No. PC-2020-954

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LOUIS R. YOUNG,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondant.

SUPPLEMENTAL BRIEF OF RESPONDANT AFTER REMAND

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

CAROLINE E.J. HUNT, OBA # 32635
ASSISTANT ATTORNEY GENERAL

313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR APPELLEE

MAY 3, 2021

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

LOUIS R. YOUNG,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. PC-2020-954**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

SUPPLEMENTAL BRIEF OF RESPONDENT AFTER REMAND

Louis R. Young, hereinafter Petitioner, claims the State of Oklahoma lacked jurisdiction in his case because he is allegedly Indian and his crime occurred within the boundaries of the Osage Nation reservation ("Indian Country jurisdictional claim"). For starters, Petitioner's Indian Country jurisdictional claim is waived and barred.[1] In any event, the district court correctly concluded that the Tenth Circuit's holding, in *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), that the Osage Nation's reservation was disestablished precludes relief. Petitioner's post-conviction application must be denied.

I. BACKGROUND.

Petitioner was convicted of first degree murder—for the killing of Jerry Doyle—in Grady County District Court Case No. CF-2005-266A, and was sentenced to life imprisonment without the possibility of parole. Petitioner's direct appeal, wherein this Court affirmed his conviction and sentence, did not challenge the State's exercise of jurisdiction. *Young v. State*, 2008 OK CR 25,

[1] The State will address this Court's recent holding that "'subject-matter jurisdiction can never be waived or forfeited'" below. *Bosse*, 2021 OK CR 3, ¶¶ 20-22, ___ P.3d ___ (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012)). The State will ask this Court to stay Petitioner's appeal until the United States Supreme Court either denies the State's petition for writ of certiorari in *Bosse*, or rules on the merits of the State's appeal.

191 P.3d 601.

Over the next few years, Petitioner sought post-conviction relief three more times. All requests were denied by the district court—the third one in 2014—and Petitioner never appealed to this Court. In that time, not once did Petitioner argue lack of state jurisdiction under the Major Crimes Act, 18 U.S.C. § 1153. Now, sixteen years later, Petitioner raises that claim for the first time in his fourth application for post-conviction relief.

On July 9, 2020, the United States Supreme Court held in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020), that the Muscogee (Creek) Nation's Reservation had not been disestablished for purposes of the Major Crimes Act, 18 U.S.C. § 1153. On that same day, and for the reasons stated in *McGirt*, the Court also affirmed the Tenth Circuit's decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). *Sharp v. Murphy*, 140 S. Ct. 2412 (2020).

Thereafter, on September 15, 2020, Petitioner filed the *pro se* application for post-conviction relief that is the subject of this appeal, and which was denied by the district court. 9/15/2020 Application for Post-Conviction Relief (Osage County Case No. CF-2005-266a); 12/14/2020 Order Denying Application for Post-Conviction Relief (Osage County Case No. CF-2005-266a).

Petitioner appealed the district court's denial of post-conviction relief to this Court. This Court granted an evidentiary hearing and ordered the district court to determine: (1) "Petitioner's Indian status" and (2) "whether the crime occurred in Indian Country." 1/27/2021 Order Remanding for Evidentiary Hearing (OCCA No. PC-2020-954) ("Remand Order") at 3.

The hearing was held on March 23, 2021, before the Honorable Stuart Tate, District Judge (O.R. 39). The parties stipulated to the admission of evidence that Petitioner has 1/8 Indian blood and was an enrolled member of the Muscogee (Creek) Nation, a federally recognized Indian Tribe,

at the time of the crime (O.R. 8, 39-40). The district court found, therefore, that "the Defendant is an Indian for purposes of determining criminal jurisdiction." (O.R. 40).

Regarding the second question, whether the crime was committed in Indian Country, the court found the Tenth Circuit's decision in *Irby* to be controlling: "The Tenth Circuit concluded, using the same standard as in McGirt – the *Solem v. Bartlett* (465 U.S. 470 (1984)) test, that 'the Osage Reservation has been disestablished by Congress.'" (O.R. 41 (quoting *Irby*, 597 F.3d at 1127)). The court concluded:

> The Court adopts the arguments of the State, uncontroverted by the Defendant, with regard to collateral estoppel and res judicata. Defendant is collaterally estopped from raising disestablishment as the Osage Nation had a full and fair opportunity to litigate the issue in *Irby*. Likewise, the claim of disestablishment is res judicata and impermissibly raised. The federal question of congressional disestablishment of the Osage Reservation resulted in a final judgment by the Tenth Circuit Court of Appeals, certainly a court of competent jurisdiction. Next, privity is applicable here. The interest at question here belongs to the Osage Nation. Any interest by the defendant, a Native American, is derived from the Osage Nation. The three considerations *of Reed v. JP Morgan Chase Bank, NA*, 2011 OK 93 – the same claim, a final judgment, and privity – are met and thus the claim is *res judicata*.
>
> In conclusion, pursuant to the stipulations of the parties, testimony, exhibits and statements of counsel the Court finds:
>
> 1. The Defendant is an "Indian" for purposes of jurisdiction.
> 2. The *Irby* decision is entitled to full faith and credit.
> 3. The Osage Nation reservation was disestablished.
> 4. The crime[] resulting in Defendant's conviction occurred in Osage County, State of Oklahoma and not "Indian Country."

(O.R. 41-42 (internal citations omitted)).

The State will show the district court correctly concluded it was bound by the Tenth Circuit's decision in *Irby*. First, however, the State respectfully asks this Court to reconsider its holding, in *Bosse v. State*, 2021 OK CR 3, ¶¶ 20-21, ___ P.3d ___, that Indian Country jurisdictional claims can never be waived.

II. PETITIONER'S INDIAN COUNTRY JURISDICTIONAL CLAIM IS WAIVED AND BARRED BY LACHES.

Petitioner's belated Indian Country jurisdictional claim—and those of so many other inmates with final convictions—offend the principles of finality the Legislature sought to preserve when it amended the Post-Conviction Procedure Act. These claims, raised so long after the convictions they challenge that retrial is often not possible—due to federal and tribal statutes of limitations and/or evidentiary issues—also threaten public safety and punish victims and their families. Petitioner's untimely claim should not be considered.

Petitioner was convicted in 2007, and his direct appeal was denied in 2008. Petitioner continued to challenge his convictions in the following years—causing the State to expend judicial and prosecutorial resources defending his presumptively valid conviction, *see Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)—but not once did Petitioner claim the crime was committed in Indian Country until after the Supreme Court decided *McGirt*. Petitioner's lack of diligence in raising his Indian Country jurisdictional claim should entirely preclude relief. 22 O.S.2011, §§ 1080, 1086.

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

> Other defendants [aside from those who choose not to seek relief] who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.[15]

> [15] For example, Oklahoma appears to apply a general rule that "issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Logan v. State*, 2013 OK CR 2, ¶1, 293 P.3d 969, 973. . . .

McGirt, 140 S. Ct. at 2479.

The State recognizes that this Court recently held that "'subject-matter jurisdiction can never be waived or forfeited.'" *Bosse*, 2021 OK CR 3, ¶¶ 20-22, __ P.3d at __ (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012)). However, Respondent respectfully submits Petitioner's Indian Country jurisdictional claim is waived and barred on a number of grounds, including both waiver for failure to raise this claim on direct appeal, and based on the doctrine of laches. While *Bosse* held that Indian Country jurisdictional claims are not subject to "the limitations of post-conviction or subsequent post-conviction statutes" and can never be waived or forfeited, *Bosse*, 2021 OK CR 3, ¶¶ 20-22 & nn. 8-9, __ P.3d at __, respectfully, *Bosse* was wrongly decided and this Court should reconsider its holding for the reasons discussed below.

Moreover, the mandate in *Bosse* has been stayed by this Court until May 30, 2021. *Bosse v. State*, No. PCD-2019-124, 4/15/2021 Order Staying Issuance of Mandate (attached as Exhibit "A"). And on April 26, 2021, the State filed an application in the Supreme Court to further stay the mandate in *Bosse* pending that Court's review of *Bosse*. As the mandate in *Bosse* has been recalled and stayed, this Court should not decide any cases that might be affected by the Supreme Court's decision in *Bosse*, just as this Court stayed its hand pending Supreme Court review of the Tenth Circuit's decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017).

This Court began abating direct appeals which raised Indian Country jurisdictional claims after the Supreme Court held, in *Murphy*, that the Muscogee (Creek) Nation's Reservation was not disestablished. For example, in one case, this Court abated an appeal before the Supreme Court

granted certiorari in *Murphy*, for the reason that the Tenth Circuit's mandate had not yet issued: "The litigation in *Murphy* is ongoing and not final. Until the matter in *Murphy* is settled, Jackson's application and case should be held in abeyance . . . ." *Jackson v. State*, No. F-2016-453, 9/26/2017 Order Holding Case in Abeyance and Directing Attorney General to Provide Status Update (attached as Exhibit "B"); *see Royal v. Murphy*, 138 S. Ct. 2026 (May 21, 2018) (Mem.) (granting petition for writ of certiorari); *see also, e.g.*, *Bosse v. State*, No. PCD-2019-124, 3/22/2019 Order Holding Case in Abeyance and Directing Attorney General to Provide Status Update (attached as Exhibit "C") (holding Bosse's post-conviction proceeding in abeyance because "[t]he litigation in *Murphy v. Royal* is ongoing and not final" as the Supreme Court had granted certiorari); *Bragg v. State*, No. F-2017-1028, 3/27/2019 Order Holding Case in Abeyance and Directing Attorney General to Provide Status Update (attached as Exhibit "D") (same). And in non-capital post-conviction appeals, this Court simply denied relief—both before and after the Supreme Court granted certiorari—because *Murphy* was not final. *See, e.g.*, *Caudill v. State*, No. PC-2018-913, 2/11/2019 Order Affirming Denial of Third Application for Post-Conviction Relief at 4 (attached as Exhibit "E") ("Because the Supreme Court's disposition of the *Murphy* appeal will likely have an impact on, or be controlling of, cases such as Petitioner's, we find no error in the District Court denying post-conviction relief at this juncture."); *Anthony Jackson v. State*, No. PC-2018-1254, 2/5/2019 Order Affirming Denial of Application for Post-Conviction Relief (attached as Exhibit "F"); *Rodney Jackson v. State*, No. PC-2018-42, 5/7/2018 Order Affirming Denial of Application for Post-Conviction Relief (attached as Exhibit "G"). The State respectfully asks this Court to abate Petitioner's post-conviction appeal until the Supreme Court denies certiorari, or rules on the merits, in *Bosse*.

1. *Bosse* Wrongly Concluded that Supreme Court Law Precluded it from Barring Indian Country Jurisdictional Claims.

In *Bosse*, this Court held that an Indian Country jurisdictional claim can *never* be waived or forfeited under Supreme Court law. *Bosse*, 2021 OK CR 3, ¶ 21, __ P.3d at __. Respectfully, *Bosse*'s holding was in conflict with *McGirt* itself, as well as *United States v. Cotton*, 535 U.S. 625 (2002), especially in light of the multiple federal courts that have relied on the latter case to hold that Indian Country jurisdictional claims *can* be waived.

As an initial matter, as with some other litigants and courts, in the past the State may have been imprecise with the phrase "subject matter jurisdiction" when referring to Indian Country jurisdictional claims. *See Gonzalez*, 565 U.S. at 141 ("This Court has endeavored in recent years to bring some discipline to the use of the term 'jurisdictional,'" given "our less than meticulous use of the term in the past" (select quotation marks omitted)); *Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999) ("Lawyers and judges sometimes refer to the interstate-commerce element that appears in many federal crimes as the 'jurisdictional element,' but this is a colloquialism—or perhaps a demonstration that the word 'jurisdiction' has so many different uses that confusion ensues."). However, as this Court is aware from the numerous briefs filed by the State in the Indian Country jurisdictional cases that have proliferated in this Court in the wake of *McGirt*, the State's *unwavering* position has been that Indian Country jurisdictional claims, whatever they may be called, *can* be waived. Thus, whether referred to as an "Indian Country jurisdictional claim," as the State does here, or a "territorial jurisdictional" claim, *see Bosse*, 2021 OK CR 3, ¶¶ 4-7, __ P.3d at __ (Rowland, V.P.J., concurring in results); *Bosse*, 2021 OK CR 3, ¶ 3, __ P.3d at __ (Hudson, J., concurring in results) ("fully join[ing] Judge Rowland's special writing concerning . . . the use of the term subject matter jurisdiction"), an Indian Country jurisdictional claim is *not* a non-waivable claim challenging subject matter jurisdiction.

While *Bosse* was correct that *Gonzalez* states generally that "[s]ubject-matter jurisdiction can

never be waived or forfeited," *Gonzalez*, 565 U.S. at 141, *Gonzalez* did not involve an Indian Country jurisdictional claim. Meanwhile, *McGirt* itself expressly invited this Court to apply procedural bars to Indian Country jurisdictional claims. *McGirt*, 140 S. Ct. at 2479 & n. 15. Given *McGirt*'s clear indication that claims regarding Indian Country jurisdiction *could* be barred, whatever *Gonzalez* meant in general by "[s]ubject-matter jurisdiction," the phrase could not have encompassed Indian Country jurisdictional challenges. *See Bosse*, 2021 OK CR 3, ¶ 7 n. 2 (Rowland, V.P.J., concurring in results) ("The *McGirt* opinion tacitly acknowledges potential procedural bars . . . . Those defenses would not be relevant if subject matter jurisdiction, which is non-waivable, were concerned.").

Bosse's holding further conflicts with *Cotton*, particularly as it has been applied by federal courts—in particular, the Tenth Circuit—to hold that Indian Country jurisdictional claims are *not* claims of subject matter jurisdiction implicating the *power* of a court to hear a case and that such claims *can* be waived. *See Cotton*, 535 U.S. at 630 ("[subject matter] jurisdiction means . . . the courts' statutory or constitutional *power* to adjudicate the case" (quotations omitted)); *United States v. Tony*, 637 F.3d 1153, 1157-60 (10th Cir. 2011); *United States v. Pemberton*, 405 F.3d 656, 659 (8th Cir. 2005); *United States v. White Horse*, 316 F.3d 769, 772 (8th Cir. 2003); *United States v. Prentiss*, 256 F.3d 971, 981-82 (10th Cir. 2001) (en banc), *overruled on other grounds by Cotton*, 535 U.S. at 631; *Welch v. United States*, No. 2:05CR8, 2008 WL 4981352, at *2 n. 2 (W.D.N.C. Nov. 19, 2008) (unpublished); *see also Bosse*, 2021 OK CR 3, ¶ 16, __ P.3d at __ (observing the importance of consistency with Tenth Circuit precedent).

Here, Oklahoma constitutional and statutory law confers on state district courts the *power* to adjudicate criminal cases arising from crimes committed within the State's borders. *See* Okla. Const. Art. VII, § 7 ("The District Court[s of Oklahoma] shall have unlimited original jurisdiction of all justiciable matters . . . ."); 22 O.S.2011, § 121 ("When the commission of a public offense,

commenced without this state, is consummated within its boundaries, the defendant is liable to punishment therefor in this state, . . . and in such case, the jurisdiction is in the county in which the offense is consummated."); *Graham v. Lanning*, 1985 OK CR 36, ¶ 5, 698 P.2d 25, 26, *overruled on other grounds by Lenzy v. State*, 1993 OK CR 53, ¶ 17, 864 P.2d 847, 850 ("We note at the outset that 22 O.S.1981, § 121 confers on the District Courts of this State jurisdiction over any offense 'commenced without this State, [and] consummated within its boundaries, . . . and . . . the jurisdiction is in the county in which the offense is consummated.'"); *see also generally* Title 20 of the Oklahoma Statutes; *Bosse*, 2021 OK CR 3, ¶ 4, __ P.3d at __ (Rowland, V.P.J., concurring in results) ("The subject matter jurisdiction of Oklahoma courts is established by Article 7 of our State Constitution and Title 20 of our statutes which grant general jurisdiction, including over murder cases, to our district trial courts."). Thus, as in *Bosse*, "the subject matter in this case is a murder prosecution." *Bosse*, 2021 OK CR 3, ¶¶ 4-7, __ P.3d at __ (Rowland, V.P.J., concurring in results). In terms of subject matter jurisdiction, "[t]hat's the beginning and the end of the 'jurisdictional' inquiry." *Hugi*, 164 F.3d at 380.

This Court's treatment of Indian Country jurisdictional claims in *Bosse* as non-waivable subject matter jurisdiction claims that implicate the power of the trial court to adjudicate a case creates a conflict with *Cotton*, in particular as it has been interpreted by lower federal courts. Furthermore, in tension with *Bosse*'s pronouncement that "[c]onsistency and economy of judicial resources compel us to adopt the same definition [of Indian status] as that used by the Tenth Circuit," *Bosse*, 2021 OK CR 3, ¶ 16, __ P.3d at __, *Bosse* also results in a curious dichotomy in which Indian Country jurisdictional claims can *never* be waived in state court but *can* be waived in federal court, including in the Tenth Circuit. If anything, one would expect the opposite. *See United States v. Prentiss*, 206 F.3d 960, 967 (10th Cir. 2000) ("Federal criminal jurisdiction is

limited by federalism concerns; states retain primary criminal jurisdiction in our system."); *Application of Poston*, 1955 OK CR 39, ¶ 31, 281 P.2d 776, 784 ("The district courts of Oklahoma are courts of general jurisdiction."). The State respectfully urges this Court to reconsider *Bosse*.

2. To the Extent *Bosse* Concluded that *McGirt* Provides a Previously Unavailable Legal Ground, this is Contrary to *McGirt* Itself.

Bosse, in the context of the capital post-conviction statute, 22 O.S.2011, § 1089(D), appeared to indicate that *McGirt* provides a previously unavailable legal ground for the filing of a successive capital post-conviction application because, "although similar claims may have been raised in the past in other cases, the primacy of State jurisdiction was considered settled and those claims had not been expected to prevail." *Bosse*, 2021 OK CR 3, ¶ 20 n. 8, __ P.3d at __. To the extent this Court concluded that *McGirt* created new law, such a conclusion is diametrically opposed to *McGirt* itself. *McGirt* purported to apply this Court's longstanding *Solem* precedent and stated it was "say[ing] nothing new." *McGirt*, 140 S. Ct. at 2464-65 (citing *Solem v. Bartlett*, 465 U.S. 463 (1984)).

In any event, this is a non-capital case not governed by § 1089. As previously discussed, Petitioner did not raise his Indian Country jurisdictional claim on direct appeal or in his first three post-conviction applications. It is axiomatic that Oklahoma law limits the grounds for relief that may be raised in a subsequent post-conviction application. *See, e.g.*, *Slaughter v. State*, 2005 OK CR 6, ¶ 20, 108 P.3d 1052, 1056; *Sellers v. State*, 1999 OK CR 6, ¶ 2, 973 P.2d 894, 895; *Duvall v. Ward*, 1998 OK CR 16, ¶ 2, 957 P.2d 1190, 1191. Section 1086 of Title 22 states:

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceedings the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court founds a ground for relief asserted which for sufficient reason was not

asserted or was inadequately raised in the prior application.

Even assuming *arguendo* that a previously unavailable legal basis for purposes of § 1089(D) would constitute "sufficient reason" for Petitioner to have not earlier raised his jurisdictional claim, *Bosse*'s previously unavailable finding was diametrically opposed to *McGirt*. This Court should reconsider *Bosse* and find Petitioner's Indian Country jurisdictional claim to be barred by his failure to bring it in his direct appeal or prior post-conviction applications pursuant to § 1086.

3. *Bosse* Not Only Proceeded on a Misapprehension of Federal Law, It Also Conflicts with the Oklahoma Legislature's Clear Language in its Post-Conviction Statutes.

Bosse appeared to hold that, because federal law precludes the barring of Indian Country jurisdictional claims, it would not subject such claims to Oklahoma's post-conviction statutes. *Bosse*, 2021 OK CR 3, ¶ 21, __ P.3d at __. Again, the State respectfully submits that *Bosse* was decided in error.

First, the State has already shown above that federal law does not prohibit the barring of Indian Country jurisdictional claims. Thus, absent any constitutional concern, this Court must apply the post-conviction statutes according to their plain language. Respectfully, *Bosse*'s holding that "the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction," *Bosse*, 2021 OK CR 3, ¶ 21, __ P.3d at __, cannot be squared with the Oklahoma Legislature's express limitations on successive post-conviction applications in § 1089. Section 1089 limits successive filings to two categories—those with certain previously unavailable legal grounds and those with certain previously unavailable factual grounds—and the statute provides no exception to its restrictions for challenges to the trial court's subject matter jurisdiction. *See* 22 O.S.2011, § 1089(D)(8)(a)-(b). This Court's judicially created exception for jurisdictional challenges—which, again, is based on a misapprehension of federal law—

impermissibly contravenes legislative intent. *See Wallace v. State*, 1997 OK CR 18, ¶ 4, 935 P.2d 366, 370 ("A statute must be held to mean what it plainly expresses and no room is left for construction and interpretation where the language employed is clear and unambiguous." (quotation marks omitted)).

Furthermore, the Oklahoma Legislature amended § 1089 shortly after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to impose essentially the same restrictions on capital post-conviction applications that apply to successive habeas petitions under the AEDPA. *Compare* 22 O.S.2011, § 1089(D)(8)(a), (9)(b), *with* 28 U.S.C. § 2244(b)(2)(A). Federal courts, including the Tenth Circuit, have repeatedly rejected, explicitly or implicitly, the notion that challenges to jurisdiction are exempt from the AEDPA's restrictions on the filing of successive habeas petitions. *See Dopp*, 750 F. App'x at 756-57; *Prost v. Anderson*, 636 F.3d 578, 592 (10th Cir. 2011); *In re Wackerly*, No. 10-7062, 2010 WL 9531121, at *2 (10th Cir. Sept. 3, 2010) (unpublished); *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); *see also, e.g.*, *Cowan v. Crow*, No. 19-CV-0639-JED-FHM, 2019 WL 6528593, at *4 (N.D. Okla. Dec. 4, 2019) (unpublished); *Clark v. MacLaren*, No. 2:10-CV-10748, 2016 WL 4009750, at *3 (E.D. Mich. July 26, 2016) (unpublished); *Cross v. Bear*, No. CV-15-133-D, 2015 WL 13741902, at *5 (W.D. Okla. Oct. 19, 2015) (unpublished); *Johnson v. Cain*, No. CIV.A. 12-2056, 2013 WL 3422448, at *1-4 (E.D. La. July 8, 2013) (unpublished); *Palmer v. McKinney*, No. 907-CV-0360-DNH-GHL, 2007 WL 1827507, at *2-3 (N.D.N.Y. June 22, 2007) (unpublished); *Perez v. Quarterman*, No. CIV.A.H-07-0915, 2007 WL 963985, at *2-3 (S.D. Tex. Mar. 29, 2007) (unpublished); *Jones v. Pollard*, No. 06-C-0967, 2006 WL 3230032, at *1-2 (E.D. Wis. Nov. 6, 2006) (unpublished). There is no reason to think that the Oklahoma Legislature intended § 1089

to be any less restrictive than the corresponding provision of AEDPA when it comes to jurisdictional challenges. *See Prost*, 636 F.3d at 589 ("The simple fact is that Congress decided that, unless [AEDPA's] subsection (h)'s requirements are met, finality concerns trump and the litigation must stop after a first collateral attack. Neither is this court free to reopen and replace Congress's judgment with our own.").

Second, with particular relevance to this non-capital case, *Bosse*'s determination that "the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction," *Bosse*, 2021 OK CR 3, ¶ 21, __ P.3d at __, is squarely in conflict with clear language in §§ 1080 and 1086. Section 1080 expressly encompasses jurisdictional challenges: "Any person who has been convicted of, or sentenced for, a crime and who claims: . . . that *the court was without jurisdiction* to impose sentence . . . may institute a proceeding under this act . . . ." 22 O.S.2011, § 1080(b) (emphasis added). Furthermore, § 1086, regarding successive non-capital post-conviction applications, says that "[a]ll grounds for relief available to an applicant under this act *must* be raised in his original, supplemental or amended application" and may not be the basis of a successive post-conviction application unless "sufficient reason" for the failure to do so is shown. 22 O.S.2011, § 1086 (emphasis added). Thus, the Oklahoma Legislature said "all" claims "must be raised" at the first opportunity—and said so in spite of its explicit recognition that challenges to the trial court's jurisdiction may be raised. *Compare* 22 O.S.2011, § 1080(b), *with* 22 O.S.2011, § 1086; *see also Wallace*, 981 F. Supp. 2d at 1166 ("[Section] 2255 itself expressly contemplates challenges to a sentencing court's jurisdiction without in any way indicating that these particular sorts of attacks need not be brought within the statute's one-year period of limitation." (quotation marks omitted)). The Legislature clearly made jurisdictional claims subject to the provisions of the post-conviction statutes, contrary to *Bosse*'s pronouncement that "the limitations of post-conviction or subsequent

post-conviction statutes do not apply to claims of lack of jurisdiction." *Bosse*, 2021 OK CR 3, ¶ 21, __ P.3d at __; *see also Wallace*, 1997 OK CR 18, ¶ 4, 935 P.2d at 370 ("A statute must be held to mean what it plainly expresses and no room is left for construction and interpretation where the language employed is clear and unambiguous." (quotation marks omitted)).

4. *Bosse* Ignored this Court's Own Precedent Applying Laches to an Indian Country Jurisdictional Claim.

Lastly, *Bosse* suggested that Indian Country claims can never be subject to laches because of "[t]he principle that subject-matter jurisdiction may not be waived." *Bosse*, 2021 OK CR 3, ¶ 21 n. 9, __ P.3d at __. As shown above, this Court's conclusion that Indian Country claims are non-waivable subject matter jurisdictional claims is in conflict with both federal authority and the Legislature's clear language in the post-conviction statutes. In addition, this Court ignored its own precedent, *Ex parte Wallace*, 81 Okla. Crim. 176, 178-79, 162 P.2d 205, 207 (1945), in which this Court applied laches to an Indian Country jurisdictional claim. In *Ex parte Wallace*, the defendant filed a state habeas petition three years after his guilty plea alleging that the federal court had exclusive jurisdiction over his crime because he and his rape victims were Comanche Indians and the crime occurred on a restricted allotment. Although this Court did not invoke the word "laches," it ultimately concluded that "at this late date" it would not consider the defendant's jurisdictional attack, noting in particular that the statute of limitations for any federal action against the defendant had lapsed. *Ex parte Wallace*, 81 Okla. Crim. at 179, 188, 162 P.2d at 207, 211.[2]

[2] Although statute of limitations is not at issue in this murder case, the State respectfully urges this Court to clarify, at the very least, that the doctrine of laches may apply, on a case-by-case basis, to Indian Country jurisdictional claims where any applicable federal or tribal statute of limitations has expired. *See, e.g.*, *Worthington v. State*, No. PC-2020-744, *Order Remanding for Evidentiary Hearing* (Okl. Cr. Dec. 22, 2020) (unpublished, Exhibit "I") (remanding 1986 rape, kidnapping, and robbery case for evidentiary hearing on Indian Country jurisdictional claim).

III. THE OSAGE NATION'S RESERVATION WAS DISESTABLISHED.

The State does not dispute that Petitioner was an Indian, for purposes of the Major Crimes Act, when he murdered Mr. Doyle. Nevertheless, the State properly exercised jurisdiction, as the murder was not committed in Indian Country. In 2001, the Osage Nation filed a lawsuit in the United States District Court for the Northern District of Oklahoma, in which it sought a declaratory judgment "that its reservation boundaries have not been disestablished and that, as a matter of law, the Osage Reservation is Indian country within the meaning of 18 U.S.C. § 1151." *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Com'n*, 597 F. Supp. 2d 1250, 1252 (N.D. Okla. 2009). The district court held the reservation had been disestablished, and the Tenth Circuit—applying *Solem v. Bartlett*, 465 U.S. 463 (1984)—affirmed. *Irby*, 597 F.3d 1117; *see also* Berlin B. Chapman, *Dissolution of the Osage Reservation*, 20 Chrons. Okla. 244 (Okla. Historical Society, 1942). Petitioner, and this Court, are bound by the Tenth Circuit's decision.

The term *res judicata* is Latin for "a matter decided." *See* 46 Am. Jur. 2d Judgments § 442. Under the doctrine of *res judicata*, the "final judgment of a court of competent jurisdiction" upon the merits of a controversy is a bar to any further litigation upon the same claim "either before the same or any other tribunal." *Dearing v. State ex rel. Comm'rs of Land Off.*, 1991 OK 6, 808 P.2d 661, 664; *see also Mid-Continent Cas. Co. v. Everett*, 340 F.2d 65, 69 (10th Cir. 1965). *Res judicata* bars state courts from relitigating federal-court judgments—"[w]hen a federal-court judgment is attacked collaterally in a state court, it is entitled to the same faith and credit as that given to it under the applicable federal law." *Veiser v. Armstrong*, 1984 OK 61, n. 5, 688 P.2d 796, 799, n. 5. Thus, even in state court, it is federal law that governs the preclusive effect of federal court judgments, not state law. *See id.* ("Federal law governs both the preclusive and res judicata effect of the prior federal-court judgment."). "[A] final judgment on the merits of an action

precludes the parties from relitigating not only the adjudicated claim, but also any theories or issues that were actually decided ... in that action." *Miller v. Miller*, 1998 OK 24, ¶ 23, 956 P.2d 887, 896; *see also Loyd v. Michelin N. Am., Inc.*, 2016 OK 46, ¶ 16, 371 P.3d 488, 493.

Res judicata applies if (1) the cause of action is the same; (2) there was a final judgment on the merits in the earlier action; and (3) the parties are identical or in privity in both cases.[3] *See, e.g., Reed v. JP Morgan Chase Bank, NA*, 2011 OK 93, ¶ 9, 270 P.3d 140, 142. Ways in which parties and nonparties can be in privity include when a nonparty and a party to the action and judgment had a pre-existing and substantive legal relationship; when a nonparty was adequately represented by a party with the same interests as those of the nonparty; when the nonparty's interest is derivative of the party's interest; or when a nonparty can be used by the party bound by the judgment as a proxy to relitigate the same claim resolved by the first judgment. *Taylor v. Sturgell*, 553 U.S. 880, 893-895 (2008).

Because all the elements of the doctrine are present here, state courts are barred from reexamining the Osage reservation question already decided by the Tenth Circuit. To begin with, the question here is the same question that was asked in *Irby*: whether the Osage Indian Reservation had been disestablished or remains "Indian country." *Compare Irby*, 597 F.3d at 1120 (The question is whether "the Nation's reservation, which comprises all of Osage County, Oklahoma, has not been disestablished and remains Indian country within the meaning of 18 U.S.C. § 1151.") *with* Remand Order at 3 (The second question is "whether the crime occurred in Indian Country.").

The question is a federal question. No doubt then that the Tenth Circuit is a court of

[3] It is the State's understanding that the Osage Nation intends to file a motion to file an *amicus curiae* brief in this case. The State has not objected to that request. However, the forthcoming analysis applies to the Osage Nation, who was a party in *Irby*, as much as it applies to Petitioner.

competent jurisdiction. And the Tenth Circuit decided the matter on the merits of the question presented holding that the "Osage reservation ha[d] been disestablished by Congress." *Id.* at 1127.

Finally, Petitioner is in privity with the Osage Nation on this matter[4] because any interest that a particular tribal member or person of Native American descent has in the reservation status is derivative of the Osage Nation's sovereign interest,[5] is the result of a legal relationship with the tribe (indeed, that's the reason given as to why these jurisdictional statutes do not violate equal protection),[6] and is adequately represented by the Nation itself.[7] Moreover, just like a corporation cannot use individual shareholders as a proxy to relitigate matters decided against it, neither can the Osage Nation use individual Native Americans. For these reasons, this Court is barred from even considering the matter decided in *Osage Nation v. Irby*.

If for some reason this Court finds that the *claims* are not the same, because the tribe had a "full and fair opportunity" to litigate the *issue*, no doubt further litigation on that issue is collaterally estopped. *See, e.g., Underside v. Lathrop*, 1982 OK 57, ¶ 6, 645 P.2d 514, 516. Oklahoma courts have held that "[e]ven if claim preclusion [also known as res judicata] does not

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[4] When a sovereign is bound by a judgment, the judgment also binds its citizens. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 107 (1938); *see also Moses v. Dep't of Corr.*, 736 N.W.2d 269, 283 (Mich. Ct. App. 2007) ("Because plaintiff is claiming rights as a member of the Saginaw Chippewa Indian Tribe, [the court] find[s] that the requisite privity exists to apply the doctrine of collateral estoppel in this case.").

[5] PRIVY, Black's Law Dictionary (11th ed. 2019) (the term includes "someone whose interests are represented by a party to the lawsuit" or anyone who "ha[s] a derivative claim").

[6] *See, e.g., Morton v. Mancari*, 417 U.S. 535, 554 (1974) ("The [hiring] preference, as applied, is granted to Indians not as a discrete racial group, but, rather, *as members of quasi-sovereign tribal entities* whose lives and activities are governed by the BIA in a unique fashion.").

[7] Indeed, in a taxing and regulatory challenge by the Muscogee (Creek) Nation, it referred to those who might be subject to the taxes and regulations as "its privy." *Muscogee (Creek) Nation v. Henry*, 867 F. Supp. 2d 1197, 1209 (E.D. Okla. 2010), *aff'd sub nom. Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012).

bar a subsequent claim, issue preclusion [also known as collateral estoppel] may *effectively* bar the claim by precluding the relitigation of a particular issue." *Indep. Sch. Dist. No. 1 of Oklahoma Cty. v. Scott*, 2000 OK CIV APP 121, ¶ 11, 15 P.3d 1244, 1248 (emphasis added). "[O]nce a court has decided an issue of fact or of law necessary to its judgment, the same parties or their privies may not relitigate that issue in a suit brought upon a different claim." *Miller*, 1998 OK 24, ¶ 25, 956 P.2d 887, 897; *see also Olson v. Cont'l Res., Inc.*, 2007 OK CIV APP 90, ¶ 8, 169 P.3d 410, 412. As *McGirt*'s author, Justice Neil Gorsuch, said when he was on the Tenth Circuit, "[a] system of law that places any value on finality—as any system of law worth its salt must—cannot allow intransigent litigants to challenge settled decisions year after year, decade after decade, until they wear everyone else out." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1012 (10th Cir. 2015).

While there is an exception to these preclusive doctrines for significant intervening changes in the law, *see, e.g., Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019), *McGirt* did not purport to change the law regarding reservation disestablishment. No doubt the ruling represents drastic changes for Oklahoma. But the Tenth Circuit has stated that *McGirt* was "based on decades-old decisions, including *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903) and *Solem v. Bartlett*, 465 U.S. 463 (1984)" to look at acts of Congress to determine whether a reservation had been disestablished. *See* Order, *In re Morgan*, No. 20-6123, p. 4 (10th Cir. Sept. 18, 2020) (attached as Exhibit H); *see also id.* ("[T]he Court cited well-established precedent reviewed Congressional action to determine whether a federal statute applied.").

Even before *McGirt*, the Tenth Circuit—the same court which found the Osage reservation disestablished—held that the Creek Reservation had not been disestablished. *Murphy v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020)

(concluding that "Congress has not disestablished the Creek Reservation. Consequently, the crime in this case occurred in Indian country as defined in 18 U.S.C. § 1151(a)."). In doing so, the Tenth Circuit applied the *Solem* test. *Id.* at 937 ("We must apply the *Solem* framework to determine whether Congress has disestablished the Creek Reservation."). And, even so, it found no need to revisit its decision in *Irby*. Quite the contrary, the Tenth Circuit acknowledged in *Murphy* that, based on the same *Solem* analysis, it "concluded Congress had disestablished the Osage Reservation." *Id.* at 954.

Nor did the Supreme Court purport to overrule or break new ground on the *Solem* framework. *McGirt*, 140 S. Ct. at 2475 ("[W]e have never insisted on any particular form of words when it comes to disestablishing a reservation."). In fact, the Supreme Court stated "we say nothing new." *Id.* at 2464. What's more, the majority opinion highlighted the availability of res judicata. *Id.* at 2481. It would make little sense and would be disingenuous if the Supreme Court did so while at the same time issuing a significant intervening change in the law making that doctrine unavailable. And, of course, *McGirt* had no direct bearing on the Osage question saying, "[e]ach tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek." *Id.* at 2479. Thus, there is no exception to *res judicata* here.

Beyond finality and the equitable administrative of law, the practical wisdom of the preclusive doctrines is on full display in this case. In *Bosse*, this Court held that "[c]onsistency and economy of judicial resources compel us to adopt the same definition [of Indian status] as that used by the Tenth Circuit." *Bosse*, 2021 OK CR 3, ¶ 16. The consequences of this Court reaching a conclusion opposite that of the Tenth Circuit in this case are far more staggering.

We would have federal law telling federal officials that this land *is not* Indian country under the Major Crimes Act. At the same time, we would have state law telling state officials that this

land *is* Indian country under the Major Crimes Act. This would create an untenable jurisdictional hole in Osage County wherein crimes committed by Indians—and, if *Bosse*'s holding that the State lacks concurrent jurisdiction over crimes by non-Indians against Indian victims stands, 2021 OK CR 3, ¶¶ 23-28, many other crimes with Indian victims—would be prosecuted neither by the state nor the federal government. That result is as dangerous as it is absurd.[8]

Thus, as an alternative to the State's procedural arguments, the State respectfully asks this Court to adopt the district court's findings of fact and conclusions of law, and hold that the State properly exercised jurisdiction in this case.

IV. CONCLUSION

Petitioner's attack on his conviction comes 13 years too late. This Court should hold, consistent with the Legislature's clear intent, that Petitioner's claim is waived. Further, to protect the interests of the State and victims of crime, this Court should not permit attacks on final convictions so many years after the fact. However, even absent these procedural doctrines, Petitioner is not entitled to relief because the Osage Nation's reservation was disestablished.

Nonetheless, should this Court find the defendant is entitled to relief based on the parties' stipulations and the district court's Order, the State respectfully requests that this Court stay any order reversing the convictions in this case for twenty (20) days. *Spears v. State*, 2021 OK CR 7, ¶ 17, __ P.3d at __; *Sizemore v. State*, 2021 OK CR 6, ¶ 17, __ P.3d __, __; *Hogner v. State*, 2021 OK CR 4, ¶ 19, __ P.3d at __; *Bosse v. State*, 2021 OK CR 3, ¶ 30, __ P.3d __, __; Rule 3.15(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

[8] Further, because the definition of Indian Country in 18 U.S.C. § 1151 is sometimes used to determine which sovereign has authority in other matters, there is a potential for great uncertainty which could affect the economy of Osage County. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) ("Although [the] definition [of Indian Country] by its terms relates only to federal criminal jurisdiction," this Court has recognized "that is also generally applies to questions of victim jurisdiction.").

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA[9]

JENNIFER L. CRABB, OBA #20546
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
Fax: (405) 522-4534

ATTORNEYS FOR APPELLEE

CERTIFICATE OF MAILING

On this 3rd day of May, 2021, a true and correct copy of the foregoing was mailed to counsel for Petitioner:

Corbin Brewster
Katie A. McDaniel
Brewster & DeAngelis, P.L.L.C.
2617 East 21st Street
Tulsa, Oklahoma 74114

JENNIFER L. CRABB

[9] 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.

ORIGINAL

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 15 2021

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

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

ORDER STAYING ISSUANCE OF MANDATE

On April 7, 2021, Respondent filed with this Court a motion to recall the mandate in this capital post-conviction case granting relief, *Bosse v. State*, 2021 OK CR 3. Oral argument was heard on this request on April 15, 2021. Respondent's request is **GRANTED**. This Court hereby stays issuance of the mandate for forty-five (45) days from the date of this Order. Mandate will automatically issue at the end of forty-five days.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 15th day of April, 2021.

DANA KUEHN, Presiding Judge

EXHIBIT
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SCOTT ROWLAND, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

CIP/DIP writing attached.

ROBERT L. HUDSON, Judge

ATTEST:

Clerk

HUDSON, J., : CONCURRING IN PART/DISSENTING IN PART

I concur in today's decision to grant a stay of mandate for forty-five days. However, I would go further and continue the stay of mandate for the pendency of the State's certiorari appeal to the United States Supreme Court.

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

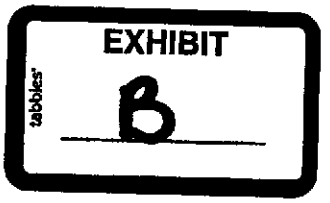
GRANT N. JACKSON, IV,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
vs.	)	Case No. F-2016-453
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee,	)	

ORDER HOLDING CASE IN ABEYANCE AND DIRECTING ATTORNEY GENERAL TO PROVIDE STATUS UPDATE

Before the Court is Appellant Jackson's Application to File Supplemental Brief. Jackson seeks to call this Court's attention to new authority, namely the Tenth Circuit's recent ruling in *Murphy v. Royal,* 866 F.3d 1164, 1205 (10TH Cir. 2017), concerning Creek Reservation land and the State of Oklahoma's lack of jurisdiction to prosecute crimes that occur on that land. The State objected to Jackson's application, arguing *Murphy* is not "new authority" under Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2017), because the mandate has not issued.

The litigation in *Murphy* is ongoing and not final. Until the matter in *Murphy* is settled, Jackson's application and case should be held in abeyance and the Attorney General should keep this Court informed of the status of the litigation.

THEREFORE IT IS THE ORDER OF THIS COURT that Jackson's Application to File Supplemental Brief and case be held in abeyance until the



decision in *Murphy v. Royal* is final. The Attorney General is directed to notify this Court once the decision in *Murphy* is finally settled.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 26th day of September, 2017.

GARY L. LUMPKIN, Presiding Judge

DAVID B. LEWIS, Vice Presiding Judge

ROBERT L. HUDSON, Judge

ATTEST:

John D. Hadden
Clerk

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

No. PCD-2019-124

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 22 2019

JOHN D. HADDEN
CLERK

ORDER HOLDING CASE IN ABEYANCE AND DIRECTING ATTORNEY GENERAL TO PROVIDE STATUS UPDATE

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 434, *reh'g granted and relief denied*, 2017 OK CR 19, 406 P.3d 26, *cert. denied*, 138 S.Ct. 1264, 200 L.Ed.2d 421 (2018). This Court denied Petitioner's first Application for Post-Conviction Relief. *Bosse v. State*, No. PCD-2013-1128 (Okl.Cr. Oct.16, 2016) (not for publication).

EXHIBIT
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Petitioner filed this Successive Application for Post-Conviction Relief on February 20, 2019. In Proposition I, he challenges the State's jurisdiction to prosecute his case. Pursuant to *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017) as well as the existing case law relied upon by the *Murphy* court, Petitioner argues that because the crime occurred within the historical boundaries of the Chickasaw Reservation, and because the victims were members of the Chickasaw Nation, the State of Oklahoma is deprived of jurisdiction in this matter. Petitioner has attached to his Successive Application documentary exhibits in support of this jurisdictional challenge.

The litigation in *Murphy v. Royal* is ongoing and not final. On May 21, 2018, the United States Supreme Court granted Oklahoma's request for certiorari review of *Murphy*, staying the matter until the Supreme Court's final disposition. *Royal v. Murphy*, __ U.S. __, 138 S.Ct. 2026, 201 L.Ed.2d 277 (2018). Until the matter in *Murphy* is settled, we find Petitioner's matter should be held in abeyance and the Oklahoma Attorney General should keep this Court informed of the status of the litigation.

THEREFORE IT IS THE ORDER OF THIS COURT that the present Application be held in abeyance until the decision in *Murphy*

v. Royal is final. The Oklahoma Attorney General is directed to notify this Court once the decision in *Murphy* is finally settled.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT **this** 22nd **day of** March **, 2019.**

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden

Clerk

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ROBERT TAYLOR BRAGG,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case No. F-2017-1028**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

ORDER HOLDING CASE IN ABEYANCE AND DIRECTING ATTORNEY GENERAL TO PROVIDE STATUS UPDATE

Before the Court is Appellant Robert Taylor Bragg's direct appeal from his conviction in Tulsa County District Court, Case No. CF-2014-4641, for Child Abuse by Injury, in violation of 21 O.S.Supp.2014, § 843.5(A). The Honorable William J. Musseman, Jr., District Judge, presided over Bragg's jury trial and sentenced him according to the recommendations of the jury to life imprisonment for Count 1 and twenty years imprisonment for each of Counts 2-6. Judge Musseman ordered the sentences to run concurrently with each other and granted credit for time served.

Bragg appeals, raising six propositions of error before this Court. In Proposition IV of his brief in chief, Bragg challenges the

State's jurisdiction to prosecute his case under *Murphy v. Royal,* 866 F.3d 1164 (10th Cir. 2017).

The litigation in *Murphy* is ongoing and not final. On May 21, 2018, the United States Supreme Court granted Oklahoma's request for certiorari review of *Murphy,* thus staying the matter until the Supreme Court's final disposition. *See Royal v. Murphy,* ___U.S.___, 138 S.Ct. 2026, 201 L.Ed.2d 277 (2018). Therefore, until the matter in *Murphy* is settled, we find Bragg's appeal should be held in abeyance and the Oklahoma Attorney General should keep this Court informed of the status of the litigation.

THEREFORE IT IS THE ORDER OF THIS COURT that the present appeal be held in abeyance until the decision in *Murphy v. Royal* is final. The Oklahoma Attorney General is directed to notify this Court once the decision in *Murphy* is finally settled.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 27th day of March, 2019.

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden

Clerk

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JONATHAN CAUDILL,	)	
	)	
Petitioner,	)	
	)	
-vs.-	)	**No. PC 2018-913**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER AFFIRMING DENIAL OF THIRD APPLICATION FOR POST-CONVICTION RELIEF

On August 31, 2018, Petitioner, pro se, filed a Petition in Error with an attached supporting brief with the Clerk of this Court in appeal of a final order entered by the Honorable Robert G. Haney, District Judge, on August 22, 2018, in the District Court of Delaware County, Case Nos. CF-2014-92 and CF-2014-176. That order denied an Amended Application for Post-Conviction Relief that Petitioner had filed in the District Court on March 16, 2018. The record reveals that this Amended Application represented Petitioner's third post-conviction action.

According to Petitioner, in CF-2014-92, he was convicted of one count of Forcible Sodomy and of three counts of Lewd or

Indecent Acts or Proposals to a Child under 12. In CF-2014-176, he was convicted of one count of Lewd or Indecent Acts or Proposals to a Child under 12. For each of these five counts, Petitioner was sentenced on October 1, 2014, to twenty-five (25) years imprisonment with all but the first twenty (20) years thereof suspended, but with all five sentences to be served concurrently. Petitioner did not appeal his convictions.

Petitioner's Amended Application raised four claims for post-conviction relief. In this appeal, Petitioner's only complaint is over that disposition made of his Proposition Four claim. Proposition Four contended the District Court of Delaware County lacked jurisdiction over his prosecutions because of the federal government's Major Crimes Act (18 U.S.C. §§ 1153 & 3242). That Act gives exclusive jurisdiction to the federal government in cases where certain offenses are committed in Indian Country by an Indian defendant. Petitioner alleges that his particular offenses are ones encompassed within that Act, that he is a member of the Cherokee Nation, and that his offenses occurred within Indian Country. (O.R. 35.)

In addressing Petitioner's Second Application, the District Court, among other things, found Petitioner's claim rested on the recent decision of the Tenth Circuit Court of Appeals in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). The District Court further found that the U.S. Supreme Court had granted certiorari in *Murphy*, and that the Tenth Circuit Court had stayed its decision therein pending a final decision by the Supreme Court. Finding that "*Murphy* is not a final decision," it denied Petitioner's Proposition Four. (O.R. 56.)

In this appeal of the District Court's order, Petitioner complains, "The District Court failed to hold an evidentiary hearing to determine the facts of the case, i.e. whether Petitioner is an Indian and the precise location of the crime." (Br. of Pet'r at 5.) Petitioner therefore asks that his case be remanded for such an evidentiary hearing to determine those matters. (*Id.* at 6.)

Petitioner's claim of Indian status, that his offenses occurred within Indian country, and that his offenses are controlled by the Major Crimes Act, present issues that potentially turn on the Tenth Circuit's decision in *Murphy* and whether the U.S. Supreme Court

will uphold, modify, or reverse that decision. Because the Supreme Court's disposition of the *Murphy* appeal will likely have an impact on, or be controlling of, cases such as Petitioner's, we find no error in the District Court denying post-conviction relief at this juncture. Accordingly, denial of Petitioner's third application for post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued on the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 11th day of February, 2019.

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

Clerk

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ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ANTHONY MICHAEL JACKSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PC 2018-1254**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER AFFIRMING DENIAL OF APPLICATION FOR POST-CONVICTION RELIEF

On December 17, 2018, Petitioner, *pro se,* filed an appeal of the order of the District Court of Caddo County, Case No. CF-2016-180, denying his application for post-conviction relief. The record reflects Petitioner pled guilty May 1, 2017, to Child Sexual Abuse. Pursuant to a plea agreement, Petitioner was sentenced to thirty years with all but the first twenty years suspended. Petitioner did not timely appeal his conviction.

Petitioner raises the sole proposition of error that the State of Oklahoma lacked jurisdiction to prosecute him because the federal government has exclusive jurisdiction to prosecute crimes committed by Indians in Indian Country.

In an order filed November 8, 2018, the Honorable Wyatt Hill, Associate District Judge, denied Petitioner's post-conviction application. Judge Hill found that this crime did not occur in "Indian Country" but occurred in the city limits of the town of Carnegie, Oklahoma. He found that the Town of Carnegie is not within the bounds of any recognized reservation as it is within the bounds of the land ceded to the United States of America under the "Jerome Agreement." Judge Hill found the Town of Carnegie is not a "Dependent Indian Community" nor is it an "Indian Allotment."

The Tenth Circuit order issued November 16, 2017, in *Murphy* v. *Royal,* 866 F.3d 1164 (10thCir.2017), stayed the unopposed motion to stay the mandate pending the filing of a Petition for Writ of Certiorari in the United States Supreme Court. Mandate was stayed for ninety days and/or until the deadline passed for filing a certiorari petition in the Supreme Court. If the certiorari petition was filed, the Tenth Circuit ordered that the stay would continue until the Supreme Court's final disposition. As a petition for a writ of certiorari was filed in the United States Supreme Court on February 6, 2018, the matter is, therefore, stayed until the Supreme Court's final disposition. Any post-conviction application based upon the Tenth Circuit's holding in

Murphy and the application of its holding to other Indian lands is premature. Further, Petitioner has not shown *Murphy* has any application to his crime and that the District Court erred in denying him post-conviction relief.

Accordingly, the denial of Petitioner's application for post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 5th day of February, 2019.

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

Robert L. Hudson

ROBERT L. HUDSON, Judge

Scott Rowland

SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden

Clerk

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RODNEY DERON JACKSON,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY - 7 2018

No. PC-2018-42

ORDER AFFIRMING DENIAL OF APPLICATION FOR POST-CONVICTION RELIEF

On January 12, 2018, Petitioner, *pro se*, filed an appeal of the order of the District Court of Oklahoma County in Case Nos. CF-1987-676, CF-1992-538 and CF-1992-1374 denying his application for post-conviction relief. The record reflects Petitioner was convicted in these cases of Shooting with Intent to Kill, Unauthorized Use of a Vehicle and Bail Jumping, respectively. He was sentenced in Case No. CF-1987-676 to ten years imprisonment, with all but the first five years suspended; in Case No. CF-1992-538 to five years imprisonment; and in Case No. CF-1992-1374 to five years imprisonment. Petitioner has discharged his sentences in these cases.

In the District Court and in his brief filed with this Court Petitioner argues that *Murphy v. Royal*, 866 F.3d 1164 (10th Cir.2017) is new law and alleges because his crimes were committed by an Indian inside an Indian reservation, the State courts in Oklahoma are deprived of jurisdiction in this matter. On post-conviction appeal Petitioner argues the District Court erred in denying him relief without an evidentiary hearing and that he is entitled to relief.

EXHIBIT
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In an order filed December 15, 2017, the District Court denied Petitioner's post-conviction application after considering Petitioner's arguments and the State's response. The Tenth Circuit order issued November 16, 2017, in *Murphy* stayed the unopposed motion to stay the mandate pending the filing of a Petition for Writ of Certiorari in the United States Supreme Court. Mandate was stayed for 90 days and/or until the deadline passed for filing a certiorari petition in the Supreme Court. If the certiorari petition was filed, the Tenth Circuit ordered that the stay would continue until the Supreme Court's final disposition.

As a petition for a writ of certiorari was filed in the United States Supreme Court on February 6, 2018, and the matter is, therefore, stayed until the Supreme Court's final disposition, Petitioner's post-conviction application based on the Tenth Circuit's holding in *Murphy* is premature. Accordingly, the denial of Petitioner's application for post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th day of May, 2018.

GARY L. LUMPKIN, Presiding Judge

DAVID B. LEWIS, Vice Presiding Judge

ROBERT L. HUDSON, Judge

DANA KUEHN, Judge

SCOTT ROWLAND, Judge

ATTEST:
Clerk
PA

FILED
United States Court of Appeals
Tenth Circuit

September 18, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: DAVID BRIAN MORGAN, Petitioner.	No. 20-6123 (D.C. No. 5:19-CV-00929-R) (W.D. Okla.)

ORDER

Before **BRISCOE**, **KELLY**, and **CARSON**, Circuit Judges.

David Brian Morgan, an Oklahoma prisoner proceeding pro se,[1] moves for authorization to file a second or successive habeas application under 28 U.S.C. § 2254. We deny the motion for authorization.

BACKGROUND

In 2011, Morgan pleaded guilty to charges of rape, molestation, kidnapping, and weapons possession. The district court sentenced him to life in prison. Three years later, he filed his first § 2254 habeas application. The district court dismissed the application as time-barred, and we denied a certificate of appealability. Morgan has continued to challenge his convictions in district court and this court, and we twice have denied him authorization to file a second or successive habeas application.

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[1] Because Morgan is pro se, we liberally construe his filings but will not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

In his current motion, Morgan seeks authorization to file a § 2254 application claiming: (1) the state court lacked jurisdiction because his crimes "occurred within the boundaries of the Indian reservation of the Choctaw and Chickasaw Nations," Mot. at 17, and therefore are subject to exclusive federal jurisdiction under the Major Crimes Act (MCA), 18 U.S.C. § 1153(a); (2) he received ineffective assistance of counsel (IAC) because his attorney failed to raise such jurisdictional objections; and (3) an unidentified state statute provides that his sentence was deemed to have expired once he was transferred to a private prison.

DISCUSSION

Morgan's second or successive habeas application cannot proceed in the district court without first being authorized by this court. *See* 28 U.S.C. § 2244(b)(3). We therefore must determine whether his "application makes a prima facie showing that [it] satisfies the requirements of" subsection (b). *Id.* § 2244(b)(3)(C). In particular, we must dismiss any claim not raised in a prior application unless the claim: (1) "relies on a new rule of constitutional law" that the Supreme Court has "made retroactive to cases on collateral review," *id.* § 2244(b)(2)(A); or (2) relies on facts that could not have been discovered through due diligence and that establish the petitioner's innocence by clear and convincing evidence, *id.* § 2244(b)(2)(B). "If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application." *Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013) (internal quotation marks omitted).

Morgan seeks authorization to proceed under § 2244(b)(2)(A) and contends his jurisdictional and IAC claims rely on a new retroactive rule of constitutional law—specifically, the Supreme Court's recent decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and our decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), which the Supreme Court summarily affirmed in *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), for the reasons stated in *McGirt*.[2] In *Murphy*, we held that Congress had not disestablished the Creek Reservation in Oklahoma and that the state court therefore lacked jurisdiction over the petitioner, a Creek citizen, for a murder he committed on the Creek reservation. 875 F.3d at 904. In *McGirt*, the Supreme Court similarly concluded that the territory in Oklahoma reserved for the Creek Nation since the 19th century remains "'Indian country'" for purposes of exclusive federal jurisdiction over "'certain enumerated offenses'" committed "within 'the Indian country'" by an "'Indian.'" 140 S. Ct. at 2459 (quoting 18 U.S.C. § 1153(a)). Morgan's motion for authorization fails for several reasons.

First, Morgan has not shown his claim actually "relies on" *McGirt*. 28 U.S.C. § 2244(b)(2)(A). Although we do not consider the merits of a proposed second or successive application in applying § 2244(b)(2), *see Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (per curiam), neither is it sufficient to merely provide a citation to a new rule in the abstract. Instead, the movant must make a prima facie showing that the claim

[2] For his conclusory claim that his sentence expired once he was transferred to a private prison, Morgan relies on an unidentified "Oklahoma statute," Mot. at 9, and not a new rule of constitutional law under § 2244(b)(2)(A).

is based on the new rule. *See* 28 U.S.C. § 2244(b)(2)(A), (3)(C). And here, Morgan has not alleged that he is an Indian or that he committed his offenses in the Indian country addressed in *McGirt*, such that the MCA might apply.

Moreover, even if Morgan had adequately alleged reliance on *McGirt*, he has failed to establish that the decision presented a new rule of constitutional law. In *McGirt*, the Court noted that the "appeal rest[ed] on the federal Major Crimes Act" and that application of the statute hinged on whether the Creek Reservation remained "Indian country" under the MCA. *McGirt*, 140 S. Ct. at 2459. Based on decades-old decisions, including *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), and *Solem v. Bartlett*, 465 U.S. 463 (1984), the Court explained that "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt*, 140 S. Ct. at 2462. In other words, the Court cited well-established precedent and reviewed Congressional action to determine whether a federal statute applied. That hardly speaks of a "new rule of constitutional law," 28 U.S.C. § 2244(b)(2)(A).

Finally, even if *McGirt* did present a new rule of constitutional law, the Court did not explicitly make its decision retroactive. "[T]he only way [the Supreme Court] could make a rule retroactively applicable is through a holding to that effect." *Cannon v. Mullin*, 297 F.3d 989, 993 (10th Cir. 2002) (internal quotation marks omitted). It is not sufficient that lower courts have found the rule retroactive or that the rule might be retroactive based on "the general parameters of overarching retroactivity principles." *Id.* Because the Supreme Court has not held that *McGirt* is retroactive, Morgan cannot satisfy this requirement for authorization under § 2244(b)(2)(A).

CONCLUSION

Because Morgan has not satisfied the requirements for authorization in § 2244(b)(2), we deny his motion. The denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." *Id.* § 2244(b)(3)(E).

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DAVID PAUL WORTHINGTON,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

No. PC-2020-744

ORDER REMANDING FOR EVIDENTIARY HEARING

On October 22, 2020, Petitioner, *pro se*, filed an appeal of the order of the District Court of Washington County in Case No. CRF-1986-52 denying his application for post-conviction relief.

In February 1987, Petitioner was convicted of first-degree robbery, first-degree rape, and kidnapping. He was sentenced to 20 years imprisonment for robbery, 70 years for rape, and 40 years for kidnapping.

On post-conviction appeal, Petitioner argues the District Court lacked jurisdiction over his case due to his claims that he is a Cherokee Indian and that his crimes occurred within Indian Country. In an order filed on September 14, 2020, the District Court denied Petitioner's post-conviction application without a hearing.

Petitioner's claim raises two separate questions: (a) his Indian status, and (b) whether the crime occurred in Indian Country. Both these issues require fact-finding. We do not find enough in the District Court order or the record before this Court to support the trial court's findings. We therefore **REMAND** this case to the District Court of Washington County, the Honorable Russell Vaclaw, Associate District Judge, 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 Petitioner's legal status as an Indian 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, Petitioner's Indian status. The District Court must determine whether (1) Petitioner has some Indian blood, and (2) is recognized as 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 v. Oklahoma,* 140 S.Ct. 2452 (2020). 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.

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 Petitioner, 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

[1] *See, e.g., 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). *See generally Goforth v. State,* 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

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 this order to the District Court of Washington County with a copy of Petitioner's October 22, 2020, Petition in Error and Brief.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 22nd day of December, 2020.

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden

Clerk

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