

ORIGINAL



No. F-2020-420

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JEFFREY DON MCCLAIN,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

FILED

**IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

AUG 12 2021

**JOHN D. HADDEN
CLERK**

**APPELLEE'S BRIEF AFTER REMAND,
AND REQUEST TO STAY AND ABATE PROCEEDINGS**

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AUGUST 12, 2021

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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JEFFREY DON McCLAIN)
)
 Appellant,)
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 v.) **Case No. F-2020-420**
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 THE STATE OF OKLAHOMA,)
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 Appellee.)

**APPELLEE'S BRIEF AFTER REMAND,
AND REQUEST TO STAY AND ABATE PROCEEDINGS**

Jeffrey Don McClain, hereinafter referred to as Appellant, seeks reversal of his convictions in this direct appeal based on *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). However, the State has just filed a certiorari petition in *Bosse v. Oklahoma*, Case No. 20A161, asking the Court to overturn *McGirt*.¹ Accordingly, pending the Supreme Court's decision in *Bosse*, this Court should stay and abate these proceedings immediately, to conserve judicial resources.

I. Background

Appellant was tried by a jury and convicted of Rape by Instrumentation (Count I), Lewd Acts with a Child Under 16 (Count II), Pattern of Criminal Offenses (Count III), and Lewd Acts with a Child Under 16 (Count IV), in McClain

¹ The Attorney General of Oklahoma's press release, including a link to the State's certiorari petition, is available here: <https://oag.ok.gov/articles/attorney-general-o%E2%80%99connor-calls-us-supreme-court-overturn-or-limit-mcgirt-decision> (last visited Aug. 8, 2021). As previously raised in the stay litigation before the Supreme Court, the State is also seeking certiorari review on the questions whether a State may impose procedural or equitable bars to a claim that State lacked prosecutorial authority because the crime of conviction occurred in Indian country, and whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian Country.

County District Court Case No. CF-2019-69. In accordance with the jury's recommendations, the Honorable Charles N. Gray, Associate District Judge, formally sentenced Appellant to ten years imprisonment for Count I, seven years imprisonment for Count II, no term of imprisonment for Count III, and three years imprisonment for Count IV. The sentences were ordered to run consecutive. Appellant was awarded credit for time served and must serve a two-year term of post-release supervision.

On December 18, 2020, Appellant filed the Brief of Appellant in this Court under this Court's Case No. F-2020-420, alleging four (4) total propositions of error. No claim for relief based on the United States Supreme Court's decision in *McGirt* was raised at any point at trial or in the Brief of Appellant. On February 3, 2021, the State filed the Brief of Appellee countering each of Appellant's propositions with argument and authority, contending that no error occurred which would require reversal or modification of Appellant's Judgment and Sentence in this case. No reply brief was filed by Appellant. On March 8, 2021, the record was transmitted to this Court and the cause was officially submitted. Appellant's direct appeal is currently pending.

Over two months later, on May 19, 2021, Appellant filed Appellant's Motion to Remand for an Evidentiary Hearing with this Court, based on *McGirt*. For the first time to any court, Appellant claimed he is a citizen of the "Choctaw/Creek Tribes" and included a copy of his Certificate of Degree of Indian Blood Card confirming he has Choctaw/Creek blood, as well as a verification

letter from the Choctaw Nation of Oklahoma stating that Appellant is an enrolled member of the Choctaw Nation. See Motion, Exhibits A and B. Appellant also claims “the alleged acts charged”² occurred in McCurtain County, Oklahoma, which is within the boundaries of the Choctaw Nation.³ Appellant moved this Court to remand his case for an evidentiary hearing (Motion at 5).

This Court issued an order remanding Appellant’s case for an evidentiary hearing on May 26, 2021 (“Order Remanding”). The Order Remanding acknowledged that Appellant’s Indian Country prosecutorial authority claim was raised for the first time in Appellant’s Motion to Remand for an Evidentiary Hearing after Appellant had filed his direct appeal (Order Remanding at 2). The Order directed the district court to hold a hearing to determine Appellant’s status as an Indian, and “whether the crime occurred in Indian Country.” (Order Remanding at 3-4). The Order allowed the parties to “enter into a written stipulation setting forth those facts upon which they agree and which answer

² Appellant incorrectly claims the acts charged are mere allegations; we are beyond mere allegations and are dealing with four (4) valid felony convictions. Based on the evidence presented at a jury trial, Appellant was found guilty and sentenced to terms of imprisonment for various sexual offenses he committed against his adopted daughter. It is from his Judgment and Sentence upon being found guilty and sentenced that Appellant initiated the instant appeal before this Court.

³ Appellant mistakenly repeats that his convictions arose out of McCurtain County. Motion at 2-3. The various acts of lewd molestation Appellant was convicted of occurred in Pauls Valley, Oklahoma, which is in Garvin County, Oklahoma, and Purcell Oklahoma, which is in McClain County, Oklahoma. To that end, Appellant neither alleges nor attempts to show that McClain County is part of the Choctaw Reservation or any Indian reservation. Moreover, as the parties subsequently agreed and stipulated, McClain County is located in the historic boundaries of the Chickasaw Reservation. See Amended Agreed Stipulation filed on July 21, 2021, in McClain County District Court.

the questions presented and provide the stipulation to the District Court.” (Order Remanding at 5). On June 2, 2021, Appellee filed an objection to the remand on the basis Appellant’s request for an evidentiary hearing, and this Court’s granting of such, was outside the scope of this Court’s Rules. Appellee’s objection is still pending before this Court.

This Court has permitted the parties to file supplemental briefs “addressing those issues pertinent to the evidentiary hearing” Order Remanding at 4. Additionally, the parties have been directed “to address whether this Court should hear Appellant’s jurisdictional challenge, filed out of time, in light of the rules regarding procedural bar.” Order Remanding at 4. For the reasons provided below, Appellant’s Indian Country prosecutorial authority claim should be deemed forfeited and barred from consideration as it has been improperly raised as a new proposition of error after the cause was submitted to this Court.

II. Appellant’s Indian Country Prosecutorial Authority Claim Filed Out of Time is Forfeited and Should not be Considered by this Court

Appellant’s claim—that the State lacked authority to prosecute his crimes that occurred in Indian Country because he is Indian—has been raised before this Court in a standalone Appellant’s Motion to Remand for an Evidentiary Hearing filed on May 19, 2021. Appellant is neither authorized nor required to present his prosecutorial authority claim to this Court at this time. First, Appellant’s motion fails to present any basis in statute or this Court’s Rules for its submission to this Court. Second, Appellant is free to present this claim on

post-conviction, should he choose. Accordingly, the State respectfully asks this Court to not consider Appellant's prosecutorial authority claim and deem the claim forfeited.

Rule 3.4(F)(2) of this Court establishes the limited circumstances wherein a new proposition of error may be raised in a supplemental brief. See Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). To file a supplemental brief, an appellant must file an Application to File Supplemental brief with his brief attached. *Id.*

Except for issues of first impression, propositions of error advanced for the first time in any supplemental brief will be deemed forfeited for consideration. New propositions of error may be advanced in a supplemental brief only on an issue of first impression decided after an appellant's brief-in-chief is filed but before the appellant's case is decided by this Court; however, the application to file supplemental brief, with brief attached, containing the new proposition must be filed within thirty (30) days after the issue of first impression is published.

Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021) (internal citations omitted). See also *Omalza v. State*, 1995 OK CR 80, ¶ 55 n.26, 911 P.2d 286, 304 n.26 ("Propositions of error raised for the first time in a supplemental brief shall be deemed forfeited for consideration.").

Further, Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), permits a party to request, or this Court to *sua sponte* order, an evidentiary hearing when there is an allegation that trial counsel was

ineffective for failing to use available evidence or failing to conduct an adequate investigation into available evidence.

In this case, Appellant's motion for an evidentiary hearing did not identify which Rule of this Court the request was submitted under, nor did this Court's Order identify the applicable rule upon which Appellant's request for an evidentiary hearing was construed and granted. Regardless of which rule Appellant's motion was requested and granted under, his prosecutorial authority claim has been forfeited for direct appeal purposes and should not be considered by this Court. As outlined above, Appellant filed the Brief of Appellant months *after* the Supreme Court's decision in *McGirt* and yet did not raise his prosecutorial authority claim until more than two months after the cause was officially submitted and some ten months after *McGirt* was decided. See Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021) (requiring a claim based on new authority on an issue of "first impression" to be filed within 30 days of the decision).⁴

Rule 3.4(F)(2) provides no exceptions for the failure to raise a new issue within 30 days of a decision on an issue of first impression. In any event, Petitioner offers no justification for his delay. An evidentiary hearing was held

⁴ The State has otherwise strenuously argued that *McGirt* does not provide a previously unavailable legal ground for the raising of a belated Indian Country claim and does not retreat from that position here. However, this Court need not reach that issue, as even assuming *McGirt* decided an issue of "first impression," Petitioner did not raise his Indian Country claim within 30 days of *McGirt*'s publication, as discussed more below. Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

on July 6, 2021, before Judge Gray. Before the presentation of evidence, the State made a record that it had filed an objection to the Order Remanding with this Court and would participate in the hearing under continued objection (E.H. Tr. 5-6). Judge Gray provided Appellant's counsel with an opportunity to respond but counsel declined to do so (E.H. Tr. 6). The hearing was then held.

At the hearing, Appellant and his mother, Debra Lindsey, testified that Appellant has possessed a Certificate Degree of Indian Blood ("CDIB") based on his Creek and Choctaw blood, and been a member of the Choctaw Nation, since approximately 1990 (E.H. Tr. 7-8). On cross-examination, the State questioned Ms. Lindsey about why information showing that Appellant has Indian blood and has been enrolled in the Choctaw Nation for a majority of his life was being presented for the first time in May 2021 (E.H. Tr. 16). Ms. Lindsey explained that at Appellant's request Ms. Lindsey provided information about Appellant's Indian status to his counsel in May because "[Appellant] just found out" that he could provide counsel with such information (E.H. Tr. 16-17).

No reading of this Court's rules allows for this Court to consider Appellant's belated Indian Country prosecutorial authority claim. Appellant's Motion did not comply with this Court's Rule 3.4(F)(2), which establishes the limited circumstances wherein a new proposition of error may be raised in a supplemental brief. See Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). To file a supplemental brief, Appellant

was required to file an Application to File Supplemental brief with his brief attached, which he did not do. *Id.*

Even had Appellant followed the proper steps to file a supplemental brief, his *McGirt* claim does not comport with the substantive requirements necessary to warrant supplemental briefing. An issue of first impression is defined as “one where the result was not dictated by precedent . . . , one which was susceptible to debate among reasonable minds, and is shown to be retroactively applicable to appellant’s trial.” *Id.* *McGirt* did not decide a question of first impression, but merely applied settled Supreme Court law to the long-standing Major Crimes Act, 18 U.S.C. § 1153. *McGirt*, 140 S. Ct. at 2464-65.⁵

Moreover, for purposes of Rule 3.4(F)(2), *McGirt* is not an issue of first impression—see *Bosse v. State*, 2021 OK CR 3, ¶ 22, 484 P.3d 286, 294 (stating Indian Country prosecutorial authority claim was “previously unavailable” for purposes of 22 O.S. § 1089(D)(8))—*McGirt* was decided on July 9, 2020, five months before Appellant filed his brief on direct appeal. Authority available at the time Appellant was preparing his propositions on direct appeal does not

⁵ Appellant’s trial took place in February 2020, prior to the issuance of *McGirt*. As noted, the new authority contemplated by Rule 3.4(F)(2) must be retroactively applicable to the appellant’s trial. It is unclear whether *McGirt* is retroactively applicable to Appellant’s trial. On one hand, this Court has previously declined to retroactively apply new authority decided after a trial but during the pendency of direct appeal. See, e.g., *Walton v. State*, 1977 OK CR 208, ¶ 11, 565 P.2d 716, 718-19. Moreover, this Court is currently considering whether *McGirt* is retroactively applicable on collateral review based on the briefing order in *State Ex Rel. District Attorney v. Wallace*, 2021 OK CR 15, ¶ 6, ___ P.3d ___. On the other hand, *Wallace* concerns *already final* convictions, while Appellant’s convictions will not be final until the conclusion of direct review. In any event, this Court need not decide this issue, as Appellant’s prosecutorial authority claim clearly does not otherwise meet the requirements of Rule 3.4(F)(2).

constitute an issue of first impression worthy of supplemental briefing. It is difficult to imagine that the *McGirt* decision could have evaded Appellant's attention, especially since he possesses some Creek and Choctaw blood and has been a member of the Choctaw Nation nearly all of his life.

The fact Appellant is attempting to raise an Indian Country prosecutorial authority claim does not excuse him from complying with the mandatory requirement of Rule 3.4(F)(2). This is not, as it appears Appellant suggests, a question of subject matter jurisdiction.⁶ In *United States v. Cotton*, 535 U.S. 625, 630 (2002), the Supreme Court held that “[subject matter] jurisdiction means . . . the courts’ statutory or constitutional *power* to adjudicate the case.” (Emphasis adopted). As recognized by *Hugi v. United States*, 164 F.3d 378, 380-81 (7th Cir. 1999), a federal court’s power to adjudicate cases is derived from 18 U.S.C. § 3231, which provides that “[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.” Multiple federal cases have relied on *Cotton* and *Hugi* to hold that Indian Country jurisdictional claims are *not* non-waivable subject matter jurisdiction claims. *United States v. Tony*, 637 F.3d 1153, 1157-60 (10th Cir. 2011); *United States v. Pemberton*, 405 F.3d 656, 659 (8th Cir. 2005); *United States v. White Horse*, 316 F.3d 769, 772 (8th Cir. 2003);

⁶ Appellant claims, “Matters implicating the Court’s jurisdiction are never waived and can be raised at any time,” and cites to *Bosse*. Motion at 5. Although this Court treated an Indian Country prosecutorial authority claim as implicating subject matter jurisdiction in *Bosse*, on May 26, 2021, the United States Supreme Court granted an application to stay the mandate in *Bosse* pending the filing and disposition of a petition for certiorari.

United States v. Prentiss, 256 F.3d 971, 981-82 (10th Cir. 2001) (en banc), overruled on other grounds by *Cotton*, 535 U.S. at 631; *Welch v. United States*, No. 2:05CR8, 2008 WL 4981352, at *2 n. 2 (W.D.N.C. Nov. 19, 2008) (unpublished).

Here, Oklahoma constitutional and statutory law confers on state district courts the *power* to adjudicate criminal cases arising from crimes committed within the State's borders. See Okla. Const. Art. VII, § 7 ("The District Court[s] of Oklahoma] shall have unlimited original jurisdiction of all justiciable matters"); 22 O.S.2011, § 121 ("When the commission of a public offense, commenced without this state, is consummated within its boundaries, the defendant is liable to punishment therefor in this state, . . . and in such case, the jurisdiction is in the county in which the offense is consummated."); see also generally Title 20 of the Oklahoma Statutes; *Bosse*, 2021 OK CR 3, ¶ 4, 484 P.3d at 296 (Rowland, V.P.J., concurring in results) ("The subject matter jurisdiction of Oklahoma courts is established by Article 7 of our State Constitution and Title 20 of our statutes which grant general jurisdiction, including over murder cases, to our district trial courts."); *Bosse*, 2021 OK CR 3, ¶ 3, 484 P.3d at 300 (Hudson, J., concurring in results) (fully joining Judge Rowland's opinion regarding "the use of the term subject matter jurisdiction"). Thus, "the subject matter in this case is a murder prosecution." *Bosse*, 2021 OK CR 3, ¶ 4, 484 P.3d at 296 (Rowland, V.P.J., concurring in results). In terms of subject matter jurisdiction, "[t]hat's the beginning and the end of the 'jurisdictional' inquiry." *Hugi*, 164 F.3d

at 380. Therefore, Appellant's belated *McGirt* claim is forfeited pursuant to Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021) ("Supplemental briefs containing new propositions filed after this thirty-day period will be deemed forfeited for consideration.").

Nor does Appellant's Motion comport with Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), which permits a party to request, or this Court to *sua sponte* order, an evidentiary hearing when there is an allegation that trial counsel was ineffective for failing to use available evidence or failing to conduct an adequate investigation into available evidence. Appellant's Motion does not allege that trial counsel was ineffective.

Further, had Appellant's Motion been construed as a request to supplement the record under Rule 3.11, it was untimely. *See* Rule 3.11(B)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021) ("A request to supplement under this rule will not be granted *after* the filing of the requesting party's brief-in-chief" (emphasis added)). Moreover, per Rule 3.11, the State was entitled to fifteen (15) days to file an objection to Appellant's Motion to Supplement. *See* Rule 3.11(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). Appellant's Motion was granted seven days after it was filed—bypassing the State's opportunity to file an objection.

Counsel for Appellant alleges she is just now presenting this Court with information as to Appellant's Indian status because "Appellant's family recently provided appellate counsel with proof that he is an Indian under federal law."

See Motion, at 1-2. As noted above, at the evidentiary hearing, Ms. Lindsey testified she provided the information to Appellant's counsel in May 2021 because "[Appellant] just found out" that he could provide such information to counsel (E.H. Tr. 16-17).

Appellant's family's purported failure to timely notify counsel of his Indian status is irrelevant and not a basis upon which supplemental briefing or an evidentiary hearing may be requested. See Rules 3.4(F)(2) & 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). Appellant's failure to adhere to Rules 3.4(F)(2) and 3.11 prevents this Court from considering his forfeited prosecutorial authority claim as part of his direct appeal.

Importantly, Appellant is not left without a remedy. If he wishes to present his prosecutorial authority claim, he can do so through Oklahoma's Post-Conviction Procedure Act. 22 O.S.2011, §§ 1080-1088.1. Through 22 O.S.2011, § 1080, Appellant is free to present his prosecutorial authority claim and challenge appellate counsel's failure to properly raise this issue on appeal.⁷ See 22 O.S.2011, § 1080 (allowing for jurisdictional challenges on post-conviction); and *Logan v. State*, 2013 OK CR 2, ¶ 5, 293 P.3d 969, 973 (providing that petitioners may present post-conviction claims sounding in the effectiveness of appellate counsel for omitted claims). Put another way, Appellant should not be

⁷ While the State acknowledges Appellant's first opportunity to assail the omission of his prosecutorial authority claim by appellate counsel is through post-conviction, the State respectfully maintains that the underlying prosecutorial authority claim itself would be barred by the doctrine of waiver. And while this Court has spoken to the contrary in *Bosse*, the State currently seeks *certiorari* review of that holding before the United States Supreme Court. *Bosse*, 2021 OK CR 3, ¶¶ 20-22, 484 P.3d at 293.

permitted to ignore or circumvent this Court's Rules to provide an avenue where another route is readily available.

In sum, Appellant fails to show this Court how he is authorized or required to present his prosecutorial authority claim now. This Court's Rules do not provide an avenue, and he fails to meet the standard for a supplemental brief or evidentiary hearing under even the most liberal construction. He also fails to show how he is left without recourse, where Oklahoma's Post-Conviction Procedure Act offers a viable route to present an ineffective assistance of appellate counsel claim. Thus, the State respectfully asks this Court to deem Appellant's jurisdictional claim forfeited on direct appeal.

III. This Court Should Stay and Abate this Appeal

Should this Court, however, consider Appellant's claim, this Court should stay and abate this appeal pending the Supreme Court's consideration of the State's certiorari appeal in *Bosse*.

The following events transpired at the evidentiary hearing held on July 6, 2021, before Judge Gray. Counsel for Appellant presented testimony from Appellant and his mother, Ms. Debra Lindsey (E.H. Tr. 6-11, 12-17). Appellant testified he was born in 1989 and has been a member of the Choctaw Nation since approximately 1991, and holds a CDIB (E.H. Tr. 7-9). At the time of the hearing, Appellant was still a member of the Choctaw Nation (E.H. Tr. 8). Ms. Lindsey testified that she is a member of the Choctaw Nation and she enrolled Appellant in the Tribe in 1989 or 1990 (E.H. Tr. 12-13). She also obtained a

CDIB for Appellant based on his Choctaw and Creek blood (E.H. Tr. 13-14). To Ms. Lindsey's knowledge, Appellant is still a member of the Choctaw Nation (E.H. Tr. 14).

The parties subsequently presented the court with a stipulation that Appellant committed the crimes charged in Pauls Valley, located in Garvin County, Oklahoma, and Purcell, located in McClain County, Oklahoma ("Amended Agreed Stipulation").⁸ The parties agreed that the locations wherein Appellant committed the offenses were within the boundaries of the Chickasaw Nation as set out in various historical treaties.

At the court's request, the parties submitted proposed findings of fact and conclusions of law within fourteen days of the hearing. Judge Gray subsequently adopted Appellant's Proposed Findings of Fact and Conclusions of Law on July 21, 2021. Based upon the evidence presented, Judge Gray concluded that Appellant is Indian. Specifically, he found that Appellant possessed "some Indian blood" and was recognized by the Choctaw Nation at the time of the crimes. Additionally, based upon the agreed stipulation, Judge Gray concluded that the crimes Appellant was convicted of were committed in Indian Country. The parties and the district court have therefore met the terms of this Court's

⁸ Appellant committed crimes in Pauls Valley, Oklahoma, located in Garvin County, and Purcell, located in McClain County, Oklahoma. Initially, the parties' agreed stipulation that was filed in district court on July 6, 2021, only provided that Appellant committed the charged crimes in McClain County, Oklahoma. However, the parties subsequently amended the agreed stipulation to include Pauls Valley, in Garvin County, as one of the locations where Appellant committed the crimes of which he was convicted.

Order remanding the case for evidentiary hearing on Appellant's prosecutorial authority claim.

The State does not contest Judge Gray's conclusion that Appellant is Indian. However, the State does contest Judge Gray's conclusion that the historical boundaries of the Chickasaw Nation constitute a reservation, *i.e.*, Indian Country, today. As the State argues in its *Bosse* certiorari petition, the decision in *McGirt* was incorrect.⁹ As the Chief Justice explained in his dissent, longstanding precedent on the disestablishment of Indian territory required the Court to consider "the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there." *McGirt*, 140 S. Ct. at 2485. But those precedents were "not followed by the Court." *Id.* Instead, the Court reasoned that "extratextual sources" may be considered in the disestablishment inquiry "only" to "clear up" statutory ambiguity. *Id.* at 2469 (majority opinion). Consideration of history is necessary, however, precisely because it is unclear

⁹To say that *McGirt* was "incorrect" and deviated from the Supreme Court's longstanding disestablishment precedents is not to say that the legal basis of a *McGirt* claim was previously unavailable as an exception to the state's postconviction bars. Under state statute, a legal basis was unavailable if it "was not recognized by or could not have been reasonably formulated from a final decision" of an appellate court. 22 O.S.2021 § 1089(D)(9)(a). Here, as the State has repeatedly argued previously—in particular in *Wallace—McGirt*—was not dictated by prior precedent. In that sense, *McGirt* deviated from the Supreme Court's established precedent on disestablishment. Yet at the same time, the arguments accepted in *McGirt* were "available" in that they could have been reasonably formulated from prior precedent. In other words, the decision in *McGirt* was neither dictated nor foreclosed by earlier caselaw.

whether Congress's alienation of Indian lands at the turn of the century changed the status of the land. *See id.* at 2488 (Roberts, C.J., dissenting). Under the correct framework prescribed by the Supreme Court's pre-*McGirt* precedent, it is clear that Congress disestablished the Creek territory in Oklahoma, as well as the territories of the four other Oklahoma tribes.

The requested stay will not impact the ability of the federal government to try Appellant once the *Bosse* litigation has concluded. For offenses that involve the sexual abuse of children, the federal statute of limitations runs for "the life of the child, or for ten years after the offense, whichever is longer." 18 U.S.C. § 3283.¹⁰

In sum, the State respectfully asks this Court to procedurally bar Appellant's Indian Country prosecutorial authority claim raised out of time. Alternatively, the State respectfully requests that this Court stay and abate Appellant's appeal pending the Supreme Court's disposition of the State's certiorari appeal in *Bosse*.

¹⁰ The State will provide the relevant United States Attorneys Offices with a list of cases that have been stayed so that the statute of limitations can be monitored. Appellant's pending state proceedings will not implicate the federal government's ability to attempt to obtain a conviction. *See United States v. Kepler*, No. 20-CR-276-GKF, 2021 WL 66654, *2-3 (N.D. Okla. Jan. 7, 2021) (unpublished) (denying motion to dismiss, on double jeopardy grounds, federal charges pending before this Court determined the defendant was entitled to relief from his state convictions).

Respectfully submitted,

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CERTIFICATE OF MAILING

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