ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE
STATE OF OKLAHOMA

LOUIS R. YOUNG, Petitioner,	)	Court of Criminal Appeals Case No.: PC-2020-954
v.	)	
STATE OF OKLAHOMA, Respondent.	)	Osage County District Court Case No.: CF-2005-266A

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN - 1 2021
JOHN D. HADDEN
CLERK

PETITIONER'S SUPPLEMENTAL BRIEF AND MOTION FOR REMAND

Clark O. Brewster, OBA #1114
Katie A. McDaniel, OBA #32345
Brewster & De Angelis, PLLC
2617 E. 21st Street
Tulsa, OK 74114
Tel: (918) 742-2021
Fax: (918) 742-2197
Attorneys for Petitioner

June 1, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Secondary Sources

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LOUIS R. YOUNG,	)	
	)	
Petitioner,	)	**Court of Criminal Appeals**
	)	**Case No.: PC-2020-954**
v.	)	
	)	
STATE OF OKLAHOMA,	)	**Osage County District Court**
	)	**Case No.: CF-2005-266A**
Respondent.	)	

PETITIONER'S SUPPLEMENTAL BRIEF AND MOTION FOR REMAND

Petitioner, Louis R. Young, by and through his attorneys, Clark O. Brewster and Katie A. McDaniel of BREWSTER AND DE ANGELIS, P.L.L.C., submits this *Supplemental Brief and Motion for Remand*. Petitioner respectfully requests that this Court grant Petitioner's Application for Post-Conviction Relief and remand with instructions to dismiss. In the alternative, Petitioner requests that the Court remand this case to the District Court for further evidentiary hearing wherein Petitioner is represented by counsel, and direct the District Court to follow the analysis set out in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In support thereof, Petitioner states as follows:

I. PROCEDURAL HISTORY

On September 15, 2020, Petitioner filed a *Pro Se Application for Post-Conviction Relief* in the District Court of Osage County, alleging that the District Court lacked jurisdiction pursuant to *McGirt*, to prosecute him, a citizen of the Muscogee Creek Nation, for a major crime that occurred within the Osage Reservation. On September 18, 2020, the State filed a response requesting that the District Court summarily deny *Petitioner's Application for Post-Conviction Relief*. The only arguments presented by the State were that Petitioner had not provided sufficient evidence of his Indian status, and that Petitioner could not rely on *McGirt* because its holding was limited to the Muscogee Creek Nation Reservation. On December 14, 2020, the District Court of Osage County

summarily denied *Petitioner's Application for Post-Conviction Relief* "for the reasons set forth in the State's Response."

On December 30, 2020, Petitioner, *pro se*, filed this appeal, seeking relief from the District Court's order denying his *Application for Post-Conviction Relief.* On January 27, 2021, this Court issued an order remanding the case to the District Court for an evidentiary hearing to be held within sixty (60) days. The Court stated as follows:

> Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the Attorney General and District Court work in coordination to effect uniformity and completeness in the hearing process. Upon Petitioner's presentation of *prima facie* evidence as to 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 Court ordered that the hearing be transcribed and that the District Court make written findings of fact and conclusions of law addressing the following issues: (1) whether Petitioner has some Indian blood, (2) whether Petitioner is recognized as an Indian by a tribe or by the federal government, and (3) whether the crime occurred within Indian Country. With regard to the third inquiry, the Court directed the District Court to "follow the analysis set out in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) [and] consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony." The Court permitted the parties to submit a supplemental brief within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed with this Court.

On February 1, 2021, the District Court set the matter for evidentiary hearing on March 2, 2021. On February 4, 2021, Petitioner, a prisoner at Dick Connor Correctional Center in Hominy, Oklahoma, filed a *Motion for Appointment of Counsel* in the District Court pursuant to 22 O.S. § 1082. On February 19, 2021, the District Court denied the *Motion,* notwithstanding this Court's

order remanding the matter and "[r]ecognizing the historical and specialized nature of th[e] remand." The District Court noted that it previously denied Petitioner's application for post-conviction relief and that "counsel [was not] necessary for a fair determination of the claim" because the claim "on it's [sic] face. . . lack[ed] merit."

On February 23, 2021, the State filed a motion for continuance of the hearing scheduled for March 2, 2021. The District Court granted the Motion and set the hearing on March 23, 2021. On the morning of the hearing, Respondent filed *State's Pre-Evidentiary Hearing Brief on Indian Country Remand* in the District Court and handed a copy to Petitioner a few minutes prior to the commencement of the hearing. The brief raised new and esoteric issues of *res judicata* and collateral estoppel, arguing that pursuant to *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), the crime did not occur in Indian Country. Petitioner was denied the appointment of counsel, a meaningful opportunity to respond to Respondent's newly raised argument, and access to the treaties, statutes, maps, and/or the ability to develop testimony regarding the existence of the reservation boundaries as directed by this Court in its Remand.

On April 8, 2021, the District Court entered its *Findings of Fact and Conclusions of Law on Remand from the Oklahoma Court of Criminal Appeals*, adopting the Respondent's *res judicata* and collateral estoppel arguments and finding that the crime did not occur in Indian Country. The District Court found that Mr. Young's claim that the Osage Nation Reservation was intact had been "impermissibly raised." On April 9, 2021, the Osage Nation filed a *Motion for Leave to File Brief in Support of Defendant/Petitioner Regarding the Existence of the Osage Reservation*. On April 12, 2021, the *District Court's Findings of Fact and Conclusions of Law on Remand from the Oklahoma Court of Criminal Appeals* was filed in the appellate record.

On April 21, 2021, prior to Petitioner retaining undersigned counsel, Petitioner filed *Supplemental Brief of Petitioner, pro se*. On April 27, 2021, Petitioner retained the undersigned counsel. Petitioner requested an enlargement of time to permit newly retained counsel to advise and consult with him, review the court records, and prepare a counseled supplemental brief permitting a meaningful opportunity to respond to Respondent's arguments regarding *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010). On May 10, 2021, this Court granted Petitioner's request for additional time to file his supplemental brief. This *Supplemental Brief and Motion for Remand* follows.

II. ARGUMENT AND AUTHORITIES

A. Mr. Young's Claim is Timely Presented.

The State's supplemental brief offers expansive, though meritless, arguments asserting that this Court has misapplied procedural doctrines and that Mr. Young's claim is procedurally barred.

There are at least two independently sufficient reasons that Mr. Young's claim is properly before the Court. This Court has long held that "lack of jurisdiction" is "never finally waived." *Johnson v. State*, 1980 OK CR 45, ¶30, 611 P.2d 1137, 1145. This rule was recently confirmed in *Bosse v. State,* 2021 OK CR 3, ___ P.3d ___, 2021 WL 958732 (March 11, 2021). Additionally, *Bosse* also provides an independently sufficient reason for raising this claim now as *Bosse* observes that "*McGirt* provides a previously unavailable legal basis for this claim" *Bosse* at ¶ 22. Although the *Bosse* mandate is stayed at the time of this writing, this inevitable ruling was predicated by a prior order remanding the case for a *McGirt* hearing on the same basis. Respondent ignores that this Court's remand of Mr. Young's case for merit determinations also denotes that no procedural impediments exist in this very case. For all these reasons this claim is timely and due to be considered.

Beyond *Bosse*, this Court recently confirmed the dual reasons these claims are timely raised in post-*McGirt* post-conviction applications. *Cole v. State*, 2021 OK CR 10, ¶16; *Ryder v. State*, 2021 OK CR 11, ¶5. In *Ryder*, this Court stated: "we find Petitioner's claim is properly before this Court as the claim could not have been previously presented because the legal basis for the claim was unavailable." *Id.* As to jurisdiction, the Court further held that: "[s]ubject matter jurisdiction may — indeed must — be raised at any time." *Id.* The Court reached the obvious conclusion: "No procedural bar applies and this issue is properly before us." *Id.* These cases, that Respondent neglected to mention, further emphasize that its procedural argument is meritless. After the State ignored these cases in its brief, the Court knocked down its procedural arguments yet again in another published opinion. *Bench v. State*, 2021 OK CR 12 (May 6, 2021). Petitioner acknowledges the mandate is stayed in these well reasoned, inevitable, decisions.

With respect to subject matter jurisdiction, Respondent expresses the misplaced belief that the Court's application of the subject matter jurisdiction rule in *Bosse* was based on an alleged misapplication of *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2011). Respondent's argument faces the weighty problem that, while *Bosse* indeed cited *Gonzalez*, its procedural ruling was by no means solely grounded thereon. Rather, it was grounded firmly on a long-standing principle of Oklahoma procedural law that was in place well before *Gonzalez* even existed. In *Bosse,* this Court cited three Oklahoma cases as support for the subject matter jurisdiction rule, holding: "This Court has repeatedly held that the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction. *See Wackerly v. State,* 2010 OK CR 16, ¶4, 237 P.3d 795,797; *Wallace v. State,* 1997 OK CR 18, ¶15, 935 P.2d 366, 372; *see also Murphy v. State*, 2005 OK CR 25, ¶¶5-7, 124 P.3d 1198, 1200." *Bosse* at ¶ 21. Furthermore, this Court in *Ryder* observed that Chief Justice Robert's dissent in *McGirt* "correctly noted" that "subject matter

jurisdiction is never waived under Oklahoma law." *Ryder*, ¶5, fn.2. This is, again, a state law doctrine totally unsuitable for Respondent to seek a Supreme Court solution.

"Beyond *Bosse*, this Court has repeatedly confirmed, in *Murphy* and elsewhere, that such a fundamental jurisdictional issue can be raised at any time." *Murphy* at ¶2, (remanding for evidentiary hearing and deciding an Indian country jurisdictional issue raised for first time in successor post-conviction relief action); *Cravatt v. State*, 1992 OK CR 6 at ¶3, 825 P.2d 277, 278 (deciding Indian Country jurisdictional question raised for the first time on the day appellate oral argument was set); and *Magnan v. State*, 2009 OK CR 16, ¶9, 207 P.3d 397, 402 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue even though issue was not raised in the trial court where appellant plead guilty and waived his appeal). Oklahoma's decisions that jurisdiction can be raised at any time have existed for almost a century. *See Armstrong v. State*, 1926 OK CR 259, 248 P. 877, 878.

As noted, *Bosse* also provides an independently sufficient reason for currently raising this claim. *Bosse* observes that "*McGirt* provides a previously unavailable legal basis for this claim." *Bosse* at ¶ 22. For both these reasons, this claim is timely and due to be considered.

In response to this second independently sufficient reason that Mr. Young's claim is timely, Respondent advances the notion that *Bosse* was a capital case. It is true that *Bosse* was a capital case.[1] *Bosse's* previously unavailable finding is also a perfect fit for the non-capital rule's "sufficient reason" for raising a claim permission. 22 O.S. § 1086. *Jones v. State,* 704 P.2d 1138, 1140 (Okla. Crim. App. 1985) (noting a subsequent change in the law "affecting petitioner's case" is a sufficient reason), *see also Stewart v. State*, 495 P.2d 834, 836 (Okla. Crim. App. 1972)

[1] Of course, the accompanying suggestion implicit in Respondent's position that the capital procedural rules are generally easier than the non-capital procedural rules is not true.

("*Burgett v. Texas* had not been decided by the United States Supreme Court at the time of defendant's trial or appeal."). However, while *McGirt* applied existing precedent – a point Respondent both asserts procedurally and seems to disagree with otherwise – it also certainly changed the law, as previously applied in Oklahoma, to include Mr. McGirt's case. This Court's persistent observation that *McGirt* provided a previously unavailable basis for post-conviction relief is exactly correct despite Respondent's dispute. Respondent has no real answer for the second reason this claim is timely either. Both reasons apply even though Mr. Young only needs one.

As in *Bosse* and the other recent post-conviction cases, this claim must be considered on the merits. No procedural bar was applied in *Bosse*; none were even mentioned in the remand of this case identifying only substantive issues, and indeed none may be applied here.

Next, this Court has firmly rejected the State's argument under the equitable doctrine of laches as well. *Bosse*, ¶ 21, fn. 9 ("The principle that subject matter jurisdiction may not be waived also settles the State's argument based on laches. . ."). Moreover, Oklahoma has long asserted essentially unlimited criminal jurisdiction over Indian Country via reservation disestablishment. Petitioner did not sit on his rights; according to Oklahoma he had none. Equity favors reaching *McGirt* claims as this Court is doing – not barring them.

And, as for the State's continuing quest for delay in this case, the foregoing discussion shows that too is built on quicksand. Moreover, Respondent again seeks an extent of the delay that was denied in *Bosse*. Respondent fails to account for the costs that accrue as Oklahoma continues to illegally hold prisoners. The stalls are coming from the State – not from criminal defendants or the tribes – which cause disruption and uncertainty. While there are factors in place that perhaps blunt those costs for now, in retrospect that reality will become unavoidably apparent. This Court

has found a way to balance these considerations by granting short stays of its mandate. No more is warranted here. Nor, as we have seen, does Respondent proffer arguments to justify this delay request here. This case is not a General Crimes Act case, upon which the State is presently seeking certiorari review. This case, like *McGirt*, centers on the Major Crimes Act. Accordingly, this Court should — indeed must — proceed to the merits.

B. Mr. Young is not in privity with the Osage Nation.

For issue preclusion to apply, there must be "(1) an earlier decision on the issue, (2) a final judgment on the merits and (3) a cause dealing with the same parties or those in privity with the original parties." *Bronson Trailers & Trucks v. Newman*, 2006 OK 46, n.9, 139 P.3d 885. Issue preclusion also requires that "the party against whom issue preclusion is interposed must have had a 'full and fair opportunity' to litigate the critical issue in the earlier case." *In re the Death of Hyde*, 2011 OK 31, ¶ 12, 255 P.3d 411 (quoting *Wilson v. City of Tulsa*, 2004 OK CIV APP 44, ¶ 9, 91 P.3d 673). The State failed to satisfy the elements of issue preclusion. The *Irby* case was not a case under the MCA for purposes of federal criminal jurisdiction, it was a civil, regulatory tax case. On the requirement that "the party against whom it is being asserted was either a party to or a privy of a party to the prior action," Mr. Young was not a named party in the *Irby* case and was not in privity with the named parties in the *Irby* case. Nor does the State show that "the party against whom it is interposed had a full and fair opportunity to litigate the claim or critical issue" because Mr. Young, as a non-party to the *Irby* case, was not afforded any opportunity "to litigate the claim or critical issue." Mr. Young is not even a member of the Osage Nation.

Taylor v. Sturgell, 553 U.S. 880 (2008) advanced in purported support of Respondent's perverse claim that a non-Osage is barred by privity with Osage Nation, is a losing case on the notion for which it is offered. *Taylor* actually supports Petitioner, *e.g*:

> "It is equally clear that preclusion cannot be justified on the theory that Taylor was adequately represented in Herrick's suit. Nothing in the record indicates that Herrick understood himself to be suing on Taylor's behalf, that Taylor even knew of Herrick's suit, or that the Wyoming District Court took special care to protect Taylor's interests."

Id. at 905. The same holds for Mr. Young. To select just one more principle from *Taylor*, the proponent of this affirmative defense carries the burden of proof. *Id.* at 907. Respondent has not even approached that vicinity. Mr. Young is not in privity. Accordingly, the District Court erred in its determination that *Irby* was dispositive of Mr. Young's claims.

C. ***Irby* is not good law and the analysis used therein was unequivocally repudiated by the United States Supreme Court in *McGirt*.**

Aside from the fact Mr. Young was not involved whatsoever with the litigation in *Osage Nation v. Irby,* 597 F.3d 1117, 1124 (10th Cir. 2010), and is not even a member of the Osage Nation itself, the State admits that there is in *Herrera v. Wyoming* 139 S. Ct. 1686 (2019) an exception to the preclusion doctrine it advances. Because *McGirt* significantly weakens the jurisprudential impact of *Irby*, Respondent's touted case neither survives following *McGirt* - nor may it have the preclusive effect Respondent erroneously insists upon.

In *Irby*, the Tenth Circuit applied its then understanding of the *Solem v. Bartlett*, 465 U.S. 463, 471 (1984), analytical framework. The *Irby* court looked first to the plain language of the Osage Allotment Act and found that "the operative language of the statute does not unambiguously suggest . . . disestablishment of the Osage reservation." *Id.* at 1124. The Court also acknowledged that "neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language." *Id.* The *Irby* court did not specifically identify any particular ambiguity in the statute. The court nevertheless went on to review the circumstances surrounding the passage of the Acts and events after the passage of the Acts. The method of analysis employed by the 10th Circuit's *Irby* decision, holding that the Osage reservation was disestablished circumstantially, is not good

law and the analysis used there was unequivocally repudiated by the United States Supreme Court in *McGirt*.

The *Irby* court also reasoned that because the Act did not contain explicit language of cession, and because the entirety of the Reservation was allotted to Osage Nation members, it likewise did not provide sum-certain payment[2] for acquired lands. *Id.* at 1123-24. The court noted the presence of secondary factors identified in *Solem* favoring the continued existence of a reservation. *Id.* at 1123. Among these secondary factors were (1) the Secretary of the Interior's reservation of lands for tribal purposes, (2) the grant of individual allotments to tribal members before the land was opened to non-Indian settlement, and (3) the reservation of mineral resources for the tribe itself. *Id.* Still, the court found that the Osage Nation had been disestablished, based on its erroneous conclusion that Congress "disestablished the Creek and other Oklahoma reservations." *Id.* at 1124.

McGirt authoritatively deconstructed *Solem*. *McGirt* held that, absent an express termination of the reservation by an Act of Congress or an intergovernmental agreement with the

---

[2] "The manner of compensation for tribal lands allotted or opened to the public for settlement may also provide evidence of Congress's intent regarding the Osage Reservation." Barbara Moschovidis, *Osage Nation v. Irby: The Tenth Circuit Disregards Legal Precedent to Strip Osage County of Its Reservation Status*, 36 Am. Indian L. Rev. 189, 211 (2012) (citing *Irby*, 597 F.3d at 1123). "One-time 'sum-certain' payments often indicate an intent to terminate the reservation status of a tract of land, while 'payment that is contingent on future sales usually indicates an intent not to terminate.'" *Id.* "In its discussion of compensation, the court of appeals echoed the Supreme Court, stating that '[e]xplicit language signifying an intent to terminate a reservation combined with a sum-certain payment creates an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.'" *Id.* (internal quotations and citations omitted). "When the court applied the rule, however, it only briefly noted that the Osage Allotment Act contains no terms of payment because the land was not intended to be sold or opened for settlement." *Id.* "It failed to consider that the absence of payment may itself be a strong indicator against disestablishment or that the absence of terms disposing of Osage lands to nonmembers is strong evidence that Congress intended to leave the Osage Reservation intact."

Muscogee Creek Nation, all land within the boundary of the Muscogee Creek Nation is Indian Country. The same analysis applies to other reservations as well. *Bosse v. State*, 2021 OK CR 3, ¶5. *McGirt* holds that only Congress can disestablish a reservation and may only do so through a clear and unambiguous act of Congress. As to the circumstantial interpretative analysis used in *Irby*, the Supreme Court clarified that it was incorrect. "To avoid further confusion, we restate the point. There is no need to consult other extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning. *Milner v. Department of Navy,* 562 U.S. 562, 574131 S.Ct. 1259, 179 L.Ed.2d 268 (2011)." *McGirt*, 140 S.Ct. at 2469. This, of course, is precisely the mode of analysis this Court acknowledged was required by *McGirt* and thus followed in *Bosse*: "Thus our analysis begins, and in the case of the Chickasaw Nation, ends, with the plain language of the treaties." 2021 OK CR 3, ¶ 4. However, this is not the mode exhibited by the *Irby* decision.

As noted in other precedent that *McGirt* relied on: "There is a presumption in favor of the continued existence of a reservation," which requires that any contrary intent of Congress "must be clearly expressed." *see, e.g., South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 343 (1998) (intent must be "clear and plain") (citation omitted); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (intent must be "clearly evince[d]"); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975) (intent to disestablish must be "clear"). The "most probative evidence" of disestablishment "is, of course, the statutory text," *Yankton Sioux Tribe*, 522 U.S. at 344 (citation omitted), and "the statutory text must establish an express congressional purpose to [disestablish]" before a court may so find. *Hagen v. Utah*, 510 U.S. 399 at 411(1994) (internal quotation marks, brackets, and citation omitted).

Not only is *Irby* wrong analytically, the circumstances *Irby* mistakenly proceeded to credit independently show that the ruling was based on a false premise as well. The Tenth Circuit relied on the premise that the Muscogee "Creek" and "other Oklahoma reservations" had been "disestablished" by the allotment process. 597 P.2d at 1124. In *McGirt*, the Supreme Court found that the Muscogee Nation was **never disestablished.** So, that premise of *Irby* has been repudiated. So too does *Osage Nation's* notion that other reservations were disestablished at the same time as evidenced by *Bosse* (Chickasaw Reservation also intact) and subsequent Oklahoma cases finding the same for the Cherokee, Seminole, and Choctaw Reservations. The State's reliance on *Irby*, in addition to being erroneous, demonstrates the value of not embarking upon a circumstantial analysis in the first place.

The 10th Circuit's 2010 *Irby* decision holding that the Osage reservation had been disestablished is simply not good law. It is it based on **both** a flawed analysis and on the flawed assumption the Muscogee "Creek" Nation was disestablished. The Osage Nation is no more disestablished than the Muscogee Nation. Both are intact. While it is true that both *Irby* and *McGirt* discussed *Solem,* it is also true, and far more relevant to the present discussion, that *McGirt* eviscerated *Irby* for all practical purposes.

In *Herrera*, the Supreme Court held that a prior case did not control the issue at hand when it did not overrule prior case law, but only "methodically repudiated" the decision's logic. 139 S.Ct. 1695. Like here, one of the repudiations was of a "false premise." *Id.* Indeed, the false premise identified in *Herrera* was perhaps less evident than the false premise that the Muscogee "Creek" and other reservations had been disestablished. *Id.* at 1696. Here, it is impossible to harmonize *Irby* with *McGirt*. *Id.* at 1697. The bottom line is that because, as in *Herrera,* a subsequent Supreme Court case – here *McGirt* – "repudiated the reasoning upon which the Tenth

Circuit relied" in *Irby, Irby* "does not preclude" Mr. Young from arguing the Osage Reservation remains intact. *Id.*

"Even when the elements of issue preclusion are met . . . an exception may be warranted if there has been an intervening change in the applicable legal context." *Id.* (intervening quotations and subsequent citation omitted). *McGirt* constitutes such an intervening change. Simple application of *McGirt* principles will show that the Osage Reservation, like the Muscogee "Creek" and many others, is indeed intact. Mr. Young was improperly cut off from addressing this point fully at the remanded hearing because of the sudden foisting of *Irby* on a pro se litigant denied counsel. The information the Osage Nation will provide as *amicus* is ample evidence its reservation remains intact. Respondent has provided no contrary evidence and has instead embarked on a flawed and failed legal wild goose chase. This Court should remand this case to the District Court for an evidentiary hearing wherein Petitioner is represented by counsel, Additionally, it should direct the District Court to follow the analysis set out in *McGirt*. The result will be the same either way: the Osage Nation still exists.

D. Congress has not disestablished the boundaries of the Osage Reservation.

Congress has not disestablished the boundaries of the Osage Reservation. "To determine whether a tribe continues to hold a reservation, there is only one place [the court] may look: the Acts of Congress." *McGirt*, 140 S. Ct. at 2462. The Supreme Court "long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties." *Id.* (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–568, 23 S.Ct. 216, 47 L.Ed. 299 (1903)). The court shall not "lightly infer such a breach once Congress has established a reservation." *Id.* (citing *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984)). Only Congress can disestablish the boundaries of a

reservation and Congress must "clearly evince an 'intent . . . to change . . . boundaries' before [disestablishment] will be found." *Solem*, 465 U.S. at 470.[3]

"History shows that Congress knows how to withdraw a reservation when it can muster the will." *McGirt*, 140 S. Ct. at 2462–63. "Sometimes, legislation has provided an '[e]xplicit reference to cession' or an 'unconditional commitment . . . to compensate the Indian tribe for its opened land.'" *Id.* "Other times, Congress has directed that tribal lands shall be 'restored to the public domain." *Id.* (quoting *Hagen v. Utah*, 510 U.S. 399, 412, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (emphasis and internal quotations omitted). "Congress might speak of a reservation as being 'discontinued,' 'abolished,' or 'vacated.'" *Id.* (quoting *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) (internal quotations omitted). Disestablishment has "never required any particular form of words," *Id.* (quoting *Hagen*, 510 U.S., at 411, 114 S.Ct. 958). But it does require that Congress clearly express its intent to do so, "[c]ommon[ly with an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'" *Id.* (quoting *Nebraska* v. *Parker*, 577 U. S. 481, —— – ——, 136 S.Ct. 1072, 1079, 194 L.Ed.2d 152 (2016)).

Courts shall liberally construe treaties, agreements, statutes, and executive orders in the light most favorable to the tribes. *Cohen's Handbook of Federal Indian Law* 311 (Nell Jessup Newton et al. eds., 2005) ("*Cohen*") at 119. Indigenous property rights are to be preserved absent clear and unambiguous congressional intent to the contrary. *Id.* "There is no need to consult extratextual sources when the meaning of a statute's terms is clear." *Id.* at 2469. "Nor may extratextual sources overcome those terms." *Id.* "The only role such materials can properly play is

[3] Some reservations were created in other ways than by Congress, *e.g.* by executive order. Only Congress can disestablish reservations it created. Congress created the Osage reservation in 1872, and thus, only Congress can disestablish it.

to help 'clear up . . . not create' ambiguity about a statute's original meaning." *Id.* Herein lies the conflict with the Tenth Circuit's decision in *Irby*. The *Irby* decision was based upon a thin analysis of extratextual sources. This "thin" analysis was based s*olely* on extratextual sources, because the *Irby* court acknowledged there was no language in the Osage Allotment Act, or the Enabling Act, that evidenced "the present and total surrender of all tribal interests."

The majority in *McGirt* made clear that extratextual sources may only be considered to help clear up ambiguity in a particular statutory term or phrase. *McGirt*, at 2467-90.

Applying the *McGirt* analysis to the statutory language regarding the Osage Nation leads to only one conclusion: Congress has not disestablished the boundaries of the Osage Nation Reservation. In 1870, settler pressure in Kansas, where the Osage Nation was then located, became intolerable and the Osage Nation negotiated to sell their diminished reservation in Kansas in order to have funds to purchase lands with which they were familiar – lands that had been their aboriginal territory. In the Enabling Act, Congress defined the boundaries of Osage County as coterminous with those of the Osage Reservation. Act of June 16, 1906, § 21, 34 Stat. 267, 277. In doing so, Congress, when it enabled Oklahoma to become a state, evidenced its intent to treat to the Osage Reservation as a tract of land distinct from the rest of Oklahoma Territory.[4] Through the Osage Allotment Act, passed only two weeks after the Enabling Act, Congress provided for

[4] *See* Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906) ("An Act to enable the people of Oklahoma and of the Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States . . . ."). The Enabling Act directed that Oklahoma Territory be divided into 56 districts for the purpose of electing delegates to serve on a constitutional convention, but particularly required that "such apportionment shall include as one district the Osage Indian Reservation." Id. § 2. The Act further directed that the Osage Reservation would constitute "a separate county, and . . . shall remain a separate county until the lands in the Osage Indian Reservation are allotted in severalty and until changed by the legislature of Oklahoma . . . ." Id. § 21.

allotment of of all reservation lands to Osage Nation citizens, except for limited land reserved from allotment for the three traditional Osage towns, schools, and other public purposes. The mineral estate was severed from the surface estate and placed in trust for the Nation, with the Nation's government continuing to exercise control. Osage Allotment Act § 2, 34 Stat. 539, 540-43 (1906).

Nothing in the text of the Osage Act or Enabling Act disestablished the Osage Nation Reservation. Under Supreme Court precedent, allotment of reservation lands to tribal members and the establishment of a county government within a reservation does not disestablish a reservation. Furthermore, Congress, federal agencies, and even the State of Oklahoma have acknowledged the continuous existence of the Reservation.

The Osage Nation is a federally recognized tribe. Its reservation was formally established by Congress in 1872 in what was then known as "Indian territory." Act of June 5, 1872, ch. 310, 17 Stat. 228. The State of Oklahoma was admitted to the Union by the Oklahoma Enabling Act. 34 Stat. 267 (1906) ("Oklahoma Act"). Section 2 of the Oklahoma Act required apportionment of the Territory into 56 districts, one of which was to be coextensive with the Osage Reservation. *Id.* at 268. That requirement was also incorporated into the Constitution of the State of Oklahoma, which provides that "[t]he Osage Indian Reservation with its present boundaries is hereby constituted one county to be known as Osage County." Okla. Const., art. XVII, § 8. In addition, Section 3 of the Oklahoma Act restricted "the manufacture, sale, barter, giving away *** of intoxicating liquors within those parts of said State *now known as* *** *the Osage Indian Reservation* and within any other parts of said State *which existed as Indian reservations.*" (emphasis added).

In 1904 and 1905, substantial oil and gas reserves were discovered in the Osage Reservation. *Cohen's Handbook of Federal Indian Law* 311 (Nell Jessup Newton et al. eds., 2005)

("*Cohen*"). As a result, Congress enacted the Osage Allotment Act of June 28, 1906 ("Osage Act"). Unlike many other allotment Acts of the era, which opened Indian lands to settlement by non-Indians, *see* Act of Feb. 8, 1887, 24 Stat. 388 (General Allotment Act),[5] the Osage Act allotted the surface estate in trust exclusively for individual Osage members, while the most valuable part of the Reservation - the subsurface - was reserved in trust for the benefit of the Osage Nation. *Osage Act* at §§ 2-3. The Osage Act repeatedly referenced the Reservation in the present and future tense. *E.g. Id.* at §§ 4, 6, 7, 10, 11.[6]

By reserving the subsurface estate for the Nation and limiting allotment to Osage members, Congress ensured continued federal superintendence over the Osage Reservation. "That supervision has continued without interruption and has produced a complex and frequently modified scheme of federal regulations. Additionally, the administration of tribal and individual property rights pertaining to the Osage Reservation are embodied in an extensive archive of federal regulations acknowledging the continued existence of the Osage Reservation." *See generally* 25 C.F.R. pt. 177 (1938) ("Agricultural and Grazing Leases, Osage Nation, Oklahoma"); 25 C.F.R. pt. 180 (1938) ("leasing of Osage Reservation Lands for Oil and Gas Mining"); 25 C.F.R. pt. 204 (1938) ("Leasing of Osage Reservation Lands, Oklahoma, for Mining, Except Oil and Gas").

Congress provided that the lands of the Osage Nation Reservation were to be divided equally as practicable among the Osage tribal members, rather than restored to the public domain.

---

[5] The Osage Nation was specifically exempted from the General Allotment Act.

[6] "Rather than showing explicit intent to disestablish the Osage Reservation, these references imply that the Osage Reservation would continue to exist after Oklahoma joined the Union and indefinitely into the future." Barbara Moschovidis, *Osage Nation v. Irby: The Tenth Circuit Disregards Legal Precedent to Strip Osage County of Its Reservation Status*, 36 Am. Indian L. Rev. 189, 210 (2012).

See 34 Stat. 539, 540. If lands remained that were not set aside for allotment for Osage citizens they could later be sold at the Nation's discretion, with the proceeds of the sale going back to the Osage citizens. *Id.* at 543. Nothing in the Act resembled a cession of the Osage lands for sum certain. The cemetery reserve given to the town of Pawhuska was to be used as a cemetery or else the site would revert back to the use and benefit of the Osage citizens. *Id.* The railroad companies' use and benefit of lands in the Osage Reservation for various railroad purposes was conditioned by the railroad companies not being able to acquire right or title to any oil, gas, or other minerals in any of those lands. Such rights were reserved only for the Osage Nation and its members. *Id.* at 545. Accordingly, applying the *McGirt* analysis to the statutory language regarding the Osage Nation, demonstrates that Congress, by allotting land, did not disestablished the boundaries of the Osage Nation Reservation.

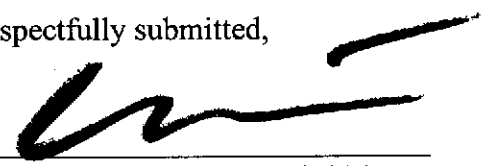
E. <u>This matter should be remanded for an evidentiary hearing.</u>

This case presents important historical issues of a specialized nature, as the Court recognized in its January 27, 2021, order remanding the case to the District Court for an evidentiary hearing. Petitioner was left to represent himself at the hearing and was blind-sided by the State's assertion of *Irby*, notwithstanding Petitioner's request for the appointment of counsel. The legal arguments set forth in this supplemental brief evidence the need for remand to the District Court "to effect uniformity and completeness in the hearing process." The District Court should be directed to "follow the analysis set out in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) [and] consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony," which the court neglected to do on previous remand.

III. CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that this Court grant Petitioner's Application for Post-Conviction Relief. In the alternative, Petitioner requests that the Court remand this case to the District Court for further evidentiary hearing wherein Petitioner is represented by counsel, and direct the District Court to follow the analysis set out in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020).

Respectfully submitted,



Clark O. Brewster, OBA #1114
Katie A. McDaniel, OBA #32345
BREWSTER & DE ANGELIS, P.L.L.C.
2617 East 21st Street
Tulsa, Oklahoma 74114
(918) 742-2021 – Telephone
(918) 741-2197 – Facsimile
Attorneys for Defendant/Petitioner

CERTIFICATE OF SERVICE

I certify that on the 1st day of June, 2021, a true and correct copy of the above and foregoing instrument was served hand delivery upon the following:

Clerk of the Appellate Courts
Oklahoma Judicial Center, Ground Floor
2100 N. Lincoln Blvd., Suite 4,
OKC, OK 73105

Mike Fisher
Osage County District Attorney
628 ½ Kihekah
Pawhuska, OK 74056

District Judge Stuart Tate
600 Grandview
Pawhuska, OK 74056

Randall Yates
Assistant Solicitor General
Office of Attorney General
313 NE 21st St
Oklahoma City, OK 73105