

MEMORANDUM



To: All Oklahoma Law Enforcement Agencies

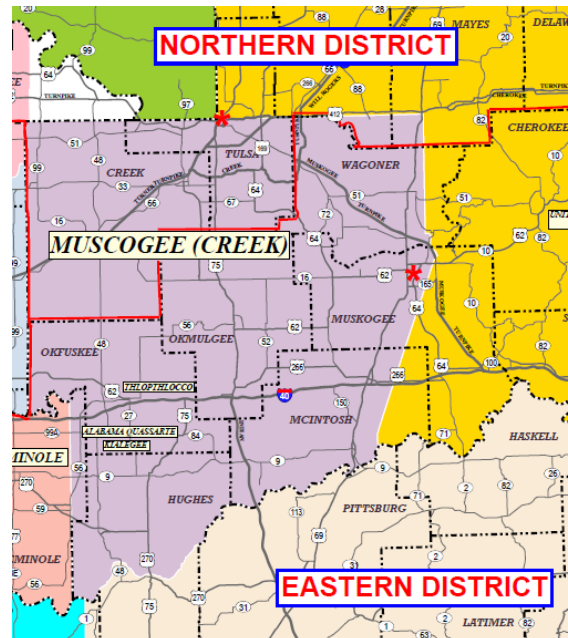
From: Oklahoma Office of the Attorney General

Re: Guidance for Oklahoma law enforcement following *McGirt v. Oklahoma*, No. 18-9526 (U.S.)

On July 9, 2020, the U.S. Supreme Court held in *McGirt v. Oklahoma* that land within the 1866 borders of the Muscogee (Creek) Nation remains Indian country today. The Office of the Attorney General and the Muscogee (Creek) Nation are actively collaborating to present a proposal to Congress that will clarify and affirm the jurisdiction of Oklahoma law enforcement to enforce state law in a manner consistent with the settled practice in Oklahoma. However, until such legislation is enacted by Congress, this memorandum is intended to provide guidance to law enforcement during the interim. This memorandum is a working document and will periodically be updated after further consultation with state, tribal, and federal law enforcement.

To start, **unless otherwise specified herein, Oklahoma law enforcement should continue to operate as it always has, prioritizing public safety.** Law enforcement should avoid making sudden and radical changes to policing and other duties meant to promote public safety. Actions to transition during this interim period should be made only after a process that involves careful deliberation and consultation with state, tribal, and federal authorities, or pursuant to a court order in a particular individual's case.

Next, law enforcement should be cognizant of the **geography** of the Supreme Court's decision. The Supreme Court's decision in *McGirt* on its face applies only to the 1866 borders of the Muscogee (Creek) Nation. *See McGirt*, slip op. at 37 ("Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek."). Thus, until there is further action by Congress or the courts, law enforcement acting outside the Creek Reservation should not change any practices at this time. That said, law enforcement should take note of and remain in contact with federal and tribal authorities in cases involving tribal members in the historic lands of the Cherokee Nation, Chickasaw Nation, Choctaw Nation, and Seminole Nation, such that if action is needed within those areas, law enforcement is prepared to make the appropriate transfers.



All law enforcement with jurisdiction within the Creek Reservation should, as soon as possible, ensure that they have signed a **cross-deputization agreement** with the Muscogee (Creek) Nation and the Bureau of Indian Affairs. Such agreements allow state and local officers to make arrests, conduct investigations, and provide assistance such as dispatching and detention, including for those offenses against tribal or federal law that involve tribal members on tribal lands. After an agreement is entered into, law enforcement agencies should make sure that all of its officers are individually cross-deputized under the agreements. This is vital to maintaining public safety and order, especially in emergency circumstances. An example of such an agreement can be found at <https://www.sos.ok.gov/documents/filelog/63941.pdf>, and more examples can be found at the website of the Oklahoma Secretary of State.

With these general considerations in mind, the Office of the Attorney General recommends the following process for Oklahoma law enforcement with cross-deputization agreements in place and acting within the boundaries of the Muscogee (Creek) Reservation. All arrests should continue to be made in the normal course when officers have probable cause. If the officer has no reason to believe that either the offender or victim is a tribal member, he should proceed with investigation and detention in the normal course. Oklahoma's criminal jurisdiction extends to all offenses that involve solely non-Indians. *See United States v. McBratney*, 104 U.S. 621, 624 (1881).

If the officer or detaining authority has reason to believe either the offender or victim for a Creek Reservation crime is a tribal member, the officer or detaining authority should, as soon as practicable, seek to ascertain such tribal status. Until tribal status is confirmed, the arrestee should continue to be detained in the normal course. Under current law, a person is an "Indian" for criminal law jurisdiction if they satisfy two criteria: (1) they have "some Indian blood," *and* (2) they are "recognized as an Indian by a tribe or by the federal government." *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). The first requirement can be shown by a Certificate of Degree of Indian Blood (CDIB) issued by the U.S. Bureau of Indian Affairs; the second requirement can be shown by official tribal document showing the defendant or victim is enrolled in a tribe or an official federal document showing the defendant or victim is receiving federal Indian services.

An officer or detaining authority that has reason to believe either the offender or victim for a Creek Reservation crime is a tribal member should, as soon as practicable, contact the relevant prosecuting authority, such as the local district attorney. The prosecuting authority should then contact both the Attorney General for the Muscogee (Creek) Nation and the U.S. Attorney for the relevant federal district. Those three prosecutorial authorities, after considering the relevant evidence including evidence discovered by the arresting officer and provided by tribal or federal records, should endeavor to come to an agreement as to the appropriate authority to detain and prosecute the offender. Only after such a determination is made should the detaining authority transfer the offender to the custody of the appropriate prosecuting authority, as well as turn over all evidence and investigatory materials. The Nation may also enter into written agreements with the state or local authority to continue to detain an offender under the Nation's jurisdiction. Specific cross-deputization agreements lay out more specific processes.

Assuming an offender or the victim is an Indian, whether tribal or federal authorities are the appropriate prosecuting entity on the Creek Reservation is dependent on the nature of the crime and the status of both the victim and offender.

Transfer is appropriate the federal government, if the offender is an Indian and the crime alleged is a “major crime” (*see* 18 U.S.C. §§ 1152, 1153):

- Murder
- Manslaughter
- Kidnapping
- Maiming
- Felony sexual abuse or assault crimes as defined in 18 U.S.C. §§ 2241-2248
- Incest
- Felony assault as defined in 18 U.S.C. § 113:
 - Assault with intent to commit murder or a violation of §§ 2241 or 2242
 - Assault with intent to commit any felony, except murder or a violation of §§ 2241 or 2242
 - Assault with a dangerous weapon, with intent to do bodily harm
 - Assault resulting in serious bodily injury
 - Assault resulting in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual who has not attained the age of 16 years
 - Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate
- Assault against an individual who has not attained the age of 16 years
- Felony child abuse or neglect
- Arson
- Burglary
- Robbery
- Felony theft as defined in 18 U.S.C. § 661

The federal government also has jurisdiction generally over any crime in Indian country if the case involves (1) an Indian defendant and a non-Indian victim; (2) a non-Indian defendant and an Indian victim; or (3) an Indian defendant who committed a victimless crime. *See id.*

Transfer is appropriate the Muscogee (Creek) Nation for all Indian-on-Indian crimes not listed in the list of “major crimes” above. Additionally, transfer to the Nation may be appropriate when both the federal and tribal authorities agree to such transfer for (1) an Indian defendant and a non-Indian victim; (2) an Indian defendant who committed a victimless crime; or (3) a non-Indian defendant and an Indian victim where the offender is accused of domestic violence, dating violence, or a violation of a protection order. *See* 25 U.S.C. §§ 1302(a)(7), 1304.

Further information on the appropriate jurisdiction can be found in the following chart prepared by the Department of Justice: <https://www.justice.gov/usao-wdok/page/file/1049076/download>.

Contacts for the Muscogee (Creek) Nation Attorney General:

- Assistant Attorney General Kyle Haskins (khaskins@mcnag.com, 918-295-9720)
- Attorney General Roger Wiley (rwiley@mcnag.com, 918-295-9720).

Contacts for the U.S. Northern District of Oklahoma:

- New case intake: USAOKN.intake@usdoj.gov
- Criminal Chief Allen Litchfield (Allen.Litchfield@usdoj.gov, 918-382-2711)

- Tribal Liaison Shannon Cozzoni (Shannon.Cozzoni@usdoj.gov, 918-382-2708)
- FBI Senior Supervisory Special Agent Chuck Dodsworth (918-664-3300)
- ATF Resident Agent in Charge Justin Demaree (918-594-1800)

Contacts for the U.S. Eastern District of Oklahoma:

- AUSA Rob Wallace (rob.wallace@usdoj.gov, (918) 684-5162)
- Criminal Chief Shannon Henson (shannon.henson@usdoj.gov, (918) 684-5154)
- FBI Supervisory Special Agent Mike Rivers ((918) 226-0462)
- FBI Special Agent Tim Deppner ((918) 977-1037)