ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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

BRIEF OF APPELLEE

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	)	
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BRIEF OF APPELLEE

Mr. Winston Whitecrow Brester was the defendant in the District Court, and the Appellee herein. He will be referred to by name or as Appellee. Appellant, the State of Oklahoma, has appealed the lower court's dismissal of pending prosecutions, as well as the court's granting of post conviction relief of a final conviction, pursuant to findings that the State lacked jurisdiction to prosecute Mr. Brester, an Indian, for offenses occurring on tribal reservations.

Citations to the record will include the Original Records compiled for each individual case, identified by case number as (____ O.R.). For simplicity, where identical pleadings relating to all case numbers are filed, the citation will be made to the Original Record in CF-2020-129. Hearings conducted on Mr. Brester's Motion to Dismiss for Lack of Jurisdiction will be identified by date (2/3/21 Tr.) and (3/11/21 Tr.). Additional citations will be to the State's Brief in Chief (St's Br.).

Mr. Brester also adopts the arguments and authorities contained within the amicus briefs filed in this Court on behalf of the Ottawa and Miami tribes,

filed December 15, 2021, and the Peoria Tribe, filed January 13, 2022, covering the extensive record establishing the creation and continued existence of the tribal reservations at issue.

STATEMENT OF THE CASE

Winston Whitecrow Brester was charged by Information in Ottawa County District Court Case No. CF-2020-129 with Count 1, Burglary I, and Count II, Robbery 1. (CF-2020-129 O.R. 3) In Ottawa County Case Nos. CF-2020-177 and CF-2020-178, Mr. Brester was charged with placing bodily fluids on a government employee and battery/assault and battery on a police officer, respectively, for conduct occurring in the Ottawa County Jail. (CF-2020-177 O.R. __; CF-2020-178 O.R. In Ottawa County Case No. CF-2018-298, Mr. Brester was convicted of attempting to elude a police officer. (CF-2018-298 O.R. 46-50)

Mr. Brester filed motions to dismiss each of the pending prosecutions for lack of state prosecutorial jurisdiction on the basis that he was Indian, and the offenses occurred on Indian land. (CF-2020-129 O.R. 22-32) In CF-2018-298, Mr. Brester filed a Post Conviction application asking the court to vacate his conviction for the same reason. (CF-2018-298 O.R. 119-124)

The State's written response agreed that the offenses charged CF-2020-129 occurred in the historical boundaries of the Peoria Nation's reservation but contended that the reservation had been disestablished by

implication by Congressional action in 1956 and was not restored by the 1978 act repealing the 1956 law. (CF-2020-129 O.R. 48-50)

Similarly, the State's written response in CF-2020-177 and CF-2020-178 agreed that the offenses occurred within the historic boundaries of the Peoria Tribe's reservation but urged that tribal reservation likewise had been effectively terminated by Congressional action in 1956 and was not restored by the 1978 act repealing the 1956 law. (CF-2020-129 O.R. 38-48)

Amicus Counsel for the Peoria Tribe filed a brief in the trial court addressing the creation of the reservation and arguing that subsequent Congressional actions in 1956 and 1978 left the reservation intact. (CF-2020-129 O.R. 89-152) Amicus Counsel for the Ottawa and Miami tribes also filed a brief in the case dealing with the creation of those reservations and contending the reservations remained intact regardless of the Congressional actions in 1956 and 1978. (CF-2020-129 O.R. 155-193)

Hearings were conducted on February 3, 2021, and March 1, 2021, after which the Honorable Becky Baird, Special Judge, found that Mr. Brester was an Indian and that the offenses at issue occurred on tribal reservations that had not been disestablished. Based on those findings, the court found the State lacked jurisdiction to prosecute Mr. Brester and granted the motions to dismiss the pending prosecutions and granted post-conviction relief to vacate the conviction in CF-2018-298.

From this ruling, the State appealed pursuant to 22 O.S.2021, § 1053 (1), by filing a Notice of Intent to Appeal and Designation of Record in the District Court on March 8, 2021, and in this Court on March 11, 2021. A Petition in Error to The State's brief in chief was filed October 4, 2021. This Court granted leave for filing of amicus briefs on behalf of the Miami and Ottawa Tribes, filed December 15, 2021, and the Peoria Tribe, filed January 13, 2021.

STATEMENT OF THE FACTS

The parties agreed that Mr. Winston Whitecrow Brester was an enrolled member of the Seneca Cayuga Nation, which is a federally recognized tribe of Indians in Oklahoma, and "was so recognized by that tribe at the time of the commission – and alleged commission of the crimes involved in these four cases, and that he has identifiable quantum of Indian blood." (2/3/21 Tr. 6) The trial court affirmed this stipulation in its ruling. (CF-2020-129 O.R. 265; 2/3/21 Tr. 22)

Mr. Brester provided the court with treaties establishing reservations for the Ottawa, Peoria and Miami tribes. (Defense Exhibits A, B, C, and D)

As to the location of the offenses, the State stipulated that the offenses charged and awaiting trial in CF-2020-177 and CF-2020-178 occurred "within the traditional boundaries of the Ottawa Tribe of Oklahoma reservation." (2/3/21 Tr. 8) The State also agreed that the offense for which Mr. Brester was

convicted in CF-2018-298 was "initated and completed within the traditional boundaries of the Ottawa Tribe's reservation . . . ." (2/3/21 Tr. 7

The State urged that the Ottawa tribal reservation was disestablished by Act of Congress, 70 Stat.963, 25 U.S.C. 841-853 (August 3, 1956), but not restored when the 1956 act was repealed by in 95 Stat. 281, 25 U.S.C. 861 (May 15, 1978).

Additionally, the State stipulated that the offense in the pending case CF-2020-129 was alleged to have occurred "within the boundaries of the area that was known as the United Peorias and Miami's reservation." (2/3/21 Tr. 8; CF-2020-129 O.R. 8) The State urged that the reservation was disestablished by an act of Congress terminating federal relationship with the Peoria tribe in 1956, 70 Stat. 937; 25 U.S.C. 821-826 (August 2, 1956), but not restored when the 1956 act was repealed by the same 1978 act repealing the termination of the Ottawa, 95 Stat. 281, 25 U.S.C. 861 (May 15, 1978).

In subsection (c), the Restoration act "reinstated all rights and privileges of each of the tribes . . . and their members under Federal treaty, statute or otherwise which may have been diminished or lost pursuant to the Act relating to them which is repealed by subsection (b) of this section." 95 Stat. 281, 25 U.S.C. 861.

The trial court correctly found that State could not point to any language addressing the reservation status in the 1956 Congressional action

terminating the federal relationship with the Ottawa and Peoria tribes. (3/1/21 Tr. 23)

With regard to the Ottawa reservation, the trial court ruled:

> The State admits that prior to 1956 there was an existing Ottawa reservation, but argues that the Act of August 3, 1956 (which appears to have an effective date in 1967) terminated not only the federal government's relationship with the tribe but also the existing reservation; and further that the Act of May 15, 1978 repealing the 1956 Act did not reestablish a reservation. The State indicates that although it has searched and spent extensive time looking into the issue, it has found no clear statutory language of disestablishment by any Act of Congress.

(CF-2020-129 O.R. 265)

As to the Peoria tribe, the written ruling stated, "The court specifically finds no language in the 1956 Act which would terminate anything other than "the federal supervision over the affairs of the Peoria tribe." (CF-2020-129 O.R. 265)

RESPONSE TO STATE'S PROPOSITIONS I & III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE PENDING PROSECUTIONS FOR OFFENSES ALLEGED TO HAVE OCCURRED WITHIN THE HISTORIC BOUNDARIES OF THE OTTAWA RESERVATION AND THE UNITED PEORIAS AND MIAMIS RESERVATION.

In *McGirt v. Oklahoma*, 140 S.Ct. 2452, (2020), the Supreme Court held the reservation Congress established for the Muscogee (Creek) Nation remains in existence today because Congress never explicitly disestablished it. That ruling meant Oklahoma lacked jurisdiction to prosecute McGirt, an Indian, because he committed his crimes on the Creek Reservation, i.e., in Indian Country. *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.")

In this case, after conducting two evidentiary hearings and hearing from amicus counsel for the tribes in question, the trial court dismissed the pending prosecutions in State court for lack of jurisdiction, after determining Mr. Brester was, in fact, Indian and the alleged offenses were committed within the bounds of historic tribal reservations that had not been disestablished. (CF-2020-129 O.R. 264-267)

This court reviews trial court findings for abuse of discretion. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Hogner v. State*, 2021 OK CR 4, ¶ 17, 500 P.3d 629, 635, citing *State v. Delso*, 2013 OK

CR 5, ¶ 5, 298 P.3d 1192, 1194. This Court should find the trial court's ruling supported by the record and adopt it.

The parties stipulated that the offenses charged in Ottawa County District Court Case No. CF-2020-129 occurred within the historic boundaries of the "area that was known as the United Peorias and Miami's reservation." (2/3/21 Tr. 8). The parties further agreed the crimes charged in Ottawa County District Court case numbers CF-2020-177 and CF-2020-178 occurred within "the traditional boundaries of the Ottawa Tribe of Oklahoma reservation." (2/3/21 Tr. 8) The treaty documents relating to the reservations' creation were admitted without objection as Defense Exhibits A, B, C and D. (2/3/21 Tr. 6)

McGirt instructs that Congress is able to withdraw, diminish, and disestablish a reservation; although disestablishment "has never required any particular form of words," Congress "must clearly express its intent to do so." *Id.*, at 2363-64.

> And, as we have said time and again, once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470, 104 S.Ct. 1161 (citation *Celestine*, 215 U.S. at 285, 30 S.Ct. 93); see also *Yankton Sioux*, 533 U.S. at 343 ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain") (citation and internal quotation marks omitted).

McGirt at 2469.

The State claimed that the reservations established for the Ottawa and Peoria tribes were disestablished by separate acts of Congress in 1956: at 70

Stat.963, 25 U.S.C. 841-853 (August 3, 1956) addressing the Ottawa tribe, and 70 Stat. 937; 25 U.S.C. 821-826 (August 2, 1956) addressing the Peoria Tribe. The trial court properly rejected the State's claim. The State was unable to point to a clear expression of congressional intent to terminate the reservation (or even a mention of the reservation status) in either act. (2/3/21 Tr. 16-17, 21)

In discussing the Ottawa reservation, the court specifically asked for evidence that the 1956 termination act disestablished the reservation. Rather than pointing to language in the statute, the State's response was that the reservation was disestablished by inference because if the government was no longer going to recognize the tribe, the tribe necessarily could not have a reservation.

> THE COURT: U-huh. Well, if that's the case, then do you have specific language which you could point me to in the 1956 Act that basically says it gets rid of the reservation?
>
> [DISTRICT ATTY]: No, there is no magic language. I wish there was. I wish there was a stamp that Congress could have used to say "reservation disestablished, but it's never worked that way.
>
> THE COURT: Okay.
>
> [DISTRICT ATTY]: So what the state is basing that the idea on is there's no way if -- in the eyes of the federal government, the tribe no longer exists –
>
> THE COURT: Uh-huh.
>
> [DISTRICT ATTY]: -- there's no way for it to have a reservation, again, in the eyes of Congress which is all that matters. . . .
> So when they removed recognition from a tribe and basically say that, you know, "No law that applies to an Indian applies to you

> anymore," they can't have a reservation. If they're not Indians, they can't have a reservation. So it had to have been disestablished in 1956.

(3/1/21 Tr. 16-17)

With regard to the offense involved on land subject to the Peoria tribe's claim to a reservation, the State made the same argument:

> [DISTRICT ATTY]: Yes. So involving the Peoria Tribe. Peoria went through the same termination and restoration essentially that the Ottawa did.

(2/3/21 Tr. 21)

While the 1956 termination statute ended federal supervision of the tribes, it neither ended the existence of the tribes, nor extinguished the reservations. Like the historical maltreatment of the Muscogee Creek Nation discussed in McGirt, the 1956 act terminating federal government interaction with the tribe was a blow to the tribe's status. But even so, it failed to rise to the explicit disestablishment required to remove the status of a reservation. "But whatever the confluence of reasons, in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation." *McGirt*, at 2468.

Although the 1956 acts did not mention reservation status at all, the State contended that by implication, the reservations were disestablished. However, when the restoration act was passed in 1978, specifically repealing the 1956 acts relating to these tribes, the State found the silence with regard to reservation status indicative that the earlier, silent "disestablishment by

implication" was not repealed. (2/3/21 Tr. 22) This ignored the obvious reason for the lack of specific language restoring the reservations – there was no need to restore what had not been extinguished.

Public Law 95-281 (May 15, 1978) did several things: extended or confirmed federal recognition of several Oklahoma tribes, including the Ottawa and Peoria (section 1(a)); repealed the termination statutes relating to the Ottawa and Peoria tribes (section 1(b)); reinstated "all rights and privileges of each of the tribes and their members under Federal treaty, statute, or otherwise, which may have been diminished or lost" pursuant to the repealed act (section 1(c)); and *except as specifically provided in a, b and c,* (which specifically included restoration of treaty rights) maintained the status of "property rights or obligations, any contract rights or obligations, including existing fishing rights, or any obligation for taxes already levied." (section 1(d)).

The State's argument relied on subsection 1(d) regarding the restoration act's statement that nothing in the restoration act "shall alter" property or contractual rights, contending that the reservation status of land "necessarily" alters property rights.

If, indeed, termination did not disestablish the reservation, the restoration act merely confirmed that the property rights of the reservation were maintained. If, however, the reservation was somehow diminished by the prior termination act, the preface to subsection 1(d) did not reduce the import of the treaty rights restored in subsection 1(c). Subsection 1(d) was

prefaced with the phrase "[e]xcept as specifically provided in this Act," and treaty rights were specifically addressed in the earlier subsections.

> THE COURT: Let me see if I understand your argument. Are you indicating that it's your belief that prior to the Termination Act in 1956, that there was a reservation for the Ottawa Tribe?
>
> [DISTRICT ATTY]: Yes, that's correct.
>
> THE COURT: Okay. And how do you deal with the reinstatement of the – of that, the repeal of the1956 Act, when they talk about it "reinstates all rights and privileges of every tribe which may have been diminished or lost" pursuant to that act?
>
> I mean the language in the reinstatement basically seems to say, does it not, that all of the rights and privileges they had before than 1956 Act are now going to be reinstated.
>
> [DISTRICT ATTY]: Um, sort of. So specifically, it's the State's position that what the Congress is talking about there [in the restoration act] is individual rights, and to a certain degree, tribal rights.
>
> But a reservation is not a right. You don't have a right to a reservation is a federal creation within property law, I suppose, property and sovereignty law.

At the conclusion of the hearing, the trial court found, even if the 1956 "termination" statutes somehow could be found to impact the reservations status, the repeal of those acts in 1978 restored whatever had been lost:

> The State admits that prior to 1956 there was an existing Ottawa reservation, but argues that the Act of August 3, 1956 (which appears to have an effective date in 1967) terminated not only the federal government's relationship with the tribe but also the existing reservation; and further that the Act of May 15, 1978 repealing the 1956 Act did not reestablish a reservation. The State indicates that although it has searched and spent extensive time looking into the issue, it has found no clear statutory language of disestablishment by any Act of Congress. Essentially, the State relies on the non-statutory considerations

set forth in *Solem v. Bartlett*, 104 S.Ct. 1161, and discussed in *McGirt*, supra.

This Court need not determine whether the 1956 Act extinguished or reduced the existing Ottawa reservation as the clear language passed by congress in 1978 repealed the 1956 Act. The common meaning of the term repeal acts as an annulment of the previously passed law. Congressional intent need not be inferred where it is clearly stated. Subsection C of the 1978 Act "reinstated all rights and privileges" . . . . "under Federal treaty, statute, or otherwise which may have been diminished or lost."

(CF-2020-129 O.R. 264)

Similarly, the trial court found regarding the Peoria tribe:

The "termination" Act of August 2, 1956, and the repeal of that Act by Congress on May 15, 978 have the same effect as discussed above relative to the Ottawa reservation. The underlying question is whether or not the land within the historical reservation remains "Indian land." Again the State is unable to present any clear statutory language of disestablishment by any Act of Congress and as discussed in the McGirt case, policies of the time designed to get rid of the reservations will not act as a proper substitution for the necessity of congress itself to act in disestablishing an Indian reservation. The Court specifically finds no language in the 1956 Act which would termination anything other than "the federal supervision over the affairs of the Peoria tribe."

(CF-2020-129 O.R.266)

As this Court noted in *State v. Lawhorn*, once the existence of a reservation is shown, Congressional actions can affect the tribe and the reservation boundaries, but must be explicit if the reservation is to be completely erased.

The record before the district court in this case, similar to that in *McGirt*, showed Congress, through a treaty, removed the Quapaws from one area of the United States to another where they were promised certain lands. A subsequent treaty redefined the

> geographical boundaries of those lands, but nothing in any of the documents showed a congressional intent to erase the boundaries of the Reservation and terminate its existence. Congress, and Congress alone, has the power to abrogate those treaties, and "this Court [will not] lightly infer such a breach once Congress has established a reservation." *McGirt*, 140 S.Ct. at 2462 (citing *Solem v. Bartlett*, 465 U.S. 463, 470, (1984)).

Id., 2021 OK CR 37, ¶ 7, 499 P.3d 777, 778-79.

A district court's factual findings that are supported by the record are afforded great deference and reviewed for an abuse of discretion. *Parker v. State*, 2021 OK CR 17, ¶34, 495 P.3d 653, 665. Here, the findings of the trial court were supported by the record the trial court's ruling determining the continued existence of the Ottawa Reservation and the jointly held reservation of United Peorias and Miamis was not an abuse of discretion.

As the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country, *State v. Klindt*, 1989 OK CR 75, ¶ 3, 782 P.2d 401, 403, the trial court properly dismissed the pending prosecutions in Ottawa County Case Nos. CF-2020-129, CF-2020-177 and CF-2020-178.

RESPONSE TO PROPOSITIONS II & III

REMAND FOR AN EVIDENTIARY HEARING IS UNWARRANTED.

THE STATE WAIVED ITS OPPORTUNITY TO PRESENT EVIDENCE REGARDING THE SPECIFIC LOCATIONS OF THE OFFENSES AS IT RELATES TO ARGUMENTS REGARDING STATE JURISDICTION WITHIN THE RESERVATIONS.

In Propositions II & III, the State seeks a remand for an evidentiary hearing on questions it could have presented at the original evidentiary hearings, but did not. The State had ample opportunity to review the specific locales of the alleged offenses and present the evidence that it had criminal jurisdiction on theories other than disestablishment of the reservations.

When the State fails to ensure a sufficient record to determine the question raised on appeal, this Court finds the issue waived. *State v. Tubby*, 2016 OK CR 17, ¶ 10, 387 P.3d 918,921-22. See *Hiler v. State*, 1990 OK CR 54, ¶ 12, 796 P.2d 346, 350 (holding it is the appellant's duty to ensure a sufficient record provided to determine the issues on appeal); *Chambers v. State*, 1988 OK CR 255, ¶ 6, 764 p.2D 536, 537 (refusing to determine issue based on an insufficient record); *Dollar v. State*, 1984 OK CR 1, ¶ 7, 674 P.2d 48, 50 (finding record insufficient for determination of issue).

In *Dollar*, the Court was "unable to determine whether the trial court erred" because "the record before us is insufficient to determine the issue. We reiterate that defense counsel has a duty to insure that a sufficient record

is provided this Court to determine the issues raised." *Dollar v. State,* 1984 OK CR 1, ¶ 7, 674 P.2d 48, 50.

Tubby merely applied the much-exercised requirement that the appealing party (usually the defense) "provide a sufficient record upon which this Court may determine the issue." *Hill v. State*, 1995 OK CR 28, ¶ 10, 898 P.2d 155, 160; *Boyd v. State*, 1987 OK CR 211, ¶ 11, 743 P.2d 674, 676.

The State's substantive arguments on the theory by which it claims jurisdiction via the General Allotment Act (Proposition II) or the purported partition of the reservation of the United Peorias and Miamis (Proposition III) do not require remand, because the State already had an opportunity to present the evidence regarding the particular parcels of land on which the alleged offenses occurred and failed to do so. The State failed to provide this Court the record necessary to decide the claims, and no second bite at the apple is available. The State was well aware of the locations of the alleged offenses, and if those precise locations fell within one of these theories of jurisdiction, the State could have shown it at the evidentiary hearings conducted in 2021. The brief filed by the State merely offers the speculative argument that if these theories of jurisdiction are viable, then maybe the offenses fall within them.

Assuming, arguendo, that the alternate theories of jurisdiction might have any merit, the State failed to demonstrate the offenses alleged against Mr. Brester factually met any of its purported theories for state criminal

jurisdiction. Accordingly, the request for another evidentiary hearing must be denied.

RESPONSE TO STATES PROPOSITION II

THE STATE'S ALTERNATIVE ARGUMENTS FOR STATE CRIMINAL JURISDICTION WITHIN THE OTTAWA RESERVATION IS WITHOUT MERIT.

In its Proposition II, the State claims that Congress subjected "fee lands within the historic Ottawa reservation to all state law, both criminal and civil." Accordingly, the State contended that it is necessary to determine whether the offenses occurred fee land over which the State has criminal jurisdiction. By failing to present evidence that the offenses occurred fee land, thus supporting jurisdiction, the State has waived this claim. *See generally, State v. Tubby,* 2016 OK CR 17, ¶10, 387 P.3d 918, 921-22, where the appellant failed to provide a record from which to review the record, the issue was waived).

Acknowledging that states generally lack jurisdiction who try Indians who commit crimes within Indian Country, the State contended, "But Congress can "expand[] state criminal jurisdiction" in Indian country by "pass[ing] a law conferring jurisdiction" on the state, citing *McGirt,* 140 S.Ct. at 2478.[1] (St's Br. at 26)

[1] The full context of this section of McGirt demonstrates the State's failure to demonstrate any law exists allowing Oklahoma criminal jurisdiction within a reservation. It reads: "Finally, Congress has sometimes expressly expanded state criminal jurisdiction in targeted bills addressing specific States. See, e.g. , 18 U.S.C. § 3243 (creating jurisdiction for Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (same for a reservation in North Dakota); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (same for certain reservations in Iowa); 18 U.S.C. § 1162 (creating jurisdiction for six additional States). But Oklahoma doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over Creek lands. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma. As a result, the MCA applies to Oklahoma according to its usual terms: Only the federal government, not the State, may prosecute Indians for major crimes committed in Indian country."

In support of its request, the State sets forth a number of federal cases dealing with the effect of the General Allotment Act regarding taxation of allotted lands within reservations. (St's Br. 19-24) None of the cases cited by the State addressed the question of criminal jurisdiction in Indian country, which is defined in 18 U.S.C. § 1151(a), establishing "federal and tribal criminal jurisdiction extends to all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation[.]" This Court has recently noted that "Federal law broadly preempts state criminal jurisdiction over crimes committed by, or against, Indians in Indian Country." *Roth v. State*, 2021 OK CR 27, ¶ 12.

McGirt disposed of a similar claim regarding the Muscogee Creek Nation, stating:

> For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected that argument. Remember Congress has defined "Indian country" to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation. So the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians.

McGirt, at 2464

In *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962), the state of Washington contended it had jurisdiction over a crime

committed on an Indian reservation, when the crime occurred on land owned by a non-Indian. The Supreme Court found the issue was put to rest by the definition of Indian country in 1151 to include "all land within the limits of any Indian reservation under the jurisdiction of the Unites States Government, notwithstanding the issuance of any patent. . . . ." *Seymour*, 368 U.S. 351, 357-58.

For criminal jurisdiction within a reservation to depend on the ownership of the exact location would exacerbate the difficulty of defining jurisdiction. Such would require determination of the existence or non-existence of jurisdiction not just by the historic reservation boundaries, but by the ownership records for each particular location within the reservation. "Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid." *Seymour.*, 368 U.S. at 358.

The State's request for remand to determine the ownership of the particular location within the reservation is without merit and should be denied.

> As *Solem* [v. Bartlett] explained, "[o]nce a block of land is set aside for an Indian reservation and *no matter what happens to the title of individual plots within the area*, the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470, 104 S.Ct. 1161 (citing United States v. *Celestine* , 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909)).

McGirt, 140 S.Ct. at 2468.

Accordingly, the trial court did not abuse its discretion and this Court should uphold the trial court's dismissal of the alleged offenses occurring within the Ottawa Reservation, Ottawa County Case Nos. CF-2020-177 and CF-2020-178.

RESPONSE TO PROPOSITION III

EVEN IF THIS COURT FINDS THE "TERMINATION" DISESTABLISHED THE PEORIA TRIBE'S INTEREST IN THE RESERVATION GRANTED TO THE UNITED PEORIAS AND MIAMIS, THE STATE MADE NO CHALLENGE BELOW TO THE MIAMI TRIBE'S CONTINUED, UNDIVIDED INTEREST IN THE SAME RESERVATION.

The State contended that "it is unclear whether the robbery/burglary at issue in case No. CF-2020-129 occurred on historic Peoria or Miami lands. The distinction matters because the Peoria were terminated while the Miami were not." (St's Br. at 38) The State provided no evidence at the evidentiary hearings conducted below that showed the two tribes ever partitioned the joint reservation granted to them or where the purported boundaries of the partitioned reservation exist, nor does it claim to have secured evidence requiring reversal of the trial court. The State only claims the issue should be further investigated. (St's Br. 38-39) Thus there is an inadequate record for this Court to review the issue, and it has been waived. *State v. Tubby,* 2016 OK CR 17, ¶10, 387 P.3d 918, 921-22 (where adequate record is not provided to the court, the court will not review issue). Further, by not presenting this theory to the court below, the State waived appellate review. *Slaughter v. State,* 1997 OK CR 78, ¶ 25, 950 P.2d 839, 850 (where issue is not adequately presented to the court below on the same grounds, it is waived).

In addressing the issues before the lower court, the State agreed the alleged offenses occurred within the boundaries of "what was known as the United Peorias and Miamis reservation." (2/16/21 Tr. 8)

At the March 1, 2021, evidentiary hearing, the State resolved this issue:

> And CF-20-129, that's the one that involves the land that would have been on what we thought of traditionally as Peoria land before we realized that *the Peoria and Miami land is all one and undivided.* And in that one, the State is not really taking a position one way or the other. I mean I would offer the Court that it is the State's position that the Peoria Tribe's interest in that reservation was terminated through the termination restoration process and where that leaves us with the Miami tribe in relation to their undivided interest in that entire reservation is for the Court to determine.

(3/1/21 Tr. 20) (emphasis added)

The State contended that the court below "should have investigated what the tribes' historic understanding was regarding how reservation lands were divided between them. Such a hearing may have resolved which tribes received the various unallotted lands as part of their reservation." (St's Br. at 39)

This argument begs the question of why the State did not present this to the trial court below. If evidence existed that the offense occurred on land within the reservation where the State can prove jurisdiction, the State had ample opportunity to present it.

McGirt again disposes of the issue in the context of the Creek Nation, apt here as well:

> For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected that argument. Remember Congress has defined "Indian country" to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation. So the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians.

McGirt, at 2464

The State's acknowledged confusion over the present status and boundaries of the Miami tribe's interest in the reservation is not sufficient to establish state jurisdiction. As the State failed to present evidence showing anything other than the undivided interest of both the Miami and Peoria tribes in the reservation, as granted by treaty in 1867, the state failed to meet the burden of demonstrating state jurisdiction over Mr. Brester for this offense.

The trial court did not abuse its discretion in its ruling on the evidence and law presented to it. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.The State has shown no abuse of discretion by the trial court's decision based on the record made by the State. Accordingly, this Court should affirm the trial court's ruling dismissing Ottawa County District Court Case No. CF-2020-129.

RESPONSE TO STATE'S PROPOSITION IV

THE TRIAL COURT PROPERLY DISMISSED THE REVOCATION APPLICATION IN CF-2018-298 BECAUSE THE STATE LACKED JURISDICTION FOR THE UNDERLYING OFFENSE.

In Ottawa County District Court Case No. CF-2018-298, Mr. Brester entered a guilty plea to a single count Information on June 6, 2020, prior to the United States Supreme Court decision in *McGirt v. Oklahoma*, 140 U.S. 2452 (2020). Mr. Brester received a suspended sentence at that time, and the State has moved to revoke his probation, based upon allegations he committed the offenses charged in Ottawa County District Court Case No. CF-2020-129. (CF-2018-298 O.R. 81-85)

The State agreed that the underlying offense in CF-2018-298 occurred within the historic boundaries of the Ottawa Tribe's reservation. (2/3/21 Tr. 7) The District Court found "the Defendant has met his burden of proof . . . , that the Court was without jurisdiction in the underlying charge, and that the state lacks jurisdiction to proceed with its pending Motion to Revoke Suspended Sentence. Thus the Judgment and sentence is reversed . . . ." (CF-2020-129 O.R> 266)

Pursuant to *Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d. 686, 688, the State contended that because Mr. Brester's conviction was final, the *McGirt* ruling regarding state criminal jurisdiction over reservation land did not apply. In Matloff, this court declined to apply McGirt retroactively in a state-postconviction proceeding to void a final conviction. Matloff, at ¶ 6.

Subject matter jurisdiction has traditionally been recognized by this Court as a requirement that cannot be waived and can be challenged at any time. The Uniform Post-Conviction Act, 22 O.S.2011, § 1080(b) specifically provides a mechanism for those convicted of an offense to challenge the jurisdiction of the court that sentenced them. The trial court found Mr. Brester did just that. (CF-2020-129 O.R. 265)

Mr. Brester respectfully urges that, at least in cases like his where the district court continues to wield sentencing power over them, the court reconsider its decision in *Matloff* and apply *McGirt's* jurisdictional ruling.

Further, federal law requires that *McGirt* be applied retroactively in state post-conviction proceedings. Under McGirt, the federal government has—and always had—exclusive jurisdiction to prosecute major crimes committed by Indians on reservations. The State has no power to do so, and never has. *McGirt* did not create that rule; rather, the Court's interpretation of federal treaties and statutes is inherently retroactive to the date of their ratification and enactment. See *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994) ("[W]hen the Supreme Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law.").

That allocation of authority is not a mere procedural rule. Rather, it goes to the heart of the Constitution's divestment of state authority (absent a contrary provision by Congress) to proscribe and prosecute major crimes by

Indians on federally recognized reservations. *See Worcester v. Georgia*, 31 U.S. 515, 561 (1832). Under the Supremacy Clause, the federal divestiture of state jurisdiction is the "supreme Law of the land." U.S. Const., art. VI, cl. 2. Because Oklahoma has no jurisdiction to proscribe and punish Appellee's conduct.

"New substantive rules generally apply retroactively" while "[n]ew rules of procedure . . . generally do not." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). The rule announced in *McGirt* is substantive. Substantive rules include those that "alter[] the range of conduct or the class of persons that the law punishes." Id. at 352. "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him." Id. (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). In these cases, "when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful" and "void." *Montgomery v. Louisiana*, 577 U.S. 190, 200-03 (2016).

By excluding a certain class of defendants from state prosecution for certain crimes, the McGirt rule both "place[s] certain criminal laws and punishments altogether beyond the State's power to impose," id. at 201, and "alters . . . the class of persons that the law punishes," *Schriro*, 542 U.S. at 352. Where a State has no authority to prosecute a defendant for a crime, no "possibility of a valid result" can exist. *Montgomery*, 577 U.S. at 201. All

convictions by a court that lacks jurisdiction are, "by definition, unlawful" and "void." Id. at 201, 203; see *Waley v. Johnston,* 316 U.S. 101, 104-05 (1942) (per curiam) ("[J]udgment of conviction is void for want of jurisdiction of the trial court to render it.").

This is especially true where the district court is asked to revoke probation and imprison a person over whom it is aware it lacks jurisdiction. Unlike final cases long dormant, the illegality of the extra-jurisdictional prosecution in cases where the district court is asked to take action in a case where it knows jurisdiction does not lie is untenable.

When a court suspends a sentence, it maintains jurisdiction over the case. *Crowels v. State,* 1984 OK CR 29, ¶ 6, 675 P.2d 451, 453. If a court never had jurisdiction, then any revocation order would be void. *Matloff* did not alter the settled law that Oklahoma courts lack subject matter jurisdiction over Indian Country crimes involving Indians. *See Matloff,* 2021 OK CR 21, ¶ 37, 497 P.3d. 686. Rather, the case addressed only "the remedial scope of the state post-conviction statutes" *Id.*, ¶ 15.

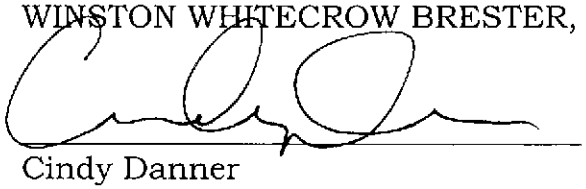
Accordingly, Mr. Brester respectfully asks this court to uphold the findings of the trial court and the dismissal of the underlying conviction for which the state lacks criminal jurisdiction; in the alternative, he requests the court dismiss the pending revocation application due to the state court's lack of jurisdiction to execute an illegally imposed sentence.

CONCLUSION

The State's appeal has been answered by both argument and citation of authority. Mr. Brester urges that the trial court's ruling was proper and based upon sound legal reasoning, and was not an abuse of discretion. Therefore, Appellee respectfully requests that this Court reject the State's claim that the State has criminal jurisdiction over the Ottawa County cases at issue.

Respectfully submitted,

WINSTON WHITECROW BRESTER,

By: 

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CERTIFICATE OF SERVICE

This is to certify that on February 1, 2022, a true and correct copy of the foregoing Brief of Appellee was served upon the Attorney General by leaving a copy with the Clerk of the Court of Criminal Appeals for submission to the Attorney General, and was caused to be mailed, via United States Postal Service, postage pre-paid, to Appellee and District Attorney at the addresses set out below, on the date of filing or the following business day.

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