ORIGINAL

No. PCD-2019-124

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

STATE'S SUPPLEMENTAL BRIEF FOLLOWING REMAND FOR EVIDENTIARY HEARING FROM MCCLAIN COUNTY DISTRICT COURT CASE NO. CF-2010-213

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STATE'S SUPPLEMENTAL BRIEF FOLLOWING REMAND FOR EVIDENTIARY HEARING

The State, by and through Greg Mashburn, District 21 District Attorney and Travis White, First Assistant District Attorney, presents herewith this Supplemental Brief Following Remand for Evidentiary Hearing, and respectfully requests that this Court consider the arguments herein in issuing its final decision on the petitioner Shaun Michael Bosse's jurisdictional claim under *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

STATEMENT OF THE CASE AND FACTS

On September 30, 2020, as directed by this Court, the district court held an evidentiary hearing on the petitioner's claim, raised in his second application for post-conviction relief, that jurisdiction over his capital crimes rests exclusively in the federal courts because his victims were members of the Chickasaw Tribe and he murdered them within the undiminished boundaries of the original Chickasaw Reservation (O.R. 92-93;

Tr.[1]). Ahead of the hearing, the parties submitted stipulations and documentation establishing that the victims were all members of the Chickasaw Nation and that they had the following quanta of Indian blood—Katrina Griffin: 23/128 (18%); C.G.: 23/256 (9%); and C.H.: 23/256 (9%) (O.R. 158, 160-62).[2] Following the evidentiary hearing, the representatives of the State presented separate proposed findings of fact and conclusions of law (O.R. 1038-1081). The Attorney General submitted proposed findings and conclusions that took no position on the Indian Country or Indian status issues (O.R. 1040, 1044). The District Attorney submitted proposed findings and conclusions that took no position on Indian Country, but that urged the district court to consider case law from other jurisdictions requiring a certain blood quantum, generally 1/8 (12.5%), for an individual to be considered Indian for purposes of federal criminal jurisdiction (O.R. 1047-1054). The District Attorney did "not advocate a particular blood quantum as a cut-off for satisfying the first prong" but requested that "[the district court]—and ultimately [this Court]—**make a judicial determination as to what blood quantum is required to satisfy the first prong**" to ensure consistency between the state and federal courts (O.R. O.R. 1049 n.4).

[1] "Tr." refers to the September 30, 2020 transcript of the petitioner's evidentiary hearing, filed in this Court on October 15, 2020.

[2] Given the applicable page limitation, this brief focuses the Statement section on the background relevant to the issues raised herein.

On October 13, 2020, the district court issued its Findings of Fact and Conclusions of Law (O.R. 1071-1080). As to Indian status, the district court acknowledged the District Attorney's blood quantum argument and the various definitions employed by other jurisdictions; "[h]owever, the OCCA was clear in its mandate when it ordered this Court to determine 'whether the victims had *some* Indian blood'" (O.R. 1073). Accordingly, based on the stipulated blood quanta of the victims, the district court found the victims had "some" Indian blood (O.R. 1073). The district court further found that the victims were enrolled members of the Chickasaw Tribe, and thus, with both Indian blood and recognition by a Tribe, all three victims were Indian for purposes of criminal jurisdiction (O.R. 1073-1074). Finally, the district court determined "that Congress established a reservation for the Chickasaw Nation, and Congress never specifically erased those boundaries and disestablished the reservation. Therefore, the crime occurred in Indian Country" (O.R. 1080).

Now before this Court, the District Attorney (hereinafter, "the State") files this brief to address only four issues. First, this Court must decide how to define the first prong of the Indian status test, that is, the requirement of Indian blood. Second, even assuming this Court accepts the district court's findings of fact and conclusions of law in full, the State respectfully re-urges the position from the Attorney General's pre-remand brief that the State possesses concurrent jurisdiction over crimes by non-Indians against Indians that occur in Indian Country. Third, the State respectfully asks this Court to

reconsider the Attorney General's previous position that the petitioner's jurisdictional claim is barred. Finally, should this Court disagree with all of these positions and grant relief on the petitioner's claim, the State asks that this Court stay its order for thirty days.

I. THIS COURT MUST DECIDE HOW TO DEFINE THE FIRST PRONG OF THE INDIAN STATUS TEST.

"The term 'Indian' is not statutorily defined, but courts have judicially explicated its meaning." *United State v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). In order to qualify as an "Indian" for purposes of invoking an exception to state jurisdiction, a defendant must prove two facts/prongs: 1) that he has some, or a significant percentage of, Indian blood and 2) tribal or governmental recognition as an Indian. Compare *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116 (requiring a "significant percentage" of Indian blood); with (O.R. 5 n.3 (requiring "some Indian blood" (citing *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001) (en banc), overruled on other grounds by *United States v. Cotton*, 535 U.S. 625, 631 (2002))). The United States Supreme Court has established that a determination of "Indian" blood is a factor in determining Indian status. See *United States v. Rogers*, 45 U.S. 567, 571 (1846).[3] Thus, Indian status requires not just official recognition as Indian, but also Indian blood. *Diaz*, 679 F.3d at 1188.

[3] *Rogers* remains binding precedent. See *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (courts are bound by the Supreme Court's precedents "until [the Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality" (quotation marks omitted)); see also *Bruce*, 394 F.3d at 1225 (explaining, in response to the dissent's equal protection

"[T]here does not appear to be a universal standard specifying what percentage of Indian blood is sufficient to satisfy the first prong." *State v. George*, 422 P.3d 1142, 1145 (Idaho 2018). Different jurisdictions employ differing adjectives for the degree of Indian blood required—referring to "some" Indian blood, see, e.g., *Diaz*, 679 F.3d at 1187; *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976); "sufficient" Indian blood, see, e.g., *United States v. LaBuff*, 658 F.3d 873, 874-75 (9th Cir. 2011); "substantial" Indian blood, see, e.g., *Vialpando v. State*, 640 P.2d 77, 79-80 (Wyo. 1982); or "significant" Indian blood, see, e.g., *State v. Perank*, 858 P.2d 927, 932 (Utah 1992); *Goforth*, 1982 OK CR 48, ¶ 6, 644 P.2d at 116. Indeed, as noted above, this Court's precedent in *Goforth* required a "significant" degree of Indian blood, while the remand order referred to "some" blood.

Various courts analyzing the question of Indian status for purposes of determining criminal jurisdiction have held that the amount of Indian blood is relevant to whether the first prong is established. See, e.g., *United States v. Loera*, 952 F. Supp. 2d 862, 870 (D. Ariz. 2013) (finding that the defendant "barely" met the first prong where he "is 3/16th, or one and one-half eighths, Fort Mojave Indian by blood quantum"); *Bruce*, 394 F.3d at 1223 ("The generally accepted test for Indian status considers . . . the degree of Indian blood . . . ." (quotation marks omitted)); *Prentiss*, 273 F.3d at 1282-83 (applying the "some" blood test and holding that evidence that victims were members of Tesuque Pueblo was

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concerns, that "until either Congress acts or the Supreme Court...revises" the test it suggested in *Rogers*, courts are "bound by the body of case law which holds that enrollment . . . is not dispositive of Indian status").

insufficient to show Indian status absent evidence of "any Indian blood"); *In re Garvais*, 402 F. Supp. 2d 1219, 1225 (E.D. Wash. 2004) (noting the habeas petitioner's "limited" blood quantum and "[c]umulating" the Indian blood from his mother and father to determine his "total Indian blood"); *Perank*, 858 P.2d at 933 (concluding that one-half Indian blood met first prong because "[p]ersons with less than one-half Indian blood have been held to have a significant degree of Indian blood"); *St. Cloud v. United States*, 702 F. Supp. 1456, 1460 (D.S.D. 1988) (comparing the defendant's blood quantum to the blood quanta of defendants found in other cases to be "Indian" to determine whether he had "some" Indian blood); *Vialpando*, 640 P.2d at 80 ("We hold that one-eighth Indian blood is not a 'substantial amount of Indian blood' to classify appellant as an Indian."); see also *United States v. Cruz*, 554 F.3d 840, 851 (9th Cir. 2009) (Kozinski, C.J., dissenting) (noting that the "defendant has the *requisite amount* of Indian blood" (emphasis added)); cf. also *United States v. Maggi*, 598 F.3d 1073, 1080-81 (9th Cir. 2010), overruled on other grounds by *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (en banc) (questioning, but not deciding, whether 1/64 Blackfeet blood was sufficient for first prong, where "Maggi has just one full-blooded Blackfeet ancestor in seven generations or, put another way, 1/64 Blackfeet blood corresponds to one great-great-great-great-great grand-parent who was

full-blooded Blackfeet, and sixty three great-great-great-great-great grandparents who had no Blackfeet blood").[4]

Courts have trended toward a minimum quantum of 1/8, or 12.5%, Indian blood. See, e.g., *George*, 422 P.3d at 1145 (first prong met where it was "undisputed that George has 22% Indian blood"); *United States v. Nowlin*, 555 F. App'x 820, 823 (10th Cir. 2014) (unpublished) (finding first prong satisfied by "31/128 Indian blood" (24 percent) and noting that "[t]he first prong is met when the defendant's 'parent, grandparent, or great-grandparent is clearly identified as an Indian'"[5] (quoting *Maggi*, 598 F.3d at 1077) (alteration adopted)); *Loera*, 952 F. Supp. 2d at 870 (finding that the defendant "barely" met the first prong where he "is 3/16th, or one and one-half eighths, Fort Mojave Indian by blood quantum"); *Cruz*, 554 F.3d at 845-46 ("Cruz concedes that he meets the first prong of the test since his blood quotient is twenty-two percent Blackfeet"); *State v. Reber*, 171 P.3d 406, 410 (Utah 2007) ("[W]e have found no case in which a court has held that 1/16th Indian blood, as claimed by defendants, qualifies as a 'significant degree of Indian blood.'"); *Bruce*, 394 F.3d at 1227 ("one-eighth Chippewa blood line" sufficient for first prong); *Perank*, 858 P.2d at 933 ("more than one-half Indian blood" sufficient for first

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[4] *Zepeda* overruled *Maggi* only to the extent *Maggi* held that the defendant's blood quantum had to come from a "federally recognized tribe." *Zepeda*, 792 F.3d at 1106.

[5] An Indian great-grandparent would give a defendant a blood quantum of 1/8. Otherwise, the Tenth Circuit has given little indication where it would draw the line as to minimum blood quantum required for Indian status. This only strengthens the need for a clear test by Oklahoma state courts, however, as defendants charged in federal court in Oklahoma will look to the precedent of other jurisdictions in arguing that Indian status has not been shown.

prong); *United States v. Driver*, 755 F. Supp. 885, 888 & n. 6 (D.S.D. 1991) (finding "7/32 Indian" blood (21.9 percent) sufficient for first prong and concluding that the Eighth Circuit had indicated that one-eighth to one-fourth blood quantum was sufficient for purposes of 18 U.S.C. § 1153); *St. Cloud*, 702 F. Supp. at 1460 ("St. Cloud's 15/32 of Yankton Sioux blood [46.9 percent] is sufficient to satisfy the first requirement of having a degree of Indian blood."); *Goforth*, 1982 OK CR 48, ¶ 7, 644 P.2d at 116 (first prong satisfied with testimony that "appellant was slightly less than one-quarter Cherokee Indian"); *Makah Indian Tribe v. Clallam Cty.*, 440 P.2d 442, 444 (Wash. 1968) ("one-fourth Indian blood" sufficient to "legally qualify as a tribal Indian"); see also *Bruce*, 394 F.3d at 1223-24 (collecting cases where blood quantum was sufficiently large, all of which involved a quantum of 1/8th or more); Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 Am. Indian L. Rev. 177, 187 (2011) ("The state and federal cases collectively seem to indicate that a blood requirement of *more than* one-sixteenth (1/16) will be required to satisfy the first prong of the *Rogers* test." (emphasis added)); but see *State v. Nobles*, 818 S.E.2d 129, 136 (N.C. App. 2018) ("Here, the trial court found, and neither party disputes, that Rogers' first prong was satisfied because defendant has an Indian blood quantum of 11/256 or 4.29%."); *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) ("The parties agree that the first *Rogers* criterion is satisfied because

Stymiest has three thirty-seconds Indian blood.")[6]; *Vialpando*, 640 P.2d at 80 ("We hold that one-eighth Indian blood is not a 'substantial amount of Indian blood' to classify appellant as an Indian.").

In this case, the district court avoided this issue when raised by the District Attorney, treating the requirement of *some* Indian blood as *any* Indian blood (O.R. 1073). Indeed, the State recognizes that this issue presents a unique and challenging legal issue for the courts to resolve, particularly as it relates to a legal determination of whether there is a threshold requirement for Indian blood quantum when determining whether State or Federal criminal jurisdiction applies.

> [T]here appears to be something odd about a court of law in a diverse nation such as ours deciding whether a specific individual is or is not "an Indian." Yet, given the long and complex relationship between the government of the United States and the sovereign tribal nations within its borders, the criminal jurisdiction of the federal government often turns on precisely this question—whether a particular individual "counts" as an Indian—and it is this question that we address once again today.

Cruz, 554 F.3d at 842 (footnote omitted). As in *Cruz*, this is a question this Court must address, given the petitioner's *McGirt* claim and the numerous *McGirt* claims being raised by defendants across the State of Oklahoma, involving a large range of blood quanta.[7]

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[6] As indicated above, in both *Nobles* and *Stymiest*, the court noted that the parties did not dispute that the first prong was met, such that the court was not actually called upon to decide the issue. Accordingly, it is unclear how each court would have held had it been so called upon.

[7] The concept of defining Indian status by blood quantum, as antiquated as it may seem, is not limited to judicially created tests. See, e.g., 25 U.S.C. § 5132 (excluding from eligibility for certain loans given to Indians any "individual of less than one-quarter degree of Indian blood"); *Morton v. Mancari*, 417 U.S. 535, 549 & n.23 (1974) (noting an Executive Order that allows a civil service

The district court's avoidance of the issue, and treatment of "some" as "any," is complicated by a number of issues. First, while the district court correctly recognized that the remand order directed the court to apply the "some" blood test, this Court's binding, published precedent in *Goforth* requires a "significant" percentage of Indian blood. This Court must decide which test controls. Second, as outlined above, even courts applying the requirement of "some" Indian blood nevertheless treat this test as containing a threshold amount. See, e.g., *Bruce*, 394 F.3d at 1223-24; *St. Cloud*, 702 F. Supp. at 1460; see also Oakley, *Defining Indian Status*, 35 Am. Indian L. Rev. at 187 (surveying state and federal courts that use varying adjectives for the Indian blood required and concluding that they "collectively seem to indicate that a blood requirement of more than one-sixteenth (1/16) will be required to satisfy the first prong of the *Rogers* test").

As an additional matter, unlike in state court where the State is presumed to have jurisdiction, in federal court, Indian status is an essential element that must be alleged in an indictment, submitted to the jury, and proven at trial by the government beyond a reasonable doubt. *Prentiss*, 206 F.3d at 974-80; see *United States v. Langford*, 641 F.3d 1195, 1196 (10th Cir. 2011) ("The Indian/non–Indian statuses of the victim and the defendant are essential elements of any crime charged under 18 U.S.C. § 1152" (quotation marks omitted, alteration adopted)). Thus, a state court's determination that an individual is

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preference for "'positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to the providing of services to Indians when filled by the appointment of Indians who are one-fourth or more Indian blood'").

Indian, precluding state jurisdiction, must be made with an eye toward federal court and whether the government will be able to prove Indian status under the applicable law and to a jury beyond a reasonable doubt. In other words, to avoid this discussion of blood quantum would run the risk of a **jurisdictional *loophole***—a defendant could have his state court conviction vacated only later to successfully argue in federal criminal proceedings that he is not "Indian" due to a low blood quantum and thereby escape justice.

On that note, it is not clear in the law that a defendant who argues he is an Indian in state court would be estopped from arguing the opposite in federal court. Cf. *United States v. Green*, 886 F.3d 1300, 1304 (10th Cir. 2018) (generally litigants "cannot waive the argument that the district court lacks subject-matter jurisdiction"); *St. Cloud*, 702 F. Supp. at 1458 ("St. Cloud's plea of guilty to a federal offense does not waive a lack of subject matter jurisdiction."). In fact, the defendant did exactly that in *State v. Dennis*, 840 P.2d 909, 910 (Wash. App. Ct. 1992), obtaining dismissal of his state charges on the argument that he *was* an Indian for purposes of federal criminal jurisdiction and then obtaining dismissal of his federal charges on the argument that he *was not* an Indian within the meaning of the Major Crimes Act. As *Dennis* illustrates, if Oklahoma state courts do not apply a test on the first prong that substantially conforms with the test applied by federal courts, particularly in the Tenth Circuit, a jurisdictional loophole could result and criminals could escape justice entirely. This Court must prevent such a loophole.

In sum, the State does not advocate a particular blood quantum as a cut-off for satisfying the first prong. Nor does the State seek to define who is, or is not, Indian for any purpose other than criminal jurisdiction. Rather, to promote consistency with other courts and avoid a jurisdictional loophole, the State has surveyed the case law to guide this Court as to how other jurisdictions have defined the first prong and explained the risk of a jurisdictional loophole if this issue is not addressed. The State further respectfully urges this Court to decide the controlling standard for the first prong of the Indian status test, what, if any, threshold blood quantum is required for that standard, and whether the blood quanta at issue here are sufficient to satisfy that standard. As stipulated to by the parties, C.G. and C.H. each had 23/256 Indian blood quantum, or 9% (O.R. 158). Ms. Griffin had 23/128 Indian blood quantum, or 18% (O.R. 162).[8] Keeping in mind the law of other courts and the risk of a jurisdictional loophole described above, this Court must determine whether these blood quanta are sufficient to prove Indian status.

II. EVEN ASSUMING THIS CASE OCCURRED IN INDIAN COUNTRY, THE STATE HAS CONCURRENT JURISDICTION WITH THE FEDERAL GOVERNMENT OVER CRIMES BY NON-INDIANS AGAINST INDIANS IN INDIAN COUNTRY.

[8] As the petitioner received separate murder convictions and death sentences for each victim, Indian status—as well as the question of jurisdiction—must be determined individually as to each victim. For instance, if this Court finds the children were not Indian, the State indisputably had jurisdiction over the murders of non-Indians by a non-Indian, even on a reservation.

Assuming this Court determines that any or all of the victims were Indian, and agrees with the district court that the petitioner committed these murders within the boundaries of the Chickasaw Nation Reservation, the State nevertheless had jurisdiction in this case under the General Crimes Act.[9] In its remand order, this Court directed that, "[u]pon Petitioner's presentation of *prima facie* evidence as to the legal status as Indians of Petitioner's victims, and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction" (O.R. 2-3). The State will now meet that burden.

The State respectfully re-urges the arguments raised in the Attorney General's pre-remand brief for why the State possesses jurisdiction concurrent with the federal government under the General Crimes Act (O.R. 34-42). To summarize, the text of the General Crimes Act—the only statute upon which the petitioner relies—does nothing to preempt state jurisdiction:

> 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.

[9] The State's brief to the district court preserved this concurrent jurisdiction argument while acknowledging same was not within the scope of this Court's remand order (O.R. 1028 n.3).

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. See *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"). As *McGirt* said with respect to reservation status, see *McGirt*, 140 S. Ct. at 2462, 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 the petitioner. See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("unless [it] was the clear and manifest purpose of Congress," courts cannot find preemption of state police powers merely because Congress also provided for federal jurisdiction (citation omitted)).

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, for all of the reasons already provided by the State in its pre-remand brief (O.R. 36-41), the reasoning of these decisions lacks merit.

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 of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 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.[10] 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

[10] *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.

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. 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 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. For the reasons above and in the State's pre-remand brief, even assuming the Chickasaw Reservation has not been diminished or disestablished, and that Petitioner's victims were Indians, the State had jurisdiction to prosecute.

III. THE STATE RESPECTFULLY URGES THIS COURT TO RECONSIDER ITS REJECTION OF THE STATE'S PROCEDURAL DEFENSES.

As previously shown by the State, the petitioner's jurisdictional claim is barred based on the limitations in 22 O.S.2011, § 1089(D)(8), on successive capital post-conviction applications; the 60-day rule in Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal*

Appeals, Title 22, Ch. 18, App (2011); and the doctrine of laches (O.R. 43-70).[11] This Court previously rejected these arguments, finding that the petitioner's jurisdictional claim "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)" (O.R. 4). The State respectfully urges this Court to reconsider that conclusion.

Jurisdictional claims such as the petitioner's were available long prior to *McGirt*. In **1962**, the Supreme Court reversed the judgment of the Washington Supreme Court affirming the conviction of an Indian on a reservation which the Washington Supreme Court had erroneously determined to be disestablished. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). This is just one of a number of cases in which the Supreme Court has considered such claims in the decades preceding *McGirt*. See e.g., *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 466 U.S. 463 (1984); see also *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (although not a criminal case, applying prior Supreme Court cases on reservation diminishment to the facts of a particular reservation).

This Court has also been called upon to determine whether a crime took place in Indian country many times in the history of the state. See, e.g., *Eaves v. State*, 1990 OK CR 42, ¶ 2, 795 P.2d 1060, 1061 (determining whether the crime took place within a dependent Indian community because the parties agreed there was no question as to a restricted

[11] The State's brief to the district court preserved these procedural arguments while acknowledging same were not within the scope of this Court's remand order (O.R. 1028 n.3).

allotment or reservation); *C.M.G. v State*, 1979 OK CR 39, ¶ 9, 594 P.2d 798, 801 (agreeing with the State that the land in question was not a reservation and thus, proceeding to determine whether it was a dependent Indian community). In **1963**, an inmate sought a writ of habeas corpus, alleging the crime was committed on an Indian reservation. *Ellis v. State*, 1963 OK CR 88, 386 P.2d 326. This Court held that the reservation was disestablished. *Id.*, 1963 OK CR 88, ¶¶ 18-24, 386 P.2d at 330-31. In **2005**, this Court declined to hold that the Creek Reservation—the subject of the Supreme Court's decisions in *McGirt* and *Murphy*—was intact because the federal courts had not addressed the question. *Murphy v. State*, 2005 OK CR 25, ¶¶ 47-52, 124 P.3d 1198, 1207-08.

The right to challenge a state court conviction based on an allegation that the crime occurred within the limits of an undiminished Indian reservation has been recognized for *decades* and Oklahoma inmates have invoked that right. There is simply no way it can be said that the petitioner's jurisdictional claim could not have been reasonably formulated prior to *McGirt* or that *McGirt* represented an intervening change in constitutional law. Indeed, the petitioner filed his post-conviction application **before** the Supreme Court's decision in *McGirt*. Thus, the jurisdictional claim was actually available before *McGirt*.

Indeed, in *McGirt*, the Supreme Court explained that its decision was dictated by precedent and was simply an application of that precedent to the Creek Reservation. *McGirt*, 140 S. Ct. at 2462-64, 2468-69; see also *Valdez v. State*, 2002 OK CR 20, ¶¶ 21-22, 46

P.3d 703, 709-10 (finding a claim not previously unavailable where other defendants in Oklahoma and across the county had raised similar claims); *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)); accord *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.").

The State recognizes that the Supreme Court's *McGirt* decision upset settled expectations within this state. *See McGirt*, 140 S. Ct. at 2480-81 (addressing the dissent's argument that the Court's decision upsets "'more than a century [of] settled understanding'") (quoting *McGirt*, 140 S. Ct. at 2502 (Roberts, C.J., dissenting) (alteration adopted)). However, a claim under the Major Crimes Act or General Crimes Act nonetheless could have reasonably been formulated before that decision and, in fact, was formulated by this petitioner and by the petitioner in *Murphy*. *McGirt* did not change the law, but merely applied it to the Creek Reservation and reached a conclusion inconsistent with what has been assumed about Oklahoma since statehood. Section 1089(D) contains no exception for unexpected <u>results</u>; only for <u>claims</u> that could not have been <u>formulated</u>.

Respectfully, for the reasons above, and the reasons in the State's pre-remand brief, the State urges this Court to reconsider its conclusion that the petitioner's jurisdictional claim was previously unavailable and find same to be barred.

IV. ANY ORDER GRANTING RELIEF SHOULD BE STAYED FOR THIRTY DAYS.

Should this Court reject the State's concurrent jurisdiction and procedural arguments and find the petitioner is entitled to relief based on the district court's findings, the State respectfully requests this Court stay any order reversing the convictions in this case for thirty days to allow the United States Attorney's Office for the Western District of Oklahoma to secure custody of the petitioner. Cf. 22 O.S.2011, § 846 (providing that "[i]f the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as it deems reasonable to await a warrant from the proper county for his arrest").

CONCLUSION

For all of the foregoing reasons, the State of Oklahoma, by and through the Office of the District Attorney, respectfully urges this Court to deny relief on the petitioner's jurisdictional claim. Alternatively, the State requests that any order granting relief be stayed for thirty days.

Respectfully Submitted,

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I certify that on the date of filing, a true and correct copy of the foregoing was mailed to:

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