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McGirt v. Oklahoma

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Authored by Ansley Sherman, Esq.; Hon. Gregory H. Bigler; and Lynelle Hartway, JD²

American Indian/Alaskan Native (AI/AN) women are more likely to experience intimate partner violence and sexual violence than women of other races, with 47.5% of AI/AN women having reported experiencing domestic violence in their lifetimes.³ Domestic violence and physical and sexual assault are three-and-a-half times higher than the national average in Native American communities; however, this number may not reflect reality, as many assaults are not reported.⁴ Recently, the United States Supreme Court, in *McGirt v. Oklahoma*, recognized the continued existence of the Muscogee (Creek) Nation's reservation, and as a consequence, that tribal and federal courts have

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 - 2 Ansley Sherman (Muscogee (Creek)) is a Program Attorney with the National American Indian Court Judges Association (NAICJA) and has an extensive background working with tribes and tribal courts. Hon. Gregory Bigler (Euclidean) is a Muscogee (Creek) Nation District Judge and a member of the NAICJA Board of Directors. Lynelle Hartway is a Program Manager at the National Council of Juvenile and Family Court Judges (NCJFCJ) and has worked as in-house counsel for tribes in Arizona and Nevada.
 - 3 U.S. CTR. FOR DISEASE CONTROL, National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (2017).
 - 4 *Id.*, see also https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf; <https://indianlaw.org/issue/ending-violence-against-native-women>; Rosay, André B., U.S. DEPT. OF JUST. OF JUST. PROG., NAT'L INST. OF JUST., Violence Against American Indian And Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey 2 (May 2016).

primary jurisdiction to prosecute citizens of tribal nations for crimes committed within that reservation.⁵ This publication examines that decision, and its potential impacts to domestic violence victims and states and tribal courts in their efforts to address domestic violence. It also looks at the impact that *McGirt* has had on the Muscogee (Creek) Nation's courts.

McGIRT DECISION:

Jimcy McGirt was convicted in an Oklahoma State court of felony sex offenses. He appealed his conviction, claiming that Oklahoma lacked criminal jurisdiction over his offenses because he is a citizen of the Seminole Nation of Oklahoma and his crime took place within the boundaries of the Muscogee (Creek) Nation's reservation.⁶ He filed a pro-se petition for certiorari to the United States Supreme Court, and the Court granted certiorari in 2019. The Muscogee (Creek) Nation, the United States Office of the Solicitor General, and others filed briefs of amicus curiae in the case. It was argued before the Court on May 11, 2020, and the decision issued on July 19, 2020.

The issue presented to the Court was whether the State of Oklahoma may exercise criminal jurisdiction over a member of a tribe for crimes alleged to have been committed on lands within a reservation.

In a 5-4 decision, the Supreme Court held that the State of Oklahoma lacked criminal jurisdiction over Petitioner McGirt. It reversed the decision of the Court of Criminal Appeals of the State of Oklahoma, finding that lands reserved for the Muscogee (Creek) Nation by treaty, establishing a reservation never explicitly disestablished by Congress, remain "Indian Country" pursuant to the Major Crimes Act and that consequently the state has no criminal jurisdiction within those lands for crimes alleged to have been committed by McGirt or other member citizens of a tribe.⁷ Under the Major Crimes Act, jurisdiction for such crimes lies solely with the federal government, the Muscogee (Creek) Nation, or both.

The Supreme Court opinion, by Justice Neil Gorsuch, relies on the unique history of relations between the Muscogee (Creek) Nation and the United States, as well as basic tenants of federal Indian law, to affirm the existence of the Nation's reservation and the state/federal/tribal criminal jurisdictional consequences thereof. The Court

5 *McGirt v. Oklahoma*, 140 S.Ct. 2452 (July 19, 2020); 591 U.S. __ (2020).

6 Pursuant to federal Indian law, an Indian is a member of a federally recognized Indian tribe. Such membership is a recognition of the political status of citizenship within that tribal government. *U.S. v. Antelope*, 430 U.S. 641 (1977).

7 See 18 U.S.C. § 1853 (the Major Crimes Act); see also 18 U.S.C. § 1851 (the definition of "Indian Country" under that Act).

recognized that treaties in 1833 and 1866 as well as subsequent federal laws and acts, clearly established the existence and the boundaries of the Muscogee (Creek) Nation’s reservation. It affirmed prior holdings that under the “plenary power” doctrine, only Congress may disestablish the boundaries of an Indian reservation and must clearly express its intent to do so. It rejected arguments by Oklahoma that Congress had “disestablished” or otherwise reduced the Muscogee (Creek) Nation’s reservation (and other reservations) pursuant to the General Allotment Act and other federal acts regarding the Nation’s jurisdiction and authority.⁸ It also rejected the arguments provided in the dissent that the pattern and practice of Oklahoma’s exercise of criminal jurisdiction in other cases and the effect of statutes such as the Curtis Act had disestablished the Muscogee (Creek) Reservation. Instead, it relied on prior precedent interpreting the Major Crimes Act and its definition of “Indian Country” to affirm that reservation lands can include lands that have been transferred to individual landowners and/or through rights of way. The Court recognized that though Congress has the authority to terminate, alter, or amend federal and tribal criminal jurisdiction if it chooses, as it did in the Major Crimes Act, unless or until it does so, states lack criminal jurisdiction over tribal citizens for crimes committed within Indian Country. The Court’s majority also rejected arguments that this lack of jurisdiction, as applied to Oklahoma and *McGirt*’s case, could have broad negative impacts, stressing that, “[e]ach tribe’s treaties must be considered on their own terms, and the only question before us concerns the Creek...” and “the MCA applies only to certain crimes committed in Indian country by Indian defendants.”⁹

In short, *McGirt* rejected the Oklahoma State Court’s jurisdiction over offenses committed by a member of an Indian tribe within the Muscogee (Creek) Nation’s reservation. In so doing, the Court held that, “[t]oday we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.”¹⁰

WHAT *McGIRT* DOES AND DOES NOT MEAN:

In order to consider the impact of *McGirt* on domestic violence, it is first important to consider what the decision did and did not do. The Supreme Court’s decision does not

⁸ The General Allotment Act of 1887 (also known as the Dawes Act) authorized the federal government to “subdivide” Native American tribal communal reservations into individual allotments assigned to individuals or families. 24 Stat. 388. *See also* the Curtis Act of 1898, 30 Stat. 504-505.

⁹ *McGirt*, 140 S.Ct. at 2479.

¹⁰ *Id.* at 2459.

affect or alter current land ownership.¹¹ It also does not alter the jurisdictional “maze” that has long existed regarding criminal jurisdiction within Indian Country, which can be federal, state, and/or tribal depending on the tribal membership/citizenship of the victim, the tribal membership/citizenship of the perpetrator, the type of crime (*i.e.*, the seriousness of the offense), and whether or not the crime occurred within a state subject to Public Law 280 or similar statutes.¹²

Instead, *McGirt* relied on long-standing Supreme Court precedent to recognize the continued existence of established reservation lands. As a consequence, it affirms the application to those lands of the pre-existing scheme of criminal jurisdiction shared by three separate sovereigns. Although it does not alter existing land ownership status, it does almost certainly change the justice system’s (both within and outside of Indian Country) understanding of the applicable law to any particular case and its responsibilities regarding offenders and victims based on tribal membership of the offender and where the offense occurred.¹³

McGIRT AND DOMESTIC VIOLENCE:

The most straightforward impact of the *McGirt* decision is the continued restriction of state courts’ jurisdiction to prosecute citizens of tribes for certain crimes committed within Indian Country, which can include domestic violence-related offenses.¹⁴ The practical impact for victims of domestic violence is an increased reliance on tribal courts and tribal justice systems for criminal domestic violence response.¹⁵

The complex nature of jurisdiction within Indian Country has long made it difficult to effectively address domestic violence committed against AI/AN victims. This is particularly true where that violence is committed by non-Native men.¹⁶ The patchwork

11 See Eid, Troy A., *McGirt v. Oklahoma: Understanding What the Supreme Court’s Native American Treaty Rights Decision Is and Is Not*, Nat’l L. Rev. (October 20, 2020), <https://www.natlawreview.com/article/mcgirt-v-oklahoma-understanding-what-supreme-court-s-native-american-treaty-rights>.

12 For information about P.L. 83-280 and the different criminal jurisdictions see <http://www.tribal-institute.org/lists/pl280.htm>; <https://www.tribal-institute.org/lists/jurisdiction.htm>.

13 See Tweedy, Ann E., *Has Federal Indian Law Finally Arrived at the ‘The Far End of the Trail of Tears’?*, Ga. State. U. L. Rev. (September 10, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3684971.

14 Though the decision in *McGirt* deals specifically with the Muscogee (Creek) Nation, it has recently been applied to the lands of the Seminole Nation in Oklahoma, which shares some legal history. See *Oklahoma v. Barker*, Case No. CF-2019-92 (September 3, 2020).

15 *McGirt* may also have an impact on domestic violence-related civil enforcement matters by states, such as protection orders. See Hedden-Nicely, Dylan R., & Mills, Monte, *The Civil Jurisdictional Landscape In Eastern Oklahoma Post McGirt v. Oklahoma*, Nat. Resource L. Network, Rocky Mtn. Min. Law Foundation (August 2020); <https://www.rmmlf.org/-/media/Files/natural-resources-law-network/august-2020/the-civil-jurisdiction-landscape-in-eastern-oklahoma.pdf?la=en>.

16 American Indians and Crime. Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, February

of jurisdictional authority has resulted in an uncoordinated justice system response. In addition, advocates for Indigenous victims of domestic violence have long asserted that federal and state justice systems have often ignored or been slow to act regarding the disproportionate violence such victims suffer.¹⁷ In 2013, the reauthorization of the Violence Against Women Act (VAWA) sought to address this issue. It included an affirmation of tribal exercise of criminal jurisdiction over persons, including non-Indians, who commit domestic violence, dating violence, or who violate protection orders within Indian Country. However, Tribes must voluntarily opt-in in order to exercise criminal jurisdiction over non-Indians who commit domestic violence-related crimes and harm a Native person.¹⁸

The Supreme Court's decision in *McGirt* and the continuing issues of jurisdiction between and among federal, state, and tribal sovereigns, such as the agency to first respond to a crime scene or who will investigate a report, underscores the ongoing need for constant collaboration between those sovereigns and their justice systems to ensure that victims of domestic violence have access to justice.

McGIRT AND ITS IMPACT ON THE MUSCOGEE (CREEK) NATION'S COURTS:

The Muscogee (Creek) Nation is one of the tribes that have opted-in and implemented the Special Domestic Violence Criminal Jurisdiction (SDVCJ) provisions of VAWA and is among several others in Oklahoma and nation-wide.¹⁹ The SDVCJ, in addition to affirming tribal jurisdiction over domestic violence offenses committed within their lands, provides additional tools for tribal justice systems to effectively address domestic violence within tribal communities and has proven to have positive impacts and outcomes for victims.²⁰

The increased reliance on tribal systems for domestic violence (and other criminal) responses can mean an increase in cases before tribal courts and an increased strain on tribal resources.

1999; <http://www.bjs.gov/content/pub/pdf/aic.pdf>.

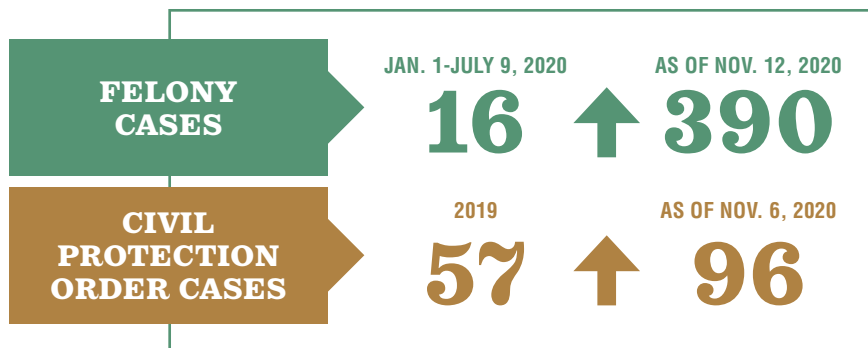
17 NAT'L CONGRESS OF AMERICAN INDIANS, VAWA 2013's Special Domestic Violence Criminal Jurisdiction: Five Year Report 3 (March 20, 2018), *citing* Clinton, Robert N., Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 ARIZ. L. REV. 503, 508-13 (1976).

18 VAWA 2013 also contains additional provisions regarding civil protection orders.

19 As of 2019, 25 Tribes have opted-in implemented VAWA's SDVCJ. <https://www.ncai.org/tribal-vaawa/get-started/currently-implementing-tribes>.

20 VAWA's SDVCJ includes, among other offenses, domestic violence committed by current or former intimate partners, dating violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and criminal violations of protection orders. For more information on SDVCJ, see [https://www.ncai.org/tribal-vaawa/overview/VAWA Information - Technical Assistance Resources Guide Updated November 11 2018.pdf](https://www.ncai.org/tribal-vaawa/overview/VAWA%20Information%20-%20Technical%20Assistance%20Resources%20Guide%20Updated%20November%2011%202018.pdf). See also *supra* n. 17.

The Muscogee (Creek) Nation has seen its criminal matters go from 16 felony cases during the period from January 1, 2020 to July 9, 2020, to 390 felony cases as of November 12, 2020. Its civil protection order docket went from 57 cases in 2019 to 96 cases as of November 6, 2020.²¹



While the Muscogee (Creek) Nation District Court has not yet tracked the precise number, many of these criminal cases involve domestic abuse. Unfortunately, a noticeable percentage of cases filed so far allege domestic abuse by strangulation.²² Prior to *McGirt*, much of the Nation’s criminal matters arose from Tribal casino properties. Now, they arise across all lands encompassed in the 11 counties comprising the Nation’s reservation.

There are always issues regarding the allocation of scarce resources and how sovereigns respond to the need for protection of its vulnerable populations. However, the Muscogee (Creek) Nation is committed to its implementation of the SDVCJ and has been fairly active in tasking resources and awareness to addressing domestic violence. Though the *McGirt* decision will likely present challenges for the Muscogee (Creek) Nation (and other tribes) due to the increased reliance on tribal courts for domestic violence response,

“It is not past our capabilities. We do not expect it to exceed our capabilities. We expect that there will be increased work, increased numbers of employees at the court, but it is within our capabilities... We are very capable. We have educated people, we have traditional people, we have that excitement to take care of our people and we will provide due process for all whether they are (non-native) native, Muscogees, Cherokees or other tribes.”²³

21 Email from Hon. Gregory H. Bigler, District Judge, Muscogee (Creek) Nation District Court (Dec. 3, 2020, 9:23 a.m.) (on file with authors).
 22 For information regarding the prevalence and lethality of domestic violence-related strangulation, see <https://vawnet.org/sc/high-lethality-risk-factors>.
 23 Hon. Gregory H. Bigler, District Judge, Muscogee (Creek) Nation District Court, NAICJA Presentation Virtual Conference, *McGirt* Plenary Session (October 21, 2020).



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