UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. JERIAH SCOTT BUDDER, Defendant – Appellant.	No. 22-7027 (D.C. No. 6:21-CR-00099-DCJ) Honorable David C. Joseph (E.D. Okla.)

OPENING BRIEF

Respectfully submitted,

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Oral argument is requested.

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RELATED APPEALS

None.

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Oklahoma had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. A federal jury convicted Budder of voluntary manslaughter. After sentencing, the judgment and commitment order was docketed on June 13, 2022. Vol. 1, at 233-39 (Doc. 191) (Attachment 4).[1] Budder timely noticed his appeal in accordance with Fed. R. App. P. 4(b)(I), on June 21, 2022. Vol. 1, at 240-41 (Doc. 193). 28 U.S.C. § 1291 and 18 U.S.C. § 3742 confer jurisdiction on this Court.

ISSUES PRESENTED FOR REVIEW

At the same time a federal jury convicted Mr. Budder of voluntary manslaughter under federal law, it unanimously answered a special interrogatory, stating that it would have acquitted him, had Oklahoma state law regarding self-defense applied. The questions presented are:

I. Whether Mr. Budder was denied due process of law (based on *ex post facto* principles) when he was federally prosecuted, convicted, and sentenced for a

[1] The record on appeal from the district court consists of five electronic volumes, the first containing relevant pleadings and orders from the district court proceedings (Vol. 1), the second containing sealed pleadings (Vol. 2), the third comprised of restricted transcripts (Vol. 3), the fourth of sealed transcripts (Vol. 4), and the fifth containing another sealed pleading (Supp. Vol. 1). Citations herein to the record are to volume and page number(s) of the electronic file.

fatal shooting that occurred in self-defense as defined by the Oklahoma law that governed his conduct before the Supreme Court's *McGirt* decision?

II. Whether Mr. Budder's sentence is cruel and unusual or was otherwise substantively unreasonable, when his conduct was justified, and thus innocent, under applicable state law?

STATEMENT OF THE CASE AND FACTS RELEVANT TO THE ISSUES

The district court's Memorandum Order denying Budder's motion to dismiss the superseding indictment for denial of due process and fair notice (Vol. 1, at 23-38 (Doc. 62), 57-62 (Doc. 97), 199-209 (Doc. 161)) thoroughly and accurately recounts the factual and procedural background. *See* Vol. 1, at 210-30 (Doc. 162), published as *United States v. Budder*, --- F.Supp.3d ----, 2022 WL 1948762, at *1-4 (E.D. Okla. April 29, 2022) (hereinafter "Order"). Budder adopts these background sections of the Order for purposes of this appeal.

To summarize succinctly, on April 24, 2019, Jeriah Budder, a registered citizen of the Cherokee Nation and eighteen-year-old high school senior, was involved in an altercation that resulted in the shooting death of David Wayne Jumper, a much bigger man twice his age who had threatened violence against him on previous occasions. On the date in question, Mr. Jumper was angry and had been drinking liquor, remarked to a third party that Budder was a "punk" who he

wanted to teach "a lesson," and later initiated a physical attack.[2] These events, which involved an instance of self-defense by Budder under Oklahoma law (as eventually determined by the jury in response to special interrogatory), occurred in the City of Tahlequah in Cherokee County, Oklahoma. On May 13, 2020, the State of Oklahoma – through its Cherokee County District Attorney's office – charged Budder with first-degree manslaughter.

On July 9, 2020, the Supreme Court issued its decision in *McGirt*, which "effectively divested Oklahoma of jurisdiction and extended jurisdiction over the offense conduct to the United States Attorney under the Major Crimes Act." Order at *2, citing *McGirt* and 18 U.S.C. § 1153. After state charges against Budder were dismissed for lack of subject matter decision in the wake of *McGirt*, on April 15, 2021, the United States indicted Budder for first-degree murder in Indian Country, and later filed a superseding indictment adding counts for lesser federal crimes.

Pretrial, Budder unsuccessfully moved to dismiss the indictment, and "also filed a motion requesting that the Court apply the Oklahoma state law of self-defense, arguing that the change from the Oklahoma law to the somewhat narrower federal law of self-defense violated the Constitution's Ex-Post Facto Clause and otherwise violated his right to due process under the law. [Doc. 62]." Order at *3.

[2] *See* Vol. 3, at 86-88, 103-04, 117-23

The court denied the motion as initially presented in part and deferred ruling in part, but, "finding Defendant's arguments and authority compelling," remained open to posing a special interrogatory to jurors if Budder presented evidence of self-defense at trial, "thus allowing a determination of whether the jury believed that the Oklahoma law of self-defense would have applied differently to the facts of this case than federal law." *Id.*; *see also* Vol. 3, at 8-12 (noting that "[i]f the answer is, yes, and if they otherwise convict the defendant of the crimes charged in the indictment, then we have an issue, a constitutional issue we need to decide at that point.").

After a three-day trial at which Budder presented evidence of self-defense, the jury returned a guilty verdict on the lesser-included offense of voluntary manslaughter under federal law, but:

> In response to the "Special Interrogatory," however, the jury answered "No," determining that the government had not proved beyond a reasonable doubt that Budder had not acted in self-defense under Oklahoma law. As such, the jury found that application of Oklahoma's law of self-defense to the facts of this case would have operated to acquit the Defendant. After the trial, the Defendant renewed his Motion to Dismiss arguing that the change wrought in *McGirt*, which precluded him from asserting the self-defense law of Oklahoma, raises *ex post facto* and due process issues. This issue is now ripe for ruling.

Id. at *4 (footnote omitted); *see also* Vol. 1, at 199-209 (Doc. 161).

The district court thoroughly and thoughtfully considered the significant constitutional issues presented under the facts of this case but, despite its

"expressed concerns with due process afforded" Budder, ultimately declined to vacate his conviction because of the absence of prior precedent on the ultimate question presented. Order at *8-9.

Prior to sentencing, Budder argued that imposing *any* additional incarceration beyond the seventeen months he had already served while awaiting his trial would be cruel and unusual, given the case's unique procedural posture, the facts elicited at trial, and the jury's unanimous conclusion that, under Oklahoma state law, his conduct was justifiable self-defense. Supp. Vol. 1, at 4-5, 11-12; Vol. 2, at 12 (reflecting 519 days of pre-sentence incarceration). He argued further that, at a minimum, a significant variance and downward departure was warranted for these same reasons and others, including his youth and Jumper's wrongful conduct, and other mitigating circumstances. Supp. Vol. 1, at 4-11.

At the sentencing hearing, the district court noted that its factual summary in its ruling denying Budder's motion to dismiss the superseding indictment and the facts elicited during the trial would serve as the factual basis for the court's sentence. *See* Vol. 1, at 596:2-6. The court determined that Budder was entitled to a two-point reduction for acceptance of responsibility, and calculated the adjusted guideline sentencing range to be 70-87 months, based on a total offense level of 27. *See* Vol. 3, at 595-96, 599-600. The court, however, imposed a sentence exceeding that applicable sentencing range under the Guidelines and committed

Budder to the federal Bureau of Prisons for a term of 96 months. Vol. 3, at 603-04, 608-09; Vol. 1, at 233-34.

SUMMARY OF ARGUMENT

Basic fairness precepts, core constitutional principles, the Due Process Clause, and the Supreme Court's precedents compel the conclusion that Mr. Budder's conviction and sentence cannot be upheld under the circumstances of this case. The Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), cannot be applied retroactively to Budder's pre-*McGirt* conduct without denying him due process, fundamental fairness, and a complete defense, criminalizing conduct that was lawful when it occurred, and demonstrably prejudicing him. The 96-month sentence imposed upon him, moreover, is cruel and unusual in violation of the Eighth Amendment and substantively unreasonable. Consequently, this Court should remand this matter to the district court with instructions to vacate the judgment of conviction and the resulting sentence, and to dismiss this matter with prejudice. In the alternative, the Court should remand this matter to the district court with instructions to vacate the sentence and conduct any and all proceedings necessary to resentence Budder in a manner consistent with the Constitution and in accordance with this Court's decision.

ARGUMENT

I. Retroactively applying *McGirt* to Budder's pre-*McGirt* conduct violates the Fifth and Sixth Amendments by depriving him of his constitutional rights to due process, fair warning, and a complete defense.

Throughout these proceedings, the district court's approach to Budder's *ex post facto* / due process arguments has been measured, thoughtful, and cautious. Eschewing an advisory opinion, the district court ensured the evidence presented at trial would support further inquiry into the *ex post facto* principles at play. It then, by way of special interrogatory, elicited the jury's unanimous conclusion that, under Oklahoma state law, Budder's conduct was justifiable self-defense – and had Oklahoma law applied, he would have been acquitted. The district court's post-trial Order analyzing the issues is thorough and accurate, right up until the end, where, in an over-abundance of caution, "[d]espite [its] expressed concerns with due process afforded to this Defendant under the facts of this case," the court held back and declined to invalidate the conviction because of the absence of prior precedent on the ultimate question presented. Order at *9.

At the time Budder shot Jumper, and for an entire century prior, homicide cases in Cherokee County had been prosecuted by Oklahoma state authorities pursuant to Oklahoma statutes. The jury confirmed via special interrogatory that it would have acquitted Budder, had Oklahoma law applied.

Before stopping short of rendering the conclusion that would logically follow, the district court well summarized the analysis:

> This case was originally brought in Oklahoma state court, which at the time was viewed as the proper jurisdiction to prosecute this homicide. It was only after *McGirt* that the state court dismissed its case for lack of jurisdiction and a federal prosecution was initiated. Put simply, both the Oklahoma authorities and the Defendant had every reason to believe that on April 24, 2019, Budder's actions were subject to Oklahoma law.
>
> Thus, the crux of the issue in this case is whether the jurisdictional change wrought by *McGirt* – effectively removing Budder's ability to avail himself of Oklahoma's self-defense law – was "unexpected and indefensible" to the point of violating his due process rights.
>
> … It seems self-evident that the *McGirt* decision brought about an "unforeseeable judicial enlargement" of the geographical scope of federal Indian Country jurisdiction in Oklahoma. By supplanting Oklahoma law, the Supreme Court retroactively changed the criminal law applicable to the approximately 400,000 Native Americans living in eastern Oklahoma, as well as those accused of victimizing Native Americans. In doing so, the *McGirt* decision "operate[d] precisely like an *ex post facto* law" with respect to a large group of Americans, including the Defendant in this case.

Order at *8-9. Feeling restrained by the absence of prior precedent, though, the district court declined to order the relief its analysis would suggest, namely vacating the conviction of a defendant the jury explicitly stated it would acquit if the prior law applied. *Id.*

The district court thus teed up the issue for this Court's decision on appellate review, which the district court expressed it "firmly believes … is warranted." *Id.*

A. Standard of Review

This Court reviews due process challenges involving pure legal questions *de novo*. *See United States v. Farris*, 448 F.3d 965, 967-68 (7th Cir. 2006); *see generally United States v. Wagner*, 951 F.3d 1232, 1253 (10th Cir. 2020) (reviewing *de novo* the denial of motion to dismiss indictment based on alleged due process violations arising from outrageous government conduct).

B. Law

1. Oklahoma's Law of Self-Defense

As described by the district court in its special interrogatory given to the jury, in relevant part:

> 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.

Order at *3; *see also* 21 Okla. Stat. § 733. As the district court recognized, "[t]he inclusion of the 'forcible felony provision' broadens the law of self-defense in Oklahoma beyond the federal law of self-defense." Order, n.18.[3]

[3] Federal criminal law, as the district court instructed jurors, "permits lethal force to be used in self-defense 'only if he reasonably believes that force is necessary to prevent

2. The Federal MCA

The Major Crimes Act (MCA), 18 U.S.C. § 1153(a), provides that "[a]ny Indian who commits" certain enumerated offenses (including murder and manslaughter) "within the Indian country, shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151.

3. *McGirt v. Oklahoma*

In *McGirt*, the Supreme Court held that Congress never disestablished the Creek Reservation in eastern Oklahoma and, thus, it constitutes Indian country for purposes of federal criminal jurisdiction. *See* 140 S.Ct. at 2482. *McGirt* did not announce "a new constitutional right. It self-professedly resolved a question of 'statutory interpretation,' surveying many 'treaties and statutes,' to determine that '[t]he federal government promised the Creek a reservation in perpetuity' and 'has never withdrawn the promised reservation.'" *Pacheco v. Al Habti*, 48 F.4th 1179, 1192 (10th Cir. 2022), quoting *McGirt*, 140 S.Ct. at 2474, 2476, 2482.

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death or great bodily harm to himself.'" Order, n.18 (citing 10th Circuit Pattern Jury Instruction 1.28, accessed at: https://www.ca10.uscourts.gov/ form/criminal-pattern-jury-instructions).

The five-Justice *McGirt* majority acknowledged the four-Justice dissent's "concern for reliance interests," and endorsed the view that lower courts should take into consideration legitimate reliance interests through "other legal doctrines … designed *to protect those who have reasonably labored under a mistaken understanding of the law*." *McGirt*, at 2481 (emphasis added). The Court expressly left "questions about … reliance interest[s] for later proceedings crafted to account for them." *Id*., quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1407 (2020).

4. Historical Context, *Ex Post Facto* Laws, Due Process, Fair Warning, and the Right to a Complete Defense

The fundamental proposition that the law should not criminalize or punish conduct that was lawful when committed, long predates the Constitution. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) (the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal"); The Federalist No. 84, at 511-12 (C. Rossiter ed., 1961) (Alexander Hamilton) ("the subjecting of men to punishment for things which, when they were done, were breaches of no law," was among "the favorite and most formidable instruments of tyranny").

The Constitution prohibits both federal and state governments from enacting any "*ex post facto* Law." Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. This prohibition forbids enactment of "any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Devine v. New Mexico Dept. of Corrections*, 866 F.2d 339, 341 (10th Cir. 1989), quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 325-26 (1866)); *see also Calder v. Bull*, 3 U.S. 386, 390 (1798) (defining an *ex post facto* law as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that aggravates a crime, or makes it greater than it was, when committed").

The Framers enacted the Ex Post Facto Clause to categorically prohibit application of a new law to pre-enactment conduct. The Framers did so in response to their fear, based on recent history in Great Britain, that Congress or the states might attempt to use *ex post facto* laws to single out unpopular groups or individuals for retroactive conviction and punishment. Such laws they considered to be "contrary to the first principles of the social compact and to every principle of sound legislation." *Peugh v. United States*, 569 U.S. 530, 544 (2013), quoting The Federalist No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison). They "sought to assure that legislative [criminal] Acts give fair warning of their effect and permit

individuals to rely on their meaning until explicitly changed." *Weaver*, 450 U.S. at 28-29. In this sense, the Ex Post Facto Clause imposes a requirement of notice consistent with the basic principles of fairness and legality: it requires that a legislature give advance notice of its intent to treat conduct as criminal so that individuals may ensure that their actions conform to the law and order their conduct in a way that avoids conviction and punishment.

The Ex Post Facto Clause also furthers a more generalized interest in "fundamental justice." *Carmell v. Texas*, 529 U.S. 513, 531 (2000). That is, "[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Id*. The government runs afoul of this fairness interest when it passes an *ex post facto* law that makes it easier, after the fact, to convict or punish its citizens. *See Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (Ex Post Facto clause prohibits application of any law "which punishes as a crime an act previously committed, *which was innocent when done*, which makes more burdensome the punishment for a crime, after its commission, *or which deprives one charged with crime of any defense available according to law at the time when the act was committed*.") (emphasis added).

Courts are no less a part of the government than are legislatures. *See Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("Judges, it is sometimes necessary to remind ourselves, are a part of the State."). Beginning in the 1960s, the Supreme Court came to acknowledge that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law." *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964). Just as the Ex Post Facto Clause prohibits Congress and the states from criminalizing conduct that was legal when undertaken, the Due Process Clause bars courts from "achieving precisely the same result by judicial construction." *Id*. at 353; *see also United States v. Lanier*, 520 U.S. 259, 265-66 (1987) (the fair warning requirement "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") (emphasis added); *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (due process is concerned with fundamental fairness and protects against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law).

The Due Process Clause of the Fifth Amendment thus entitles defendants to fair warning of the conduct that constitutes a crime. *Bouie*, at 350; *see also Marks v. United States*, 430 U.S. 188, 992-93 (1977) ("a right to fair warning of that

conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty"). Fair warning exists only if defendants could reasonably foresee the legal consequences of their conduct. *See Lanier*, 520 U.S. at 270-71. And, because the deprivation of the right to fair warning can result from an unforeseeable and retroactive judicial expansion of a criminal statute, *Bouie*, at 352, the Due Process Clause imposes "*limitations* on ex post facto judicial decisionmaking." *Rogers*, 532 U.S. at 456, 459 (emphasis added). Under this 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." *United States v. Muskett*, 970 F.3d 1233, 1242 (10th Cir. 2020), quoting *Bouie*, at 354.

Finally, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984).

C. Discussion

1. The district court's analysis is generally on point, but its ultimate conclusion denying relief is in error because it does not logically follow from the otherwise proper analysis.

The district court's decision denying Budder's motion is thorough and accurate in its recitation of the facts, governing legal frameworks, and relevant precedents. In fact, the court's analysis is mostly spot on and appropriately frames the constitutional dilemma now confronting this Court:

> [T]here can be no doubt that on the night of April 24, 2019, the Defendant would have had every reason to believe that he was subject to Oklahoma criminal law. Indeed, the Oklahoma prosecutorial authorities also reasonably believed that Oklahoma law applied to Budder, as evidenced by his arrest and initial prosecution in state court.
>
> Only after *McGirt* was decided did any party to this case come to understand that federal Indian Country jurisdiction applied and that therefore federal self-defense laws would apply to Budder's actions.
>
> Though in most cases this change would have little practical effect, in this case it meant that Budder could no longer assert the affirmative defense that his actions were justified in order "to terminate or prevent the commission of a forcible felony against himself." 21 OKLA. STAT. § 733(A)(2).
>
> Here, the practical and retroactive application of the *McGirt* decision to Budder, as a member of the Cherokee nation, resulted in his conviction of Voluntary Manslaughter under federal law. Were Budder not a Native American or in absence of the *McGirt* decision, the jury determined that his actions would have constituted justifiable homicide under Oklahoma law, ***and he would have been acquitted***.

Order at *8-9 (emphasis added; footnotes omitted).

In spite of its own "expressed concerns with the due process afforded to this Defendant under the facts of this case," the district court nevertheless declined to vacate Budder's conviction, noting the absence of "analogous Tenth Circuit or Supreme Court precedent." *Id*. Given the table the district court has set, this Court

now has the opportunity to create such precedent, which, Budder respectfully submits, the Constitution compels in the circumstances of this case.

a. *McGirt* was unforeseeable in light of prior understanding and practice.

When Budder committed his alleged offense in April 2019, the State of Oklahoma had a "long historical prosecutorial practice of asserting jurisdiction over Indians in state court, even for serious crimes on the contested [Creek] lands." *McGirt*, 140 S. Ct. at 2470. Indeed, the State had "maintained *unquestioned* jurisdiction for more than 100 years" over the area now understood to be part of the Muscogee (Creek) Nation Reservation. *Id*. at 2485 (Roberts, C.J., dissenting) (emphasis added); *see also Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2499 (2022) ("Until the Court's decision in *McGirt* two years ago, … [m]ost everyone in Oklahoma previously understood that the State included almost no Indian country. But after *McGirt,* about 43% of Oklahoma – including Tulsa – is now considered Indian country. Therefore, the question of whether the State of Oklahoma retains concurrent jurisdiction to prosecute non-Indian on Indian crimes in Indian country has *suddenly* assumed immense importance.") (emphasis added); *Rogers Cnty. Bd. of Tax Roll Corrections v. Video Gaming Techs., Inc.*, 141 S.Ct. 24 (2020) (Thomas, J., dissenting from denial of certiorari) ("Earlier this year, the Court 'disregard[ed] the 'well settled' approach required by our precedents' and transformed half of Oklahoma into tribal land. That decision 'profoundly

destabilized the governance of eastern Oklahoma' and 'create[d] significant uncertainty' about basic government functions like 'taxation.' The least we could do now is mitigate some of that uncertainty.") (quoting Justice Roberts' *McGirt* dissent, 140 S.Ct. at 2482-83).

Oklahoma's courts, too, have stated that *McGirt* "broke new legal ground in the sense that it was not dictated by, and indeed, arguably involved controversial innovations upon, Supreme Court precedent." *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶¶ 28-32 & n.6, 497 P.3d 686, 692 (recognizing that until *McGirt*, Oklahoma courts and law enforcement officials "generally, declined to recognize the historic boundaries of any Five Tribes reservation, as such, as Indian Country"); *see also Bench v. State*, 2021 OK CR 39, ¶ 8, 504 P.3d 592, 597 ("*McGirt* rule was new because it broke new ground, imposed new obligations on both the state and the federal governments and the result was not required by precedent").

Several decisions of federal district courts in Oklahoma denying motions to suppress evidence obtained by state authorities have rested on the premise of state officers' good faith reliance upon the settled law preceding *McGirt*. *See, e.g., United States v. Patterson*, No. CR-20-71-RAW, 2021 WL 633022, at *3 (E.D. Okla. Feb. 18, 2021) (noting that for the past century, the State of Oklahoma has "investigated, arrested, prosecuted, and convicted Native Americans for crimes on

the lands in question"), appeal pending, No. 21-7053; *United States v. Little*, No. CR-162-JFH, 2022 WL 14224529, at *2 (N.D. Okla. Oct. 24, 2022) (collecting cases in which "[t]his same conclusion has been reached"). This same reasoning should apply to Budder, who like those officers, had *no* reason to believe he was in "Indian Country" at the time of the alleged offense and, instead, had *every* reason to believe that he was subject to the state laws of Oklahoma, including the broader right of self-defense afforded by those laws.

b. In this case, *McGirt* has been applied retrospectively, to Budder's great detriment: conviction rather than acquittal.

In *Smith v. Scott*, 223 F.3d 1191 (10th Cir. 2000), this Court concluded that habeas relief was warranted for "a violation of the Ex Post Facto Clause and due process notions of fair notice" resulting from the Oklahoma Department of Corrections (ODOC)'s rescission of certain earned time credits based on amended ODOC regulation. Quoting the Supreme Court, this Court explained that, "[t]o fall within the ex post facto prohibition, a law must be retrospective – that is, it must apply to events occurring before its enactment – and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime." *Smith*, 223 F.3d at 1194, quoting *Lynce v. Mathis*, 519 U.S. 433, 441 (1997), and citing *Weaver*, 450 U.S. at 29. These requirements are indisputably met here: the deprivation of Budder's complete defense under

Oklahoma law of self-defense is the result of *McGirt*'s retrospective application to his conduct, and the jury's indication through special interrogatory that it would have acquitted Budder under Oklahoma law of self-defense could not be a clearer expression of the degree to which *McGirt*'s retrospective application disadvantaged Budder. *See Lopez v. McCotter*, 875 F.2d 273, 278 (10th Cir. 1989) ("Because the decision of the New Mexico Court of Appeals was unforeseeable and retroactively rendered Mr. Lopez's conduct criminal by depriving him of the bail bondsman's privilege, it violated the due process clause.").

2. This Court should take the final step consistent with the district court's otherwise proper analysis, reverse Budder's conviction, and remand the matter to the district court with instructions to vacate the judgment of conviction.

The district court was overly cautious in declining to vacate Budder's conviction. It is incumbent on this Court to correct that error.

The district court declined to go out on a limb, when "there is no analogous Tenth Circuit or Supreme Court precedent." Order at *9. While it may be true that there is no precedent on all fours with the unique situation presented by this case, there is also no precedent for convicting and punishing a defendant in Budder's shoes – *i.e.*, where a jury has indicated he should be acquitted under state law. Straightforward application of *Bouie* and its progeny suggests that reversal of Budder's conviction is constitutionally required.

Moreover, an analogy can be drawn to several cases in which federal courts recognized *ex post facto* issues resulting from a December 2002 determination by the Department of Justice, communicated by memoranda to the Federal Bureau of Prisons (BOP) and to federal judges regarding BOP's authority to house certain convicts in community corrections centers (CCCs or halfway houses) for the imprisonment portion of their sentences. *See United States v. Eakman*, 378 F.3d 294 (3d Cir. 2004) (holding that "the sentence imposed violated due process" where the sentencing "judge relied on a mistaken understanding of the law in believing that the [BOP] had the discretion to place him in a community corrections center (also known as a 'halfway-house'), when in fact the [BOP] lacked such authority under the law"); *Ashkenazi v. Attorney General of the United States*, 246 F. Supp. 2d 1, 7 (D.D.C. 2003) (granting preliminary injunction to inmate where "[t]here [was] nothing in the statute or BOP's prior implementation of the statute to suggest that this well-known and long-standing policy would be abruptly changed") (dismissed as moot on appeal, 346 F.3d 191 (D.C. Cir. 2003)); *United States v. Serpa*, 251 F. Supp. 2d 988, 993 (D. Mass. 2003) (granting sentencing downward departure for defendant who pled guilty before the December 2002 directive because "a sentence that did not make any allowances for [his] reasonable *inability* to foresee such a change when deciding whether to plead

guilty would, in this Court's view, raise the specter of an ex post facto violation") (emphasis in original).

Despite the absence of a perfect analogue, this case falls squarely within the Supreme Court's decisions on "judicial ex post facto" due process violations resulting from judicial interpretations making certain conduct criminal which had before been legal. *See Bouie, supra* (South Carolina supreme court expanded scope of trespass statute applied to civil rights protesters at lunch counter); *Marks, supra* (United States Supreme Court expanded scope of illegal obscenity applied to marketers of pornographic films). Under the standards established by these cases and their progeny, which standards focus on whether the new judicial decision was foreseeable in light of the "law which had been expressed prior to the conduct in issue," this Court must hold that the *McGirt* decision "was unforeseeable, and that its retroactive application [to Budder] thereby violated due process." *Devine*, 866 F.2d at 345. *Cf. Ashkenazi*, 246 F. Supp. 2d at 6-7 ("Relying on the *Weaver* court's emphasis on 'fair notice,' numerous other courts have concluded that the *ex post facto* prohibition applies to administrative rules that purport to correct or clarify a misapplied existing law, provided the new rule was not foreseeable.") (collecting cases; footnote omitted). To suggest that *McGirt* should be retroactively applied to Budder's April 2019 conduct because the Supreme Court's decision was foreseeable at that time would attribute to him a level of clairvoyance

that the Due Process Clause cannot tolerate. *See Douglas v. Buder*, 412 U.S. 430, 432 (1973) (rejecting argument that state law be interpreted to equate a traffic citation to an arrest for purposes of probation revocation, where "the unforeseeable application of that interpretation in the case before us deprived petitioner of due process").

Indeed, despite the novelty of the questions presented, this is actually an "easy" case, according to a scholarly treatise:

> it is obvious that the rationale behind the ex post facto prohibition … is relevant in the situation where a judicial decision is applied retroactively to the disadvantage of a defendant in a criminal case…. ***Perhaps the easiest case is that in which a judicial decision subsequent to the defendant's conduct operates to his detriment by overruling a prior decision which, if applied to the defendant's case, would result in his acquittal.***

1 Wayne R. LaFave, Substantive Criminal Law § 2.4(c), at 162 (2d ed. 2003) (emphasis added; footnotes omitted). There are two inter-related due process considerations at issue in this case: fair warning and complete defense. Retroactive application of *McGirt* denied Budder of both. The jury's unanimous answer to the court's special interrogatory demonstrates unequivocally the harm Budder suffered as a result.

II. The district court committed constitutional error at sentencing by imposing cruel and unusual punishment in violation of the Eighth Amendment, and also abused its discretion by imposing a sentence that is substantively unreasonable.

A. Standard of Review

This Court reviews *de novo* the question of whether a criminal sentence violates the Eighth Amendment. *See*, *e.g.*, *United States v. Angelos*, 433 F.3d 738, 750 (10th Cir. 2006).

The Court reviews other sentencing challenges for reasonableness under an abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007). Reasonableness is required in two respects – the length of the sentence and the method by which the sentence is calculated. *United States v. Lopez-Flores*, 444 F.3d 1218, 1220 (10th Cir. 2006). In reviewing reasonableness, the Court reviews factual findings for clear error and legal determinations *de novo*. *United States v. Kristle*, 437 F.3d 1050, 1054 (10th Cir. 2006).

A defendant is not required to object at the time of sentencing to an error that implicates the substantive reasonableness of a sentence. *United States v. Torres-Duenas*, 461 F.3d 1178, 1183 (10th Cir. 2006); *see also United States v. Mancera-Perez*, 505 F.3d 1054, 1059 (10th Cir. 2007) (clarifying "*Torres-Duenas*'s exception allowing reasonableness review of unpreserved substantive sentencing challenges to require that the defendant have at least made the argument for a lower sentence before the district court"). Where, as here, the district court

"decides that an outside-Guidelines sentence is warranted, [the court] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *United States v. Pena*, 963 F.3d 1016, 1028-29 (10th Cir. 2020), quoting *Gall*, 552 U.S. at 50. On review, this Court must "give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance," *id.* at 1029, quoting *Gall*, at 51, but nevertheless "must determine if the district court's proffered rationale, on aggregate, justifies the magnitude of the sentence. *Id.*, quoting *United States v. Pinson*, 542 F.3d 822, 836 (10th Cir. 2008).

B. Discussion

1. The 96-month sentence constitutes cruel and unusual punishment and is fundamentally unjust.

Before sentencing, Budder argued that, under the unique circumstances and procedural posture of this case, any additional incarceration beyond that already served would violate the Eighth Amendment's prohibition on cruel and unusual punishment and would be fundamentally unfair. *See* Supp. Vol. 1, at 4-5, 11-12; Vol. 3, at 603-02 (arguing basic "fairness" principles). Although the district court did not expressly address these contentions, Budder's claims were adequately preserved for review. *See generally Mancera-Perez*, 505 F.3d at 1059.

It has long been established that the Constitution prohibits the government from punishing the innocent. *See Robinson v. California,* 370 U.S. 660, 667 (1962); *Calder,* 3 U.S. at 388 ("The Legislature may … declare new crimes … but they cannot change innocence into guilt; or punish innocence as a crime…."); *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); *United States v. U.S. Coin & Currency,* 401 U.S. 715, 726 (1971) (Brennan, J., concurring) ("the government has no legitimate interest in punishing those innocent of wrongdoing"). As the Supreme Court explained in *Robinson*:

> We hold that a state law which imprisons a person thus afflicted [with an addiction to narcotics] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

370 U.S. at 667. As the Court explained in *Calder* more than two centuries ago, "[i]t is impossible, that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had, therefore, no cause to abstain from it; ***and all punishment for not abstaining, must, of consequence, be cruel and unjust.***" 3 U.S. at 396, citing 1 Bl. Com. 46

(emphasis added). Such is the case here where the jury unanimously found that, under Oklahoma state law, Budder's conduct in defending himself against Jumper's violent attack was justifiable self-defense – and had Oklahoma law applied, he would have been unanimously acquitted. Under the unique circumstances of this case and for all of the reasons previously articulated, a prison sentence of any length for Budder's conduct – which was not criminal at the time of its commission, – must be considered a cruel and unusual punishment under the Eighth Amendment.

2. The 96-month sentence is substantively unreasonable.

Substantive reasonableness depends on whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a). *Pena*, 963 F.3d at 1024.

Here, in addition to his Eighth Amendment and basic fairness objections, Budder also argued that, at a minimum, a significant variance and downward departure was warranted in light of the unique procedural posture of the case, the facts elicited at trial, the jury's unanimous conclusion that his conduct was justifiable self-defense under Oklahoma state law (which was the law of the land when the incident occurred), his youth (then only eighteen years old), and Jumper's wrongful conduct. Supp. Vol. 1, at 4-11. Not only did the district court fail to address these contentions, it also imposed an upward variance to 96 months

from the advisory sentencing guideline range (which it correctly calculated to be 70-87 months, based on a total offense level of 27), citing the number of shots fired into Jumper's body, Budder's "prior opportunity … to withdraw from the conflict, and his immediate flight from the scene of the shooting, as well, of course, as the need for just punishment, deterrence, and the protection of the public." Vol. 3, at 608-09.

Budder respectfully submits that a 96-month sentence is substantively unreasonable for all of the reasons articulated above, and because the district court failed to appropriately consider other § 3553(a) factors, including Budder's history and characteristics under § 3553(a)(1) and USSG § 5H1.1, his need for educational and vocational straining under § 3553(a)(2)(d), and Jumper's wrongful conduct under USSG § 5k2.10. Budder was only eighteen and still in high school when the offense occurred, had no prior or subsequent criminal history aside from two tickets for public intoxication (for which he paid fines), had continued his studies while incarcerated (where his conduct was exemplary), and was in need of educational and/or vocational training. *See* Supp. Vol. 1, at 3-4, 6. Jumper was much older, bigger, and stronger than Budder, had threatened him with violence on previous occasions, was drinking vodka before the incident, and had described Budder as a "punk" who Jumper was going to teach "a lesson" (even before Budder was in Jumper's vehicle). *See* Vol. 3, at 122-23. After Budder was in the

vehicle, Jumper "got out of the car, opened Budder's door, and began striking Budder in the face with his fists and trying to pull him out of the vehicle," and "also attempted to wrestle the firearm away from" Budder. Order at *1; *see also* USSG § 5k2.10 (describing circumstances where a downward departure might be warranted based on the victim's wrongful conduct). The district court did not appropriately weigh these factors.

At a minimum, the district court abused its discretion in upwardly varying from the applicable guideline range. Indeed, if anything, the circumstances of this case warrant a downward departure from the advisory guidelines because they fall far outside the "heartland" of typical cases upon which the guidelines are based. Supp. Vol. 1, at 10-11, citing USSG ch. 1 pt. A.4(a), at 6 (2011). The asserted justifications for the district court's upward variance are not sufficiently compelling to warrant the severe punishment imposed, especially when juxtaposed against the appropriate considerations, which the court failed to consider or afford any weight.

Budder respectfully requests this Court to find that his sentence is unconstitutional and/or that it is substantively unreasonable, and remand the case to the district court to vacate the sentence and, if necessary, to conduct re-sentencing proceedings.

CONCLUSION

For the foregoing reasons, pursuant to due process principles prohibiting *ex post facto* application of new law to prior conduct, and in light of the jury's specific, unanimous answer to special interrogatory indicating that it would acquit Budder under the Oklahoma law that applied at the time of his conduct, this Court should reverse the district court's decision denying Budder relief, and remand with instructions to vacate the conviction and dismiss the case with prejudice.

In the event this Court affirms Budder's conviction, it should at least order that he be resentenced in compliance with constitutional requirements and in accordance with this Court's instructions.

REASONS WHY ORAL ARGUMENT IS NECESSARY

The issues presented in this case raise novel and important questions of constitutional law. Counsel has endeavored to set forth correct frameworks and straightforward analysis of these legal issues. Questions may arise, however, and counsel believes that oral argument may assist the Court in considering the questions presented.

Respectfully submitted this 2nd day of December, 2022.

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CERTIFICATES OF COMPLIANCE, SERVICE, AND DIGITAL SUBMISSION

I hereby certify that on this 2nd day of December 2022, a copy of the foregoing **OPENING BRIEF** was filed electronically using the CM/ECF system, which will send electronic notification of such filing to the following:

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I hereby also certify that with respect to the foregoing:

(1) Pursuant to Fed. R. App.Rule 32(a)(7)(C), I hereby certify that this brief complies with the type-volume and word limitations set forth in Fed. R. App.Rule 32(a)(7)(B). This brief is proportionally spaced, contains 6,997 words, and is in a Roman font and 14 point, with footnotes in 13 point. I relied on my word processor to obtain the count and it is Microsoft Word 2022 for Windows, Version 2210.

(2) all required privacy redactions have been made per 10th Cir. R. 25.5;

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Laura Koch
Laura Koch