High Court's McGirt Ruling Will Not Lead To Disaster

By **Steven Gordon and Philip Baker-Shenk** (September 13, 2021)

Steven Gordon

Philip Baker-Shenk

Last year, the U.S. Supreme Court ruled 5-4 in McGirt v. Oklahoma[1] that the eastern half of Oklahoma, with a population of almost 2 million people, remains Indian Country under the jurisdiction of the Five Civilized Tribes — Cherokee, Choctaw, Chickasaw, Creek and Seminole.

This means that Oklahoma state courts lack jurisdiction to prosecute crimes committed in this area by or against Native Americans, who constitute some 10%-15% of the population, requiring those offenses to be prosecuted either by the federal government or by the relevant tribal government.

This ruling requires a major change in how these criminal prosecutions are conducted in this half of the state. For more than 100 years, the state has prosecuted most of the criminal offenses in this region committed by or against Native Americans and non-Native Americans.

Unsurprisingly, many state officials in Oklahoma hate the McGirt decision. Last month, the state returned to the Supreme Court with a new case, Bosse v. Oklahoma, seeking to have the court overrule McGirt.[2]

Days thereafter, the Oklahoma Court of Criminal Appeals — the state's highest criminal court — ruled that McGirt shall not apply retroactively to void a final state conviction.[3] This led the OCCA to vacate its prior decision overturning the conviction in the Bosse case, thereby mooting the state's claims before the Supreme Court.

More recently, Oklahoma dismissed its cert petition, but Oklahoma Attorney General John M. O'Connor emphasized that he "plans to file more cases to either overturn or limit the McGirt decision in the coming weeks."[4] The state's assault on McGirt is far from over.

Oklahoma contends that "[n]o recent decision of this Court has had a more immediate and destabilizing effect on life in an American State" and that McGirt "drives thousands of crime victims to seek justice from federal and tribal prosecutors whose offices are not equipped to handle those demands [with the result that] [n]umerous crimes are going uninvestigated and unprosecuted, endangering public safety."[5]

Contrary to these shrill contentions, however, the sky is not falling in Oklahoma. Although the shift to a post-McGirt world will not be seamless, no disaster is in the offing. McGirt requires a reallocation of federal, state and tribal resources on a going-forward basis, but there is every reason to believe that this can and will be accomplished in an effective and satisfactory manner.

Most old convictions will not be undone.

When Oklahoma sought Supreme Court review of the Bosse case, its lead argument was that McGirt might undo all convictions obtained by the state in cases involving Native Americans.

This could produce a number of adverse consequences: (1) Some defendants may not be subject to reprosecution because the statute of limitations has expired; (2) the ability to successfully reprosecute cases where the limitations period has not expired may be hobbled by lost evidence, missing witnesses or faded memories; (3) a flood of reprosecutions could put a substantial burden on the federal and tribal criminal justice systems and divert resources from current cases; and (4) reprosecutions may inflict substantial pain on crime victims who must testify again and endure new trials.

The state noted that, as a result of McGirt, over 3,000 applications for post-conviction relief had been filed. It claimed that approximately a quarter of these challenges involve crimes already beyond the federal statute of limitations.

But the specter of these grim consequences was eliminated by the OCCA's decision last month that McGirt shall not apply retroactively to void a final state conviction.[6] In other words, defendants whose convictions are final cannot seek to reopen their cases based on McGirt.

The OCCA's decision does not apply to convictions that are still on direct appeal; those defendants can get a second bite at the apple based on McGirt.

However, the number of these cases is relatively small compared to the number of final convictions. Further, these direct-appeal cases are of recent vintage, which means that the witnesses and evidence necessary to reprosecute them should still be readily available.

It is also probable that plea or sentence bargains will be reached in some of these cases, which will eliminate the need for a retrial. Some number of these cases will ultimately need to be reprosecuted and that will impose a burden on federal and tribal courts, as well as the victims and witnesses. But this burden is manageable.

The number of cases affected may be greatly reduced.

Another issue of large practical importance is whether McGirt affects only crimes committed by Native Americans or whether it also affects crimes committed against Native Americans by non-Native Americans. Can Oklahoma continue to prosecute non-Native Americans for state law crimes committed against Native Americans in the part of the state that constitutes Indian Country?

In March the OCCA ruled that the federal General Crimes Act,[7] which gives federal courts jurisdiction over Native Americans and non-Native Americans who commit crimes against Native Americans in Indian Country, preempts jurisdiction over these crimes in state courts.[8]

That case involved Shaun Bosse, a non-Native American, who murdered his Native American girlfriend, Katrina Griffin, and her two young children. The Bosse case was the subject of Oklahoma's now withdrawn request for Supreme Court review of McGirt.

The state's petition in Bosse asked the Supreme Court, as an alternative to overturning McGirt, to rule that federal law does not prevent it from prosecuting non-Native Americans for state offenses committed against Native Americans in Indian Country.

The state is virtually certain to resurrect this argument when it returns to the court with another challenge to McGirt. It seems unlikely that the court will agree to revisit McGirt so soon after it was decided, but Oklahoma may well have a better chance of persuading the

court to take up the issue of whether federal law bars states from prosecuting non-Native Americans.

Should the Supreme Court rule that Oklahoma can continue to prosecute non-Native Americans for crimes committed against Native Americans, that would significantly limit the number of cases that henceforth must be prosecuted in federal or tribal court.

The necessary resources exist and practical solutions can be found.

Admittedly, there are challenges in shifting the prosecution of crimes involving Native Americans from state court to federal and tribal courts. But these challenges are surmountable if the affected parties — the state, the Five Tribes and the federal government — cooperate with each other.

Federal prosecutors have the necessary authority, under the Major Crimes Act[9] and Assimilative Crimes Act,[10] to prosecute virtually all the felony offenses that previously have been handled by the state.

The practical issue confronting the federal government is the need to provide adequate resources to its investigators, prosecutors and judges to handle their increased caseloads. Before McGirt, the resources were provided by the state of Oklahoma; now, the federal government must step up.

Historically, there has been criticism that the federal government has skimped on the resources it provides to fight crime on Native American lands. But here, the eyes of the entire state of Oklahoma are on this issue. The Biden administration has asked Congress to add $75 million to the U.S. Department of Justice budget for next year to provide more support to the FBI and the U.S. attorney's offices in eastern Oklahoma.

Tribal prosecutors and courts face issues involving both legal authority and resources.

The Indian Civil Rights Act limits the sentence that a tribal court can impose for a single offense to three years. It permits consecutive sentences if the defendant is convicted of multiple offenses, but limits the total term of imprisonment to nine years.[11]

Further, tribes lack the authority to prosecute almost all non-Native American offenders, except some domestic violence cases. These limitations could be overcome by a division of labor between federal and tribal prosecutors whereby the tribes prosecute misdemeanors and lower-level felonies for which a three-year sentence is adequate, while the federal government handles more serious felonies and cases against non-Native Americans.

Other steps that might be taken include amendments to federal law to expand the tribes' ability to punish serious offenses, or for the U.S. attorney's offices to cross-designate state or tribal prosecutors as special assistant U.S. attorneys, enabling them to prosecute cases involving Native American defendants or victims in federal court.[12]

Tribes also need considerably more resources for criminal law enforcement in the wake of McGirt. Their caseloads have increased dramatically, and they are already hiring more police officers, investigators, prosecutors and judges. They may also need new or expanded facilities to adjudicate cases and to house those awaiting trial or sentenced to prison.

Some tribes currently house prisoners in county jails with which the tribes have contracts. Going forward, tribes may need contracts for longer-term prison detention.

In addition, while the Five Tribes already have many cross-deputization agreements with their neighboring state and local law enforcement agencies, there is room for improvement in the actual functioning of some of those agreements.

All of these are issues that the tribes are ready, willing and able to address. No tribe has complained about the new responsibilities that McGirt has conferred on it; but each of the Five Tribes has expressed concern that its federal trustee has provided no additional financial support for these new tribal obligations.

As the true dimensions of the issues created by the McGirt decision become clear, it is apparent that they are neither terrible nor insurmountable. Once the state of Oklahoma realizes that there is no going back, the actual issues can be resolved satisfactorily within the next few years. None of the affected parties — the tribes, the state and the federal government — has an interest in letting crimes go unpunished and criminals walk free.

Years ago, former Justice Sandra Day O'Connor explained that:

> Today, in the United States, we have three types of sovereign entities — the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country.[13]

During the decades before McGirt, Oklahoma had a system of criminal justice with federal, state and tribal components that unlawfully restricted the role of the tribes. Responsibilities within this system must now be reallocated to accord tribes their proper role.

This will affect the fraction of statewide criminal offenses that are committed in Indian Country and involve Native Americans defendants or victims. There is no reason to conclude this change cannot be accomplished, or that the revamped criminal justice system will be less workable than its predecessor.

Steven D. Gordon and Philip Baker-Shenk are partners at Holland & Knight LLP.

[1] McGirt v. Oklahoma, 140 S.Ct. 2452 (2020).

[2] Oklahoma v. Bosse, petition for cert., No. 21-186 (filed Aug. 6, 2021).

[3] State ex rel. Matloff v. Wallace, 2021 OK CR 21 (Aug. 12, 2021).

[4] Andrew Westney, "Okla. Drops One Petition To Upend McGirt, Will Bring More," Law 360 (Sept. 3, 2021).

[5] Oklahoma v. Bosse, petition for cert., No. 21-186 (filed Aug. 6, 2021).

[6] State ex rel. Matloff v. Wallace, 2021 OK CR 21 (Aug. 12, 2021).

[7] 18 U.S.C. § 1152.

[8] Bosse v. State, 2021 OK CR 3, 484 P.3d 286 (2021).

[9] 18 U.S.C. § 1153.

[10] 18 U.S.C. § 13.

[11] 25 U.S.C. § 1302.

[12] See 28 U.S.C. § 543.

[13] Sandra Day O'Connor, Lessons from the Third Sovereign: Indian Tribal Courts, 33 Tulsa L.J. 1, 1 (1997).