No. S-2021-209

IN THE COURT OF CRIMINAL APPEALS THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,

Appellant,

v.

WINSTON WHITECROW BRESTER,

Appellee,

APPELLANT'S BRIEF

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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	
	)	
v.	)	**No. S-2021-209**
	)	
WINSTON WHITECROW BRESTER,	)	
	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

The State of Oklahoma, by and through Attorney General John M. O'Connor, offers the following reply brief in support of an appeal from the District Court's Order.[1] Because Brester incorporates the arguments of his tribal amici by reference, Appellee's Br. at 1-2, and because not all the amici arguments otherwise appear in his brief, this reply addresses all arguments raised by Brester and his amici.

REPLY REGARDING STANDARD OF REVIEW

THESE ARE LEGAL, NOT FACTUAL, QUESTIONS.

This case is about the meaning of statutes: termination acts (Ottawa and Peoria), restoration acts (Ottawa and Peoria), and section 6 of the General Allotment Act (Ottawa alone). All three types of statutes are relevant to the crimes committed on alleged Ottawa lands in CF-2018-298, CF-2020-177 and CF-2020-

[1] The State re-urges all issues and arguments in its opening brief. In focusing this reply on the most relevant points from Brester's response brief, the State in no way abandons any prior issues or arguments from its opening brief.

178. In addition, the termination and restoration acts are relevant to the one case on alleged Peoria or Miami lands: CF-2020-129.

Brester recasts the district court's interpretation of these statutes as a "factual finding" to seek some deference here. Appellee's Br. at 14. He is wrong: The interpretation of statutes, like all legal conclusions, is decided "without deference." *Parker v. State*, 2021 OK CR 17, ¶ 34. The district court denied jurisdiction in all four cases by using errant statutory interpretation, and based on that error, it refused to address the conflict it perceived in CF-2020-129 between the Peoria and the Miami over their historic lands. This Court's *de novo* interpretation of the statutes at issue is both appropriate and needed for all four cases, and this Court would also benefit from the district court's resolution of the Peoria-Miami tribal dispute in CF-2020-129.

REPLY REGARDING APPELLANT'S PROPOSITION I (ALL FOUR CASES)

TERMINATION ENDS A RESERVATION, AND RESTORATION CANNOT RECREATE A RESERVATION WITHOUT TITLE TO THE LAND.

A. TERMINATION ENDS A RESERVATION.

Brester and his amici emphasize the importance of text based on *Solem*[2] and *McGirt*, but they then furiously avoid addressing the plain text of the termination acts, and any analysis should start there. Congress opens with a statement that it is terminating Federal supervision over the property of the Ottawa and Peoria tribes *and* terminating Federal services to them as Indians,

[2] *Solem v. Bartlett*, 465 U.S. 463 (1984).

meaning that the termination of services was separate from the effect on the land. *See* 70 Stat. 963 (1956) (Ottawa); 70 Stat. 937 (1956) (Peoria). Both statutes are clear that "the Federal trust relationship" is at an end for all affairs, whether personal or property. *See* 70 Stat. 963 § 8(a); 70 Stat. 937 § 3(a).

Brester offers no explanation of how "termination of federal supervision," 70 Stat. 963, 963, fails to end a reservation. After all, a reservation is land subjected to restrictions or some other supervision via the Federal trust relationship, and "terminating" is a well-accepted term for ending a reservation. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020). When Congress was addressing the Five Tribes, one of which was reviewed in *McGirt*, "Congress may not have been entirely sure of its power to terminate an established reservation unilaterally" until the Supreme Court's 1903 decision to that effect. *Id.* at 2463. But after 1903—and certainly by the 1950s—Congress's power to terminate was clear. *See id.* at 2464. Demanding language beyond termination is a demand for magic words for disestablishment—a rule that the Supreme Court firmly rejected in *McGirt*. *See id.* at 2475 ("[W]e have never insisted on any particular form of words when it comes to disestablishing a reservation."). Perhaps that is why the Supreme Court has already stated that "termination of Federal supervision," paired with a provision applying state law to tribal members, cedes a reservation to State jurisdiction. *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968); *see also* 70 Stat. 963 § 8(a) (identical provision to the Menominee provision); 70 Stat. 937 § 3(a) (same).

Brester argues that in terminating federal supervision over the Ottawa and Peoria in the 1950s, Congress created reservations for "No Indians In Particular." He does not dispute that during termination both tribes were subject to state jurisdiction and lost federal recognition. Thus, his apparent theory of the case is that the land where the Ottawa and Peoria lived counted as a reservation for any recognized Indian friends that visited but did not count as Indian country for the tribes that lived there. As the State succinctly stated to the district court, "If they're not Indians, they can't have a reservation." Appellee's Br. at 10 (quoting 3/1/21 Tr. 16-17). His theory of an Indian-less reservation is both novel and irrational, which is why no Court has ever adopted it.

To be sure, as Brester argues, the Ottawa and Peoria Indians still existed as racial Indians despite termination. Appellee's Br. at 10. But federal Indian status is not the same as being racially Indian. *See Morton v. Mancari*, 417 U.S. 535, 553-54 (1974). The federal government can give special land and services to Indians without violating equal protection because it relies on federal recognition, not race. *See id.* The corollary is that racial Indians without federal recognition lose the land and services provided to their recognized counterparts. Brester simply confuses racial identity with political benefit when he argues that Ottawa and Peoria still existed after termination.

While the Ottawa and Miami add nothing to Brester's arguments on this point, the Peoria extensively brief the issue. To start, the Peoria emphasize that Congressional reports called their land a reservation prior to termination. Peoria

Br. at 17. That part is not in dispute. They omit two other key portions of the same report, though. *First*, the Senate report observes that the Peoria had only 30,455.91 acres of their original 50,000-acre reservation, while the Miami had other acreage—and makes this observation in the context of a bill to terminate the Peoria and not the Miami. S. Rep. No. 84-2519, at 4 (1956). *Second*, the Senate report explains that the bill was *not* about passing land into fee simple because "[t]here are no tribal lands, and restrictions on allotted lands expired in 1915." *Id.* at 3-4. The land was already in fee simple, and all that remained of a reservation was supervision by the Federal government under its trust relationship with the Peoria Tribe. Thus, termination was about reservation status and not about altering titles to individual fee simple because the latter already had already occurred.

Thus, the focus on the differences with respect to tribal property between the Peoria termination and the Menominee and Klamath termination are irrelevant. *Contra* Peoria Br. at 18. What is relevant is that all three termination acts ended federal *supervision*, regardless of what happened to the title to the property. So while the Menominee Act provided for the transfer or sale of "tribal property" and "the title to all property, real and personal, held in trust by the United States," 68 Stat. 250, 251-252 §§ 7-8 (1954), *McGirt* held that transfer of title does not end reservation status. 140 S. Ct. at 2468. The act otherwise never uses the word "reservation," let alone any other magic words Brester insists are required. *See generally* 68 Stat. 250. And yet the Supreme Court still held that

the Menominee reservation ended with the termination act. Why? The Supreme Court said that it was the "termination of Federal supervision," not the tribal property provisions, that terminated the Menominee reservation. *Menominee Tribe*, 391 U.S. at 412. That same termination of supervision occurred with the Peoria and Ottawa, and therefore yielded the same result: termination of their reservations.

The Peoria exhaustively cover the portions of the *Menominee Tribe* opinion addressing hunting and fishing rights that may survive termination of a reservation, but it is unclear how the potential for those rights helps Brester here. To be sure, ending a reservation does not necessarily end other treaty rights—*McGirt* tells us that other treaty rights are considered apart from reservation status. 140 S. Ct. at 2466. But whether hunting and fishing rights or other rights survive termination of a reservation is of no help to Brester, who was not indicted on or convicted of a hunting or fishing crime.

The Peoria's attempt to reverse-engineer the hunting and fishing holding into a reservation holding relies on violating multiple Supreme Court rulings on Indian law. Their argument appears to be that (1) hunting and fishing are treaty rights, (2) reservations are treaty rights, (3) hunting and fishing rights survived termination, and (4) ergo all treaty rights, including reservations, survived termination. The three premises are not all correct, but even if they were, the conclusion in point (4) is making an unexplained leap over the plain text of the opinion, which says that "termination of Federal supervision" is what ceded the

reservation to the state. *Menominee Tribe*, 391 U.S. at 412. The Peoria apparently intend to imply, without saying, that it was the sale of title to the land that ended the Menominee reservation and not the termination of federal supervision because the title issue was different with the Menominee. Peoria Br. at 21. But, again, transfer of title does not end reservations. *McGirt*, 140 S. Ct. at 2468. Holding that transfer of title ends a reservation, while termination of supervision does not, would be directly contrary to Supreme Court rulings on both issues.

Similarly, the termination of the Klamath also ended the reservation via termination of federal supervision. The Klamath Act provides for transfer of title to tribal property, with unique provisions allowing individual members to receive either continued joint ownership or receive the cash equivalent of their share. 68 Stat. 718, 718-719 §§ 5(a)(1)-6(a) (1954). Like the Menominee act, the Klamath Act never refers to the reservation. Yet the Supreme Court held that they, too, had their reservation terminated when "federal supervision" was terminated. *See Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 761 (1985); *see also id.* at 766 ("the termination of an Indian reservation"). It cited *Menominee* for those statements, re-affirming that termination of federal supervision—and not other title transfers of tribal land—is the statutory act that terminates a reservation. *See id.* at 766 n.18.

The Peoria claim that termination statutes vary in whether they terminate a reservation, Peoria Br. at 22, but they have no authority for that proposition. To the contrary, the Supreme Court has uniformly interpreted termination of

federal supervision to end a reservation. That is why every other restored tribe had to re-obtain a reservation. *See infra* p. 10-11 & nn.4-5.

The Peoria's other attempts to avoid these plain holdings are fruitless. In *Venetie*, the Supreme Court reaffirmed its statement in *John* that all Indian country requires "a federal set-aside and federal superintendence." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530 (1998). It explained that the three categories of Indian country—reservations, dependent Indian communities, and allotments—are all different forms of that core definition of Indian country. *See id.* Applying certain core criteria across all three forms of Indian country does not collapse their other distinctions. *Compare id., with* Peoria Br. at 25. The Peoria are again just trying to avoid the plain meaning of termination of federal supervision—the termination of Indian country in any form, including reservations.

Similarly, the actions taken toward the Five Tribes have no relevance here. *Contra* Peoria Br. at 26. One of the core issues in *McGirt* was that Congress violated several treaty provisions but chose to indefinitely extend its proposed termination of the Creek. *McGirt*, 140 S. Ct. at 2466. The question in *McGirt* was whether those treaty violations terminated a reservation notwithstanding the indefinite extension of the final date. *Id.* at 2465-66. As *McGirt* explains, the series of steps was evidence that Congress had not yet terminated the reservation. *Id.* at 2466. Congress likely took several steps toward termination with the Five Tribes because it was concerned it could not unilaterally terminate

the reservation without taking steps. *See id.* at 2463. The Supreme Court told Congress in the 1903 *Lone Wolf* decision that there is no need to take steps toward termination, as Congress did with the Creek, if Congress just enacts a unilateral termination. *See id.* That distinction entirely accounts for why the Five Tribes were subjected to a multi-step process pre-dating 1903 while the Ottawa and the Peoria were completely terminated on a date certain in the 1950s. But the important point is that *McGirt* held the reservation persisted because "Congress never withdrew its recognition of the tribal government," *id.* at 2466, whereas it did precisely that with respect to the Peoria and Ottawa.

In sum, Congress terminated the Ottawa reservation and the Peoria reservation when it ended federal supervision over their lands. *See Menominee Tribe*, 391 U.S. at 412; *see also Klamath Indian Tribe*, 473 U.S. at 761. Neither Brester nor the tribes can avoid that plain text.

B. RESTORATION CANNOT RECREATE A RESERVATION WITHOUT TITLE TO THE LAND.

Brester believes the general language present in every restoration act gave the Ottawa and the Peoria greater rights than other tribes who were explicitly granted a reservation in other restoration acts. His argument requires ignoring other restoration acts[3] and has no basis in authority.

[3] The U.S. House keeps a public database where all of the statutes discussed in this case may be reviewed. *See, e.g.*, https://uscode.house.gov/statviewer.htm ?volume=97&page=770 (Menominee.

Every restoration statute has both a provision restoring treaty rights and a provision disclaiming any change to property.[4] In addition, all but one—the restoration statute at issue in this case—address the existence of a reservation despite those two clauses.[5] Those reservation provisions would be wholly unnecessary if the provision regarding treaty rights included the restoration of reservations. *See id.*

Indeed, the property clause in every statute also contains the tax language cited by the Ottawa and Miami, Ottawa/Miami Br. at 20-21, regardless of whether the rest of the statute explicitly granted or denied a reservation. *Compare, e.g.*, 104 Stat. 1167, 1168 (Ponca) ("Nothing in this Act may be construed as altering or affecting . . . any obligation to pay a tax levied before the date of enactment of this Act."), *with id.* ("Reservation status shall not be granted

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[4] 87 Stat. 770, 770-771 (1973) (Menominee); 91 Stat. 1415, 1415 (1977) (Siletz); 94 Stat. 317, 317-318 (1980) (Southern Paiute); 97 Stat. 1064, 1065 (1983) (Grande Ronde); 98 Stat. 2250, 2250-2251 (1984) (Coos et al.); 100 Stat. 849, 849-850 (1986) (Klamath); 101 Stat. 666, 666-667 (1987) (Ysleta del Sur Pueblo); 101 Stat. 666, 669-670 (1987) (Alabama Coushatta); 103 Stat. 91, 91-92 (1989) (Coquille); 104 Stat. 1167, 1167-1168 (1990) (Ponca); 108 Stat. 4533, 4533 (1994) (Auburn); 108 Stat. 4793, 4793-4794 (1994) (Paskenta); 114 Stat. 2939, 2939-2940 (2000) (Graton Rancheria). *See also* 96 Stat. 1960, 1960-61 (1982) (Cow Creek Band Recognition Act) (The Cow Creek Band has a more complicated history involving recognition questions along with termination and restoration).

[5] Most grant reservations. *See* 87 Stat. 770, 773 (1973) (Menominee); 94 Stat. 317, 320 (1980) (Southern Paiute); 98 Stat. 2250, 2253 (1984) (Coos et al.); 100 Stat. 849, 850 (1986) (Klamath); 101 Stat. 666, 666-668 (1987) (Ysleta del Sur Pueblo); 101 Stat. 666, 669-671 (1987) (Alabama Coushatta); 103 Stat. 91, 92 (1989) (Coquille); 108 Stat. 4533, 4534 (1994) (Auburn); 108 Stat. 4793, 4794 (1994) (Paskenta); 114 Stat. 2939, 2940 (2000) (Graton Rancheria). Three do not. 91 Stat. 1415, 1415 (1977) (Siletz); 97 Stat. 1064, 1068 (1983) (Grande Ronde); 104 Stat. 1167, 1168 (1990) (Ponca).

any land acquired by or for the Tribe."). While the Ottawa and Miami cite the tax clause as evidence of a reservation, its presence in every restoration statute regardless of reservation status only confirms that no reservation is being created absent express provision. Perhaps that is why the Peoria reject the Ottawa/Miami argument about any effect on taxation. *See* Peoria Br. at 30.

The Ottawa and Miami also note that restoration acts varied in language from repeal of termination statutes to repeal of all their effects on the affected tribes. Ottawa/Miami Br. at 19; *Compare* 92 Stat. 246, 246 (1978) (Ottawa) ("The following Acts are hereby repealed: . . . the Act of August 3, 1956 relating to the Ottawa Tribe) (internal citation omitted), *with* 91 Stat. 1415, 1415 (1977) (Siletz) ("such Act shall be inapplicable to the tribe and to members of the tribe after the date of enactment of this Act"). Once the two approaches are seen side by side, it strains credulity to say that voiding a statute's effects is meaningfully different than repealing it. The general language of restoration acts functions similarly across all tribes.

More importantly, neither form of repeal of a termination act can create a reservation because Congress lacks the power to seize state jurisdiction without either consent of the State or purchase of the land at issue. Appellant's Br. at 16-18. Brester and his amici's arguments about the "legal nullity" of a statute are just an improper attempt to give Congress extra-Constitutional powers in repeal that it could never exercise in enactment. Repeal of a termination act,

without more, cannot give Congress the ability to unilaterally seize state jurisdiction.

The opposite view reads the restoration acts in a highly incongruous manner. For example, with respect to the restoration of the Coos, Lower Umpqua, and Siuslaw, the restoration act established new reservations for those tribes that were *smaller* than their original reservation. But in Brester's and his amici's view, the explicit creation of a reservation for these three tribes gave them *less* than the total absence of reservation-creating language for the Ottawa and Peoria who, in Brester's view, got their whole former reservation restored. In other words, in their view, adding "[a] reservation shall be established by this Act," 98 Stat. 2250, 2253 (1984) to a restoration act was secretly stripping the Coos, Lower Umpqua, and Siuslaw of their original treaty reservation. After all, these three tribes were granted treaty rights, and their termination was repealed, too, just like the Peoria and Ottawa. Brester and his amici counterintuitively believe that those tribes would have otherwise been granted a large reservation by the treaty rights provision in the same statute, 98 Stat. 2250, 2250, if they had *not* also gotten explicit reservation recognition. The more natural reading is that Congress only created reservations when it said it did, as the State argued in its opening brief. Appellant's Br. at 14.

Brester's reading of the statute is especially peculiar because his interpretation casts doubt on the entire federal fee-to-trust system of buying land and having the federal government take it into trust to create reservations. The

longstanding approach of the federal government has been that it must acquire title to the land to create reservations. Indeed, every single restoration act that restores treaty rights and grants a reservation involves the federal government holding title to the land in trust.[6] Yet in Brester's view, Congress could have simply declared a reservation without ever first buying the land at issue. Brester's view that ten other restoration statutes were granting less reservation with more explicit recognition of reservation status is implausible.

Brester and his amici otherwise have no response to the State's explanation of the restoration acts: that the Ottawa and Peoria were being permissively added to the fee-to-trust program without guaranteeing they could acquire any particular land. This understanding is confirmed by viewing the Siletz acts. Congress initially denied any reservation to the Siletz in restoration. 91 Stat. 1415, 1415 § 3(c) (1977). Then, when Congress removed that denial and subsequently authorized a reservation, it particularly authorized the Siletz to participate in fee-to-trust and granted them certain identified trust lands. 94 Stat. 1072, 1072-1074 (1980). Similarly, the Grande Ronde were not given a reservation in restoration and later received a reservation in trust lands. *Compare* 97 Stat. 1064, 1068 (1983), *with* 102 Stat. 1594 (1988). The most rational reading of these statutes is that Congress viewed reservation status in

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[6] *See supra* n.5. The only peculiarity among those statutes is that Texas was permitted to hold part of the trust—under state jurisdiction—for two of the trust relationships. *See* 101 Stat. 666, 666-668 (1987) (Ysleta del Sur Pueblo); 101 Stat. 666, 669-671 (1987) (Alabama Coushatta).

restoration as entirely about whether a tribe could buy lands for use in the federal fee-to-trust program. By avoiding a prohibition on reservations, the Ottawa and Peoria were able to participate in fee-to-trust.

Brester and his amici also have no material response to the State's argument that allowing reservations by declaration rather than by fee-to-trust would violate the Enclave Clause of the U.S. Constitution. The Peoria alone try to respond, and the best they can manage is to chain cite all the cases holding that buying land and turning it into a reservation through fee-to-trust does not violate the Enclave Clause. Peoria Br. at 34-35. The State already acknowledged that fee-to-trust precedent in the opening brief. Appellant's Br. at 16-17. Whatever disputes the State and the tribes have regarding that jurisprudence are of no import to Brester, as this case is not about land that was purchased and used in fee-to-trust. There is still no authority anywhere that supports the proposition that Congress can alter state jurisdiction over property without first acquiring title the property, and this Court would become the first court in the country to make that radical holding if it accepted Brester's argument.

General restoration language combined with Congressional silence on the Ottawa and Peoria reservations did not re-create those reservations, and multiple similar restoration statutes confirm that general language regarding treaty rights or repeal of termination does not supplant the longstanding fee-to-trust method of re-creating reservations. This Court should reverse the district court's statutory interpretation, holding that the restoration acts only permitted

the Ottawa and Peoria to participate in fee-to-trust like other restored tribes and did not give them any broader reservation. That holding would require reversing the district court's conclusion on state jurisdiction in CF-2018-298, CF-2020-177 and CF-2020-178 (Ottawa cases).[7] It would also require reversing and remanding the district court's conclusion on state jurisdiction in CF-2020-129. *See infra* Proposition III.

REPLY REGARDING APPELLANT'S PROPOSITION II (CF-2018-298, CF-2020-177 and CF-2020-178)

SECTION 6 OF THE GENERAL ALLOTMENT ACT IS NOT A NULLITY.

Congress subjected the fee lands of the Ottawa to state jurisdiction and exempted the Miami and Peoria from that same express provision. 24 Stat. 388, 390-91 (1887); *see also* 25 Stat. 1013, 1014 (1889). Yet now Brester and the Ottawa want to claim that the same exemption applies to the Ottawa because the act of allotment itself does not subject a tribe to state jurisdiction or because the act of allotment itself is not disestablishment. That assertion twists the State's argument: there is no dispute that under *McGirt* the act of allotment alone does not subject a reservation to state jurisdiction, nor does Section 6 raise the issue of disestablishment. Instead, this proposition concerns what Congress did to the Ottawa in Section 6 that it did *not* do to the Miami and Peoria. Pretending that all three tribes were treated in the same manner just ignores statutory text.

[7] There is no evidence in the record that suggests those crimes occurred on the lone fee-to-trust Ottawa parcel identified by the State, and the Ottawa are unable to point to any other evidence suggesting Indian country status.

Neither Brester nor the Ottawa offer any interpretation of the statutory text to this Court. Instead of citing authority interpreting Section 6, they simply complain that the State's authority is not good enough because it involves tax cases. *See, e.g.*, Ottawa/Miami Br. at 29. Their attacks on the value of the State's authority are meaningless when they have no contrary authority. But even if they did, the suggestion that civil cases do not apply to criminal law was firmly rejected by the Supreme Court just a year ago, when it applied the civil *Montana* framework to a criminal law question in Indian country. *See United States v. Cooley*, 141 S. Ct. 1638, 1643-44 (2021).

Brester and the Ottawa also argue that 18 U.S.C. § 1151 repealed section 6's applicability to criminal jurisdiction, citing the Supreme Court's decision in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). Ottawa/Miami Br. at 27-28; *see also* Appellee's Br. at 19-20. That argument is incorrect: The Supreme Court's subsequent *County of Yakima* decision acknowledges that "[t]he Tribe argues that" a series of statutes including § 1151 repealed section 6's jurisdictional grant. *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 260 (1992). The Supreme Court then rejected that reading of statutes and *Seymour*, holding that the argument is an attempt to repeal section 6 by implication that "is not supportable" under precedent. *Id.* at 262. The Ottawa misleadingly cite the summary of tribal argument in *County of Yakima* instead of the Supreme Court's

holding.[8] *See* Ottawa/Miami Br. at 27-28 & n.84. Brester and the Ottawa are certainly entitled to preserve their challenge to Supreme Court authority, but there is nothing this Court can do with that argument.

In short, this is an argument about what Congress did to the Ottawa (but not the Peoria and Miami) in section 6 of the General Allotment Act, which the Supreme Court has affirmed is still a valid and enforceable statute. Allegations about the acts of allotment or about disestablishment have no bearing on that question. Since the only interpretation proffered to this Court is the one the State proffered, this Court should adopt it, holding that Section 6 meant that any Ottawa reservation lands were subjected to state jurisdiction upon the issuance of fee patents.

Brester offered nothing to the district court that would suggest that these lands are anything but ordinary fee lands. Brester's argument about "failure of proof" is really an attempt to reverse the normal presumption of jurisdiction to be in his favor, adding title searches to every indictment just in case the criminal defendant says the magic words "Indian country." This Court could reverse the district court and affirm the State's jurisdiction, holding that the presumption is in favor of state jurisdiction, not against it, and observing Brester offered nothing to call that jurisdiction into doubt. The most efficient result would be a remand,

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[8] Brester is less forthright than his amici, as he just articulates the losing argument in *County of Yakima* without admitting that the Supreme Court has already considered and rejected that argument. *See* Appellee's Br. at 20-21. He cannot escape that his reading of the 1962 *Seymour* decision was rejected in the 1992 *County of Yakima* decision.

though, to sort out the boundaries of fee patent land for both this and all other related prosecutions moving forward to enable this court to publish a rule regarding Ottawa lands.

Accordingly, if this Court disagrees with Proposition I and reaches this issue, it should remand CF-2020-177 and CF-2020-178 to get the most accurate result for this prosecution and all the related ones, resolving the fee patent status of Ottawa lands.[9]

REPLY REGARDING APPELLANT'S PROPOSITION III (CF-2020-129)

A REMAND IS NEEDED TO ADDRESS THE PEORIA AND MIAMI QUESTION THAT THE DISTRICT COURT ACKNOWLEDGED BUT EXPRESSLY DECLINED TO ANSWER.

As explained above, *see supra* Proposition I, any Peoria reservation was terminated. While the State and Brester both discussed the historically united Peoria and Miami reservation, the district court viewed the Peoria and Miami reservation as separated at some point, but it further observed that even the Peoria could not adequately explain where their present-day reservation is. II O.R. 266. It then refused to resolve the tension because it found that termination did not end the Peoria Reservation, regardless of its current boundaries. *Id.* If this Court reverses the district court's holding on termination, as it should, *see supra* Proposition I, then in-line with the district court's holding,

[9] A remand would not be necessary for CF-2018-298. *See infra* Proposition IV.

it should remand for the district court to address the question it left open: the boundaries of what was terminated.

As Brester observes, the State argued below that the Peoria's interest was terminated—thereby passed to the State—while the Miami's interest was not. Appellee's Br. at 23. The necessary result of that argument is that the State has jurisdiction over all the historic reservation, although in some fashion that overlaps with the Miami's jurisdiction. The State is still fine with that result, which would find jurisdiction here while leaving open some interesting discussions with the Miami for another day.

The State's argument about the potential divide between the Peoria and the Miami in reservation lands is in response to the district court's order, not the State's primary argument. Despite the State's argument that it has jurisdiction over all the land and Brester's argument that all the land is Indian country, the district court apparently believed that there is a boundary between the Peoria and Miami lands. The district court reached this conclusion because of tribal amici representations, as discussed in the opening brief. Appellant's Br. at 39. Such representations include the Peoria specifically disclaiming the State's and Brester's theory that the land was shared. *See* 3/1/2021/ Tr. at 21 ("I can't tell you that we agree that the entire reservation area as it existed under the Omnibus Treaty, we're not going to say that the Peoria Tribe shares that with the Miami Tribe.") Such representations likely also include the repeated insistence that the Miami did not confederate with the Peoria, stated again here by the

Peoria. Peoria Br. at 7-9. The tribes' insistence on that point is puzzling because confederation was part of the Miami acquiring an undivided interest. *Id.* at 7 (quoting Omnibus Treaty, art. XXVI). Even in this appeal, the Peoria introduce a map that labels the entire reservation pre-termination as the "Peorias" land alone. *Id.* at 4. The inability of the Peoria and Miami tribes to agree on where their land is led to the district court's avoidance of the issue below.

The State's invitation for a remand was in the interest of addressing questions explicitly reserved by the district court in order to enable a final, published decision from this Court about how to handle the Peoria and Miami. The State has no objection to a ruling that an undivided interest to the reservation passed to the State, as pressed below. The record as it stands supports that outcome alone. But the district court correctly observed that the tribes have raised several issues that call into question whether there is some boundary between lands for the Peoria and Miami. Brester's current defense that "there is Indian country somewhere, but I don't know whose or where" is hardly sufficient for a criminal defendant to defeat state jurisdiction. If this Court is going to publish a rule for how to handle the Peoria and Miami, it should be able to consider the district court's view that there is some boundary before resolving what is disestablished among those two tribes.

The district court avoided the hard question of any boundary by erring on the issue of termination. With its error corrected, it should face the hard question in the first instance. There is no rule against an Appellant seeking a remand to

clarify the district court's view on a discrete issue when appealing a judgment, especially when the district court explicitly noted and reserved the issue. *Contra* Appellee's Br. at 23-24.

REPLY REGARDING APPELLANT'S PROPOSITION IV (CF-2018-298)

WALLACE IS STILL GOOD LAW.

Brester's only defense of the district court's failure to apply *Wallace* in CF-2018-298 is to ask this Court to overrule *Wallace*. If this court does not reverse that ruling on other grounds, *see supra* Propositions I-II, then it should enforce its decision in *Wallace* and reverse CF-2018-298 for improperly applying *McGirt* retroactively.

PROPOSITION V

THE STATE'S ARGUMENTS ARE PROPERLY BEFORE THIS COURT.

Brester narrowly asserts that some of the State's arguments should not be considered on appeal because they were not raised below, and his amici broadly assert waiver. *Compare* Appellee's Br. at 15, *with* Ottawa/Miami Br. at 26. Brester's argument against remand was addressed above. *See supra* Proposition III. Because he also incorporated his amici's arguments, though, the State addresses the broader argument as well.

Neither Brester nor his amici cite any case law from this Court supporting the suggestion that the State's arguments on appeal should receive *no* consideration. The arguments on termination and restoration were raised in the district court, and the Section 6 argument is the only issue subject to the

question of waiver. A new issue on appeal does receive consideration, albeit generally pursuant to the plain error standard of review. *See Frederick v. State*, 2017 OK CR 12, ¶ 61, 400 P.3d 786, 809, *overruled on other grounds by Williamson v. State*, 2018 OK CR 15, 422 P.3d 752 ("[W]e review the claim for plain error only."); *Romano v. State*, 1995 OK CR 74, ¶ 18, 909 P.2d 92, 109 ("[T]his Court will only review Appellant's present challenges for plain error.").

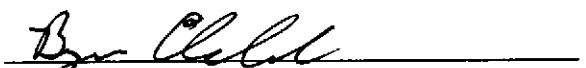
More importantly, Brester and his amici neglect to mention that this Court's common practice has been to fully consider Indian country claims raised for the first time on direct appeal, without so much as the application of plain error review. This is the case even for *McGirt* claims that were omitted from the defendant's opening brief but filed in a supplemental brief months later. *See, e.g., Michael Gary Parker v. State of Oklahoma*, Case No. F-2019-247; *Justin Cecil Detar v. State of Oklahoma*, Case No. F-2019-351. Notably, in *Detar*, the appellant did not raise his *McGirt* claim until a supplemental brief filed in March 2021, some eight months after the *McGirt* decision issued. Moreover, this Court specifically rejected the State's procedural challenges to Detar's *McGirt* claim based on its late filing. *See Detar v. State*, No. F-2019-351, Opinion on Rehearing at 2 n.2 (Okl. Cr. Nov. 4, 2021) (unpublished and attached as Exhibit A).[10] While, as this Court knows, the State has consistently argued that Indian country claims are subject to procedural doctrines such as waiver, the State is not aware

[10] *Detar* is cited and attached as an exhibit because no published case would serve as well the purpose for which counsel cites it. *See* Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

of any case where this Court has applied such doctrines on direct appeal to an Indian country claim. Brester offers no reason why this Court should deviate from that practice here in considering all of the reasons underlying the State's claim that it has prosecutorial authority over him.

Respectfully submitted,

JOHN M. O'CONNOR
ATTORNEY GENERAL



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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JUSTIN CECIL DETAR,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2019-351**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
NOV - 4 2021
JOHN D. HADDEN
CLERK

OPINION ON REHEARING

ROWLAND, PRESIDING JUDGE:

This Opinion on Rehearing resolves the direct appeal in this matter. Detar appealed his conviction for Lewd or Indecent Proposals to a Child under Sixteen, After Former Conviction of Two or More Felonies, in Tulsa County District Court Case No. CF-2015-4675. We affirmed his conviction and sentence in *Detar v. State*, 2021 OK CR 9, 489 P.3d 70. After that decision was rendered, we granted Detar's motions to file a supplemental brief, challenging the State's jurisdiction to prosecute based upon the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), along with his motion to supplement the record with documents relevant to his jurisdiction

EXHIBIT
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A

claim.[1] We also granted his Petition for Rehearing and Motion to Withdraw Mandate and remanded the matter for an evidentiary hearing. By order dated October 14, 2021, we vacated and set aside our original opinion and ordered the original opinion withdrawn. *Detar v. State*, 2021 OK CR 34, ___P.3d___.

Our resolution of this case now turns on whether Detar is an Indian as defined by federal law, and whether the alleged crime was committed within Indian Country. Because the answer to both questions is yes, federal law grants exclusive criminal jurisdiction to the federal government. Accordingly we find relief must be granted on rehearing based upon Detar's jurisdictional challenge.[2]

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[1] Detar's motions were filed several weeks before our decision was rendered, but the Court's opinion did not address the jurisdiction issue.

[2] The State filed a supplemental brief following the evidentiary hearing, objecting to review of Detar's jurisdictional challenge on the basis that his supplemental brief was untimely under our court rules. We will consider Detar's jurisdiction challenge on rehearing because *McGirt* announced a new procedural rule applicable to cases pending on direct appeal, and claims involving subject matter jurisdiction may be raised any time with a few exceptions. *See State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶¶ 8 & 28, ___P.3d___ (stating "[n]ew rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced" and unanimously holding that *McGirt* announced a new rule of criminal procedure concerning Indian Country jurisdiction). If we decline to adjudicate his *McGirt* claim based upon when it was raised during his appeal, he would likely be precluded from then pursuing it via post-conviction relief based upon our decision in *Matloff*.

While I recognize that a majority of this Court holds that the Major Crimes Act and the Indian Country Crimes Act involve subject matter jurisdiction. I continue to disagree and find that Congress has exercised in these Acts its own territorial

1. Controlling Law: *McGirt v. Oklahoma*

In *McGirt*, the Supreme Court held that land set aside for the Muscogee (Creek) Nation in the 1800's was intended by Congress to be an Indian reservation, and that this reservation remains in existence today for purposes of federal criminal law because Congress has never explicitly disestablished it.

2. Jurisdiction

Federal and tribal governments, not the State of Oklahoma, have jurisdiction to prosecute crimes committed by or against Indians on the Muscogee (Creek) Reservation. 18 U.S.C. §§ 1152, 1153; *McGirt,* 140 S.Ct. at 2479-80. The charge filed against Detar in this case fits squarely within the crimes subject to exclusive federal jurisdiction. *See State v. Klindt,* 1989 OK CR 75, ¶ 3, 782 P.2d 401, 403 ("[T]he State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.").

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jurisdiction over Indians in Indian Country by virtue of its plenary power to regulate affairs with Indian tribes. *Hogner v. State,* 2021 OK CR 4, ¶ 4, ___P.3d___ (Rowland, J. concurring in result).

3. Two Questions Upon Remand

We remanded Detar's case to the District Court of Tulsa County for an evidentiary hearing for fact finding on his claim that the State of Oklahoma lacked jurisdiction to prosecute him because he is an Indian and his crime occurred in Indian country. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Detar's status as an Indian; and (b) whether the crime occurred within the boundaries of the Muscogee (Creek) Reservation. Our Order provided that, if the parties agreed as to what the evidence would show with regard to the questions presented, the parties could enter into a written stipulation setting forth those facts, and no hearing would be necessary.

On June 11, 2021, the parties entered a written joint stipulation in which they agreed: (1) that Detar has some Indian blood; (2) that he was an enrolled member of the Cherokee Nation on the date of the charged offense; (3) that the Cherokee Nation is a federally recognized tribe; and (4) that the charged crime occurred within the boundaries of the Muscogee (Creek) Reservation. The District Court accepted the parties' stipulation.

The District Court filed its Findings of Fact and Conclusions of Law in this Court on September 1, 2021. The District Court found the facts recited above in accordance with the stipulation. The District Court concluded that Detar is an Indian under federal law and that the charged crime occurred within the boundaries of the Muscogee (Creek) Reservation, i.e., Indian Country. The District Court's findings and conclusions are supported by the record. The ruling in *McGirt* governs this case and requires us to find the State of Oklahoma was without jurisdiction to prosecute Detar. Accordingly, we grant relief on rehearing.

DECISION

The Judgment and Sentence of the District Court is **VACATED** and this matter is **REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), the **MANDATE** is **ORDERED** to issue in twenty (20) days from the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE DAWN MOODY, DISTRICT JUDGE

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

HUDSON, VICE PRESIDING JUDGE: SPECIALLY CONCURS

Today's decision dismisses a conviction for lewd or indecent proposals to a child under sixteen from the District Court of Tulsa County based on the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). This decision is unquestionably correct as a matter of *stare decisis*. The record shows Appellant had some Indian blood and was recognized as an Indian by a tribe and/or the federal government at the time of the crime. The record further shows the crime in this case took place within the historic boundaries of the Creek Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the crime in this case. Instead, Appellant must be prosecuted in federal court where the exclusive jurisdiction for these crimes lies. *See Roth v. State*, 2021 OK CR 27, __P.3d__. I therefore as a matter of *stare decisis* fully concur in today's decision.

Further, I maintain my previously expressed views on the significance of *McGirt*, its far-reaching impact on the criminal justice system in Oklahoma and the need for a practical solution by Congress. *See, e.g., State v. Lawhorn*, 2021 OK CR 37, __P.3d__ (Hudson, V.P.J., Specially Concurs); *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867 (Hudson, J., Concur in Results).

LUMPKIN, JUDGE: CONCURRING IN RESULTS

Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, __ U.S. __, 140 S. Ct. 2452 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt*, I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas, I was forced to conclude the Majority had totally failed to follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

My quandary is one of ethics and morality. One of the first things I was taught when I began my service in the Marine Corps was that I had a duty to follow lawful orders, and that same duty required me to resist unlawful orders. Chief Justice Roberts's scholarly and judicially penned dissent, actually following the Court's precedents and required analysis, vividly reveals the failure of the majority opinion to follow the rule of law and apply over a century of precedent and history, and to accept the fact that no Indian reservations remain in the State of Oklahoma.[1] The result seems to be some form of "social

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[1] Senator Elmer Thomas, D-Oklahoma, was a member of the Senate Committee on Indian Affairs. After hearing the Commissioner's speech regarding the Indian Reorganization Act (IRA) in 1934, Senator Thomas opined as follows:

> I can hardly see where it (the IRA) could operate in a State like mine where the Indians are all scattered out among the whites and **they have no reservation**, and they could not get them into a community without you would go and buy land and put them on it. Then they would be surrounded very likely with thickly populated white sections with whom they would trade and associate. I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly-settled population. (emphasis added).

John Collier, Commissioner of Indian Affairs, *Memorandum of Explanation* (regarding S. 2755), p. 145, hearing before the United States Senate Committee on Indian Affairs, February 27, 1934. Senator Morris Sheppard, D-Texas, also on the Senate Committee on Indian Affairs, stated in response to the Commissioner's speech that in Oklahoma, he did not think "we could look forward to building up huge reservations such as we have granted to the Indians in the past." *Id.* at 157. In 1940, in the

justice" created out of whole cloth rather than a continuation of the solid precedents the Court has established over the last 100 years or more.

The question I see presented is should I blindly follow and apply the majority opinion or do I join with Chief Justice Roberts and the dissenters in *McGirt* and recognize "the emperor has no clothes" as to the adherence to following the rule of law in the application of the *McGirt* decision?

My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all

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Foreword to Felix S. Cohen, *Handbook of Federal Indian Law* (1942), Secretary of the Interior Harold Ickes wrote in support of the IRA, "[t]he continued application of the allotment laws, **under which Indian wards have lost more than two-thirds of their reservation lands**, while the costs of Federal administration of these lands have steadily mounted, must be terminated." (emphasis added).

parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.