IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD RAY ROTH,	)	
	)	
Appellant,	)	
vs.	)	Case No. F-2017-702
	)	
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

BRIEF *AMICUS CURIAE* OF THE CHEROKEE NATION AND MUSCOGEE NATION

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INTRODUCTION

The Cherokee Nation and Muscogee Nation submit this joint brief amicus curiae at the Court's invitation. *See* Order Directing Supplemental Briefing and Request for *Amicus Curiae* Briefs, Apr. 30, 2021. Oklahoma has no criminal jurisdiction over Mr. Roth, a non-Indian who was originally tried in state court for offenses against a Cherokee citizen on the Muscogee Reservation.[1] Only the federal government can prosecute non-Indians under those circumstances.

Amici appreciate this Court's consternation over whether a prosecution of Roth in federal court will be barred by a federal statute of limitations as the result of the passage of more than seven years after he committed the offense that led to his conviction in a state court that had no jurisdiction to prosecute him.[2] Amici also understand that the transitory nature of the impact of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2021) on past convictions offers no solace to victims and their families. However, the existence of federal statutes of limitation, that may or may not be used to bar federal prosecutions during this transition period, cannot usurp the plenary power of Congress to regulate Indian affairs in Indian country; or change the plain wording of federal statutes governing criminal jurisdiction there. The tribes and federal authorities are taking every possible lawful measure to ensure that persons – like Roth – who was subject to an unlawful state prosecution, will be prosecuted in federal court.

This Court asks Amici to address two questions: 1) whether "the criminal jurisdiction of the State of Oklahoma" is preempted by the General Crimes Act, 18 U.S.C. § 1152 (also known

[1] This Court recently recognized this absence of state jurisdiction in other cases involving crimes by non-Indians against Indians on other reservations. *See Cole v. State*, 2021 OK CR 10 (Okla. Crim. App. 2021); *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286; and *Ryder v. State*, 2021 OK CR 11 (Okla. Crim. App. 2021). The Supreme Court stayed issuance of mandate in *Bosse* pending Oklahoma's filing of petition for certiorari, and this Court then stayed issuance of mandates in *Cole* and *Ryder*.

[2] Roth has been incarcerated in state facilities since his sentencing and Amici understand he will remain in state prison pending this Court's opinion.

as the Indian Country Crimes Act) (GCA), or the Major Crimes Act, 18 U.S.C. § 1153 (MCA), "when the [federal] statute of limitations bars the federal prosecution of an individual for offenses covered by one or both of these statutes;"[3] and 2) whether Congress's plenary authority under the Constitution to regulate Indian affairs, along with the various treaties made by the federal government with the Muscogee Nation, permit state prosecution of crimes on the Muscogee Reservation when the applicable federal statute of limitations bars the federal prosecution of an individual for offenses covered by the GCA or MCA.

Because the first question's reference to preemption cannot be answered without first discussing the plenary authority of Congress over Indian affairs referenced in the second question, part I of this brief will address the rule of law that criminal jurisdiction in Indian country is based on plenary Congressional authority. Part II will separately address the statutes of limitations referenced in both questions, including the legal consequences, practical aspects, and ongoing efforts to secure justice related to both past and future criminal prosecutions.

ARGUMENTS AND AUTHORITY

I. THE RULE OF LAW GOVERNING FEDERAL, TRIBAL, AND STATE JURISDICTION IN INDIAN COUNTRY, AS ESTABLISHED BY FEDERAL STATUTE AND CASE PRECEDENT, MUST BE FOLLOWED IN OKLAHOMA.

A. Criminal Jurisdiction over Crimes by or Against Indians in Indian Country is Determined by Congress in the Exercise of its Plenary Authority over Indian Affairs.

Oklahoma argues in its Supplemental Brief of Appellee after Remand, Nov. 12, 2020 (State Brf.), that there is "a strong presumption against preemption of state law," that "there is no reason

[3] Although the Court referenced crimes covered by "one or both" the MCA or GCA, it is not factually possible for both the MCA and the GCA to cover a crime. The MCA establishes exclusive federal jurisdiction over certain listed major crimes committed by an Indian against an Indian or any other person. The GCA establishes federal jurisdiction over federal crimes committed by or against an Indian, but recognizes tribal jurisdiction in certain other circumstances. *See* footnotes 7 and 11 for GCA text.

to assume" that federal jurisdiction "necessarily precludes concurrent state jurisdiction," and that the GCA "does not clearly preclude state jurisdiction over crimes committed by non-Indians against Indians" in Indian country. State Brf. at 5, 7-8. Oklahoma claims that a few civil cases support its position. *Id.* at 6-8. None involve Indians, Indian country, criminal jurisdiction, or Indian law principles grounded in the United States' special legal relationship with tribes.[4] All are completely irrelevant to criminal jurisdiction in Indian country. And, contrary to Oklahoma's position, a presumption against preemption of state law does not apply at all to criminal jurisdictional issues involving Indian country.[5]

A presumption against preemption of state law "is not triggered when the State regulates in an area where there has been a history of significant federal presence," particularly in cases where "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *United States v. Locke,* 529 U.S. 89, 108 (2000). Oklahoma acknowledges the long history of federal presence in Indian affairs, including the detailed federal statutory scheme in the MCA, GCA, and many other federal statutes addressing

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[4] *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349-52 (2020) (state court claims related to federal environmental laws); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (state law claims related to warning label requirements for prescription drug); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (state court civil personal injury claim); *Silas Mason Co. v. Tax Com'n of State of Washington*, 302 U.S. 186, 207 (1937) (state income tax claims related to receipts by contractors with the United States for dam construction work); *United States v. Bank of New York & Tr. Co.*, 296 U.S. 463, 479 (1936) (state court suits for accounting and delivery filed by the United States, seeking to recover funds held by a bank); and *Claflin v. Houseman*, 93 U.S. 130, 134 (1876) (creditor's state court claim against a debtor subject to federal bankruptcy proceeding).

[5] Oklahoma's obvious confusion is demonstrated by its attempt to rely on scattered phrases in caselaw concerning tribal and state *civil* jurisdiction over non-Indians in Indian country. State Brf. at 9-11 (citing *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257–58 (1992)) (involving county ad valorem tax on reservation land owned in fee by a tribe or tribal citizens, not jurisdiction over crimes committed by non-Indians against Indians as implied by Oklahoma); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (upholding state severance tax on non-Indian production of oil and gas on a reservation, when production was also subject to a tribal severance tax); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148-49 (1984) (involving a civil suit for negligence and breach of contract filed by a tribe in state court against a corporation). Oklahoma fails to recognize that these cases concerning *civil* jurisdiction in Indian country involve a distinctly different analysis.

federal and tribal criminal jurisdiction in Indian country. However, instead of acknowledging where the long history inexorably leads, Oklahoma not only relies on an inapplicable preemption analysis, but also the false premise that Oklahoma had jurisdiction over crimes by and against Indians in Indian country to begin with. That premise defies the well-established principle that states have no criminal jurisdiction over offenses committed by or against Indians in Indian country absent an *express* Congressional grant of such criminal jurisdiction.

This fundamental principle is based on the plenary authority of Congress over Indian affairs under the United States Constitution. art. I, § 8, cl. 3. Almost two centuries ago, the Supreme Court held in *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 557, 561 (1832), that under the Constitution, treaties and laws of the United States "all intercourse with them [tribes] shall be carried on exclusively by the government of the union." *Worcester,* 31 U.S. at 557. Applying that principle, the Court ruled that a state criminal law that prohibited "white men" from living on Cherokee lands in Georgia without a state license was void, "as being repugnant to the constitution, treaties, and laws of the United States." *Id.* at 562. The Court found that "the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes . . . comprehend all that is required for the regulation of our intercourse with the Indians." *Id.* at 559.

Worcester remains the law. *See United States v. Lara,* 541 U.S. 193, 200 (2004) (Congress's authority "to legislate in respect to Indian tribes" is "plenary and exclusive."); *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 62 (1996) (Under the Constitution, the states are "divested of virtually all authority over Indian commerce and Indian tribes."); *Montana v. Blackfeet Tribe,* 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes"); *Oneida Indian Nation v. County of Oneida,*

414 U.S. 661, 670 (1974) ("[W]ithin their boundary, they [Indian nations] possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States," quoting *Worcester*, 31 U.S. at 560).

B. Congress Exercised its Constitutional Authority by Enacting Statutes Specifically Governing Criminal Jurisdiction in Indian Country.

1. The MCA and GCA do not grant state jurisdiction over offenses committed by or against Indians in Indian country.

Jurisdiction over reservations rests with federal and tribal authorities except where Congress, in the exercise of its plenary and exclusive power over Indian affairs, has expressly provided that state laws shall apply. *See Washington v. Confed. Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979). "[T]he exclusive criminal jurisdiction of federal and tribal courts under 18 U.S.C. §§ 1152 [GCA], 1153 [MCA]," is well-recognized, and "[w]ithin Indian country, State jurisdiction is limited to crimes by non-Indians against non-Indians, and victimless crimes by non-Indians." *Solem v. Bartlett,* 465 U.S. 463, 465, n. 2, 467, n.8 (1984) (citing *New York ex rel. Ray v. Martin,* 326 U.S. 496 (1946).

Oklahoma nevertheless argues that the GCA "does not confer exclusive jurisdiction on the United States." State Brf. at 4.[6] Oklahoma correctly states that the GCA's reference to general federal laws "as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States"[7] identifies the federal criminal laws applicable in Indian country. State Brf. at 4. But it then argues that this reference to "exclusive jurisdiction" is not an *exclusive*

[6] Oklahoma acknowledged that it "would lack jurisdiction to prosecute any crime involving an Indian (whether defendant or victim) in eastern Oklahoma" if *McGirt* was decided the way it was. Okla. *McGirt* Brief, at 3.

[7] The first sentence of the GCA provides: "Except as otherwise expressly provided by law, *the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States*, except the District of Columbia, shall extend to the Indian country." 18 U.S.C. § 1152 (emphasis added).

grant of exclusive federal jurisdiction over crimes by or against Indians in Indian country. Oklahoma intentionally misses the point: Because states acquire jurisdiction over crimes by or against Indians in Indian country only through express Congressional grant, there is no need for the GCA to contain an express statement as to exclusive federal jurisdiction. None of the cases cited by Oklahoma supports a different conclusion.[8]

Since 1790, Congress has exercised its constitutional authority over Indian affairs by enacting statutes under which federal jurisdiction is exclusive of state jurisdiction, beginning with the Trade and Intercourse Act. Act of July 22, 1790, ch. 33, § 5-6, 1 Stat. 138 (1790 Act). The 1790 Act established that the federal government, rather than the states, would exercise basic police and regulatory powers over interactions between Indians and non-Indians. *See* Cohen's Handbook of Federal Indian Law § 1.03[2], at 35-38 (2012). It provided that "the Federal Government would punish offenses committed *against* Indians by 'any citizen or inhabitant of the United States'; it did not mention crimes committed by Indians." *United States v. Wheeler,* 435 U.S. 313, 324 (1978). In 1796, Congress defined prosecutable crimes and applicable sentences, and provided that these offenses were to be prosecuted in federal or territorial courts. Act of May 19, 1796, ch. 30, §§ 4, 6, 15, 1 Stat. 470-71.[9] Those provisions were reenacted in the Act of Mar.

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[8] *See Donnelly v. United States*, 228 U.S. 243, 270 (1913) (holding that the MCA, "which provides for the punishment of [certain] crimes committed by Indians only," did not repeal the GCA, "which extended to the Indian country certain general laws of the United States as to the punishment of crimes"); *Ex parte Wilson,* 140 U.S. 575, 577-78 (1891) (stating that Congress has exercised its power "to provide for the punishment of all offenses committed [on Indian reservations] by whomsoever committed"); and *United States v. White*, 508 F.2d 453 (8th Cir. 1974) (finding that the GCA's application of federal enclave laws in Indian country did not authorize federal prosecution of an Indian for on-reservation activities under a general federal statute prohibiting the hunting of eagles, absent an express abrogation of treaty rights in the general statute). *See also Williams v. United States,* 327 U.S. 711, 714 (1946) (finding that Arizona "may have jurisdiction" over offenses committed on a reservation between persons who are not Indians, but stating that "the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.")

[9] "When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as 'an agency of the federal government.'" *Wheeler,* 435 U.S. at 321 (quoting *Domenech v. Nat'l City Bank,* 294 U.S. 199, 204-05 (1935)).

30, 1802, ch. 13, §§ 4, 6, 15, 2 Stat. 139, and reflected that Congress "manifestly consider[ed] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, . . . which is not only acknowledged, but guarantied by the United States." *Worcester,* 31 U.S. at 556-57.

In 1817, Congress revised the Trade and Intercourse Act to extend federal jurisdiction "to crimes committed within the Indian country by 'any Indian, or other person or persons,' except "any offence committed by one Indian against another, within any Indian boundary." Act of Mar. 3, 1817, ch. 92, §§ 1, 2, 3 Stat. 383. See *Wheeler,* 435 U.S. at 324. "Thus, federal courts were given authority to try Indians who committed crimes in Indian territory only if the victim were non-Indian—a jurisdictional pattern commonly found in the contemporaneous treaties." Robert Clinton, "*Indian Criminal Jurisdiction,*" 17 Ariz. Law Rev. 951, 959 (1975).

The first permanent Indian Trade and Intercourse Act was enacted in 1834. Act of June 30, 1834, ch. 61, § 25, 4 Stat. 729. 1834. It incorporated the substance of the 1817 statute, and "carried forward the intra-Indian offense exception." *Wheeler*, 435 U.S. at 324-25. In 1854, Congress "expressly recognized the jurisdiction of tribal courts when it added another exception to the [GCA], providing that federal courts would not try an Indian 'who has been punished by the local law of the tribe."' *Id.* at 324-25 (citing Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 270). Since the 1854 Act, the GCA has not been substantively amended. However, Congress enacted the MCA in 1885, Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 385, sec. 9, after the Supreme Court construed the 1854 Act's intra-Indian offense exception to be a limitation on federal authority preventing federal prosecution of the on-reservation murder of an Indian by an Indian. *Ex Parte Crow Dog,*

109 U.S. 556, 571-72 (1883).[10] The MCA conferred federal jurisdiction over certain listed crimes by Indians on an Indian reservation, thus removing exclusive tribal jurisdiction over those offenses.

Although Indian status is not actually a racial classification, GCA has generally been understood as only affecting so-called "interracial crimes" (either crimes by non-Indians against Indians, or crimes by Indians against non-Indians). Alexander Tallchief Skibine, *"Indians, Race, and Criminal Jurisdiction in Indian Country,"* 10 Alb. Govt. L. Rev. 49, 52, 67 (2017) (citing *United States v. Antelope*, 430 U.S. 641, 643-644, 646 (1977)). In contrast to the GCA's express recognition of pre-existing tribal jurisdiction over certain intra-Indian crimes,[11] nothing in the GCA recognizes or confers jurisdiction on Oklahoma over crimes by or against Indians, which Oklahoma has never had.

2. *No other federal statute has granted jurisdiction to Oklahoma over offenses committed by or against Indians in Indian country.*

Congress has not granted jurisdiction to Oklahoma over crimes by or against Indians in Indian country by enactment of any statute in the exercise of its plenary authority, unlike such express grants to other states. *See* Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. § 3243) (conferring jurisdiction on Kansas), and Public Law 83-280, Act of Aug. 15, 1953, ch.

[10] *See United States v. Kagama*, 118 U.S. 375, 382-384 (1886) (upholding constitutionality of the MCA); *United States v. John*, 437 U.S. 634, 649, n. 18 (1978). "By subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the Creek that they would be free to govern themselves. But this particular incursion has its limits—applying only to certain enumerated crimes and allowing only the federal government to try Indians. State courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country.'" *McGirt* 140 S. Ct. at 2459, citing *Negonsott v. Samuels*, 507 U.S. 99, 102–103 (1993).

[11] Consistent with predecessor statutes, the second sentence of the GCA, 18 U.S.C. 1152, excepts certain intra-Indian crimes from federal jurisdiction: "This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." These intra-Indian offenses are left exclusively to tribal jurisdiction, except for the listed "major crimes" by Indians against Indians, which are subject to federal jurisdiction under 18 U.S.C. 1153.

505, 67 Stat. 588 (codified as amended, 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360) (Public Law 280). If states already possessed concurrent jurisdiction over crimes committed by or against non-Indians in Indian country, legislation such as the Kansas jurisdictional grant and Public Law 280 would be meaningless.

Public Law 280 expressly granted "jurisdiction over offenses committed by or against Indians" to certain identified states in specified areas of Indian country, and provided that such states' criminal laws "shall have the same force and effect within such Indian country as they have elsewhere within the State ..." 18 U.S.C. § 1162(a). Public Law 280 also provides federal "consent" to assumption of jurisdiction by "any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State," but requires tribal consent to state assumption of jurisdiction, as amended in 1968. 25 U.S.C. § 1321(a). Oklahoma, which was not among the listed states and has never sought or obtained tribal consent, has not acquired jurisdiction under Public Law 280. *See Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993).

Public Law 280 also reflects that only Congress controls the applicability and scope of the GCA and MCA, by providing that the GCA and MCA "shall not be applicable" in states exercising criminal jurisdiction under Public Law 280. 18 U.S.C. § 1162(c). It authorizes concurrent federal, state, and where applicable, tribal jurisdiction under the GCA and MCA in such states only if the tribe requests it and the U.S. Attorney General consents. 18 U.S.C. § 1162(c), (d).

3. Congress has preserved tribal and federal criminal jurisdiction over Indian country in Oklahoma.

Consistent with the established rule of law, only one year ago the Supreme Court recognized in *McGirt* that Oklahoma's jurisdiction is limited to crimes by non-Indians against non-

Indians, and non-Indian victimless crimes. After discussing *Worcester*, the Court found that the MCA, which "provided 'exclusive federal jurisdiction' over qualifying crimes by Indians in 'any Indian reservation' located within 'the boundaries of any State,'" applied to Oklahoma at statehood. *McGirt*, 140 S. Ct. at 2476-77. The Court cited and described the GCA as "[a] neighboring statute" providing "that federal law applies to a broader range of crimes by or against Indians in Indian country." *Id.* The Court continued: "States are *otherwise* free to apply their criminal laws in cases of non-Indian victims *and* defendants, including within Indian country." *Id.* (emphasis added) (citing *United States v. McBratney*, 104 U.S. 621, 624 (1881)).[12]

The ruling in *McGirt is* consistent with earlier federal criminal cases arising in Oklahoma. *See United States v. Ramsey*, 271 U.S. 467 (1926) (involving federal prosecution under the GCA of a non-Indian for one of the many non-Indian murders of Osage mineral headright owners, and confirming that the United States' "authority in respect of crimes committed by or against Indians continued after the admission of the state [Oklahoma] as it was before" (citing *Donnelly*, 228 U.S. at 271 and *Kagama*, 118 U.S. at 384). "States have no [criminal] authority over Indians in Indian Country unless it is expressly conferred by Congress." *Cheyenne-Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980) (finding Oklahoma's hunting and fishing laws inapplicable in Indian country); *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir. 1990) (involving illegal arrest on Cherokee trust land and stating that "Indian country is subject to exclusive federal or tribal criminal jurisdiction '[e]xcept as otherwise expressly provided by law.' 18 U.S.C. Sec.

[12] The Court in *McBratney* emphasized that it did not address "the punishment of crimes committed by or against Indians." *McBratney*, 104 U.S. at 624. The recognition of state jurisdiction in Indian country in *McBratney* and *Draper v. United States*, 164 U.S. 240, 247 (1896), is limited to non-Indian crimes against non-Indians, and the federal government has jurisdiction over crimes committed by a non-Indian against an Indian on a reservation under the GCA. *See Donnelly*, 228 U.S. at 269-270 (1913) (rejecting an attempt to narrow the scope of GCA to exclude federal jurisdiction over crimes by non-Indians against Indians, and holding that "[u]pon full consideration, we are satisfied that offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper* cases.").

1152."); *United States v. Burnett*, 777 F.2d 593, 596 (10th Cir.1985) (citing *State v. Burnett*, 1983 OK CR 153, 671 P.2d 1165, as recognizing that Oklahoma has not acted to assume criminal jurisdiction under Public Law 280.) *See also State v. Klindt,* 1989 OK CR 75, 782 P.2d 401 ("[T]he State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.")[13]

As stated by the U.S. Solicitor General last month: "[T]he text, background, and consistent interpretation of Section 1152, as well as Congress's other enactments in this area, indicate that Oklahoma lacks jurisdiction over crimes committed by non-Indians against Indians." *Oklahoma v. Bosse*, U.S. Sup. Ct. Case No. 20A161, U.S. Brf. Re Stay, May 2021, at 25, "[A]bsent a contrary Act of Congress, federal jurisdiction over crimes committed by non-Indians against Indians in Indian country is exclusive." *Id.* at n. 9 (explaining that this has been a longstanding federal position and citing U.S. Dep't of Justice, Crim. Resource Manual 685 (updated Jan. 23, 2020)).

II. OKLAHOMA HAS NO JURISDICTION OVER OFFENSES BY OR AGAINST INDIANS IN INDIAN COUNTRY PREVIOUSLY PROSECUTED BY THE STATE AND NOW BARRED BY THE FEDERAL STATUTE OF LIMITATIONS.

As discussed above, Oklahoma has no jurisdiction over offenses by or against Indians in Indian country because Congress, in the exercise of its plenary authority over Indian affairs, has not granted Oklahoma such jurisdiction. This principle applies even to those offenses barred by a federal statute of limitations. The Court in *McGirt* discussed Oklahoma's fears that "thousands"

[13] In *Klindt,* 1989 OK CR at ¶ 5, 782 P.2d at 403, this Court rejected the defendant's argument that he had no affirmative duty to prove Indian status for jurisdictional purposes. The Court found that proof of Indian status is "necessary because federal jurisdiction over crimes committed in Indian Country does not extend to crimes committed *by non-Indians against non-Indians*," citing *McBratney. Id.* In *Klindt*, the Court did not completely overrule its decision in *Burnett*, as suggested by Oklahoma. State Brf. at 6, n. 2. The Court simply stated, with no further explanation, that "[a]ny portion of *Burnett* inconsistent with this opinion is overruled." After dismissal of the state case against him, Burnett was subsequently determined in federal court to be an Indian, and was prosecuted under the MCA for the murder of another Indian. If he had been determined to be a non-Indian, he would still have been subject to federal prosecution under the GCA, due to the Indian status of the victim.

of persons convicted in Oklahoma courts could be impacted by its decision, which the Court described as "admittedly speculative," and explained:

> In any event, the magnitude of a legal wrong is no reason to perpetuate it. When Congress adopted the MCA, it broke many treaty promises that had once allowed tribes like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes. All our decision today does is vindicate that replacement promise. And if the threat of unsettling convictions cannot save a precedent of this Court, it certainly cannot force us to ignore a statutory promise when no precedent stands before us at all.

McGirt, 140 S. Ct. at 2479-80, citing *Ramos v. Louisiana*, 140 S.Ct. 1390, 1406–08 (2020) (plurality opinion). This promise of federal jurisdiction in both the MCA and GCA cases cannot be ignored simply because the passage of time may bar a federal prosecution.[14] The effectiveness of the *McGirt*, *Bosse*, *Cole*, and *Ryder* decisions does not expire when a federal statute of limitations expires.

A. Federal and Tribal Partners Made Swift Adjustments to Ensure Public Safety on Reservations in Oklahoma.

On July 9, 2020, the date *McGirt* was decided, Oklahoma's U.S. Attorneys released a joint statement expressing confidence that tribal, state, local, and federal law enforcement "would work together to continue providing exceptional public safety under this new ruling by the United States Supreme Court."[15] The Muscogee Nation issued a similar statement the same day pledging to work with federal and state authorities to ensure public safety within the Muscogee Reservation.[16] These were not hollow words. Attorneys and staff from U.S. Attorneys' offices in other jurisdictions

[14] Oklahoma's ongoing litigation raising collateral *McGirt*-related issues risks further delaying lawful prosecutions while federal and tribal limitation clocks continue to tick.

[15] *See* https://www.justice.gov/usao-ndok/pr/joint-statement-united-states-attorneys-northern-eastern-and-western-districts-oklahoma (last visited June 14, 2021).

[16] *See* https://www.muscogeenation.com/muscogee-creek-nation-statement-regarding-u-s-supreme-court-decision/ (last visited June 14, 2021).

quickly arrived to assist. This assistance continues. In March, 2021, following this Court's decisions in *Bosse v. State,* 2021 OK CR 3, 484 P.3d 286 and *Hogner v. State*, 2021 OK CR. 4 (Okla. Crim. App. 2021), finding the Chickasaw and Cherokee Nations' Reservations intact, the Acting U.S. Attorney in the Eastern District reported filing forty complaints for "violent crimes in Indian country" in an approximate two-week period. He credited his ability to file these charges – many of which resulted from the vacation of state convictions – to the "collective effort of our state, tribal, and federal partners."[17]

The Cherokee and Muscogee Nations responded quickly to implement the opinions in *McGirt* and *Hogner* to ensure public safety and to provide justice on their reservations. In anticipation of the *Hogner* ruling recognizing its reservation, the Cherokee Nation Council enacted wide-ranging legislation that revised its criminal, traffic, and juvenile codes. *See* Office of the Att'y Gen, Cherokee Nation, *Tribal Code*, https://bit.ly/3un7E9L (last accessed June 6, 2021) (providing links to 2021 amendments to Titles 10A, 21, 22, and 47 of the Cherokee Nation Code). The Muscogee Nation adopted a new traffic code, MCNCA Title 14 § 3-101 *et seq*., that closely mirrors Oklahoma's traffic code and provides familiarity and consistency for tribal, state and local police. The Muscogee Nation expects National Council approval of Juvenile Code revisions soon.

Both Nations expanded their law enforcement capacity. The Muscogee Nation hired twenty-five additional Lighthorse police officers, thirteen investigators, nine dispatchers, and two records clerks, five additional tribal prosecutors, three legal assistants, two records clerks, one criminal investigator, and two new district judges. It amended its law to allow for a full-time Chief District Judge. The Cherokee Nation hired six additional tribal prosecutors, six criminal justice

[17] *See* https://www.newson6.com/story/5f331c06e9d97622933f4667/us-attorney-office-prosecutors-staff-volunteer-to-move-to-tulsa-after-mcgirt-ruling- (last visited June 14, 2021); https://www.justice.gov/usao-edok/pr/united-states-attorneys-office-eastern-district-oklahoma-files-more-20-indian-country (last visited June 14, 2021).

support staff, two new judges, and a new court clerk, as well as more marshals to police the reservation. The Cherokee Nation's Attorney General is hiring more investigators and probation officers.

The Muscogee Nation contracted for space for additional courtrooms in Okmulgee. The Cherokee Nation is expanding its district court in Tahlequah by opening two new court locations in Delaware and Muskogee Counties, and anticipates opening a third in Rogers County.

Both Nations have long maintained cross-deputization agreements with county and municipal law enforcement agencies across their reservations, and with statewide agencies such as the Oklahoma Highway Patrol, Oklahoma State Bureau of Investigation, and State Fire Marshal. *See* Okla. Sec'y of State, Tribal Compacts and Agreements, https://bit.ly/3fP7brL (last accessed June 14, 2021) (enter "Cherokee" or "Creek" into "Doc Type" search and select "Submit"). Since December 2020, the Cherokee Nation has entered into over twenty-eight additional agreements; the Muscogee Nation has sixty-two agreements in place.[18]

The expanded federal and tribal criminal justice systems in place are successfully ensuring public safety in Indian country, even for those offenses that occurred long ago. For example, Jimcy McGirt was convicted in federal court for three counts of sexual abuse in Indian country that occurred in 1996. *See* https://www.justice.gov/usao-edok/pr/jimcy-mcgirt-found-guilty-aggravated-sexual-abuse-abusive-sexual-contact-indian-country (last visited June 14, 2021). Patrick Murphy awaits trial on multiple counts related to his state conviction for a murder that

[18] Chickasaw Nation has responded similarly in anticipation of the judicial affirmation of its reservation that occurred in *Bosse*. *See* Chickasaw Nation's Brief as Amicus Curiae in Response to the Court's April 8 Invitation to File at 2-4, *Bosse v. State*, PCD-2019-124 (Apr. 12, 2021).

occurred in 1999.[19] *See* Dkt. 53, *United States v. Murphy*, EDOK Case No. CR-20-78-RAW (superseding indictment charging one count of murder in Indian country, one count of murder in Indian country in perpetuation of kidnapping, and two counts of kidnapping resulting in death).

Since the Court decided *McGirt,* Muscogee Nation prosecutors have filed 1827 criminal cases; it has six adult detention agreements in place, with two more pending approval, and two juvenile detention agreements. Since March 2021, when this Court affirmed the continued existence of the Cherokee Reservation, Cherokee Nation prosecutors have filed approximately 1,000 criminal cases. The Nation has also entered into detention agreements with twelve of the fourteen counties that are entirely or partially within the Cherokee Reservation and with three juvenile detention centers on the reservation, for housing Indians arrested on the reservation.

These herculean efforts by federal and tribal authorities may not be able to satisfy all stakeholders in all cases. And Oklahoma will likely continue to make unsupported statements, using back of the envelope numbers, to promote fear that criminals will escape punishment in federal and tribal courts post-*McGirt*. However, the federal government in this case, and Amici's governments in similar cases involving Indian defendants, have the tools – and the will – to file charges and pursue prosecutions to seek justice.[20] This Court should allow that work to go forward and trust federal and tribal governments to make wise decisions in each case.

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[19] In the prosecution for these violent offenses, federal prosecutors proceeded without concern that their prosecutions would be barred by a statute of limitation. *See* 18 U.S.C. § 3281(providing no time limitations for offenses punishable by death); 18 U.S.C. § 3283 (providing no limitation during the life of minor child who is victim of sexual abuse); and 18 U.S.C. §3299 (providing no limitation for specified offenses involving a minor child).

[20] Both the Cherokee and Muscogee Nations have filed charges in tribal court against Indian defendants who had state convictions overturned, alleging they caused vehicular deaths while driving under the influence of intoxicants. *See Muscogee (Creek) Nation v. Graham*, Muscogee Dist. Ct. Case No. 2021-39 (charging Graham, a Cherokee citizen, in tribal court after her state conviction was vacated by Tulsa County District Court in a post-conviction action filed after *McGirt*; offenses occurred in 2007); and *Cherokee Nation v. Gage Shriver*, Cherokee Dist. Ct. Case No. CRM-21-55 and *Cherokee Nation v. Dakota Shriver*, Cherokee Dist. Ct. Case No. CRM-21-56 (charging brothers, both Cherokee citizens, after this Court reversed their convictions; offenses occurred in 2015).

B. Statutes of Limitations do not Create Absolute Bars to Prosecutions.

Amici recognize this Court's concern about bars to prosecutions that may be caused by statutes of limitations. And the traditional purposes of statutes of limitations do not fit well in cases arising in this transitional period that must be re-prosecuted in federal or tribal court. For instance, this case does not involve delay caused by lax federal or tribal law enforcement or prosecutorial neglect in failing to file timely charges. Although the initial delay was the result of Oklahoma's initial unlawful prosecution, further delays were unavoidable when its *Murphy* litigation spanned two terms in the Supreme Court before *McGirt* was decided.[21] During that time, this Court understandably held cases in abeyance awaiting the Supreme Court's decision. Federal prosecutors were not at fault for the delay. Mr. Roth first raised his Indian country jurisdictional claim before the five-year federal statute of limitations ran. As suggested below, there may be expansive ways to interpret federal statutes of limitations and corollary statutory tolling provisions. Principles of equitable tolling that could permit federal prosecutions to go forward may be appropriate to apply in these unique circumstances. However, those remedies are for federal prosecutors to pursue in this case. This Court should not attempt a broad-stroke solution by adopting a preemption analysis that is unsupported in the law, especially when such argument was never raised until after *McGirt* was decided and even after this Court remanded for a hearing on Roth's *McGirt* claim.

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[21] Roth's crime occurred on January 27, 2014. On February 1, 2018 he first raised his claim in direct appeal that Oklahoma had no jurisdiction over the offense that he, as a non-Indian, committed against a Cherokee citizen on the Muscogee (Creek) Reservation. *See* Brief of Appellant, F-2017-702 (Feb. 1, 2018) at 6-10. There was slightly less than a year left under the federal general 5-year statute of limitations at that time. Four months later, Oklahoma agreed Roth could raise his jurisdictional claim for the first time on appeal, made no claim Oklahoma had concurrent jurisdiction under the GCA, and informed this Court certiorari had been granted in *Murphy v. Royal,* 875 F.3d 896 (10th Cir. 2017). *See* Brief of Appellee, F-2017-702 (June 1, 2018) at 11-16. On August 21, 2020 this Court ordered the appeal be held in abeyance pending the Supreme Court's decision in *Murphy.*

Statutes of limitations are *legislative* provisions that federal, state, and tribal governments enact to provide "the primary guarantee against bringing overly stale criminal charges." *United States v. Ewell*, 383 U.S. 116, 122 (1966). *See United States v. Marion*, 404 U.S. 307, 320-21 (1971) (noting statute of limitations provisions represent a "legislative assessment" of the interests of the government and the defendant in "administering and receiving justice"). The purpose of such statutes is to limit a defendant's exposure to criminal prosecution to a fixed period, and thus protect him from having to defend against charges when the basic facts may have become obscured by the passage of time. Such provisions have the additional "salutary" effect of encouraging law enforcement officials to promptly investigate suspected criminal activity. *Touissie v. United States*, 397 U.S. 112, 115 (1970). The history, purposes, and language of statutes of limitations create restrictions on prosecutions, but not permanent barriers to them. Reasons for the delay in prosecution and the possibility of prejudice to the defendant merit consideration. *United States v. Levine*, 658 F.2d 1134, 120,123 (3rd Cir. 1981) (noting the protection conferred by statutes of limitations is not absolute; such provisions reflect an "underlying legislative balance" and are subject to tolling, suspension, and waiver).

The Cherokee and Muscogee Nations agree that in Roth's case the purposes behind limitation periods are not promoted by the rigid application of them. Amici see the underlying legislative balance favoring proceeding with the federal prosecution. Here, State law enforcement promptly investigated Roth's crimes and the basic facts of his crimes have not been obscured by the passage of time. But it is the federal government—the only government with jurisdiction over Roth—that must be left to craft the solution.

One solution is a legislative one. Congress already provides a range of limitation periods for specific federal crimes, and some offenses have no limitation periods: 18 U.S.C. §3281

(offenses punishable by death); 18 U.S.C. § 3286 (non-capital terrorism offenses that created a risk of death or serious injury); 18 U.S.C. §3282 (a) (offenses in which the identity of offender was unknown until discovery through DNA profiling); and 18 U.S.C. § 3299 (offenses involving abductions or sexual offenses against children). For theft of major artwork the limitation period is twenty years. *See* 18 U.S.C. § 3294. For recruitment of children as soldiers, human trafficking, arson, nationality and citizenship offenses, and bank and wire fraud the limitation period is ten years. *See* 18 U.S.C. §§ 3300, 3298, 3295, 3293. For certain non-capital terrorist offenses it is eight years, and for securities fraud it is six years. *See* 18 U.S.C. §§ 3286, 3301.

There are statutory provisions tolling limitation periods during a child victim's minority, during the period an accused is a fugitive, during periods needed to obtain foreign evidence, during concealment of assets in bankruptcy, and during times of war. *See* 18 U.S.C. §§ 3293, 3290, 3292, 3284, and 3287. There are no statutory tolling provisions that explicitly apply to the passage of time that occurs because of unlawful state convictions, but there is nothing to prevent Congress from enacting them.[22]

Tolling circumstances do not have to be statutory. Equitable tolling has been applied in many different contexts, and is meant for extraordinary circumstances. *See Clymore v. United States*, 217 F.3d 370, 376 (5th Cir. 2000) (applying equitable tolling to time periods in which defendant's imperfect claim for return of forfeited property was pending in other courts). Equitable tolling principles apply in the habeas context. *See Holland v. Florida,* 560 U.S. 631, 645 (2010) (deciding AEDPA's statutory limitations period may be tolled for the equitable reason that petitioner's attorney failed to satisfy professional standard of care); *Woodward v. Williams*, 263

[22] The Cherokee Nation's legislature, in anticipating the need to prosecute offenses from state convictions that may have pre-dated its existing statute of limitations, amended its statute and extended limitation periods for specific crimes, and provided tolling provisions applicable to these unique prosecutions. *See* 22 CNCA §§151, 154-55.

F.3d 1135, 1142-43 (10th Cir. 2001) (applying equitable tolling of AEDPA statute of limitations if petitioner can show prolonged delay in receiving notice of triggering event); and *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009) (applying equitably tolling of AEDPA statute of limitations if petitioner is diligently pursuing his rights but some extraordinary circumstance stands in the way).

Amici found no cases applying equitable tolling to criminal limitations periods under the specific circumstances of this case. But there is nothing to prevent federal prosecutors from arguing such principles in order to pursue prosecutions that initially appear to be barred by statutes of limitations. Equitable tolling has been applied to limitations that affect entire groups of litigants. *See Hanger v. Abbott*, 73 U.S. 532 (1867) (finding extraordinary circumstances justified tolling of limitation periods when courts in southern states were closed). In response to the potential COVID-19 pandemic on federal court operations, the Western District of Texas issued an order that "[a]ll deadlines are suspended and tolled for all purposes, *including the statutes of limitations*." *See* March 16, 2020 District Wide Order, https://www.txwd.uscourts.gov/coronavirus-covid-19-guidance/ (last visited June 14, 2021) (emphasis added). Amici do not suggest this unique transition period equates to wartime or a worldwide pandemic, but the same principles should apply, or certainly could be argued to apply.

C. Federal Prosecutorial Decisions Are Discretionary.

Amici recognize they have no right to question, judge, or direct federal prosecutors to pursue any particular charge or defendant. We can only control the cases we can prosecute. Prosecutorial decisions to charge or not charge crimes are discretionary and not always easy to make, but the discretion to make them in cases like this rests exclusively with the U.S. Attorneys' offices. Amici further understand there are legitimate reasons why federal prosecutors may elect

not to prosecute, including, among others, prioritizing violent crimes, recognizing a defendant may have already served a sentence that is greater than what he could expect to receive in federal court, or a belief the offense is barred by a statute of limitations. And whether federal prosecutors will file a complaint against Roth is unknown. What is known is that the decision rests solely with the government lawyers that have jurisdiction and discretion to make that decision.

McGirt created an extraordinary need – and opportunity – for federal, state, and tribal governments, with their shared interest in public safety, to cooperate in the transition to the new criminal jurisdictional framework. There is no authority for upending this process of cooperation by re-creating a state jurisdictional scheme in limited situations where a federal statute of limitations *may* bar a prosecution in that court. We are concerned that such insertion of yet newer rules in the middle of this transition period could undermine our ongoing efforts and contribute to greater uncertainty by the public, law enforcement, and victims and their families. Only the federal courts, or Congress, can fashion an exception to the federal statute of limitations or tolling of it. These transitory problems will resolve. There is simply nothing in the running of a federal statute of limitation that can serve to resurrect criminal jurisdiction Oklahoma never had.

CONCLUSION

This Court's concerns over the inequity of federal statutes of limitations barring federal prosecutions is shared by Amici. However, those weighty concerns should not tempt this Court to reject the rule of law, i.e., that states have no criminal jurisdiction over offenses committed by or against Indians in Indian country absent an express Congressional grant of such criminal jurisdiction, and elevate a consequence – the barring of a federal prosecution because the statute of limitations has expired – to a court-ordered grant of default jurisdiction to Oklahoma that Congress, in its plenary power over Indian tribes, never authorized or intended.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 14th day of June, 2021, a true and correct copy of the above document was hand delivered, emailed or mailed with proper postage fully prepaid thereon, to the following:

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