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 BRESSTER,	)	
	)	
	)	
Appellee.	)	
	)	

BRIEF OF AMICUS CURIAE MIAMI TRIBE OF OKLAHOMA AND OTTAWA TRIBE OF OKLAHOMA

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INTRODUCTION

The Defendant in this case seeks the dismissal of state criminal charges against him because he is an Indian and he committed his alleged crimes in Indian Country. He argues that under federal law,[1] and the United States Supreme Court's recent decision in *McGirt v. Oklahoma*, 591 U.S. __, 140 S. Ct. 2452 (2020), the State of Oklahoma lacked jurisdiction to prosecute him.

Here, as in *McGirt*, the question is whether an Indian defendant committed a crime in Indian Country. In this case, the parties have stipulated that the Defendant is an enrolled citizen of the Seneca-Cayuga Tribe and that the alleged criminal activity occurred in areas of Ottawa County that are within the boundaries of the historical Miami Reservation as to one pending charge, and the historical Ottawa Reservation as to the other.[2] The only remaining contested question in this case, as in *McGirt*, is whether Congress explicitly disestablished or diminished either reservation, so that it no longer constituted Indian Country at the time that the defendant allegedly committed the crime.

The Miami Tribe of Oklahoma and Ottawa Tribe of Oklahoma (the Tribes or the Amici) submit this brief because they each have a continuing interest in maintaining law and order and the safety of all citizens within their reservation boundaries and in protecting their sovereign and treaty-based rights. The Tribes take no position on, and do not

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[1] See 18 U.S.C. § 1151-1153 (the Major Crimes Act and General Crimes Act) and 18 U.S.C § 13 (the Assimilative Crimes Act).

[2] *See Oklahoma v. Brester*, Nos. CF-2020-129, CF-2020-178, CF-2020-179, CF-2018-298, Court Order with Findings of Fact and Conclusions of Law, March 2, 2021, O.R. 232.

interpose this Brief with the intention of addressing, the guilt or innocence of the Defendant but, rather, which sovereign has the jurisdiction to prosecute him for the conduct alleged.

FACTUAL BACKGROUND

A. The 1867 Treaty

The Amici Tribes share elements of a common history. Each originally had a homeland in the east, and each negotiated a series of treaties with the United States spanning from the late 18th century to the Treaty of 1867.[3] In general, in these treaties the tribes promised to cede ownership of specific lands in the east, and in exchange, the United States promised the tribes permanent homes in the west, often accompanied by goods and cash annuities.[4] The treaties signed by the Amici Tribes in this case are similar to the

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[3] *See, e.g.*, *Wiggan v. Connolly*, 163 U.S. 56, 63 (1896) (concluding that the Ottawa Tribe (and other tribes including the Miami) negotiated the Treaty of 1867 to allow its citizens to "remove to the Indian Territory and continue their tribal relations. . . . with the government."); *Miami Tribe of Oklahoma v. United States*, 656 F.3d 1129, 1132–33 (10th Cir. 2011) (describing history of the Miami Tribe of Oklahoma up to the signing of the Treaty of 1867).

[4] Miami Tribe: *See* Art. 10 of Treaty of 1838 with the Miami, 7 Stat., 569, Nov. 6, 1838, *reprinted in* Kappler, Charles, *Indian Affairs: Laws and Treaties.*, Vol. 2, 519 (Government Printing Office: 1904)(the Miami Tribe ceded land in exchange for money and for a promise that the United States would "guaranty to [the Miami Tribe] forever, a country west of the Mississippi River to remove to and settle on ..."; Art. 12 of Treaty of 1840 with the Miami, 7 Stat. 582, Nov. 28, 1840, *reprinted in* Kappler, Charles, *Indian Affairs: Laws and Treaties.*, Vol. 2, 531 (Government Printing Office: 1904)(the Miami Tribe ceded additional land in exchange for money and for a specific tract of land in the west, in what would later become the State of Kansas).
Ottawa Tribe: In Article III of the Treaty with the Ottawa, etc. 1831, 7 Stat. 359, Aug. 30, 1831 ("1831 Treaty"), the Ottawa Tribe ceded lands in Ohio and, in exchange, the United States promised the Tribe specific land west of the Mississippi "to them and their heirs for ever [sic], as long as they shall exist as a nation, and remain upon the same." *Id.* at Art. IX. In Article IX of the 1831 Treaty, the Ottawa Tribe promised that they would never sell those lands to anyone except the United States, and in exchange:

removal era treaties signed by the Creek tribe in *McGirt.* All of these treaties, both in this case and in *McGirt*, reflect a common trend of the time; as non-Indian settlers pushed westward, the United States adopted a policy of "removal" aimed at moving Amici Indian tribes away from the path of non-Indian expansion.[5]

A reservation for each tribe was established in the Indian Territory by the 1867 Treaty.[6] In that Treaty, the United States removed certain tribes, including the Ottawa, Miami, Wyandotte, and Confederated Peoria Tribes, from Kansas and moved them to the Indian Territory in the northeast corner of what would later become the state of Oklahoma. Under Articles I through IV of the Treaty of 1867 the Seneca, Eastern Shawnee, and Quapaw tribes ceded ownership of specific parcels of land in the Indian Territory to the United States, and these parcels were then sold by the United States to the tribes that were being removed from Kansas to Indian Territory, including the Ottawa, the Miami, and the Confederated Peoria Tribes.[7] By Article 16 of the 1867 Treaty, the United States

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> the United States guarantee[s] that said lands shall never be within the bounds of any State or territory, nor subject to the laws thereof, and further, that the President of the United States will cause said band to be protected at their new residence, against all interruption or disturbance from any other tribe or nation of Indians and from any other person or persons whatever …

[5] *See generally*, Francis Paul Prucha, The Great Father: The United States Government and the American Indian, (1995), p. 243 et. seq (Chapter 9 addressing the removal of the northern tribes).

[6] Treaty with the Seneca, Mixed Seneca and Shawnee, Quapaw, etc. February, 23, 1867, 15 Stat. 513, reprinted in Kappler, Charles, *Indian Affairs: Laws and Treaties*, Vol. 2, 960 (Government Printing Office: 1904)(hereinafter, "Treaty of 1867").

[7] *See* Treaty of 1867, Arts. 5–26.

established the Ottawa Reservation, purchasing land with the proceeds from the Tribe's sale of its Reservation in Kansas.[8] By Article 26 of the 1867 Treaty, the United States established the Miami Reservation by allowing the Miami to purchase an undivided interest in a reservation jointly established with the confederated Peoria tribes.[9]

The State does not dispute that the 1867 Treaty established a reservation for both Amici.[10] The State also does not argue that either reservation was disestablished by any allotment era statutes.[11]

B. The Relationship Between the Miami and Confederated Peoria Tribes.

In the District Court below, the State argued that the Miami Tribe and the Peoria Tribe were confederated into one political unit sometime in the 1870s,[12] and then inexplicably separated in the 1920s.[13] The State has apparently abandoned that argument on appeal.

The State also acknowledged to the District Court that the Reservation shared by the Miami Tribe and Peoria Tribe was never partitioned such that the two Tribes each hold

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[8] *See* Treaty of 1867, Art. 16.
[9] *See* Treaty of 1867, Art. 26.
[10] *Oklahoma v. Bresster,* S-2021-209, Appellant's Brief, at 9 and 30, October 4, 2021 (hereinafter "Appellant's Br.).
[11] *Id.* For additional background information on the establishment of these reservations and how they were affected by allotment era statues, the Amici refer the Court to the amicus curiae briefs filed *Oklahoma v. Dixon*, No. S-2021-205 (Ottawa) and *Oklahoma v. Lee*, No. S-2021-206 (Miami).
[12] *Oklahoma v. Brester*, No. S-2021-206, (O.R. 46), State's Amended Response to Defendant's Motion to Dismiss, at 16, Feb. 1, 2021.
[13] *Id.* at 19 (O.R. 149) ("In the 1920's, the Miami Tribe split away from the United Peorias and Miamis. It is unclear how this was accomplished. The State is unable to locate any record of the split.")

an undivided interest in the whole Reservation.[14] On appeal, the State argues, in a single sentence, the exact opposite, claiming that Congress implicitly partitioned the Reservation into two separate reservations in 1889.[15]

The State's shifting historical theories about the relationship of the Miami and Peoria tribes and the nature of their shared Reservation are unnecessarily confusing, convoluted, and inaccurate. The treaties between the Miami Tribe and the confederated Peoria Tribes and the United States make clear that the two Tribes were never combined into one political unit, but they did end up sharing a reservation, a circumstance that is not unique in Indian Country.[16]

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[14] *Id.* at 16 (O.R. 146) ("Thus was created the United Peorias and Miamis with all the tribes sharing undivided interests in the reservation"); at 19 (O.R. 149) ("Most importantly, no provisions were made during the [1920s] to account for partition of the jointly held undivided interests in the United Peoria and Miami's reservation."); at 20 (O.R. 150) ("Still, with both tribes having been recognized as separate tribes by the federal government [under the IRA in the 1930s], no action was taken to address the issue of partition of the United Peorias and Miami's reservation."); *see also Oklahoma v. Brester*, No. S-2021-209, (O.R. 198), Tr. 27, lines 6-9 ("[After the tribes supposedly deconfederated in the 1920s] no one has done anything to address the dividing of the united [R]eservation. And, again, those are jointly held, undivided interests."); *Id.* O.R. 198, Tr. 27-28, lines 24-5 ("So after the – after the Reorganization Act, and the federal government recognizes both of these tribes, still no one takes any action, in any way whatsoever, to address the problem of these two separate tribes owning undivided interests – undivided proportional interest in a united reservation."); *Id.* O.R. 198, Tr. 32, lines 17-18 ("Now, I am not arguing that the lack of partition would disestablish the Miami's interest in a reservation. I don't think that is the case.")

[15] Appellant's Br., at 27 ("Congress ordered the allotment of the Peoria and Miami lands in 1889, separating the tribes into two distinct reservations.")

[16] Two sovereigns sharing a single reservation is not unique. The Wind River Reservation in Wyoming is home to both the Eastern Shoshone Tribe and the Northern Arapahoe Tribe. *See*, Wind River Indian Reservation, https://en.wikipedia.org/wiki/Wind_River_Indian_Reservation (last accessed 2/23/21). The Barona and Viejas Bands of Kumeyaay Indians are independently recognized tribes

In 1854, the Peoria Tribe confederated with the Kaskaskia, Piankeshaw, and Wea Indians into one political and sovereign unit, and were subsequently treated by the United States as one tribe.[17] This confederated Peoria Tribe did not include the Miami Tribe. Then, in 1867, several tribes then resident in Kansas, including both the Miami Tribe and the confederated Peoria Tribe were removed from Kansas to the Indian Territory. Section 22 of the 1867 Treaty provides that the United States would establish a 50,000-acre reservation in what is now northeastern Oklahoma, to which the Miami and the

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who share joint land patents to a 15,000-acre reservation in southern California. *See* Capitan Grande Reservation, https://en.wikipedia.org/wiki/Capitan_Grande_Reservation (last accessed 2/23/21). In addition, numerous tribes have joint-use areas and joint use agreements with other tribes as well, including the Kickapoo Reservation/Sac and Fox Nation Trust Land joint-use area, the San Felipe Pueblo/Santa Ana Pueblo joint-use area, and the San Felipe Pueblo/Santo Domingo Pueblo joint-use area. In fact, the Miami Tribe holds an undivided interest in a parcel of trust land along with the Ottawa, Wyandotte, Peoria, Eastern Shawnee, Shawnee, Seneca Cayuga and Modoc Tribes, which is located within the Ottawa Reservation. *See* P.L. 93-588, Jan. 2, 1975.

[17] *See* Art. 1 of the Treaty with the Kaskaskia, Peoria, Etc. 1854, 10 Stat. 1082, May 30, 1854, reprinted in Kappler, Charles, *Indian Affairs: Laws and Treaties*, Vol. 2, 636 (Government Printing Office: 1904). Article 1 reads:

> The tribes of the Kaskaskia and Peoria Indians, and of the Piankeshaw and Wea Indians, parties to the two [earlier] treaties made with them respectively ... having recently in joint council assembled, united themselves into a single tribe, and having expressed a desire to be recognized and regarded as such, the United States hereby assent to the action of said joint council to this end, and now recognize the delegates who sign and seal this instrument as the authorized representative of said consolidated tribe.

There is no similar treaty, statute, or other historical document expressing a mutual intent to join the Miami Tribe to this confederated Peoria tribe.

Confederated Peoria would remove. By Section 26 of that Treaty the Miami Tribe were authorized to purchase an undivided interest in that same Reservation, which they did.[18]

Whatever else the State argues regarding the Peoria Tribe, the Miami Tribe has held a continuous and undivided interest in the entire reservation as established by the 1867 Treaty and paid for by the Miami Tribe in 1879.[19] As discussed below, the State's new appellate theory that Congress has implicitly directed a legal partition and reduction of each Tribe's interest in the 1867 Reservation through allotment cannot be squared with the plain language of the 1867 Treaty, the General Allotment Act, 25 U.S.C. § 340, or with any subsequent Congressional enactment identified by the State.

C. The Termination Period and the Ottawa Tribe.

In 1956, during the short-lived Termination Era of federal Indian policy, the United States passed legislation terminating its intergovernmental relationship with the Ottawa Tribe.[20] The Miami Tribe was never subject to any termination legislation. The Ottawa

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[18] *See* Articles 22 and 26 of the Treaty of 1867, 15 Stat. 513, Feb. 23, 1867. In 1875, the Miami Tribe Chief Richardville wrote the Commissioner of Indian Affairs complaining that the Peoria Tribe still had not been paid for the Miami's undivided interest in the Reservation. It took still four years for payment to be made, but in May of 1879, a full payment of $24,952.03 was made to the Peoria for the Miami Tribe's undivided interest in the Reservation. William Nicholson to Hiram W. Jones, Receipt for payment for lands sold to the Miamis of Kansas, May 8, 1879, Quapaw Agency Letters Received, Copies Letters Sent and other Documents Concerning the Miami (May 17, 1848 - December 12, 1881), Oklahoma Historical Society, Indian Archives Division, Series 11, Microfilm Roll 6, digitized page 554. The Miami's interest in the Reservation would not, therefore, be reflected in relevant Annual Reports or maps of the Indian Territory until *after* 1879.

[19] Appellant's Br. at 29 ("Congressional reports make clear that the Miami are a separate entity not addressed by the Peoria Termination Act.")

[20] Pub. L. 943, 70 Stat. 963 (hereinafter "Termination Act").

Termination Act contemplated that the Tribe would continue to exist,[21] but ended federal supervision of tribal property,[22] federal services available to tribal member Indians,[23] and extended state law to tribal members.[24] The Termination Era lasted just 20 years, and was abandoned and replaced with a policy of encouraging tribal sovereignty and self-determination.[25] In 1978, Congress passed the Ottawa Restoration Act,[26] which both expressly repealed The Ottawa Termination Act and fully restored all "rights and privileges" of the Ottawa Tribe and its members, including treaty rights, that were or might have been interpreted to have been "diminished or lost" by the Termination Act.[27] Since that time, the Ottawa Tribe has enjoyed the same sovereign intergovernmental relationship with the United States, and rights, privileges, and authorities of a sovereign Indian tribe, that it possessed prior to 1956.

ARGUMENTS AND AUTHORITY

The State's primary contention on appeal is that both the Ottawa and Peoria Reservations were implicitly and permanently disestablished by the suspension of their

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[21] *See id.*, § 9(b)(continuing tribal existence would be without federal supervision) and § 11 (tribal waters rights not terminated by act).
[22] *Id.*, § 2–3, 5.
[23] *Id.*, § 8.
[24] *Id.*, § 8(a).
[25] *See* Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 Conn. L. Rev. 777, 779–82 (2006) (describing origins of self-determination period); *see also* President Richard Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970) ("Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.").
[26] Pub. L. 95-281, 92 Stat. 246, 246 (1978) (hereinafter "Restoration Act").
[27] *Id.*

government-to-government relationships with the United States from 1959 to 1978. The State also believes a remand is warranted in case CF-2020-129 because it now argues for the first time on appeal that the reservation shared by the Miami Tribe and the Peoria Tribe was implicitly partitioned through allotment, and the Court below should have determined where the crimes in that case took place because the Peoria Reservation, but not the Miami Reservation, was disestablished. This brief will first address the State's Propositions 1 and 2 related to the Ottawa Tribe, and then Proposition 3 related to the Miami Tribe. The Amici express no opinion on Proposition 4.

Proposition 1: Congress Has Never Disestablished the Ottawa Reservation

A. Standard of Review

On appellate review the Court, "afford[s] a district court's factual findings that are supported by the record great deference and review those findings for an abuse of discretion [and] decide[s] the correctness of legal conclusions based on those facts without deference."[28]

B. *McGirt v. Oklahoma* Sets Forth the Governing Standard for Reservation Disestablishment.

The United States Supreme Court's decision in *McGirt v. Oklahoma* reiterated the fundamental rule that "once a reservation is established, it retains that status until Congress explicitly indicates otherwise."[29] The "only step proper for a court of law" in applying that

[28] *Parker v. State*, 2021 OK CR 17, ¶ 34, 495 P.3d 653, 665 (citations omitted).
[29] 140 S. Ct. at 2469 (citations omitted).

rule is to interpret the relevant statutes and to "follow the[ir] original meaning."[30] Neither historical events, nor demographics are part of the analysis, as neither "can suffice to disestablish or diminish reservations."[31] Instead, to disestablish a reservation, Congress must explicitly express its intent to do so, with either an "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests."[32]

C. The United States Established a Reservation for the Ottawa Tribe and Congress has Never Disestablished that Reservation.

In the District Court below, and in its brief in this Court, the State has acknowledged that a reservation was established by the Ottawa Tribe in the 1867 Treaty,[33] and there is no dispute in this case that Congress did not disestablish the reservation at any time between 1867 and 1956. The State, however, argues that the Ottawa Termination Act implicitly and permanently disestablished the Ottawa Reservation in 1956, despite the fact that the Termination Act was expressly and unqualifiedly repealed in 1978.

As the District Court noted, the State's argument is based entirely on Congressional action by implication: "The State indicates that although it has searched and spent considerable time looking into the issue, it has found no clear statutory language of

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[30] *Id.* at 2468 (citations omitted).
[31] *Id.* at 2468–69.
[32] *Id.* at 2463.
[33] Appellant's Br. At 9 ("The Ottawa received a reservation in 1867."); *See Oklahoma v. Brester*, Nos. CF-2020-129, CF-2020-178, CF-2020-179, CF-2018-298, Court Order with Findings of Fact and Conclusions of Law, March 2, 2021 (O.R. 232) ("The State admits that prior to 1956 there was an existing Ottawa reservation ....")

disestablishment by any Act of Congress."[34] At its essence, the State argues, argues that by temporarily suspending its government-to-government relationship with the Tribe through termination, Congress must have intended to permanently disestablish the reservation without actually saying so. As discussed below, the State's argument falls far short of the burden under *McGirt*, which requires an explicit expression of Congress to disestablish a reservation, which the State acknowledged to the District Court it could not demonstrate[35]

However, it does not ultimately matter what the Termination Act did or did not do, because Congress expressly repealed it in 1978, rendering it a legal nullity.[36] More than a simple repeal, Congress, in the Ottawa Restoration Act, also expressly expressed that the Ottawa Tribe was returned to the status and rights it enjoyed prior to termination. The State acknowledgement that the Ottawa Tribe had a treaty-based reservation prior to 1956,[37] renders its argument based on the repealed Termination Act legally and factually untenable.

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[34] *See Oklahoma v. Brester*, Nos. CF-2020-129, CF-2020-178, CF-2020-179, CF-2018-298, Court Order with Findings of Fact and Conclusions of Law, March 2, 2021 (O.R. 232)
[35] *McGirt*, 140 S.Ct. at 2462 ("If Congress wishes to break the promise of a reservation, it must say so.")
[36] Ottawa Restoration Act, 92 Stat. 246.
[37] *See Oklahoma v. Brester*, Nos. CF-2020-129, CF-2020-178, CF-2020-179, CF-2018-298, Court Order with Findings of Fact and Conclusions of Law, March 2, 2021 (O.R. 232) ("The State admits that prior to 1956 there was an existing Ottawa reservation ....")

1. The Express Repeal of the Termination Act Renders It a Legal Nullity that Cannot Serve as the Basis for Finding Disestablishment.

As a preliminary matter, the Termination Act, and any effect that it might have had in 1956, should not be considered by the Court because the Act was expressly repealed by the Ottawa Restoration Act rendering negating any effect it ever had on the Ottawa Tribe or its Reservation.

Recognizing that the termination era policies were "a failure" and seeking to "right the wrong," [38] on May 15, 1978, Congress passed the Ottawa Restoration Act, [39] which expressly repealed the Ottawa Termination Act.[40] The repeal was full and unqualified.[41] As a result, the Termination Act is a legal nullity, because where Congress expressly repeals a statute, "Congress overtly state[s] with specificity that the subsequent statute repeals a[n] . . . earlier statute"[42] the express "repeal of a statute renders the rescinded act as if it never existed."[43] The result of an express repeal "is to destroy the effectiveness of the repealed act *in futuro* and to divest the right to proceed under the statute, which, except

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[38] Congressional Record, Proceedings and Debates of the 95th Congress, S. 661, April 11, 1978, pp. H2717-18.
[39] Ottawa Restoration Act, 92 Stat. 246.
[40] 92 Stat. 246, 246(b)(3).
[41] *See* 70 Stat. 963; 92 Stat. 246.
[42] *Patten v. United States*, 116 F.3d 1029, 1033 (4th Cir. 1997).
[43] *Women Aware v. Reagen*, 331 N.W.2d 88, 91 (Iowa 1983); *see also Yakima Valley Mem'l Hosp. v. Washington State Dep't of Health*, 654 F.3d 919, 934 (9th Cir. 2011) (quoting *Ex Parte McCardle*, 74 U.S. 506, 514 (1868) ("the general rule ... [has been] that when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.").

as to proceedings past and closed, is considered as if it had never existed.'"[44] This has been the consistent approach used by courts regarding the repeal of federal statutes for more than 150 years.[45]

As Judge Baird held below,

> This Court need not determine whether the 1956 Act extinguished or reduced the existing Ottawa reservation as the clear language passed by [C]ongress 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." . . . The Court specifically finds no language in the 1956 Act which would terminate anything other than "Federal supervision over the trust and restricted property of the Ottawa Tribe" and "of Federal services furnished to such Indians."[46]

Because the Termination Act was expressly repealed by the Restoration Act, and the repeal was full and unqualified, this Court must proceed as if the Termination Act never existed. The Restoration Act thus divested the State of any arguments under the Termination Act, and the State cannot now claim that the Termination Act—which in the eyes of the law never existed—serves as a basis for reservation disestablishment.

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[44] *Isenstein v. Rosewell*, 478 N.E.2d 330, 335 (Ill. 1985) (quoting A. J. Sutherland, Statutory Construction § 23.33, 279 (4th ed. 1972)).

[45] "[T]he general rule, supported by the best elementary writers, is, that when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." *Ex parte McCardle*, 74 U.S. 506, 514 (1868) (quotations omitted); *see also* 1A Sutherland Statutory Construction § 23:34 (7th ed.) ("Repeal of a statute having neither a saving clause nor a general saving statute to prescribe the governing rule for the effect of the repeal destroys the effectiveness of the repealed act *in futuro* and divests the right to proceed under the statute. Except as to proceedings past and closed, the statute is considered as if it had never existed.").

[46] *Oklahoma v. Brester*, No. CF-2020-129, Court Order with Findings of Fact and Conclusions of Law, March 2, 2021 (O.R. 232) at 2.

2. The Restoration Act Expressly Restored All Treaty Rights That May Have Been Diminished by the Termination Act, Including the Ottawa Reservation.

In addition to expressly repealing the Termination Act, Congress also explicitly "reinstate[d] 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.*"[47] Thus—even if the Termination Act is read to have diminished the Ottawa Reservation (which it did not), the plain language of the Restoration Act explicitly and unqualifiedly reinstates all treaty rights of the Ottawa Tribe that might have been affected including the Reservation which was established by the 1867 Treaty. Congress understood that the restored tribes had reservations that were established by the 1867 Treaty, and the plain language of the Restoration Act demonstrates Congress's intent to restore all treaty rights, without limitation, that may have been lost via statutes aiming to terminate the federal government's relationship with those Tribes.[48]

[47] Pub. L. No. 95-281, 92 Stat. 246, § 1(c) (May 15, 1978) (emphasis supplied). The legislative history of the Restoration Act reveals Congress's intent to "reinstate[] all rights and privileges lost by the three tribes under any treaty or statutes because of termination." H.R. Rep. No. 95-1019 at 4 (1978). In addition to restoring federal recognition to the Ottawa Tribe, the Restoration Act explicitly repealed statutes that terminated or attempted to terminate federal recognition of the Modoc, Confederated Peoria, and Wyandotte Tribes in Eastern Oklahoma and restored all the rights and privileges to those tribes. The legislative history of the Restoration Act largely discusses the tribes collectively. Additionally, it acknowledges that the tribes were eventually settled on reservations in Indian Territory after entering into a series of treaties with the United States. H.R. Rep. No. 95-1019 at 2–3 (1978).

[48] *McGirt*, 140 S. Ct. at 2469 ("There is no need to consult extratextual sources when the meaning of the statute's terms is clear.")

The language of the Restoration Act is nearly identical to that of a similar statute that restored federal recognition to the Menominee Tribe of Wisconsin. Like the Ottawa Restoration Act, the Menominee restoration legislation expressly repealed the Menominee Termination Act and restored all "rights and privileges of the tribe,,,[that] may have been diminished or lost" as a result of the termination Act:

> [t]he Act of June 17, 1954 (68 Stat. 250; 25 U.S.C. secs. 891–902), as amended, is hereby repealed and there are hereby reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to such Act.[49]

In *Wisconsin v. Webster*, the Supreme Court of Wisconsin held that the Menominee restoration language resolved any doubt about any lingering effect of the Termination Act following express repeal:

> Any doubts as to the effect of the Termination Plan are resolved by the provisions of the Restoration Act reinstating any rights and privileges which might have been diminished or lost pursuant to the Termination Act. Thus, even assuming that the transfer of roads under the Termination Plan somehow removed the underlying land from the reservation, we conclude Congress intended to restore the Menominee's rights to that land when it enacted the Menominee Restoration Act.[50]

Here, the Ottawa Restoration Act uses the same statutory language that is aimed at the same legal effect. Any argument that the Termination Act disestablished the Ottawa Reservation, is resolved by the Restoration Act's "reinstate[ment of] all rights and privileges . . . under Federal *treaty*, statute, or otherwise," which restored the Ottawa

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[49] Pub. L. No. 93-197, 87 Stat. 770, § 3(B) (1973).

[50] *Wisconsin v. Webster*, 338 N.W.2d 474, 480 (Wis. 1983). Importantly, the court first found that nothing within the tribe's termination legislation expressly showed a congressional intent to remove the reservation rights in question. *Id.* at 480–81.

Reservation to its status before the enactment of the Termination Act.[51] Moreover, as discussed in this brief below, any argument that rights that were affected by the Termination Act are lost if not expressly restored by the Restoration Act must be rejected because it ignores the fact that the repealed statute has no continuing effect.

3. The Restoration Act Makes Provisions for an Ottawa Reservation and Specifically Adds to the Tribe's Land Base.

The State argues because the Restoration Act did not explicitly mention the re-creation of a reservation, that the Ottawa's Reservation was not restored along with the rest of its treaty rights.[52] However, the State's argument seems to ignore the plain language of the Restoration Act, which makes specific provision for the Ottawa Reservation in two separate places.

First, as mentioned above, in subsection 1(c) Congress restored all treaty rights to the Ottawa. Congress was aware, and the State acknowledges in this case, the Ottawa had a treaty-based reservation at least up until termination. Therefore, even if the Termination Act impacted the tribe's reservation, the Restoration Act specifically undid that impact. The State's argument requiring a specific "re-creation" of a reservation would require that Congress not only restore all of the Ottawa's treaty-based rights in 1978, but then repeat itself by spelling out in statute what each and every one of those rights entailed. The language restoring all treaty rights in subsection 1(c) should be sufficient. Congress should not have to repeat itself twice.

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[51] Pub. L. No. 95-281, 92 Stat. 246, § 1(c) (May 15, 1978) (emphasis added).
[52] Appellant's Br., at 14-15

Second, the Restoration Act provides for an additional, new piece of tribal trust land to be added for the Ottawa Tribe after restoration. Section 3(a) of the Restoration Act specifies that the restoration of the Ottawa Tribe will result in the tribe holding a joint interest in a specific parcel of trust land, originally granted under a separate 1975 statute.[53] Reading the 1975 trust act with the specific reference in subsection 3(a) of the 1978 Restoration Act, it becomes clear that Congress anticipated that the Ottawa would have a federally supervised reservation after restoration, and that Congress intended to even augment the land base held specifically for the Ottawa.

The State's reference to the Siletz Restoration Act[54] is important for the Court to consider, but not for the reason apparently offered by the State. The State suggests that silence in the Ottawa Restoration Act means that a reservation was not one of the rights restored. While that is a fatally flawed argument[55] standing alone, the Siletz Restoration Act demonstrates that the Ottawa Restoration Act must not be interpretated as limiting the restoration of a treaty-guaranteed reservation.

A comparison of the Siletz Restoration Act and the Ottawa Restoration Act shows that the same Congress that passed both pieces of legislation intended for the Ottawa Reservation to continuing existing after restoration, while directing a different result in the case of the Siletz. The Siletz Restoration Act was enacted by the same 95th Congress that enacted the Ottawa Restoration Act just six months prior to enactment of the Ottawa

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[53] See Pub. L. 93-588.
[54] Appellant's Br., at 14 and 35.
[55] See discussion below at subsection 4.

Restoration Act. While Section 1(d) of both restoration acts are virtually identical, Section 1(c) of the Siletz Restoration Act specifically disavows "granting, establishing or restoring a reservation."[56] Section 1(c) of Ottawa Restoration Act—drafted six months later by the same Congress—does not include the anti-reservation language found in the Siletz Act.[57]

Due to their common purposes, similar time periods and identical authors, these statutes must be viewed *in pari materia* and read in harmony with one another. *See United*

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[56] Section 1:

> (c) This Act shall not grant or restore any hunting, fishing, or trapping right of any nature, including any indirect or procedural right or advantage, to the tribe or any member of the tribe, **nor shall it be construed as granting, establishing, or restoring a reservation for the tribe.**
>
> (d) Except as specifically provided in this Act, nothing in this Act shall alter any property right or obligation, any contractual right or obligation, or any obligation for taxes already levied.

(emphasis added).

[57] Section 1 (of the Ottawa Restoration Act):

> (c) There are hereby reinstated all rights and privileges of each of the tribes described in subsection (a) of this section 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. Nothing contained in this Act shall diminish any rights or privileges enjoyed by each of such tribes or their members now or prior to enactment of such Act, under Federal treaty, statute, or otherwise, which are not inconsistent with the provisions of this Act.
>
> (d) Except as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligation for taxes already levied

States v. Feltner, 546 F. Supp. 1002, 1016-17 (D. Utah 1982) (reading tribal termination acts in pari materia with other Indian Country legislation of the era), *affirmed by United States v. Feltner*, 752 F.2d 1505 (10th Cir. 1985). Six months prior to the Ottawa Restoration Act, the 95th Congress demonstrated that it knew precisely how to disavow restoring a reservation and that it does so by express language not by silence.

Lastly, and notably, the Ottawa Restoration Act expressly repealed the Ottawa Termination Act by name. The Siletz Restoration Act did not. Rather it restored rights while the Siletz Termination Act remained in force—albeit not applicable to the Siletz. Again, the same Congress drafted and enacted both the Siletz and Ottawa restoration acts. Based on the reading of these acts, and others discussed below, Congress knew that a restoration of a tribe and a restoration of treaty rights, without specific disavowing language, would reinstate a tribe's reservation boundaries.

4. The Plain Language of Subsection 1(d) of the Restoration Act Demonstrates That Congress Intended That the Ottawa Reservation Would Continue to Exist After Restoration.

Throughout its argument, the State uses a clipped reading of subsection 1(d) of the Restoration Act to argue that Congress implicitly excluded the Ottawa Reservation from the treaty rights that were restored by Section 1(c) of the Act. The State relies on the phrase "nothing in the Act shall alter any property rights or obligations" as indicating that Congress implicitly refused to "recreate" a reservation via restoration.[58] However, in doing

[58] Appellant's Br., at 14. ("Thus, because the [Restoration] statute did not 'alter any property rights or obligations' no reservation was recreated.")

so, the State ignores the actual language of subsection (d) and applies that misreading in a way that ignores subsections (a)-(c). Such an interpretation is not supported by applicable cannons of statutory construction or the requirements for explicit disestablishment language in the *McGirt* decision.

The State's analysis of subsection 1(d) leaves out key words. Rather than providing that the Act would not affect property rights, as the State suggests, Congress acknowledged that Act would affect property rights. Subsection 1(d) begins by stating "*Except as otherwise provided in this act*, nothing in the Act shall alter any property rights or obligations ...". There is no need for this prefactory phase if Congress did not intend for the rest of the Restoration Act to affect specific property rights.[59] And Congress did, in fact, affect property rights and obligations in other parts of the Act, including treaty rights, as evidenced by the plain language of subsections (a)-(c). The State's failure to acknowledge the introductory clause of Section 1(d) results in flipping the meaning of the Subsection on its head and is frankly, misleading. Congress intended for the Restoration Act to affect property rights, as indicated by subsections 1(a)-(c), and the first phrase in subsection 1(d) recognizes that fact.

The State also mentions, but fails to engage with, the *remainder* of the subsection 1(d), which provides that the Restoration Act shall not affect the obligations for any taxes

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[59] *See, e.g., Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("The rule against superfluities complements the principle that courts are to interpret the words of a statute in context. See 2A N. Singer, Statutes and Statutory Construction §46.06, pp. 181–186 (rev. 6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ... ." (footnotes omitted)).")

already levied.[60] This language would be meaningless, and unnecessary, unless Congress understood that the Restoration Act would restore some lands that were taxable during the termination period to the nontaxable status those lands held prior to termination. The only lands that could fit this category are either tribal lands or individual allotments held by the United States in trust for either the tribe or individual. Congress would have had no reason to use this language unless it understood that the Ottawa Reservation was restored by the Act.

Finally, subsection 1(d) is not, as the State argues, an implicit exclusion of the Ottawa Reservation from the treaty rights restored by Congress. Instead, subsection 1(d) explains how the changes in subsection 1(a)-(c) are to be implemented. Because the State's argument cannot be reconciled with either the actual text of subsection 1(d), or with the Supreme Court's requirement that a reduction in tribal rights be expressly stated, it should be rejected.

5. All of the State's Other Arguments Purporting Disestablishment of the Ottawa Reservation Are Without Merit.

Having admitted to the District Court that it could not identify specific language disestablishing the Ottawa Reservation, the State nevertheless argues on appeal that permanent disestablishment of the Ottawa Reservation should be implied from the two-decade interruption in federal superintendence of the Ottawa Reservation during the termination period. This new route to finding disestablishment is untethered to any

[60] Appellant's Br., at 9 and 30.

Supreme Court precedent, is contrary to the Supreme Court's ruling in *McGirt*, and should be rejected.

The State's new implicit disestablishment theory relies on a misreading of dicta in *United States v. John*, 437 U.S. 634 (1978). *John* had nothing to do with a Tribal restoration act or the status of a tribe's Treaty reservation boundary. Rather, it concerned whether a reservation had been *created* in the first instance, which the State in this case has admitted occurred and which is not at issue on appeal.[61] In *John*, if a reservation had been *created* for the Mississippi Choctaws, then federal law preempted state criminal jurisdiction under the Major Crimes Act. The Mississippi land in question had been ceded by the Mississippi Choctaw to the United States in the Treaty in 1831, but was reacquired for that Tribe by the United States in 1939 and recognized by the federal government as the Tribe's reservation.[62] The Court concluded that, despite a gap of 108 years where there was no federal supervision of the tribal land, Congress had created a reservation in 1939 by statute.[63] Thus, *John* dealt with the proper test for the *establishment* of a reservation, not *disestablishment*. The State does not contest the establishment of the Ottawa Reservation or its existence until 1956. Its reliance on *John* is inapposite because that case

[61] 437 U.S. at 651–53.
[62] *Id.* at 646.
[63] *Id.* at 649.

says nothing about the disestablishment of a reservation, nor does it address the impact of a repealed termination act on the disestablishment standard.

The State performs no better with respect to its treatment of cases it cites regarding termination and disestablishment of an Indian reservation. For example, the State alleges that the United States Supreme Court has "repeatedly confirmed that termination of federal supervision destroys reservation status," but cites a single case, *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). The State claims that the Klamath Termination Act, discussed in that case, is "materially identical" to the Ottawa Termination Act.[64] That is simply wrong, as a casual review of that decision demonstrates.

Rather than being "materially identical," the Klamath Termination Act and the Ottawa Termination Act are significantly and substantively different. The Klamath Termination Act (1) closed the tribal membership rolls for the Tribe, (2) directed the Secretary of the Interior to catalog and appraise all personal or real property belonging to the tribe, (3) directed the Secretary to either sell that property and distribute the proceeds to tribal members or put the property aside for conservation and management.[65] There is nothing even remotely comparable in the Ottawa Termination Act closing tribal membership rolls or selling tribal property. While Klamath Termination Act has that kind of language, the Ottawa Termination Act does not. In the Klamath Termination Act, Congress was express a meticulous in its effort to destroy the Tribal fabric of the Klamath

[64] Appellant's Br., at 10 and 31.
[65] *See* Secs. 3 and 5 of Pub. L. 587, Aug. 13, 1954.

people and their relatives. Rather than being "materially identical" the Klamath Termination Act is so substantively different in material ways to the Ottawa Termination Act that the State's comparison is non-sensical. In fact, the Klamath Termination Act probably best demonstrates what Congress was capable of and did not do to the Ottawa Tribe, much to their relief.

The State further alleges that "lower courts are in agreement that the termination of federal supervision necessarily disestablishes and abolishes a reservation as of the date the Termination Act became fully effective."[66] But the only cases the State cites for this broad and definitive statement trace back to the 1954 Klamath Termination Act, just discussed. Contrary to the State's broad claim, none of the cited cases holds that the termination of federal supervision automatically triggers the disestablishment of a reservation.

This Court has held that federal law preempts the kind of state criminal jurisdiction in Indian Country that the State is trying to exercise here.[67] This Court has also held that the State may only defeat this federal preemption by following the parameters set out in McGirt.[68] This Court should reject the State's poorly supported argument that the termination of federal services to the Ottawa Tribe between 1956 and 1978 implicitly and

[66] Appellant's Br., at 12 and 32.
[67] *Roth v. State*, 2021 OK CR 27, ¶ 12 (Sept. 16, 2021).
[68] *Id.*, at ¶ 13-15.

permanently disestablished the Ottawa Reservation, which is inconsistent with *McGirt* and *Roth,* and the language of the Ottawa Termination Act.

Proposition 2: The State's Argument for the Extension of State Criminal Jurisdiction into Indian County Is Inconsistent with this Court's Precedents and Federal Law and Must Be Rejected.

For the first time on appeal, the State urges this Court to adopt the legally- unteathered theory that this Court should extend state criminal jurisdiction to parts of Indian Country, based on an implicit grant of Congressional authority under the General Allotment Act.[69] Its theory, which presumes that the Ottawa Reservation exists and all land within its boundary is Indian Country, weaves through a line of *civil tax cases* that are completely unrelated to the federal statutes and regulatory framework that govern criminal jurisdiction in Indian Country.[70] The lone criminal case the State cites does not involve the extension of state criminal jurisdiction into Indian country,[71] but rather the application of a **federal** criminal statute in Indian Country, brought as part of a **federal** criminal prosecution.

The State's theory should be rejected because it was not raised below, it ignores the plain text of 18 U.S.C. §1151(a) and the history of federal preemption of state criminal jurisdiction on reservations, it attempts to bypass the disestablishment analysis required by *McGirt* and this Court in *Perales v. Oklahoma*,[72] and it stands alone without support from any other court in the country.

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[69] 24 Stat. 388. Appellant's Br., at 18-25.
[70] Appellant's Br., at 18-25.
[71] *U.S. v. Nice*, 241 U.S. 591 (1916).
[72] *Perales v. Oklahoma*, No. F-2018-383, Order Remanding for an Evidentiary Hearing, August 24, 2020; *see also Roth v. State*, 2021 OK CR 27, ¶ 4-6 (Sept. 16, 2021).

A. The State's Argument Should be Rejected Because It Has Been Waived.

Issues raised for the first time on appeal are typically barred.[73] The reason for this rule is to preserve the integrity of the judicial process. Lower courts adjudicate issues in the first instance, and should be reversed only when they make a mistake in assessing what is presented to them. If the lower court was not given the chance to pass on a particular argument, it is hard to claim that it made a mistake.[74]

The State has been actively litigating issues related to criminal jurisdiction in Indian Country for several years, from when *McGirt* and several related cases went up on appeal. At this point, there is simply no excuse for the State failing to raise its legal theories in the District Court below.

B. The State's Argument is Contrary to Federal Law.

As this Court has recently noted that "Federal law broadly preempts state criminal jurisdiction over crimes committed by, or against, Indians in Indian Country."[75] Under 18 U.S.C. § 1151(a), federal and tribal criminal jurisdiction extends to "all land within the limits of any Indian reservation under the jurisdiction of the United States Government,

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[73] *See, e.g., Marlin Oil Corp. v. Barby Energy Corp.*, 2002 Ok CV APP 92, ¶ 8, 55 F.3d 446, 449 (2002) ("We will not review questions not presented to and passed upon by the trial court. As an appellate court, our function is to correct error. Unless there is presentation of the question to the trial court and a subsequent erroneous determination of that question, there is no error to correct on appeal.") (citations omitted).

[74] *Id.*

[75] *Roth v. State*, 2021 OK CR 27, ¶ 12 (Sept. 16, 2021).

notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation[.]"[76]

Federal courts read this language to include all fee lands within the exterior boundaries of an Indian reservation as part of "Indian Country," regardless of who owns the land.[77] In *Seymour v. Superintendent of Washington State Penitentiary*,[78] an Indian sought federal habeas relief after being convicted in Washington state court of burglary,[79] arguing that the United States had exclusive jurisdiction because his crime occurred in Indian Country.[80] The State of Washington argued that it possessed criminal jurisdiction, because the alleged crime occurred on fee land within an Indian reservation.[81] The Supreme Court said the plain language of § 1151(a) "squarely put to rest" [82] the States' fee land argument:

> Since the burglary with which [the defendant] was charged occurred on property plainly located within the limits of [the] reservation, the courts of Washington had no jurisdiction to try him for that offense.[83]

Even one of the primary cases the State cites to construct its new theory acknowledges that whatever Sec. 6 of the General Allotment Act means in the context of state civil taxing jurisdiction, Congress has specifically preempted state criminal

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[76] 18 U.S.C. § 1151(a) (emphasis added).
[77] *See e.g., Murphy v. Royal*, 875 F.3d 896, 917 (10th Cir. 2017).
[78] *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962)
[79] *Id.* 368 U.S. at 352 n.2.
[80] *Id.* 368 U.S. at 352-54.
[81] *Id.* 368 U.S. at 357.
[82] *Id.*
[83] *Id.* 368 U.S. at 359.

jurisdiction over "all fee land within the boundaries of an existing reservation, whether or not held by an Indian [.]"[84] Under § 1151(a), therefore, all lands within the boundaries of a reservation have Indian Country status, whether held in fee at the moment, or not, and whether held by the tribe, Indians or non-Indians.

The extent to which Congress has pre-empted state criminal jurisdiction in Indian Country is made clear by the passage of P.L. 280.[85] When Congress wanted to permit state criminal jurisdiction in Indian Country, it provided a clear statutory path for states to do so.[86] Oklahoma has not sought to exercise criminal jurisdiction under P.L. 280, and should not be permitted to end-run the congressional framework for doing so at this point. If it wants to pursue such jurisdiction it can and should direct its attention to Congress, not the Courts.[87]

In addition, *McGirt*, and many cases before it, examined whether the General Allotment Act could be read to provide the requisite intent to disestablish a reservation and permit state criminal jurisdiction. These courts concluded it cannot.[88] In this case, the

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[84] *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 260 (1992).
[85] Pub. L. 83-280; 18 U.S.C. § 1162; 25 U.S.C. § 1321.
[86] *Id.*
[87] *Cherokee Nation and Chickasaw Nation Criminal Jurisdiction Compacting Act of 2021*, H.R. 3091, 117th Cong. (2021).
[88] *McGirt*, 140 S.Ct. at 2464 ("For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument."); *see also Sizemore v. State*, 2021 OK CR 6, ¶¶ 8, 10-16, Apr. 1, 2021 ("[C]iting language from McGirt noting that allotment of individual plots of land within this area do not equate to disestablishment, Judge Mills found that the Choctaw Reservation remains in existence. This finding is supported by the record.")

State does not point to any language in the General Allotment Act that provides explicit congressional intent to disestablish the Ottawa reservation by ceding reservation land from the Ottawa Tribe, or any tribe, to the United States. Instead, its theory is one of disestablishment by implication, which must fail under *McGirt*.

Undeterred by the clarity of federal statutory and judicial authority, and this Court's own precedents, the State cites a few cases where states have exercised civil taxing authority over reservation fee land.[89] But these precedents clearly are not relevant because State taxation jurisdiction within Indian Reservations has never been considered to constitute express evidence of Congressional intention to disestablish an Indian Reservation. And the Court has no reason nor proper legal basis to make that law for the first time in this case. Because the State completely fails to explain how its theory of the implicit extension of criminal jurisdiction into Indian Country can be reconciled with existing federal law, or the precedent of both the United States Supreme Court and this Court, it should be rejected.

Proposition 3: Congress Never Partitioned the Miami and Peoria Reservation, so the Entire Reservation Has Always Been And Remains Indian Country.

A. Standard of Review.

On appellate review the Court, "afford[s] a district court's factual findings that are supported by the record great deference and review those findings for an abuse of discretion

[89] Appellant's Br. and 18-25.

[and] decide[s] the correctness of legal conclusions based on those facts without deference."[90]

In this case the parties stipulated to the facts that the Defendant is an Indian and that his alleged crimes took place within the historic boundaries of the reservation shared by the Miami and Peoria Tribes.[91] Further, the State acknowledged to the District Court that the Miami and Peoria Reservation had never been partitioned.[92] The only question for review, therefore, is the legal one of whether Congress ever explicitly disestablished the reservation it created for the Miami and confederated Peoria Tribes in 1867.

Further, the Court need not consider the State's arguments about the status of the Peoria Tribe's interest in the Reservation following the termination and restoration of its sovereign-to-sovereign relationship with the United States. Those arguments are not material because Congress has never partitioned the Reservation it created under the 1867 Treaty and, therefore, the crimes alleged in the underlying proceeding occurred in "Indian Country" within the meaning of 18 U.S.C. § 1151, regardless of any conclusion that this Court might reach regarding the status of the confederated Peoria Tribe's interest in the Reservation.

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[90] *Parker v. State*, 2021 OK CR 17, ¶ 34, 495 P.3d 653, 665 (citations omitted).
[91] *Oklahoma v. Brester*, Nos. CF-2020-129, CF-2020-178, CF-2020-179, CF-2018-298, Court Order with Findings of Fact and Conclusions of Law, March 2, 2021 (O.R. 232).
[92] *See* footnote 14, *supra.*

B. The State Should Not Be Permitted to Raise New Factual and Legal Theories on Appeal.

1. The State's Argument on Appeal Is Barred Because It Has Been Waived.

The State argues for the first time on appeal that Congress implicitly created two separate reservations for the Miami and Peoria Tribes in 1889.[93] This new factual claim forms the basis for the State's entire legal request for relief on appeal. The State now argues that since 1889, the Miami and confederated Peoria's shared Reservation has been partitioned into two distinct reservations with separate lands for the confederated Peoria and for the Miami, and that since the Peoria Tribe was terminated, a remand is required to see where the alleged crimes took place. This argument for a remand, that Congress created two separate reservations, was not raised and preserved before the District Court and in fact is contrary to the State's repeated arguments to and admissions before the District Court that the entire reservation was never partitioned.[94]

Issues raised for the first time on appeal are barred.[95] The reason for this rule is to preserve the integrity of the judicial process. Lower courts adjudicate issues in the first instance and should be reversed only when they make a mistake in assessing what is

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[93] Appellant's Br., at 27. (25 U.S.C. § 340, extending the General Allotment Act to the Miami Reservation, also implicitly, "seperat[ed] the tribes into two distinct reservations.")
[94] *See* footnote 14 *supra.*
[95] *See, e.g., Marlin Oil Corp. v. Barby Energy Corp.*, 2002 Ok CIV APP 92, ¶ 8, 55 F.3d 446, 449 (2002) ("We will not review questions not presented to and passed upon by the trial court. As an appellate court, our function is to correct error. Unless there is presentation of the question to the trial court and a subsequent erroneous determination of that question, there is no error to correct on appeal.") (citations omitted).

presented to them. If the lower court was not given the chance to rule on a particular argument, it is hard to claim that the lower court made a mistake.[96]

The State's new appellate argument demonstrates precisely why issues raised on appeal for the first time should be barred. There is no way for this Court, or the parties, to evaluate the validity of the State's new legal and factual theories raised for the first time on appeal, particularly when those theories rely on documents that are not in the record.[97] Therefore, the State's new argument suggesting that the Miami and Peoria Tribes and Congress implicitly partitioned the shared Reservation should not be entertained on appeal because it was waived.

2. The State's Argument on Appeal Seeks to Assign Error to Facts and Conclusions That It Supported Before the District Court and Is Barred by Judicial Estoppel and Equitable Principles of Appellate Review.

This Court should also reject the State's new appellate argument based on judicial estoppel, because it is factually and legally contrary to the State's repeated arguments to and admissions before the District Court. Judicial estoppel prevents a party from asserting

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[96] *Id.*

[97] As a central factual assertion in support of its new appellate argument, the State relies on an alleged 1872 contract between the Miami and Peoria Tribes that the State asserts "delineat[ed] how [the two tribes] would share the new reservation in Indian Country." Cite State's brief at 27. The State did not present this document to this Court or the Court below and, notably, does not explain how the alleged contract addressed the Reservation sharing. The State does, however, imply that the agreement implemented a voluntary partition, a suggestion that has absolutely no basis in the historical record, much less the Court's record.

a position in a legal proceeding that is contrary to a position previously taken by him in the same or some earlier legal proceeding.[98] As the United States Supreme Court has noted:

> Courts have observed that '[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle' ... Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be 'clearly inconsistent' with its earlier position ... Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled,' ... Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations,' ... and thus poses little threat to judicial integrity ... A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped ...").[99]

Here, the State repeatedly represented to the District Court that the shared, undivided interests of the Miami and Peoria Tribes were never partitioned.[100] That position was shared by the Defendant and was adopted by the District Court in its decision.[101] Now, the State urges this Court to adopt a contrary position, assigning error to the very position that it acknowledged and supported before the District Court, and asks this Court to remand

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[98] *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *Sill v. Hydrohoist Intern*, 262 P.3d 377, 383, (Ct. App. Okla. 2011), 2011 OK CIV APP 80, ¶ 18 (holding inconsistent appellate position barred by judicial estoppel); see also, Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 Cal. L. Rev. 1423 (2001).

[99] *New Hampshire v. Maine,* 532 U.S. at 750-51 (internal citations omitted).

[100] *See supra* note 14.

[101] *Oklahoma v. Brester,* CF-2020-129, Court Order with Findings of Fact and Conclusions of Law, at 3, March 2, 2021. "While it is perhaps normal to think of a reservation as a defined area separate from all other entities that is not the case with the Peoria tribe."

this case for further proceedings.[102] The State's particularly create a risk of inconsistent judicial determinations in the same case and may create an impression that the either "the first or second court was misled."[103]

The State should be bound to the arguments it made below and the record it certified for appeal. Arguing a contrary position on appeal, supported by documents it did not provide the District Court, the Defendant, or this Court, is fundamentally unfair and contrary to accepted appellate practice and the equitable principles of judicial estoppel.

C. Congress Never Partitioned the Miami and Peoria Reservation, so the Entire 1867 Reservation Has Always Been And Remains Indian Country.

1. The State Was Correct When It Argued Below That the 1867 Reservation Had Never Been Partitioned.

Even if this Court entertains the State's new factual and legal arguments on appeal, the State was right the first time when it argued to the District Court that there has never been a partition of the undivided interests held by the Miami and Peoria Tribe. Simply put, Congress has never clearly directed such a partition, or any kind of legal separation, which would necessarily reduce each tribes' undivided interest in its own reservation.[104]

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[102] Appellant's Br., at 38-39.

[103] *New Hampshire v. Maine*, 532 U.S. at 750.

[104] In addition, a determination of each tribe's specific interest in a federal reservation would seem to be beyond the power of this Court to render. Neither the Peoria Tribe nor the Miami Tribe are a party to this case. *See* 3B C.J.S. Amicus Curiae § 2 ("An intervenor becomes a party to the litigation and an *amicus curiae* does not ...")
Neither tribe waived it sovereign immunity for purpose of partitioning or quieting title to reservation land. *See e.g.*, *Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649 (2018) (tribal sovereign immunity can be raised even for an *in rem* action to quiet title involving tribal fee land). The interests of both tribes extend to lands held in trust for the tribes by the United States, some of which include lands held jointly for the tribes. *See e.g.*, P.L. 93-

In order to understand why the State was correct in its original presentation to the District Court, but not on appeal, it is necessary to understand that tribal sovereignty and reservation status is not dependent on land ownership within a reservation. In 1867, the United States entered into a treaty with the confederated Peoria tribes and with the Miami Tribe, which created a joint reservation for them in northeastern Oklahoma. Although the land ownership pattern within the exterior boundaries of that reservation has changed over the years through allotment and subsequent land sales to non-Indians, the sovereign authority and jurisdiction of each tribe over that reservation has not changed. As the Supreme Court explained in *McGirt*, the alteration of land ownership within a reservation does not serve to diminish or reduce the sovereign authority of a tribe.[105] The analogy the Court uses is that of the United States itself:

> The federal government issued its own land patents to many homesteaders throughout the West. These patents transferred legal title and are the basis for much of the private land ownership in a number of States today. But no one thinks any of this diminished the United States' claim to sovereignty over any land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another. And there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally. Indeed, such an arrangement seems to be contemplated by § 1151(a)'s plain terms.[106]

588, Jan. 2, 1975 (specific parcel to be held in trust "jointly" for eight different tribes, including the Miami and Peoria tribes.) The United States would be a necessary party to any action quieting title to reservation trust lands, and it has not waived its sovereign immunity to such an action, nor has the state attempted to join it in these proceedings. 28 U.S.C. § 2904a(a).

[105] *See, e.g., Seymour v. Superintendent of Washington State Penitentiary* 368 U.S. 351, 357 (1962); *Murphy v. Royal*, 875 F.3d 896, 917 (10th Cir. 2017) (all land within the boundaries of an Indian reservation is "Indian Country.")

[106] *McGirt*, 140 S.Ct. at 2426 (citations omitted).

In order to demonstrate that the interest held by either tribe was reduced or disestablished through partition, the State needs to identify clear congressional language doing so.[107] Even if the State were allowed to proceed with its new appellate argument, it has failed to meet its burden.

The State suggests, almost in passing, that the original 1889 Allotment Act partitioned the jointly held Reservation into two distinct reservations. However, the plain language of the 1889 Act shows that Congress understood the reservation was jointly held at the beginning of the allotment process and that Congress intended that the reservation would remain that way after the allotment.[108] In Sec. 1 of the 1889 Act, Congress states that the Secretary of Interior will make allotments based on lists provided by the Miami and Peoria chiefs, and these allotments will be made "out of their common reserve."[109] Later, Congress states that land set aside for school, church, or cemetery purposes "shall be held as common property of the respective tribes."[110] And still later, Congress notes that any land not allotted "shall be held in common under present title" after the allotment

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[107] *See e.g., Nebraska v. Parker*, 577 U.S. 481, 487-88 (2016) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear.")(citations and quotations omitted); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Once 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.")

[108] *See An act to provide for allotment of land severalty to United Peorias and Miamies in Indian Territory, and for other purposes*, 25 Stat. 1013, Chap. 442, Mar. 2, 1889, *reprinted in*, Kappler, Charles, *Indian Affairs: Laws and Treaties*, Vol. 1, 344 (Government Printing Office: 1904).

[109] *Id.*, Sec. 1.

[110] *Id.*

process is complete.[111] Even the way Congress handled the allotments demonstrates an intent to keep the reservation intact. Congress capped the amount of acres that could be allotted to tribal members of each tribe and stated that even the allotted land would be considered reservation land for each tribe.[112]

Congressional intent to disestablish or diminish an Indian reservation must be clear on the face of the statute. If that expression is clearly present or absent, the Court's inquiry is over.[113] In the end, the State points to no passage, phrase, or even word in the text of the 1899 Act that it contends expresses Congress's clear and specific intent[114] to disestablish or diminish the Reservation.

This conclusion should not be surprising. The 1889 Act is not a disestablishment act. It is an allotment act.[115] Its purpose was to alter the land ownership patterns within an

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[111] *Id.*, Sec. 2.

[112] *Id.*, Sec. 2. Remarkably, it is this last phrase that the State says implied a partition of the Reservation. *Oklahoma v. Brester,* S-2021-209, Appellant's Brief, Oct. 4, 2021, at 27-28. But the phrase seems to recognize just the opposite – stating that the allotted land "shall be treated in making said allotments in all respects as the extent of the reservation of each of said tribes, respectively." This language states that even allotted land would remain reservation land, and does not demonstrate an intent to partition the entire reservation, or for either tribe to cede any of its sovereign authority over the reservation. This reading is supported by and consistent the other references in the 1889 Act to jointly held lands referenced above. As explained in *McGirt*, statutory language allotting tribal lands is not sufficient to disestablish or reduce a reservation holding. *McGirt*, 140 S.Ct. at 2464. In addition, there is simply no evidence the United States or the Tribes have ever viewed the 1889 Act as partitioning the Reservation.

[113] *McGirt*, 140 S.Ct. at 2468.

[114] *See e.g., Nebraska v. Parker*, 577 U.S. 481, 487-88 (2016) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear.")(citations and quotations omitted); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

[115] The title of the act is "An act to provide for allotment of land in severalty to United Peorias and Miamies [sp.] in Indian Territory, and for other purposes."

established reservation by transferring a portion of communally owned land to individual Indians. The Act extends the General Allotment Act of 1889 to the Miami and Peoria Reservation (singular) and says nothing whatsoever about partitioning the shared reservations into "two distinct reservations" as the State suggests. Sec. 1 of the 1889 Act, as currently codified in the United States Code, reads:

> The provisions of the Act of February 8, 1887, are declared to extend to and are made applicable to the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians, and the Western Miami tribe of Indians, located in the North Eastern part of the former Indian Territory and to their reservation, in the same manner and to the same extent as if said had not been excepted from the provisions of said act, except as to section 349 of this title, and as otherwise hereinafter provided.[116]

As *McGirt* and numerous cases before it have held, the application of the General Allotment Act to a reservation does not disestablish or diminish a tribe's sovereign authority over the exterior boundaries of its reservation. This reality is reflected by the definitions used by Congress in the Major Crimes Act and General Crimes Act.

> For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the 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." 18 U.S.C. § 1151(a). 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. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others.[117]

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[116] 25 U.S.C. §340.

[117] *McGirt*, 140 S.Ct. at 2464 (emphasis added). See also, *Seymour v. Superintendent*, 368 U.S. 352, 354-355 (1962); *Mattz v. Arnett*, 412 U.S. 481, 499 (1973) (discretionary allotment opening land for settlement did not terminate reservation); Letter Re: Mille Lacs Reservation Boundaries, from Mark Anderson on behalf of the Field Solicitor to Earl

The end result is that 25 U.S.C. § 340 cannot be read implicitly to divide the reservation in two, and the State has not produced any legislative language, or any phrase, clause or word to support its argument that the Miami Tribe's interest in its reservation has ever been disestablished or diminished by partition or othewise. Therefore, the Miami Tribe has held a continuous and undivided interest in the entire reservation since 1867, and the land where the crimes alleged in this case is considered Indian County under the definitions of 18 U.S.C. § 1151.

2. Because Congress Has Never Partitioned the Reservation, a Remand is Not Necessary, and the District Court Should Be Affirmed.

As this Court recently noted in *Roth v. State*, "Federal law broadly preempts state criminal jurisdiction over crimes committed by, or against, Indians in Indian Country."[118] Here, the relevant federal law, 18 U.S.C. § 1151(a), defines "Indian Country" to include:

> (a) all land 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 …

For over fifty years, federal courts have read this language to mean that "Indian Country" includes all lands within the exterior boundaries of an Indian reservation,

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Barlow, Minneapolis Area Director, Bureau of Indian Affairs (February 28, 1991); United States Department of the Interior "Opinion on the Boundaries of the Mille Lacs Reservation, M-37032 at 21 (Nov. 20, 2015) available at: https://www.doi.gov/sites/doi.gov/files/uploads/m-37032.pdf (quoting *Solem*, 465 U.S. at 470).

[118] *Roth v. State*, 2021 OK CR 27, ¶ 12 (Sept. 16, 2021).

regardless of who owns the land, or how it is owned.[119] As a result, the State may only exercise criminal jurisdiction over the Defendant if this Court concludes that the original 1867 Reservation was disestablished such that it was not "Indian Country" under federal law at the time of the Defendant's offense.

The United States Supreme Court's recent decision in *McGirt v. Oklahoma* makes it clear disestablishment requires an explicit textual act by Congress. The Supreme Court states: "once a reservation is established, it retains that status until Congress explicitly indicates otherwise."[120] The "only step proper for a court of law" in applying that rule is to interpret the relevant statutes and to "follow the[ir] original meaning."[121] Neither historical events nor demographics are part of the analysis, as neither "can suffice to disestablish or diminish reservations."[122] Instead, to disestablish a reservation, Congress must explicitly express its intent to do so, with either an "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests."[123] In addition, the Supreme Court noted in *McGirt* that "For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument." [124]

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[119] *See e.g., Seymour v. Superintendent of Washington State Penitentiary* 368 U.S. 351, 357 (1962); *Murphy v. Royal*, 875 F.3d 896, 917 (10th Cir. 2017).
[120] 140 S. Ct. at 2469 (citations omitted).
[121] *Id.* at 2468 (citations omitted).
[122] *Id.* at 2468–69.
[123] *Id.* at 2463.
[124] *McGirt*, 140 S.Ct. at 2464 (emphasis added).

As discussed above, the State's new appellate theory that Congress has implicitly partitioned the Reservation through allotment cannot be squared with the plain language of the 1867 Treaty, the General Allotment Act, the 1889 Act, or any subsequent Congressional enactment identified by the State. Therefore, the State's request for a remand in both Proposition 1 and 2 lacks support and should be denied.

The Miami Tribe has held a continuous and undivided interest in the entire reservation since 1867. Therefore, the States remaining arguments regarding the status of the Peoria Tribe and its interest in the Reservation – while factually and legally wrong – are immaterial to the Court's ability to affirm the District Court's opinion. In sum, because the Miami Tribe holds an undivided interest in the whole Reservation, the land constitutes "Indian Country" irrespective of the status of any other party's interest.

CONCLUSION

The Miami Tribe of Oklahoma and the Ottawa Tribe of Oklahoma each negotiated for and were granted reservations in present-day Northeast Oklahoma under the Treaty of 1867. At no point since the creation of these reservations has United States expressed a clear intent to disestablish, diminish, or partition these reservations. As such, the conduct of the Defendant in the case before the Court occurred in Indian Country and was beyond the jurisdiction of the State of Oklahoma to prosecute.

Respectfully Submitted,

Dated: December 14, 2021

By: _____

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