ORIGINAL

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

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

PETITIONER'S POST-HEARING BRIEF REGARDING PROPOSITION I OF HIS SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF

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November 4, 2020

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Petitioner, Shaun Michael Bosse, by and through undersigned counsel, submits this post-hearing brief "addressing only those issues pertinent to the evidentiary hearing" ordered by this Court August 12, 2020. *See* Order Remanding for Evidentiary Hearing ("Remand Order").[1]

BACKGROUND

Petitioner filed a Successive Application for Post-Conviction Relief ("APCR") on February 20, 2019. As relevant here, Proposition I of that APCR challenges the State's jurisdiction to prosecute him. More specifically, in Proposition I, Petitioner asserts exclusive jurisdiction rests with the federal courts because the victims were citizens of the Chickasaw Nation and the crimes occurred within the boundaries of the Chickasaw Nation Reservation. Because the authority upon which Petitioner's claim rested had not yet become final, this Court *sua sponte* held the matter in abeyance pending the final decision of the Supreme Court in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom Sharp v. Murphy*, 140 S. Ct. 2412 (July 9, 2020) (mem). On the same day it handed down the *Murphy* ruling, the Supreme Court also decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). In both cases, the Supreme Court acted to reverse rulings of this Court, concluding Congress never disestablished the Creek Reservation. The crimes in both cases occurred in Indian Country, thus depriving the Oklahoma courts of jurisdiction. After allowing the State an opportunity to respond to Petitioner's jurisdictional claim in Proposition I, this Court

[1] Pursuant to this Court's Remand Order, post-hearing briefs of no more than 20 pages are to be filed simultaneously within 20 days of the filing in this Court of the District Court's findings of fact and conclusions of law and must address "only those issues pertinent to the evidentiary hearing." Remand Order at 4. Because counsel for Respondent addressed issues in the District Court that were beyond the scope of the Remand Order, counsel for Petitioner anticipates Respondent may raise the same non-pertinent issues in its supplemental brief in this Court. Petitioner will address those issues briefly here, but counsel for Petitioner reserves the right to seek to have Respondent's brief stricken or, in the alternative, for leave to file a reply to address any non-pertinent issues raised by Respondent.

remanded this case to the District Court for McClain County for an evidentiary hearing to determine two questions. Specifically, this Court directed that:

> The District Court shall address *only the following issues*:
>
> First, the status as Indians of Appellant's victims. The District Court must determine whether (1) the victims had some Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government.
>
> Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Chickasaw Nation and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps and/or testimony.

Remand Order at 3-4 (emphasis added).

The District Court held the evidentiary hearing September 30, 2020, and has issued its Findings of Fact and Conclusions of Law as directed by this Court. The matter is therefore now ripe for this Court to decide whether the State had jurisdiction over Petitioner's crimes. The State never had jurisdiction to prosecute Petitioner.

STIPULATIONS

Prior to the remanded evidentiary hearing, the parties reached the following stipulations:

1. As to the location of the crime, the parties hereby stipulate and agree as follows:
   a. The crime in this case occurred at 15734 212th Street, Purcell, OK, 73080. That address is within the boundaries set forth in the 1855 and 1866 treaties between the Chickasaw Nation, the Choctaw Nation, and the United States.
   b. If the Court determines that those treaties established a reservation, and if the court further concludes that Congress never explicitly erased those boundaries and disestablished that reservation, then the crime occurred within Indian Country as defined by 18 U.S.C. § 1151(a).

2. As to the status of the victims, the parties hereby stipulate and agree as follows:

   a. Katrina Griffin was an Indian for purposes of the General Crimes Act, 18 U.S.C. § 1152.

   b. Christian Griffin had 23/256ths Indian blood quantum and was recognized as a Chickasaw Nation Citizen.

   c. Chasity Hammer had 23/256ths Indian blood quantum and was recognized as a Chickasaw Nation Citizen.

   d. The Chickasaw Nation Tribal Enrollment Verification forms for Katrina, Christian and Charity are attached to this stipulation and the parties agree they should be admitted into the record of this case.

Stipulation of the Parties, filed September 14, 2020; *see also* Petitioner's Exhibits (Pet. Ex.) 1, 1(a)-1(c).

EVIDENCE PRESENTED AT HEARING

At the evidentiary hearing, Petitioner presented testimony from Attorney Jereme Cowan, who specializes in oil and gas law. Tr. at 9. Mr. Cowan established that title to the land on which the crimes occurred can be traced directly back to the land held by the Choctaw and Chickasaw Nations. Tr. at 11-14; Pet. Ex. 2(a)-2(c). Moreover, while chaining title to the property, Mr. Cowan confirmed that at no time did the State of Oklahoma ever own or exercise sovereign rights over that property. Tr. at 14. The State did not refute or respond to any of the evidence presented by Mr. Cowan.

Petitioner also presented various treaties, statutes, maps and other official documents. *See* Pet. Ex. 3-15. The State did not refute or respond to any of the documentary evidence presented by Petitioner. In fact, the State did not present any evidence at the hearing and made no argument regarding any of the questions upon which this Court remanded for a hearing. Tr. at 16 ("the State does not have any witnesses to present, and we will rely on the briefs that have been provided to the Court...."); State's Brief on Remand for Evidentiary Hearing ("State Remand Brief") at 10

("As to Indian Country, the State takes no position on whether the Chickasaw Nation has, or had, a reservation").

Based on this evidentiary record, the District Court concluded that each of the victims were Indians, that Congress did create a reservation for the Chickasaw Nation, and that Congress never erased the reservation boundaries and disestablished that reservation. *See generally* Findings of Fact and Conclusions of Law, filed October 13, 2020. Petitioner does not expect the State to challenge any of these findings or conclusions in this Court. In the event the State does attempt to challenge the findings or conclusions, any such challenge would be waived given the State failed to address the issues in any way in the District Court. *See Bane v. Anderson, Bryant & Co.*, 1989 OK 140, 786 P.2d 1230, 1236 ("Parties will not be permitted to raise issues before this court which were not raised in the trial court"), citing *Sharp v. Henry,* 298 P.2d 1058 (Okla.1956); *Helfinstine v. Martin,* 561 P.2d 951 (Okla.1977).

Before turning to the "issues pertinent to the evidentiary hearing," Remand Order at 4, Petitioner will briefly respond to some of the non-pertinent issues he anticipates the State may raise in this Court.

PROCEDURAL DEFENSES[2]

The State has taken the position, both before this Court and in the District Court on remand, that Petitioner's jurisdictional claim should be procedurally barred. *See* Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452

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[2] In addition to urging the Court to disregard any non-pertinent issues raised by the State in its post-remand briefing, Petitioner also urges the Court to treat them all as waived for the State's failure to fully develop those claims below. The State correctly recognized the issues it is now expected to make in this Court were beyond the scope of the Court's Remand Order, so it presented no evidence or meaningful argument on any of the issues. Having failed to adequately raise its procedural bar, burden of proof, blood quantum, and concurrent jurisdiction arguments below, the State has waived them and should not be permitted to raise them here. Bane, 786 P.2d at 1236.

(2020), filed August 4, 2020 ("State's Pre-Remand Brief") at 22-49 (asserting numerous procedural defenses); State Remand Brief at 10 n.3 (preserving procedural defenses and concurrent jurisdiction arguments for review in this Court).

Not only did the State's arguments lack any merit when made initially, but this Court has already properly rejected those arguments. As noted, the State devoted 27 pages of its Pre-Remand Brief to its procedural bar arguments. After reviewing all of the State's arguments, this Court correctly rejected the State's position:

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

Remand Order at 2 (emphasis added). *Compare Goode v. State*, PCD-2020-530, Order Remanding for Evidentiary Hearing at 3 (August 23, 2020) ("We find that the issues raised are issues which fall under the parameters of section 1089(D), and this issue is properly before this Court") *with Goode v. State*, PCD-2020-333, Order Dismissing Successive Application for Post-Conviction Relief and Denying Motion to Hold Case in Abeyance at 4 (June 9, 2020) (dismissing successive post-conviction application as premature "[b]ecause neither *Murphy* nor *McGirt* is a final opinion").

Petitioner's jurisdictional claim is properly before this Court, and any attempt by the State to argue otherwise should be rejected.

BURDEN OF PROOF

The State asserted in its Pre-Remand Brief in this Court (at 10-13) and in its Remand Brief in the District Court (at 12-16) that Petitioner bears the burden of proof, not only as to whether

Congress ever created a reservation for the Chickasaw Nation, but also as to whether Congress ever disestablished any such reservation. The State is wrong.[3]

The State's error regarding the burden of proof stems from its apparent misunderstanding of what an evidentiary presumption is. There is a presumption that once a reservation is established it continues to exist until Congress acts to disestablish it. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Petitioner bears no burden to show that the reservation has *not* been disestablished. The Tenth Circuit made this point quite clear:

> What the OCCA did say in its analysis contradicted *Solem*. Instead of heeding *Solem*'s "presumption" that an Indian reservation continues to exist until Congress acts to disestablish or diminish it, *see* 465 U.S. at 481, the OCCA flipped the presumption by requiring evidence that the Creek Reservation had not been disestablished—that it "still exists today," 124 P.3d at 1207. In other words, *the OCCA improperly required Mr. Murphy to show the Creek Reservation had not been disestablished instead of requiring the State to show that it had been.*

Murphy, 875 F.3d at 926 (emphasis added).[4] But the Tenth Circuit did not blame the legal error only on the OCCA; it pointed out the State was just as much as fault:

> The State, repeating the OCCA's mistake in reversing the presumption against disestablishment, argues Mr. Murphy "failed to present evidence that Congress did not intend disestablishment." Aplee. Br. at 48 (emphasis added). But under *Solem*, that is not the test. *Solem* and every case applying it presume that a reservation continues to exist unless Congress has legislated otherwise. As

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[3] Petitioner clearly proved that Congress created a Chickasaw reservation and that Congress has never taken steps to disestablish that reservation. Because the State offered no evidence in response to Petitioner's evidence on these questions, "the Court cannot find the Chickasaw reservation was disestablished." Findings of Fact and Conclusions of Law at 10. Petitioner addresses the State's argument because the issue is likely to come up in other Indian Country cases this Court will be called upon to decide.

[4] The State attempts to escape its burden of proof by asserting that Murphy is not binding because this Court is not bound by decisions of the Tenth Circuit. The State ignores that the presumption that a reservation continues to exist is not a creation of the Tenth Circuit; rather, it is clear and controlling Supreme Court law as set forth in Solem and reaffirmed throughout the Supreme Court's other disestablishment cases. *See, e.g.*, Bates v. Clark, 95 U.S. 204, 209 (1877) (noting Indian Country remains Indian Country "in the absence of any different provision by treaty or by act of Congress"); United States v. Celestine, 215 U.S. 278, 285 (1909) (holding "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress"). So, while this Court may not be bound by the Tenth Circuit's rulings, it is beyond question that this Court is required to follow what the Supreme Court says. See Bosse v. Oklahoma, 137 S. Ct. 1 (2016).

> demonstrated above, the OCCA not only ignored but also reversed this presumption. So does the State. We will not make the same mistake here.

Id. at 927-28. This Court should not accept the State's invitation to make the same mistake again.

BLOOD QUANTUM

Throughout the pendency of this case, as well as numerous other remanded *McGirt* evidentiary hearings, the State has taken varying positions on this question. Because Petitioner does not know what the State's current position will be on this issue, he addresses it briefly.

Because the term "Indian" is not defined in statutes addressing criminal jurisdiction in Indian Country, courts have adopted a two-part test to determine whether a person is Indian for purposes of federal law. *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss,* 273 F.3d 1277, 1279 (10th Cir. 2001). Under that test, to be considered "Indian," a person must (1) have "some Indian blood" and (2) be "recognized as an Indian by a tribe or by the federal government." *Diaz*, 679 F.3d at 1187; *Prentiss*, 273 F.3d at 1280. This test applies whether it is the status of the defendant or victim that is at issue. *Diaz*, 679 F.3d at 1187.

In its Remand Order, this Court clearly set forth the inquiry the District Court was to undertake by stating, "First, the status as Indians of Appellant's victims. The District Court must determine whether (1) the victims had *some* Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government." Remand Order at 3 (emphasis added) (citing *Diaz*, 679 F.3d at 1187; *Prentiss*, 273 F.3d at 1280-81).

At the remanded hearing, the State urged the court to ignore the clear language of what this Court had ordered. Specifically, despite that the Remand Order clearly directed the District Court to determine if the victims had "some Indian blood," the State nonetheless urged the District Court to require a showing of a "significant percentage of Indian blood." State Remand Brief at 11 (citing

Goforth v. State, 1982 OK CR 48 ¶ 6, 644 P.2d 114, 116). Beyond including the word "significant" in its description of what the court was required to find, the State made no effort to define how much blood is enough to satisfy its proposed standard.

As with the procedural bar issue discussed above, the State laid out its arguments for why the standard should be "significant percentage" as opposed to "some blood" in its Pre-Remand Brief in this Court. State's Pre-Remand Brief at 4. Having that argument before it and giving it due consideration, this Court chose not to adopt the State's proposed "significant percentage" requirement, and instead required that Petitioner demonstrate the victims had "some Indian blood." Remand Order at 3. Moreover, there are several persuasive arguments for why the test should be "some Indian blood" as opposed to "significant percentage." In fact, the State identified many of those reasons in its Pre-Remand Brief in this Court.[5]

"*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." State Pre-Remand Brief at 5, citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) ("tribes retain power...to determine tribal membership"). If a tribe is satisfied that a certain quantum of Indian blood is sufficient to afford someone citizenship in the tribe, that choice should be respected.

Second, focusing the inquiry more on tribal membership and less on how much Indian blood someone has before deciding what laws apply to them "avoids the constitutional pitfalls of giving the term 'Indian' a racial definition that could run afoul of the Equal Protection Clause."

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[5] The State made these arguments in connection to its position regarding the second step in the "Indian status" test—namely, recognition by a tribe—but the same arguments advanced by the State in that context are even more persuasive in this one.

State's Pre-Remand Brief at 6, citing *United States v. Bruce*, 394 F.3d 1215, 1233-34 (9th Cir. 2005) (Rymer, J., dissenting). The Constitution permits the government to enact laws treating Indians differently precisely because Indians are treated "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." State's Pre-Remand Brief at 6, citing *Morton v. Mancari*, 417 U.S. 535, 554 (1974). As the State emphasized: "[W]hat is important to avoid constitutional prohibitions on race discrimination is treating Indians differently only because of their membership in the tribe." State's Remand Brief at 6, citing *Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000) (finding unconstitutional a statute treating native Hawaiians differently based on race rather than membership in a quasi-sovereign).

Finally, the two-part test discussed above traces its origins to *United States v. Rogers*, 45 U.S. 567 (1846). There, the Supreme Court was considering the case of a non-Indian who killed another non-Indian on an Indian reservation. The defendant sought to defeat the court's jurisdiction by claiming he had renounced his United States citizenship and had been adopted by the Cherokee Tribe. He had no Indian blood at all. In rejecting his argument that he should be considered an Indian, the Supreme Court reached the unremarkable conclusion that a person with absolutely no Indian blood cannot qualify as an Indian for purposes of determining where jurisdiction over crimes committed by that person should lie. *Id.* at 571-73. Thus, from *Rogers* comes the long-standing requirement that a person claiming Indian status must at least have *some* Indian blood. The State's attempt to impose a higher burden to establish one's Indian status is contrary to federal law and should be rejected.

Congress recently rejected the notion that any minimum blood quantum is required to be entitled to the benefits that come along with citizenship in one of the Five Tribes. *See* Stigler Act Amendments of 2018, P.L. 115–399 (extending restrictions on alienation of property for any

citizen of the Five Tribes "of whatever degree of Indian blood"). *See also* Statement of Rep. Tom Cole upon passage of the Stigler Act Amendments, *available at* https://cole.house.gov/media center/press-releases/cole-and-mullin-praise-final-passage-stigler-act-amendments (last visited 11/3/20) ("Without question and especially in Oklahoma, Native American heritage is something to be celebrated. But that special heritage must also be protected, preserved and passed on. Land ownership is part of that unique inheritance for many tribal citizens and their descendants, and over the years, the Stigler Act has unfortunately diminished that rightful inheritance *due to an unfair blood quantum requirement*") (emphasis added).

CONCURRENT JURISDICTION UNDER THE GENERAL CRIMES ACT

Finally, in its last-ditch effort to save this case from being dismissed for lack of jurisdiction, the State will likely argue that it shares concurrent jurisdiction with the Federal government under the General Crimes Act, 18 U.S.C. § 1152. *See* State's Pre-Remand Brief at 13-21. The State is wrong for several reasons.

By way of background, the jurisdictional parameters of criminal jurisdiction in Indian Country are clearly defined by federal law. First, under the Major Crimes Act (MCA),[6] federal courts have exclusive jurisdiction over prosecutions for certain enumerated crimes committed by Indians in Indian Country. *See McGirt,* 140 S. Ct. at 2459. Second, Oklahoma lacks jurisdiction over prosecutions of crimes defined by federal law committed by or against Indians in Indian Country under the General Crimes Act (GCA);[7] such crimes are subject to federal or tribal

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

[7] The GCA provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except

jurisdiction. *McGirt*, 140 S. Ct. at 2478. The GCA expressly protects tribal courts' jurisdiction over prosecutions of "a broader range of crimes by or against Indians in Indian Country." *Id.* at 2479. *See United States v. Prentiss*, 273 F.3d 1277, 1278 (10th Cir. 2001) (noting that GCA "establishes federal jurisdiction over 'interracial' crimes, those in which the defendant is an Indian and the victim is a non-Indian, or vice-versa"). Third, Oklahoma has jurisdiction over all offenses committed by non-Indians against non-Indians in Indian Country, but it extends no further. *McGirt* at 2460, citing *United States v. McBratney*, 104 U.S. 621, 624 (1882). *See also* Indian Country Criminal Jurisdiction Chart: justice.gov/usao-wdok/page/file/1300046/download (last visited 11/03/20) (also in the record as Pet. Ex. 6).

McGirt laid to rest Oklahoma's flawed position that the MCA and the GCA do not apply in Oklahoma. Oklahoma's claim to a special exemption from the MCA for the eastern half of Oklahoma was said to be "one more error in historical practice." *McGirt*, 140 S. Ct. at 2471. Oklahoma's use of "statutory artifacts" to argue it was granted criminal jurisdiction in Indian Country was a "twist" even the *McGirt* dissenters declined to join. *Id.* at 2476.

The State continues to use a backwards theory – that there must be an express retention of federal jurisdiction or an express withdrawal of state jurisdiction – when in fact, jurisdiction in Indian Country has historically been exercised only by tribal and federal courts, and states acquire such jurisdiction only by express grants. It is not necessary for a federal statute to "withdraw" jurisdiction from the State in Indian Country. The State does not acquire jurisdiction in Indian

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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.

Country unless a federal statute provides it. Once again—as it did with the burden of proof issue—the State is taking a straight-forward rule regarding Indian Country jurisdiction and turning it on its head.

States may acquire criminal jurisdiction over crimes by or against Indians in Indian Country only if expressly granted by Congress. Congress has granted such jurisdiction in a few statutes applicable to certain states, including Public Law 280, which was originally enacted in 1953.[8] Public Law 280 demonstrates that states may obtain jurisdiction over crimes by or against Indians in Indian Country only by express Congressional *grants* to the states of such jurisdiction. Using wording quite different from the GCA and MCA, section 1162, entitled "State jurisdiction over offenses committed by or against Indians in the Indian Country," expressly granted to certain identified states "*jurisdiction* over offenses *committed by or against Indians*" in Indian Country, and provided that state criminal laws "shall have the same force and effect within such Indian Country as they have elsewhere within the State ..." 18 U.S.C. § 1162(a). Public Law 280 further provided that the MCA and GCA "shall not be applicable within the areas of Indian Country listed in subsection (a). . .as areas *over which the several States [shall] have exclusive jurisdiction.*" 18 U.S.C. § 1162(c) (emphasis added). It authorized application of the MCA and GCA to the listed states only upon tribal request and consent of the Attorney General, and expressly provides that such "jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments." 18 U.S.C. § 1162(c) and (d).

When Congress enacted Public Law 280, Oklahoma declined to exercise the option of voluntarily assuming complete civil and criminal jurisdiction over Indian Country within its

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[8] Act of Aug. 15, 1953, Pub. L. No. 67, Stat. 588, codified at 18 U.S.C. § 1162, 25 U.S.C. § 1321-26.

boundaries. Public Law 280 was amended in 1968 to require tribal consent to acquire such jurisdiction.[9] 18 U.S.C. § 1321. Public Law 280 provides federal consent to "any State *not having jurisdiction* over criminal offenses committed by or against Indians" in Indian Country within the state, if the tribe consents, "to the same extent that such State has jurisdiction over any such offense committed *elsewhere* within the State," and provides that such state criminal laws "shall have the same force and effect within such Indian Country or part thereof as they have elsewhere within that State." 25 U.S.C. § 1321(a)(1) (emphasis added). It provides that, at the request of the tribe and with consent of the Attorney General, "the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of title 18 within the Indian Country of the Indian tribe." 25 U.S.C. § 1321(a)(2). In other words, states wishing to exercise criminal jurisdiction over crimes by or against Indians in Indian Country under Public Law 280, as amended in 1968, may only do so if a tribe consents to state assumption of such jurisdiction; and concurrent federal jurisdiction under the GCA and MCA may be exercised only if the tribe requests it and the Attorney General consents.

Oklahoma has never requested tribal consent to state assumption of jurisdiction under Public Law 280, and Oklahoma tribes have not issued such consent. This Court recognized more than thirty years ago that Oklahoma failed to assume criminal and civil jurisdiction under Public Law 280 before it was amended to require tribal consent, 25 U.S.C. § 1321, and that Oklahoma "does not have jurisdiction over crimes committed by or against an Indian in Indian Country." *See*

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[9] Act of Apr. 11, 1968, 82 Stat. 80, codified 25 U.S.C. §§ 1321-26.

Cravatt v. State, 825 P.2d 277, 279 (Okla. Crim. App. 1992) (citing *State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989)).[10]

This Court recognized federal preemption of State criminal jurisdiction for crimes involving Indians in Indian Country when it found that "[a]lthough §§ 1152 and 1153 provide a broad assertion of federal jurisdiction over crimes committed upon Indian lands, the *preemption of state jurisdiction* is not total." *Goforth v. State,* 1982 OK CR 48,15, 644 P.2d 114, 115-16 (emphasis added). Indeed, the United States Supreme Court has expressly stated that federal jurisdiction in these matters preempts state jurisdiction:

> Mississippi appears to concede, Brief for Appellee in No. 77-575, p. 44, that if § 1153 provides a basis for the prosecution of Smith John for the offense charged, the State has no similar jurisdiction. This concession, based on the assumption that § 1153 ordinarily is *pre-emptive* of state jurisdiction when it applies, seems to us to be correct.

United States v. John, 437 U.S. 634, 651 (1978) (emphasis added).

In addition to 18 U.S.C. § 1162, Congress has on other occasions passed legislation specifically granting states jurisdiction over crimes in Indian Country. In *Negonsott v. Samuels*, 507 U.S. 99 (1993), the Supreme Court noted:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations. Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. § 3243).

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[10] This Court overruled *Ex Parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936), which wrongly held Oklahoma had jurisdiction to convict and sentence a full-blood Choctaw for the murder of another full-blood Choctaw on a restricted Choctaw allotment. *See Klindt*, 782 P.2d at 403.

> Passed in 1940, the Kansas Act was followed in short order by virtually identical statutes granting to North Dakota and Iowa, respectively, jurisdiction to prosecute offenses committed by or against Indians on certain Indian reservations within their borders. See Act of May 31, 1946, ch. 279, 60 Stat. 229; Act of June 30, 1948, ch. 759, 62 Stat. 1161.

Id. at 103-04. The fact Congress had to pass legislation to *grant* jurisdiction to states over crimes committed by *or against* Indians in Indian Country is all the proof necessary to overcome the State's assertion of concurrent jurisdiction under the General Crimes Act.

The State's confusion is particularly apparent in its attempt to rely on scattered phrases in caselaw concerning tribal and state *civil* jurisdiction over non-Indians in Indian Country to interpret the very specific federal statutes governing federal criminal jurisdiction there. The State, with no legal analysis or support, uses these phrases to suggest a "presumption" of state criminal jurisdiction and some new rule of statutory construction that would include consideration of the impact of state criminal jurisdiction in Indian Country on tribal self-government. State's Pre-Remand Brief at 17-18, citing *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (involving an Indian's *tribal court civil* suit against state game wardens for alleged civil rights violations and tort in executing a search warrant on a reservation related to alleged off-reservation state law crimes); *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257–58 (1992) (involving county ad valorem tax on reservation land owned in fee by a tribe or tribal citizens); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (upholding state severance tax on non-Indian production of oil and gas on a reservation, when production was also subject to a tribal severance tax); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148-49 (1984) (involving a *civil suit* for negligence and breach of contract filed by a tribe in state court against a corporation); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 71-74

(1962) (involving enforcement of state anti-fish trap conservation law against member of an Alaska tribe that had no reservation).

The State also cites and provides random quotes from a few civil cases in an attempt to support its weak arguments that "there is no reason to assume" that federal jurisdiction "necessarily precludes concurrent state jurisdiction," and that the GCA "does not clearly preclude state jurisdiction over crimes committed by non-Indians against Indians." State's Pre-Remand Brief at 16. None of the cases cited by Oklahoma address criminal jurisdiction or involve Indians or Indian Country. *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349-52 (2020) (state court suit related to federal environmental laws); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (state law claims concerning warning label requirements for prescription drug); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (state court civil personal injury action); *Silas Mason Co. v. Tax Com'n of State of Washington*, 302 U.S. 186, 207 (1937) (state income tax on receipts by contractors with the United States for dam construction work); *United States v. Bank of New York & Tr. Co.*, 296 U.S. 463, 479 (1936) (state court suits for accounting and delivery filed by the United States, seeking to recover funds held by a bank); and *Claflin v. Houseman*, 93 U.S. 130, 134 (1876) (creditor's state court claim against a debtor subject to federal bankruptcy proceeding). These cases are all irrelevant to interpretation of the GCA and Indian law principles grounded in the United States' special legal relationship with tribes.

THE STATE NEVER HAD JURISDICTION TO CHARGE PETITIONER

Based on the clear record developed at the evidentiary hearing, there is no legitimate question as to whether the State of Oklahoma had jurisdiction to charge, try and sentence Petitioner for a crime against Indians in Indian Country. The answer is clearly "no."

Indian Status of the Victims

All three victims were Indian as that term is defined for purposes of federal jurisdiction. They all had "some Indian blood" and each was recognized as a citizen of the Chickasaw Nation, which is a federally recognized Tribe. *See* Findings of Fact and Conclusions of Law at 2-4.

Indian Country

There is likewise no legitimate question as to whether the crimes occurred in Indian Country. As discussed briefly below and set out in more detail in the District Court's detailed findings of fact and conclusions of law, a series of treaties between the Choctaw Nation, the Chickasaw Nation, and the United States between 1830 and 1866 unquestionably created a reservation for the Chickasaw Nation. Further, having created such reservation, Congress has never disestablished it. Because it is undisputed that the crimes occurred within the boundaries of that reservation, the State lacked jurisdiction.

Pursuant to the authority outlined in the Indian Removal Act of 1830 (Pet. Ex. 7), in the 1830 Treaty of Dancing Rabbit Creek between the United States and the Choctaw Nation the United States granted to the Choctaw Nation certain lands "in fee simple to them and their descendants, to insure to them while they shall exist as a nation and live on it" in exchange for the Choctaw Nation ceding their lands east of the Mississippi River. Pet. Ex. 8, art. 2. Article 4 granted the Choctaw people "the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State." The land granted to the Choctaw Nation was described as: "beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork; if in the limited of

the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning."

Then, in 1837, the Treaty of Doaksville granted the Chickasaw people a "district within the limits of [the 1830 Treaty of Dancing Rabbit Creek territory] to be held on the same terms that the Choctaws now hold it." Pet. Ex. 10. The 1837 Treaty entered between the Choctaws and Chickasaws made the provisions of the 1830 Treaty of Dancing Rabbit Creek applicable to the Chickasaw Nation.

In 1855, the Treaty of Washington reaffirmed the 1837 Treaty of Doaksville and modified the Western boundary of the Chickasaw territory. Pet. Ex. 12. Congress explicitly asserted that "pursuant to [the Indian Removal Act], the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes" and reserved those lands from sale "without the consent of both tribes." *Id.* at art. 1. The 1855 Treaty further reaffirmed the Chickasaw Nation's right of self-government. *Id.* at art. 2.

Finally, following the Civil War, the Chickasaw and Choctaw Nations entered into the 1866 Treaty of Washington with the United States. Pet. Ex. 13. That treaty did not alter the Chickasaw district but reiterated the Choctaw and Chickasaw Nations' rights to self-governance and reaffirmed the rights granted under the previous treaties.

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

at 2461. The Court further stated that the "most authoritative evidence of [a tribe's] relationship to the land. . . lies in the treaties and statutes that promised the land to the Tribe in the first place," *id.* at 2475-76, and specifically noted that Creek treaties promised a "permanent home" that would be "forever set apart," and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. *Id.* at 2461-62. As such, the Supreme Court found that, "[u]nder any definition, this was a [ ] reservation." *Id.* at 2461.

Applying *McGirt* to the case at bar leads to the same conclusion. Under any definition, the treaties discussed above created a reservation for the Chickasaw Nation. Specifically, in the 1830 Treaty of Dancing Rabbit Creek, the Choctaw Nation was granted the land in question "*in fee simple to them and their descendants*, to insure to them while they shall exist as a nation." It secured the rights of self-government and jurisdiction over all persons and property within the Treaty Territory and promised that no state shall interfere with those rights.

These rights applied equally to the Chickasaw Nation under the 1837 Treaty of Doaksville. The Treaty of Doaksville secured to the Chickasaw Nation a "district within the limits of [the Treaty Territory]," and guaranteed them the same privileges, rights of homeland ownership and occupancy that the Choctaw held under the 1830 Treaty.

In the 1855 Treaty of Washington, the Choctaw and Chickasaw governments were made independent of each other. The United States promised that it does "hereby *forever secure and guarantee the lands* embraced within the said limits, to the members of the Choctaw and Chickasaw tribes," and explicitly reserved those lands from sale *"without the consent of both tribes*." It reaffirmed the tribes' rights of self-government, stating "the Choctaws and Chickasaws shall be *secured in the unrestricted right of self-government and full jurisdiction over persons and property within their respective limits*." These treaty rights were once again reaffirmed in the 1866

Treaty of Washington, which was entered when the Chickasaw and Choctaw Nations agreed to cede certain defined lands to the United States for a sum of money. Therefore, like the Creek treaty promises, the United States' treaty promises to the Chickasaw Nation were not made gratuitously.

Applying the reasoning from *McGirt*, the plain wording of the treaties demonstrates the Chickasaw lands were set aside for the Chickasaw people and their descendants and assured the right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. Congress established a reservation for the Chickasaw Nation.

Having created a reservation for the Chickasaw Nation, Congress has never diminished or disestablished that reservation. As discussed above, Petitioner and the State disagree over which party has the burden on the question of disestablishment. Regardless of how the Court resolves that dispute, there is nothing in the record before this Court (because nothing exists) that would show the Chickasaw Reservation has been disestablished.

CONCLUSION

This Court remanded to the District Court of McClain County for an evidentiary hearing to resolve two questions: (1) whether the victims in this case were "Indian," and (2) whether the crimes occurred in Indian Country. The answers to both of those questions overwhelmingly is "yes." Because the State of Oklahoma does not have jurisdiction over crimes committed by or against Indians in Indian Country, the State lacked jurisdiction to charge Petitioner in this case. The Court should grant Petitioner's application for post-conviction relief, and remand to the District Court with instructions to vacate Petitioner's judgment and sentence in CF-10-213.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2020 a true and correct copy of the foregoing document was delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9 (B), Rules of the Court of Criminal Appeals, and was mailed, first-class postage prepaid, to the Office of the District Attorney for McClain County.

Michael W. Lieberman