



JUN 24 2021

## Case No. PR-2021-366

**CHEROKEE NATION’S, CHICKASAW NATION’S, CHOCTAW NATION OF  
OKLAHOMA’S, AND MUSCOGEE (CREEK) NATION’S BRIEF IN SUPPORT OF  
MOTION FOR LEAVE TO FILE JOINT AMICUS BRIEF IN RESPONSE TO THE  
OKLAHOMA COURT OF CRIMINAL APPEALS’ MAY 21 ORDER**

The Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, and Muscogee (Creek) Nation (collectively “Nations”) hereby submit this brief in support of their motion for leave in the above-captioned matter. The Nations attach an executed copy of their amicus brief to their motion. The Nations have unique and specialized interests in the resolution of the question on which the Court solicited briefing in this case, as this Court recognized by inviting the Choctaw Nation to submit an amicus brief. Therefore, and for the reasons that follow, the Court should permit the other Nations to participate as amici curiae and to join in an amicus brief with the Choctaw Nation should be granted.

The question presented by the Court deals with a fundamental issue affecting public safety and the criminal justice system on the Nations’ Reservations: How the courts and governments in eastern Oklahoma will apply the Supreme Court’s decision in *McGirt v. Oklahoma*, 140 S. Ct. S. Ct. 2452 (2020), to ensure that crimes are prosecuted and punished consistent with the rule of law. It arises from the conviction of Clifton Mark Parish of second-degree murder in March 2012. This Court affirmed his conviction on direct appeal. *Parish v. State*, No. F-2012-335 (Okla. Ct. Crim. App. Mar. 6, 2014). Parish neither petitioned for rehearing in this Court, nor did he petition for a writ of certiorari in the United States Supreme Court, and accordingly his conviction became final on or about June 4, 2014. *State ex rel. Matloff v. Wallace*, 2021 OK CR 15, ¶ 2.

On August 17, 2020, Parish sought post-conviction relief in the district court, alleging that the State lacked subject matter jurisdiction to try him for second degree murder under the Supreme Court’s decision in *McGirt*. See Pet’r’s Appl. for Post-Conviction Relief, *Parish v. State*, No. CF-2010-26, <https://bit.ly/3wTtdku>. In *McGirt*, which the Court decided after Parish’s conviction became final, the Supreme Court held that the State lacked criminal jurisdiction to prosecute an Indian, Jimcy McGirt, because the Muscogee (Creek) Reservation continues to exist, and because

under the Major Crimes Act, 18 U.S.C. § 1153 (“MCA”), federal jurisdiction is exclusive over certain enumerated offenses, including *McGirt*’s crimes, when committed within an Indian reservation. *McGirt*, 140 S. Ct. at 2478, 2482. Parish argued that *McGirt* deprived the State of jurisdiction over his crime, as well, because he is an Indian and committed his crime within the boundaries of the Choctaw Reservation. Pet’r’s Appl. for Post-Conviction Relief, at 5.

After Parish filed his petition, this Court decided in several cases that, pursuant to the Supreme Court’s decision in *McGirt*, Congress had also never disestablished the Cherokee, Chickasaw, and Choctaw Reservations that Congress had established by treaty with those Nations, and so federal law, *see* 18 U.S.C. §§ 1151-1153, bars Oklahoma from exercising jurisdiction over certain crimes committed by or against Indians within those Reservations. *See Bosse v. State*, 2021 OK CR 3, ¶ 12, 484 P.3d 286, 291, *as corrected* (March 19, 2021), *mandate stayed*, No. 20A161, 2021 WL 2123824 (U.S. May 26, 2021); *Hogner v. State*, 2021 OK CR 4, ¶ 18; *Sizemore v. State*, 2021 OK CR 6, ¶¶ 13-14, 485 P.3d 867, 870-71; *Spears v. State*, 2021 OK CR 7, ¶ 15, 485 P.3d 873, 877; *Cole v. State*, 2021 OK CR 10, ¶ 19, *mandate stayed*, (May 28, 2021); *Ryder v. State*, 2021 OK CR 11, ¶ 29, *mandate stayed*, (May 28, 2021); *Bench v. State*, 2021 OK CR 12, ¶ 18, *mandate stayed*, (May 28, 2021); *McDaniel v. State*, No. F-2017-357, at 5-6 (Okla. Ct. Crim. App. Apr. 29, 2021), *mandate stayed*, (June 2, 2021).

The district court “held a hearing and found that Parish was an Indian and committed his crime within the Choctaw Reservation, the continued existence of which was recently recognized by this Court, applying *McGirt*, in *Sizemore v. State*, 2021 OK CR 6, ¶ 16....” *Wallace*, 2021 OK CR 15, ¶ 3; *see also* Findings of Fact & Conclusions of Law at 9-10, *State v. Parish*, No. CF-2010-26 (Pushmataha Cty. Dist. Ct. Apr. 28, 2021), <https://bit.ly/2TFpvw1>. On April 7, the district court issued an Order in which it concluded that the state lacked jurisdiction over Parish’s offenses and

stayed the effectiveness of the Order until April 21. *See* Order, *State v. Parish*, No. CF-2010-26 (Pushmataha Cty. Dist. Ct. entered Apr. 13, 2021), <https://bit.ly/3w7BReV>. The district court later indefinitely stayed its Order, in response to the Pushmataha County District Attorney's request for a stay pending a request to this Court for extraordinary relief. *See* Ct. Order, *State v. Parish*, No. CF-2010-26 (Pushmataha Cty. Dist. Ct. entered Apr. 20, 2021), <https://bit.ly/2TIEkhl>.

On April 27, the district attorney filed a writ of prohibition in this Court and a request for continued stay of the district court proceedings, asking the Court to "prohibit[] the enforcement of [the district court's] April 13, 2021, Order" on the basis that "*McGirt* ... is not retroactive in its application." Pet. for Writ of Prohibition, Designation of Record, & Request for Continued Stay Pending Decision, at 2-3. On May 21, this Court issued the stay and requested briefing from the district attorney and Parish, and from the State and the Choctaw Nation as amici curiae, on the question of whether *McGirt* and *Sizemore*'s rulings on the existence of the Choctaw and Creek Reservations should apply retroactively in light of Supreme Court, Tenth Circuit, and Oklahoma precedent. *Wallace*, 2021 OK CR 15, ¶¶ 6-7.

Thus, the Court's order asks the parties and amici to address the application of *McGirt*. As a general matter, that implicates the Nations' sovereign interests, since *McGirt* and this Court's follow-up decisions provide judicial recognition of the Nations' Reservation boundaries, and the courts' application of those decisions defines the consequences of the Reservations' continued existence. More specifically, the application of *McGirt* implicates the Nations' interests in public safety on their Reservations, the protection of their citizens from crime, the punishment of criminal offenses committed within their Reservation boundaries, and the rule of law on their Reservations, including the criminal justice system's compliance with the governing law. The Nations' citizens

also have a keen interest in the punishment of crime as members of the public who are affected by the commission, prosecution, and punishment of crimes in their communities.

The Nations are not parties to this case, but, as this Court has already acknowledged by inviting the Choctaw Nation's participation, this case certainly implicates tribal interests. The Court has specifically asked for the parties, State, and Choctaw Nation to brief whether rulings on the existence of the Choctaw and Creek Reservations should be applied retroactively on collateral review. *Wallace*, 2021 OK CR 15, ¶¶ 6-7. The resolution of that question will affect the application of this Court's rulings on the existence of the Cherokee and Chickasaw Reservations.

Moreover, the Nations have a firm commitment to the implementation of *McGirt*—but the State's litigation of this and other cases have raised our concern that the State is not committed to this goal. Instead of implementing *McGirt*, the State appears to be using the criminal justice system to set up a challenge to the Supreme Court's recent ruling in that case. As part and parcel of this strategy, the State is relying on the outcomes of its own litigation strategy to attempt to justify revisiting the existence of the Nations' reservations. The State already had an opportunity to establish the non-retroactivity of the ruling in *McGirt* and of the Tenth Circuit's earlier decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (*per curiam*). The Tenth Circuit in *Murphy* squarely addressed the issue, ruling that a court's application of the *Solem v. Bartlett*, 465 U.S. 463 (1984), test for diminishment to a particular reservation's existence was not a "new" rule and therefore did not face bars against retroactivity. 875 F.3d at 921-23. But the State chose not to challenge this ruling in its petitions for rehearing to the Tenth Circuit and for certiorari in the Supreme Court. This enabled the State to describe the impacts of an unfavorable decision in *McGirt* as unlocking all jailhouse doors and to paint itself as powerless to prevent that result. *See McGirt*, 140 S. Ct. at 2478-80.

That strategy failed. Now, in an attempt to frustrate the implementation of *McGirt*, the State is relying on possible negative impacts of the *McGirt* decision to convert criminal cases in Oklahoma arising on the Nations' Reservations into vehicles for Supreme Court review—despite its own role in creating these results. The State's litigation strategy also makes it harder to bring the criminal justice system in eastern Oklahoma in compliance with the law, because it perpetually destabilizes the ground on which the framework for implementation must be built. It also risks the release of defendants whom the federal government has already taken into custody or convicted under the Major Crimes Act or General Crimes Act. These concerns all implicate the Nations' interests in public safety and the implementation of criminal justice on their Reservations. Moreover, the Nations' unique knowledge of laws and court decisions applicable to them can also provide insight into the legal issues before the Court.

It is appropriate for Oklahoma criminal courts, including this Court, to grant a motion to file an amicus brief in a case involving “novel legal issues” or where a proposed amicus has a special interest in a case in which questions of the public interest are presented and the amicus could provide a unique and useful viewpoint on the issues presented. *See Valdez v. State*, No. PCD 2001-1011, 2001 WL 1715885, at \*1 (Okla. Ct. Crim. App. Sept. 10, 2001); *Malone v. State*, 2002 OK CR 34, ¶ 3, 58 P.3d 208, 209; *see also Teleco, Inc. v. Corp. Comm'n*, 649 P.2d 772, 774 (Okla. 1982) (“In public-law litigation of general interest the [Oklahoma Supreme C]ourt looks with favor on proffered assistance from those who may be desirous of presenting different views by brief amicus curiae.”). Granting this motion is appropriate in this particular case, as this Court has already invited the Choctaw Nation's participation as amicus, and has granted the Chickasaw Nation leave to participate as amicus in another case dealing with the application of *McGirt*, *see*

Order Directing Clerk to File Chickasaw Nation's Mot. for Leave to File Amicus Br., & Granting Mot., *Bosse v. State*, No. PCD-2019-124 (entered Oct. 20, 2020).

### **CONCLUSION**

For the foregoing reasons, the Nations respectfully request that this Court grant the Cherokee, Chickasaw, and Muscogee (Creek) Nations leave to participate as amici curiae and to join the amicus brief attached hereto.

Dated: June 24, 2021

Respectfully submitted,

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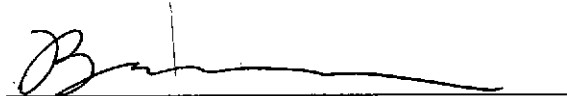
## **CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of June 2021, a true and correct copy of this Brief in Support of Motion for Leave to File Amicus Brief was served via first-class mail to each of the following:

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A handwritten signature in black ink, appearing to be "Bryan", is written over a horizontal line.