

ORIGINAL



**2021 OK CR 40
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

MICA ALEXANDER MARTINEZ,)
)
 Petitioner,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

FOR PUBLICATION

Case No. PCD-2020-612

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC 30 2021

JOHN D. HADDEN
CLERK

OPINION

LEWIS, JUDGE:

¶1 Mica Alexander Martinez, Petitioner, was tried by jury and found guilty of Counts 1 and 2, first degree murder, in violation of 21 O.S.Supp.2009, § 701.7(A); and Count 3, assault and battery with a dangerous weapon, in violation of 21 O.S.Supp.2006, § 645, in Comanche County District Court, Case No. CF-2009-473. The jury found two statutory aggravating circumstances¹ and sentenced Mr. Martinez to death in Counts 1 and 2, and ten years imprisonment in Count 3. On direct appeal, this Court affirmed. *Martinez v. State*,

¹ The defendant knowingly created a great risk of death to more than one person; and the murders were especially heinous, atrocious, or cruel. 21 O.S.2001, §§ 701.12(2), (4).

2016 OK CR 3, 371 P.3d 1100.

¶2 Mr. Martinez's convictions and sentences became final on October 31, 2016, when the Supreme Court denied his petition for certiorari to review that decision. *Martinez v. Oklahoma*, 137 S. Ct. 386 (2016). This Court also previously denied Petitioner's first and second applications for post-conviction relief. *Martinez v. State*, No. PCD-2013-936 (Okl.Cr., May 5, 2016)(unpublished); *Martinez v. State*, No. PCD-2017-951 (Okl.Cr., October 17, 2017)(unpublished).

¶3 On September 8, 2020, Mr. Martinez filed this third application for post-conviction relief, stating the following ground for relief:

Because Mr. Martinez has a quantum of Indian blood and is a citizen of the Comanche Tribe and the crimes at issue occurred in Indian Country—namely, within the undiminished boundaries of the Kiowa-Comanche-Apache Reservation *McGirt v. Oklahoma*² confirms that exclusive jurisdiction to prosecute Mr. Martinez is vested in the United States under the Major Crimes Act, 18 U.S.C. § 1153. Because the State of Oklahoma lacked jurisdiction, Mr. Martinez's convictions in the District Court of Comanche County are void *ab initio* and should be vacated and the charges dismissed.

² 140 S. Ct. 2452 (2020).

¶4 The post-conviction procedure is not intended to provide a second appeal. *Carter v. State*, 1997 OK CR 22, ¶ 2, 936 P.2d 342, 342. The statutes governing our review of second or successive capital post-conviction applications provide even fewer grounds to collaterally attack a judgment and sentence than the narrow grounds permitted in an original post-conviction proceeding. *Sanchez v. State*, 2017 OK CR 22, ¶ 6, 406 P.3d 27, 29.

¶5 This Court “may not consider the merits of or grant relief” on a second or successive capital post-conviction application unless the claims “have not been and could not have been presented” in a previous application, either because the legal basis was unavailable; or because the factual basis was unavailable, and that factual basis, “if proven and viewed in light of the evidence as a whole,” would establish “clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.” 22 O.S.2011, § 1089(D)(8)(a), (b)(1) and (2).

¶6 A successive application must be filed within sixty days from the date the previously unavailable legal or factual basis is announced or discovered. Rule 9.7(G)(3), *Rules of the Oklahoma Court*

of *Criminal Appeals*, Title 22, Ch. 18, App. (2021). On review of the application, this Court must determine: (1) whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist; (2) whether the claims were or could have been raised in earlier proceedings; and (3) whether relief may be granted. § 1089(D)(4). Based on these governing requirements, we turn to Mr. Martinez's ground for relief.

¶7 We initially find that the Mr. Martinez's Indian Country claim is cognizable in this successive post-conviction proceeding. The legal basis was unavailable at the time of direct appeal and prior post-conviction applications, because no final decision of an Oklahoma or federal appellate court had recognized the continued existence of historic Oklahoma Indian reservations as Indian Country prior to *McGirt* in 2020. See § 1089(D)(8)(a).³

³ The other definition of a previously unavailable legal basis is a "new rule of constitutional law that was given retroactive effect," either by the U.S. Supreme Court or an Oklahoma appellate court. § 1089(D)(9)(b). *McGirt* has not been given retroactive effect. See also *McGirt*, 140 S. Ct. at 2460 (noting this Court's rejection of the claimed Muscogee (Creek) Reservation, the Tenth Circuit's opposite conclusion in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), and the Supreme Court's grant of certiorari to settle the question).

¶8 Because Mr. Martinez's ground for relief involved potentially controverted and unresolved factual issues, this Court remanded to the District Court of Comanche County for an evidentiary hearing on Mr. Martinez's alleged status as an Indian; and whether, applying *McGirt*, the Kiowa Comanche Apache Reservation had been disestablished by Congress, and thus, whether the crimes occurred in Indian Country.⁴

¶9 The Comanche County District Court, Honorable Emmit Tayloe, District Judge, conducted the evidentiary hearing and filed findings of fact and conclusions of law. The parties and amicus curiae Comanche Nation have filed briefs following the evidentiary hearing. The record of those proceedings is sufficient for our resolution of Mr. Martinez's Indian Country claim.

¶10 The evidence presented on remand established beyond doubt that Mr. Martinez is an Indian;⁵ and that he committed major

⁴ As relevant to this case, Indian Country includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151.

⁵ The parties stipulated that Martinez has 1/4 quantum of Indian blood and was recognized in 2009 as a citizen of the Comanche Nation, a federally recognized Indian tribe.

crimes in Comanche County.⁶ Specifically, in the early morning of October 12, 2009, Mr. Martinez murdered Carl and Martha Faye Miller and assaulted and battered their son, Shawn Monk, with a dangerous weapon inside the Millers' home at 4028 S.W. County Highway 115, about five miles south of Cache in Comanche County. The evidence also established beyond doubt that this land lies within the historical boundaries of the Kiowa Comanche Apache Reservation.

¶11 In *McGirt*, the Supreme Court held that the Muscogee (Creek) Reservation was never disestablished by Congress; that land within the historic boundaries of that reservation is Indian Country; and that major crimes committed by Indians within those boundaries must be prosecuted in federal court. 18 U.S.C. § 1153. This Court had previously declined to recognize the historic Muscogee (Creek) Reservation as Indian Country in *Murphy v. State*, 2005 OK CR 25, ¶¶ 50-52, 124 P.3d 1198, 1207-08.

⁶ The Major Crimes Act vests the federal government with exclusive jurisdiction over major crimes committed by Indians in Indian Country, including murder and assault and battery with a dangerous weapon. 18 U.S.C. §§ 113(a)(3); 1153(a).

¶12 Mr. Martinez filed this application within sixty days of the *McGirt* decision, alleging that he is an Indian and challenging the State's jurisdiction to prosecute him for major crimes committed within the Kiowa Comanche Apache Reservation, which he argues was never disestablished and is therefore Indian Country. Given the importance of the question presented for the enforcement of law in several southwest Oklahoma counties, we find it appropriate to review the trial court's legal conclusion that the Kiowa Comanche Apache Reservation was disestablished by Congress.

¶13 The First and Second Medicine Lodge Treaties of 1867 reserved a large expanse of southwestern Oklahoma for the Kiowa, Comanche, and Apache Tribes, including western parts of present day Jefferson, Stephens, and Grady Counties, a southern part of present day Caddo County, and all of present day Comanche, Cotton, Kiowa, and Tillman Counties.⁷

⁷ The 1867 boundary line of the reservation follows the main course of the Washita River west from the 98th Meridian of west longitude from Greenwich to a point thirty miles west of Ft. Cobb, then due west to the North Fork of the Red River, then south along the main course of the North Fork of the Red River to where it meets the Red River, then east along the main course of the Red River to the 98th Meridian, then north along the line of meridian to the point of beginning. See Petitioner's Exhibit 3.

¶14 The creation of a Kiowa Comanche Apache Reservation on these lands is confirmed in statutes, maps, and documents of the period, and has since been repeatedly acknowledged or assumed by state and federal courts. See 15 Stat. 581, 589; *Murphy v. Royal*, 875 F.3d 949 (10th Cir. 2017), *aff'd*, *Sharp v. Murphy*, 140 S. Ct. 2412 (2020); *Tooisgah v. United States*, 186 F.2d 93, 97 (10th Cir. 1950); *Ex Parte Wallace*, 1945 OK CR 92, 162 P.2d 205; *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

¶15 The trial court found that Congress had disestablished the Kiowa Comanche Apache Reservation by the Act of June 6, 1900 (hereafter “the Act of 1900,” or “the Act”), 31 Stat. 676 *et seq.* The Act of 1900 ratified most of the terms of the 1892 Jerome Agreement, according to which the Indians would receive individual allotments from the former reservation lands and other consideration from the United States. The Act provided that, subject to those allotments and other terms:

the said Comanche, Kiowa, and Apache Indians hereby cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following-described tract of country in the Indian Territory

[describing the lands within the previously created Kiowa Comanche Apache Reservation as described in footnote 2].

31 Stat. 672, 676-77.

¶16 In consideration for the tribes' relinquishment of these lands, the United States additionally promised to pay the tribes two million dollars. 31 Stat. 678. The tribes were to abandon the transferred lands, and the United States Court of Claims was authorized to adjudicate any pre-existing Choctaw and Chickasaw claims to the land. 31 Stat. at 680.

¶17 The record also establishes that the specific tract of land on which the Millers resided was neither allotted to tribal members, nor part of the grazing reserve established by the Act, and was later opened by the government for non-Indian settlement no later than 1901. Martinez's ground for relief raises the question whether this land remained a reservation in 2009.

¶18 Only Congress can disestablish a reservation. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). To determine whether a tribe continues to hold a reservation, we look exclusively to the Acts of Congress concerning tribal lands. *McGirt*, 140 S. Ct. at 2462.

Disestablishment has never required any particular form of words[.] But it does require that Congress clearly express its intent to do so, commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests.

McGirt, 140 S. Ct. at 2463 (internal quotations, some brackets, and citations omitted).

¶19 Congress's ratification of a tribe's agreement to "cede, sell, relinquish, and convey" all of a tribe's "claim, right, title, and interest in and to all" of its reservation lands previously has been acknowledged to constitute termination of a reservation in language "precisely suited to this purpose." *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 445 (1975); see also, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977).

¶20 We find the very similar language in the Act of 1900, confirming present and total relinquishment of tribal interests, to strongly indicate Congressional intent to disestablish the reservation. And when such explicit language is combined with a Congressional promise to compensate the tribes for their land by payment of a fixed sum, the intent to diminish the reservation seems especially clear. *Murphy*, 875 F.3d at 920 (citing *Solem*, 465 U.S. at 470-71).

¶21 Further, we see no basis to question Congress's plenary authority to disestablish the reservation, despite arguments that the Jerome Agreement was obtained by fraud; lacked the required approval of three-fourths of adult male Indians; or involved amendments never submitted for tribal approval. The Supreme Court long ago held that Congress's actions respecting a reservation were wholly within the legislative power, and were conclusive and binding on the courts. *Lone Wolf*, 187 U.S. at 567-68.

¶22 In cases long before *McGirt*, both the Tenth Circuit Court of Appeals and this Court had concluded that the Act of 1900 disestablished the Kiowa Comanche Apache Reservation, citing the language confirming complete tribal cession, transfer, conveyance, relinquishment, and surrender of all tribal claims to their reservation lands. *See Tooisgah*, 186 F.2d at 97 (holding tribes' unreserved transfer of "all their claim, title and interest" in reservation lands disestablished the Kiowa Comanche Apache Reservation); *see also, Application of Yates*, 1960 OK CR 8, ¶¶ 3-4, 349 P.2d 45, 47 (finding *Tooisgah* foreclosed prisoner's Indian Country jurisdictional claim challenging Comanche County manslaughter conviction).

¶23 According to these cases, the lands in question here were no longer within an Indian reservation after June 6, 1900, and thus no longer Indian Country. And it is worth noting here that in *Murphy v. Royal*, the Court of Appeals cited to the Act of 1900, among others, as primary evidence that Congress is “capable of stating its intention to disestablish or diminish a reservation” when it wants to do so. *Murphy*, 875 F.3d at 948-49 (citing *Tooisgah*, 186 F.2d at 97).

¶24 The record convinces us that Congress intended to disestablish the Kiowa Comanche Apache Reservation, and did so, by the Act of 1900. Nothing presented in the evidentiary hearing or the briefs casts serious doubt on this legal conclusion in previous cases, even in light of *McGirt*. We therefore affirm the trial court’s legal conclusion that Congress disestablished the Kiowa Comanche Apache Reservation. Mr. Martinez was subject to trial for murder and felony assault in the district court of Comanche County. Okla. Const. art. 7, § 7(a).

¶25 Even if we concluded otherwise, we would grant no relief. In *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, this Court held that *McGirt*’s holding, and its impact on state criminal jurisdiction in a vastly expanded Indian Country, was a procedural

change of law that would not apply retroactively to void convictions already final when *McGirt* was decided.⁸

¶26 Mr. Martinez's convictions were final in 2016, long before the Supreme Court decided *McGirt* in 2020. Following *Matloff's* independent state law analysis interpreting the remedial scope of the post-conviction statutes, we decline to apply *McGirt* and our post-*McGirt* reservation rulings retroactively to void already final convictions. Mr. Martinez's third application for post-conviction relief is denied.

DECISION

¶27 The third application for post-conviction relief is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

⁸ The State's request to file a supplemental brief concerning *Matloff* is **DENIED**. The State's June 11, 2021 motion to abate proceedings pending the outcome of *Matloff* in this Court is moot. Mr. Martinez's September 8, 2021 motion for a stay in anticipation of Supreme Court review of *Matloff* is also **DENIED**.

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OPINION BY: LEWIS, J.
ROWLAND, P.J.: Concur
LUMPKIN, J.: Concur in Results
HUDSON, J.: Concur in Results

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

¶1 I concur in denying post-conviction relief. I write separately to address portions of the analysis within the opinion.

¶2 As an initial matter, Petitioner's claim that his crime occurred in Indian Country, *i.e.*, the Kiowa Comanche Apache Reservation, is precluded by prior precedent of the Tenth Circuit and of this Court holding that the Kiowa Comanche Apache Reservation was disestablished by the congressional Act of 1900. *Tooisgah v. United States*, 186 F.2d 93, 97 (10th Cir. 1950); *Application of Yates*, 1960 OK CR 8, ¶¶ 3-4, 349 P.2d 45, 47. While the opinion recognizes these precedents and concludes in accordance with them, it only does so after an analysis of the creation by Congress of the Kiowa Comanche Apache Reservation and subsequent analysis of its disestablishment by Congress, including discussion of Congress's authority to do so. These analyses are unnecessary to the resolution of this post-conviction matter pursuant to *Tooisgah* and *Yates*. Additionally, the opinion addresses *McGirt v. Oklahoma*, __ U.S. __, 140 S. Ct. 2452 (2020). *McGirt* is inapplicable to this case because the former reservation at issue was disestablished by Congress over one hundred years ago.

¶3 Lastly, in the concluding paragraph, the opinion cites this Court's decision in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, as authority for the Court's decision to deny relief in this matter. *Matloff* simply has no relevance to the resolution of this post-conviction application. Petitioner is not entitled to relief herein for the simple reason that Congress disestablished the Kiowa Comanche Apache Reservation in 1900.

¶4 I am authorized to state that Vice Presiding Judge Hudson joins me in this separate writing.