirming same. As to the location of the crimes, Petitioner includes only an affidavit from a Federal Public Defender's Office investigator, Julie Gardner, stating her belief that "the land in question is within the boundaries of the Chickasaw Nation Reservation." App., Attachment 6. However, Ms. Gardner does not provide any information suggesting that she is an expert appropriately qualified to examine the relevant maps and opine as to reservation boundaries. Furthermore, as a lay witness, it appears her affidavit relies improperly on hearsay, as she references "the consensus of all the individuals I contacted." For all these reasons, Petitioner's evidence is insufficient to prove his jurisdictional claim.[8] If this Court rejects the State's procedural defenses and concurrent jurisdiction argument, *see infra* Parts IV and VI, and concludes that Petitioner's jurisdictional claim warrants consideration on the merits, then the State respectfully requests that this matter be remanded to the state district court for an evidentiary hearing for Petitioner to submit proper evidence in support of his claim.

[8] Nor does Petitioner's Amended Supplemental Brief offer any additional evidence in support of this claim.

IV. Concurrent Jurisdiction under the General Crimes Act

Petitioner argues that federal courts have exclusive jurisdiction over the murders he committed pursuant to 18 U.S.C. § 1152 ("General Crimes Act") because, although he is not an Indian, he claims his victims were Indians. Although Petitioner perpetuates a longstanding assumption about the scope of state jurisdiction, if *McGirt* makes one thing clear, longstanding assumptions cannot substitute for clear text. *See McGirt*, slip op. at 18-28, 35.[9] Petitioner concedes that the focus of *McGirt* is the text of Acts of Congress. Pet.'s Suppl. Br. at 4 (citing *McGirt*, slip op. at 7). Here, the text of the General Crimes Act—the only statute upon which petitioner relies—does nothing to preempt state jurisdiction.

The text of the General Crimes Act states:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. § 1152. Although the statute refers to the "exclusive jurisdiction of the United States," it does not confer exclusive jurisdiction on the United States. Rather, it incorporates the body of laws which applies in places where the United States has exclusive jurisdiction into Indian country. As the Supreme Court has already held, the phrase "within the sole and exclusive jurisdiction of the United States" specifies what law applies (*i.e.* the law that applies to federal enclaves that are within the exclusive jurisdiction of the United States), not that the federal government's

[9] On Westlaw, the *McGirt* opinion includes no page numbers for either the Supreme Court Reporter or Westlaw's pagination. Accordingly, the State cites to page numbers in the slip opinion.

jurisdiction is exclusive. *Ex parte Wilson*, 140 U.S. 575, 578 (1891) (under the General Crimes Act "the jurisdiction of the United States courts was not sole and exclusive over all offenses committed within the limits of an Indian reservation" because "[t]he words 'sole and exclusive,' in [the General Crimes Act] do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it"); *see also Donnelly v. United States*, 228 U.S. 243, 268 (1913); *United States v. White*, 508 F.2d 453, 454 (8th Cir. 1974). As *McGirt* said with respect to reservation status, *see* slip op. at 8, when Congress seeks to withdraw state jurisdiction, it knows how to do so. *See, e.g.*, 25 U.S.C. § 1911(a) (providing that tribes "shall have jurisdiction, exclusive as to any State, over any child custody proceeding involving an Indian child" on a reservation). Here, the text of the General Crimes Act does not so exclude state jurisdiction over crimes committed by non-Indians like those perpetrated by Petitioner.

Thus, under the principles firmly established by *McGirt*—where the analysis begins and ends with the text—while the General Crimes Act confers federal jurisdiction over Petitioner's crimes, nothing in the text of that law deprives the State of concurrent jurisdiction over the same crimes. Under *McGirt*, the inquiry should end there. This is especially true because there exists a strong presumption against preemption of state law, so "unless that was the clear and manifest purpose of Congress," courts cannot find preemption of state police powers merely because Congress also provided for federal jurisdiction. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted).

Petitioner also cites dicta from some of this Court's cases contemplating that the state lacks jurisdiction over non-Indians that victimize Indians, but those cases did not involve non-Indian defendants and did not analyze the question presented here, much less issue a binding holding on the matter. Pet.'s Suppl. Br. at 1 (citing *Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277; *State v.*

Klindt, 1989 OK CR 75, 782 P.2d 401). And as *McGirt* noted, such dicta cannot overcome the text of the statute. *McGirt*, slip op. at 27 n.14.[10]

To be sure, a handful of state courts have held that states lack jurisdiction over non-Indians who commit crimes in Indian country. *See, e.g.*, *State v. Larson*, 455 N.W.2d 600 (S.D. 1990); *State v. Flint*, 756 P.2d 324, 327 (Ariz. Ct. App. 1988), *cert. denied*, 492 U.S. 911 (1989); *State v. Greenwalt*, 663 P.2d 1178, 1182-83 (Mont. 1983); *State v. Kuntz*, 66 N.W.2d 531, 532 (N.D. 1954); *but see Greenwalt*, 633 P.2d at 1183-84 (Harrison, J., dissenting); *State v. Schaefer*, 781 P.2d 264 (Mont. 1989). But the reasoning of these decisions lacks merit.

First, these decisions rely on statements from the Supreme Court suggesting the state lacks jurisdiction over crimes such as this, but they admit this is mere dicta. *See Larson*, 455 N.W.2d at 601 (citing *Williams v. United States*, 327 U.S. 711, 714 (1946); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979)); *Flint*, 756 P.2d at 325-26. Again, such dicta cannot substitute for the lack of clear statutory text. Indeed, the Supreme Court had earlier stated that by admission into the Union, a state on equal footing with other states "has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, . . . and that [a] reservation is no longer within the sole and exclusive jurisdiction of the United States," unless Congress expressly provides otherwise. *United States v. McBratney*, 104 U.S. 621, 623-24 (1881).

This statement was in the context of a holding that, despite the General Crimes Act, jurisdiction over crimes between two non-Indians is within the exclusive jurisdiction of the *state*,

[10] Similarly, although this Court once affirmed dismissal of the prosecution of several individuals, one of whom was not Indian, because the crime occurred on Indian country, *State v. Burnett*, 1983 OK CR 153, 671 P.2d 1165, that case did not discuss the jurisdictional issues raised here and was later overruled by *Klindt*, which held that "one's status as an Indian is a factor in determining jurisdiction," 1989 OK CR 75, ¶ 6, 782 P.2d 401, 403.

and that the federal government lacks jurisdiction over such crimes. *Id.*; *see also Draper v. United States*, 164 U.S. 240 (1896). To be sure, these cases were later limited by *Donnelly v. United States*, 228 U.S. 243 (1913), but that case held only that the federal government had jurisdiction over crimes committed by a non-Indian against an Indian, not that such jurisdiction was exclusive or that the state lacked it. There is no reason to assume that, merely because the federal government has jurisdiction over a certain matter, such jurisdiction necessarily precludes concurrent state jurisdiction. Rather, in general, the state and federal governments "exercise concurrent sovereignty." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). Thus, "the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Id.* (citing *United States v. Bank of New York & Tr. Co.*, 296 U.S. 463, 479 (1936) ("It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive."). Indeed, there is a "'deeply rooted presumption in favor of concurrent state court jurisdiction' over federal claims," and that presumption applies with even more force against arguments attempting to "strip[] state courts of jurisdiction to hear their own *state* claims"—Congress does not "take such an extraordinary step by implication," and to do so Congress must be "[e]xplicit, unmistakable, and clear." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349-52 (2020) (citation omitted). That takes us back to the text of the General Crimes Act which, as explained, does not clearly preclude state jurisdiction over crimes committed by non-Indians against Indians.[11]

[11] *See also Claflin v. Houseman*, 93 U.S. 130, 134 (1876) (although federal bankruptcy courts can exercise jurisdiction over claims against the estate, that does not necessarily preclude concurrent state court jurisdiction over such claims); *Silas Mason Co. v. Tax Com'n of State of Washington*, 302 U.S. 186, 207 (1937) (upholding concurrent jurisdiction so long as the state's exercise of jurisdiction was "consistent with federal functions").

Second, some state courts suggest that states lack jurisdiction over crimes by non-Indians against Indians because of the federal government's general control over Indian affairs. *See Flint*, 756 P.2d at 325. But while this means states usually lack jurisdiction over Indians (*e.g.*, states lack jurisdiction over major crimes committed by Indians, *see McGirt*, slip op. at 33, 36), this general presumption says nothing about state jurisdiction over *non-Indians*, including those who commit crimes against Indians. After all, states presumptively have jurisdiction over non-Indians, including on reservations. *See, e.g.*, *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257–58 (1992) (noting "the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands").

States also have jurisdiction over non-Indians on Indian country even when they are interacting with Indians, so long as such jurisdiction would not "interfere with reservation self-government or impair a right granted or reserved by federal law"—neither of which is true of concurrent jurisdiction here. *Id.*; *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (upholding concurrent state and tribal jurisdiction to tax non-Indian oil & gas activities on Indian trust land). Thus, in the closest analogous civil context, the U.S. Supreme Court "repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country," because "tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148-49 (1984).[12]

[12] This can only be more true in the criminal context where it is the State, not the victim, that brings prosecution. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

To hold otherwise, and say that the state is presumptively preempted from all jurisdiction over non-Indians when interacting with Indians on reservations, would be absurd. For example, the federal government provides education, health care, and housing services to Indians on reservations. *See, e.g.*, 25 U.S.C. §§ 1601 *et seq*. But that exercise of federal authority in no way precludes the State from treating Indians at state-run hospitals, educating Indians in state schools, or providing housing to Indians who need it. Nor does it mean that the State lacks the ability to license and discipline non-Indian doctors who are treating Indians at private or state-run hospitals, or to do the same with teachers teaching Indians at state-run or private schools. By the same token, federal jurisdiction to protect Indians from non-Indian criminals like Petitioner does not divest the State from providing the same service of police protection and criminal justice to those Indian victims.

Arguments that states lack any authority over non-Indians interacting with Indians ultimately rely on outdated notions that on reservations Congress's purpose is "segregating [Indians] from the whites and others not of Indian blood." *Donnelly*, 228 U.S. at 272 (1913). But Congress has long since moved away from the segregationist policies of the early Republic, and the Supreme Court has recognized the significance of that shift for presumptions about state jurisdiction on reservations, especially over non-Indians. *See Organized Vill. of Kake v. Egan*, 369 U.S. 60, 71-74 (1962). Thus, the Court has held:

> State sovereignty does not end at a reservation's border. Though tribes are often referred to as sovereign entities, it was long ago that the Court departed from Chief Justice Marshall's view that the laws of [a State] can have no force within reservation boundaries. Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State.

Nevada v. Hicks, 533 U.S. 353, 361-62 (2001) (internal citations, quotation marks, and footnote omitted; alteration adopted). For these reasons, nothing in the general policies of Indian law can

overcome the clear text of the General Crimes Act, which is not exclusive of state jurisdiction, particularly where—as here—the defendant is not an Indian.

Third, courts have noted that some commentators support the idea that states lack jurisdiction over non-Indians who victimize tribal members. *See Larson*, 455 N.W.2d at 602; *Flint*, 756 P.2d at 327. Other commentators, however, recognize that there is no adequate justification for precluding state jurisdiction over crimes by non-Indian offenders against Indians because (1) "[n]o tribal interest appears implicated by state prosecution of non-Indians for Indian country crimes, since tribes lack criminal jurisdiction over non-Indians," and (2) no federal interest is impaired because "state prosecution of a non-Indian does not bar a subsequent federal prosecution of the same person for the same conduct." AM. INDIAN LAW DESKBOOK § 4:9 (citing, *inter alia*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Abbate v. U.S.*, 359 U.S. 187 (1959)). As *McGirt* makes clear, Felix Cohen isn't always right. Slip op. at 25-26.

Fourth, some courts have pointed to Public Law 280, *Flint*, 756 P.2d at 327-28, which allows "any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume" such jurisdiction "with the consent of the Indian tribe," 25 U.S.C. § 1321—with courts implying that the states otherwise lack that jurisdiction over crimes committed "against Indians." But Public Law 280 has nearly the same language with respect to *civil* jurisdiction, allowing "any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe," such civil jurisdiction. 25 U.S.C. § 1322. And yet, as noted above, this language has *not* precluded the U.S. Supreme Court from ruling that, even without Public Law 280, states generally have jurisdiction over civil actions with Indians as parties, that is, as plaintiffs. *See Three Affiliated Tribes*, 467

U.S. at 148-49. For this reason, mere implications from a later congressional enactment like Public Law 280 cannot overcome the clear text of the General Crimes Act, which does not preclude the exercise of state jurisdiction. *Cf. McGirt*, slip op. at 27 n.14.

Ultimately, state jurisdiction here furthers both federal and tribal interests by providing additional assurance that tribal members who are victims of crime will receive justice, either from the federal government, state government, or both. *Cf. Three Affiliated Tribes*, 476 U.S. at 888 (1986) ("tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country"). It minimizes the chances abusers and murderers of Indians will escape punishment and maximizes the protection from violence received by Native Americans. This is especially important because, as commentators have expressed in fear after *McGirt*, federal authorities frequently decline to prosecute crimes on their reservations.[13] While *McGirt* leaves Indians vulnerable under the exclusive federal jurisdiction of the Major Crimes Act, there is no reason to perpetuate that injustice by assuming without textual support exclusive federal jurisdiction over non-Indian on Indian crimes covered by the General Crimes Act. Nor is there reason to believe the State of Oklahoma will not vigorously defend the rights of Indian victims, as it has for a century. *See Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 608–09 (1943) ("Oklahoma supplies [Indians] and their children schools, roads, courts, police protection and all the other benefits of an ordered society."). In fact, this very case proves it will. To hold otherwise would amount to "disenfranchising" and "closing our Courts to a large number of citizens of Indian heritage who

[13] *See, e.g.*, David Heska Wanbli Weiden, *This 19th-Century Law Helps Shape Criminal Justice in Indian Country And that's a problem — especially for Native American women, and especially in rape cases*, N.Y. TIMES (July 19, 2020), https://www.nytimes.com/2020/07/19/opinion/mcgirt-native-reservation-implications.html.

live on a reservation," thereby "denying protection from the criminal element of the state." *Greenwalt*, 663 P.2d at 208-09 (Harrison, J., dissenting).

The text of the General Crimes Act controls, and its plain terms do not preclude the state's jurisdiction in this case. Such jurisdiction over non-Indians who victimize Indians does not interfere with the federal government's concurrent jurisdiction over such crimes, nor does it impinge on tribal sovereignty, but instead advances the interests of tribal members in receiving justice. And the contrary conclusion unjustifiably intrudes into state sovereignty. Even assuming the Chickasaw Reservation has not been diminished or disestablished, and that Petitioner can prove he committed the murders within said boundaries and that the victims were Indians, the State had jurisdiction to prosecute.

V. *McGirt* Expressly Limited Its Holding to the Creek Reservation and Any Question as to a Chickasaw Reservation should be Remanded for Fuller Consideration.

As previously stated, Petitioner claims the State lacked jurisdiction in this case because his crimes occurred on the Chickasaw Reservation. App. at 18-32. *McGirt* expressly limited its analysis and holding to the Creek Reservation. *See McGirt*, slip op. at 37 ("Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek."). The Tenth Circuit said the same about *Murphy*. *See Comanche Nation of Oklahoma v. Zinke*, 754 F. App'x 768, 774 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2645 (2019) ("Our *Murphy* panel concluded the Creek Reservation remains extant, but it did not address the status of the Chickasaw Reservation at all.").[14]

That is not to say that *McGirt* does not inform the analysis of whether there also exists a Chickasaw reservation. But Petitioner's cursory analysis of *McGirt* in his supplemental brief is

[14] Clearly, Petitioner's claim that "there is nothing" in the *Murphy* and *McGirt* opinions "to suggest such cases apply only to the Creek Nation," Pet's Supp. Br. at 3, is patently incorrect.

insufficient for this Court to rule on this significant issue. Thus, if this Court finds that relief is not barred by the issues raised in Parts IV and VI of this brief, the Court should remand to the district court to receive full argument and evidence on the treaties, statutes, and historical materials relevant to this question. The district court should have the first opportunity to address this issue in light of *McGirt*. This will also allow the Chickasaw Nation to weigh in on the matter if it so desires.

VI. Procedural Defenses

In deciding *McGirt*, the Supreme Court expressly invited this Court to apply procedural bars to the jurisdictional challenges that would proliferate in the wake of its decision:

> Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.[15]
>
> > [15] For example, Oklahoma appears to apply a general rule that "issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Logan v. State*, 2013 OKCR 2, ¶ 1, 293 P.3d 969, 973. . . .

McGirt, slip op. at 38. This Court should accept that invitation.

Here, a number of procedural bars apply to Petitioner's jurisdictional claim. Specifically, this Court should refuse to consider Petitioner's jurisdictional challenge because he did not raise it until his second post-conviction application, such that it is procedurally barred. Alternatively, this Court should find the claim to be time-barred. As a final alternative, this Court should refuse to consider the claim based on the doctrine of laches.

A. Bar on Successive Capital Post-Conviction Applications

Petitioner did not raise his present jurisdictional challenge until his second post-conviction application. He did not raise the claim in either his direct appeal or his first post-conviction application. *See generally Bosse v. State*, 2015 OK CR 14, 360 P.3d 1203; *Bosse v. State*, 2017

OK CR 10, 400 P.3d 834; *Bosse v. State*, No. PCD-2013-360 (Okl. Cr. App. Dec. 16, 2015). Accordingly, this Court should find the claim to be waived.

It is axiomatic that Oklahoma law limits the grounds for relief that may be raised in a subsequent post-conviction application. *See, e.g.*, *Slaughter v. State*, 2005 OK CR 6, ¶ 20, 108 P.3d 1052, 1056; *Sellers v. State*, 1999 OK CR 6, ¶ 2, 973 P.2d 894, 895; *Duvall v. Ward*, 1998 OK CR 16, ¶ 2, 957 P.2d 1190, 1191. Section 1089 of Title 22 states:

> 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, or
> >
> > b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and
> >
> > (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

22 O.S.2011, § 1089(D)(8).

Below, Respondent demonstrates that, first, Petitioner has made no showing that his jurisdictional claim falls within any of the above-quoted exceptions in § 1089(D)(8) that would allow its consideration in this successive post-conviction proceeding. Second, while Petitioner suggests—and this Court's cases at times has supported—that his claim need not meet the requirements of § 1089(D)(8) because it is a challenge to the trial court's subject matter

jurisdiction, App at 16-17, this argument contravenes legislative intent and should be rejected by this Court.

i. Petitioner cannot meet the requirements of § 1089(D)(8) for a successive capital post-conviction application

Petitioner's jurisdictional claim is barred by § 1089(D)(8). To begin with, as to § 1089(D)(8)(a), Petitioner cannot show that the legal basis of this claim was previously unavailable. Section 1089 explains that "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.

22 O.S.2011, § 1089(D)(9). Thus, there are two ways in which Petitioner can show a previously unavailable legal basis—he satisfies neither way.

Under § 1089(D)(9)(a), Petitioner could reasonably have formulated the legal basis for his jurisdictional claim years prior to either the Tenth Circuit's decision in *Murphy* or the Supreme Court's decision in *McGirt*. Specifically, at the time of his direct appeal and first post-conviction application, Petitioner could have raised this claim based on the Major Crimes Act and *Solem v. Bartlett*, 465 U.S. 463 (1984).[15] Both *Murphy* and *McGirt* concluded that the Creek Reservation had not been disestablished primarily based on application of *Solem* and an examination of statutes enacted in the late 1800s and early 1900s. *Murphy*, 875 F.3d at 937-54; *McGirt*, slip op. at 3-17. Petitioner, too, bases his jurisdictional claim on *Solem* and treaties and laws from the 1800s and

[15] Indeed, Murphy himself raised his jurisdictional challenge based on the Major Crimes Act in 2004. *Murphy*, 2005 OK CR 25, ¶ 6, 124 P.3d at 1200.

early 1900s. App. at 21-32. Clearly, his claim was previously available. *See Walker v. State*, 1997 OK CR 3, ¶ 33, 933 P.2d 327, 338, *superseded by statute on other grounds*, 22 O.S.Supp.2004, § 1089(D)(4) (concluding that the legal basis for Walker's claim "was recognized by and could have reasonably been formulated from a final decision of this Court" in light of "the decades-old Oklahoma case and statutory law upholding the presumption of innocence instruction"); *Hatch v. State*, 1996 OK CR 37, ¶ 41, 924 P.2d 284, 293 (holding that claim based on a case decided in 1982 was clearly available "at any time since 1982" and did not satisfy the exceptions in § 1089(D)(8)); *see also Dopp v. Martin*, 750 F. App'x 754, 757 (10th Cir. 2018) (unpublished) ("Nothing prevented Dopp from asserting in his first § 2254 application a claim that the Oklahoma state court lacked jurisdiction because the crime he committed occurred in Indian Country. The fact that he, unlike the prisoner in *Murphy*, did not identify that argument does not establish that he could not have done so.").[16]

Indeed, the Tenth Circuit and the Supreme Court both indicated that their decisions broke no new ground. The Tenth Circuit, in concluding that Murphy's jurisdictional claim was not *Teague*[17]-barred, held that any post-*Solem* cases it applied were mere "applications of the *Solem* framework." *Murphy*, 875 F.3d at 930 n. 36. In *McGirt*, the Supreme Court, in rejecting the State's reliance on allotment to show disestablishment, stated, "[W]e say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument." *McGirt*, slip op. at 10. Here, too, Petitioner spills considerable ink

[16] Even if Petitioner could not have raised this claim until after the Tenth Circuit's decision in *Murphy*, his post-conviction application is still untimely, as explained further below. *Murphy* was decided in August 2017, but Petitioner did not file this post-conviction application until February 20, 2019.

[17] *Teague v. Lane*, 489 U.S. 288, 299-301, 307 (1989) (holding that, subject to narrow exceptions, the application of new rules is barred on collateral review, while cases that merely apply a prior precedent do not state new rules).

in an attempt to show that allotment did not diminish the Chickasaw Reservation, App. at 24-29— but, as shown by *McGirt*, the reasoning and authority on which he relies are nothing new. *See Walker*, 1997 OK CR 3, ¶ 37, 933 P.2d at 339 (reasoning that the legal basis of Walker's challenge to Oklahoma's "clear and convincing" burden of proof in competency proceedings was available even six years prior to *Cooper v. Oklahoma*, 517 U.S. 348 (1996), where "the Supreme Court in *Cooper* explained at great length how years of case and statutory law supported and even dictated its holding").

Under § 1089(D)(9)(b), Petitioner's jurisdictional claim does not implicate any new, retroactive rule of constitutional law announced by the Supreme Court or this Court. "[A] case announces a 'new' rule when it 'breaks new ground or imposes a new obligation' or if its result 'was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *Walker*, 1997 OK CR 3, ¶ 38, 933 P.2d at 338 (quoting *Teague*, 489 U.S. at 301) (alteration adopted, emphasis supplied by *Teague*). A case does "not announce a new rule" when it is "merely an application of the principle that governed [an earlier] decision." *Teague*, 489 U.S. at 307. As already shown above, *McGirt* was a mere application of, and was dictated by, *Solem*.[18] Further, the decision did not break new ground or impose a new obligation on the State— even prior to this decision, under the relevant federal statutes, the State did not have jurisdiction to prosecute an Indian who committed a major crime in Indian Country. *McGirt* simply held that the original Creek Reservation was still Indian Country for purposes of these statutes. For all these reasons, *McGirt* did not announce a new rule, let alone a retroactive one. *See Walker*, 1997 OK CR 3,

[18] And the Tenth Circuit's decision in *Murphy* was not a decision of the Supreme Court or this Court. To the extent that Petitioner relies on the Supreme Court's *Murphy* decision, such simply affirmed the Tenth Circuit's decision for the reasons stated in *McGirt*. *Murphy*, slip op. at 1. Thus, the Supreme Court's *Murphy* decision no more announced a new rule than did *McGirt*.

¶¶ 34-38, 933 P.2d at 338-39 (concluding that Supreme Court cases did not announce new rules under *Teague* where one "simply reiterated and enforced long standing case law and statutory rules" and the other "simply applied well established constitutional principles to facts generated by a rather new state statute").

Nor can Petitioner meet the restrictions of § 1089(D)(8)(b). First, § 1089(D)(8)(b)(1) requires that the factual basis of Petitioner's jurisdictional claim have not been previously ascertainable through reasonable diligence. The factual bases for Petitioner's jurisdictional claim consist of the location of the murders and the alleged status of his victims as Indians—all facts that were known, or could have been determined through reasonable diligence—at the time of the crimes, let alone by the time of direct appeal and first post-conviction. For starters, based on the evidence in this case, the exact location of the murders has never been in question. *See Bosse*, 2017 OK CR 10, ¶ 15, 400 P.3d at 840-43 (summarizing the evidence). As to the victims' alleged status as Indians, Petitioner supplies memoranda on Chickasaw Nation letterhead from August 2018 purporting to verify the victims' Chickasaw Nation citizenship and possession of CDIB cards. App., Attachments 3-5. Although these memoranda were apparently obtained in 2018, Petitioner does not allege any "specific facts establishing that" these memoranda were not previously "ascertainable through the exercise of reasonable diligence," 22 O.S.2011, § 1089(D)(8)(b)(1), and in any event, it is clear the victims' alleged Indian status could have been verified years ago. The factual basis for Petitioner's jurisdictional claim was not previously unavailable. *See Smith v. State*, 2010 OK CR 24, ¶ 7, 245 P.3d 1233, 1236 (concluding that expert's report was not previously unavailable where, although it was dated after Smith's first post-conviction application, it was derived from information that was available at the time of trial and first post-conviction).

Second, in addition to satisfying § 1089(D)(8)(b)(1)—which he has not done—Petitioner must, but fails to, meet the requirements of § 1089(D)(8)(b)(2). Under the latter provision, he must demonstrate that "the facts underlying the claim . . . would be sufficient to establish . . . [that] no reasonable fact finder would have found [him] guilty of the underlying offense or would have rendered the penalty of death." 22 O.S.2011, § 1089. This Court has indicated that this standard requires a showing of actual, factual innocence, and that a showing of legal innocence is insufficient. *See Braun v. State*, 1997 OK CR 26, ¶ 28 n. 15, 937 P.2d 505, 514 n. 15.[19] Petitioner's claim—that the State of Oklahoma lacked jurisdiction to try or sentence him to death—is at most a claim of legal innocence. *See Jones v. Warden*, 683 F. App'x 799, 801 (11th Cir. 2017) (unpublished) (state court prisoner's attempt to claim actual innocence to avoid time bar failed because his claim that the state court lacked jurisdiction was "at most, a claim of legal innocence, not factual innocence"); *Rashad v. Ives*, No. 2:10-CV-0771 KJN P, 2010 WL 1644576, at *2 (E.D. Cal. Apr. 20, 2010) (unpublished) (petitioner's claim that trial court lacked jurisdiction to try and sentence him was a claim of legal, not actual, innocence).

[19] *Braun* was discussing § 1089(C)(2), which requires that a claim raised in any post-conviction application, even a first application, "[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." 22. O.S.2011, § 1089(C)(2). However, despite the difference in wording between § 1089(C)(2) and § 1089(D)(8)(b)(2), it is clear that the latter provision still requires a showing of factual innocence of the crime or the death penalty. The language of § 1089(D)(8)(b)(2), enacted in 2006, mirrors the Supreme Court's well-established actual innocence standard. *Compare* 22 O.S.2011, § 1089(D)(8)(b)(2) (". . . no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death"), *with Schlup v. Delo*, 513 U.S. 298, 327 (1995) ("To satisfy the [actual innocence] gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."), *and Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) (a prisoner can claim to be "actually innocent" of the death penalty if he can show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."). And, as this Court recognized in *Braun*, the Supreme Court's standard "is applicable only to factual innocence" and is "not applicable to legal innocence." *Braun*, 1997 OK CR 26, ¶ 28 n. 15, 937 P.2d at 514 n. 15. Thus, in using language that mirrored the Supreme Court's standard, it is clear the Oklahoma Legislature intended for § 1089(D)(8)(b)(2) to require actual, not legal, innocence.

For all of the above reasons, Petitioner has not demonstrated that he can meet the provisions of either § 1089(D)(8)(a) or § 1089(D)(8)(b). Accordingly, his jurisdictional claim cannot be considered in this second post-conviction proceeding.

ii. Petitioner's challenge to jurisdiction should not allow him to escape the provisions of § 1089(D)(8)

Petitioner does not address how his jurisdictional claim potentially satisfies the requirements of § 1089(D)(8); rather, he contends that challenges to subject matter jurisdiction can "be raised at any time" under Oklahoma law. App. at 16. Although this argument finds some support in this Court's case law, this Court should clarify that, in light of the Oklahoma Legislature's intent in enacting § 1089, it will enforce the requirements of § 1089(D)(8) according to that statute's plain language, and find Petitioner's claim to be waived and barred.

In two different opinions, this Court has suggested that challenges to the trial court's jurisdiction are not subject to the restrictions in § 1089(D)(8) on the filing of successive capital post-conviction applications.[20] First, in *Murphy*, 2005 OK CR 25, ¶¶ 2, 6, 124 P.3d at 1199-1200,

[20] Petitioner relies on a number of other cases that are inapposite, as they involved jurisdictional claims that were raised *prior* to *second* post-conviction and thus were not subject to § 1089(D)(8). *See Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (direct appeal); *Cravatt v. State*, 1992 OK CR 6, ¶¶ 3-4, 825 P.2d 277, 278 (same); *Buis v. State*, 1990 OK CR 28, ¶ 1, 792 P.2d 427, 428 (same); *see also Johnson v. State*, 1980 OK CR 45, ¶ 30,, 611 P.2d 1137, 1145 (noting, *only in dicta*, that "[l]ack of jurisdiction, for instance, can be raised at any time"). Although Petitioner does not cite it, this Court also said in *Wallace v. State*, 1997 OK CR 18, ¶ 15, 935 P.2d 366, 372-73, that "issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal." However, *Wallace* was a *first* post-conviction application. *Wallace*, 1997 OK CR 18, ¶¶ 1-2, 935 P.2d at 368-69. Finally, to the extent that any of this Court's cases prior to the enactment of § 1089(D)(8) stated that jurisdiction challenges may be raised at any time, such do not control here as they were decided prior to the passing of that statute and its restrictive provisions.

To be clear, the State does *not* concede that belated jurisdictional claims should not be barred at early stages, such as on first post-conviction. *See, e.g.*, 22 O.S.2011, § 1089(C) (providing limitations on the claims that may be considered in first capital post-conviction applications). However, because Petitioner's claim here is on second post-conviction, the State limits its argument to the bars specific to that stage of litigation. In an appropriate case, the State will show that jurisdictional claims raised in first post-conviction applications should also be barred.

Murphy filed a second capital post-conviction application claiming, as Petitioner does here, that the State lacked jurisdiction over his crime because it occurred in Indian Country. This Court fully reviewed Petitioner's jurisdictional challenge on the merits but applied the restrictions of § 1089 to another claim raised by Petitioner, finding it to be waived. *Murphy*, 2005 OK CR 25, ¶¶ 6-54, 57-58, 124 P.3d at 1200-09.

Second, in *Wackerly v. State*, 2010 OK CR 16, ¶¶ 1, 3, 5, 237 P.3d 795, 796-97, Wackerly filed a second capital post-conviction application, arguing that the State lacked jurisdiction to prosecute him for the murder of which he was convicted because the crime occurred on land owned by the federal government. This Court noted that, "[o]rdinarily, this claim would be barred because the factual and legal bases upon which it is based were available and could have been presented in a timely original application." *Wackerly*, 2010 OK CR 16, ¶ 4, 237 P.3d at 797 (citing 22 O.S.Supp.2006, § 1089(D)(8)). This Court reasoned, however, "that 'issues of subject matter jurisdiction are never waived and can therefore be raised on collateral appeal.'" *Id.*, 2010 OK CR 16, ¶ 4, 237 P.3d at 797 (quoting *Wallace,* 1997 OK CR 18, ¶ 15, 935 P.2d at 372). Accordingly, this Court considered, but ultimately rejected, Wackerly's jurisdictional claim. *Id.*, 2010 OK CR 16, ¶¶ 4-10, 237 P.3d at 797-99.

Neither *Wackerly* nor *Murphy* appeared to consider whether this Court's general rule that challenges to subject matter jurisdiction can never be waived could be squared with the Oklahoma Legislature's express limitations on successive post-conviction applications in § 1089. Respectfully, an examination of that statute and its history shows that they cannot.

The Oklahoma Legislature's amendments to § 1089 to add the restrictions on successive capital post-conviction applications were effective on November 1, 1995. Importantly, this followed just months after Congress's enactment of the Antiterrorism and Effective Death Penalty

Act of 1996 ("AEDPA"), which was effective on April 24, 1996. AEDPA, PL 104–132, April 24, 1996, 110 Stat 1214. In pertinent part, the AEDPA implemented strict requirements for the filing of second or successive federal habeas petitions challenging state court convictions:

> (b) LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.—Section 2244(b) of title 28, United States Code, is amended to read as follows:
>
> "(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> "(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> "(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> "(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> "(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. . . ."

AEDPA, PL 104–132, April 24, 1996, 110 Stat 1214. To this day, § 2244 contains these same limitations on the filing of successive habeas petitions. 28 U.S.C. § 2244(b)(2).

The Oklahoma Legislature's amendments to § 1089, enacted just months later, contain multiple similarities to Congress's changes to § 2244:

> SECTION 4. AMENDATORY 22 O.S. 1991, Section 1089, is amended to read as follows:
>
> . . .
>
> 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 the

> application contains sufficient specific facts establishing that the current claims and issues 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 factual or 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.
>
> For purposes of this subsection, a factual basis of a claim is unavailable on or before a date described by this subsection if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

CRIMINAL PROCEDURE—DEATH SENTENCE—EXECUTION OF JUDGMENT—POST–CONVICTION RELIEF, 1995 Okla. Sess. Law Serv. Ch. 256 (H.B. 1659) (WEST). Then, in 2004, the Oklahoma Legislature amended § 1089 again, conforming it even more closely to § 2244's restrictions on successive habeas petitions. Criminal Procedure—Stays of Executions and Capital Post-Conviction Relief, 2004 Okla. Sess. Law Serv. Ch. 164 (S.B. 1220) (WEST). The amended § 1089 was changed to read—and still reads to this day—such that it bars consideration of successive capital post-conviction applications 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, or
>
> b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and

> (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

Okla. Stat. Ann. tit. 22, § 1089 (West).

Thus, as finally amended, § 1089 provides essentially the same restrictions on capital post-conviction applications that apply to successive habeas petitions under the AEDPA. Both § 1089 and the AEDPA limit successive filings to two categories—those with certain previously unavailable legal grounds and those with certain previously unavailable factual grounds. Previously unavailable legal grounds exist only when the Supreme Court (or this Court, in the case of § 1089) announces a new rule of constitutional law with retroactive effect. *Compare* 22 O.S.2011, § 1089(D)(8)(a), (9)(b), *with* 28 U.S.C. § 2244(b)(2)(A).[21] Previously unavailable factual grounds exist only when the factual grounds could not have been earlier discovered through the exercise of reasonable diligence *and* the facts show actual innocence of the crime of conviction (or of the death penalty, in the case of § 1089). *Compare* 22 O.S.2011, § 1089(D)(8)(b)(1)-(2), *with* 28 U.S.C. § 2244(b)(2)(B)(i)-(ii). Based on the plain language of both statutes, neither statute provides an exception to its restrictions for challenges to the trial court's subject matter jurisdiction.

Indeed, the Tenth Circuit, in construing the AEDPA, has squarely rejected the argument that challenges to subject matter jurisdiction escape its restrictions on the filing of successive habeas petitions:

> As a threshold matter, before addressing the statutory requirements for filing a second or successive habeas petition, Mr. Wackerly argues that the

[21] Section 1089 has one other exception for a previously unavailable legal ground, discussed more below. *See* 22 O.S.2011, § 1089(D)(9)(a).

> jurisdictional nature of his claim exempts it from the authorization requirements altogether. He insists that the omission of this claim from his first petition "does not preclude this Court from considering it, because jurisdiction is not waivable and may always be presented in habeas review." Mot. for Auth., Att. E at 29 (citing to *United States v. Bink*, 74 F.Supp. 603, 610 n. 18 (D.Or.1947)). We do not find the citation to a District of Oregon case from 1947, nearly fifty years before passage of the controlling provisions in § 2244(b), to be especially persuasive. Of course, we do agree that jurisdictional issues can be raised on collateral review. *See, e.g., United States v. Cook*, 997 F.2d 1312, 1320 (10th Cir. 1993). But that general proposition does not establish the further point critical to Mr. Wackerly's motion for authorization—that the failure to raise an available jurisdictional claim in a *first* habeas petition does not implicate the statutory constraints applicable to second or successive petitions. Neither the *Bink* case cited by Mr. Wackerly nor the *Cook* case involved a second or successive habeas petition, much less the treatment of such a petition under the relevant provisions added to § 2244 in 1996. And nothing in the unqualified language of those provisions suggests any exemption for jurisdictional claims.
>
> Moreover, this court has previously addressed jurisdictional claims raised in second or successive § 2254 habeas petitions and § 2255 motions and held that they must satisfy the requirements for authorization in § 2244(b) and § 2255(h), respectively. In *Hatch v. Oklahoma*, another death penalty case, Mr. Hatch sought authorization to file a successive § 2254 habeas claim alleging that the information that charged him with felony murder was insufficient to confer subject matter jurisdiction on the state trial court. 92 F.3d 1012, 1014–15 (10th Cir.1996), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180 (10th Cir. 2001). We explained, however, that "lack of jurisdiction is not an [independently] authorized ground upon which a second or successive habeas petition may be filed under the 1996 Act." *Id.* at 1015; *see also In re Cline*, 531 F.3d 1249, 1253 (10th Cir. 2008) (concluding district court correctly treated jurisdictional attack on conviction as successive § 2255 motion). Because the jurisdictional claim did not meet the requirements in § 2244(b)(2), we denied authorization. *Hatch*, 92 F.3d at 1015, 1017; *see also Cline*, 531 F.3d at 1253 (denying authorization for jurisdictional claim in successive § 2255 motion where movant failed to demonstrate that the claim satisfied statutory requirements). Indeed, *Mr. Wackerly does not cite a single case holding that jurisdictional challenges to conviction are exempt from the categorical Congressional mandate that claims raised in second or successive habeas petitions must be authorized by a circuit court before they may proceed in district court.* Accordingly, we now consider whether Mr. Wackerly has met those requirements here.

In re Wackerly, No. 10-7062, 2010 WL 9531121, at *2 (10th Cir. Sept. 3, 2010) (unpublished) (emphasis added); *see also Hatch v. State of Okl.*, 92 F.3d 1012, 1014–15 (10th Cir. 1996) (*per curiam*), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180 (10th Cir. 2001)

("lack of jurisdiction is not an authorized ground upon which a second or successive habeas petition may be filed"); *In re Harrison*, No. 09-2245, 2009 WL 9139587, at *1 (10th Cir. Nov. 3, 2009) (unpublished) (denying authorization to file a second or successive § 2255 motion to vacate federal sentence claiming the district court lacked subject matter jurisdiction because the site of the crime was not Indian territory).

In the published case of *Prost v. Anderson*, 636 F.3d 578, 592 (10th Cir. 2011), the Tenth Circuit reaffirmed its reasoning in *In re Wackerly*. In *Probst*, a federal prisoner attempted to challenge his conviction based on a new Supreme Court case, *United States v. Santos*, 553 U.S. 507 (2008). *Prost*, 636 F.3d at 579. The prisoner conceded that *Santos* did not fit within the limitations for filing a successive motion to vacate a federal sentence under 28 U.S.C. § 2255(h) (requirements very similar to those in § 2244(b)(2)), but argued that "he should be excused from having failed to pursue a *Santos*-type argument in his initial § 2255 motion because *Santos*'s reading of the money laundering statute was erroneously foreclosed under Eighth Circuit law at the time he was convicted and sentenced." *Id.* at 590. The Tenth Circuit was unpersuaded: "Although Mr. Prost suggests there is something unusual about barring a claim that rests on a correct and previously foreclosed statutory interpretation, the fact is that *many* other provisions of AEDPA limit the ability of prisoners to reap the benefit of unforeseeable but helpful new legal developments." *Id.* at 591 (emphasis in original). The Tenth Circuit noted several examples, including jurisdictional challenges:

> [T]hough the writ of habeas corpus in its earliest form was largely a remedy against confinement imposed by a court lacking jurisdiction, *see McCleskey,* 499 U.S. at 478, 111 S.Ct. 1454, this court has barred a state prisoner convicted of murder and sentenced to death by the wrong sovereign from bringing a successive collateral attack to contest his conviction on this basis. *See In re Wackerly,* No. 10–7062, at 5 (10th Cir. Sept. 3, 2010). This is because, like a statutory claim of innocence, lack of jurisdiction is not one of the two authorized grounds upon which a successive § 2254 motion may be filed. *Id.*

Id. at 592.

In *Dopp*, as already mentioned, the Tenth Circuit applied *Prost* and *In re Cline* to a state habeas petitioner's attempt to file a successive habeas petition based on the Tenth Circuit's decision in *Murphy*. The petitioner claimed the "Ottawa County District Court lacked jurisdiction to enter judgment and sentence against him because he committed his crimes of conviction within 'Indian Country,' specifically within the boundaries of the Seneca-Cayuga Tribe reservation." *Dopp*, 750 F. App'x at 756 (quoting Dopp's habeas petition). The petitioner further contended that "his claim challenging the state trial court's jurisdiction is not second or successive because . . . a jurisdictional claim can be brought at any time and cannot be waived or forfeited." *Id.* The Tenth Circuit disagreed and concluded that the federal district court properly dismissed the habeas petition as an unauthorized second or successive petition: "Contrary to his assertion, Dopp's jurisdictional challenge is not exempt from authorization under § 2244(b). . . . [T]he jurisdictional nature of Dopp's claim does not exempt his § 2254 application from dismissal for lack of jurisdiction as a successive and unauthorized application." *Id.* at 756-57.

Likewise, numerous federal district courts have dismissed second or successive § 2254 petitions for failure to meet the requirements of § 2244 despite the inclusion of jurisdictional challenges. *See, e.g.*, *Cowan v. Crow*, No. 19-CV-0639-JED-FHM, 2019 WL 6528593, at *4 (N.D. Okla. Dec. 4, 2019); *Clark v. MacLaren*, No. 2:10-CV-10748, 2016 WL 4009750, at *3 (E.D. Mich. July 26, 2016) (unpublished); *Cross v. Bear*, No. CV-15-133-D, 2015 WL 13741902, at *5 (W.D. Okla. Oct. 19, 2015); *Johnson v. Cain*, No. CIV.A. 12-2056, 2013 WL 3422448, at *1-4 (E.D. La. July 8, 2013); *Palmer v. McKinney*, No. 907-CV-0360-DNH-GHL, 2007 WL 1827507, at *2-3 (N.D.N.Y. June 22, 2007); *Perez v. Quarterman*, No. CIV.A.H-07-0915, 2007

WL 963985, at *2-3 (S.D. Tex. Mar. 29, 2007); *Jones v. Pollard*, No. 06-C-0967, 2006 WL 3230032, at *1-2 (E.D. Wis. Nov. 6, 2006).

Here, Respondent respectfully urges this Court to reconsider its prior statements—in particular, in *Wackerly* and *Murphy*—that jurisdictional challenges escape the restrictions of § 1089(D)(8). As previously shown, § 1089(D)(8) is materially indistinguishable from § 2244(b)(2), and federal courts have repeatedly determined that jurisdictional claims are subject to § 2244(b)(2)'s restrictions. There is no reason to think that the Oklahoma Legislature intended § 1089 to be any less restrictive than § 2244 when it comes to jurisdictional challenges.[22] Further, as this Court recognized in *Walker* with regard to the Legislature's 1995 amendments,

> [t]he amendments to the capital post-conviction review statute reflect the legislature's intent to honor and preserve the legal principle of finality of judgment, and we will narrowly construe these amendments to effectuate that intent. Given the newly refined and limited review afforded capital post-conviction applicants, we must also emphasize the importance of the direct appeal as the mechanism for raising all potentially meritorious claims.

Walker, 1997 OK CR 3, ¶ 5, 933 P.2d at 331. Giving § 1089 its proper narrow construction, it is clear that the statute does not allow jurisdictional claims to escape its restrictions. A contrary interpretation contravenes legislative intent. *Cf. Prost*, 636 F.3d at 589 ("The simple fact is that Congress decided that, unless subsection (h)'s requirements are met, finality concerns trump and the litigation must stop after a first collateral attack. Neither is this court free to reopen and replace Congress's judgment with our own.").

[22] In fact, the Oklahoma Legislature did provide an exception to the bar on successive capital post-conviction applications that has no parallel in § 2244: where the legal basis for a claim "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 . . . ." 22 O.S.2011, § 1089(D)(9)(a). Thus, with that provision, the Legislature made clear its desire to carve out an exception beyond those provided in the AEDPA. Its failure to do so as to jurisdictional claims speaks volumes.

Beyond the plain language of § 1089, there are good policy reasons for not exempting jurisdictional challenges from its requirements. As this Court recognized in *Walker*, "'[o]ne of the law's very objects is the finality of its judgments.'" *Walker*, 1997 OK CR 3, ¶ 5 n. 16, 933 P.2d at 331 n. 16 (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)). *Prost* discussed society's interest in finality of criminal judgments at length:

> The principle of finality, the idea that at *some* point a criminal conviction reaches an end, a conclusion, a termination, "is essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *see also McCleskey v. Zant,* 499 U.S. 467, 491, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). In every case there comes a time for the litigation to stop, for a line to be drawn, and the parties encouraged to move forward rather than look back. "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude," the Supreme Court has explained, "implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of underlying substantive commands.... There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility." *McCleskey,* 499 U.S. at 492, 111 S.Ct. 1454 (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L.Rev. 441, 452–53 (1963)). Anxiety and immobility, of course, are accompanied by other social costs—to victims, their families, to future potential victims, to the government, and to the courts—that revisiting and retesting convictions five or ten years old—or (as here) even older—can involve.

Prost, 636 F.3d at 582–83; *see also Morales v. Jones*, 417 F. App'x 746, 749 (10th Cir. 2011) (unpublished) (recognizing that while lack of jurisdiction in the convicting court does raise a due process claim, "Morales makes no argument to differentiate this case from any other due process violation," and concluding that such a claim could be time-barred "[a]s with any other habeas claim").

This case provides a stark illustration of the problems *Prost* predicted when the principle of finality is disregarded—*ten* years ago last month Petitioner murdered a mother and her two children, leaving behind a grieving family that still awaits justice. In the interests of finality, it is

perfectly reasonable to conclude Petitioner's state court attacks on his convictions and death sentences at this juncture, even if doing so forecloses a jurisdictional challenge.

Finally, Petitioner would be hard-pressed to argue that there is anything unfair or controversial about barring a jurisdictional claim. For starters, Justice Thomas discussed with approval the bar referenced by this Court in *McGirt*, *i.e.*, McGirt's failure to raise his jurisdictional claim on direct appeal. *McGirt*, slip op. at 2-3 (Thomas, J., dissenting). Moreover, in the *Murphy* litigation before the Supreme Court, Murphy's Brief in Opposition to the State's Petition for Writ of Certiorari scoffed at the idea that numerous state court convictions would be open to attack if the Tenth Circuit's decision were permitted to stand. Among other things, Murphy asserted that "[s]tate courts . . . limit defendants from challenging long-final convictions. *See, e.g.*, Okla. Stat. tit. 22 § 1086 (requiring "sufficient reason" to consider successive petition) . . . ." Brief in Opposition at 33, *Terry Royal v. Patrick Dwayne Murphy*, Case No. 17-1107 (U.S. Supreme Court, April 29, 2018) (hereinafter, "*Murphy* Brief in Opposition") (available at https://www.supremecourt.gov/DocketPDF/17/17-1107/42807/20180409154638946_Murphy%20BIO%204-9-2018%201215pmA.pdf). This Court should accept that invitation and bar this claim here.

* * *

For all of these reasons, this Court should find Petitioner's jurisdictional challenge to be waived and barred by § 1089(D)(8).

B. Sixty-Day Deadline for Successive Capital Post-Conviction Applications

Alternatively, this Court should refuse to consider Petitioner's jurisdictional claim because it is untimely. This Court's Rules provide that "[n]o subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the

previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2011).

Here, the Chickasaw Nation memoranda submitted by Petitioner in support of his claim that his victims were Indians are all dated August 29, 2018. App., Attachments 3-5. However, Petitioner did not file the present post-conviction application until February 20, 2019. Furthermore, to the extent Petitioner bases his claim on the Tenth Circuit's decision in *Murphy*, that opinion was issued on August 8, 2017, and amended on November 9, 2017.[23] Clearly, Petitioner is time-barred under the sixty-day rule as to any new legal or factual bases he contends support his claims. This Court should refuse to consider his jurisdictional claim under Rule 9.7(G)(3).

Admittedly, this Court has previously declined to apply the sixty-day rule as to a jurisdictional claim. Again, in *Wackerly*, this Court observed that an "examination of the evidentiary materials submitted in support of Wackerly's application shows that the legal and factual bases of this claim were available much earlier than sixty days before the filing of the instant application for post-conviction relief." *Wackerly*, 2010 OK CR 16, ¶ 4, 237 P.3d at 797. While this Court noted that, "[o]rdinarily, such an untimely filing would bar the current claim," "issues of subject matter jurisdiction are never waived and can therefore be raised on collateral appeal." *Id.* (citing Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2010)) (quotation marks omitted). As previously discussed, this Court then considered on the merits Wackerly's jurisdictional claim.

[23] As shown above, *Murphy* did not provide a new legal basis for challenging jurisdiction.

Respondent respectfully submits that this Court should enforce its sixty-day rule even as to jurisdictional claims. Again looking to the AEDPA for an analogous bar, federal courts have repeatedly imposed the statute of limitations for filing § 2254 habeas petitions or § 2255 motions to vacate to jurisdictional claims. *See, e.g.*, *Jones v. Warden*, 683 F. App'x 799, 801 (11th Cir. 2017) (unpublished) (affirming dismissal of § 2254 petition raising jurisdictional challenge as time-barred); *Morales*, 417 F. App'x at 749 (denying petitioner's argument that claims that the convicting court lacked subject matter jurisdiction could not be time barred); *United States v. Patrick*, 264 F. App'x 693, 694-96 (10th Cir. 2008) (unpublished) (declining to grant a certificate of appealability to review the district court's dismissal of prisoner's § 2255 petition—challenging the trial court's jurisdiction—as untimely); *Mcintosh v. Hunter*, No. CV 16-460-RAW-KEW, 2017 WL 3598514, at *3 (E.D. Okla. Aug. 21, 2017) (unpublished) ("The Tenth Circuit and district courts have held that jurisdictional claims are subject to ADEPA's time limit.").

Furthermore, the inequity of permitting Petitioner to sit on his jurisdictional claim for so long is pronounced in this case. At the Supreme Court's oral argument in *Murphy* in November 2018, counsel for Murphy claimed the State had exaggerated the number of state court convictions that were in jeopardy. Oral Argument Transcript at 45-47, *Mike Carpenter v. Patrick Dwayne Murphy*, Case No. 17-1107 (U.S. Supreme Court, Nov. 27, 2018) ("*Murphy* Argument Transcript") (available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1107_q86b.pdf). Meanwhile, Petitioner here had already marshaled evidence in support of his jurisdictional challenge, including the verification of his victims' tribal membership as discussed above, and yet waited until February 2019 to initiate this action. This blatant flouting of this Court's rules, in order to downplay the effects of the Tenth Circuit's

decision in *Murphy*, should not be rewarded with consideration of Petitioner's patently untimely claim.[24]

C. The Doctrine of Laches

As a final alternative, this Court should refuse to consider Petitioner's jurisdictional challenge based on the doctrine of laches. This Court has long held that, pursuant to the laches doctrine, "one cannot sit by and wait until lapse of time handicaps or makes impossible the determination of the truth of a matter, before asserting his rights." *Thomas v. State*, 1995 OK CR 47, ¶ 11, 903 P.2d 328, 331 (quotation marks omitted, alteration adopted) (collecting cases); *see also Berry v. Anderson*, 1972 OK CR 192, ¶ 4, 499 P.2d 959, 960 (barring claim based on laches even where it was "apparent" that the petitioner would be "would have been entitled to release" had he earlier brought his challenge); *Application of Smith*, 1959 OK CR 59, ¶ 10, 339 P.2d 796, 797-98 ("The right to relief . . . may be lost by laches, when the petition for habeas corpus is delayed for a period of time so long that the minds of the trial judge and court attendants become clouded by time and uncertainty as to what happened, or due to dislocation of witnesses, the grim hand of death and the loss of records the rights sought to be asserted have become mere matters of speculation, based upon faulty recollections, or figments of imagination, if not outright falsifications."). Furthermore, the laches doctrine applies to collateral attacks upon convictions, including by means of an application for post-conviction relief. *Thomas*, 1995 OK CR 47, ¶ 15, 903 P.2d at 332; *see also Paxton v. State*, 1995 OK CR 46, ¶ 8 903 P.2d 325, 327 ("We hold, therefore, that the doctrine of laches has been and continues to be applicable, in appropriate cases, to collateral attacks upon convictions, whether by means of an extraordinary writ, as in former

[24] Petitioner cannot seriously claim he sat on his claim in reliance on *Wackerly*, as he does not even cite *Wackerly*, or any other case, in support of any argument that he is not subject to the sixty-day rule.

times, or by means of an application for post-conviction relief."). "Thus, the doctrine of laches may prohibit the consideration of an application for post-conviction relief where a petitioner has forfeited that right through his own inaction." *Paxton*, 1995 OK CR 46, ¶ 8, 903 P.2d at 327.

This Court has "emphasize[d] that the applicability of the doctrine of laches necessarily turns on the facts of each particular case." *Id.* The question is whether the post-conviction applicant has provided "sufficient reason" for the delay in seeking post-conviction relief. *See id.*, 1995 OK CR 47, ¶ 16, 903 P.2d at 332 (holding that "Petitioner's contention that depression caused by incarceration for subsequent convictions have prevented him from seeking relief . . . for fifteen years is not sufficient reason to overcome the doctrine of laches"). Finally, this Court has refused to place a threshold burden upon the State to demonstrate actual prejudice before laches applies. *Id.*, 1995 OK CR 47, ¶ 14, 903 P.2d 328, 332.

Moreover, the *McGirt* Court, tacitly recognizing that its decision would open the floodgates to jurisdictional challenges, encouraged this Court to consider applying laches to such challenges:

> Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are "fre[e] to say what we know to be true . . . today, while leaving questions about . . . reliance interest[s] for later proceedings crafted to account for them." *Ramos*, 590 U. S., at ——, 140 S.Ct., at 1047 (plurality opinion).

McGirt, slip op. at 41.

Although in a civil instead of criminal context, the Supreme Court has explained that the doctrine of laches is about not just one party's inaction, but the opposing party's detrimental reliance. In *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 202 (2005), the Supreme Court considered a claim by the Oneida Indian Nation of New York that the Tribe should not have to pay taxes on parcels of land that the Tribe had recently purchased on the free

market but that were part of the Tribe's original reservation two hundred years prior. Previously, the Supreme Court had twice ruled favorably in litigation by the Tribe against local governments seeking damages for the taking of their ancestral lands. *See Oneida Indian Nation of N.Y. State v. Oneida Cty., New York*, 414 U.S. 661, 675 (1974); *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 240-50 (1985). In *City of Sherrill*, however, the Supreme Court refused to grant the Tribe the "disruptive," equitable remedy that it sought, in part, based on laches:

> The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's. And not until the 1990's did [the Tribe] acquire the properties in question and assert its unification theory to ground its demand for exemption of the parcels from local taxation. . . .
>
> The principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises. It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief.

City of Sherrill, 544 U.S. at 216-17.

Here, Petitioner committed these crimes in July 2010, *ten years ago* last month. Furthermore, as previously discussed, all of the facts underlying his jurisdictional claim—that is, his evidence that the Chickasaw Reservation has allegedly not been disestablished and that his victims were allegedly Indians—were available to him at every prior stage of this criminal case, including at the time of the crimes and trial. Yet, Petitioner did not bring this jurisdictional claim until nearly nine years after his crimes. This Court has repeatedly found laches to bar collateral attacks in cases with delays similar in length to the present one. *See, e.g.*, *Thomas*, 1995 OK CR 47, ¶ 7, 903 P.2d at 332 (fifteen years); *Ex parte French*, 1952 OK CR 13, 240 P.2d 818 (almost fifteen years); *Ex parte Workman*, 1949 OK CR 68, 207 P.2d 361 (eight years).

Indeed, this Court has on multiple occasions applied laches to jurisdictional claims. In *Ex parte Wallace*, 81 Okla. Crim. 176, 178-79, 162 P.2d 205, 207 (1945), the defendant filed a state

habeas petition three years after his guilty plea alleging that the federal court had exclusive jurisdiction over his crime because he and his rape victims were Comanche Indians and the crime occurred on a restricted allotment. Although this Court did not invoke the word "laches," it ultimately concluded that "at this late date" it would not consider the defendant's jurisdictional attack, noting in particular that the statute of limitations for any federal action against the defendant had lapsed.[25] *Ex parte Wallace*, 81 Okla. Crim. at 179, 188, 162 P.2d at 207, 211.

Similarly, in *Allen v. Raines*, 1961 OK CR 41, ¶¶ 6-8, 360 P.2d 949, 951, this Court applied laches to a state habeas petitioner's claim that he was not furnished counsel at the time of his guilty plea sixteen years prior. Importantly, at the time, this Court treated the denial of counsel as a jurisdictional issue. *See Allen*, 1961 OK CR 41, ¶ 6, 360 P.2d at 951 ("We have held that a trial court may lose jurisdiction to pronounce judgment by failure to complete the court by appointing counsel to represent the accused where the accused has not effectively waived his constitutional right to the assistance of counsel."); *see also Application of Smith*, 1959 OK CR 59, ¶ ¶ 1, 10-14, 339 P.2d 796, 798-99 (barring based on laches jurisdictional claim of denial of counsel); *Ex parte Paul*, 93 Okla. Crim. 300, 301, 227 P.2d 422, 423 (1951) (same).[26]

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[25] Although there is no federal statute of limitations for murder, laches does not require that there be no possibility of a retrial. In this case, it is patently unfair that Petitioner sat on a potentially meritorious jurisdictional challenge for *nine* years. The State expended great resources at Petitioner's capital murder trial, and has continued to spend time and money defending what is now a presumptively valid judgment. *See Brecht*, 507 U.S. at 633-37 (recognizing that convictions are presumed correct after direct appeal). Further, Petitioner's belated claim has placed the victims' family members at risk of having to begin the painful process of trial and appeal all over again after ten years. The reasoning of *Wallace* applies, perhaps with even more force, in this case.

[26] This Court has on occasion not applied laches to delayed jurisdictional claims. *See, e.g.*, *Ex parte Ray*, 87 Okla. Crim. 436, 441-44, 198 P.2d 756, 759-60 (1948) (considering on the merits claim of deprivation of counsel before denying based on laches delayed habeas petition); *Ex parte Motley*, 86 Okla. Crim. 401, 404-09, 193 P.2d 613, 615-17 (1948) (same). But this is not surprising, as laches is applied on a case-by-case basis. *See Paxton*, 1995 OK CR 46, ¶ 8, 903 P.2d at 327. The State will show that the facts of this case warrant application of laches.

As previously discussed, Petitioner not only waited nine years to raise his jurisdictional claim, he utterly flouted this Court's well-established procedural rules at every stage, failing to raise this claim at trial, on direct appeal, in his first post-conviction proceeding, or within sixty days of uncovering the facts underlying the claim. He has provided no reason whatsoever for his inaction, let alone "sufficient" reason. *Paxton*, 1995 OK CR 47, ¶ 16, 903 P.2d at 332. Petitioner, as a capital defendant who has been provided able counsel at every stage of these proceedings, has no excuse for failing to raise this claim for so many years.

Not only has Petitioner not provided a reason for his delay, but in the *Murphy* litigation, **Murphy's counsel—in part the same office that represents Petitioner here—agreed that the doctrine of laches should apply to belated jurisdictional claims.** Murphy's Brief in Opposition to the State's Petition for Writ of Certiorari stated:

> Similarly overstated is Oklahoma's assertion about the number of "state convictions [that] will be subject to collateral attack." Pet. 21. . . . State courts . . . limit defendants from challenging long-final convictions. *See, e.g.*, Okla. Stat. tit. 22 § 1086 (requiring "sufficient reason" to consider successive petition); *Paxton v. State*, 903 P.2d 325, 327 (Okla. Crim. App. 1995) ("laches" may "prohibit the consideration" of challenges to long-final convictions).

Murphy Brief in Opposition at 33; *see also Murphy* Argument Transcript at 46 (counsel for Murphy noting that "the state has a laches doctrine"). The Creek Nation also urged the application of laches to bar untimely post-conviction claims in its briefing in *Murphy*. *See* Supplemental Brief for *Amicus Curiae* Muscogee (Creek) Nation in Support of Respondent at 12, *Mike Carpenter v. Patrick Dwayne Murphy*, Case No. 17-1107 (U.S. Supreme Court Dec. 28, 2018) (available at https://www.supremecourt.gov/DocketPDF/17/17-1107/77854/20181228130713523_17-1107%20Supplemental%20Brief%20of%20Amicus%20Curiae%20MUscogee%20Creek%20Nation.pdf). Again, this Court should accept this invitation to apply laches to belated jurisdictional claims.

The State is not required to show prejudice from Petitioner's inaction for laches to apply. *Paxton*, 1995 OK CR 47, ¶ 14, 903 P.2d at 332. In any event, given that this is a capital case, the prejudice to the State is obvious. As Justice Scalia recognized, death sentences are costly and time-consuming for the State to secure and defend, given "the proliferation of labyrinthine restrictions on capital punishment" over the foregoing decades. *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring). Here, as in other capital cases, the State has suffered prejudice in relying on Petitioner's inaction in bringing his jurisdictional claim. Until his second post-conviction action, Petitioner never questioned the trial court's jurisdiction; thus, the State has expended extraordinary time and resources in defending Petitioner's murder convictions and death sentences at every previous stage of this case under the belief that jurisdiction was uncontested. The victims' family members have been subjected to the trauma of a trial and numerous appeals, all while Petitioner silently sat on his jurisdictional challenge. Given the State's legitimate reliance on Petitioner's inaction and the undoubtedly "disruptive" application of *McGirt* he seeks, this Court should refuse to consider his belated jurisdictional challenge. *See City of Sherrill*, 544 U.S. at 216-17; *cf. also McGirt*, slip op. at 31 ("[F]or 113 years, Oklahoma has asserted jurisdiction over the former Indian Territory on the understanding that it is not a reservation, without any objection by the Five Tribes until recently (or by McGirt for the first 20 years after his convictions)." (Roberts, C.J., dissenting)); *id.* at 34 ("[T]he Court's decision draws into question thousands of convictions obtained by the State for crimes involving Indian defendants or Indian victims across several decades." (Roberts, C.J., dissenting)).

It bears repeating that Petitioner knowingly sat on his jurisdictional claim for months before filing it in this Court, all while his counsel downplayed the effects of the Tenth Circuit's decision in the *Murphy* litigation before the Supreme Court. In *McGirt*, the majority ridiculed the

"speculative" concern of "Oklahoma and the dissent" that "thousands of Native Americans like Mr. McGirt wait in the wings to challenge the jurisdictional basis of their state-court convictions." *McGirt*, slip op. at 38 (quotation marks omitted). And yet, that is exactly what happened in this case. At bottom, laches is an equitable doctrine. *See Sullivan v. Buckhorn Ranch P'ship*, 2005 OK 41, ¶ 32, 119 P.3d 192, 202 ("Laches is an equitable defense to stale claims. . . . Application of the doctrine is discretionary depending on the facts and circumstances of each case as justice requires."). Under these circumstances, it is grossly inequitable and unjust to reward Petitioner with consideration of his belated jurisdictional claim.

For all these reasons, this Court should find Petitioner's jurisdictional claim to be barred by laches.

VII. Conclusion

Based on all of the above, although the State asserts multiple procedural bars, the State respectfully requests that this Court provide guidance for the numerous cases affected by *McGirt* by resolving the issues left unsettled by *McGirt* as implicated in this case. Specifically, this Court should clarify how Indian status is to be proven (*see* Part II, *supra*), that the defendant has the burden of proving Indian status and that the location of his crime fell within the boundaries of the purported reservation (*see* Part III, *supra*), that this Court has concurrent jurisdiction under the General Crimes Act and that the trial court had jurisdiction in this case (*see* Part IV, *supra*), and that *McGirt* expressly limited its holding to the Creek Reservation and that this Court will not step in and expand that holding without remand to the district court (*see* Part V, *supra*). Further, the State respectfully asks that this Court procedurally bar Petitioner's jurisdictional claim and deny relief (*see* Part VI, *supra*). Alternatively, should this Court decide to reach the merits of

Petitioner's jurisdictional claim—and hold that the State does not have concurrent jurisdiction—the State submits that a remand for an evidentiary hearing is necessary (*see* Parts III and V, *supra*).

Respectfully submitted,

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