ORIGINAL

No. PCD-2015-698

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MILES STERLING BENCH,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT AFTER REMAND

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THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

SUPPLEMENTAL BRIEF OF RESPONDENT AFTER REMAND

Miles Sterling Bench (hereinafter, "Petitioner") claims the State of Oklahoma lacked jurisdiction over his capital murder because he is Indian and his crime occurred in Indian Country (hereinafter, "jurisdictional claim"). The district court below found that the elements of Petitioner's jurisdictional claim were established but the claim was waived because Petitioner did not raise it until his post-conviction application. For the reasons below, this Court should conclude this claim is waived. Alternatively, should this Court find Petitioner is entitled to post-conviction relief, this Court should stay any order granting relief for thirty days to allow federal authorities to take custody of Petitioner.

I. BACKGROUND OF PETITIONER'S CLAIM.

On June 6, 2012, Petitioner unleashed a prolonged, brutal, and relentless attack on 16-year-old B.H., ultimately hitting and stomping her to death in the Tepee Totem convenience store where he worked in Velma, Oklahoma. *Bench v. State*, 2018 OK CR 31, ¶¶ 2-17, 431 P.3d 929, 943-44. Petitioner was convicted by a jury of Murder in the First Degree (Malice Aforethought) in Case No. CF-2012-172 in the District Court of Stephens County. The jury found the existence

of two aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel; and (2) Petitioner posed a continuing threat to society. The jury sentenced Petitioner to death. The district court imposed judgment and sentence in accordance with the jury's verdict. This Court affirmed the judgment and sentence on direct appeal. *Bench*, 2018 OK CR 31, ¶ 235, 431 P.3d at 983, *cert. denied, Bench v. Oklahoma*, 140 S. Ct. 56 (2019).

On March 15, 2018, Petitioner filed the instant application for post-conviction relief ("P.C. App."). For the first time, Petitioner raised his jurisdictional claim, arguing that the State lacked jurisdiction in his case because he is allegedly Indian and his crime occurred within the boundaries of the alleged Chickasaw Nation Reservation (P.C. App. at 1-15). Petitioner based his jurisdictional claim on the Tenth Circuit's August 2017 decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), holding that the Creek Nation's Reservation had not been disestablished (P.C. App. at 2-3). In cursory fashion, Petitioner also claimed appellate counsel was ineffective for not raising his jurisdictional claim on direct appeal, offering a single sentence of argument in support (P.C. App. at 49 ("Appellate counsel failed to raise the lack of state jurisdiction . . . .")).

On July 9, 2020, the United States Supreme Court held in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020), that the Creek Nation's Reservation had not been disestablished. On the same day, and for the reasons stated in *McGirt*, the Court also affirmed the Tenth Circuit's decision in *Murphy*. *Sharp v. Murphy*, 140 S. Ct. 2412 (2020).

On August 14, 2020, this Court remanded Petitioner's post-conviction proceedings for an evidentiary hearing ("Order"), directing the district court to hold a hearing to determine (1) "the Appellant's status as an Indian"; and (2) "whether the crime occurred in Indian Country" (Order at 3). This Court instructed that the parties could "enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court" (Order at 4).

On October 5, 2020, counsel for Petitioner and the State appeared before the Honorable G. Brent Russell, District Judge of Stephens County (O.R. 987; Tr. 5-6).[1] The Chickasaw Nation appeared as Amicus through Debra Gee (O.R. 987; Tr. 6). Ahead of the hearing, the parties filed Stipulations (O.R. 838-39). On November 5, 2020, the district court issued its Findings of Fact and Conclusions of Law (O.R. 987-96).

The parties stipulated that Petitioner "has 1/64 Choctaw blood and was an enrolled member of the federally recognized Choctaw Nation at the time of the crime" (O.R. 838).[2] The parties further stipulated that the address of the crime

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[1] "O.R." refers to the 1,001-page Original Record filed in this Court on November 23, 2020, and "Tr." refers to the transcript of the October 5, 2020, hearing held in the district court.

[2] Although not within the scope of the remand order, in the interest of completeness, the parties also stipulated that B.H. had "31/128 Indian blood and was an enrolled member of federally recognized Choctaw Nation of Oklahoma" (O.R. 839). If for any reason this Court concludes that Petitioner was not Indian, but that B.H. was Indian, then the State nonetheless had jurisdiction, concurrent with the federal government, over this crime and post-conviction relief must be denied. The plain text of the General Crimes Act does nothing to preempt state jurisdiction, *see* 18 U.S.C. § 1152, and *McGirt* firmly established that statutory interpretation begins and ends with a statute's plain text, *see McGirt*, 140 S. Ct. at 2462-63, 2468-74. Although the statute refers to the "exclusive jurisdiction of the United States," it does not confer exclusive jurisdiction on

was "within the historical geographic area of the Chickasaw Nation, as set forth in the 1855 and 1866 treaties between the Chickasaw Nation, the Choctaw Nation, and the United States" (O.R. 839).

As to Indian status, the district court found based on the stipulations that Petitioner "has some Indian blood and is recognized as an Indian by a tribe or the federal government" (O.R. 988). Thus, Petitioner "was an Indian defendant" (O.R. 989). As to the Indian Country issue, the district court applied *McGirt* and

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the United States. Rather, it incorporates the body of laws which applies in places where the United States has exclusive jurisdiction into Indian Country. As the Supreme Court has already held, the phrase "within the sole and exclusive jurisdiction of the United States" specifies what law applies (*i.e.* the law that applies to federal enclaves that are within the exclusive jurisdiction of the United States), not that the federal government's jurisdiction is exclusive. *Ex parte Wilson*, 140 U.S. 575, 578 (1891) (under the General Crimes Act "the jurisdiction of the United States courts was not sole and exclusive over all offenses committed within the limits of an Indian reservation" because "[t]he words 'sole and exclusive,' in [the General Crimes Act] do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it"); *see also Donnelly v. United States*, 228 U.S. 243, 268 (1913); *United States v. White*, 508 F.2d 453, 454 (8th Cir. 1974). The Supreme Court has stated that by admission into the Union, a state on equal footing with other states "has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, . . . and that [a] reservation is no longer within the sole and exclusive jurisdiction of the United States," unless Congress expressly provides otherwise. *United States v. McBratney*, 104 U.S. 621, 623-24 (1881). There is no reason to assume that, merely because the federal government has jurisdiction over a certain matter, such jurisdiction necessarily precludes concurrent state jurisdiction. Rather, in general, the state and federal governments "exercise concurrent sovereignty." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). Thus, "the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Id.* (citing *United States v. Bank of New York & Tr. Co.*, 296 U.S. 463, 479 (1936) ("It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive.")). Indeed, there is a "'deeply rooted presumption in favor of concurrent state court jurisdiction' over federal claims," and that presumption applies with even more force against arguments attempting to "strip[] state courts of jurisdiction to hear their own *state* claims"—Congress does not "take such an extraordinary step by implication," and to do so Congress must be "[e]xplicit, unmistakable, and clear." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349-52 (2020) (citation omitted). That takes us back to the text of the General Crimes Act which, as explained above, does not clearly preclude state jurisdiction over crimes committed by non-Indians against Indians in Indian Country.

determined that "Congress established a reservation for the Chickasaw Nation" (O.R. 992). The district court further found that "[n]o evidence was presented . . . to establish Congress erased or disestablished the boundaries of the Chickasaw Nation. Without such, this Court cannot find that the Chickasaw reservation was disestablished" (O.R. 993). As a result, the Court concluded "that the subject crime occurred in Indian Country" (O.R. 993).

The district court additionally found, by Petitioner's own admission, that he did not raise his jurisdictional claim until his post-conviction application (O.R. 993). Accordingly, Petitioner's claim was subject to the provisions of 22 O.S.2011, § 1089(C), limiting the grounds for relief available on capital post-conviction review (O.R. 993). While Petitioner asserted the claim could not have been earlier raised because the legal basis for the claim was previously unavailable,

> [t]he United States Supreme Court in McGirt v. Oklahoma, 140 [S]. Ct. 2452 (2020), seems to disagree. The McGirt (sic) Court clearly indicated that its ruling was saying nothing new, and recognized that Oklahoma had been dealing with the issue as far back as 1989, citing State v. Klindt, 782 P. 2d 401 (Okla. Crim. App. 1989), and United States v. Sands, 968 F. 2d 1085 (CA 10,1992).
>
> Further, the McGirt Court specifically recognized that "Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on post-conviction review in criminal proceedings." The McGirt Court further set out that "Oklahoma appears to apply a general rule that 'issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review'," citing Logan v. State, 293 P. 3d 969 (Okla. Crim. [App.] 2013).
>
> The case at bar clearly falls within the line of cases anticipated by the United States Supreme Court to be barred by Oklahoma procedural obstacles, namely 22 Okla. Stat. § 1089. Accordingly,

> this Court finds that the jurisdictional issue before it, raised for the first time by Petitioner in his Application for Post-Conviction Relief, should be barred.

(O.R. 994-95 (footnotes omitted)).

II. PETITIONER'S JURISDICTIONAL CLAIM IS WAIVED.

This Court should uphold the district court's determination that Petitioner's jurisdictional claim is waived. As Petitioner conceded below (O.R. 910-11), Petitioner did not raise the claim until post-conviction review. Accordingly, the claim is waived pursuant to 22 O.S.2011, § 1089(C).

It is axiomatic that Oklahoma law limits the grounds for relief that may be raised in a post-conviction application to those that were not, and could not have been, raised on direct appeal. *See, e.g., Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973; *Woodruff v. State*, 1996 OK CR 5, ¶ 2, 910 P.2d 348, 350; *Berget v. State*, 1995 OK CR 66, ¶ 3, 907 P.2d 1078, 1080-81. Section 1089 of Title 22 states:

> C. The only issues that may be raised in an application for post-conviction relief are those that:
>
> 1. Were not and could not have been raised in a direct appeal; and
>
> 2. Support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.

22 O.S.2011, § 1089(C).

This Court has stressed the "narrow scope of review available on collateral appeal" pursuant to § 1089. *Walker v. State*, 1997 OK CR 3, ¶ 3, 933 P.2d 327, 330, *superseded by statute on other grounds*, 22 O.S.Supp.2004, § 1089(D)(4).

> First and foremost, the Post-Conviction Procedure Act was neither designed nor intended to provide applicants another direct appeal. Rather, the post-conviction statutes have always provided applicants with only very limited grounds upon which to attack their "final" judgments. Accordingly, post-conviction claims which could have been raised in previous appeals but were not are generally considered waived; and, post-conviction claims which were raised and addressed in previous appeals are barred as *res judicata.*
>
> . . . Under section 1089, only those capital post-conviction claims that "[w]ere not and could not have been raised" on direct appeal will escape the effects of waiver and *res judicata*. . . .
>
> The amendments to the capital post-conviction review statute reflect the legislature's intent to honor and preserve the legal principle of finality of judgment, and we will narrowly construe these amendments to effectuate that intent. Given the newly refined and limited review afforded capital post-conviction applicants, we must also emphasize the importance of the direct appeal as the mechanism for raising all potentially meritorious claims. Because the direct appeal provides appellants their only opportunity to have this Court fully review *all* claims of error which might arguably warrant relief, we urge them to raise all such claims at that juncture.

Walker, 1997 OK CR 3, ¶¶ 3-5, 933 P.2d at 330-31 (emphasis in original).

Before the district court, Petitioner raised three arguments for why his jurisdictional claim should not be waived for his failure to raise it on direct appeal. This Court should reject each argument.

A. Previously Unavailable Legal Ground

First, Petitioner claims that his jurisdictional claim could not have been raised on direct appeal because the grounds for the claim were previously unavailable (O.R. 911-12). *See Walker*, 1997 OK CR 3, ¶ 4, 933 P.2d at 331

(providing, as an example of a claim that could not have been raised on direct appeal, a claim that was "not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state" (quotation marks omitted)). As did the district court, Respondent disagrees.

Petitioner could reasonably have formulated the legal basis for his jurisdictional claim years prior to either the Tenth Circuit's decision in *Murphy* or the Supreme Court's decision in *McGirt*, including at the time of trial and direct appeal. Indeed, Petitioner filed his post-conviction application *prior* to *McGirt*, proving the claim was available before that decision.

In fact, a conclusion that Petitioner's claim was not previously unavailable follows unavoidably from the face of *McGirt*: "In saying [allotment did not affect disestablishment] we say nothing new." *McGirt*, 140 S. Ct. at 2464; *see also Murphy*, 875 F.3d at 921-22 (holding that the Supreme Court's reservation disestablishment framework was well established). Likewise, the Tenth Circuit, in concluding that Murphy's jurisdictional claim was not *Teague*[3]-barred, held that any post-*Solem*[4] cases it applied were mere "applications of the *Solem* framework." *Murphy*, 875 F.3d at 930 n. 36.

Moreover, jurisdictional claims such as Petitioner's were available long prior to *McGirt*. The Major Crimes Act was enacted in **1885**.

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

[4] *Solem v. Bartlett*, 466 U.S. 463 (1984).

https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153. 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 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 Petitioner's jurisdictional claim could not have been reasonably formulated prior to *McGirt*.

The State recognizes this Court's recent order in *Bosse v. State*, No. PCD-2019-124, order at 2 (Okla. Crim. App. Aug. 12, 2020) (unpublished and attached as Exhibit A),[5] which, referring to a jurisdictional claim like that raised by Petitioner, determined that "[t]he 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)." However, the *Bosse* order is unpublished and not binding. *See* Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2019) ("In all instances, an unpublished decision is not binding on this Court.").

Moreover, Respondent respectfully submits that this Court's order in *Bosse* is in error. As shown above, the legal basis for a post-conviction applicant's challenge to jurisdiction based on an argument that a crime occurred

[5] This unpublished order is attached as an exhibit and cited because no published opinion would serve as well the purpose for which it is being cited. *See* Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019).

on an Indian reservation could have been formulated as early as 1885 and was recognized by the Supreme Court as early as 1962, and by this Court in 1963.[6]

This Court's contrary conclusion violates the plain language of § 1089, legislative intent, and its own prior precedent. As this Court recognized after the Legislature amended the capital post-conviction review procedures, the changes "reflect the legislature's intent to honor and preserve the legal principle of finality of judgment, and we will narrowly construe these amendments to effectuate that intent." *Walker*, 1997 OK CR 3, ¶ 5, 933 P.2d at 331 (footnote omitted). In *Walker*, the petitioner's competency hearing was governed by a state statute that required him to prove by clear and convincing evidence that he was incompetent. *Id*, 1997 OK CR 3, ¶ 35, 933 P.2d at 338. Subsequently, the Supreme Court held that this statute was unconstitutional. *Id.*, 1997 OK CR 3, ¶ 35, 933 P.2d at 338-39 (citing *Cooper v. Oklahoma*, 517 U.S. 348 (1996)). The petitioner argued that his claim based on *Cooper* was previously unavailable. *Id.*, 1997 OK CR 3, ¶ 35, 933 P.2d at 338. This Court disagreed because the Supreme Court explained in *Cooper* that its decision was dictated by precedent. *Id.*, 1997 OK CR 3, ¶ 37, 933 P.2d at 339. This Court also held that *Cooper* was not a new rule of constitutional law because it "simply applied well established constitutional principles to facts generated by a rather new state statute. Further, the result in *Cooper* was effectively dictated by long standing precedents

[6] In any event, like Petitioner, Bosse filed his post-conviction application *before* the Supreme Court's decision in *McGirt*. Thus, the jurisdictional claim was actually available before *McGirt*.

requiring that States 'jealously guard' fundamental constitutional rights." *Id.*, 1997 OK CR 3, ¶ 38, 933 P.2d at 339.

In *McGirt*, the Supreme Court similarly 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.").

Respondent 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 nonetheless could have reasonably been formulated before that decision and, in fact, was formulated by 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 contains no exception for unexpected results; only for claims that could not have been formulated.

Respectfully, the unpublished order in *Bosse* contradicts published decisions by this Court and the plain language of § 1089, and ignores that Petitioner actually raised his jurisdictional claim before the Supreme Court's *McGirt* decision. This Court should find that Petitioner's jurisdictional claim is barred by the provisions of § 1089.

B. Ineffective Assistance of Appellate Counsel

Second, Petitioner claims that he should be excused from the waiver of his jurisdictional claim because his appellate counsel rendered ineffective assistance in failing to raise the claim (O.R. 911). Petitioner has not shown deficient performance.

Claims of ineffective assistance of appellate counsel are governed by the two-part standard under *Strickland v. Washington*, 466 U.S. 668 (1984). *Logan v. State*, 2013 OK CR 2, ¶ 5, 293 P.3d 969, 973. Thus, Petitioner "must show both (1) deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding (in this case the appeal) would have been different." *Id.* As to deficient performance, this Court "must apply a strong presumption that counsel's representation was within the wide range of reasonable professional

assistance." *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quotation marks omitted)). When this Court can dispose of an ineffective assistance claim on one prong, it need not reach the other prong. *Id.*, 2013 OK CR 2, ¶ 7, 293 P.3d at 974.

Here, Petitioner cannot show deficient performance in appellate counsel's failure to raise his jurisdictional claim. Direct appeal counsel filed their opening brief on February 28, 2017, months prior to the Tenth Circuit's *Murphy* decision originally issued on August 8, 2017. *See Murphy v. Royal*, 866 F.3d 1164, 1172 (10th Cir. 2017), *amended and superseded on denial of rehearing en banc*, 875 F.3d 896 (Nov. 9, 2017). Although Petitioner's jurisdictional claim was certainly available long before direct appeal, the decision in *Murphy* was undeniably unexpected. *See McGirt*, 140 S. Ct. at 2499 (Roberts, C.J., dissenting) ("[F]or 113 years, Oklahoma has asserted jurisdiction over the former Indian Territory on the understanding that it is not a reservation, without any objection by the Five Tribes until recently . . . ."). Appellate counsel were not required to be clairvoyant to render effective assistance. *See Brown v. State*, 1994 OK CR 12, ¶ 76, 871 P.2d 56, 76 ("[C]lairvoyance is not required of effective trial counsel." (quotation marks omitted)).

Indeed, as noted, prior to the Tenth Circuit's *Murphy* decision, this Court itself had declined to hold that the Creek Reservation was intact. *Murphy*, 2005 OK CR 25, ¶¶ 47-52, 124 P.3d at 1207-08. Petitioner claims various similarities in the statutory treatment of the Five Tribes by Congress (P.C. App. at 5-9). But to the extent this is accurate, then appellate counsel had no reason to think that

this Court would hold differently as to the alleged Chickasaw Reservation than it had as to the alleged Creek Reservation in *Murphy*. Appellate counsel were not ineffective for failing to raise a claim that found no support in then-existing precedent of this Court. *See Toledo v. United States*, 581 F.3d 678, 681 (8th Cir. 2009) (sentencing counsel reasonably declined to pursue objections that had no support in the law at the time of sentencing, and although the Supreme Court issued an intervening decision that changed the law, "sentencing counsel's performance was not constitutionally deficient for failure to anticipate future changes in the law").

C. Subject Matter Jurisdiction

Third and finally, Petitioner claims that subject matter jurisdiction claims can never be waived (O.R. 913-15). Indeed, Respondent recognizes that this Court has previously stated that challenges to subject matter jurisdiction can never be waived. *See Wackerly v. State*, 2010 OK CR 16, ¶ 4, 237 P.3d 795, 797; *see also Murphy*, 2005 OK CR 25, ¶¶ 2, 6, 124 P.3d at 1199-1200 (reviewing jurisdictional challenge raised in second post-conviction application on the merits). However, this is not a requirement of constitutional law.[7] *See In re*

[7] Indeed, at least six of the Supreme Court Justices endorsed, either explicitly or implicitly, the idea that courts may refuse to consider jurisdictional claims on procedural grounds. *See McGirt*, 140 S. Ct. at 2479 ("Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings."); *id.* at 2481 (stating the Court was free to reach its decision because doctrines such a procedural bars and laches exist to protect reliance interests); *id.* at 2502-04 (Thomas, J., dissenting) (arguing the Supreme Court lacked jurisdiction because this Court procedurally barred McGirt's claim). The Chief Justice's dissent recognized that this Court might not bar such claims, but did not suggest it would be unconstitutional for this Court to do so. *Id.* at 2501 n. 9 (Roberts, C.J., dissenting).

Wackerly, No. 10-7062, 2010 WL 9531121, at *2 (10th Cir. Sept. 3, 2010) (unpublished) (holding challenges to subject matter jurisdiction may be procedurally barred); *see also Hatch v. State of Okl.*, 92 F.3d 1012, 1014-15 (10th Cir. 1996) (*per curiam*), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180 (10th Cir. 2001) ("lack of jurisdiction is not an authorized ground upon which a second or successive habeas petition may be filed").

Furthermore, this Court's judicially created exception for subject matter jurisdiction claims violates legislative intent. Based on the plain language of § 1089, claims that could have been raised on direct appeal, but were not, are barred, and the statute provides no exception to claims based on subject matter jurisdiction. Importantly, the Oklahoma Legislature amended § 1089 just months after Congress's enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), PL 104-132, April 24, 1996, 110 Stat 1214, which placed various limitations on the filing of federal habeas corpus petitions by state prisoners. The amended § 1089 contains numerous similarities to the AEDPA. *Compare* 22 O.S.2011, § 1089, *with* 28 U.S.C. §§ 2244, 2254. Like § 1089, the AEDPA contains no exception for jurisdictional challenges, and federal courts have repeatedly refused to exempt such challenges from its provisions. *See, e.g.*, *Cowan v. Crow*, No. 19-CV-0639-JED-FHM, 2019 WL 6528593, at *4 (N.D. Okla. Dec. 4, 2019); *Dopp*, 750 F. App'x at 756-57; *Clark v. MacLaren*, No. 2:10-CV-10748, 2016 WL 4009750, at *3 (E.D. Mich. July 26, 2016) (unpublished); *In re*

Clearly, Petitioner's suggestion that the Supreme Court holds that claims of subject matter jurisdiction can never be waived is patently incorrect (O.R. 914).

Wackerly, 2010 WL 9531121, at *2; *In re Harrison*, No. 09-2245, 2009 WL 9139587, at *1 (10th Cir. Nov. 3, 2009) (unpublished); *Hatch*, 92 F.3d at 1014-15. As the Tenth Circuit has explained, in finding itself bound by congressional intent:

> [T]hough the writ of habeas corpus in its earliest form was largely a remedy against confinement imposed by a court lacking jurisdiction, *see McCleskey [v. Zant]*, 499 U.S. [467,] 478, 111 S.Ct. 1454 [1991], this court has barred a state prisoner convicted of murder and sentenced to death by the wrong sovereign from bringing a successive collateral attack to contest his conviction on this basis. *See In re Wackerly*, No. 10–7062, at 5 (10th Cir. Sept. 3, 2010). This is because, like a statutory claim of innocence, lack of jurisdiction is not one of the two authorized grounds upon which a successive § 2254 motion may be filed. *Id.*

Prost v. Anderson, 636 F.3d 578, 592 (10th Cir. 2011). This Court is similarly required to give effect to the intent of the legislature. *King v. State*, 2008 OK CR 13, ¶ 8, 182 P.3d 842, 844. Petitioner's claim must be considered waived pursuant to § 1089(C)(1) based on his failure to raise same on direct appeal.

III. ALTERNATIVELY, THIS COURT SHOULD STAY FOR THIRTY DAYS ANY GRANT OF POST-CONVICTION RELIEF.

Should this Court find Petitioner's claim properly before it and that he is entitled to relief based on the district court's findings, the State respectfully requests this Court stay any order reversing the conviction in this case for thirty days to allow the United States Attorney's Office for the Western District of Oklahoma to secure custody of 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

Based on the foregoing, this Court should find Petitioner's jurisdictional claim to be waived. Alternatively, this Court should stay any order granting relief.

Respectfully submitted,

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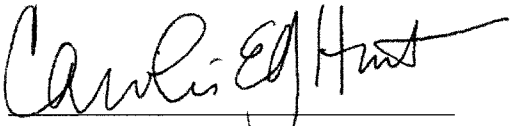
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF MAILING

On this 30th day of November 2020, a true and correct copy of the foregoing was mailed to:

Kristi Christopher
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070



CAROLINE E.J. HUNT

[8] An electronic signature is being used due to the current COVID-19 restrictions. A signed original can be provided to the Court upon request once restrictions are lifted.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,	)	
	)	NOT FOR PUBLICATION
Petitioner,	)	
vs.	)	No. PCD-2019-124
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER REMANDING FOR EVIDENTIARY HEARING

Shaun Michael Bosse was tried by jury, convicted of Counts I-III, First Degree Murder, and Count IV, First Degree Arson, and sentenced to death (Counts I-III and thirty-five (35) years imprisonment and a fine of $25,000.00 (Count IV), in the District Court of McClain County, Case No. CR-2010-213. This Court upheld Petitioner's convictions and sentences in *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834, *reh'g granted and relief denied*, 2017 OK CR 19, 406 P.3d 26, *cert. denied*, 138 S.Ct. 1264 (2018). This Court denied Petitioner's first Application for Post-Conviction Relief. *Bosse v. State*, No. PCD-2013-360 (Okl.Cr. Dec.16, 2015) (not for publication). Petitioner filed this Successive Application for Post-Conviction Relief on February 20, 2019. In

Proposition I, Petitioner challenges the State's jurisdiction to prosecute him.

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

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

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Petitioner's presentation of *prima facie*

evidence as to the legal status as Indians of Petitioner's victims, and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

The hearing shall be transcribed, and the court reporter shall file an original and two (2) certified copies of the transcript within twenty (20) days after the hearing is completed. The District Court shall then make written findings of fact and conclusions of law, to be submitted to this Court within twenty (20) days after the filing of the transcripts in the District Court. The District Court shall address only the following issues.

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

Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Chickasaw Nation, and (2) if so, whether Congress specifically erased

[1] *See, eg., 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).

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, an/or testimony.

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record, to the Clerk of this Court, and counsel for Appellant, within five (5) days after the District Court has filed its findings of fact and conclusions of law. Upon receipt thereof, the Clerk of this Court shall promptly deliver a copy of that record to the Attorney General. A supplemental brief, addressing only those issues pertinent to the evidentiary hearing and limited to twenty (20) pages in length, may be filed by either party within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed in this Court.

Provided however, in the event the parties agree as to what the evidence will show with regard to the questions presented, they may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. In this event, no hearing on the

questions presented is necessary. Transmission of the record regarding the matter, the District Court's findings of fact and conclusions of law and supplemental briefing shall occur as set forth above.

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

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 12th day of August, 2020.

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

Clerk