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.)

REPLY BRIEF

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In-person oral argument has been scheduled for May 18, 2023, at 9:00a.m.

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INTRODUCTION

Already quoted in Budder's Opening Brief (p.8), the district court's words bear repeating:

> 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.

United States v. Budder, 601 F.Supp.3d 1105, 1116 (E.D. Okla. 2022), citing *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964).

By its own description, the only thing holding the district court back from granting Budder relief on due process grounds was its hesitancy to be the first court to do so. *Id*. ("To do so would be to extend the scope of the Supreme Court precedent in *Bouie* and its progeny beyond the contours within which the Supreme Court and Tenth Circuit have ***thus far*** indicated it should apply.") (emphasis added). Encouraging appeal, the district court looked to this Court to establish that precedent. This Court should accept the invitation.

ARGUMENT

The Government devotes a significant portion of its Answer Brief to reciting factual details that are immaterial to the fundamental constitutional issues

presented. The jury's unanimous and unequivocal response to the special interrogatory the district court posed provides the complete factual framework for this appeal, notwithstanding the Government's attempts to muddy the waters.

The question is not whether Budder would have been acquitted in a hypothetical state court proceeding (as the Government has tried to conjure), but rather what this federal jury did in fact do – which is to find that had Oklahoma's broader definition of self-defense applied, on the evidence presented at trial, it would have acquitted Budder on the basis that he was acting justifiably in self-defense when he shot Jumper. *Budder*, 601 F.Supp.3d at 1111. The Government labels the special interrogatory "problematic" (Ans.Br., pp.14, 31), but points to nothing in the record showing any requests for instructions on aspects of Oklahoma law it now claims are applicable (Ans.Br., pp.16-20), at, before, or even in its supplemental briefing after the time the district court instructed the jury as to the special interrogatory or commanded the jury's response thereto.[1]

The Government complains of "Defendant's selective analysis" (Ans.Br., p.15) with respect to Oklahoma's self-defense law. The only thing selective about

[1] The court had deferred ruling "as to the Constitutional implications should the jury enter a finding of guilty as to Count 1 of the Superseding Indictment with a concurrent finding by the jury that the Defendant's conduct would qualify as justifiable homicide under Oklahoma law." Vol. 1, at 128 (March 10, 2022 Minute Sheet reflecting court rulings at motion hearing/pretrial conference). Even in its post-trial supplemental briefing invited by the court after that scenario in fact came to be, the Government nowhere offered the arguments it now makes regarding Oklahoma's law of self-defense.

the analysis was the jury's selection of the response "No" to the question posed in the special interrogatory. The district court put the interrogatory to the jury after consultation with the parties, and after hearing the evidence presented during the trial, in order to set up the constitutional questions now before this Court.

I. The Government does not refute that retroactive application of *McGirt* violates Budder's constitutional rights.

A. The jury was deliberate in acquitting Budder of murder.

The jury's verdict form (Vol. 1, at 170-71) reflects a verdict of "***Not Guilty***" for both First and Second Degree Murder in Indian Country (Count One), as well as Counts Two and Three ("Use, Carry, Brandish and Discharge of a Firearm During and in Relation to a Crime of Violence," and "Causing the Death of a Person in the Course of a Violation of Title 18, United States Code, Section 924(c)," respectively). The jury instead found Budder "Guilty" only of Voluntary Manslaughter in Indian Country (a Count One lesser-included offense), which, together with its unanimous response to the special interrogatory indicates just how close a question it was whether the prosecution met its burden to prove the absence of self-defense beyond a reasonable doubt. Indeed, initially the jury mistakenly perceived the special interrogatory to apply only if it found Budder guilty of first or second degree murder, which it did not do. *See* Vol. 3, at 576-77 (in response to the court's question "Why was the special interrogatory not filled out?", jury

foreperson offered an initial explanation citing "the instructions on how the second two counts did not coincide with the first- and second-degree murder").

The jury's acquittal of Budder on the greater offenses of first and second degree murder demonstrates that the Government failed to sustain its burden to prove beyond a reasonable doubt that Budder acted with premeditation or with malice aforethought, the latter of which required the Government to prove he did not act in the "heat of passion." *See* Vol. 1, at 150-55 (Instructions Twelve and Thirteen) ("Heat of passion negates malice. The term 'heat of passion' means a passion, fear, or rage in which the Defendant loses his normal self-control, as a result of circumstances that provoke such a passion in an ordinary person, but which did not justify the use of deadly force."). In finding Budder guilty of voluntary manslaughter, the jury necessarily found that he acted "[w]hile in a sudden quarrel or heat of passion, and therefore without malice." Vol. 1, at 156-57 (Instruction Fourteen).

B. The district court acted properly within its discretion in giving the special interrogatory.

The Government does not challenge the district court's power to insist upon the jury's response to the special interrogatory concerning the jury's view of the evidence vis-à-vis Oklahoma's definition of self-defense. It was within the court's reasonable discretion to give the special interrogatory, subject to an abuse of discretion standard of review. *See Firestone Tire & Rubber Co. v. Pearson*, 769

F.2d 1471, 1483 (10th Cir. 1985) ("The submission of special interrogatories lies within the discretion of the trial court and will not be reversed absent an abuse of discretion."), citing *Miller's Nat'l Ins. Co. v. Wichita Flour Mills Co.*, 257 F.2d 93, 101 (10th Cir. 1958). The Government does not argue the district court abused its discretion. Instead, it obfuscates the issue by offering up a series of points about Oklahoma law based on pattern jury instructions that it never proposed before or during trial.

C. This case must be decided on the facts, law, and jury verdicts that were actually presented at trial, not on some hypothetical state court proceeding.

The ultimate question in this case is one of federal constitutional law – *i.e.*, whether judicial *ex post facto* application of *McGirt* violated Budder's rights to due process and a complete defense by criminalizing conduct the federal jury determined, based on the evidence presented at trial, would have constituted lawful self-defense under Oklahoma's definition, which justifies homicide "when the person using force reasonably believes such force is necessary to … terminate or prevent the commission of a forcible felony." 21 Okla. Stat. § 733. The court properly instructed the jury that, while assault and battery are misdemeanors, attempted aggravated assault and battery is a felony (601 F.Supp.3d at 1110; Vol. 1, at 172); and the jury by its answer to the special interrogatory plainly determined

that the evidence showed Jumper's conduct rose to the level of attempted aggravated assault and battery.

The Government's primary argument – that certain Oklahoma pattern jury instructions preclude Budder's claim of self-defense under Oklahoma law (*see* Ans.Br., pp.15-21) – may be an interesting academic exercise, but it is beside the point. The Government's foray into the niceties of its interpretation of state law is unnecessary, given the jury's response to the special interrogatory. It would also usurp the jury's determination, reflected in its response to the special interrogatory, that Budder's shooting of Jumper was precipitated by Jumper's commission of a forcible felony against him.[2] No guesswork is required because the jury gave a clear and unanimous answer to the question: had Oklahoma's definition of self-defense applied, the jury would have acquitted.[3]

The district court correctly determined that, based on the evidence presented at trial, Budder would have been entitled to claim self-defense to terminate or prevent a forcible felony under Oklahoma law. *Cf. United States v. Barrett*, 797

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[2] The Government's argument that Budder "provoked" Jumper (Ans.Br., p.19) is an example of the Government's stretching facts in search of a theory. Jumper was 6'2", 260 pounds – a large man, with big hands and fists, who was scary when angry and drinking, and had expressed dislike of Budder, who at 5'9" was much smaller. Vol.3, pp.88, 91, 245, 361. Jumper stopped his vehicle in the middle of a road, yanked open the rear driver's side door and began to throw what were described as "haymakers" at Budder. Vol. 3, pp.130-33. Jumper was shot only after he tried to wrestle Budder's gun from him, possibly to use it on Budder himself. Vol. 3, pp.134-37.

[3] None of the instructions the Government now claims should have been given was offered by the government in its proposed instructions to the jury. Vol. 1, at 63-82.

F.3d 1207, 1218 (10th Cir. 2015) ("A defendant's 'burden of production to warrant a self-defense instruction is not onerous.' It requires only that there be 'evidence sufficient for a reasonable jury to find in his favor.'"), quoting *United States v. Toledo,* 739 F.3d 562, 567-68 (10th Cir. 2014). Both the district court and the jury recognized the distinction between federal law and Oklahoma law – namely, the more defendant-friendly standard of self-defense afforded by Oklahoma's inclusion of terminating or preventing a forcible felony as justifiable homicide.

The Government points to nothing in the record to suggest it offered different statements of Oklahoma self-defense law when the special interrogatory was given, or when the jury's response to it was received, or when individual juror polling was conducted. It points to nothing indicating that it presented any of the pattern Oklahoma jury instructions it now cites as afterthoughts seeking to usurp the jury's role in teeing up the constitutional questions this case raises. And, it makes no argument that the district court abused its discretion in submitting the special interrogatory to the jury.

D. Budder did not have fair notice that the federal law of self-defense applied.

Despite the Government's best efforts to characterize *McGirt* as "a long-anticipated decision" providing "a final determination of what had long been recognized" that was nothing more than "a continuation and fulfillment of a long line" and that merely "clarified the procedural rule for determining the proper

jurisdiction for criminal prosecution" (Ans.Br., pp.22, 25 n.11, 26), *McGirt* rather suddenly reversed the understanding held by all interested parties for the prior century that alleged crimes in eastern Oklahoma were to be prosecuted by state authorities based on state law.

The Government's argument that *McGirt* was merely a continuation of known law is belied by the simple, telling fact that the federal government did not prosecute this case until after *McGirt* was decided, consistent with the actions of the federal government in not prosecuting similar cases for the previous century. Had it been so obviously a federal matter, the United States Attorney's Office and federal law enforcement agents would have led the investigation and the prosecution. They did not.

The Government tries to casually brush away the cases Budder cites (Op.Br., pp.18-19) in which courts have found that state police officers justifiably relied on settled law in conducting searches in locations that only *McGirt* later revealed to be Indian Country, by glibly suggesting that no person could shoot another 12 times "in good faith." Ans.Br., pp.30-31. The Government misconstrues or seeks to distract from the import of these cases, which are among the bodies of law and/or legal doctrines contemplated by the *McGirt* majority when it said that the dissent's "concern for reliance interests" could be properly addressed in "later proceedings crafted to account for them" that would take into consideration "other legal

doctrines … designed to protect those who have reasonably labored under a mistaken understanding of the law." *McGirt*, at 2481.[4]

Two weeks after Budder filed his Opening Brief, this Court issued its decision in *United States v. Patterson*, No. 21-7053, 2022 WL 17685602 (10th Cir. Dec. 15, 2022) (unpublished), in which it rejected the argument the Government now makes, that Budder "had notice that eastern Oklahoma was an Indian reservation at least as early as 2017 when the *Murphy* decision was issued" (Ans.Br., pp.27, 31):

> Patterson's contention that Deputy Youngblood knew or should have known the warrant was defective because *Murphy* had been decided two years earlier is unpersuasive. When Deputy Youngblood obtained and executed the warrant, "Oklahoma's long historical prosecutorial practice" was for state law enforcement to investigate crimes on the land where the offense here occurred and to prosecute them in state court. *McGirt*, 140 S.Ct. at 2470. And Oklahoma courts, including the district court in this case, did not regard *Murphy* as binding because the Tenth Circuit's mandate in that case had not issued.

Patterson,[5] at *5 & n.8, citing *McGirt v. Oklahoma*, No. PC-2018-1057 (Okla. Crim. App. Feb. 25, 2019) (unpublished) ("*Murphy* is not a final decision and

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[4] The Government altogether ignores this Court's decisions finding due process violations in *Smith v. Scott*, 223 F.3d 1191 (10th Cir. 2000), and *Lopez v. McCotter*, 875 F.2d 273 (10th Cir. 1989), as well as the cases Budder cites in which federal courts granted relief on due process grounds for sentences that had been based on a suddenly-corrected misunderstanding of the law relating to the Bureau of Prisons' authority to house prisoners in halfway houses. *See* Op.Br., pp.19-20; 21-22.

[5] While not binding because unpublished, *Patterson* is persuasive in the force of its rejection of the Government's argument based on *Murphy*, and can be considered for its persuasive value under Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Petitioner has cited no other authority that refutes the jurisdictional provisions of the Oklahoma Constitution."), and *Bosse v. State*, 499 P.3d 771, 774 (Okla. Crim. App. 2021) ("[N]o final decision of an Oklahoma or federal appellate court had recognized any of the Five Tribes' historic reservations as Indian Country prior to *McGirt* in 2020."). Moreover, neither state nor federal prosecutorial authorities changed their behavior in the wake of *Murphy*, while it lay in abatement until *McGirt* was decided.

The Government's own words in briefing such cases undermine its argument that *McGirt* did not create a new state of affairs that was contrary to settled understanding before the decision. *See, e.g.,* Government's brief in *Patterson*, 2022 WL 1190256, at *19 ("Deputy Youngblood had no idea whatsoever that he was in Indian Country or investigating a crime that occurred in Indian Country. … As of July 2019, Oklahoma had 'maintained unquestioned jurisdiction for more than 100 years'…."), quoting *McGirt*, 140 S.Ct. at 2485 (Roberts, C.J., dissenting); Government's brief in *United States v. Sherwood*, 2021 WL 5863517, at *5 ("*McGirt* upended over 100 years of legal understanding by lawyers, lawmakers, and police forces").

The filing by Budder's state court counsel for dismissal of the state proceedings based on the lack of jurisdiction *McGirt* revealed, cannot be equated with Budder being on notice that federal criminal law would apply to conduct that

occurred in 2019. The record reflects that Budder's counsel never consulted with him on the differences between federal and state law on self-defense before filing the motion to dismiss state proceedings. *See* Vol. 1, pp.58, 124.

The Government acknowledges that the cases it cites rejecting a *McGirt*-based extension of the one-year time period in which to file a federal habeas petition are "not directly on point." Ans.Br., pp.29-30. Budder has not argued that *McGirt* recognized any new constitutional right. His argument is that application of *McGirt* under the circumstances deprived him of his existing due process rights to fair notice and to present the complete defense available to him, based on the accepted understanding of settled law at the time his actions were taken and his Oklahoma statutory right to defend himself from the forcible felonies being committed by Jumper. The habeas statute of limitations cases the Government cites have no bearing on that issue.

In analogous space of assessing retroactivity of a new statutory provision, the Supreme Court has said:

> the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, … familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Landgraf v. USI Film Prods., 511 U.S. 244, 269-70 (1994).

II. The Government barely addresses Budder's claim that his sentence violates the Eighth Amendment.

If the Court grants Budder relief and his conviction is reversed on due process grounds, constitutional questions surrounding his sentence become moot. But if his conviction stands, the Court should look anew at his sentence through an Eighth Amendment lens. *See* Op.Br., pp.25-29.

The Government gives short shrift to Budder's Eighth Amendment claim, simply incorporating its prior arguments and quoting the prosecution's arguments at the sentencing hearing and the district court's statement of reasons for upward variance. *See* Ans.Br., pp.32-33. None of these takes into account the jury's unanimous verdict in response to the special interrogatory. Under state law – which everyone reasonably understood to be the law of the land at the time of the alleged offense – Budder's actions constituted "justifiable homicide." 21 Okla. Stat. § 733. He was thus innocent and the Eighth Amendment should operate to prohibit the Government from punishing him.

CONCLUSION

This case resides at precisely the point of the change *McGirt* wrought – *i.e.*, where the difference between federal and Oklahoma law of self-defense is outcome-determinative. For the foregoing reasons, and those set forth in his

Opening Brief, Budder respectfully requests that this Court reverse the district court's cautious conclusion in its decision denying him relief.

Respectfully submitted this 23rd day of March 2023.

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CERTIFICATES OF COMPLIANCE, SERVICE, AND DIGITAL SUBMISSION

I hereby certify that on this 23rd day of March 2023, a copy of the foregoing **REPLY 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 3,073

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 2011 for Mac, Version 14.7.7.

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

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/s/ Laura Koch
Laura Koch