

possessing a quantum of Indian blood, and 2) the alleged crimes occurred within “Indian country,” to wit: the Chickasaw reservation. See *Major Crimes Act*, 18 U.S.C. §1151 and §1153, the *Indian Country Crimes Act*, 18 U.S.C. § 1152

3. To the **RENEWED MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION IN LIGHT OF *McGIRT V. OKLAHOMA***, the State by and through the Office of District Attorney for Seminole County responds and argues as follows:

4. **THE APPLICATION OF THE MAJOR CRIMES ACT**

When the Major Crimes Act applies which it only could apply in the case at hand IF a lawsuit establishing a binding precedent applying the same analysis and ruling established by the SCOTUS in ***McGirt***, supra, similarly applied to the original boundaries of the Seminole Nation, and if the same was affirmed in by the U.S. Supreme Court, then and only then would Jurisdiction be subject to the two part test of the Indian Major Crimes Act of 18 U.S.C. 1153 (a). The Major Crimes Act involves a two-step inquiry in determining whether the Act applies vesting jurisdiction exclusively with the United States Government and their respective congressionally established courts of criminal jurisdiction. The two (2) step inquiry is as follows: (1) Where the offense took place (i.e. In “Indian Country?”); and (2) whether the perpetrator/defendant or victim was an “Indian” for the purposes of the Act, or a non-Indian. **St. Cloud v. U.S., 702 F. Supp. 1456, 1459 (D. S.D. 1988)**.

If the answer to both areas of inquiry are in the affirmative, then the Indian Major Crimes Act would apply vesting Jurisdiction in the United States government to the exclusion of the State government authority. It is both the issue of the present status of the land on which the Petitioner’s brutal Murder of Michael Kelough occurred AND the Indian status of the Petitioner at the time of the act of the Murder that dictates whether or NOT the holding of ***McGirt***, supra would apply to the case at hand **IF and only IF the SCOTUS** were to prospectively establish precedent similar to the holding in ***McGirt*** applying the same analysis to the original boundary of the Seminole Nation.

5. **THE PETITIONER MUST PROVE THAT HE WAS AN INDIAN FOR PURPOSES OF THE ACT AT THE TIME OF THE MURDER; TO DO OTHERWISE WOULD IMPLICATE THE POTENTIAL OF A FRAUDULENT ARGUMENT OF INDIAN STATUS**

Defining one's status as "Indian" is not by whim or fiat or even by statute but requires a judicial analysis of the term "Indian" which must be "judicially explicated" **U.S. v. Bruce**, 394 F. 3d 1215, 1223 (9th Cir. 2005) (Citing **U.S. v. Broncheau**, 597 F. 2d 1260 1263 (9th Cir. 1979). Deciding whether one is "Indian" also requires a two (2) part test involving analysis of (1) Whether the defendant/perpetrator appears to have a significant percentage of Indian blood; and (2) the defendant assailant must be recognized either by the federal government or by some tribe or society of Indians. **Goforth v.State**, 1982 OK CR 48, 644 P.2d 114, 116 referring to the holding in **U.S. v. Rodgers**, 45 U.S. 567, 11 L.Ed. 1105 (1845) applying the first criteria of the test.

The first step in this analysis requires a showing of ancestry living in America before the Europeans arrived. **Bruce**, supra. Because that would be so burdensome to prove, evidence of an ancestor is who is clearly identified as an Indian is sufficient to satisfy the first part of the test. **Goforth**, 1982 OK CR 48, 644 P.2d. 116 Finding that testimony from appellants parents that the appellant was slightly less than ¼ Cherokee Indian was sufficient. While there is a plethora of cases discussing a particular quantum of blood to satisfy the "significant percentage" requirement, there is not a specific amount prescribed by statute of case law. The determination of Indian blood is not enough; the second part of the test must also be satisfied. **St. Cloud**, supra @ 1461. A defendant or perpetrator's enrollment in a tribe may be a common means to establish that he is an Indian, but it is not the only one, and is not necessarily determinative. **Broncheau**, supra @ 1262-1263. In order of import, these factors are to be considered (1) enrollment in a tribe, (2) government recognition formally and informally through providing the person assistance reserved only to Indians; (3) enjoying benefits of tribal affiliation; and (4) social recognition as an Indian through living on a reservation and participating in Indian social life. **St. Cloud**, supra @ 1461. Absent recognition by the Federal government or by some tribe or society of Indians, the Defendant/Perpetrator cannot be found to be an Indian, as it would enable him to assert Indian heritage only when he wished to and evade state criminal action. **Goforth**, supra @ 116.

Moreover, the Defendant MUST BE AN INDIAN AT THE TIME OF THE OFFENSE FOR PURPOSES OF DETERMING JURISDICTION. **U.S V. ZEPEDA**, 792 F. 3D 1103, 1113 (9TH Cir. 2015). This requirement serves two (2) purposes to satisfy the "notice function" that criminal laws serve and providing the ability for a defendant/perpetrator to predict with certainty the consequences

for any crime that one may commit. **Apprendi v. New Jersey**, 530 U.S. 478, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). **The government must be assured that when it charges a crime that its jurisdiction would not disappear because an astute defendant managed to either enroll in a tribe.** The Defendant bears the burden to establish their status as an “Indian” at the time when jurisdiction is determined. **State v. Klindt**, 1989 OK CR 75, 782 P.2d 401 @ 403. The burden is on the defendant to prove he was an “Indian” at the time of the crime and that the crime occurred in Indian Country. **Klindt**, supra @ 403.

6. **THE COUNSEL OF U.S. ATTORNEY’S FOR THE STATE OF OKLAHOMA AND THE OKLAHOMA ATTORNEY GENERAL HAVE EACH ASSERTED PUBLICALLY THAT THE MCGIRT RULING IS CASE SPECIFIC ONLY TO THE BOUNDRIES OF THE 1866 MUSCOGEE CREEK NATION RESERVATION BOUNDRIES**

As earlier stated, the **McGirt** decision is particular to the boundaries of the Muscogee Creek Nation Reservation that was established in 1866 and to any Indian who commits or becomes a victim of a major crime under the Major Crimes Act within the boundaries of the reservation. Thus, the one and the same Holding in **McGirt**, supra, may have no application herein to the arguments of the Defendant herein.

7. **MAGNITUDE OF THE DECISION**

The following is borrowed with credit due to the authors of the Supplemental Brief of the State of Oklahoma filed in the United States Supreme Court on January 1, 2019:

“All Agree that affirmance (of the 10th Circuit in Murphy) would have seismic consequences...Any delay in resolving the original question presented would create an intolerable state of uncertainty. The United States, too, urges this Court to resolve the reservation question now and in Oklahoma’s favor...The criminal-law implications are even starker. Barriers to federal habeas relief are irrelevant if there are no barriers to state relief. Tellingly ...no limits on state collateral review in Oklahoma courts; respondent cites only a general observation from a Minnesota case before punting the issue to the Tribe. Resp. Suppl. Br. 14. The Tribe speculates (at 12) that laches might bar some collateral challenges. But laches and waiver are cut from the same cloth, and the Tribe ignores the mountain of precedent in Oklahoma holding that collateral challenges to subject-matter jurisdiction are never waived and can be raised at any time...Here’s the relevant takeaway: after statehood, the former Indian Territory was a checkerboard of federal, state, and tribal jurisdiction. Countless judicial opinions spanning decades analyzed whether

particular plots of land were Indian country. Those fact-intensive disputes would have been pointless had the entire area been reservation land, rendering it automatically Indian country...import of these cases—four generations of jurists understood that no reservations in the former Indian Territory survived statehood. Sometimes the most obvious and common-sense conclusion is the right one...”

8. **SUBSEQUENT COURT OF COMPETENT JURISDICTION ACTION**

Presently pending before the Oklahoma Court of Criminal Appeals is the case of **Bosse v. State**, PCD-2019-124 wherein the Oklahoma Court of Criminal Appeals, Oklahoma’s highest Court of Competent Jurisdiction relating to Criminal Cases IS AFFIRMATIVELY ADDRESING THE ISSUES. As such, the Oklahoma Attorney General has been directed to brief the applicability of the **McGirt** decision to the original 1866 Reservation Boundaries of the Chickasaw Nation. In Conjunction therewith, the Oklahoma Administrative Office of the Courts has entered or is expected to enter a directive or informational Memo to the District Courts of Oklahoma directing or suggesting that those District Courts should defer the matter to the OCCA until such matter has been addressed in the Bosse case and perhaps resolved with respect to all of the other four (4) civilized Tribal Historical 1866 Reservation Borders and the applicability of the **McGirt** decision to the same.

In such litigation in the **Bosse** case, the Office of Attorney General has confirmed that the issues presented will include but are NOT necessarily limited to the following subject matter:

- (1) Determining Indian Status including the applicability of the current Federal definition and the factors to be considered including enrollment in a federally recognized Tribe, the Government recognition, the benefits enjoyed by the affiliation, and the social recognition of Indian Status.
- (2) The State of the Law with reference to the Burden of Proof to establish “Indian” Status in light of the conflict of law arising from the 10th Circuits Affirmation by the SCOTUS in Murphy providing criticism of the Oklahoma COCA decision regarding the same in **Klindt v. State**.
- (3) The applicability of the CONCURRENT JURISDICTION in Indian Territory as to Non-Indian on Indian criminal offenses, both MCA criminal offenses and other criminal offenses, both Misdemeanor and Felony.
- (4) Application of the Procedural Bars under Oklahoma Law wherein it has been historically held that Lack of Jurisdiction can be raised at any time, even Post-Conviction; the effect of amendments to 22 O.S. Section 1089 et. Seq.; the effect of the

apparent conflict of Federal Law which provides that Jurisdiction can be procedurally barred and the reference to the same in Justice Gorsuch's Authored Majority Opinion in **McGirt**, supra; and finally the applicability of the Doctrine of Laches to the current flurry of Jurisdictionally impacted cases in Eastern Oklahoma.

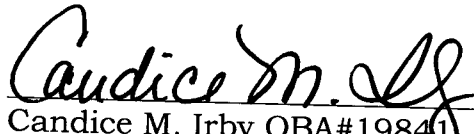
Whereas, Judicial Restraint would dictate a call to promote consistency of decision making among the various District Courts of Oklahoma as encouraged by the Oklahoma AOC and would limit the necessity for a flood of appeals that most assuredly could break open if the District Courts of Oklahoma were not to receive additional precedential guidance and from the State's highest Court of Competent Criminal Jurisdiction.

9. **A.G. HUNTER'S Federal Resolution Efforts & the Provision of State/Tribal Compacts:**

Finally, compacts that were discussed by the Amicus Briefs in the **Murphy** and **McGirt** cases may offer another solution to resolve these jurisdictional practical problems presented by the **McGirt** decision and are in the works as of this writing as illustrated by the recent actions of the Oklahoma DHS in compacting with the Chickasaw Nation to establish jurisdiction in deprived children cases to be handled in State Court.

WHEREFORE, premises considered, the State of Oklahoma asserts that the Defendant's Motion is AT BEST NOT YET RIPPENED into a proper Motion to Dismiss for lack of Subject Matter Jurisdiction. Alternatively, the office of the District Attorney, requests the Honorable Trial Court to consider a pattern of Judicial Restraint of Deferring to the Oklahoma Court of Criminal Appeals as the Highest Court of Competent Criminal Jurisdiction in the State of Oklahoma, as encouraged by the Oklahoma AOC and other legal minds bidding the Trial Courts to have patience awaiting guidance from the Oklahoma COCA and/or other Federal Court Declaratory Judgement Relief until applicability of the **McGirt** decision is finally resolved by the United States Supreme Court **as to the other original 1866 Historical Tribal Reservation Boundaries of the Seminole, Chickasaw, Cherokee, and Choctaw Nation; and/or a Resolution of the same by the Oklahoma Court of Criminal Appeals, and /or the Intervention by the US Congress, and/or the Curative Efforts of Inter-governmental Compacts can be negotiated; or by Declaratory Federal Court Judgement.**

Paul B. Smith,
DISTRICT ATTORNEY



Candice M. Irby OBA#19841
Assistant District Attorney

CERTIFICATE OF MAILING

I, _____, DO HEREBY CERTIFY THAT TRUE AND
CORRECT COPY OF THE ABOVE AND FORGOING
RESPONSE/REQUEST WAS MAILED TO THE
DEFENDANT/PETITIONER, PRO SE ON THE _____ DAY OF August,
2020 BY DEPOSITING THE SAME IN THE U.S. MAIL WITH SUFFICIENT
POSTAGE AFFIXED THERETO AND ADDRESSED TO: Peter C. Astor,
OBA # 17570; ATTORNEY FOR DEFENDANT, Oklahoma Indigent Defense
System, 610 S. Hiawatha, Sapulpa, Oklahoma 74066.