IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-7027

UNITED STATES OF AMERICA,
***Plaintiff/Appellee*,**

v.

JERIAH SCOTT BUDDER,
***Defendant/Appellant*.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
THE HONORABLE DAVID C. JOSEPH, UNITED STATES DISTRICT JUDGE
CASE NO. CR-21-99-DCJ

BRIEF OF PLAINTIFF/APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

Pursuant to 18 U.S.C. § 3231, the district court had subject matter jurisdiction over Defendant's criminal charges because he committed his offense within the Eastern District of Oklahoma. (Vol. I, *Superseding Indictment*, ROA at 20-22).[1]

Pursuant to 28 U.S.C. § 1291, courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The district court sentenced Defendant on June 10, 2022, and entered its written judgment on June 13, 2022. (Vol. I, *Judgment*, ROA at 233-239). Defendant/Appellant timely filed his notice of appeal on June 21, 2022. (Vol. I, *Notice of Appeal*, ROA at 240-241). *See* Fed.R.App.P. 4(b)(1)(A) providing that notice of appeal must be filed within 14 days of the entry of judgment.

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[1] References to the record on appeal ("ROA") will be made as follows:

Volume I – Pleadings: by document title, followed by the page number(s) where the cited material appears in the consecutively paginated record, e.g. "Vol. I, *Motion*, ROA at 10."

Volume II – Transcripts: by the hearing name, followed by the page number(s) where the cited material appears in the consecutively paginated transcripts, e.g. "Tr. 7."

Volume III –Sealed PSR Materials: by paragraph number, followed by the page of the sealed record as it appears on the electronic file stamp, e.g. as "Vol. III, *PSR* ¶4, Sealed ROA at 2."

Defendant/Appellant's brief will be referenced as "*Def. Brf.*"

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court properly deny Defendant's motion to dismiss based on an ex post facto and due process grounds?

2. Did the district court impose a constitutionally sound and substantively reasonable sentence?

STATEMENT OF FACTS

On the evening of April 24, 2020, within the Cherokee Nation reservation, Tahlequah, Oklahoma Police Officer Chase Reed was parked at the city library when he heard gunshots nearby. He drove toward the sounds and found a man with multiple gunshot wounds laying in the middle of the road at the intersection of Downing Street and Bluff Avenue. (Trial Tr. 39-49). The man, identified by his Cherokee Nation identification card a David Jumper, was not breathing. (Trial Tr. 42-44). Officer Reed could see gunshots wounds in the man's stomach, elbow and head. (Trial Tr. 43). A young man named Dyson Hanson was standing by the victim. (Trial Tr. 52). Moments later, Officer Reed heard a 911 call reporting the shooter was exiting a nearby house at 601 Bluff Avenue and surrendering to law enforcement. (Trial Tr. 53).

1. Three men travel from Kenwood to Tahlequah to give Defendant a ride

Earlier on April 24, 2020, Dyson Hanson was at his grandparent's house in Kenwood, a rural Cherokee community located about 50 miles from Tahlequah.

(Trial Tr. 61-63, 97-100). His uncle, David Jumper (the victim in the shooting) and his great-uncle Lewis Thompson were also at the house. (Trial Tr. 57-6198-99). Lewis and David, known to the family as "Boy", had been hanging out and drinking a little that day by the time Dyson arrived. (Trial Tr. 61).

Defendant Jeriah Budder had asked Dyson, his friend since 4th grade, to come get him in Tahlequah and drive him to Kenwood where his grandparents also lived. (Trial Tr. 100). Defendant wanted to move out of his father's Tahlequah house and back to Kenwood. (Trial Tr. 104). Dyson asked Jumper to drive him over to Tahlequah to pick up Defendant. (Trial Tr. 100-104). His great-uncle Lewis rode in the back seat and Dyson rode in the front passenger seat as the three headed out, briefly stopping in Locust Grove to buy a case of beer. (Trial Tr. 61-64, 103-104).

Dyson had one beer that night. (Trial Tr. 117-118). Dyson knew Jumper had been drinking, but wasn't concerned about him driving. (Trial Tr. 103-104). Jumper had access to his daughter's car. (Trial Tr. 68). Three days earlier, Jumper's girlfriend had asked Jumper to move out, so the small car's trunk was full of Jumper's belongings and Jumper had been drinking since that time. (Trial Tr. 64, 117). Jumper had been sad, upset and angry over those three days. (Trial Tr. 117).

Dyson saw Jumper take three swigs from a vodka bottle during the drive to Tahlequah, but he didn't think his uncle was too drunk. (Trial Tr. 104). Asking his uncle for the ride was a last resort. (Trial Tr. 119-120). Dyson was aware his uncle

did not approve of Defendant, did not like Defendant's social media posts "throwing up money and gang signs," thought Defendant was a "punk," and had punched Defendant on two prior occasions causing Dyson to intervene. (Trial Tr. 119, 123, 147).

2. A short ride goes horribly wrong as Defendant shoots Jumper repeatedly

When the car arrived at Defendant's house, Dyson jumped out to help his friend pack while Jumper and Lewis waited in the car. (Trial Tr. 64, 104). Defendant had a black trash bag filled with clothes, a safe and a gun case. (Trial Tr. 105). Dyson carried out a single magazine while Defendant had the gun and another magazine. (Trial Tr. 106). When they got to the car, Defendant got in the back seat with his black bag since the trunk was full of Jumper's things. (Trial Tr. 64, 106). Dyson didn't tell Jumper about the gun, thinking the gun wouldn't be out of the case and his uncle didn't need to know. (Trial Tr. 106).

The group had barely pulled away when Jumper heard Defendant loading a magazine in the back seat. (Trial Tr. 106-108). Jumper did not want a gun in his daughter's car. (Trial Tr. 68). Jumper called Defendant a "punk" and said, "a real man fights with his fists and he don't need a gun." (Trial Tr. 106-109). About 20 yards from the house, Jumper stopped the car and told Defendant to get out, but Defendant refused. (Id). Jumper drove another short distance and again stopped the car and ordered Defendant to get out and walk home. (Trial Tr. 68-69, 108-109).

Dyson was trying to calm Jumper down as Defendant continued to refuse. (Trial Tr. 109-110). Jumper parked, got out, and went to the back door to extract Defendant from the car. (Trial Tr. 412-413).

Defendant was holding the gun and magazine and Jumper grabbed Defendant by the wrists and they struggled over the gun. (Trial Tr. 70-71, 110-111). Defendant was pointing the gun out the passenger door as Jumper punched him 6-7 times. (Trial Tr. 111). As Jumper backed up a step or two, Defendant shot Jumper. (Trial Tr. 111). Dyson heard nine shots and when he got out he saw his uncle on the ground and Defendant looking "spaced out". (Trial Tr. 112-113). Defendant asked Dyson, "What did we do?" (Trial Tr. 113). Dyson told Defendant he had just killed his uncle. (Trial Tr. 113). Defendant asked Dyson to help him put Jumper's body back in the car. (Trial Tr. 113-114). Dyson refused and threw the magazine and bullets he was carrying for Defendant under a tree. (Trial Tr. 114). Defendant went to look for them, then declared he would not "make it in prison" and he pointed the gun at his own head where Dyson heard it click two times. (Trial Tr. 114). Then Defendant left the scene, taking the gun with him. (Trial Tr. 114). The police arrived 3-4 minutes after the shooting, but Dyson denied knowing the shooter to protect his friend from prison. (Trial Tr. 115).[2] He later told police Defendant was the shooter.

[2] Lewis, the great-uncle, observed the struggle and shooting, but left the area to sit on a nearby park bench where he heard the last two shots. He was afraid of being shot and feared he might have a warrant for his arrest. (Trial Tr. 64-78).

(Trial Tr. 142).

<u>*3. Defendant is apprehended and eventually confesses to shooting Jumper*</u>

Responding to a 911 call, police detained Defendant about a half-mile from the shooting scene at 610 Bluff Avenue. (Trial Tr. 234-235). Defendant showed police where he had hidden the gun, a Glock 9mm pistol, in some flowers by a tree in a neighboring yard. (Trial Tr. 236-238). He was transported to the police station, some 5-6 minutes away, where he was given dip tobacco and a spit cup before being interviewed about 30 minutes later. (Trial Tr. 239-240).

Detectives testified Defendant did not request or require medical attention for some minor injuries to his face. (Trial Tr. 247, 411-413). One detective observed "a little bit of blood on his nose or on his lip and a little bit of blood on his shirt." (Trial Tr. 247). The other detective testified the blood on the shirt looked like "blood splatter." (Trial Tr. 413). They did note Defendant suffered no discomfort from the tobacco dip and, in fact, asked for more during the ensuing interview. (Trial Tr. 248, 415).

After *Miranda* warnings, Defendant gave detectives his version of the night's events. Defendant said he was an 18-year-old Cherokee citizen. (Trial Tr. 241, 418). He said Jumper was mad he brought a gun to the car and Jumper hit the side of his face 10 times. (Trial Tr. 410). Detectives observed no injuries on Defendant which

would be consistent with such a beating. (Trial Tr. 411). Defendant also claimed initially Jumper tried to stab him with a "prison shank", but later admitted Jumper had no such weapon. (Trial Tr. 416-417). He originally claimed he did not take the gun out of its case until Jumper was coming in the back of the car. (Trial Tr. 420). When detectives challenged Defendant's initial story of opening the bag, locating the gun case, extracting the weapon and loading it with one hand while fighting off Jumper with the other as nonsensical, Defendant said the gun was just inside the bag. (Trial Tr. 420-421).

Defendant admitted shooting Defendant twice from the car and three-to-four more times "on the fly." (Trial Tr. 417-418). Toward the end of the interview, Defendant further admitted he stood over Jumper and fired into him while Jumper was on the ground. (Trial Tr. 418).[3]

4. Expert testimony described the firearm and Jumper's wounds

Various law enforcement official described the collection and preservation of the firearm, shell casings, Jumper's body, and other physical evidence. (Trial Tr. 150-195, 211-228, 387-406, 532-570). The officer processing the shooting scene observed bullet strikes to the concrete and bullet fragments by the body, in addition to permanent defects to the pavement with corresponding blood spots caused when

[3] After taped clips of the interview could not be played clearly enough due to technical difficulties at trial, prosecutors were allowed to read portions of the interview transcript to the jury. (Trial Tr. 429-477).

a person is shot on the ground and bullets go through the body to the pavement after Jumper was removed from the scene. (Trial Tr. 168-189). An Oklahoma Bureau of Investigation criminalist supervisor explained the Glock used here required the trigger to be pulled for every round Defendant fired at Jumper. (Trial Tr. 249-268).

The medical examiner described twelve separate gunshot wounds suffered by Jumper – one to the head, nine to the torso and two to the left arm. (Trial Tr. 315-316). He noted four exit wounds and at least one back exit wound with abrasion where the body is pressing against another surface, like the ground. (Id.). Jumper also suffered blunt force injuries, particularly to the back and head which could result from falling to the ground. (Trial Tr. 322-324). A hematoma indicated Jumper was alive and bleeding after he fell to the ground. (Trial Tr. 324). The medical examiner stated Jumper's blood alcohol content was .14 and Jumper's hands had no broken bones or lacerations. (Trial Tr. 340-347).

PROCEDURAL STATEMENT OF THE CASE

On September 14, 2021, an Eastern District of Oklahoma grand jury returned a three-count Superseding Indictment charging Jeriah Scott Budder ("Defendant") with one count of Murder in Indian Country in violation of 18 U.S.C. §§ 1111(a), 1151, & 1153; one count of Use, Carry, Brandish and Discharge of a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C. §§ 924 (c)(1)(A)(i), (ii), & (iii); and one count of Causing the Death of a Person in the Course of a

Violation of Title 18, United States Code, Section 924(c) in violation of 18 U.S.C. § 924(j). (Vol. I, *Superseding Indictment*, ROA at 20-22).

Defendant filed a motion to dismiss based on a violation of due process arising from the application of *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). (Vol. I, *Motion to Dismiss*, ROA at 23-41). He argued he did not have fair warning he was in Indian Country and subject to federal criminal prosecution. (Id. at 24). The United States responded in opposition, noting among other arguments, Defendant had invoked *McGirt* in seeking dismissal of the Cherokee County state case seeking to prosecute him for the death of Mr. Jumper. (Vol. I*, Response in Opposition*, ROA at 42-56). Defendant replied. (Vol. I*, Reply in Support of Motion*, ROA at 57-62). Defendant later filed a supplemental motion. (Vol. I*, Supplement to Motion*, ROA at 122-126).

During a pretrial motion hearing, the district court denied the motion, but indicated an intent to submit a supplemental interrogatory to the jury on Oklahoma self-defense if proof at trial supported a self-defense instruction. (Vol. I*, Minutes of Motion Hearing*, ROA at 128). Defendant submitted a proposed Oklahoma self-defense instruction. (Vol. I*, Defendant's Proposed Oklahoma Instruction*, ROA at 131-134).

A jury trial was held from April 5-7, 2022. (Vol. I, *Docket Sheet*, ROA at 14). In addition to instructing on the lesser-included homicide crimes, the court also instructed the jury on the federal law governing self-defense. (Vol. I*, Instruction*

Sixteen, ROA at 160). The jury returned a verdict finding Defendant guilty of Voluntary Manslaughter. (Vol. I, *Verdict*, ROA at 170-171). In receiving the verdict, the district court noted the jury failed to consider its special interrogatory on the Oklahoma law of self-defense. (Trial Tr. 574-576).

The district court ordered the jury return to the jury room and the interrogatory which asked "[i]f the Oklahoma law of self-defense is determined to be applicable in this case, has the Government proved beyond a reasonable doubt that the Defendant did not act in self-defense for the conduct charged in Count 1 of the Superseding Indictment?" (Vol. I, *Special Interrogatory*, ROA at 172-173; Trial Tr. 577).[4] The jury returned an answer of "no." (Id.). The district court attempted to clarify the confusion caused by the special interrogatory and polled the jury simultaneously on both the verdict and interrogatory. (Trial Tr. 578-579). The district court denied a Rule 29 motion, but then requested briefing on whether it should dismiss the case based on due process principles. (Trial Tr. 580-583).

Both parties submitted supplemental briefing. (Vol. I, Gov. Ex Post Facto Brief, ROA at 174-198; Def. Supplemental Brief, ROA at 199-209). The district court ultimately denied the motion to dismiss, but encouraged appellate review. (Vol. I, *Memorandum Order*, ROA 210-230).

[4] The district court did not inform the jury that Oklahoma's excessive force law arguably precluded the defense of self-defense on these facts. The government therefore asserts the instruction/interrogatory was incomplete and meaningless.

The final PSR was filed on June 3, 2022, which calculated Defendant's advisory sentencing range under the 2021 Guidelines. (Vol. III, *PSR* ¶18, Sealed ROA at 17).

Base offense level for an offense under 18 U.S.C. §1112 *See* U.S.S.G. § 2A1.3. (*Id*., at ¶19, Sealed ROA at 17).	29
Adjusted Offense Level. (*Id*., at ¶24, Sealed ROA at 17).	29
Total Offense Level. *See* U.S.S.G. Chap. 5, Part A, note 2. (*Id*., at ¶27, Sealed ROA at 17).	29

Defendant had zero criminal history points, resulting in a Category I criminal history. (*Id*., at ¶32-33, Sealed ROA at 18). An offense level of 29, combined with a Category I criminal history, yielded an advisory guideline imprisonment range of 87-108 months. (*Id*., at ¶50, Sealed ROA at 21).

Although the draft PSR found Defendant was not entitled to a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1., Defendant argued he was entitled to the acceptance because he: (1) offered to plead guilty to voluntary manslaughter before trial; (2) admitted "the entire *actus reus* of the crime" to police; (3) voluntarily surrendered to police; and (4) voluntarily assisted police in recovering the firearm he used to kill the victim. (Vol. III, *Def. Objections*, Sealed ROA at 28-44).

In opposing Defendant's request, the government noted he had lied to police, litigated every component of the case from jurisdiction to suppression of evidence

to sufficiency of the evidence, and argued that the jury should acquit him because he had a Second Amendment right to defend himself. (Doc. 183). Additionally, he contested numerous factual issues such as the circumstances leading up to the shooting (*e.g.,* the number of times the car was stopped and whether Defendant was holding the gun when the victim opened the door), the events of the shooting (*e.g.*, the number of times he fired into the victim while the victim was lying on the ground), and even events after the shooting. (Vol. III, *Gov. Response*, Sealed ROA at 45-53).

On June 10, 2022, Defendant appeared for sentencing. (Sent. Tr. 586). Over the government's objection, the district court granted Defendant a two-level reduction for acceptance of responsibility. (Id. at 590-595). The Court set the total offense level at 27 and calculated the guidelines range at 70 - 87 months. (*Id.* at 595-596).

The Court then varied upwards and sentenced Defendant to 96 months imprisonment based on the nature and circumstances of the offense; the history and characteristics of the defendant; the seriousness of the offense; the need to promote respect for the law, provide just punishment for the offense, deter criminal conduct, and protect the public from further crimes. (*Id.* at 604, 608-609). In upwardly varying, the Court noted the number of shots fired by Budder, his prior opportunity to withdraw from the conflict, and his flight from the scene. (*Id.*).

This appeal followed.

SUMMARY OF THE ARGUMENT

On April 24, 2020, Jeriah Scott Budder killed David Wayne Jumper outside a running car at a Tahlequah, Oklahoma intersection by shooting Jumper twelve times: once in the head, nine times in the torso (shoulder, chest, abdomen, groin), and twice in the left upper arm. Crime scene evidence definitively showed and Defendant admitted he fired several of these shots while the victim was lying incapacitated in the middle of the street.

Defendant argues his due process rights were violated by application of the *McGirt* decision, despite the fact that he moved to have his state case dismissed just days after *McGirt* issued. In federal court, Defendant argued retroactive application of *McGirt* to federalize his crime unconstitutionally deprived him of the benefit of Oklahoma's more lenient self-defense law. His argument fails because when the full scope of Oklahoma's self-defense jurisprudence and Uniform Jury Instructions are examined, he fails to qualify for jury consideration of state-denied self-defense. Additionally, *McGirt* did not establish a new or expanded criminal law. Instead *McGirt* applied established law to hold that reservations in eastern Oklahoma had never been disestablished. As such, federal law – not state law – controls his crime.

Relying on the jury's completion of a supplemental interrogatory required by the district court on Oklahoma's self-defense law (which lacked complete

instruction, was not argued by counsel, and was irrelevant to the federal crime charged), Defendant now argues any sentence in excess of time served is cruel and unusual because the jury found he would be innocent under Oklahoma law. He further claims the trial court erred by departing upward to add nine months to the guideline range sentence. The court's sentence was substantively reasonable.

Defendant's conviction and sentence should be affirmed.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS BASED ON EX POST FACTO AND DUE PROCESS GROUNDS.

A. Standard of Review

An ex post facto challenge is a question of law which this Court reviews de novo." *United State v. Hampshire,* 95 F.3d 999, 1005 (10th Cir. 1996). Constitutional challenges based on due process are likewise subject to de novo review. *United States v. Mutorov*, 20 F.4th 558, 620 (10th Cir. 2021).

B. Discussion

Defendant insists his right to due process, fundamental fairness and a complete defense were violated when *McGirt* required him to be tried under federal law, depriving him of the benefit of what he argues is a more forgiving Oklahoma state law governing self-defense. (Def. Brf. at 6). After submitting a problematic supplemental interrogatory to the jury on Oklahoma self-defense law in an effort to prepare the case for an anticipated appeal, the district court ultimately correctly

denied Defendant's motion to dismiss. (Vol. I, *Memorandum Order*, ROA 210-230). Defendant is not entitled to reversal because (1) his self-defense argument is not cognizable when Oklahoma's law is considered in its entirety; (2) even if he could benefit from Oklahoma's self-defense law, applying *McGirt* retroactively to apply the federal self-defense law only is not a due process/ex post facto violation.

1. *When Oklahoma's law on self-defense is not constrained by Defendant's selective analysis, Defendant could not have benefited even if the jury were able to consider the state law*.

On appeal, Defendant continues to limit his recitation of Oklahoma's law on self-defense to the language in a single section of the Oklahoma criminal code:

> Under Oklahoma law, a person is justified in using deadly force in self-defense if that person reasonably believed that use of deadly force was necessary to:
>
> a) prevent death or great bodily harm to himself; or
>
> b) to terminate or prevent the commission of a forcible felony against himself.
>
> … A forcible felony is any felony which involves the use or threat of physical force or violence against any person.

(Def. Brf. at 9). The district court's order and interrogatory were likewise limited to 21 Okla. Stat. § 733. (Vol. I, *Memorandum Order*, ROA at 216-217).

Contrary to Defendant's assertions, when Oklahoma's self-defense jurisprudence is considered in its entirety, little difference exists between state and federal law. Defendant's conduct in shooting Mr. Jumper qualified under neither.

Oklahoma law provides a homicide is justifiable (1) when a person resists "any attempt to murder [him], or to commit any felony upon him, or upon or in any dwelling house in which such person is; [or (2)] when committed in the lawful defense of such person . . ., when the person using force reasonably believes such force is necessary to prevent death or great bodily harm to himself . . . or to terminate or prevent the commission of a forcible felony . . . ." 21 Okla. Stat. § 733(A). "'Forcible felony' means any felony which involves the use or threat of physical force or violence against any person." 21 Okla. Stat. § 733(B). Only one Oklahoma appellate decision has included the language "terminate or prevent the commission of a forcible felony" and only in the context of presenting the statutory text. *See Parker v. State*, 495 P.2d 653, 658 (Okla. Crim. App. 2021).

As applicable to the facts of this case, the self-defense principles under Oklahoma and federal law are quite similar. Under Oklahoma law, "[o]nly those felonies which involve danger of imminent death or great bodily harm may be defended against by the use of deadly force." Oklahoma Uniform Criminal Jury Instruction 8-46, committee comments (2d ed. Dec. 2019). Such a standard is consistent with the Tenth Circuit's self-defense pattern jury instruction 1.28, which states in part that "a person may use force which is intended or likely to cause death or great bodily harm only if he reasonably believes that force is necessary to prevent death or great bodily harm to himself [or] another." (brackets omitted).

Oklahoma law recognizes a person holds "a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another" in certain situations (when confronting an intruder in a residence or vehicle) not applicable here. 21 Okla. Stat. § 1289.25(B). Nevertheless, even assuming Oklahoma law applied to the facts of this case, the presumption does not apply if the person against whom the defensive force is used has the right to be in the vehicle, which Mr. Jumper assuredly did in his own car. 21 Okla. Stat. § 1289.25(C)(1).[5]

Furthermore, under Oklahoma law, "[s]elf-defense is permitted a person solely because of necessity. Self-defense is not available to a person (who was the aggressor)/(provoked another with the intent to cause the altercation)/(voluntarily entered into mutual combat), no matter how great the danger to personal security became during the altercation unless the right of self-defense is reestablished." Oklahoma Uniform Criminal Jury Instruction 8-50 (2d ed. Dec. 2019) (emphasis omitted).

[5] Additionally, the presumption does not apply if the person who uses the defensive force is either engaged in or using the vehicle to engage in an unlawful activity. 21 Okla. Stat. § 1289.25. At the time of the offense, persons aged 18 to 20 who were not serving in the armed forces could not transport a handgun in a motor vehicle. *See* 21 Okla. Stat. § 1289.7 (2020) and 21 Okla. Stat. § 1290.8(A) (2020). In 2021, the law was broadened to include those 18 to 20 years old who carry unloaded firearms. *See* 21 Okla. Stat. § 1289.7 (2021). Accordingly, at the time of the offense, Defendant was breaking the law by transporting a handgun in the car.

Additionally, "[t]he defense of self-defense is available to a person who was a trespasser only if the trespasser availed or attempted to avail himself/herself of a reasonable means of retreat from the imminent danger of (death or great bodily harm)/(bodily harm) before repelling/(attempting to repel) an unlawful attack." Oklahoma Uniform Criminal Jury Instruction 8-54 (2d ed. Dec. 2019) (emphasis omitted). "Use of excessive force destroys the defense of self-defense for the trespasser, just as it does for all other persons claiming self-defense." Oklahoma Uniform Criminal Jury Instruction 8-55, committee comments (2d ed. Dec. 2019) (citation omitted). Here, the evidence showed Mr. Jumper told Defendant to exit the vehicle repeatedly – a car being lawfully driven by the victim and which Defendant had no legal right to occupy. Defendant's refusal to exit the car when asked rendered him a trespasser.[6]

Furthermore, Defendant's use of excessive force was fatal to his self-defense claim regardless of whether he was trespassing. *See* Oklahoma Uniform Criminal Jury Instruction 8-55, committee comments (2d ed. Dec. 2019) (citation omitted). Defendant shot the victim 12 times, including while the victim was lying on the ground.

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[6] While the term "trespasser" is typically used in the context of real property, it also applies to places of transportation. *See, e.g., St. Louis & S.F.R. Co. v. Hodge*, 157 P.60, 64 (Okla. 1916) ("a railroad company may operate its trains without regard to the possibility that unauthorized persons may trespass thereon.").

Even assuming, *arguendo*, Defendant was not a trespasser and did not use excessive force, Defendant provoked the victim by holding the gun and pointing it at Mr. Jumper. Self-defense is not available to a person who provokes another with intent to cause the altercation "no matter how great the danger to personal security became during the altercation unless the right of self-defense is reestablished." Oklahoma Uniform Criminal Jury Instruction 8-50 (2d ed. Dec. 2019).

Defendant did not act in self-defense under Oklahoma law because his use of deadly force was not in response to a felony being committed by Mr. Jumper involving a danger of imminent death or great bodily harm. *See* Oklahoma Uniform Criminal Jury Instruction 8-46, committee comments (2d ed. Dec. 2019). Even assuming Mr. Jumper punched Defendant without provocation, such conduct is only a misdemeanor under Oklahoma law. *See* 21 Okla. Stat. § 644 (assault and battery is punishable by no more than 90 days in a county jail). The victim was not engaged in felony maiming of Defendant. *See* 21 Okla. Stat. §§ 751, 759 ("[e]very person who, with premeditated design to injure another, inflicts upon his person any injury which disfigures his personal appearance or disables any member or organ of his body or seriously diminishes his physical vigor, is guilty of maiming."). The victim was not engaged in assaulting the victim with a dangerous weapon. *See* 21 Okla. Stat. § 645. The victim did not commit an aggravated assault and battery. *See* 21 Okla. Stat. §§ 646 and 647 (aggravated assault and battery involves either (1)

inflicting great bodily injury, which "means bone fracture, protracted and obvious disfigurement, protracted loss or impairment of the function of a body part, organ or mental faculty, or substantial risk of death," or (2) an assault and battery "by a person of robust health or strength upon one who is aged, decrepit, or incapacitated").[7] Accordingly, Defendant used lethal force without legal justification.

Finally, assuming *arguendo*, Defendant had not killed Mr. Jumper and Mr. Jumper had been charged with assaulting Defendant, Mr. Jumper would have been able to assert self-defense based on Defendant's possession of a firearm and refusal to exit the vehicle. Under Oklahoma law, "[t]o use . . . force or violence upon or toward the person of another is not unlawful . . . (3) [w]hen committed . . . by the person about to be injured . . . in preventing or attempting to prevent an offense against such person, or any trespass or other unlawful interference with real or personal property in such person's lawful possession; provided the force or violence used is not more than sufficient to prevent such offense . . . ." 21 Okla. Stat. § 643.

When the facts of this case are considered in light of the full panoply of self-defense law, including Oklahoma Uniform Jury Instructions, which would be applicable in a state trial, it is apparent Defendant would not have benefited from a

[7] That Mr. Jumper had allegedly assaulted Defendant on two prior occasions without causing great bodily injury or disfigurement or death significantly undercuts the reasonableness of any claim Defendant that he feared such outcomes if struck by the victim.

self-defense claim. As a result, this Court could affirm the district court's order on this basis alone without reaching the question of whether applying *McGirt* retroactively violated due process.

2. *Applying federal criminal law to pre-McGirt crimes does not violate due process*.

The district court ultimately ruled that vacating the jury's verdict would extend the scope of Supreme Court precedent "beyond the contours within which the Supreme Court and Tenth Circuit have thus far indicated it should apply." (Vol. I, *Memorandum Order*, ROA at 229). This conclusion is sound and should not be disturbed on appeal.

This Court recently set forth the parameters for an ex post facto/due process analysis:

> [T]he Ex Post Facto Clause, appearing in Article I of the Constitution, "is a limitation upon the powers of the Legislature and does not of its own force apply to the Judicial Branch of government." *Marks v. United States*, 430 U.S. 188, 191, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (citation omitted); *see* U.S. Const. art. I, § 9, cl. 3 ("No ... ex post facto Law shall be passed."). It is the Due Process Clause of the Fifth Amendment that imposes "limitations on *ex post facto* judicial decisionmaking." *Rogers v. Tennessee*, 532 U.S. 451, 456, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001).
>
> Under the Due Process framework, "[i]f a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." *Bouie v. City of Columbia*, 378 U.S.

> 347, 354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (internal quotation marks omitted). "[A]lthough clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (citations omitted). "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267, 117 S.Ct. 1219.

United States v. Muskett, 970 F. 3d 1233, 1242 (10th Cir. 2020). The language applied retroactively here is not a change to a criminal statute, but the Supreme Court decision in *McGirt*.

a. Supreme Court's Recognition of Continued Federal Jurisdiction in *McGirt.*

In *McGirt v. Oklahoma,* the Supreme Court issued a long-anticipated decision recognizing the failure of Congress to disestablish the Muscogee (Creek) reservation through proper statutory procedures and ruling that, as a result, the federal government alone retained the power to try certain crimes committed by American Indians in Indian Country. 140 S.Ct. 2452 (2020). In so holding, the Supreme Court clarified the procedural rule for determining the proper jurisdiction for criminal prosecution.[8]

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[8] *See* The Federal Rules of Civil Procedure, Rule 4, clarifying the process of commencing an action and ascertaining jurisdiction as within the scope of

McGirt v. Oklahoma appeared unique in not addressing retroactivity immediately within its opinion.[9] Yet, the Court understood itself to be issuing only a *clarification* of the existing statutes echoed by years of federal opinions and interpretive doctrine - *not* issuing a new rule or broadening the scope of an existing rule. "The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation." *Id.* at 2482.

Moreover, as the Court pointed out, its interpretation was neither new, nor unexpected, nor impermissibly broadened the scope of an otherwise narrow statute. *Id.* at 2464 ("…[T]he Creek Reservation survived allotment. In saying this, we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument.")

In its reasoning, the Court pointed to the longstanding rule that Congress alone has the power to disestablish a reservation; that power cannot be usurped by the states or the courts. *Id.* at 2462 (2020) ("To determine whether a tribe continues to

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procedural, rather than substantive, rules.

[9] "[I]t is precisely because those doctrines exist that we are 'fre[e] to say what we know to be true ... today, while leaving questions about ... reliance interest[s] for later proceedings crafted to account for them.'" *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020), at 2481; citing *Ramos v. Louisiana*, 140 S. Ct. 1390, 1407, 206 L. Ed. 2d 583 (2020) (plurality opinion).

hold a reservation, there is only one place we may look: the Acts of Congress.") (citing *Solem v. Bartlett*, 465 U.S. 463 (1984) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries."). Next, the Court reasoned that Congress had exercised this power in the past, but distinctively failed to do so in the case of Oklahoma. *McGirt*, at 2481 (citing *Hagen v. Utah*, 510 U.S. 399, 412, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) ("History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an "[e]xplicit reference to cession". . . Other times, Congress has directed that tribal lands shall be "'restored to the public domain.'").

Finally, in surveying the depth of cases reiterating the scope of Congress's power and the extent of the state's jurisdictional claims, the Court put to rest any remaining counterarguments by the state in favor of its continued jurisdiction. *Id.* at 2481. The Court held any insistence on perpetuating a willful misreading against an extensive and consistent understanding of Congress's powers would "elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *Id.* at 2482 ("[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.").

Thus, the Court's own statement of the failure of Congress to disestablish reservations in Oklahoma by its plain language necessarily implied *continued* status of reservations in Oklahoma. *McGirt* at 2479. Far from being a new rule, the Court

understood its decision to uphold a long precedent of requiring Congress to make explicit its intention to disestablish a grant of sovereignty in Indian territory.[10] As a result, federal jurisdiction was not retroactive, it simply had never ceased to be. *Id*. at 2481.[11]

Under the retroactivity guidelines laid out in *Griffith*, the Court's decision is rendered instantaneous, with immediate application to all cases not yet final. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708 (1987) ("We therefore hold that a

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[10] *See e.g. Oklahoma Tax Commission v. Citizen Band Potawatomi*, 498 U.S. 505, 511 (1991) (holding that "[no] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges."); *United States v. Sands,* 968 F.2d 1058, 1061 (10th Cir. 1992) (holding that allotments of individual citizens in territory of Five Civilized Tribes are "Indian country" for purposes of Indian Major Crimes Act); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 123-128 (1993) (holding that absent explicit congressional direction to the contrary, it must be presumed that a State does not have jurisdiction to tax tribal members who live and work in Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities); *Indian Country, U.S.A., Inc. v. State of Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967 (10th Cir., 1987) (holding that "[t]hese lands historically were considered Indian country and still retain their reservation status within the meaning of 18 U.S.C. § 1151(a).").

[11] Although the Oklahoma Court of Criminal Appeals, in relying on *Teague* to foreclose attempts to reopen and relitigate final convictions, countenanced the decision in *McGirt* as "a new rule" (*see State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 28, 497 P.3d 686, 692, cert. denied sub nom. *Parish. v. Oklahoma*, 142 S. Ct. 757, 211 L. Ed. 2d 474 (2022)), it is clear from the language within the *McGirt* opinion itself that none of the justices joining with the majority considered the opinion as anything other than a final determination of what had long been recognized in federal courts: a failure by Congress to disestablish Oklahoma reservation territories.

new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.")

b. Retroactive Application of *McGirt* was not Unforeseeable, Unexpected, or Indefensible.

Far from taking the citizens of Oklahoma by surprise, the resulting decision was a continuation and fulfilment of a long line of widely contested and publicized cases brought by state interests and tribal members challenging state jurisdiction over reservation territories in both state and federal courts.[12] Far from being an arcane feature of the Oklahoma landscape, the fight over jurisdiction instead formed a continuous backdrop to the state conversation over the nexus of state and tribal

[12] *See e.g. Ex Parte Nowabbi,* 61 P.2d 1139 (Okla.Crim App. 1936) (holding that there was no Indian Country jurisdiction in Eastern Oklahoma); but see *State v. Klindt,* 782 P.2d 401, (Okla.Crim. App. 1989)(overruling *Nowabbi* and finding an allotment of Indian Country in Eastern Oklahoma was Indian Country). *See also supra, n. 11 citing Oklahoma Tax Commission v. Citizen Band Potawatomi*, 498 U.S. 505, 511 (1991) (holding that "[no] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges."); *United States v. Sands,* 968 F.2d 1058, 1061 (10th Cir. 1992) (holding that allotments of individual citizens in territory of Five Civilized Tribes are "Indian country" for purposes of Indian Major Crimes Act); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 123-128 (1993) (holding that absent explicit congressional direction to the contrary, it must be presumed that a State does not have jurisdiction to tax tribal members who live and work in Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities); *Indian Country, U.S.A., Inc. v. State of Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987) (holding that "[t]hese lands historically were considered Indian country and still retain their reservation status within the meaning of 18 U.S.C. § 1151(a).").

power.

The steady appeal of cases to the Supreme Court culminated in 2017 with *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). As early as November 9, 2017 (years before Defendant's killing of Mr. Jumper), in an already-widely-heralded case, the Tenth Circuit panel in *Murphy v. Royal* issued an opinion identifying crucial errors in statutes that purported to strip reservations of their status, nullifying Oklahoma's attempt to disestablish tribal reservations, declaring the State lacked jurisdiction to prosecute certain tribal members, and locating proper jurisdiction for those cases with the federal government under the Major Crimes Act. *Id.* The Supreme Court granted certiorari in 2018. *Royal v. Murphy,* 138 S. Ct. 2026. The Court held oral argument in November of 2018.

Over the course of the next several months, nearly every stakeholder group filed amicus briefs, including several states, multiple special interest groups, the Muscogee (Creek) Nation, the Seminole Nation, and the United Keetoowah Band of Cherokee Indians. Statewide discussion of the impact of a possible restoration of reservation lands continued unabated during the two years the Supreme Court held-over its ruling on *Murphy.*

The furor only increased when the Court granted cert in *McGirt v. Oklahoma*. When the Supreme Court finally rendered its verdict on *McGirt v. Oklahoma*—and by extension, *Royal v. Murphy*—on Thursday, July 9, 2020, it took a mere two

business days for Defendant to assert his Cherokee heritage and submit his Motion to Dismiss for Lack of Subject Matter Jurisdiction to the state district court. (Vol. 1, *Response in Opposition*, ROA 51-55).

It would be another eight months before the Oklahoma Court of Criminal Appeals would officially issue a ruling recognizing the application of *McGirt* in affirming that the Cherokee Nation was never disestablished. *See Hogner v. State,* 2021 OK CR 4 (decided March 11, 2021). Far from being unforeseeable, unexpected, or indefensible, the Supreme Court opinion restoring tribal reservations and subjecting Indians to prosecution under the Major Crimes Act for convictions not yet final was anticipated, celebrated, and its application was welcomed by many, including Defendant.

c. Federal law alone applies to Defendant's crime.

The Court holds the Major Crimes Act applies to enumerated crimes committed by Indians in Indian Country. *Murphy,* at 915. Where the Major Crimes Act applies, jurisdiction is exclusively federal. *Id.*, citing *Negonsott v. Samuels*, 507 U.S. 99, 103, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993) ("[F]ederal jurisdiction over the offenses covered by the Indian Major Crimes Act is exclusive of state jurisdiction."); *United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992) ("The State of Oklahoma does not have jurisdiction over a criminal offense committed by one Creek Indian against another in Indian Country."); *Cravatt v. State*, 825 P.2d

277, 279 (Okla. Crim. App. 1992) ("[Q]uite simply the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.") The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the United States' history. *Murphy*, at 915 (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832)).

When the Major Crimes Act applies to an Indian defendant, such as this Defendant, the defendant must be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States. *Murphy*, at 915 (citing 18 U.S.C. § 3242). Murder is among the Major Crime Act's enumerated offenses. *Murphy*, at 915 (citing 18 U.S.C. § 1153(a)). This necessitates the application of federal law, including the federal law regarding self-defense. See generally, *United States v. Antelope,* 430 U.S. 641, 648 (1977)("Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country ….."), citing *United States v. Kagama*, 118 U.S. 375 (1886).

d. The district court's order aligns with other decision on *McGirt's* retroactivity

Courts have already applied *McGirt* retroactively despite due process arguments in challenges to state convictions under 28 U.S.C. § 2244.

> [E]ach federal district court in Oklahoma has rejected the argument that *McGirt* triggered a new one-year limitation period under § 2244(d)(1)(C) for asserting Indian-country

> jurisdictional claims because the *McGirt* Court did not recognize any new constitutional right when it determined that Congress has not disestablished the historical boundaries of the Muscogee (Creek) Nation Reservation. *See Jones v. Pettigrew*, No. CIV-18-633-G, 2021 WL 3854755, at *3 (W.D. Okla. Aug. 27, 2021) (unpublished); *Sanders v. Pettigrew*, No. CIV-20-350-RAW-KEW, 2021 WL 3291792, at *5 (E.D. Okla. Aug. 2, 2021) (unpublished); *Littlejohn v. Crow*, No. 18-CV-0477-CVE-JFJ, 2021 WL 3074171, at *5 (N.D. Okla. July 20, 2021) (unpublished); *Berry v. Braggs*, No. 19-CV-0706-GKF-FHM, 2020 WL 6205849, at *6-7 (N.D. Okla. Oct. 22, 2020) (unpublished). Because these cases are persuasive on this issue, the Court likewise rejects Greene's argument that his petition could be timely under § 2244(d)(1)(C).

Greene v. Nunn, 606 F. Supp. 3d 1108, 1115 (N.D.Okla. 2022). See also, *Sweet v. Hamilton*, -- F.Supp.3d --, 2022 WL 6755830 (N.D. Okla. Oct. 11, 2022); *Allen v. Tuggle*, 2023 WL 1069730, *4 (slip op.)(E.D.Okla. Jan. 30, 2023)(" Regardless of the untimeliness of the petition, the federal courts have repeatedly rejected the notion that *McGirt* recognized a new, retroactive constitutional right for purposes of § 2244(d)(1)(C). *See Mitchell v. Nunn*, 601 F. Supp. 3d 1076, 1082 (N.D. Okla. 2022); *Jones v. Pettigrew*, No. CIV-18-633-G, 2021 WL 3854755, at *3 (W.D. Okla. Aug. 27, 2021) (unpublished) (collecting cases); *Sanders*, 2021 WL 3291792, at *5").

While not directly on point, these cases are far more closely analogous to Defendant's case than the line of exclusionary rule cases cited by Defendant. (Def. Brf. at 18-19). Defendant, unlike the officers acting in reliance on the settled state law preceding *McGirt*, could under no circumstances have been acting in "good

faith" when he shot Mr. Jumper.

Because Defendant had no valid self-defense claim under Oklahoma law, because he had notice that eastern Oklahoma was an Indian reservation at least as early as 2017 when the *Murphy* decision was issued, because *McGirt* did not announce a new law or a new punishment for a new crime, because Defendant himself had previously availed himself of *McGirt* to secure a state court dismissal, and because the district court's ultimate ruling was sound, the conviction should be affirmed.

II. THE DISTRICT COURT IMPOSED A CONSTITUTIONALLY SOUND AND SUBSTANTIVELY REASONABLE SENTENCE.

A. Standard of Review

The United States agrees with Defendant's presentation of the standard of review. (Def. Brf. at 24-25).

B. Discussion

Defendant relies on the problematic special interrogatory to argue he is actually innocent of the crimes for which he stands convicted and, therefore, any sentence is cruel and unusual punishment under the Eighth Amendment. (Def. Brf. at 25-27).[13] Defendant was convicted of a federal offense as defined by federal law.

[13] This sentencing argument further amplifies why a court should not instruct a jury on inapplicable law or submit a special interrogatory based on such law. See generally, *United States v. Ofarrit–Figureoa*, 15 Fed. Appx. 360, 365 (7th Cir. 2001) (error occurs if instructions were inaccurate summaries of the law,

It is well-established that crimes committed under §1153 are prosecuted under federal law. See *United States v. Antelope*, 430 U.S. 641, 643 (1977); *United States v. Langford*, 641 F.3d 1195, 1189-99 (10th Cir. 2011). For all the reasons discussed previously in Section One, Defendant had no viable self-defense claim under established Oklahoma self-defense law. Oklahoma law does not authorize the repeated shooting of an unarmed man lying on the ground who poses no threat to the shooter. Defendant is not innocent of the crime of conviction.

Moreover, the district court decision to depart upward was substantively reasonable. The 96-month sentence imposed was well-within the original guideline range of 87-108 months as calculated by the PSR before Defendant was granted a questionable two-point credit for acceptance of responsibility. (Vol. III, *PSR*, at ¶50, Sealed ROA at 21). The 96-month sentence only exceeded the final guideline range by 8 months. Such an increase under the facts of this case was by no means unreasonable or excessive.

During the sentencing hearing, the Assistant United States Attorney was granted three minutes to argue for an upward departure or variance:

> Yes, sir. So we're requesting an upward variance under 3553(a) based on three things.
>
> First, based on the fact that the defendant was trespassing in the car at the time of the offense. If he had gotten out of the car, this wouldn't have happened. I

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unsupported by the record, or misled the jury).

> recognize that there is some indication that perhaps the child safety locks were in place; however, he never said that. He never told police that was the reason he didn't get out. There was indication that the car was stopped multiple times.
>
> Additionally, he was possessing a handgun in the car at the time, in violation of Oklahoma law.
>
> And then, finally, to the extent the Court does not grant our departures or upward departure requests, the same bases, the number of shots he fired, the manner in which he killed the victim, the dangerousness, given that it happened in a Tahlequah street at an intersection with other people present, nearby homes. Those would be the bases for the upward variance request.

(Sent Tr. at 601).

The district court adequately explained, in addition to its consideration of the § 3553(a) factors, the reason for the upward variance:

> Among other things, in its upward variance from the advisory guideline range, the Court considered the nature and circumstances of the offense – namely the number of shots fired into the body of the victim, Mr. Jumper; the prior opportunity the Defendant had to withdraw from the conflict; and the Defendant's immediate flight from the scene of the shooting, as well as the need for just punishment, deterrence, and protection of the public. The Court would also note that the defendant's sentence would remain the same even if there is an error in the calculation of the sentencing guidelines.

(Vol. III, *Statement of Reasons*, Sealed ROA at 62).

Defendant's sentence should be affirmed.

CONCLUSION

Based upon the foregoing arguments and authorities, the United States urges this Court to affirm the Defendant's conviction and sentence.

STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully asserts that argument would not be helpful in this matter and oral argument is therefore not requested.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to MS Word 2016, this brief contains 8,482 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

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I certify that:

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CERTIFICATE OF ECF FILING & DELIVERY

I hereby certify that on March 3, 2023, I electronically transmitted the attached documents to the Clerk of Court using the CM/ECF System for filing. A Notice of Electronic Filing will be sent via the Court's CM/ECF filing system to counsel for Defendant/Appellant:

James Castle jcastlelaw@gmail.com
Andre Belanger andre@masassehandgill.com

/s/Linda A. Epperley