IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANTHONY COOK,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 21-CV-0461-JFH-SH**
	)	
SCOTT NUNN,	)	
	)	
Respondent.	)	

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

The Attorney General of the State of Oklahoma, John M. O'Connor, appearing on behalf of the above-named Respondent, in response to the Petition for Writ of Habeas Corpus on file herein shows the court as follows:

1. Petitioner, Anthony Cook, an inmate in the custody of the James Crabtree Correctional Center, has filed with this Court a petition seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254. Doc. 1.[1]

2. Petitioner is currently incarcerated pursuant to a Judgment and Sentence entered in the District Court of Tulsa County, Case No. CF-2017-849, for convictions by guilty plea of Trafficking in Illegal Drugs, in violation of OKLA. STAT. tit. 63, §§ 2-415(C)(7)(a), 2-416 (Supp. 2015) (Count 1), Acquiring Proceeds from Drug Activity, in violation of OKLA. STAT. tit. 63, § 2-503.1(A) (2011) (Count 2), Possession of Controlled Drugs without Tax Stamp Affixed, in violation of OKLA. STAT. tit. 68, § 450.8 (2011) (Count 3), Possession of a Firearm after Former Conviction of a Felony, in violation of OKLA. STAT. tit. 21, § 1283 (Supp. 2014) (Count 4),

[1] Except where otherwise noted, Respondent's page citations are to the original page numbering of each document, as opposed to the CM/ECF header pagination.

Possession of a Firearm while in the Commission of a Felony, in violation of OKLA. STAT. tit. 21, § 1287 (Supp. 2012) (Count 5), Receiving/Concealing Stolen Property, in violation of OKLA. STAT. tit. 21, § 1713 (Supp. 2016) (Counts 6 and 7), and Possession or Selling of Paraphernalia while not using a Motor Vehicle, in violation of OKLA. STAT. tit. 63, § 2-405 (2011) (Count 8), after two or more prior felony convictions. Exhibit "1," Judgment and Sentence. On October 8, 2019, the state district court sentenced Petitioner as follows, with all counts to run concurrently: twenty years imprisonment on each of Counts 1, 4, 5, 6, and 7; ten years imprisonment on Count 2; five years imprisonment on Count 3; and one year imprisonment on Count 8. Exhibit 1 at 1, 10.

2. Petitioner did not seek to withdraw his guilty pleas or directly appeal to the Oklahoma Court of Criminal Appeals ("OCCA"). Exhibit "2," Docket Sheet for Tulsa County District Court Case No. CF-2017-849. Accordingly, on October 18, 2019, his convictions and sentences became final when the ten-day period for filing a motion to withdraw expired. *See Fisher v. Gibson*, 262 F.3d 1135, 1142 (10th Cir. 2001); Rule 4.2, *Rules of the Court of Criminal Appeals*, OKLA. STAT. tit. 22, Ch. 18, App.

3. On July 9, 2020, the United States Supreme Court issued its opinion in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020), holding that the Creek Nation's Reservation had not been disestablished. On October 1, 2020, Petitioner filed *pro se* in state district court a "Motion to Dismiss for Lack of Jurisdiction." Exhibit "3," Motion to Dismiss for Lack of Jurisdiction. Petitioner alleged he was a member of the Muscogee (Creek) Nation and that his crimes in Case No. CF-2017-849 occurred within the boundaries of the Cherokee Nation, such that the State lacked prosecutorial authority in his case. Exhibit 3 at 1-2, 4. As to his claimed Indian status, the Motion to Dismiss referred to "attached documents," but Petitioner attached no documents

establishing tribal membership or a degree of Indian blood. Exhibit 3 at 1. The State filed a response in opposition to Petitioner's pleading, construing it as an Application for Post-Conviction Relief. Exhibit "4," State of Oklahoma's Response to Petitioner's Application for Post-Conviction Relief.

4. On June 18, 2021, the state district court entered an order denying Petitioner's Motion to Dismiss, which it too construed as an Application for Post-Conviction Relief. Exhibit "5," Order Denying Petitioner's Application for Post-Conviction Relief. In relevant part, the state district court found that Petitioner's crimes were committed at "2034 E. Woodrow Pl., Tulsa, Oklahoma," which is "within the boundaries of the Muscogee Creek Nation and/or the Cherokee Nation." Exhibit 5 at 1-2. However, Petitioner failed to prove he was Indian for purposes of federal law. Exhibit 5 at 2.

5. Petitioner appealed the denial of post-conviction relief to the OCCA in Case No. PC-2021-650. Exhibit "6," Petition in Error. On October 5, 2021, the OCCA affirmed the denial of post-conviction relief, based on its pathmarking decision in *State ex rel. Matloff v. Wallace*, 497 P.3d 686 (Okla. Crim. App. 2021)), *cert. denied sub nom.*, *Parish v. Oklahoma*, No. 21-467, 2022 WL 89297 (U.S. Jan. 10, 2022), which held: "[E]xercising our independent state law authority to interpret the remedial scope of the state post-conviction statutes, we now hold that *McGirt* and our post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided." *Wallace*, 497 P.3d at 689.[2] Here, the OCCA

[2] Because of its unusual writ posture, *State ex rel. Matloff v. Wallace* is known by multiple names. The case arose from a writ filed by District Attorney Mark Matloff against the Honorable Judge Jana Wallace after she granted post-conviction relief on a *McGirt*-based prosecutorial authority claim. However, the real party in interest is Clifton Parish, the defendant in the case who later

expressly invoked and summarized its holding in *Wallace*—that "the United States Supreme Court decision in *McGirt*, because it is a new procedural rule, is not retroactive and does not void final state convictions"—and applied it to Petitioner's case. Exhibit "7," Order Affirming Denial of Post-Conviction Relief. "The conviction in this matter was final before the July 9, 2020 decision in *McGirt*, and the United States Supreme Court's holding in *McGirt* does not apply." Exhibit 7 at 1.

6. It appears Petitioner has exhausted his state-court remedies.

7. It appears the petition is timely filed.

8. Because Petitioner entered guilty pleas and never initiated a direct appeal, there are no transcripts available. Nor is there an original record as would normally be prepared on direct appeal. A court reporter was present at Petitioner's plea/sentencing hearing, Exhibit 2 at 12, so it is likely that hearing was recorded. However, it was not transcribed, again due to Petitioner's failure to ever withdraw his guilty pleas or file a direct appeal.

9. Petitioner is not entitled to an evidentiary hearing. To the extent this Court finds Petitioner's *McGirt* claim procedurally barred, he is not entitled to a hearing on a barred claim. *See Thacker v. Workman*, 678 F.3d 820, 836 (10th Cir. 2012) ("Because . . . Thacker's claim is procedurally barred, the district court did not err in failing to conduct an evidentiary hearing."). Alternatively, assuming this Court finds Petitioner's *McGirt* claim was adjudicated on the merits by the OCCA, then this Court's review of Petitioner's habeas petition is limited to the record that was before the OCCA when it adjudicated that claim on the merits. *Cullen v. Pinholster*, 563 U.S.

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perfected the certiorari appeal to the Supreme Court. Respondent refers to the case as "*Wallace*," but this Court may find it referred to as *Matloff*, *Parish*, or *Wallace* in other opinions and pleadings.

170, 181 (2011). As will be shown, Petitioner fails to show that the OCCA's adjudication of his claims resulted in unreasonable determinations of law or fact under 28 U.S.C. § 2254(d). Finally, Petitioner is not entitled to an evidentiary hearing also due to his lack of diligence in failing to substantiate his claim of Indian status in state court. *See Cannon v. Trammell*, 796 F.3d 1256, 1264 (10th Cir. 2015) (agreeing with the district court "that Cannon was not diligent because he failed to develop his ineffective assistance claim by submitting witness affidavits during the OCCA post-conviction process"); *cf. also Young v. Sirmons*, 486 F.3d 655, 679 (10th Cir. 2007) (petitioner diligent where he "submitted affidavits substantiating his allegations to the OCCA").

STATEMENT OF THE FACTS

Petitioner admitted the following according to his Plea of Guilty Summary of Facts:

> On 1/20/17, in Tulsa Cty, I was in possession of more than 5 grams of cocaine base. There was no tax stamp on the drugs. I also had money from selling drugs. At the time I was also in possession of a firearm after former conviction of a felony. The Mossberg shotgun was stolen as was the Weatherby shotgun. There were also scales in my possession.

Exhibit "8," Plea of Guilty Summary of Facts.

Additional facts will be presented below as they become relevant.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant habeas relief with respect to a claim adjudicated on the merits by a state court only if the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The threshold question for this Court on habeas review is whether Petitioner seeks to apply a rule of law that was "clearly established" by the Supreme Court at the time his conviction became final. *See House v. Hatch*, 527 F.3d 1010, 1018 (10th Cir. 2008). "[C]learly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*." *Id.* at 1016. Where there is no clearly established federal law, that ends this Court's inquiry under § 2254(d)(1). *See id.* at 1018.

If a clearly established rule of federal law is implicated, however, then this Court must decide whether the state court's decision was contrary to, or an unreasonable application of, that clearly established rule of federal law. *See id.* A state court decision is contrary to clearly established federal law as determined by the Supreme Court when it applies a rule that contradicts the governing law set forth in the Supreme Court's cases or decides a case differently than the Supreme Court has on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *Mitchell v. Gibson*, 262 F.3d 1036, 1045 (10th Cir. 2001).

A state court decision involves an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States when the state court correctly identifies the governing legal principle but applies it to the facts of the particular case in an unreasonable manner. *Valdez v. Bravo*, 373 F.3d 1093, 1096 (10th Cir. 2004); *Gilbert v. Mullin*, 302 F.3d 1166, 1171 (10th Cir. 2002). The Supreme Court has explained as follows regarding the "unreasonable application" clause:

> In § 2254(d)(1), Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Williams, 529 U.S. at 411.

The Supreme Court has further held that "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). As the Tenth Circuit has explained, the fairminded jurist test is a way of measuring reasonableness:

> The Court's "fairminded jurists" test . . . serves as a proxy for "unreasonable application." It is designed to help federal courts reviewing § 2254 habeas motions to determine whether a state court decision that would be incorrect under de novo review is also unreasonable. Under the test, if all fairminded jurists would agree the state court decision was incorrect, then it was unreasonable and the habeas corpus writ should be granted. If, however, some fairminded jurists could possibly agree with the state court decision, then it was not unreasonable and the writ should be denied.

Frost v. Pryor, 749 F.3d 1212, 1225 (10th Cir. 2014). *Frost* further stated that federal courts

> may issue the writ only when the petitioner shows there is *no possibility* fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents. Thus, even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable. If this standard is difficult to meet—and it is—that is because it was meant to be. Indeed, AEDPA stops just short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. Accordingly, we will not lightly conclude that a State's criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy.

Id. at 1223 (quotation marks and citations omitted, alterations adopted, emphasis in original). This "fairminded jurists" standard applies to the determination of whether there exists clearly

established federal law, as well as to the contrary to and unreasonable application clauses of § 2254(d)(1) and to § 2254(d)(2). *See Dunn v. Madison*, 138 S. Ct. 9, 10 (2017) (*per curiam*); *Brumfield v. Cain*, 576 U.S. 305, 313-14 (2015); *White v. Woodall*, 572 U.S. 415, 427 (2014).

In addition, state court determinations of fact "shall be presumed correct" unless Petitioner rebuts the presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Thus, a state court's decision cannot be said to be based on an unreasonable determination of the facts until a petitioner has shown by clear and convincing evidence that the state court's factual determination was incorrect. *Black v. Workman*, 682 F.3d 880, 896-97 (10th Cir. 2012) (refusing to grant relief under § 2254(d)(2) because the petitioner had failed to present clear and convincing evidence to rebut a state court's factual finding); *but see Wood v. Allen*, 558 U.S. 290, 300-01 (2010) (declining to decide the relationship between § 2254(d)(2) and § 2254(e)(1)); *(John) Grant v. Trammell*, 727 F.3d 1006, 1024 n.6 (10th Cir. 2013) (same); *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004) (holding that § 2254(d)(2) applies to challenges based solely on the state court record whereas § 2254(e)(1) applies when the petitioner relies upon new evidence).

ARGUMENT AND AUTHORITY

GROUND I

THE OCCA'S REFUSAL TO APPLY *McGIRT* RETROACTIVELY ON COLLATERAL REVIEW TO VOID PETITIONER'S FINAL CONVICTIONS DOES NOT ENTITLE PETITIONER TO HABEAS RELIEF, WHETHER VIEWED AS A BAR, A MERITS ADJUDICATION, OR *DE NOVO*.

In his habeas petition, Petitioner raises a single claim: "The trial court lacked jurisdiction to prosecute Petitioner due to provisions of treaties between US and Cherokee Nation reserving jurisdiction to the Tribe." Doc. 1 at 6. Although Petitioner does not cite *McGirt*, it is clear he

relies on same and Respondent will refer to his only ground for relief as his "*McGirt* claim." Notably, Petitioner admits he is not Indian: "Petitioner, a non-Indian of African descent whose family has resided on the Cherokee reservation since prior to Oklahoma statehood, was convicted of a crime alleged to have occurred within the boundaries of the Cherokee Nation reservation." Doc. 1 at 6. As shown below, the OCCA's refusal to grant relief on Petitioner's *McGirt* claim must not be disturbed. To the extent the OCCA's ruling on Petitioner's *McGirt* claim is considered to be the application of a procedural bar, it was independent and adequate and Petitioner has not shown cause and prejudice or a fundamental miscarriage of justice. To the extent the OCCA's ruling is considered to be a merits adjudication, it is neither contrary to, or an unreasonable application of, any clearly established Supreme Court law, nor was it based on an unreasonable determination of fact. Alternatively, Petitioner's *McGirt* claim fails under *de novo* review because he is not Indian.[3] Habeas relief must be denied.

I. Background

As background to Petitioner's *McGirt* claim, it is necessary to examine *McGirt*, its progeny, and *Wallace*, the pathmarking decision based on which the OCCA denied relief in Petitioner's case and in numerous other cases, as shown later.

A. *McGirt* and Its Progeny

McGirt expressly limited its decision to the Muscogee (Creek) Reservation: "Each tribe's

[3] This Court may wish to bypass the OCCA's adjudication of Petitioner's *McGirt* claim and deny relief under *de novo* review because the claim is patently frivolous given Petitioner's admission that he is not Indian. *See McGirt*, 140 S. Ct. at 2479 ("States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country."). Nevertheless, habeas review "focuses on what a state court knew and did," *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), and thus, Respondent will start with showing why Petitioner is not entitled to relief based on the OCCA's application of *Wallace* to his case.

treaties must be considered on their own terms, and the only question before us concerns the Creek." *McGirt*, 140 S. Ct. at 2479.[4] The OCCA—not the Supreme Court or another federal court—applied *McGirt* to find the existence of reservations belonging to the four remaining Five Tribes: the Cherokee Nation Reservation in *Hogner v. State*, 500 P.3d 629, 635 (Okla. Crim. App. 2021); the Choctaw Reservation in *Sizemore v. State*, 485 P.3d 867, 871 (Okla. Crim. App. 2021); the Seminole Reservation in *Grayson v. State*, 485 P.3d 250, 254 (Okla. Crim. App. 2021); and the Chickasaw Reservation in *McClain v. State*, ___ P.3d. ___, ___, 2021 WL 5414939, *3 (Okla. Crim. App. 2021); *see also Bosse v. State*, 499 P.3d 771, 774 (Okla. Crim. App. 2021) (reaffirming "the trial court's legal conclusion that the Chickasaw Reservation was never disestablished by Congress, and the lands within its historic boundaries are Indian Country," but denying post-conviction relief based on *Wallace*).

B. *Wallace*

When the Supreme Court decided *McGirt*, it recognized that many state inmates who attempt to seek release under its decision would nonetheless remain in state custody "thanks to well-known state and federal limitations on postconviction review in criminal proceedings." *McGirt*, 140 S. Ct. at 2479. In *Wallace*, the OCCA took *McGirt* at its word, applying one such

[4] The State recognizes that this Court is bound by *McGirt*. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (only the Supreme Court can overrule itself). Moreover, the State realizes that the Supreme Court has so far declined to consider overturning *McGirt*. However, this does not mean the Court will not choose to do so in the future, and the State continues to strenuously disagree with the holding in *McGirt*. As explained by Chief Justice Roberts in his dissent, Congress disestablished any reservation created for the Muscogee (Creek) Nation. *See McGirt*, 140 S. Ct. at 2482-2500 (Roberts, C.J., dissenting). *McGirt* is inconsistent with the Supreme Court's cases that do not require the use of any particular words to disestablish a reservation. *Id*. at 2486-89 (Roberts, C.J., dissenting). For these reasons and others, the State should have prosecutorial authority in this case because the crimes were not committed within Indian Country as defined by 18 U.S.C. § 1151(a).

well-known limitation: claims seeking to apply new decisions retroactively are, as a general rule, not redressable when raised for the first time on post-conviction review.

The real party in interest in *Wallace*, Clifton Parish, was convicted of second-degree felony murder and sentenced to twenty-five years of imprisonment. *Wallace*, 497 P.3d at 687. The OCCA affirmed his conviction and sentence on direct appeal, and after he failed to seek certiorari review in the Supreme Court, his conviction thereafter became final on or about June 4, 2014. *Id.* In August 2020, after the Supreme Court decided *McGirt*, Parish applied for state post-conviction relief in state district court, claiming that he is a Choctaw Indian and that he committed the murder within the Choctaw Nation's reservation. *Id.* While his post-conviction application was pending, the OCCA in another case held, based on *McGirt*, that Congress had created a reservation for the Choctaw Nation that had never been disestablished. *See Sizemore v. State*, 485 P.3d 867 (Okla. Crim. App. 2021). In Parish's case, the state district court granted post-conviction relief based on *McGirt* and *Sizemore*. *Wallace*, 497 P.3d at 687.

The State filed a petition for writ of prohibition in the OCCA, arguing that *McGirt* and its state court progeny (such as *Sizemore*) should not apply retroactively on state post-conviction review to invalidate convictions that were final when *McGirt* was decided. *See id.* at 687-88. The OCCA—after calling for briefing from the parties and amici curiae on the question of whether *McGirt* applies retroactivity to already final convictions on collateral review—issued a thorough and lengthy opinion granting the State's petition.

The OCCA began its analysis by explaining "its own non-retroactivity doctrine—often drawing on, but independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus." *Id.* at 688-89 (citing, *inter alia*, *Ferrell v. State*, 902 P.2d 1113 (Okla. Crim. App.

1995)). The OCCA noted that, just as the Supreme Court's "*Teague*'s[5] doctrine of non-retroactivity 'was an exercise of [the Supreme Court's] power to interpret the federal habeas statute,' we have barred state post-conviction relief on new procedural rules as part of our independent authority to interpret the remedial scope of state post-conviction statutes." *Id.* at 689 (quoting *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008), second alteration by *Wallace*). Like the Supreme Court's retroactivity jurisprudence, the OCCA's retroactivity approach includes equitable considerations that take into account "the narrow purposes of collateral review, and the reliance, finality, and public safety interests in factually accurate convictions and just punishments," recognizing that retroactivity "invites burdensome litigation and potential reversals unrelated to accurate verdicts, undermining the deterrent effect of the criminal law." *Id.* at 689.

In answering the specific issue presented as to *McGirt*'s retroactivity, the OCCA looked to similar decisions of the Supreme Court and the Tenth Circuit on federal habeas review for guidance, finding those decisions "very persuasive in our analysis of the state law question today." *Id.* The court primarily examined the Tenth Circuit's decision in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), which held that the Supreme Court's decision in *Hagen v. Utah*, 510 U.S. 399 (1994)—holding the Uintah reservation was diminished—should not be applied retroactively to invalidate final federal convictions on collateral review. *Id.* at 689-91.

Having examined its own precedent and having sought guidance from federal case law, the OCCA decided that "[f]or purposes of [its] state law retroactivity analysis, *McGirt*'s holding" was not "substantive." *Id.* at 691. *McGirt*, the OCCA explained, "did not determine whether specific conduct is criminal, or whether a punishment for a class of persons is forbidden by their status,"

[5] *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion).

but instead was "procedural" in that it "effectively decided which sovereign must prosecute major crimes committed by or against Indians within" historic Muscogee (Creek) lands. *Id.* The OCCA also held that *McGirt* was "new" in that it "imposed new and different obligations on the state and federal governments" and "it was not dictated by, and indeed, arguably involved controversial innovations upon, Supreme Court precedent," pointing to the reasoned disagreement between the Justices of the Supreme Court. *Id.* at 691-92 ("With no disrespect to the views that later commanded a Supreme Court majority in *McGirt*, the dissenting opinion of Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Thomas, whom we take to be 'reasonable jurists' in the required sense, certainly did not view the holding in *McGirt* as dictated by precedent even in 2020, much less in 2014."). And the OCCA noted that *McGirt* itself did not require undoing all prior inconsistent final state convictions, but instead contemplated the exact opposite. *Id.* at 693 (citing *McGirt*, 140 S. Ct. at 2479, 2481).

The OCCA then weighed the equities of affording relief based on *McGirt* on state post-conviction review, finding that while relief is available on direct review, "[t]he balance of competing interests is very different in a final conviction," and denying relief in the latter cases "strik[es] a proper balance between the public safety, finality, and reliance interests in settled convictions against the competing interests of those tried and sentenced under the prior jurisdictional rule"—jurisdiction that "went wholly unchallenged, as it did at Mr. Parish's trial in 2012." *Id.* at 693-94.

> We cannot and will not ignore the disruptive and costly consequences that retroactive application of *McGirt* would now have: the shattered expectations of so many crime victims that the ordeal of prosecution would assure punishment of the offender; the trauma, expense, and uncertainty awaiting victims and witnesses in federal re-trials; the outright release of many major crime offenders due to the impracticability of new prosecutions; and the incalculable loss to agencies and

> officers who have reasonably labored for decades to apprehend, prosecute, defend, and punish those convicted of major crimes; all owing to a longstanding and widespread, but ultimately mistaken, understanding of law.[6]
>
> By comparison, Mr. Parish's legitimate interests in post-conviction relief for this jurisdictional error are minimal or non-existent. *McGirt* raises no serious questions about the truth-finding function of the state courts that tried Mr. Parish and so many others in latent contravention of the Major Crimes Act. The state court's faulty jurisdiction (unnoticed until many years later) did not affect the procedural protections Mr. Parish was afforded at trial. The trial produced an accurate picture of his criminal conduct; the conviction was affirmed on direct review; and the proceedings did not result in the wrongful conviction or punishment of an innocent person. A reversal of Mr. Parish's final conviction now undoubtedly would be a monumental victory for him, but it would not be justice.

Id.

In sum, the OCCA held: "[E]xercising our independent state law authority to interpret the remedial scope of the state post-conviction statutes, we now hold that *McGirt* and our post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided." *Id.* at 689. Respondent will refer to this holding as the "*Wallace* rule."

Shortly after issuing *Wallace*, the OCCA vacated and withdrew every opinion, save one, in which it had previously applied *McGirt* retroactively on collateral review to grant post-conviction relief on an already-final conviction. *See Bosse v. State*, 495 P.3d 669 (Okla. Crim. App. 2021); *Cole v. State*, 495 P.3d 670 (Okla. Crim. App. 2021); *Ryder v. State*, 495 P.3d 669 (Okla. Crim. App. 2021); *Bench v. State*, 495 P.3d 670 (Okla. Crim. App. 2021). The *only* exception was the case of Jimcy McGirt himself—unlike in the cases of *Bosse*, *Cole*, *Ryder*, and

[6] As occurred with *Hagen*, as explained in *Cuch*, *McGirt* effectively reversed the OCCA's earlier holding that the Muscogee (Creek) Reservation was not intact. *See Murphy v. State*, 124 P.3d 1198, 1207-08 (Okla. Crim. App. 2005).

Bench, the OCCA's opinion granting post-conviction relief to McGirt, following the Supreme Court's *McGirt* decision, had not been stayed. *See Wallace*, 497 P.3d at 689 & n. 3; Exhibit "9," Docket Sheet for *McGirt v. State*, Case No. PC-2018-1057. The OCCA subsequently entered orders denying post-conviction relief based on application of the *Wallace* rule in *Bosse*, *Cole*, *Ryder*, and *Bench*. *See Bosse v. State*, 499 P.3d 771, 775 (Okla. Crim. App. 2021); *Cole v. State*, 499 P.3d 760, 761 (Okla. Crim. App. 2021); *Ryder v. State*, 500 P.3d 647, 649 (Okla. Crim. App. 2021); *Bench v. State*, ___ P.3d ___, ___, 2021 WL 6122757, *3 (Okla. Crim. App. 2021). Moreover, as shown below, the OCCA has applied the *Wallace* rule to deny post-conviction relief on *McGirt*-based prosecutorial authority claims in hundreds of other cases, including Petitioner's own case.

Parish petitioned for a writ of certiorari, but the Supreme Court denied certiorari review on January 10, 2022. *Parish v. Oklahoma*, No. 21-467, 2022 WL 89297 (U.S. Jan. 10, 2022).

II. Application of *Wallace* in Petitioner's Case

As previously stated, the OCCA affirmed the denial of post-conviction relief in this case based on the *Wallace* rule:

> In *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, __ P.3d __, this Court determined that the United States Supreme Court decision in *McGirt*, because it is a new procedural rule, is not retroactive and does not void final state convictions. *See Matloff*, 2021 OK CR 21, ¶¶ 27-28, 40.
>
> The conviction in this matter was final before the July 9, 2020 decision in *McGirt*, and the United States Supreme Court's holding in *McGirt* does not apply.

Exhibit 7 at 1.

The application of *Wallace* to deny post-conviction relief appears to be an issue of first impression in federal court. To Respondent's knowledge, this is only the second **timely filed**

§ 2254 habeas petition in which a petitioner raises a *McGirt* claim that was denied by the OCCA based on the *Wallace* rule.[7] Moreover, Respondent has located a dearth of authority on whether a state court's retroactivity bar is treated as a procedural bar or a merits adjudication in federal court. *Compare Wallace*, 497 P.3d at 688-89 ("In state post-conviction proceedings, this Court has previously applied its own non-retroactivity doctrine . . . to *bar* the application of new procedural rules to convictions that were final when the rule was announced." (emphasis added)), *with Lambrix v. Sec'y, DOC*, 872 F.3d 1170, 1177 (11th Cir. 2017) (treating state court's denial of relief on claim based on non-retroactivity of new Supreme Court decision as a merits adjudication subject to § 2254(d)); *Losh v. Fabian*, 592 F.3d 820, 824 (8th Cir. 2010) (same).

Accordingly, given the novelty of the issue and the sparseness of on-point authority, Respondent will demonstrate that, however the OCCA's application of *Wallace* is viewed, habeas relief must not be granted. Specifically, the OCCA's application of *Wallace* can only be one of two things—a procedural bar or a merits adjudication—and either way it does not warrant relief. First, assuming the OCCA's application of *Wallace* is considered to be a procedural bar, it was independent and adequate. Second, alternatively, assuming the OCCA's ruling is considered to be a merits adjudication, it is neither contrary to, or an unreasonable application of, any clearly established Supreme Court law, nor was it based on an unreasonable determination of fact. Finally, in any event, Petitioner is not Indian, and thus, his *McGirt* claim fails even under *de novo* review.

[7] In the other case, Respondent only recently filed a response to the habeas petition, and the matter remains pending. *See Wilson v. Nunn*, Case No. 4:21-cv-00445-JFH-SH (N.D. Okla.).

A. *Wallace* Represents an Independent and Adequate Procedural Bar

The OCCA's application of *Wallace* to deny Petitioner post-conviction relief represents an independent and adequate state-law procedural bar that this Court must honor. Petitioner has shown no grounds for overcoming this bar, through either cause and prejudice or a fundamental miscarriage of justice.

1. Independent and Adequate Procedural Bar

In *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), the Supreme Court held that "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred," absent certain exceptions discussed below. Accordingly, "[w]hen a state court dismisses a federal claim on the basis of noncompliance with adequate and independent state procedural rules, federal courts ordinarily consider such claims procedurally barred and refuse to consider them." *Banks v. Workman*, 692 F.3d 1133, 1144 (10th Cir. 2012). To be independent, a state procedural rule must rely on state law, rather than federal law, as the basis for the decision. *Id.* at 1145. To be adequate, "a state procedural rule must be 'strictly or regularly followed' and applied 'evenhandedly to all similar claims.'" *Id.* (quoting *Duvall v. Reynolds*, 139 F.3d 768, 796-97 (10th Cir. 1998)).

Here, the *Wallace* rule is (a) a procedural rule, (b) independent, and (c) adequate.

a. procedural rule

As previously noted, no federal court has addressed whether the application of the *Wallace* rule operates as a procedural bar or merits adjudication. But here, the *Wallace* rule is a procedural bar, as the OCCA noted that, through its retroactivity jurisprudence, it had "*barred* state post-

conviction relief on new procedural rules as part of our independent authority to interpret *the remedial scope of state post-conviction statutes*." *Wallace*, 497 P.3d at 689 (emphases added).

Further, the *Wallace* rule appears to be very similar to Oklahoma's equitable doctrine of laches, which the Tenth Circuit has recognized as a "state procedural bar" that precludes federal review of a claim unless cause and prejudice or a federal miscarriage of justice is shown. *Fontenot v. Crow*, 4 F.4th 982, 1026 (10th Cir. 2021). Pursuant to the laches doctrine, the OCCA has long held that "one cannot sit by and wait until lapse of time handicaps or makes impossible the determination of the truth of a matter, before asserting his rights." *Thomas v. State*, 903 P.2d 328, 331 (Okla. Crim. App. 1995) (quotation marks omitted, alteration adopted) (collecting laches cases). The Supreme Court itself has recognized the applicability of laches to Indian Country issues, refusing in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 202 (2005), to grant a tribe the "disruptive," equitable remedy it sought based on, in part, laches:

> The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's. And not until the 1990's did [the Tribe] acquire the properties in question and assert its unification theory to ground its demand for exemption of the parcels from local taxation. . . .
>
> The principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises. It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief.

City of Sherrill, 544 U.S. at 216-17.

Likewise, the OCCA's retroactivity jurisprudence has long been grounded in equitable considerations. In *Ferrell v. State*, 902 P.2d 1113, 1115 (Okla. Crim. App. 1995), invoked in *Wallace*, the OCCA explained "[i]t is a general rule of law in Oklahoma that decisions of the highest court are prospective in application unless specifically declared to have retroactive effect,"

so "a petitioner is not necessarily entitled to retroactive application of the change, especially on collateral review." *Id.*; *see also Wrone v. Page*, 481 P.2d 479, 482 (Okla. Crim. App. 1971). The OCCA reasoned that retroactivity rules are justified based on the purposes of collateral review, finality, deterrence, and the problems if "a final criminal conviction were subjected to fresh litigation tomorrow and every day thereafter." *Ferrell*, 902 P.2d at 1114-15. *Ferrell* followed a long line of cases in which the OCCA had generally applied new decisions only prospectively. *See, e.g.*, *Thomas v. State*, 888 P.2d 522, 527 (Okla. Crim. App. 1994); *Poke v. State*, 515 P.2d 252, 254 (Okla. Crim. App. 1973); *Battle v. State*, 515 P.2d 269, 272 (Okla. Crim. App. 1973); *Butler v. State*, 500 P.2d 297, 299 (Okla. Crim. App. 1972); *Mumford v. State*, 489 P.2d 1085, 1085-86 (Okla. Crim. App. 1971). These decisions were based both on the scope of the state post-conviction statutes and equitable considerations. *See, e.g.*, *Ferrell*, 902 P.2d at 1114-15; *Poke*, 515 P.2d at 254; *cf. also Walton v. State*, 565 P.2d 716, 718-19 (Okla. Crim. App. 1977).

Here, too, *Wallace* considered and based its rule in part on "the disruptive and costly consequences that retroactive application of *McGirt* would now have," including, *inter alia*, "the outright release of many major crime offenders due to the impracticability of new prosecutions." *Wallace*, 497 P.3d at 693. *Wallace* further recognized the *McGirt* Court's anticipation that claims resulting from the decision would be barred, including by laches:

> *McGirt* was never intended to annul decades of final convictions for crimes that might never be prosecuted in federal court; to free scores of convicted prisoners before their sentences were served; or to allow major crimes committed by, or against, Indians to go unpunished. The Supreme Court's intent, as we understand it, was to fairly and conclusively determine the claimed existence and geographic extent of the reservation.
>
> The Supreme Court predicted that *McGirt*'s disruptive potential to unsettle convictions ultimately would be limited by "other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few," designed to "protect

> those who have reasonably labored under mistaken understanding of the law." *McGirt*, 140 S.Ct. at 2481. The Court also well understood that collateral attacks on final state convictions based on *McGirt* would encounter "well-known state and federal limitations on post-conviction review in criminal proceedings." *Id*. at 2479. "[P]recisely because those doctrines exist," the Court said, it felt "free" to announce a momentous holding effectively recognizing a new jurisdiction and supplanting a longstanding previous one, "leaving questions about reliance interests for later proceedings crafted to account for them." *Id.* at 2481 (brackets and ellipses omitted).

Wallace, 497 P.3d at 693. Balancing the equities, as with a doctrine like laches, the OCCA concluded: "Non-retroactivity of *McGirt* in state post-conviction proceedings can mitigate some of the negative consequences so aptly described in *Cuch*, striking a proper balance between the public safety, finality, and reliance interests in settled convictions against the competing interests of those tried and sentenced under the prior jurisdictional rule." *Id.*

In sum, the equitable considerations relied upon by the OCCA in *Wallace*, as well as in developing its longstanding state retroactivity jurisprudence, are functionally indistinguishable from other equitable doctrines like laches and waiver that regularly preclude otherwise meritorious claims. The difference between the state court's "non-retroactivity" doctrine and other equitable doctrines appears to be one of label more than substance. *Cf. Danforth*, 552 U.S. at 271 & n. 5 (noting that the "word 'retroactivity' is misleading" and the doctrine is better understood as concerning the availability of a post-conviction remedy).

For all these reasons, assuming its independence and adequacy, and absent a showing of cause and prejudice or a fundamental miscarriage of justice, this Court should respect the *Wallace* rule as a procedural bar that precludes federal review of Petitioner's *McGirt* claim.

b. independence

The *Coleman* Court affirmed again that the Supreme Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman*, 501 U.S. at 729. "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id.* Specifically, "[b]ecause [the Supreme] Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id.*

The Supreme Court applies its direct-review "independent and adequate state ground doctrine" equally to "deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions." *Id.* Thus, "[t]he doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Id.* at 729-30. As the *Coleman* Court explained, concerns of comity and federalism compel this result—"Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." *Id.* at 730-31.

Some state-court opinions "clearly and expressly state[] that [the] judgment rests on a state procedural bar," in which case the ruling is clearly independent. *Harris v. Reed*, 489 U.S. 255, 263 (1989) (quotation marks omitted). For state-court opinions that are ambiguous, *Coleman* made

clear that the rules of *Michigan v. Long*, 463 U.S. 1032 (1983), dealing with such ambiguity, apply in habeas cases. *Coleman*, 501 U.S. at 732-35. According to *Long*, "when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," a federal court may "accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Long*, 463 U.S. at 1040-41. *However*,

> [i]f a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1041.

Here, the OCCA denied relief based on the *Wallace* rule, citing *Wallace* and noting that, in that decision, the OCCA "determined that the United States Supreme Court decision in *McGirt*, because it is a new procedural rule, is not retroactive and does not void final state convictions." Exhibit 7 at 1. Thus, having invoked only its own precedent, specifically, the *Wallace* rule, the OCCA's decision "clearly and expressly" rested on a state-law rule and is, therefore, independent. *See Harris*, 489 U.S. at 263; *see also Klein v. Neal*, 45 F.3d 1395, 1398-99 (10th Cir. 1995) ("The decision of the Colorado Court of Appeals does not contain even a scintilla of evidence suggesting the court relied on federal law. . . . The only references to legal authority are to Colorado statutory and decisional law. We therefore find the Colorado Court of Appeals' decision . . . rested exclusively on state law, entirely 'independent' of federal law.").

Even assuming analysis turns to the face of *Wallace* itself, the *Wallace* rule as articulated in that opinion was independent under either *Harris* or *Long*. For starters, the OCCA "clearly and expressly" rested its decision on a state-law procedural bar. *Harris*, 489 U.S. at 263. Citing state-court precedent, the OCCA began by stating that "[i]n state post-conviction proceedings," the court "ha[d] previously applied its own non-retroactivity doctrine—often drawing on, but independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus." *Wallace*, 497 P.3d at 688 (citations omitted). That doctrine, the court explained, is based on its "independent authority to interpret the remedial scope of state post-conviction statutes," *id.* at 689, and the court reached that holding by "exercising [that] independent state law authority," *id.*; *see also id.* at 693 (analyzing *McGirt* as part of its "independent exercise of authority to impose remedial constraints under state law"); *id.* at 694 (Hudson, J., concurring) (interpreting the majority opinion as resting "on state law grounds"). Those statements are consistent with the OCCA's longstanding application of retroactivity principles as a matter of state law. *See Ferrell*, 902 P.2d at 1114. Under *Harris*, the OCCA's *Wallace* rule is independent of federal law.

Lest there be any doubt, the OCCA also included *Long*-satisfying statements, making clear that any federal decisions it cited were merely "for the purpose of guidance." *Long*, 463 U.S. at 1041.[8] For instance, as to the OCCA's discussion of *Cuch*, the OCCA was of course aware that it

[8] Of course, because the OCCA "clearly and expressly" relied on a state-law procedural bar, it did not even need to include such statements and its decision is independent without even reaching the *Long* analysis. *See Coleman*, 501 U.S. at 735 ("A predicate to the application of the *Harris* presumption[, *i.e.*, the presumption that a ruling is not independent of federal law,] is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law."); *see also id.* at 740 ("The *Harris* presumption does not apply here. Coleman does not argue, nor could he, that it 'fairly appears' that the Virginia Supreme Court's decision rested primarily on federal law or was interwoven with such law. The Virginia Supreme Court stated plainly that it was granting the

was not bound by *Cuch*. *See, e.g.*, *Martinez v. State*, 442 P.3d 154, 156 (Okla. Crim. App. 2019) (expressly disagreeing with the Tenth Circuit's interpretation of Supreme Court law). Instead, in looking to that decision, the OCCA plainly stated that it found the decision "very persuasive in our analysis of the state law question today." *Wallace*, 497 P.3d at 689; *see also id.* at 691 ("We find *Cuch*'s analysis and authorities persuasive as we consider the independent state law question of collateral non-retroactivity for *McGirt*.").

The independence of the *Wallace* rule is readily apparent on both the face of the opinion under review and the face of *Wallace* itself.

c. adequacy

"To satisfy the adequacy element, a state procedural rule must be strictly or regularly followed and applied evenhandedly to all similar claims." *Banks v. Workman*, 692 F.3d 1133, 1145 (10th Cir. 2012) (quotation marks omitted). Even where a state court has not applied a procedural rule in a small number of cases, this does not defeat adequacy where the court *has* applied the rule in "the vast majority of cases." *Thacker v. Workman*, 678 F.3d 820, 836 (10th Cir. 2012) (quotation marks omitted). In *Thacker*, even where the OCCA had failed to apply a rule in four cases, including one unpublished case, the Tenth Circuit refused to find the rule not adequate. *See id.* at 835-36.

Here, the OCCA has applied the *Wallace* rule to all *McGirt* claims of which Respondent is aware, save just one case, that of Jimcy McGirt himself.[9] And McGirt's case was decided in

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Commonwealth's motion to dismiss the petition for appeal. That motion was based solely on Coleman's failure to meet the Supreme Court's time requirements.").

[9] It is not clear that McGirt should "count," so to speak, when McGirt's is the case in which the rule was announced. Indeed, the Supreme Court has previously announced a new rule on collateral review—meaning the particular post-conviction petitioner who brought the case to the Supreme

September 2020, nearly a year before *Wallace* was decided, meaning the OCCA has applied the *Wallace* rule to *every* post-*Wallace* decision on a *McGirt* claim Respondent has identified. Exhibit "10," *McGirt v. State*, Case No. PC-2018-1057 (Sept. 2, 2020) (unpublished). Furthermore, this means the OCCA did not truly fail to apply *Wallace* to McGirt's case, as *Wallace* was not in existence at the time; it simply declined to vacate its prior order granting McGirt relief, perhaps due to the fact that the OCCA's case had not been stayed, McGirt had already been tried federally and was in federal custody at that point, and the State failed to file a motion urging the OCCA to vacate its prior decision. *See Jimcy McGirt Found Guilty Of Aggravated Sexual Abuse, Abusive Sexual Contact In Indian Country*, Department of Justice Press Release (Nov. 6, 2020), available at https://tinyurl.com/546hvff5 (last visited Jan. 30, 2022).

Again, the OCCA not only applied the *Wallace* rule prospectively, it also vacated its prior opinions in four capital cases and ultimately issued an opinion applying the *Wallace* rule in each of those cases. *See Bosse*, 499 P.3d at 775; *Cole*, 499 P.3d at 761; *Ryder*, 500 P.3d at 649; *Bench*, 2021 WL 6122757, *3. As the OCCA indicated, it had, prior to *Wallace*, granted relief in many direct appeals but had granted post-conviction relief in only those capital cases and one non-capital case, McGirt's. *Wallace*, 497 P.3d at 689 ("[T]his Court initially granted post-conviction relief

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Court (Jose Padilla) received the benefit of the new rule on collateral review—but then later held that the new rule did not apply retroactively on collateral review to anyone else. *See Padilla v. Kentucky*, 559 U.S. 356, 360-61, 374 (2010) (holding, on certiorari review of Supreme Court of Kentucky's denial of post-conviction relief, that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea); *Chaidez v. United States*, 568 U.S. 342, 358 (2013) (holding that *Padilla* announced a new rule that does not apply retroactively on collateral review and that "defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding"). In any event, even counting McGirt's case, his is the only one where the *Wallace* rule was not applied.

and vacated several capital murder convictions, and at least[10] one non-capital conviction (Jimcy McGirt's), that were final when *McGirt* was announced.").

Since *Wallace* was decided, the OCCA has further applied the *Wallace* rule in more than 200 additional cases of which Respondent is aware, including one published capital case. *See Martinez v. State*, ___ P.3d ___, ___, 2021 WL 6202796, *5 (Okla. Crim. App. 2021).[11] The unpublished cases located by Respondent are included together in Exhibit "11":[12]

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[10] Despite the OCCA's uncertain language, "at least," the undersigned counsel is not aware of any other non-capital post-conviction case in which relief was granted on a *McGirt* claim. As background, following *McGirt*, the OCCA began remanding dozens and dozens of cases, ultimately around 100, to the state district courts for evidentiary hearings on *McGirt* claims, as findings of fact were necessary on Indian status and location. These cases consisted of a mix of direct appeals and post-convictions. Because the Oklahoma Attorney General's Office participated in these hearings, the undersigned is aware of the outcome in every one of these cases and can represent to this Court that, among those remands, no other post-conviction applicant escaped application of the *Wallace* rule. Nor does it seem that the OCCA would have granted relief on a non-remanded case without an evidentiary hearing.

[11] *Martinez* opened with a merits analysis, agreeing with the state district court's conclusion that the alleged reservation at issue, the former Kiowa Comanche Apache ("KCA") Reservation, had clearly been disestablished. *Martinez*, 2021 WL 6202796, *2-5. The inclusion of this discussion was likely a matter of judicial economy, intended to resolve the matter for the benefit of other cases, pending in both the OCCA and state district court, alleging the existence of a KCA Reservation. In any event, the OCCA concluded with an unequivocal application of the *Wallace* rule, *see Martinez*, 2021 WL 6202796, *5 ("Even if we concluded otherwise, we would grant no relief."), and an alternative merits holding does not defeat a procedural bar in federal court, *Harris*, 489 U.S. at 264 n. 10.

[12] As indicated previously, the undersigned is aware of many *McGirt* cases decided by the OCCA because they were remanded for hearings and/or published when decided. However, the vast majority of post-conviction *McGirt* claims were ultimately disposed of in unpublished orders without a hearing, as *Wallace* obviated the need for same. These unpublished orders are not included in any legal database, so the undersigned located such orders only through many hours spent manually checking hundreds of 2020 and 2021 post-conviction dockets on OSCN. All of this is to say, there are likely many more cases in which the *Wallace* rule was applied, but it would take many more hours to locate them all. In any event, the undersigned reiterates that she did not locate a single post-conviction case decided following *Wallace* in which the *Wallace* rule was not applied.

1) *Shelman v. State*, Case No. PC-2021-687 (Jan. 26, 2022) (unpublished)

2) *Petties v. State*, Case No. PC-2021-1070 (Jan. 24, 2022) (unpublished)

3) *Bowens v. State*, Case No. PC-2021-1088 (Jan. 24, 2022) (unpublished)

4) *Kimbrough v. State*, Case No. PC-2021-938 (Jan. 21, 2022) (unpublished)

5) *Bradford v. State*, Case No. PC-2021-993 (Jan. 21, 2022) (unpublished)

6) *Gregory v. State*, Case No. PC-2021-1063 (Jan. 20, 2022) (unpublished)

7) *Cruse v. State*, Case No. PC-2021-1074 (Jan. 19, 2022) (unpublished)

8) *McCarty v. State*, Case No. PC-2021-1196 (Jan. 7, 2022) (unpublished)

9) *Baker v. State*, Case No. PC-2021-1073 (Jan. 6, 2022) (unpublished)

10) *Jump v. State*, Case No. PC-2021-1094 (Jan. 6, 2022) (unpublished)

11) *Winfrey v. State*, Case No. PC-2021-1087 (Jan. 6, 2022) (unpublished)

12) *Young v. State*, Case No. PC-2021-982 (Jan. 6, 2022) (unpublished)

13) *Reed v. State*, Case No. PC-2021-1069 (Jan. 6, 2022) (unpublished)

14) *Edwards v. State*, Case No. PC-2021-1081 (Jan. 5, 2022) (unpublished)

15) *Washington v. State*, Case No. PC-2021-974 (Jan. 5, 2022) (unpublished)

16) *Warledo v. State*, Case No. PC-2021-1065 (Jan. 5, 2022) (unpublished)

17) *Akin v. State*, Case No. PC-2021-840 (Jan. 5, 2022) (unpublished)

18) *Davis v. State*, Case No. PC-2021-1275 (Jan. 5, 2022) (unpublished)

19) *Galindo v. State*, Case No. PC-2021-967 (Jan. 5, 2022) (unpublished)

20) *Reed v. State*, Case No. PC-2021-1069 (Jan. 5, 2022) (unpublished)

21) *Crenshaw v. State*, Case No. PC-2021-1086 (Jan. 4, 2022) (unpublished)

22) *Jones v. State*, Case No. PC-2021-940 (Jan. 4, 2022) (unpublished)

23) *Williams v. State*, Case No. PC-2021-964 (Jan. 4, 2022) (unpublished)

24) *Proctor v. State*, Case No. PC-2021-958 (Jan. 4, 2022) (unpublished)

25) *Hallmark v. State*, Case No. PC-2021-984 (Jan. 4, 2022) (unpublished)

26) *Maier v. State*, Case No. PC-2021-633 (Jan. 4, 2022) (unpublished)

27) *Adetula v. State*, Case No. PC-2021-1041 (Jan. 4, 2022) (unpublished)

28) *Duston v. State*, Case No. PC-2021-1018 (Dec. 28, 2021) (unpublished)

29) *Duston v. State*, Case No. PC-2021-1017 (Dec. 28, 2021) (unpublished)

30) *Duston v. State*, Case No. PC-2021-1016 (Dec. 28, 2021) (unpublished)

31) *Duston v. State*, Case No. PC-2021-1015 (Dec. 28, 2021) (unpublished)

32) *Duston v. State*, Case No. PC-2021-1014 (Dec. 28, 2021) (unpublished)

33) *Duston v. State*, Case No. PC-2021-1013 (Dec. 28, 2021) (unpublished)

34) *Duston v. State*, Case No. PC-2021-1012 (Dec. 28, 2021) (unpublished)

35) *Duston v. State*, Case No. PC-2021-1011 (Dec. 28, 2021) (unpublished)

36) *Duston v. State*, Case No. PC-2021-1010 (Dec. 28, 2021) (unpublished)

37) *Duston v. State*, Case No. PC-2021-1009 (Dec. 28, 2021) (unpublished)

38) *Boggs v. State*, Case No. PC-2021-1068 (Dec. 8, 2021) (unpublished)

39) *Scott v. State*, Case No. PC-2021-1068 (Dec. 8, 2021) (unpublished)

40) *Hamilton v. State*, Case No. PC-2021-1085 (Dec. 7, 2021) (unpublished)

41) *Hudson v. State*, Case No. PC-2021-944 (Dec. 3, 2021) (unpublished)

42) *Lowery v. State*, Case No. PC-2020-610 (Dec. 1, 2021) (unpublished)

43) *Pitts v. State*, Case No. PC-2021-841 (Dec. 1, 2021) (unpublished)

44) *Donahue v. State*, Case No. PC-2021-71 (Nov. 30, 2021) (unpublished)

45) *Morrison v. State*, Case No. PC-2021-113 (Nov. 30, 2021) (unpublished)

46) *Musonda v. State*, Case No. PC-2021-681 (Nov. 30, 2021) (unpublished)

47) *Burns v. State*, Case No. PC-2021-449 (Nov. 30, 2021) (unpublished)

48) *Winterhalter v. State*, Case No. PC-2021-674 (Nov. 30, 2021) (unpublished)

49) *Funkhouser v. State*, Case No. PC-2021-597 (Nov. 30, 2021) (unpublished)

50) *Jackson v. State*, Case No. PC-2021-730 (Nov. 30, 2021) (unpublished)

51) *Sweet v. State*, Case No. PC-2021-741 (Nov. 30, 2021) (unpublished)

52) *Taylor v. State*, Case No. PC-2021-858 (Nov. 30, 2021) (unpublished)

53) *Lansdale v. State*, Case No. PC-2021-1022 (Nov. 24, 2021) (unpublished)

54) *Lowe v. State*, Case No. PC-2021-1037 (Nov. 24, 2021) (unpublished)

55) *Bauders v. State*, Case No. PC-2021-1008 (Nov. 23, 2021) (unpublished)

56) *Thompson v. State*, Case No. PC-2021-1034 (Nov. 23, 2021) (unpublished)

57) *Burnett v. State*, Case No. PC-2021-972 (Nov. 19, 2021) (unpublished)

58) *Twobabies v. State*, Case No. PC-2021-973 (Nov. 19, 2021) (unpublished)

59) *Custard v. State*, Case No. PC-2021-983 (Nov. 19, 2021) (unpublished)

60) *Alberty v. State*, Case No. PC-2021-994 (Nov. 19, 2021) (unpublished)

61) *Jackson v. State*, Case No. PC-2021-1026 (Nov. 16, 2021) (unpublished)

62) *Jones v. State*, Case No. PC-2021-922 (Nov. 15, 2021) (unpublished)

63) *Tyler v. State*, Case No. PC-2021-1080 (Nov. 15, 2021) (unpublished)

64) *Mason v. State*, Case No. PC-2021-1097 (Nov. 15, 2021) (unpublished)

65) *Snell v. State*, Case No. PC-2021-1076 (Nov. 12, 2021) (unpublished)

66) *Brauning v. State*, Case No. PC-2021-910 (Nov. 10, 2021) (unpublished)

67) *Moore v. State*, Case No. PC-2021-1021 (Nov. 10, 2021) (unpublished)

68) *Bartling v. State*, Case No. PC-2021-1072 (Nov. 10, 2021) (unpublished)

69) *Pierce v. State*, Case No. PC-2021-895 (Nov. 8, 2021) (unpublished)

70) *Glaze v. State*, Case No. PC-2021-881 (Nov. 5, 2021) (unpublished)

71) *Drennon v. State*, Case No. PC-2021-887 (Nov. 5, 2021) (unpublished)

72) *Malone v. State*, Case No. PC-2021-891 (Nov. 4, 2021) (unpublished)

73) *McConnell v. State*, Case No. PC-2021-902 (Nov. 4, 2021) (unpublished)

74) *Bethel v. State*, Case No. PC-2021-800 (Nov. 3, 2021) (unpublished)

75) *Adams v. State*, Case No. PC-2021-798 (Nov. 3, 2021) (unpublished)

76) *Moutaw v. State*, Case No. PC-2021-815 (Nov. 3, 2021) (unpublished)

77) *Thompson v. State*, Case No. PC-2021-768 (Nov. 2, 2021) (unpublished)

78) *Hill v. State*, Case No. PC-2021-783 (Nov. 2, 2021) (unpublished)

79) *Hammer v. Hogan*, Case No. MA-2021-417 (Oct. 27, 2021) (unpublished)

80) *White v. State*, Case No. PC-2021-1048 (Oct. 27, 2021) (unpublished)

81) *Ferrell v. State*, Case No. MA-2021-883 (Oct. 26, 2021) (unpublished)

82) *Haak v. State*, Case No. PC-2021-1071 (Oct. 20, 2021) (unpublished)

83) *Barker v. State*, Case No. PC-2020-535 (Oct. 20, 2021) (unpublished)

84) *State v. Montgomery*, Case No. PC-2021-661 (Oct. 18, 2021) (unpublished)

85) *Vinson v. State*, Case No. PC-2021-736 (Oct. 19, 2021) (unpublished)

86) *State v. Bryant*, Case No. PC-2021-517 (Oct. 18, 2021) (unpublished)

87) *State v. Rankins*, Case No. PC-2021-594 (Oct. 18, 2021) (unpublished)

88) *State v. Wray*, Case No. PC-2021-489 (Oct. 15, 2021) (unpublished)

89) *State v. Brewer*, Case No. PC-2021-624 (Oct. 15, 2021) (unpublished)

90) *Harris v. State*, Case No. PC-2021-690 (Oct. 15, 2021) (unpublished)

91) *State v. Durnal*, Case No. PC-2021-639 (Oct. 15, 2021) (unpublished)

92) *State v. Durnal*, Case No. PC-2021-640 (Oct. 15, 2021) (unpublished)

93) *Mason v. State*, Case No. PC-2021-666 (Oct. 15, 2021) (unpublished)

94) *State v. Dan*, Case No. PC-2021-563 (Oct. 15, 2021) (unpublished)

95) *State v. Shrader*, Case No. PC-2021-568 (Oct. 15, 2021) (unpublished)

96) *State v. South*, Case No. PC-2021-593 (Oct. 15, 2021) (unpublished)

97) *Tilley v. State*, Case No. PC-2021-1049 (Oct. 15, 2021) (unpublished)

98) *Tilley v. State*, Case No. PC-2021-1050 (Oct. 15, 2021) (unpublished)

99) *State v. Taylor*, Case No. PC-2021-570 (Oct. 13, 2021) (unpublished)

100) *Wilson v. State*, Case No. PC-2021-562 (Oct. 13, 2021) (unpublished)

101) *Spears v. State*, Case No. PC-2021-558 (Oct. 12, 2021) (unpublished)

102) *McGill v. State*, Case No. PC-2021-797 (Oct. 12, 2021) (unpublished)

103) *Knight v. State*, Case No. PC-2021-524 (Oct. 8, 2021) (unpublished)

104) *Terry v. State*, Case No. PC-2018-1076 (Oct. 6, 2021) (unpublished)

105) *Francis v. State*, Case No. PC-2020-705 (Oct. 5, 2021) (unpublished)

106) *Littlesun v. State*, Case No. PC-2021-10 (Oct. 5, 2021) (unpublished)

107) *Grass v. State*, Case No. PC-2021-465 (Oct. 5, 2021) (unpublished)

108) *Strange v. State*, Case No. PC-2021-487 (Oct. 5, 2021) (unpublished)

109) *Jenkins v. State*, Case No. PC-2021-572 (Oct. 5, 2021) (unpublished)

110) *State v. Long*, Case No. PC-2021-600 (Oct. 5, 2021) (unpublished)

111) *State v. Long*, Case No. PC-2021-602 (Oct. 5, 2021) (unpublished)

112) *State v. Long*, Case No. PC-2021-603 (Oct. 5, 2021) (unpublished)

113) *State v. Long*, Case No. PC-2021-606 (Oct. 5, 2021) (unpublished)

114) *State v. Long*, Case No. PC-2021-618 (Oct. 5, 2021) (unpublished)

115) *Lopez v. State*, Case No. PC-2021-731 (Oct. 5, 2021) (unpublished)

116) *Sanders v. State*, Case No. PC-2021-850 (Oct. 5, 2021) (unpublished)

117) *Smith v. State*, Case No. PC-2021-269 (Oct. 4, 2021) (unpublished)

118) *Doak v. State*, Case No. PC-2020-698 (Oct. 1, 2021) (unpublished)

119) *Worthingon v. State*, Case No. PC-2020-744 (Oct. 1, 2021) (unpublished)

120) *State v. Long*, Case No. PC-2021-601 (Oct. 1, 2021) (unpublished)

121) *State v. Long*, Case No. PC-2021-604 (Oct. 1, 2021) (unpublished)

122) *Bentley v. State*, Case No. PC-2018-743 (Oct. 1, 2021) (unpublished), *cert. denied*, *Bentley v. Oklahoma*, No. 21-6301, 2022 WL 145219 (U.S. Jan. 18, 2022)

123) *Grass v. State*, Case No. PC-2020-827 (Oct. 1, 2021) (unpublished)

124) *Hughart v. State*, Case No. PC-2021-43 (Oct. 1, 2021) (unpublished)

125) *McDade v. State*, Case No. PC-2021-187 (Oct. 1, 2021) (unpublished)

126) *July v. State*, Case No. PC-2021-267 (Oct. 1, 2021) (unpublished)

127) *Eads v. State*, Case No. PC-2021-306 (Oct. 1, 2021) (unpublished)

128) *Allen v. State*, Case No. PC-2021-332 (Oct. 1, 2021) (unpublished)

129) *Bethel v. State*, Case No. PC-2021-415 (Oct. 1, 2021) (unpublished)

130) *Davison v. State*, Case No. PC-2021-456 (Oct. 1, 2021) (unpublished)

131) *Davis v. State*, Case No. PC-2021-468 (Oct. 1, 2021) (unpublished)

132) *Lewis v. State*, Case No. PC-2021-505 (Oct. 1, 2021) (unpublished)

133) *State v. Alexander*, Case No. PC-2021-566 (Oct. 1, 2021) (unpublished)

134) *Folsom v. State*, Case No. PC-2021-696 (Oct. 1, 2021) (unpublished)

135) *Matthews v. State*, Case No. PC-2021-713 (Oct. 1, 2021) (unpublished)

136) *Watkins v. State*, Case No. PC-2021-714 (Oct. 1, 2021) (unpublished)

137) *Miller v. State*, Case No. PC-2021-735 (Oct. 1, 2021) (unpublished)

138) *Shields v. State*, Case No. PC-2021-782 (Oct. 1, 2021) (unpublished)

139) *Brown v. State*, Case No. PC-2021-832 (Oct. 1, 2021) (unpublished)

140) *Wilson v. State*, Case No. PC-2019-670 (Oct. 1, 2021) (unpublished)

141) *Richardson v. State*, Case No. PC-2021-469 (Sept. 30, 2021) (unpublished)

142) *State v. Morrison*, Case No. PC-2021-546 (Sept. 30, 2021) (unpublished)

143) *Taylor v. State*, Case No. PC-2020-643 (Sept. 30, 2021) (unpublished)

144) *Alexander v. State*, Case No. PC-2021-534 (Sept. 30, 2021) (unpublished)

145) *Miller v. State*, Case No. PC-2021-142 (Sept. 30, 2021) (unpublished)

146) *State v. Hensley*, Case No. PC-2021-567 (Sept. 30, 2021) (unpublished)

147) *State v. Dick*, Case No. PC-2021-638 (Sept. 30, 2021) (unpublished)

148) *State v. Holland*, Case No. PC-2021-641 (Sept. 30, 2021) (unpublished)

149) *State v. Barton*, Case No. PC-2021-596 (Sept. 30, 2021) (unpublished)

150) *Harding v. State*, Case No. PC-2021-734 (Sept. 30, 2021) (unpublished)

151) *Warnick v. State*, Case No. PC-2020-656 (Sept. 29, 2021) (unpublished)

152) *Brown v. State*, Case No. PC-2020-338 (Sept. 29, 2021) (unpublished)

153) *Berryhill v. State*, Case No. PC-2021-223 (Sept. 29, 2021) (unpublished)

154) *Compelleebee v. State*, Case No. PC-2020-667 (Sept. 27, 2021) (unpublished)

155) *Fairres v. State*, Case No. PC-2020-647 (Sept. 21, 2021) (unpublished)

156) *Pacheco v. State*, Case No. PC-2020-635 (Sept. 21, 2021) (unpublished)

157) *Lottinville v. State*, Case No. PC-2021-537 (Sept. 21, 2021) (unpublished)

158) *State v. Lottinville*, Case No. PC-2021-541 (Sept. 21, 2021) (unpublished)

159) *State v. Clark*, Case No. PC-2021-540 (Sept. 21, 2021) (unpublished)

160) *State v. Bray*, Case No. PC-2021-542 (Sept. 21, 2021) (unpublished)

161) *State v. Boggs*, Case No. PC-2021-535 (Sept. 21, 2021) (unpublished)

162) *State v. Parsons*, Case No. PC-2021-538 (Sept. 21, 2021) (unpublished)

163) *State v. Parsons*, Case No. PC-2021-539 (Sept. 21, 2021) (unpublished)

164) *State v. Smith*, Case No. PC-2021-560 (Sept. 21, 2021) (unpublished)

165) *State v. Smith*, Case No. PC-2021-561 (Sept. 20, 2021) (unpublished)

166) *State v. Smith*, Case No. PC-2021-562 (Sept. 20, 2021) (unpublished)

167) *Miller v. State*, Case No. PC-2021-281 (Sept. 20, 2021) (unpublished)

168) *Young v. State*, Case No. PC-2020-954 (Sept. 20, 2021) (unpublished)

169) *Davis v. State*, Case No. PC-2019-451 (Sept. 20, 2021) (unpublished), *cert denied*, *Davis v. Oklahoma*, No. 21-6030, 2022 WL 89459, at *1 (U.S. Jan. 10, 2022)

170) *Leon v. State*, Case No. PC-2020-619 (Sept. 16, 2021) (unpublished)[13]

171) *Logsdon v. State*, Case No. PC-2020-867 (Sept. 16, 2021) (unpublished)

172) *Tarkington v. State*, Case No. PC-2021-762 (Sept. 16, 2021) (unpublished)

173) *Tarkington v. State*, Case No. PC-2021-781 (Sept. 16, 2021) (unpublished)

174) *Mitchell v. State*, Case No. PC-2020-675 (Sept. 15, 2021) (unpublished)

175) *Bruner v. State*, Case No. PC-2020-843 (Sept. 15, 2021) (unpublished)

176) *State v. Slinkard*, Case No. PC-2021-518 (Sept. 15, 2021) (unpublished)

177) *State v. Perez*, Case No. PC-2021-517 (Sept. 15, 2021) (unpublished)

178) *Davis v. State*, Case No. PC-2021-697 (Sept. 15, 2021) (unpublished)

179) *Rogers v. State*, Case No. PC-2020-752 (Sept. 15, 2021) (unpublished)

180) *Chandler v. State*, Case No. PC-2021-565 (Sept. 15, 2021) (unpublished)

181) *State v. Neely*, Case No. PC-2021-607 (Sept. 15, 2021) (unpublished)

182) *State v. Allen*, Case No. PC-2021-660 (Sept. 15, 2021) (unpublished)

183) *State v. Bushyhead*, Case No. PC-2021-712 (Sept. 15, 2021) (unpublished)

184) *State v. Moore*, Case No. PC-2021-262 (Sept. 14, 2021) (unpublished)

185) *State v. Mann*, Case No. PC-2021-500 (Sept. 14, 2021) (unpublished)

186) *State v. Mann*, Case No. PC-2021-501 (Sept. 14, 2021) (unpublished)

[13] Notably, in *Leon*, the state district court found that Leon was not an Indian for purposes of federal law at the time of the crime, as he was not enrolled in a tribe until around two years after the crime, but the OCCA still applied its *Wallace* rule without reaching the Indian status issue. Exhibit "12," *Leon v. State*, Evidentiary Hearing Findings of Fact and Conclusions of Law, Case No. PC-2020-619 (Apr. 12, 2021) (unpublished). Thus, the OCCA's opinions in *Leon* and the present case underscore that the OCCA is consistently applying the *Wallace* rule regardless of the merits of the *McGirt* claim at issue.

187) *State v. Mann*, Case No. PC-2021-502 (Sept. 14, 2021) (unpublished)

188) *State v. Vann*, Case No. PC-2021-659 (Sept. 14, 2021) (unpublished)

189) *State v. Nelson-Coddington*, Case No. PC-2021-591 (Sept. 14, 2021) (unpublished)

190) *Long v. State*, Case No. PC-2021-185 (Sept. 14, 2021) (unpublished)

191) *Stout v. State*, Case No. PC-2021-243 (Sept. 14, 2021) (unpublished)

192) *Billy v. State*, Case No. PC-2021-342 (Sept. 14, 2021) (unpublished)

193) *Caldwell v. State*, Case No. PC-2021-399 (Sept. 14, 2021) (unpublished)

194) *State v. Spencer*, Case No. PC-2021-564 (Sept. 14, 2021) (unpublished)

195) *State v. Postoak*, Case No. PC-2021-569 (Sept. 14, 2021) (unpublished)

196) *State v. Miller*, Case No. PC-2021-599 (Sept. 14, 2021) (unpublished)

197) *State v. Hitchcock*, Case No. PC-2021-605 (Sept. 14, 2021) (unpublished)

198) *State v. Littlebear*, Case No. PC-2021-637 (Sept. 14, 2021) (unpublished)

199) *State v. Gore*, Case No. PC-2021-244 (Sept. 10, 2021) (unpublished)

200) *Greenlee v. State*, Case No. PC-2021-381 (Sept. 10, 2021) (unpublished)

201) *Burger v. State*, Case No. PC-2021-664 (Sept. 10, 2021) (unpublished)

202) *State v. Neel*, Case No. PC-2021-670 (Sept. 10, 2021) (unpublished)

203) *State v. Deer-In-Water*, Case No. PC-2021-608 (Sept. 10, 2021) (unpublished)

204) *State v. McHenry*, Case No. PC-2021-595 (Sept. 1, 2021) (unpublished)

205) *Johnson v. State*, Case No. PC-2018-343 (Aug. 25, 2021) (unpublished)

Based on the above, the *Wallace* rule is clearly adequate. Looking to decisions issued post-*Wallace*, the rule is being "strictly or regularly followed and applied evenhandedly to *all* similar claims." *Banks*, 692 F.3d at 1145 (quotation marks omitted, emphasis added). Even assuming one looks to decisions initially issued prior to *Wallace*, the OCCA failed to vacate its prior decision and apply the *Wallace* rule in only case, McGirt's case. Because the OCCA has applied the

Wallace rule in "the vast majority of cases," *Thacker*, 678 F.3d at 836, with at most a single exception, the rule is still adequate.

2. Exceptions to the Bar

A federal court may not grant relief on a claim defaulted in state court based on an independent and adequate rule "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. Here, Petitioner makes no showing of cause and prejudice or a fundamental miscarriage of justice.

a. cause and prejudice

"Cause for a procedural default exists where something *external* to the petitioner, something that cannot fairly be attributed to him, impeded his efforts to comply with the state's procedural rule." *Smith v. Allbaugh*, 921 F.3d 1261, 1267 (10th Cir. 2019) (emphasis in original, alterations adopted, quotation marks omitted). Here, Petitioner does not acknowledge his *McGirt* claim is barred by the *Wallace* rule, let alone allege cause and prejudice. He has thus failed to carry his burden of showing cause and prejudice. *See Klein v. Neal*, 45 F.3d 1395, 1399 (10th Cir. 1995) ("The magistrate judge was thus correct in concluding Mr. Klein's ineffective assistance of counsel claim was subject to a procedural bar, and we will not reach the merits of his claim *unless he carries his burden* of overriding the procedural bar." (emphasis added)); *Brecheen v. Reynolds*, 41 F.3d 1343, 1356 (10th Cir. 1994) (declining to address cause and prejudice where "Brecheen does not argue that he has shown cause and prejudice to override his procedural default").

b. fundamental miscarriage of justice

The "fundamental miscarriage of justice" exception "is a markedly narrow one, implicated only in extraordinary cases where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Magar v. Parker*, 490 F.3d 816, 820 (10th Cir. 2007) (quotation marks omitted and alteration adopted). A petitioner must show, in light of new evidence, that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

As stated above, in his § 2254 petition, Petitioner does not acknowledge his default of his *McGirt* claim, let alone allege a fundamental miscarriage of justice. Indeed, Petitioner admitted his guilt in this case, which would seriously undermine any attempt to show actual innocence now. *See Johnson v. Medina*, No. 13-1324, 547 F. App'x 880, 885 (10th Cir. Dec. 4, 2013) (unpublished) (finding the petitioner's "plea of guilty simply undermines" his actual innocence claim). Moreover, Petitioner's *McGirt* claim is, at best, a claim of legal innocence, not factual innocence. *See Bousley v. United States*, 523 U.S. 614, 623 (1998); *Jones v. Pettigrew*, CIV-18-633-G, 2021 WL 3854755, at *4 (W.D. Okla. Aug. 27, 2021) (unpublished) (*McGirt*-based prosecutorial authority claims did not implicate actual innocence). In sum, Petitioner has not alleged actual innocence, let alone met the "demanding" standard of showing same. *House v. Bell*, 547 U.S. 518, 538 (2006).

* * *

As shown above, Petitioner has shown neither cause and prejudice nor a fundamental miscarriage of justice to overcome the independent and adequate *Wallace* rule applied by the OCCA to preclude relief on his *McGirt* claim. Habeas relief must be denied.

B. Alternatively, the OCCA's Adjudication of this Claim Did Not Run Afoul of § 2254(d)

Alternatively, some federal courts have viewed a state's retroactivity bar as a merits adjudication subject to § 2254(d) deference. *See Lambrix*, 872 F.3d at 1177; *Losh*, 592 F.3d at 824. To the extent this Court concludes the same as to the *Wallace* rule, Respondent submits that the OCCA's rejection of Petitioner's *McGirt* claim was neither contrary to, or an unreasonable application of, any clearly established Supreme Court law, nor was it based on an unreasonable determination of fact. *See* 28 U.S.C. § 2254(d). Put simply, the question comes down to whether any clearly established Supreme Court precedent required the OCCA to apply *McGirt* and its progeny retroactively on collateral review. Because the answer is no, habeas relief must be denied.

1. This Court Cannot Second-Guess the OCCA's Refusal to Apply *Hogner* Retroactively

As an initial matter, while the OCCA refused to apply *McGirt* retroactively to Petitioner's case, what Petitioner seeks in reality is the retroactive application of *state*-law precedent—*Hogner*, in which the OCCA applied *McGirt* to find the continued existence of the Cherokee Nation Reservation. *Hogner*, 500 P.3d at 635.[14] Viewed that way, Petitioner's claim must fail under § 2254(d).

In *Warren v. Kyler*, 422 F.3d 132 (3d Cir. 2005), the Third Circuit rejected the petitioner Warren's claim that the Pennsylvania Supreme Court's refusal to apply its own precedent, *Com.*

[14] The state district court found that Petitioner's crimes in this case were committed "within the boundaries of the Muscogee Creek Nation and/or the Cherokee Nation." Exhibit 5 at 1-2. However, Petitioner has repeatedly admitted it is the Cherokee Nation's boundaries, not the Muscogee (Creek) Nation's, that are implicated in this case. Exhibit 3 at 1-2, 4; Doc. 1 at 6. This is consistent with Respondent's own search of the address of Petitioner's crimes in the Bureau of Indian Affairs's ("BIA") online Federally Recognized Tribes' Land Areas Map. Exhibit "15," BIA Map Results. On this map, the address of Petitioner's crimes is marked with a black dot.

v. Butler, 760 A.2d 384, 385 (Pa. 2000), retroactively on post-conviction review violated his due process rights:

> In short, Warren's failure to receive the benefit of the *Butler* decision was based on the Pennsylvania courts' application of their own established retroactivity doctrines. On habeas review we are in no position to second-guess the state courts' determination as to that state law issue. We must rather review for a potential violation of federal law, and because we conclude that nothing in the Constitution requires states to apply their own decisions retroactively, we find no such violation.

Warren, 422 F.3d at 136-37. The Third Circuit reached this conclusion despite the fact that *Butler*'s holding was predicated on the "state court's interpretation of the United States Constitution." *Id.* at 137.

Here, Respondent again notes that *McGirt* expressly limited its decision to the Muscogee (Creek) Reservation: "Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek." *McGirt*, 140 S. Ct. at 2479. *McGirt* said this in the context of rejecting Oklahoma's argument that an adverse ruling would extend to other tribes and "half its land." *Id.* In other words, *McGirt* was expressly reserving the question of whether the remaining of the Five Tribes had reservations. Where "the Supreme Court has expressly reserved consideration of an issue," there is plainly no clearly established law. *Alberni v. McDaniel*, 458 F.3d 860, 864 (9th Cir. 2006); *see also Vick v. Williams*, 233 F.3d 213, 218 (4th Cir. 2000) (no clearly established law where the issue has been "expressly reserved by the Supreme Court"); *cf. also House*, 527 F.3d at 1016 ("[C]learly established law consists of Supreme Court holdings . . . .").

Indeed, federal district courts in Oklahoma, including this Court, have repeatedly recognized that *McGirt*'s holding is limited to the Muscogee (Creek) Reservation. *See Berry v. Braggs*, No. 19-CV-0706-GKF-FHM, 2020 WL 6205849, at *5 (N.D. Okla. Oct. 22, 2020)

(unpublished) ("But *McGirt* said nothing about whether major crimes committed within the boundaries of the Cherokee Nation Reservation must be prosecuted in federal court."); *Maples v. Whitten*, No. 21-CV-0091-CVE-CDL, 2021 WL 4255615, at *5 (N.D. Okla. Sept. 17, 2021) (unpublished) ("Critically, *McGirt*'s holding was limited to the Muscogee (Creek) Nation Reservation. But Maples contends that the state lacked jurisdiction to prosecute him for crimes committed on the Cherokee Nation Reservation." (citation omitted)); *Barnett v. Oklahoma*, No. CIV-20-00757-JD, 2021 WL 325716, at *5 (W.D. Okla. Feb. 1, 2021) (unpublished) ("Mr. Barnett has also not established that *McGirt* applies outside of the narrow holding of that case—he has not shown that the holding applies to convictions in Oklahoma County. By its terms, *McGirt* only applies to defendants who commit certain crimes within the Muscogee (Creek) Nation Reservation. As the Report and Recommendation notes, Oklahoma County lies outside of the boundaries of the Creek Nation, and therefore *McGirt* does not apply." (citation omitted)).

Accordingly, what is truly at issue is the OCCA's refusal to apply *Hogner*, not *McGirt*, retroactively. Indeed, the *Wallace* rule encompasses both *McGirt* and its progeny. Thus, the OCCA here, in effect, was refusing to apply *Hogner* retroactively on collateral review, and respectfully, this Court may not "second-guess" that decision, as "nothing in the Constitution requires states to apply their own decisions retroactively." *Warren*, 422 F.3d at 136-37. This is so despite the fact that *Hogner* interpreted federal law in determining whether the territory of the Cherokee Nation constituted Indian Country. *See id.* at 137. Habeas relief must be denied.

2. No Clearly Established Supreme Court Law Requires Retroactive Application of *McGirt*

Even if the relevant question is whether any clearly established Supreme Court law required retroactive application of *McGirt* itself, Petitioner still cannot satisfy § 2254(d). There is

simply no Supreme Court case which holds, as a matter of constitutional law, that *McGirt* or decisions like it must apply retroactively.[15] Thus, at bottom, in challenging the *Wallace* rule and its application in his case, Petitioner alleges an error of state law which cannot be reviewed. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). In any event, as will be shown, the OCCA's refusal to apply *McGirt* retroactively on collateral review to invalidate final convictions finds broad support in a slew of federal precedents, including *McGirt* itself. Habeas relief must be denied.

a. *McGirt* and other Supreme Court precedent

The *Wallace* rule finds broad support in both *McGirt* itself and other Supreme Court precedent. For starters, the *McGirt* Court contemplated that its holding would not result in post-conviction relief. The *McGirt* Court predicted that those attempting to vacate their final convictions may be prevented from doing so "thanks to well-known state and federal limitations on postconviction review in criminal proceedings." *McGirt*, 140 S. Ct. at 2479. Such limitations include the general rule against a retroactive remedy that the Supreme Court embraced in *Teague* and that Oklahoma state courts adopted as a matter of state law in cases like *Ferrell* and *Wallace*. Indeed, the Court in *McGirt* endorsed the consideration of "reliance interests" through doctrines like "procedural bars" and "laches" in order "to protect those who have reasonably labored under a mistaken understanding of the law," *id.* at 2481—precisely the sort of equitable considerations

[15] The only potential exception is *Montgomery v. Louisiana*, 577 U.S. 190 (2016), which Respondent addresses and shows to be inapplicable below.

upon which the *Wallace* relied when it declined to apply *McGirt* retroactively, as previously discussed.[16]

Indeed, the general rule is that "States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (citations omitted). "The States thus have great latitude to establish the structure and jurisdiction of their own courts." *Id.* So, for example, in *Johnson v. Frankell* this Court held that state courts were not obligated to hear interlocutory qualified immunity appeals in § 1983 actions even though there is such a federal procedural right in federal courts. *Johnson v. Frankell*, 520 U.S. at 919-23.

One narrow exception to this general rule is found in *Montgomery v. Louisiana*: "[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery v. Louisiana*, 577 U.S. 190, 200 (2016).[17] But *McGirt* is not a new "rule of constitutional law," nor

[16] In fact, these portions of *McGirt* quoted the Court's decision in *Ramos v. Louisiana* that left "questions about reliance interests for later proceedings crafted to account for them." 140 S. Ct. at 2481 (quoting 140 S. Ct. 1390, 1407 (2020)) (internal marks omitted). That quote from *Ramos*, in turn, was specifically referring to whether its decision should be applied retroactively under *Teague*, which the Court later answered in the negative by *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021).

[17] Notably, *Montgomery*'s continuing viability is highly dubious. *See Jones v. Mississippi*, 141 S. Ct. 1307, 1318 (2021) ("[T]o the extent that *Montgomery*'s application of the *Teague* standard is in tension with the Court's retroactivity precedents that both pre-date and post-date *Montgomery*, those retroactivity precedents—and not *Montgomery*—must guide the determination of whether rules other than *Miller* [*v. Alabama*, 567 U.S. 460 (2012)] are substantive."); *id.* at 1323, 1327 (Thomas, J., concurring) ("The better approach is to be patently clear that *Montgomery* was a demonstrably erroneous decision worthy of outright rejection. . . . The majority, however, selects a third way: Overrule *Montgomery* in substance but not in name."). In any event, this Court need not reach that question, as *McGirt* clearly does not fall within the *Montgomery* exception even if it remains viable.

does it "set forth categorical constitutional guarantees" or constitute "a controlling right asserted under the Constitution." *Id.* at 200-05. Instead, *McGirt* was a statutory decision regarding the statutes enacted in the process of Oklahoma statehood, the mode of analyzing those statutes, and preemption of Oklahoma's prosecutorial authority under the Major Crimes Act (18 U.S.C. § 1153). Specifically, the decision in *McGirt* centered on whether Congress had established, and subsequently disestablished, a reservation. *Id.* at 2460-76. After the Court held that the area was a reservation and therefore "Indian country" for purposes of 18 U.S.C. § 1151, the Court then analyzed whether the Major Crimes Act preempted state law. *Id.* at 2476-78. The deprivation of state authority under *McGirt* is therefore statutory and not a constitutional rule subject to *Montgomery*. Because *McGirt* is not a rule of constitutional law, the OCCA was not required to apply it retroactively.[18]

In fact, the Supreme Court's prior cases have never applied a rule like *McGirt*'s retroactively. The Supreme Court's retroactivity rules start with the recognition that applying new decisions retroactively on post-conviction review "seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Edwards v. Vannoy*, 141 S. Ct. 1574, 1554 (2021) (citation omitted). Meanwhile, "the costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application." *Id.* at 1555 (citation and internal quotation marks omitted).

[18] In addition, *Montgomery* is also not applicable because *McGirt* did not create a retroactively applicable "substantive" rule, as explained more below.

Especially with respect to *McGirt*, application of a new ruling "retroactively would potentially overturn decades of convictions obtained in reliance on" previous court cases. *Id.* at 1554. "[C]onducting scores of retrials years after the crimes occurred would require significant state resources," and the State "may not be able to retry some defendants at all because of lost evidence, faulty memory, and missing witnesses." *Id.* "Even when the evidence can be reassembled, conducting retrials years later inflicts substantial pain on crime victims who must testify again and endure new trials." *Id.* at 1554-55 (citations and internal marks omitted).

Because the federal habeas statute grants the Supreme Court remedial discretion to take into account such equitable and prudential considerations, *id.* at 1554, the Supreme Court itself, like the OCCA, *Ferrell*, 902 P.2d at 1115, has adopted "a general rule of nonretroactivity," *Danforth*, 552 U.S. at 278, affording retroactive relief on post-conviction review for only a few narrow categories of "substantive" rules. *McGirt* fits into none of them.

McGirt is not a decision on the "kind of conduct that cannot constitutionally be punished in the first instance" and thus that "could not properly be prosecuted at all" in any court. *E.g.*, *United States v. U.S. Coin & Currency*, 401 U.S. 715, 723 (1971). *McGirt* also does not interpret existing statutes to limit the conduct criminalized by those laws such that the legislative authority did not seek to penalize the conduct at issue. *E.g.*, *Bousley v. United States*, 523 U.S. 614, 620-21 (1998). Nor is *McGirt* a decision that a particular type of punishment is impermissible, such as the death penalty for a certain category of offenders, regardless of the sovereign prosecuting them. *E.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). These are the only categories of cases in which the Supreme Court

has held that a new rule is substantive. As *McGirt* does not fit into these categories, Petitioner's claim fails for a lack of clearly established federal law. *See House*, 527 F.3d at 1017.

McGirt is not an exception to the general rule against retroactive remedies. Regardless of whether state or federal law is applicable, "[t]he proscribed conduct in the instant case is capital murder, the prosecution of which is, to put it mildly, not prohibited by the rule in" *McGirt*. *Butler v. McKellar*, 494 U.S. 407, 415 (1990). Preemption under *McGirt* is not within the limited "substantive" rule exceptions to the general rule of non-retroactivity that the Supreme Court has previously recognized.

Indeed, to the extent the Supreme Court has addressed decisions like *McGirt*, it has refused to apply such rulings retroactively. In *Gosa v. Mayden*, 413 U.S. 665 (1973), the Supreme Court declined to apply retroactively its ruling in *O'Callahan v. Parker*, 395 U.S. 258 (1969), which held that military courts could not try service members for crimes not "service connected." The *Gosa* Court held that "the validity of convictions by military tribunals, now said to have exercised jurisdiction inappropriately over nonservice-connected offenses is not sufficiently in doubt so as to require the reversal of all such convictions rendered." *Gosa*, 413 U.S. at 676. In so holding, *Gosa* distinguished cases that "dealt with the kind of conduct that cannot constitutionally be punished in the first instance" such that it was "conduct constitutionally immune from punishment in any court," *id.* at 677 (internal marks omitted). The Court explained that the question before it "was not whether [the defendant] could have been prosecuted; it was, instead, one related to the forum." *Id.*

Like *Gosa*, the issue in *McGirt* was the proper forum of prosecution for conduct unquestionably made criminal by the laws of all forums. *See also Caspari v. Bohlen*, 510 U.S.

383, 396 (1994) (new double jeopardy decision not retroactive since defendant still "subject to imprisonment"). To use Justice Harlan's words in his pathmarking concurrence on retroactivity, because *McGirt* is not a rule that "free[s] individuals from punishment for conduct that is constitutionally protected," applying it retroactively would not avoid "the adverse collateral consequences of retrial," and therefore retroactivity is neither equitably nor prudentially justified. *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgment). Denying post-conviction relief in cases such as this has thus been the Supreme Court's consistent practice. *See also Toy Toy v. Hopkins*, 212 U.S. 542, 548-49 (1909) (denying habeas corpus to Indian who claimed federal government lacked jurisdiction over crime committed on allotment that was not Indian country because fee patent had issued). Petitioner's claim fails at the threshold requirement of clearly established Supreme Court law.

b. *Cuch* and related decisions

The *Wallace* rule is further in harmony with lower federal court rulings. As the *Wallace* court explored in depth, the Tenth Circuit has held that when the Supreme Court renders a new decision on the diminishment or disestablishment of an Indian reservation, the changed rules regarding proper prosecutorial forum do not apply retroactively on post-conviction review. *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996). Unlike retroactively applicable decisions, the Tenth Circuit reasoned, criminal convictions secured based on a misunderstanding of reservation boundaries "involved conduct made criminal by both state and federal law." *Id.* at 992. The question in such cases solely "focuses on *where* these Indian defendants should have been tried for committing major crimes." *Id.* at 992 (emphasis in original). There is no "complete miscarriage of justice to these movants that would mandate or counsel retroactive application . . .

to invalidate these convictions." *Id.* at 994 (internal marks omitted). *Cuch* is on all fours with *Wallace*, and it is impossible to see how the OCCA could violate § 2254(d), let alone produce an extreme malfunction in the state criminal justice system, when its treatment of a new Supreme Court disestablishment (or, in this case, non-disestablishment) decision is materially indistinguishable from the Tenth Circuit's approach in exactly such a case. *See Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) ("[H]abeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." (quotation marks omitted)).

Other courts of appeals have reached the same result in similar circumstances. *See McSparran v. Weist*, 402 F.2d 867, 876-77 (3d Cir. 1968) (en banc) (new decision regarding scope of federal diversity jurisdiction applied prospectively only). And in federal court Indian country cases, the lack of prosecutorial authority under the Major Crimes Act is not an issue that can reach back to vacate a final conviction. *See, e.g.*, *United States* v. *Tony*, 637 F.3d 1153, 1158-59 (10th Cir. 2011); *Davis v. Johnston*, 144 F.2d 862, 862 (9th Cir. 1944).

c. Federal courts have also held *McGirt* is not retroactive

The Tenth Circuit and its lower courts have uniformly held that *McGirt* is not retroactive. Exhibit "13," *In re Davis*, No. 21-7030 (10th Cir. July 6, 2021) (unpublished) (denying authorization to file a second or successive habeas petition under 28 U.S.C. § 2244(b)(2)(A) because *McGirt* is not a retroactive new rule of constitutional law); Exhibit "14," *In re Morgan*, No. 20-6123 (10th Cir. Sept. 18, 2020) (unpublished) (same); *Sanders v. Pettigrew*, No. CIV-20-350-RAW-KEW, 2021 WL 3291792, *5 (E.D. Okla. Aug. 2, 2021) (unpublished) (the *McGirt* decision did not provide the petitioner with a new starting date of his statutory year under 28 U.S.C.

§ 2244(d)(1)(C) "because that case did not break any new ground or recognize any new rights"); *Littlejohn v. Crow*, No. 18-CV-0477-CVE-JFJ, 2021 WL 3074171, *5 (N.D. Okla. July 20, 2021) (unpublished) (finding that § 2244(d)(1)(C) was inapplicable "because the Supreme Court did not newly recognize any constitutional rights in *McGirt*"); *Sampson v. Dowling*, No. 20-CV-0361-JED-CDL, 2021 WL 1318662, at *3 n. 7 (N.D. Okla. Apr. 8, 2021) (unpublished) (finding the petitioner's prosecutorial authority challenge was time-barred under the AEDPA and refusing the petitioner's assertion that his claim could be raised "at any time" notwithstanding the time constraints of § 2244(d)(1)); *Berry*, 2020 WL 6205849, *7 (Section 2244(d)(1)(C) did not apply to make the habeas petition at issue in that case timely in spite of the recent decision in *McGirt* because "the *McGirt* Court did not recognize any new constitutional rights when it determined that Congress did not disestablish the Muscogee Creek Nation Reservation").

Admittedly, there is a small amount of daylight between the *Wallace* rule and these federal decisions—specifically, on whether *McGirt* is "new." *However*, these federal decisions nonetheless point inescapably to the conclusion that the OCCA did not violate any clearly established Supreme Court law in declining to apply *Wallace* retroactively. As an initial matter, the relevant question is not whether this Court, applying a *Teague* analysis on *de novo* review, would consider *McGirt* new or old.[19] Rather, "the AEDPA and *Teague* inquiries are distinct." *Greene v. Fisher*, 565 U.S. 34, 39 (2011) (quotation marks omitted); *see also id.* ("We have explained that AEDPA did not codify *Teague* . . . . The retroactivity rules that govern federal

[19] Even if this court were to analyze the "new" versus "old" question, it would have to find that no fairminded jurist could agree with the OCCA for Petitioner to satisfy § 2254(d). But, given the OCCA's previous holding in *Murphy* refusing to find a Muscogee (Creek) reservation, and the *McGirt* dissent's reasonable argument that the majority in *McGirt* did not apply the *Solem v. Bartlett*, 465 U.S. 463 (1984) test, Petitioner has failed to satisfy this high burden.

habeas review on the merits—which include *Teague*—are quite separate from the relitigation bar imposed by AEDPA; neither abrogates or qualifies the other."). And review under AEDPA is focused on the OCCA's decision overall, not the specifics of its retroactivity analysis:

> On habeas review, we properly eschew the role of strict English teacher, finely dissecting every sentence of a state court's ruling to ensure all is in good order. Rather, our focus is on the reasonableness of the state court's *decision—viz.*, whether that decision is contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts.
>
> Consequently, our inquiry relates to the overall substance of the state court's analysis and the conclusion it thereafter makes.

(Donald) Grant v. Royal, 886 F.3d 874, 905-06 (10th Cir. 2018) (citations omitted, emphasis in original).

Here, "the overall substance of the state court's analysis and the conclusion it thereafter makes"—that *McGirt* is not retroactively applicable on collateral review—is fully in line with the above-cited federal decisions. For instance, *In re Morgan* and *In re Davis* analyzed whether *McGirt* was retroactive for purposes of 28 U.S.C. § 2244(b)(2)(A), pursuant to which provision the new rule of constitutional law relied upon by a petitioner must be made retroactive by the Supreme Court itself. *See* 28 U.S.C. § 2244(b)(2)(A). As *In re Morgan* found, "even if *McGirt* did present a new rule of constitutional law, the Court did not explicitly make its decision retroactive." Exhibit 14 at 4. *Wallace* too recognized that "[t]he Supreme Court itself has not declared that *McGirt* is retroactive to convictions already final when the ruling was announced." *Wallace*, 497 P.3d at 693. If the Supreme Court has not said *McGirt* is retroactive on collateral review for purposes of § 2244(b)(2)(A), then it cannot be said clearly established Supreme Court law requires its retroactive application for purposes of § 2254(d).

d. Analogous habeas decisions on state retroactivity rules

As shown above, Supreme Court and other federal precedents affirmatively support the *Wallace* rule; it certainly cannot be said that any clearly established law requires the OCCA to apply *McGirt* retroactively on collateral review. Under analogous circumstances, the Eleventh and Eighth Circuits have found that habeas relief must be denied.

In *Lambrix*, 872 F.3d at 1174-75, the Eleventh Circuit considered the Florida state courts' refusal to apply retroactively on collateral review the Supreme Court's highly consequential decision in *Hurst v. Florida*, 577 U.S. 92 (2016), which invalidated Florida's death penalty scheme because it required the judge alone to find the existence of an aggravating circumstance necessary for the imposition of a death sentence. In Lambrix's case, he twice raised *Hurst* claims in successive state post-conviction motions, and both times the Florida Supreme Court rejected the claims on grounds that his convictions and sentences were final in 1986, such that he was not entitled to retroactive application of *Hurst* under the Florida Supreme Court's decision in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S. Ct. 41 (2017). *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017); *Lambrix v. State*, 217 So. 3d 977, 989 (Fla. 2017).

As previously indicated, the Eleventh Circuit treated these rulings as merits adjudications subject to § 2254(d) deference. *See Lambrix*, 872 F.3d at 1181 ("[T]he Florida Supreme Court has denied on the merits Lambrix's constitutional claims, which are all based on the non-retroactivity of the U.S. Supreme Court's *Hurst* decision and Florida's new death penalty statute. Under 28 U.S.C. § 2254 . . . our review of Lambrix's current § 2254 petition is limited.").[20] The Eleventh

[20] The Eleventh Circuit declined to reach the issue "of whether Lambrix's current petition is second or successive and subject to the strictures of § 2244(b)" since his claims failed under § 2254(d). *Lambrix*, 872 F.3d at 1181.

Circuit then concluded that, pursuant to § 2254(d), "the Florida courts' rejection of Lambrix's constitutional claim was not contrary to nor an unreasonable application of a holding of a Supreme Court decision." *Id.* at 1182-83. Chiefly, "[n]o U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable." *Id.* at 1182. Moreover, "[t]he Florida Supreme Court's ruling—that *Hurst* is not retroactively applicable to Lambrix—is fully in accord with the U.S. Supreme Court's" decision that *Hurst*'s predecessor decision is not retroactively applicable. *Id.* at 1182-83.

Here, *McGirt* is Oklahoma's *Hurst*, *Wallace* is Oklahoma's *Asay*, and *Lambrix* instructs that habeas relief must be denied. "No U.S. Supreme Court decision holds that" *McGirt* "is retroactively applicable." *Id.* at 1182. In addition, as described at length above, the OCCA's refusal to apply *McGirt* retroactively is "fully in accord," *id.* at 1182-83, with other Supreme Court precedent, including *Gosa* and *McGirt* itself, not to mention *Cuch*. Given the lack of clearly established law that required retroactive application of *McGirt*, Petitioner cannot possibly show that no fairminded jurist could agree with the application of the *Wallace* rule in his case.[21]

The persuasiveness of *Lambrix* is only more compelling when one considers the underlying retroactivity analysis employed by the Florida Supreme Court there. As *Asay* explained, Florida courts, "despite the federal courts' use of *Teague* . . . to determine retroactivity," "continue to apply [their] longstanding *Witt* analysis." *Asay*, 210 So. 3d at 15 (citing *Witt v. State*, 387 So. 2d 922

[21] Petitioner does not dispute that his convictions became final prior to the July 9, 2020, decision in *McGirt*. In any event, the OCCA's finding that Petitioner's convictions were final prior to *McGirt* was not unreasonable. *See* 28 U.S.C. § 2254(d)(2). Because Petitioner pleaded guilty and did not move to withdraw his pleas, his convictions became final ten days after sentencing, on October 18, 2019. *See Fisher*, 262 F.3d at 1142; Rule 4.2, *Rules of the Court of Criminal Appeals*, OKLA. STAT. tit. 22, Ch. 18, App.

(Fla. 1980)). The "*Teague* test . . . utilizes completely different factors from Florida's *Witt* test." *Id.* The *Witt* test balances the interests in finality, fairness, and the conservation of judicial resources. *Id.* *Witt* requires retroactivity, in relevant part, where "the change in law . . . place[s] beyond the authority of the state the power to regulate certain conduct or impose certain penalties, or, alternatively, be of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Asay*, 210 So. 3d at 16 (quotation marks omitted) (citing *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965)). *Stovall* and *Linkletter*, in turn, "require[] courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice." *Id.* at 16-17.

The OCCA's retroactivity jurisprudence, as applied in *Wallace*, bears multiple similarities to the *Witt* test. Much like the OCCA's retroactivity analysis in *Wallace*, the *Witt* test is heavily based in equitable considerations. *Compare Asay*, 210 So. 3d at 15 (discussing concerns of finality, fairness, and the conservation of judicial resources) (quoting *Witt*, 387 So. 2d at 924-25)), *with Wallace*, 497 P.3d at 689-90 (same). Furthermore, the OCCA effectively considered all three *Stovall*/*Linkletter* factors as to the purpose of the new rule, the extent of reliance on the prior rule, and the effect retroactive application would have on the administration of justice. *See Wallace*, 497 P.3d at 693 (reasoning that "*McGirt* was never intended to annul decades of final convictions for crimes that might never be prosecuted in federal court," but instead "to fairly and conclusively determine the claimed existence and geographic extent of the reservation"; considering "[t]he State's reliance and public safety interests in the results of a guilty plea or trial on the merits, and [that] appellate review according to then-existing rules, are always substantial," and that "the

State's jurisdiction was hardly open to doubt for over a century and often went wholly unchallenged"; and concluding that "retroactive application of *McGirt*" now would have "disruptive and costly consequences").[22]

The takeaway is this: the Eleventh Circuit's § 2254(d) analysis did not consider the specifics of Florida's retroactivity analysis or whether it aligned with *Teague*. Instead, the only question was whether any clearly established Supreme Court law required Florida to apply *Hurst* retroactively on collateral review. *See Lambrix*, 872 F.3d at 1182-83. Applying that analysis to *Wallace*, regardless of the basis of the OCCA's retroactivity jurisprudence or whether it matches *Teague*, the bottom line is that no clearly established Supreme Court law required the OCCA to apply *McGirt* retroactively to final convictions.[23]

The Eighth Circuit's decision in *Losh*, 592 F.3d at 822, also supports the denial of habeas relief here. In *Losh*, the state court refused to apply retroactively on collateral review the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), in which the Court held "that an upward departure from the maximum statutory sentence is unconstitutional under a guideline system unless the underlying facts have been found by a jury or admitted by the defendant." The Eighth Circuit concluded Losh could not satisfy § 2254(d): "The Supreme Court has yet to consider whether *Blakely* applies retroactively to cases that became final before it was decided.

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[22] Indeed, this is unsurprising since *Wallace* found to be persuasive both *Cuch* and *Gosa*, which themselves relied on *Linkletter* and *Stovall*. *See Gosa*, 413 U.S. at 677; *Cuch*, 79 F.3d at 995.

[23] In any event, the Supreme Court's prior retroactivity framework in *Linkletter*/*Stovall* was "tightened" by *Teague*. *Edwards*, 141 S. Ct. at 1558 n. 5. In other words, state retroactivity rules that find their origin in *Linkletter*/*Stovall* are actually broader than *Teague*. *See, e.g.*, *Asay*, 210 So. 3d at 15 ("[O]ur longstanding *Witt* analysis . . . provides *more expansive retroactivity standards* than those adopted in *Teague*." (footnote omitted, emphasis in original)).

Because no clearly established federal law therefore exists, § 2254(d)(1) affords no grounds for disturbing the supreme court's conclusion. Our own court has reached a similar conclusion." *Losh*, 592 F.3d at 824 (citations omitted). Here, too, the Supreme Court has not declared *McGirt* retroactive, and the Tenth Circuit itself has said *McGirt* is not retroactive.

* * *

For all the foregoing reasons, the *Wallace* rule does not run afoul of any clearly established Supreme Court law, and no such law required the OCCA to apply *McGirt* retroactively to Petitioner's final conviction. Thus, Petitioner cannot satisfy § 2254(d). Habeas relief must be denied.

C. Alternatively, Petitioner's *McGirt* Claim Fails Under *De Novo* Review

As a final alternative, even assuming that Petitioner's *McGirt* claim is reviewed *de novo*, habeas relief must be denied. Indeed, while Respondent is confident in the constitutionality of the *Wallace* rule, given the novelty of the issue and the fact that Petitioner is not Indian, this Court could bypass the question of the *Wallace* rule and deny relief based on *de novo* review. As this Court has recognized, "[i]t is well-established that federal courts should avoid deciding constitutional issues unless necessary to do so." *Laney v. Schneider Nat. Carriers, Inc.*, No. 09-CV-389-TCK-TLW, 2011 WL 1667434, at *3 (N.D. Okla. May 3, 2011) (unpublished) (collecting cases); *see also Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1250 (10th Cir. 2008) (canon of constitutional avoidance follows "from courts' prudential desire not to decide constitutional issues unnecessarily").

Here, as previously noted, the state district court found that Petitioner had not substantiated his claim of Indian status. Exhibit 5 at 2. And before this Court, Petitioner blatantly admits he is

not Indian: "Petitioner, a *non-Indian* of African descent whose family has resided on the Cherokee reservation since prior to Oklahoma statehood, was convicted of a crime alleged to have occurred within the boundaries of the Cherokee Nation reservation." Doc. 1 at 6 (emphasis added). It is unclear if Petitioner is claiming that he is a Freedmen descendant, but regardless he has never, in state court or this Court, presented evidence of tribal enrollment.[24] And in any event, Petitioner cannot show he is Indian for purposes of federal criminal prosecutorial authority absent a showing *both* that he has been recognized as an Indian by a tribe or by the federal government *and* that he has Indian blood. *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001) ("[T]he fact that the defendant had been recognized as an Indian by a tribe was not sufficient to prove his Indian status; some evidence of Indian blood was also necessary."). Because Petitioner has not presented any evidence of Indian status, and in fact admits he is not Indian, his *McGirt* claim is patently frivolous and fails even under *de novo* review. *See McGirt*, 140 S. Ct. at 2479 ("States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country.").

[24] In state district court, Petitioner claimed he was a member of the Muscogee (Creek) Nation, but he presented no documentation in support. Exhibit 3 at 1. Moreover, as best Respondent can tell, the Muscogee (Creek) Nation does not extend membership to Freedmen descendants. *See* Exhibit "16," Chris Cameron and Mark Walker, *Tribes to Confront Bias Against Descendants of Enslaved People* (New York Times May 28, 2021); Exhibit "17," Lenzy Krehbiel-Burton, *Citizenship lawsuit by Muscogee (Creek) freedmen descendants dismissed* (Tulsa World May 9, 2019). In any event, as cited above, federal law requires a showing of both recognition as an Indian by a tribe or the federal government and Indian blood to be considered Indian for purposes of federal prosecutorial authority. Petitioner has simply presented no evidence of either of these elements and, indeed, has presented only insinuation, and not evidence, that he is a Freedmen descendant.

CONCLUSION

Based on the above and foregoing law and reasoning, federal habeas corpus relief is unwarranted. Petitioner's petition for federal habeas corpus relief should therefore be denied in its entirety by this Court.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

X I hereby certify that on February 4, 2022, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing.

X I hereby certify that on February 4, 2022, I served the attached document by mail on the following:

Anthony Cook, #173498
James Crabtree Correctional Center
216 N MURRAY ST
HELENA, OK 73741

s/ Caroline E.J. Hunt