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STATE OF OKLAHOMA

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Case. No. PCD-2019-124

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR REHEARING

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STANDARD FOR REHEARING 2

I. THIS COURT SHOULD RECONSIDER ITS DETERMINATION THAT THE STATE LACKS CONCURRENT JURISDICTION UNDER THE GENERAL CRIMES ACT, 18 U.S.C. § 1152. 3

II. THIS COURT SHOULD RECONSIDER ITS REFUSAL TO BAR INDIAN COUNTRY JURSIDICTIONAL CLAIMS 7

A. This Court Overlooked the State's Arguments that Indian Country Jurisdictional Claims Can Be Waived under Federal Constitutional Law and Created a Conflict with Federal Authority. 8

B. This Court Overlooked the State's Arguments that Indian Country Jurisdictional Claims Can Be Waived under State Statutory Law and Created a Conflict with the Post-Conviction Statutes. 16

C. This Court Overlooked the State's Reliance on *Ex parte Wallace*, 81 Okla. Crim. 176, 162 P.2d 205 (1945). 20

CONCLUSION 21

CERTIFICATE OF MAILING 22

TABLE OF AUTHORITIES

FEDERAL CASES

Atl. Richfield Co. v. Christian, 140 S. Ct. 1335 (2020) 5

Bosse v. Oklahoma, 137 S. Ct. 1 (2016) 2, 10

Claflin v. Houseman, 93 U.S. 130 (1876) 5

Clark v. Martinez, 543 U.S. 371 (2005) 4

Donnelly v. United States, 228 U.S. 243 (1913) 3, 4, 5

Ex parte Wilson, 140 U.S. 575 (1891) 3

Gonzalez v. Thaler, 565 U.S. 134 (2012) 7, 8, 9, 11

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) 5

Hugi v. United States, 164 F.3d 378 (7th Cir. 1999) 9, 12, 15

McDaniel v. Sanchez, 452 U.S. 130 (1981) 10

McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) 2, 8, 10

Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017) 8

Patel v. Napolitano, 706 F.3d 370 (4th Cir. 2013) 4

Prost v. Anderson, 636 F.3d 578 (10th Cir. 2011) 18

Sharp v. Murphy, 140 S. Ct. 2412 8

Silas Mason Co. v. Tax Com'n of State of Washington, 302 U.S. 186 (1937) 5

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138 (1984) 6

United Rentals Nw., Inc. v. Yearout Mech., Inc., 573 F.3d 997 (10th Cir. 2009) 4

United States v. Bank of New York & Tr. Co., 296 U.S. 463 (1936) 5

United States v. Cotton, 535 U.S. 625 (2002) 8, 11, 13

United States v. Green, 886 F.3d 1300 (10th Cir. 2018) 15

United States v. Heon Seok Lee, 937 F.3d 797 (7th Cir. 2019) 4

United States v. John, 437 U.S. 634 (1978) 5

United States v. Pemberton, 405 F.3d 656 (8th Cir. 2005) 13

United States v. Prentiss, 206 F.3d 960 (10th Cir. 2000) 15

United States v. Prentiss, 256 F.3d 971 (10th Cir. 2001) (en banc) 13

United States v. Santos, 553 U.S. 507 (2008) 4

United States v. Tony, 637 F.3d 1153 (10th Cir. 2011) 13

United States v. White Horse, 316 F.3d 769 (8th Cir. 2003) 13

Wallace v. United States, 981 F. Supp. 2d 1160 (N.D. Ala. 2013) 18, 19

Welch v. United States, No. 2:05CR8, 2008 WL 4981352 (W.D.N.C. Nov. 19, 2008) (unpublished) 14

Wyeth v. Levine, 555 U.S. 555 (2009) 5

STATE CASES

Application of Poston, 1955 OK CR 39, 281 P.2d 776 15

Bosse v. State, 2021 OK CR 3, ___ P.3d ___ ..... passim

Ex parte Wallace, 81 Okla. Crim. 176, 162 P.2d 205 (1945) 20, 21

Graham v. Lanning, 1985 OK CR 36, 698 P.2d 25 14

Murphy v. State, 2005 OK CR 25, 124 P.3d 1198 ..... 16, 18

State v. Canavan, Case No. PR-2020-526, *Order Granting Application for Writ of Prohibition and Remanding Matter to District Court for Further Proceedings* (Okla. Crim. App. Sept. 11, 2020) (unpublished) 19

Wackerly v. State, 2010 OK CR 16, 237 P.3d 795 16

Walker v. State, 1997 OK CR 3, 933 P.2d 327 16

Wallace v. State, 1997 OK CR 18, 935 P.2d 366 ..... 16, 17, 18, 20

Worthington v. State, Case No. PC-2020-744, *Order Remanding for Evidentiary Hearing* (Okla. Crim. App. Dec. 22, 2020) (unpublished) ... 21

FEDERAL STATUTES AND RULES

18 U.S.C. § 1152 ..... 2, 3

18 U.S.C. § 1153 5

18 U.S.C. § 3231 12

18 U.S.C. § 3282(a) 8

25 U.S.C. § 1322 6

28 U.S.C. § 2253 10

28 U.S.C. § 2255 18

Public Law 280, Act of Aug. 15, 1953, Pub. L. No. 67, Stat. 588, codified at 18 U.S.C. § 1162, 25 U.S.C. § 1321-26; 18 U.S.C. § 1162(a) 6

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 17

The Kansas Act, 18 U.S.C. § 3243 6

STATE STATUTES AND RULES

22 O.S.2011, § 121 14

22 O.S.2011, § 1080 ..... 16, 18, 19, 20

22 O.S.2011, § 1086 ..... 16, 18, 19, 20

22 O.S.2011, § 1089 ..... 16, 17, 18, 20

Rule 3.14(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011) 1, 2, 7, 20

Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019) 19

CONSTITUTIONAL PROVISIONS

Okla. Const. Art. VII, § 7 14

LIST OF EXHIBITS

Exhibit A: ***State v. Canavan*****, Case No. PR-2020-526,** ***Order Granting Application for Writ of Prohibition and Remanding Matter to District Court for Further Proceedings*** **(Okla. Crim. App. Sept. 11, 2020) (unpublished)**

Exhibit B: ***Worthington v. State*****, Case No. PC-2020-744,** ***Order Remanding for Evidentiary Hearing*** **(Okla. Crim. App. Dec. 22, 2020) (unpublished)**

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PCD-2019-124**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

PETITION FOR REHEARING

COMES NOW, the State of Oklahoma, by and through Attorney General Mike Hunter, and pursuant to Rule 3.14(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), respectfully petitions this Court for rehearing of its published decision in *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___, decided March 11, 2021.[1]

PRELIMINARY STATEMENT

As a preliminary matter, before turning to the grounds for rehearing, the State wishes to clarify why it took no position on the reservation issue in this case. *See Bosse*, 2021 OK CR 3, ¶ 2, ___ P.3d at ___ (Hudson, J., concurring in results) ("The State's tactic of passivity has created a legal void in this Court's

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[1] In this Petition, Petitioner's *Successive Application for Post-Conviction Relief – Death Penalty*, filed February 20, 2019, will be referred to as "App." The Attorney General's *Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in* McGirt v. Oklahoma, *140 S. Ct. 2452 (2020)*, filed August 4, 2020, will be referred to as "State's Response." The District Attorney's *State's Supplemental Brief Following Remand for Evidentiary Hearing from McClain County District Court Case No. CF-2010-213*, filed November 4, 2020, will be referred to as "State's Supplemental Brief." Petitioner's *Post-Hearing Brief Regarding Proposition I of his Successive Application for Post-Conviction Relief*, filed November 4, 2020, will be referred to as "Petitioner's Post-Hearing Brief."

ability to adjudicate properly the facts underlying Petitioner's argument."). As the Honorable Judge Lumpkin expressed, the State is bound to follow the Supreme Court's majority opinion in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), irrespective of any disagreement with same. *See Bosse*, 2021 OK CR 3, ¶¶ 1-4, ___ P.3d at ___ (Lumpkin, J., concurring in results). Furthermore, the State recognizes this Court is bound by the Supreme Court's precedent, as only the Supreme Court can overrule itself. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016). Accordingly, the State, also bound by the *McGirt* decision, did not take a position that would contradict binding Supreme Court authority.

STANDARD FOR REHEARING

Rule 3.14(B) states that a petition for rehearing should be filed "only for the following reasons":

> (1) Some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or
>
> (2) The decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.

Rule 3.14(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

Here, the State seeks rehearing on two issues: concurrent jurisdiction and waiver.

I. THIS COURT SHOULD RECONSIDER ITS DETERMINATION THAT THE STATE LACKS CONCURRENT JURISDICTION UNDER THE GENERAL CRIMES ACT, 18 U.S.C. § 1152.

In rejecting the State's argument that it has jurisdiction concurrent with the federal government to prosecute crimes committed by non-Indians against Indians, this Court overlooked several arguments. Rehearing is warranted to reexamine these arguments.

First, the Court overlooked the State's textual argument on the General Crimes Act (18 U.S.C. § 1152) by holding that the State's jurisdiction is contrary to the "clear language of . . . [the] statute." *Bosse*, 2021 OK CR 3, ¶¶ 23-24, __ P.3d at __. In fact, while the General Crimes Act grants the federal government jurisdiction over certain crimes in Indian country, nothing in that Act explicitly preempts the State's jurisdiction (*see* State's Response at 13-14; State's Supplemental Brief at 13-14). As explained, the reference to "the sole and exclusive jurisdiction of the United States" is used to designate the substantive law extended to Indian country—*i.e.* those laws that apply to federal enclaves such as military bases or national forests (except for the District of Columbia)—not to declare that the federal jurisdiction granted by the General Crimes Act is exclusive. Or as the Supreme Court put it, those words "do not mean that the United States must have sole and exclusive jurisdiction over the Indian country in order that that section may apply to it; the words are used in order to describe the laws of the United States, which, by that section, are extended to the Indian

country." *Donnelly v. United States*, 228 U.S. 243, 268 (1913) (citing *Ex parte Wilson*, 140 U.S. 575, 578 (1891)).

This Court attempted to distinguish *Ex parte Wilson* by noting that the Supreme Court's interpretation of the text of the General Crimes Act in that case arose in a different context. *Bosse*, 2021 OK CR 3, ¶ 24 n.10, __ P.3d at __. But that cases like *Wilson* and *Donnelly* involved different facts doesn't change the meaning of the text of the General Crimes Act, where the phrase "sole and exclusive" does not define the scope of the United States' jurisdiction (but instead defines the law to be applied) and no other text in the Act otherwise preempts state jurisdiction. To hold that the meaning of the text changes with the facts of a case "'would render every statute a chameleon,' and 'would establish within our jurisprudence . . . the dangerous principle that judges can give the same statutory text different meanings in different cases.'" *United States v. Santos*, 553 U.S. 507, 522 (2008) (quoting *Clark v. Martinez*, 543 U.S. 371, 378 (2005)) (internal citations omitted); *see also United States v. Heon Seok Lee*, 937 F.3d 797, 813 (7th Cir. 2019); *Patel v. Napolitano*, 706 F.3d 370, 376 (4th Cir. 2013); *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 573 F.3d 997, 1001 (10th Cir. 2009) ("Statutory interpretation presents a question of law, and the facts of an individual case will not affect a court's interpretation of a statute.").

Thus, the phrase "sole and exclusive jurisdiction of the United States" designates the law to be applied in federal courts and does not preempt state jurisdiction, nor did this Court point to any other text in the General Crimes Act that would preempt state jurisdiction.

Second, this Court appears to have presumed that "where federal jurisdiction exists by statute, states [do not] have concurrent jurisdiction as well." *Bosse*, 2021 OK CR 3, ¶ 24, __ P.3d at __. But that overlooks the State's argument that the exact opposite is true: even where the federal government has jurisdiction, there is a deeply-rooted presumption that states have jurisdiction concurrent with the federal government unless Congress clearly and unmistakably expresses otherwise (State's Response at 16-17 (citing *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349-52 (2020); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981); *Silas Mason Co. v. Tax Com'n of State of Washington*, 302 U.S. 186, 207 (1937); *United States v. Bank of New York & Tr. Co.*, 296 U.S. 463, 479 (1936); *Claflin v. Houseman*, 93 U.S. 130, 134 (1876))). This Court's ruling similarly overlooks the State's argument on the more general presumption against preemption (State's Response at 15 (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009))).

Thus, this Court's invocation of *Donnelly* is inapposite because in that case the Supreme Court held that the federal government has jurisdiction over crimes committed by or against Indians under the General Crimes Act, not that the State lacks such jurisdiction. Nor does this Court's invocation of *United States v. John*, 437 U.S. 634, 651 (1978) answer the question, because that case was interpreting the Major Crimes Act (18 U.S.C. § 1153), which has a text distinct from that of the General Crimes Act. Specifically, the Major Crimes Act defines the applicable law and then says punishment for violation of those laws is "within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153. By contrast,

as stated above, the General Crimes Act merely defines the applicable law and then extends that law to the Indian Country, without saying anything about jurisdiction—leaving the presumption that federal and state courts exercise concurrent jurisdiction in place.

Third, this Court pointed to the Kansas Act, 18 U.S.C. § 3243, and Public Law 280, Act of Aug. 15, 1953, Pub. L. No. 67, Stat. 588, codified at 18 U.S.C. § 1162, 25 U.S.C. § 1321-26; 18 U.S.C. § 1162(a), which conferred on certain states jurisdiction over crimes by or against Indians, as implicitly recognizing that states otherwise lack jurisdiction over non-Indians who offend against Indians. *Bosse*, 2021 OK CR 3, ¶¶ 25-27, __ P.3d at __. However, this overlooks the State's argument that laws like Public Law 280 also authorize state jurisdiction over "civil causes of action between Indians or to which Indians are parties," 25 U.S.C. § 1322, even though states *already have* jurisdiction over civil cases brought by Indians on Indian country against non-Indian defendants (State's Response at 18, 20 (citing, *inter alia*, *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148-49 (1984))). Thus, laws like the Kansas Act and Public Law 280 cannot be read to retroactively change the meaning of the much-older General Crimes Act to implicitly preclude state jurisdiction without express congressional authorization. Nor does recognizing state concurrent jurisdiction over non-Indian offenders make these laws "unnecessary" since the Kansas Act and Public Law 280 significantly altered state criminal jurisdiction by providing jurisdiction over Indian offenders notwithstanding laws like the Major Crimes Act.

For these reasons, this Court should grant rehearing on the issue of whether the state retains its inherent jurisdiction over crimes committed by non-Indian offenders against Indians, concurrent with the jurisdiction of the federal government under the General Crimes Act.[2]

II. THIS COURT SHOULD RECONSIDER ITS REFUSAL TO BAR INDIAN COUNTRY JURSIDICTIONAL CLAIMS.

In refusing to apply procedural bars or waiver principles to Petitioner's jurisdictional claim, this Court concluded that "'subject-matter jurisdiction can never be waived or forfeited,'" "the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction," and the State failed to point to a case in which this Court had applied laches to a jurisdictional claim. *Bosse*, 2021 OK CR 3, ¶ 21 & n. 9, ___ P.3d at ___ (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012)). In so holding, this Court both "overlooked" arguments and authority offered by the State and reached a conclusion that is "in conflict" with controlling Supreme Court law and "express" language of the Uniform Post-Conviction Procedure Act. Rule 3.14(B)(1)-(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Rehearing is warranted.

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[2] This Court also points to prior statements in this Court's and the Supreme Court's cases suggesting the state might not have jurisdiction over non-Indian on Indian crimes, but as the State has noted, these statements are dicta and those cases did not squarely confront the question of whether the State lacked jurisdiction over such crimes (*see* State's Response at 15-16).

A. This Court Overlooked the State's Arguments that Indian Country Jurisdictional Claims Can Be Waived under Federal Constitutional Law and Created a Conflict with Federal Authority.

In its opinion, this Court held that not only was Petitioner's Indian Country jurisdictional claim previously unavailable based on *McGirt*, but that such a claim can *never* be waived or forfeited under Supreme Court law. However, this Court overlooked the State's arguments that federal constitutional law does not prohibit the application of procedural bars to Indian Country jurisdictional claims.[3] Furthermore, this Court's holding is in conflict with *McGirt* itself, as well as *United States v. Cotton*, 535 U.S. 625 (2002), especially in light of the multiple federal courts that have relied on the latter case to hold that Indian Country jurisdictional claims *can* be waived.

As an initial matter, before turning to the grounds justifying rehearing, an issue of semantics must be addressed. As with some other litigants and courts,

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[3] In contrast, this Court addressed, and rejected, the State's arguments that Petitioner's jurisdictional claim was previously available. *Bosse*, 2021 OK CR 3, ¶ 20 n. 8, ___ P.3d at ___. To be clear, the State strongly disagrees with this Court's finding that *McGirt* provides a previously unavailable legal basis and contends this is contrary to the Supreme Court's own characterization of the issue in *McGirt*. *See, e.g.*, *McGirt*, 140 S. Ct. at 2464 ("In saying [allotment did not affect disestablishment] we say nothing new."); *see also Murphy v. Royal*, 875 F.3d 896, 921-22 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (holding that the Supreme Court's reservation disestablishment framework was well established). However, it does not appear this Court overlooked the fully briefed arguments of the State as to this Court's "previously unavailable" finding. Accordingly, the State's focus here is on this Court's determination that, even after *McGirt* becomes no longer newly available, Indian Country jurisdictional claims can still never be waived. This is significant in that anyone convicted in state court post-*McGirt* and given a lengthy sentence can simply wait until the applicable federal statute of limitations (which is typically five years) expires. *See* 18 U.S.C. § 3282(a). The person would then be entitled to vacatur of his or her state conviction, and would not be subject to federal prosecution. This untenable scenario cannot be permitted.

the State here may have been imprecise with the use of the phrase "subject matter jurisdiction" (*see, e.g.*, State's Response at 24, 29-30, 33, 35, 41). *See Gonzalez*, 565 U.S. at 141 ("This Court has endeavored in recent years to bring some discipline to the use of the term 'jurisdictional,'" given "our less than meticulous use of the term in the past" (select quotation marks omitted)); *Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999) ("Lawyers and judges sometimes refer to the interstate-commerce element that appears in many federal crimes as the 'jurisdictional element,' but this is a colloquialism—or perhaps a demonstration that the word 'jurisdiction' has so many different uses that confusion ensues."). However, the State's *unwavering* position has been that Petitioner's claim, whatever it is called, *can* be waived (State's Response at 22-49; State's Supplemental Brief at 16-20). Thus, whether referred to as Petitioner's "Indian Country jurisdictional claim," as the State does here, or a "territorial jurisdictional" claim, *see Bosse*, 2021 OK CR 3, ¶¶ 4-7, ___ P.3d at ___ (Rowland, V.P.J., concurring in results); *Bosse*, 2021 OK CR 3, ¶ 3, ___ P.3d at ___ (Hudson, J., concurring in results) ("fully join[ing] Judge Rowland's special writing concerning . . . the use of the term subject matter jurisdiction"), the State has preserved its arguments that the claim can be waived. Further, in holding to the contrary, this Court has both overlooked the State's arguments and created a conflict in the law.

First, in citing *Gonzalez v. Thaler* for the proposition that "[s]ubject-matter jurisdiction can never be waived or forfeited," *Gonzalez*, 565 U.S. at 141, this Court overlooked the State's argument that, "[i]n deciding *McGirt*, the Supreme

Court expressly invited this Court to apply procedural bars to the jurisdictional challenges that would proliferate in the wake of its decision" (State's Response at 22). As quoted by the State (State's Response at 23), *McGirt* stated that "defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings," including Oklahoma's rule that claims that were not, but could have been, raised on direct appeal are waived. *McGirt*, 140 S. Ct. at 2479 & n. 15. Thus, to the extent that this Court viewed itself as bound by the Supreme Court or federal constitutional law not to bar Indian Country jurisdictional claims, this cannot be squared with *McGirt*.

Second, this Court's application of *Gonzalez* creates an unnecessary conflict between that case and *McGirt*, as well as between this Court and *United States v. Cotton*, on which *Gonzalez* relied. *Cf. Bosse*, 137 S. Ct. at 2 ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (quotation marks omitted)). For starters, *Gonzalez* concerned 28 U.S.C. § 2253, a congressionally enacted limitation on federal appellate courts' ability to hear habeas appeals, and the Court found that the particular provision at issue, § 2253(c)(3), was *non*-jurisdictional. *Id.* at 139, 143. So the general statement relied on by this Court was made in a very specific statutory context not at issue in this case, and in addition it was mere dictum. *See McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981) (dictum is a statement "unnecessary to the decision in [the] case"). In *McGirt*, in contrast, the Supreme

Court very specifically indicated that claims regarding Indian Country jurisdiction *could* be barred. Thus, whatever *Gonzalez* meant in general by "[s]ubject-matter jurisdiction," the phrase could not have encompassed Indian Country jurisdictional challenges. *See Bosse*, 2021 OK CR 3, ¶ 7 n. 2, ___ P.3d at ___ (Rowland, V.P.J., concurring in results) ("The *McGirt* opinion tacitly acknowledges potential procedural bars . . . . Those defenses would not be relevant if subject matter jurisdiction, which is non-waivable, were concerned."). Unsurprisingly, Petitioner himself has not argued that such challenges cannot be waived as a matter of constitutional law or that Oklahoma's post-conviction statutes are unconstitutional (App. at 16-17; Petitioner's Post-Hearing Brief at 4-5).

In addition, as indicated, *Gonzalez* relied on *United States v. Cotton* for the propositions that "[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented," and that "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez*, 565 U.S. at 141–42. Indeed, in the context of addressing defects in a federal indictment on direct appeal, *Cotton* said that "subject-matter jurisdiction . . . can never be forfeited or waived." *Cotton*, 535 U.S. at 630. However, what this Court did not acknowledge is that *Gonzalez* and *Cotton* both explained that "subject matter jurisdiction" is about a court's *power* to hear a case: "[subject matter] jurisdiction means . . . the courts' statutory or constitutional *power* to adjudicate the case." *Cotton*, 535 U.S. at 630 (quotation marks omitted, emphasis in original); *see also id.* at 630-31

("defects in an indictment do not deprive a court of its power to adjudicate a case" and therefore can be waived); *Gonzalez*, 565 U.S. at 141 ("The question before us is whether that defect deprived the Court of Appeals of the power to adjudicate Gonzalez's appeal."). More importantly, this Court did not acknowledge that multiple federal courts have relied on *Cotton* to hold that Indian Country jurisdictional claims are *not* claims of subject matter jurisdiction implicating the *power* of a court to hear a case and that such claims *can* be waived.

It all started with *Hugi*, authored by the Honorable Judge Easterbrook. Although not an Indian Country case, in *Hugi*, the Seventh Circuit rejected Hugi's contention that his claim, that his crime did not implicate interstate commerce, was subject matter jurisdictional in nature. *Hugi*, 164 F.3d at 380-81. Relevant here, *Hugi* explained:

> Subject-matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231, and there can be no doubt that Article III permits Congress to assign federal criminal prosecutions to federal courts. *That's the beginning and the end of the "jurisdictional" inquiry. . . .*
>
> The nexus with interstate commerce, which courts frequently call the "jurisdictional element," is simply one of the essential elements of the offense. Although courts frequently call it the "jurisdictional element" of the statute, it is "jurisdictional" only in the shorthand sense that without that nexus, there can be no federal crime. It is not jurisdictional in the sense that it affects a court's subject matter jurisdiction, *i.e.*, a court's constitutional or statutory power to adjudicate a case, here authorized by 18 U.S.C. § 3231.

Hugi, 164 F.3d at 380-81 (alterations adopted, quotation marks omitted, emphasis added). Section 3231 provides that "[t]he district courts of the United

States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." 18 U.S.C. § 3231.

A few years later, as already quoted, *Cotton* held that "'jurisdiction'" means "the courts' statutory or constitutional *power* to adjudicate the case," and this "concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Cotton*, 535 U.S. at 630 (quotation marks omitted). Multiple federal cases have relied on *Cotton*—subject matter jurisdiction is about a court's power to adjudicate a case—and *Hugi*—federal courts' power to hear a criminal case is established by § 3231—to hold that Indian Country jurisdictional claims are *not* non-waivable subject matter jurisdiction claims.

In *Tony*, the Tenth Circuit, relying on *Cotton* and *Hugi*, held:

> The Indian Country nexus, like other similar nexuses in the context of federal crimes, has been called a "jurisdictional element" but it is "jurisdictional" only in the shorthand sense that without that nexus, there can be no federal crime. The absence of a required element is not jurisdictional in the sense that it affects a court's subject matter jurisdiction, *i.e.*, a court's constitutional or statutory power to adjudicate a case.
>
> To obtain a conviction, the government was required to plead and prove the crime occurred in Indian Country. Failure to do so would not remove subject-matter jurisdiction. Tony's claim is really an insufficiency of the evidence argument and was waived when he failed to raise it on direct appeal.

United States v. Tony, 637 F.3d 1153, 1157–60 (10th Cir. 2011) (citations and quotation marks omitted); *see Bosse*, 2021 OK CR 3, ¶ 16, ___ P.3d at ___ (observing this Court must be consistent with Tenth Circuit precedent). Multiple other federal cases have reached the same conclusion in the context of Indian

Country claims. *See, e.g.*, *United States v. Pemberton*, 405 F.3d 656, 659 (8th Cir. 2005); *United States v. White Horse*, 316 F.3d 769, 772 (8th Cir. 2003); *United States v. Prentiss*, 256 F.3d 971, 981-82 (10th Cir. 2001) (en banc), *overruled on other grounds by Cotton*, 535 U.S. at 631; *Welch v. United States*, No. 2:05CR8, 2008 WL 4981352, at *2 n. 2 (W.D.N.C. Nov. 19, 2008) (unpublished).

Here, Oklahoma constitutional and statutory law confers on state district courts the *power* to adjudicate criminal cases arising from crimes committed within the State's borders. *See* Okla. Const. Art. VII, § 7 ("The District Court[s of Oklahoma] shall have unlimited original jurisdiction of all justiciable matters . . . ."); 22 O.S.2011, § 121 ("When the commission of a public offense, commenced without this state, is consummated within its boundaries, the defendant is liable to punishment therefor in this state, . . . and in such case, the jurisdiction is in the county in which the offense is consummated."); *Graham v. Lanning*, 1985 OK CR 36, ¶ 5, 698 P.2d 25, 26, *overruled on other grounds by Lenzy v. State*, 1993 OK CR 53, ¶ 17, 864 P.2d 847, 850 ("We note at the outset that 22 O.S.1981, § 121 confers on the District Courts of this State jurisdiction over any offense 'commenced without this State, [and] consummated within its boundaries, . . . and . . . the jurisdiction is in the county in which the offense is consummated.'"); *see also generally* Title 20 of the Oklahoma Statutes; *Bosse*, 2021 OK CR 3, ¶ 4, ___ P.3d at ___ (Rowland, V.P.J., concurring in results) ("The subject matter jurisdiction of Oklahoma courts is established by Article 7 of our State Constitution and Title 20 of our statutes which grant general jurisdiction,

including over murder cases, to our district trial courts."). Thus, "the subject matter in this case is a murder prosecution." *Bosse*, 2021 OK CR 3, ¶¶ 4-7, ___ P.3d at ___ (Rowland, V.P.J., concurring in results). In terms of subject matter jurisdiction, "[t]hat's the beginning and the end of the 'jurisdictional' inquiry." *Hugi*, 164 F.3d at 380.

This Court's treatment of Indian Country jurisdictional claims as non-waivable subject matter jurisdiction claims that implicate the power of the trial court to adjudicate a case creates a conflict with *Cotton*, in particular as it has been interpreted by lower federal courts. Furthermore, in tension with this Court's pronouncement that "[c]onsistency and economy of judicial resources compel us to adopt the same definition [of Indian status] as that used by the Tenth Circuit," *Bosse*, 2021 OK CR 3, ¶ 16, ___ P.3d at ___, this Court's decision also results in a curious dichotomy in which Indian Country jurisdictional claims can *never* be waived in state court but *can* be waived in federal court, including in the Tenth Circuit. If anything, one would expect the opposite. *See United States v. Prentiss*, 206 F.3d 960, 967 (10th Cir. 2000) ("Federal criminal jurisdiction is limited by federalism concerns; states retain primary criminal jurisdiction in our system."); *Application of Poston*, 1955 OK CR 39, ¶ 31, 281 P.2d 776, 784 ("The district courts of Oklahoma are courts of general jurisdiction."). The State urges this Court to grant rehearing to address this conflict.[4]

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[4] Respectfully, this Court's statement that "[t]he District Attorney admits that generally litigants 'cannot waive the argument that the district court lacks subject-matter jurisdiction,' citing *United States v. Green*, 886 F.3d 1300, 1304 (10th Cir. 2018)," *Bosse*,

B. This Court Overlooked the State's Arguments that Indian Country Jurisdictional Claims Can Be Waived under State Statutory Law and Created a Conflict with the Post-Conviction Statutes.

In addition to holding that Petitioner's Indian Country jurisdictional claim could never be waived or forfeited under Supreme Court law, this Court also held that it is not subject to Oklahoma's post-conviction statutes pursuant to *Wackerly v. State*, 2010 OK CR 16, ¶ 4, 237 P.3d 795, 797; *Murphy v. State*, 2005 OK CR 25, ¶¶ 5-7, 124 P.3d 1198, 1200; and *Wallace v. State*, 1997 OK CR 18, ¶ 15, 935 P.2d 366, 372. *Bosse*, 2021 OK CR 3, ¶ 21, ___ P.3d at ___. However, this Court overlooked the State's arguments that *Wackerly*, *Murphy*, and *Wallace* are in conflict with 22 O.S.2011, § 1089(D)(8). Furthermore, this Court's holding is in conflict with 22 O.S.2011, §§ 1080 and 1086, which expressly encompass jurisdictional claims and provide that they can be waived.

First, in holding that "the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction" based on

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2021 OK CR 3, ¶ 21, ___ P.3d at ___, takes the District Attorney's citation to *Green* out of context. The District Attorney relied on *Green* to observe that "[i]t is not clear in the law that a defendant who argues he is an Indian in state court would be estopped from arguing the opposite in federal court" in urging this Court to clearly define Indian status (State's Supplemental Brief at 11). More importantly, in focusing on a single citation in the State's briefing to generate a concession on the State's part, this Court overlooked that the State's briefs argued *at length* that jurisdictional claims *can* be waived (State's Response at 22-49; State's Supplemental Brief at 16-20; *see also* Petitioner's Post-Hearing Brief at 5 ("the State devoted 27 pages of its Pre-Remand Brief to its procedural bar arguments")). Finally, an alleged concession by a party does not relieve this Court of its duty to correctly interpret the law. *Cf. Walker v. State*, 1997 OK CR 3, ¶ 5, 933 P.2d 327, 331, *superseded by statute on other grounds*, 22 O.S.Supp.2004, § 1089(D)(4) ("The amendments to the capital post-conviction review statute reflect the legislature's intent to honor and preserve the legal principle of finality of judgment, and we will narrowly construe these amendments to effectuate that intent.") (quoted in State's Response at 38).

Wackerly, *Murphy*, and *Wallace*, *Bosse*, 2021 OK CR 3, ¶ 21, ___ P.3d at ___, this Court overlooked the State's argument that "[n]either *Wackerly* nor *Murphy* . . . could be squared with the Oklahoma Legislature's express limitations on successive post-conviction applications in § 1089" (State's Response at 30-31).[5] As the State asserted, "§ 1089 . . . limit[s] successive filings to two categories—those with certain previously unavailable legal grounds and those with certain previously unavailable factual grounds"—and the "statute provides [no] exception to its restrictions for challenges to the trial court's subject matter jurisdiction" (State's Response at 34). Thus, this Court's judicially created exception for jurisdictional challenges in *Wackerly* and *Murphy* impermissibly "contravenes legislative intent" (State's Response at 38-39). *See Wallace*, 1997 OK CR 18, ¶ 4, 935 P.2d at 370 ("A statute must be held to mean what it plainly expresses and no room is left for construction and interpretation where the language employed is clear and unambiguous." (quotation marks omitted)).

The State further pointed out that the Oklahoma Legislature amended § 1089 shortly after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to impose "essentially the same restrictions on

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[5] Despite Petitioner's failure to cite it, the State also addressed *Wallace*, 1997 OK CR 18, ¶ 15, 935 P.2d at 372-73, acknowledging its statement that "issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal" (State's Response at 30 n. 20). However, the State explained, "*Wallace* was a *first* post-conviction application[,] *Wallace*, 1997 OK CR 18, ¶¶ 1-2, 935 P.2d at 368-69"; "because Petitioner's claim here is on second post-conviction, the State limit[ed] its argument to the bars specific to that stage of litigation" (State's Response at 30 n. 20 (emphasis in original)). In any event, like § 1089(D)(8) (governing successive capital post-conviction applications), § 1089(C) (governing first capital post-conviction applications) does not contain any special exception for jurisdictional claims.

capital post-conviction applications that apply to successive habeas petitions under the AEDPA" (State's Response at 31-34). Federal courts, including the Tenth Circuit, have repeatedly rejected, explicitly or implicitly, the notion that challenges to jurisdiction are exempt from the AEDPA's restrictions on the filing of successive habeas petitions (State's Response at 34-38 (collecting cases)).[6] Thus, the State argued, "[t]here is no reason to think that the Oklahoma Legislature intended § 1089 to be any less restrictive than [the corresponding provision of AEDPA] when it comes to jurisdictional challenges" (State's Response at 38). This Court overlooked all of these arguments in reaffirming its conclusion from *Wackerly*, *Murphy*, and *Wallace* that jurisdictional claims are not subject to § 1089. *See Prost v. Anderson*, 636 F.3d 578, 589 (10th Cir. 2011) ("The simple fact is that Congress decided that, unless [AEDPA's] subsection (h)'s requirements are met, finality concerns trump and the litigation must stop after a first collateral attack. Neither is this court free to reopen and replace Congress's judgment with our own.") (discussed in State's Response at 36-40).

Second, relatedly, this Court's determination that "the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction," *Bosse*, 2021 OK CR 3, ¶ 21, ___ P.3d at ___, is squarely in conflict

[6] Likewise, in the context of federal motions to vacate sentence under 28 U.S.C. § 2255, the parallel for federal prisoners to habeas petitions by state prisoners, "courts have uniformly rejected" the contention that the statute of limitations in § 2255 does not apply to jurisdictional claims because "§ 2255 itself expressly contemplates challenges to a sentencing court's jurisdiction without in any way indicating that these particular sorts of attacks need not be brought within the statute's one-year period of limitation." *Wallace v. United States*, 981 F. Supp. 2d 1160, 1166 (N.D. Ala. 2013) (quotation marks omitted) (collecting cases).

with clear language in §§ 1080 and 1086. Section 1080 expressly encompasses jurisdictional challenges: "Any person who has been convicted of, or sentenced for, a crime and who claims: . . . that *the court was without jurisdiction* to impose sentence . . . may institute a proceeding under this act . . . ." 22 O.S.2011, § 1080(b) (emphasis added). Furthermore, § 1086, regarding successive non-capital post-conviction applications, says that "[a]ll grounds for relief available to an applicant under this act *must* be raised in his original, supplemental or amended application" and may not be the basis of a successive post-conviction application unless "sufficient reason" for the failure to do so is shown. 22 O.S.2011, § 1086 (emphasis added). Thus, the Oklahoma Legislature said "all" claims "must be raised" at the first opportunity—and said so in spite of its explicit recognition that challenges to the trial court's jurisdiction may be raised. *Compare* 22 O.S.2011, § 1080(b), *with* 22 O.S.2011, § 1086; *see also Wallace*, 981 F. Supp. 2d at 1166 ("[Section] 2255 itself expressly contemplates challenges to a sentencing court's jurisdiction without in any way indicating that these particular sorts of attacks need not be brought within the statute's one-year period of limitation." (quotation marks omitted)).[7] The Legislature clearly made jurisdictional claims subject to the provisions of the post-conviction statutes,

[7] Indeed, this Court relied on § 1080(b) in recently holding that a defendant raising a *McGirt* claim could not bypass the statutory post-conviction procedures and bring her claim in a state habeas petition. *State v. Canavan*, Case No. PR-2020-526, *Order Granting Application for Writ of Prohibition and Remanding Matter to District Court for Further Proceedings* at 4 (Okla. Crim. App. Sept. 11, 2020) (unpublished), attached as Exhibit A. Any unpublished orders are attached as an exhibit and cited because no published opinion would serve as well the purpose for which they are cited. *See* Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019).

contrary to this Court's pronouncement that "the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction." *Bosse*, 2021 OK CR 3, ¶ 21, ___ P.3d at ___; *see also Wallace*, 1997 OK CR 18, ¶ 4, 935 P.2d at 370 ("A statute must be held to mean what it plainly expresses and no room is left for construction and interpretation where the language employed is clear and unambiguous." (quotation marks omitted)).[8]

C. This Court Overlooked the State's Reliance on *Ex parte Wallace*, 81 Okla. Crim. 176, 162 P.2d 205 (1945).

This Court further held that "[t]he principle that subject-matter jurisdiction may not be waived also settles the State's argument based on laches," noting that "[n]one of the cases on which the State relies concern a claim of lack of jurisdiction." *Bosse*, 2021 OK CR 3, ¶ 21 n. 9, ___ P.3d at ___. However, this Court overlooked the State's reliance on *Ex parte Wallace*, 81 Okla. Crim. 176, 178-79, 162 P.2d 205, 207 (1945) (State's Response at 46). As explained by the State, in *Ex parte Wallace*, "the defendant filed a state habeas petition three years after his guilty plea alleging that the federal court had exclusive jurisdiction over his crime because he and his rape victims were Comanche Indians and the crime occurred on a restricted allotment." (State's

[8] The State did not rely on §§ 1080 and 1086 in its Response and Supplemental Brief because this is a capital case subject to § 1089. However, in broadly holding that "the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction," *Bosse*, 2021 OK CR 3, ¶ 21, ___ P.3d at ___, this Court has created a clear conflict with these non-capital post-conviction statutes, *see* Rule 3.14(B)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). And there is nothing in § 1089 that indicates the Legislature intended to exempt jurisdictional claims from the requirement—which appears in both § 1086 and § 1089—that every claim be brought at the first available opportunity.

Response at 46). "Although this Court did not invoke the word 'laches,' it ultimately concluded that 'at this late date' it would not consider the defendant's jurisdictional attack, noting in particular that the statute of limitations for any federal action against the defendant had lapsed." (State's Response at 56 (quoting *Ex parte Wallace*, 81 Okla. Crim. at 179, 188, 162 P.2d at 207, 211)). This Court was clearly applying the doctrine of laches in *Ex parte Wallace* to an Indian Country jurisdictional claim. Respectfully, this Court's statement in this case that the State did not identify any case in which this Court applied laches to a jurisdictional challenge is incorrect. The State urges this Court to clarify, at the very least, that the doctrine of laches may apply, on a case-by-case basis, to Indian Country jurisdictional claims where any applicable federal or tribal statute of limitations has expired. *See, e.g.*, *Worthington v. State*, Case No. PC-2020-744, *Order Remanding for Evidentiary Hearing* (Okla. Crim. App. Dec. 22, 2020) (unpublished), attached as Exhibit B (remanding 1986 rape, kidnapping, and robbery case for evidentiary hearing on Indian Country jurisdictional claim).

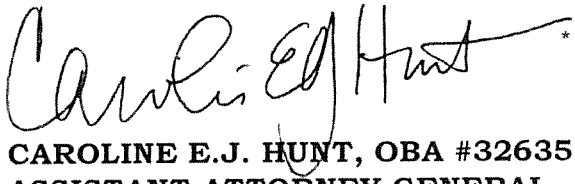
CONCLUSION

The stakes in this case could not be higher for the State of Oklahoma and its people, Indian and non-Indian alike. For all these reasons, the State respectfully urges this Court to grant this petition for rehearing and reconsider this case.

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL

MITHUN MANSINGHANI, OBA #32453
SOLICITOR GENERAL



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CERTIFICATE OF MAILING

On this ~~30~~ 31th day of March, 2021, a true and correct copy of the foregoing was mailed to:

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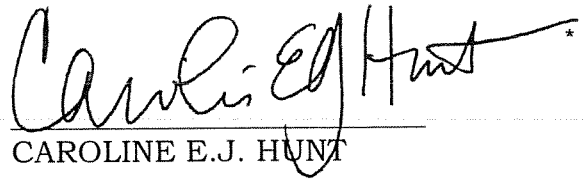


CAROLINE E.J. HUNT

* An electronic signature is being used due to the current COVID-19 restrictions. A signed original can be provided to the Court upon request once restrictions are lifted.

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 11 2020

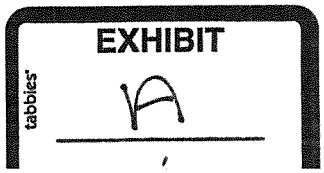
JOHN D. HADDEN
CLERK

THE STATE OF OKLAHOMA,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PR 2020-0526**
	)	
THE HONORABLE JOHN G. CANAVAN, DISTRICT JUDGE,	)	
	)	
Respondent.	)	

ORDER GRANTING APPLICATION FOR A WRIT OF PROHIBITION AND REMANDING MATTER TO DISTRICT COURT FOR FURTHER PROCEEDINGS

On August 10, 2020, Petitioner, by and through Mike Hunter, the Attorney General of Oklahoma, and Theodore M. Peeper and Caroline E.J. Hunt, Assistant Attorneys General, filed a petition for a writ of prohibition in Pottawatomie County District Court Case No. CV-2020-80. The State seeks a writ of prohibition directed to the Honorable John G. Canavan, District Judge, prohibiting him from hearing Clarissa Mars' habeas petition, filed July 10, 2020.[1] The State moved to dismiss

[1] Mars pled guilty on November 23, 2015, to Lewd or Indecent Acts to Child Under Sixteen in Garvin County District Court Case No. CF-2014-419. She was sentenced to ten years imprisonment with all but the first nine months suspended and with credit for time served. Five years of Mars' suspended sentence was revoked on July 25, 2017.



the habeas petition on July 22. After a hearing, Judge Canavan denied the State's motion to dismiss but stayed further proceedings in the District Court, including a ruling on Mars' habeas petition, until this Court rules on the State's petition for extraordinary relief.

The State claims that Judge Canavan erroneously permitted Mars' habeas action, which challenges her Judgment and Sentence, to proceed over the State's objection. Mars has filed neither a motion to withdraw her plea nor a post-conviction action, and she was convicted in Garvin County, not Pottawatomie County. Mars' habeas petition claims the Garvin County District Court did not have jurisdiction in her criminal case because she is Indian and her crime occurred within Indian Country. Mars argued, and Judge Canavan agreed, that she could bring a habeas petition in Pottawatomie County, the location of her confinement, rather than Garvin County. The State argues that this contravenes the plain language of the Post-Conviction Procedure Act, which requires Mars to bring her jurisdictional claim in a post-conviction application in Garvin County District Court. Given this requirement, the State argues that Judge Canavan exercised a power unauthorized by law when he denied the State's motion to dismiss Mars' petition for a writ of habeas corpus.

On August 11, 2020, Jaye Mendros and Bert Richard, attorneys for Mars, filed a motion for leave to file a response to the State's petition for a writ of prohibition. In an Order issued August 18, 2020, the motion was granted. The response was filed in this Court on August 25, 2020.

Mars argues that where the basis for a writ of habeas corpus is a definitive challenge to jurisdiction, the writ is proper without exhaustion of direct appeal or post-conviction remedies, citing *Frazier v. State*, 2002 OK CR 33, 59 P.3d 512.[2]

For a writ of prohibition Petitioner must establish: (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal* Appeals, Title 22, Ch.18, App. (2020).

Writs of habeas corpus are not suspended or altered by the Post-Conviction Procedure Act, provided the statutory appeal procedures enacted by the Legislature have first been exhausted. The writ of

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[2] *Frazier* does not authorize the use of habeas prior to the exhaustion of direct or collateral appeal remedies.

habeas corpus is not an authorization to bypass the statutory appeal process. *Twyman v. Oklahoma Pardon & Parole Board*, 1992 OK CR 53, ¶ 4, 837 P.2d 480; Rule 10.6(C). For a writ of habeas corpus, a petitioner has the burden of establishing his or her confinement is unlawful. Rule 10.6(C). Challenges to a judgment and sentence must be brought, not in a petition for a writ of habeas corpus, but as an application for post-conviction relief, filed in the county in which the person's judgment and sentence on conviction was imposed. *See* 22 O.S.2011, § 1080(b). Mars is attempting to bypass the statutory appeal process and has not exhausted her post-conviction remedies in the court in which her judgment and sentence on conviction was imposed.

Accordingly, the State's application for a writ of prohibition is **GRANTED.** The matter is **REMANDED** to the District Court of Pottawatomie County for further proceedings consistent with this Order.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 11th day of September, 2020.

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden

Clerk

OA

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC 22 2020

JOHN D. HADDEN
CLERK

DAVID PAUL WORTHINGTON,	)	
Petitioner,	)	
v.	)	**No. PC-2020-744**
STATE OF OKLAHOMA,	)	
Respondent.	)	

ORDER REMANDING FOR EVIDENTIARY HEARING

On October 22, 2020, Petitioner, *pro se*, filed an appeal of the order of the District Court of Washington County in Case No. CRF-1986-52 denying his application for post-conviction relief.

In February 1987, Petitioner was convicted of first-degree robbery, first-degree rape, and kidnapping. He was sentenced to 20 years imprisonment for robbery, 70 years for rape, and 40 years for kidnapping.

On post-conviction appeal, Petitioner argues the District Court lacked jurisdiction over his case due to his claims that he is a Cherokee Indian and that his crimes occurred within Indian Country. In an order filed on September 14, 2020, the District Court denied Petitioner's post-conviction application without a hearing.

EXHIBIT
B

Petitioner's claim raises two separate questions: (a) his Indian status, and (b) whether the crime occurred in Indian Country. Both these issues require fact-finding. We do not find enough in the District Court order or the record before this Court to support the trial court's findings. We therefore **REMAND** this case to the District Court of Washington County, the Honorable Russell Vaclaw, Associate District Judge, for an evidentiary hearing to be held within sixty (60) days from the date of this order.

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Petitioner's presentation of *prima facie* evidence as to the Petitioner's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

The hearing shall be transcribed, and the court reporter shall file an original and two (2) certified copies of the transcript within twenty (20) days after the hearing is completed. The District Court shall then make written findings of fact and conclusions of law, to be submitted to this Court within twenty (20) days after the filing of the

transcripts in the District Court. The District Court shall address only the following issues.

First, Petitioner's Indian status. The District Court must determine whether (1) Petitioner has some Indian blood, and (2) is recognized as Indian by a tribe or by the federal government.[1]

Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020). In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony.

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record, to the Clerk of this Court, and Petitioner, within five (5) days after the District Court has filed its findings of fact and conclusions of law. Upon receipt thereof, the Clerk of this Court shall promptly deliver a

[1] *See, e.g., United States v. Diaz,* 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss,* 273 F.3d 1277, 1280-81 (10th Cir. 2001). *See generally Goforth v. State,* 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

copy of that record to the Attorney General. A supplemental brief, addressing only those issues pertinent to the evidentiary hearing and limited to twenty (20) pages in length, may be filed by either party within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed in this Court.

Provided however, in the event the parties agree as to what the evidence will show with regard to the questions presented, they may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. In this event, no hearing on the questions presented is necessary. Transmission of the record regarding the matter, the District Court's findings of fact and conclusions of law and supplemental briefing shall occur as set forth above.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit copies of this order to the District Court of Washington County with a copy of Petitioner's October 22, 2020, Petition in Error and Brief.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 22nd day of December, 2020.

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

ROBERT L. HUDSON, Judge

SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden

Clerk

NF

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 31 2021
JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,	)	
Petitioner,	)	
v.	)	**No. PCD-2019-124**
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

MOTION FOR FURTHER STAY OF THE MANDATE BASED ON PENDING PETITION FOR REHEARING OR, ALTERNATIVELY, FOR GOOD CAUSE SHOWN

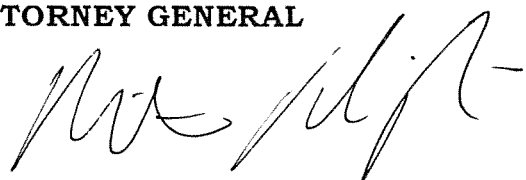
COMES NOW, the State of Oklahoma, by and through Attorney General Mike Hunter, and pursuant to Rule 3.14(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), respectfully moves this Court to further stay the mandate in this case. In light of the State's contemporaneous filings, its Motion for Leave to File Petition for Rehearing and its Petition for Rehearing, the State submits that the mandate in this case should automatically be stayed pursuant to Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Alternatively, assuming the State is not entitled to an automatic stay of the mandate based on its petition for rehearing, the State demonstrates "good cause" for a further stay based on its petition for rehearing and its planned filing, if necessary, of a Petition for Writ of Certiorari in the United States Supreme Court. Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Pursuant to Rule 3.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), the

State has filed a brief in support of this Motion that is being filed simultaneously herewith that more fully explains and supports the State's position.

WHEREFORE, for the reasons contained within the State's brief in support, the State respectfully requests this Court further stay the mandate for the pendency of the State's Petition for Rehearing and, if necessary, Certiorari Petition. It is the State's understanding that the mandate will remain stayed until this motion is ruled upon.

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL



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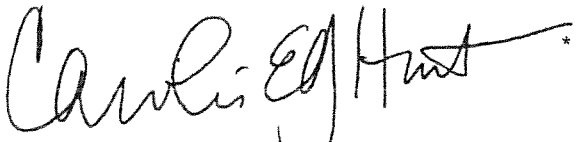

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ATTORNEYS FOR APPELLEE

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CERTIFICATE OF MAILING

On this ~~30~~ 31th day of March, 2021, a true and correct copy of the foregoing was mailed to:

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Sarah M. Jernigan
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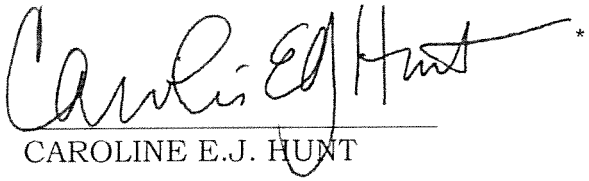

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FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 31 2021

JOHN D. HADDEN
CLERK

Case. No. PCD-2019-124

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

BRIEF IN SUPPORT OF MOTION FOR FURTHER STAY OF THE MANDATE BASED ON PENDING PETITION FOR REHEARING OR, ALTERNATIVELY, FOR GOOD CAUSE SHOWN

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MARCH 31, 2021

TABLE OF CONTENTS

I. THE MANDATE SHOULD BE AUTOMATICALLY STAYED BASED ON THE STATE'S PETITION FOR REHEARING. 2

II. ALTERNATIVELY, THE MANDATE SHOULD BE STAYED FOR GOOD CAUSE SHOWN. 2

CONCLUSION 6

CERTIFICATE OF MAILING 7

TABLE OF AUTHORITIES

FEDERAL CASES

Gonzalez v. Thaler, 565 U.S. 134 (2012) 5

McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) 3

Murphy v. Royal, No. 07-7068 & No. 15-7041, Order (Nov. 16, 2017) 6

United States v. Cotton, 535 U.S. 625 (2002) 5

STATE CASES

Bosse v. State, 2021 OK CR 3, ___ P.3d ___ 2, 3, 4, 5

Post v. State, 1986 OK CR 52, 717 P.2d 1151 5

Tiger v. State, 1995 OK CR 59, 907 P.2d 1075 6

STATE RULES

Rule 3.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011) 1

Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011) 1, 4

Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011) 1, 2

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PCD-2019-124**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

BRIEF IN SUPPORT OF MOTION FOR FURTHER STAY OF THE MANDATE BASED ON PENDING PETITION FOR REHEARING OR, ALTERNATIVELY, FOR GOOD CAUSE SHOWN

COMES NOW, the State of Oklahoma, by and through Attorney General Mike Hunter, and in support of its Motion for Further Stay of the Mandate Based on Pending Petition for Rehearing or, Alternatively, for Good Cause Shown, filed pursuant to Rule 3.14(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), files this brief in support pursuant to Rule 3.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). In light of the State's contemporaneous filings, its Motion for Leave to File Petition for Rehearing and its Petition for Rehearing, the State submits that the mandate in this case should automatically be stayed pursuant to Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Alternatively, assuming the State is not entitled to an automatic stay of the mandate based on its petition for rehearing, the State demonstrates "good cause" for a further stay based on its petition for rehearing and its planned filing, if necessary, of a Petition for Writ of Certiorari in the United States Supreme Court. Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

In support of this request, the State shows as follows. The State respectfully requests this Court further stay the mandate for the pendency of the State's Petition for Rehearing and, if necessary, Certiorari Petition for the reasons herein.

I. THE MANDATE SHOULD BE AUTOMATICALLY STAYED BASED ON THE STATE'S PETITION FOR REHEARING.

In issuing its decision in this case, this Court stayed the mandate for twenty days. *Bosse v. State*, 2021 OK CR 3, ¶ 30, ___ P.3d ___, ___. Ordinarily, the stay of the mandate is automatically extended if a petition for rehearing is filed, pending the disposition of that petition. *See* Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011) ("If a petition for a rehearing is timely filed after the filing of a decision, the mandate shall not issue until the disposition of the petition for rehearing . . . ."). Here, as shown in the State's contemporaneously filed Motion for Leave to File Petition for Rehearing, this Court has made this post-conviction appeal subject to Rule 3.15. *Bosse*, 2021 OK CR 3, ¶ 30, ___ P.3d at ___. Accordingly, the State submits that it is entitled to an automatic further stay of the mandate pending this Court's resolution of its petition for rehearing pursuant to Rule 3.15(B).

II. ALTERNATIVELY, THE MANDATE SHOULD BE STAYED FOR GOOD CAUSE SHOWN.

Alternatively, assuming this Court concludes that the State is not automatically entitled to further stay of the mandate, Rule 3.15(B) provides for a further stay where "good cause" is "shown." Rule 3.15(B), *Rules of the*

Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2011) ("When the petition for rehearing has been decided, the mandate shall issue forthwith. The mandate shall not be recalled, nor stayed pending an appeal to any other court, . . . unless a majority of the Court, for good cause shown, recalls or stays the mandate."). As shown below, the State has good cause because it has filed a petition for rehearing and weighty interests compel staying the mandate until these matters have been fully litigated.

The interests of justice counsel in favor of staying the mandate in this case until the State's petition for rehearing, and possible certiorari petition are resolved. As predicted, the impact of *McGirt* on this State is tremendous, with crime victims largely bearing the costs. *See Bosse*, 2021 OK CR 3, ¶¶ 6, 8, ___ P.3d at ___ (Hudson, J., concurring in results); *see also McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting) ("Across this vast area, the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma."). Prosecutors and law enforcement across the affected parts of the State are grappling with the myriad of complications that have arisen as thousands of cases, both old and new, change hands jurisdictionally. If nothing else, prosecutors and law enforcement need certainty regarding the state of the law post-*McGirt*. Issuing the mandate in this case—this Court's seminal post-*McGirt* precedent, as discussed in the Motion for Leave to File Petition for Rehearing—before the State has had the

opportunity to fully litigate the issues involved will only exacerbate uncertainty regarding the state of the law.

The State's rehearing petition offers persuasive grounds for reconsideration of this Court's decision in this case—persuasive enough that good cause for stay of the mandate is shown. As demonstrated in the rehearing petition, in rejecting the State's concurrent jurisdiction and waiver arguments, this Court both "overlooked" arguments and authority offered by the State and reached a conclusion that is "in conflict" with Supreme Court authority and "express" statutory language, Rule 3.14(B)(1)-(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Furthermore, as explained in the Motion for Leave to File Petition for Rehearing, the stakes in this case are extraordinarily high. The State should be permitted to fully litigate the significant issues conclusively decided in *Bosse*, including this Court's rejection of the State's concurrent jurisdiction and waiver arguments, before mandate issues. The potentially meritorious issues raised in the rehearing petition, combined with the enormous interests at stake, provide good cause for further staying the mandate pending resolution of the rehearing petition. *See Bosse*, 2021 OK CR 3, ¶¶ 6, 8, ___ P.3d at ___ (Hudson, J., concurring in results) ("All of this foreshadows a hugely destabilizing force to public safety in eastern Oklahoma. . . . And the clock is running on whether the federal system can keep up with the large volume of new cases undoubtedly heading their way from state court.").

Moreover, in addition to the State's state law procedural arguments, the State's arguments also present an important question of federal law. The State's concurrent jurisdiction arguments, if they ultimately prevail, would have a substantial mitigating effect on the jurisdictional upset in the state. *See Bosse*, 2021 OK CR 3, ¶¶ 6, 8, ___ P.3d at ___ (Hudson, J., concurring in results) (noting "the growing number of cases . . . where non-Indian defendants are challenging their state convictions using *McGirt* because *their victims* were Indian" (emphasis in original)). As previously shown by the State, the Supreme Court has addressed this issue only in dicta (*Petitioner's Proposition I in Light of the Supreme Court's Decision in* McGirt v. Oklahoma, *140 S. Ct. 2452 (2020)* at 15-16, filed August 4, 2020). This Court's decision has also created a conflict in interpreting *Gonzalez v. Thaler*, 565 U.S. 134 (2012), which this Court held to prohibit it from barring Indian Country jurisdictional claims, when *McGirt* itself repeatedly indicates that such claims *can* be barred (*Petition for Rehearing* at 9-11, filed March 31, 2021). And this Court's decision conflicts with *United States v. Cotton*, 535 U.S. 625 (2002), and multiple federal cases that rely on *Cotton*, by treating Indian Country jurisdictional claims as non-waivable subject matter jurisdiction claims that implicate the power of the trial court to adjudicate a case (*Petition for Rehearing* at 11-15, filed March 31, 2021). These federal issues present an opportunity for seeking a writ of certiorari, so the mandate should be stayed until certiorari is resolved or the opportunity to seek it has expired. *See Post v. State*, 1986 OK CR 52, ¶ 6, 717 P.2d 1151, 1152 (holding that, although "the petition for rehearing should be denied," "[b]ecause the Supreme Court has not

addressed this precise issue, we agree that the mandate should be stayed" so that the State "may lodge a petition for writ of certiorari with the United States Supreme Court"); *Murphy v. Royal*, No. 07-7068 & No. 15-7041, Order (Nov. 16, 2017) (staying mandate "until the deadline passes for filing a certiorari petition in the Supreme Court" or if the court "receives notice the respondent has filed a petition the stay will continue until the Supreme Court's final disposition").

As a final matter, Petitioner would be hard-pressed to argue any prejudice from a further stay of the mandate. As Petitioner's counsel stated at the evidentiary hearing, dismissing the impact of this jurisdictional claim on the victims' family, "This case will be brought in federal court. . . . And Mr. Bosse is not going anywhere. He's going to another prison. That's all that's going to happen." (Evidentiary Hearing Transcript at 22). Any claim of prejudice by Petitioner now would be disingenuous and should not prevent this Court from further staying the mandate. *See Tiger v. State*, 1995 OK CR 59, ¶ 5, 907 P.2d 1075, 1076 (refusing to recall the mandate where the recall would "prejudice the Petitioner").

CONCLUSION

For the above reasons, the State respectfully requests this Court further stay the mandate through the pendency of the State's Petition for Rehearing and, if necessary, Certiorari Petition.

Respectfully submitted,

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MITHUN MANSINGHANI, OBA #32453
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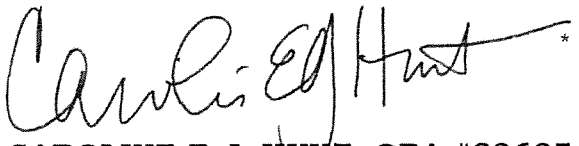

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On this ~~30~~ 31th day of March, 2021, a true and correct copy of the foregoing was mailed to:

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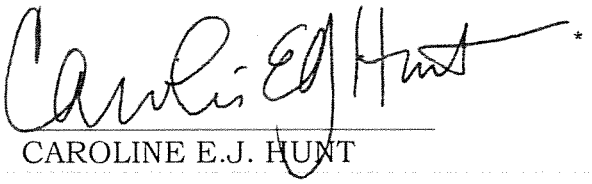

CAROLINE E.J. HUNT

* An electronic signature is being used due to the current COVID-19 restrictions. A signed original can be provided to the Court upon request once restrictions are lifted.