

**ORIGINAL**



No. F-2020-420

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

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**JEFFREY DON MCCLAIN,**

**Appellant,**

**-vs-**

**THE STATE OF OKLAHOMA,**

**Appellee.**

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

**AUG 18 2021**

**JOHN D. HADDEN**  
**CLERK**

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**BRIEF IN SUPPORT OF MOTION TO STAY AND ABATE PROCEEDINGS**

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**JOHN M. O'CONNOR**  
**ATTORNEY GENERAL OF OKLAHOMA**

**JULIE PITTMAN, OBA # 32266**  
**ASSISTANT ATTORNEY GENERAL**

**313 NE 21<sup>st</sup> Street**  
**Oklahoma City, Oklahoma 73105**  
**(405) 521-3921**  
**(405) 522-4534 (FAX)**

**ATTORNEYS FOR APPELLEE**

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**AUGUST 18, 2021**

**TABLE OF AUTHORITIES**

**CASES**

*Bosse v. State*,  
2021 OK CR 3, 484 P.3d 286 ..... 2

*McGirt v. Oklahoma*,  
140 S. Ct. 2452 (2020) ..... 1, 2, 3

**STATUTES**

18 U.S.C. § 1153 ..... 1

18 U.S.C. § 3283 ..... 3

22 O.S.2021, § 1089 ..... 3

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

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

**BRIEF IN SUPPORT OF MOTION TO STAY AND ABATE PROCEEDINGS**

Comes now Appellee, the State of Oklahoma, by and through John M. O'Connor, Attorney General of the State of Oklahoma, and respectfully moves to stay and abate the ongoing proceedings in Case No. F-2020-420.<sup>1</sup> The defendant seeks relief from his judgment and sentence based on *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020) (holding the Muscogee (Creek) Nation's Reservation had not been disestablished for purposes of the Major Crimes Act, 18 U.S.C. § 1153). However, the State has asked the United States Supreme Court to grant certiorari review in *Oklahoma v. Bosse*, Case No. 21-186, and overturn *McGirt*. Accordingly, this Court should stay and abate these proceedings immediately, to conserve judicial resources, pending the outcome of *Bosse*.

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<sup>1</sup> Appellant's claim arising under *McGirt* was first raised in a standalone motion requesting an evidentiary hearing two months after the direct appeal briefing was complete and the cause submitted to this Court. As Appellee has argued to this Court in both a written objection and supplemental brief, Appellant's Indian Country prosecutorial authority claim filed out of time is forfeited and should not be considered by this Court. By requesting that this Court stay and abate the proceedings in light of *Bosse*, Appellee does not waive or forfeit its argument that Appellant's prosecutorial authority claim is forfeited.

In this case, following a remand for an evidentiary hearing, the district court applied *McGirt* and concluded that the defendant's crimes occurred on a non-disestablished reservation, such that the State lacked jurisdiction under the Major Crimes Act. However, as the State argues in its *Bosse* certiorari petition, the decision in *McGirt* was incorrect. As Chief Justice Roberts explained in his dissent, longstanding precedent on the disestablishment of Indian reservations 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.*; see also *Bosse v. State*, 2021 OK CR 3, ¶ 1, 484 P.3d 286, 298 (Lumpkin, J., concurring in results) ("[T]he [*McGirt*] Majority . . . totally failed to follow the Court's own precedents . . ."). Instead, the Court reasoned that "extratextual sources" may be considered in the disestablishment inquiry "only" to "clear up" statutory ambiguity. *McGirt*, 140 S. Ct. at 2469 (majority opinion). Consideration of history is necessary, however, precisely because it is unclear 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 reservations of the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Tribes in Oklahoma.<sup>2</sup>

Assuming the State is not successful in overturning *McGirt*, the requested stay will not impact the ability of the federal government to try the defendant 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.

The instant motion is made in good faith and not for the purpose of delay. For the foregoing reasons, this Court should abate this proceeding as a result of the ongoing litigation in *Bosse*.

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<sup>2</sup> To 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 previously argued in *State Ex Rel. District Attorney v. Wallace*, Case No. PR-2021-366, *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. Indeed, many defendants who have sought or are seeking relief before this Court, including of course Patrick Murphy and Jimcy McGirt, raised Major Crimes Act claims long prior to *McGirt*.

Respectfully submitted,

**JOHN M. O'CONNOR  
ATTORNEY GENERAL OF OKLAHOMA**

*for Jennifer Miller*  
**JULIE PITTMAN, OBA #32266  
ASSISTANT ATTORNEY GENERAL**  
313 N.E. 21<sup>st</sup> Street  
Oklahoma City, Oklahoma 73105  
(405) 521-3921  
(405) 522-4534 (FAX)

**ATTORNEYS FOR THE APPELLEE**

**CERTIFICATE OF MAILING**

On this 17th day of August, 2021, the undersigned mailed a true and correct copy of the foregoing to:

Nicollette Brandt  
OIDS  
P.O. Box 926  
Norman, Oklahoma 73070

*for Jennifer Miller*  
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*for Julie Pittman*