Graham v. White, 2023 WL 4141662 (N.D. Okla. June 22, 2023).

- **Holding**: On petition for habeas corpus, federal court ordered release of member of Cherokee Nation convicted in state court for manslaughter occurring within bounds of Muscogee (Creek) Nation Reservation prior to holding in *McGirt v. Oklahoma*, finding that the Oklahoma Court of Criminal Appeals (OCCA) arbitrarily vacated district court's grant of postconviction relief issued in reliance on (OCCA's) decision, later vacated, that postconviction relief was available to invalidate convictions that were final before *McGirt* was decided.
- **Summary**: In 2007, Graham was convicted in an Oklahoma district court of five counts of first-degree manslaughter, and sentenced to 107 years in state prison. In 2012, White filed a motion for post-conviction relief, and amended the motion in 2017 to claim that the state lacked jurisdiction to prosecute her because she was a member of the Cherokee Tribe and the crimes for which she was convicted occurred within the boundaries of the Muscogee (Creek) Nation Reservation. The district court did not order a response or take any other action on Graham's application until the Supreme Court issued *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020), holding that the Muscogee (Creek) Indian Reservation had not been disestablished and remained Indian country for purposes of the Major Crimes Act. Thereafter, the Oklahoma Court of Appeals, in *Bosse v. State*, 484 P.3d 286 (Okla. Crim. App. Mar. 11, 2021) ("*Bosse I*"), granted postconviction relief to a prisoner who, like Graham, sought to invalidate convictions that were final before *McGirt* was decided.

  Applying the holding in *Bosse I*, the state district court granted Graham's application for postconviction relief, vacating her convictions and releasing her from custody. Given the holding in *Bosse I*, the state did not seek a stay of the district court's order granting postconviction relief and did not perfect a postconviction appeal.

  After Graham's release, the Oklahoma Court of Criminal Appeals held, in *State ex rel. Matloff v. Wallace*, 497 P.3d 696, 688 (Okla. Crim. App. 2021), "that *McGirt v. Oklahoma* announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction." It subsequently vacated its decision in *Bosse I* and withdrew its published opinion. *Bosse v. State*, 499 P.3d 771, 775 (Okla. Crim. App. Oct. 7, 2021) (*Bosse II*).

  Thereafter, in Graham's case, the state filed a motion to vacate the post-conviction relief and remand Grahm to custody. The district court granted the motion, but stayed it to allow Graham to seek review before the Oklahoma Court of Criminal Appeals (OCCA). Graham filed a petition for a writ of prohibition with the OCCA, which, in a 3-2 decision, held that "[b]ecause the convictions in this matter were final before the July 9, 2020, decision in *McGirt*, the holding in *McGirt* does not apply." The dissenters asserted that at the time of Graham's postconviction proceeding, *McGirt* and *Bosse I* were the applicable holdings, and the later change in the law in *Bosse II* could not be applied retroactively.

  Graham was re-incarcerated, and filed a federal habeas petition. The federal district court concluded that the petition demonstrated exceptional circumstances justifying a writ of habeas corpus—concluding that the decision to retroactively apply *Bosse II* and

re-incarcerate Graham deprived her of the liberty interest protected by the Fourteenth Amendment in a manner that was fundamentally unfair and arbitrary, because the law existing at the time the district court granted postconviction relief (*McGirt* and *Bosse I*) was that the state lacked authority to prosecute Graham for crimes she committed in Indian country, creating a "substantial and legitimate expectation that the TCDC's final judgment granting postconviction relief would remain final absent a timely postconviction appeal by the state." The federal district court ordered Graham's release, and barred any retrial in state court.

- **Relevant (2023) Deskbook Section**: 4:5, 4:15
- **Comment:** Warden White immediately appealed and asked the district court for a stay and an order allowing the State to reacquire custody of Graham, which the court denied. 2023 WL 4290054.