



# ***McGirt v Oklahoma* Victim Impact Report**

20 August 2021

Prepared for the Tulsa County District Attorney's Office, funded by the U.S. Department of Justice, Bureau of Justice Assistance, National Training and Technical Assistance Center

Prepared by Dr. Jason Pudlo and Dr. William Curtis Ellis

Oral Roberts University

**Title:** *McGirt v Oklahoma* Victim Impact Report

**Prepared for:** Tulsa County District Attorney

**Prepared by:** Dr. Jason Pudlo and Dr. William Curtis Ellis, Oral Roberts University

**Submitted:** August 20, 2021

## **Project Summary**

### Tasks and Deliverables:

1. Quantitative analysis of *McGirt*-impacted dispositions, time delays, and other factors.
2. Statistical analysis of trends and patterns emerging due to the *McGirt* decision.
3. Suggestions for tracking cases impacted by the *McGirt* decision.
4. Qualitative analysis of the impact of *McGirt* changes on victims with a focus on common critiques and perceptions of justice and efficacy by victims.
5. Legal research that considers precedent for legal questions raised by *McGirt*.

### Summary of Findings and Recommendations:

1. 18% of cases referred by TCDA to the USAO and Cherokee Nation were indicted by the referred agency.
2. Felonies and violent crimes are more likely to be indicted after referral than other case severities or types.
3. Unique data systems and limits on access make tracking the impact of *McGirt* cases difficult.
4. Improve the interoperability of existing court database systems or the expansion of OSCN online system to include tribal court networks.
5. Pending cases could provide clarity to myriad of jurisdictional issues still outstanding.

## **Recommended Citation**

Pudlo, Jason M. and William Curtis Ellis. 2021. "*McGirt v Oklahoma* Victim Impact Report". US Department of Justice Bureau of Justice Assistance.

## ***McGirt v. Oklahoma* (2020): Overview and Immediate Impacts**

The 2020 Supreme Court's landmark decision in *McGirt v. Oklahoma* held that under the Major Crimes Act (MCA) all land reserved for the Creek Nation since the 19<sup>th</sup> century remains "Indian Country". This asserts that the state of Oklahoma lacks criminal jurisdiction for the prosecution of crimes involving a Native American victim or perpetrator or occurring within recognized reservation borders. In practice, this means all Oklahoma land within the 1866 boundaries of the Five Tribes of Oklahoma<sup>1</sup> is now under tribal and federal jurisdiction for the purposes of criminal law in cases involving Native American victims and/or perpetrators. Additionally, the case applies retroactively, leading many municipalities in eastern Oklahoma within these boundaries to dismiss thousands of decided cases and then referring those cases to the United States Attorneys' Office (USAO) and/or tribal courts.

The *McGirt* decision was a 5-4 ruling by the Supreme Court in favor of Jimcy McGirt. McGirt, a member of the Muscogee (Creek) Nation was previously convicted of sex crimes against a child by the state of Oklahoma. McGirt argued that Oklahoma could not exercise criminal jurisdiction in his case because the crimes took place on land within the boundaries of the historical Muscogee Nation<sup>2</sup>. In the majority opinion, written by Justice Gorsuch (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan), The Court held that only a "clear expression of congressional intent" can diminish or disestablish a federal registration established by Congress. The minority dissent, written by Chief Justice Roberts (joined by Justices Alito and Kavanaugh, and Justice Thomas in part), members of The Court argued that the statutes should be examined in isolation and because a reservation did not exist when McGirt committed his crimes, the state of Oklahoma holds jurisdiction.

### **Research Rationale, Purpose, and Scope**

The immediate impacts of the *McGirt* decision were the jurisdictional and resource challenges faced by state, federal, and tribal law enforcement. Throughout eastern and northeastern Oklahoma, the state faced immediate appeals of both decided and pending criminal cases and, despite being the primary law enforcement mechanism in Indian Country, the immediate loss of criminal jurisdiction in cases involving a member of one of the Five Tribes. Federal law enforcement faced the immediate influx of cases and case referrals from the state, exponentially increasing the case load falling on the Northern District of the USAO. The tribes faced a similar challenge with their jurisdiction and case referrals from the state increasing significantly. With such an influx of criminal cases to the tribes and federal courts, combined with the existing lack of capacity, state district attorneys and others expressed immediate worries over the *McGirt* decision's impact on victims.

The Tulsa County District Attorney's (TCDA) office approached the research team from Oral Roberts University for help tracking cases referred out by Tulsa County to the USAO, the Cherokee, and the Muscogee criminal systems and to research the personal impacts felt by victims, particularly in the instances of previously decided but now dismissed cases. While the impact of *McGirt* is playing out across all counties in eastern and northeastern Oklahoma, this research is strictly a collaboration with

---

<sup>1</sup> Five Tribes is a collective reference to the Cherokee, Chickasaw, Muscogee (Creek), Choctaw, and Seminole nations.

<sup>2</sup> Muscogee (Creek) Nation is also known as the Muscogee Nation. While both nomenclatures are correct and Muscogee (Creek) Nation is the format used in the tribal Constitution, we follow the preferences [announced in May 2021](#) and adopt the shortened form of the official name for the remainder of this report.

the TCDA. The research only examines the *McGirt* docket of dismissals and referrals provided by the TCDA. The research does not examine cases in other counties, nor does it examine cases initiated by the USAO or tribal law enforcement. This project does trace all cases, as best as possible given data availability, referred out of the *McGirt* docket by Tulsa County to determine if the cases are being acted upon by the referred agencies and in what time. The research does not investigate individual details of any cases, as this is beyond the scope of the project.

## **Quantitative Analysis (Deliverable 1 and 2)**

### *Method*

In order to provide a quantitative analysis of cases referred due to the *McGirt* ruling it was necessary for the TCDA to provide the researchers with cases from the *McGirt* docket. While the Oklahoma State Courts Network (oscn.net) provides a public record of court dockets, the only way to identify *McGirt* cases is by reading the actions history of each individual case. Thus, TCDA provided a database of cases processed on the “*McGirt* docket” directly to the research team. The docket included 1304 cases resulting in 1495 referrals by the TCDA from July 2020 through May 2021.<sup>3</sup> The TCDA database contained the following information for each case: defendant name, file number, court number, case date, criminal charge(s), case attorney, date of referral(s), and referral agency (agencies). The research team then added the following information: charge severity (felony, misdemeanor, or either), charge type (following the FBI/TCDA classification schemes), the age of the case, indictment by a referral agency (agencies), and indictment charge(s).

In order to add the original data to the information provided by the TCDA, the researchers took a number of steps. To determine charge severity the researchers cross-referenced the charge provided by the TCDA on the 2020 State Statute List from the Oklahoma Bureau of Investigation. This information was used to identify whether the crimes were felonies or misdemeanors. For instances where the charge can be classified as either a felony or misdemeanor the variable was coded as “either.”

To identify charge type, the research team examined the details of the charges listed in the TCDA data and compared it to the definitions provided in the FBI and TCDA classification schemes. The research team examined each individual case and charge and categorized the type under one of the three FBI categories (violent, property, or drugs) or one of the six TCDA categories (traffic, crimes against children non-violent, domestic non-violent, sexual crimes non-violent, or public order). While the categories are imperfect as some crimes seem to overlap classifications, the researchers followed the definitions as closely as possible and in questionable cases the team erred on the side of the harsher category. Category definitions are provided below:

*Violent:* Murder (non-negligent manslaughter), assault, robbery, rape

*Property:* Larceny, burglary, motor vehicle theft, arson

*Drugs:* All drug charges

*Traffic:* All vehicle related charges except theft

---

<sup>3</sup> In some instances, the TCDA refers cases to the USAO and a tribal court as both hold jurisdiction and could choose to act. For this reason, there are more total referrals than total cases.

*Crimes against children:* All child-related non-violent

*Domestic:* All domestic non-violent

*Sexual crimes:* All sexual non-violent

*Public order:* Everything else

To determine the age of each case, we calculated the time span between the “case date” and the “date of referral” provided by the TCDA. The data is presented categorically in order to correspond with common statutes of limitations time frames.

To address the question of whether a *McGirt* referral resulted in an indictment from a referral agency, the researchers downloaded the semi-monthly release of USAO Northern District Federal Grand Jury A and Grand Jury B indictments through June 2021.<sup>4</sup> The name and case number of each indicted defendant was then cross-referenced with the TCDA database. If a defendant in the TCDA database was indeed indicted by the referred agency, that was designated, and the indictment charge was recorded to ensure the cases matched. The process was repeated with the Cherokee indictment database provided to the researchers by the TCDA via Cherokee prosecutors. The researchers attempted to produce the same process with the Muscogee Nation referrals. However, data availability was so limited that the researchers did not feel confident in the ability to match cases and no indictments were recorded. This does not prove that the referred cases have not been indicted (further detail provided below in the Data Challenges section).<sup>5</sup>

Due to COVID-19 protocols, the researchers were limited to data that could be acquired or provided electronically. Traveling to tribal courts for observational or research purposes was prohibited for much of the research period.

The following sections provide a statistical summary of the data analysis.

### *Data Summary*

In order to address the concerns of the TCDA regarding the legal standing of post-*McGirt* case referrals the research team analyzed the TCDA’s database in order to determine which agencies cases were being referred to, and what was happening to those cases post-referral. According to the data provided, the state of Oklahoma provided post-*McGirt* relief in 1304 TCDA cases between July 2020 and May 31, 2021. Those 1304 cases resulted in 1495 referrals by the TCDA to other agencies (See Table 1 and Figure 1 below). The number of referrals is greater than the number of cases as the TCDA, in some instances, referred cases to multiple agencies.

---

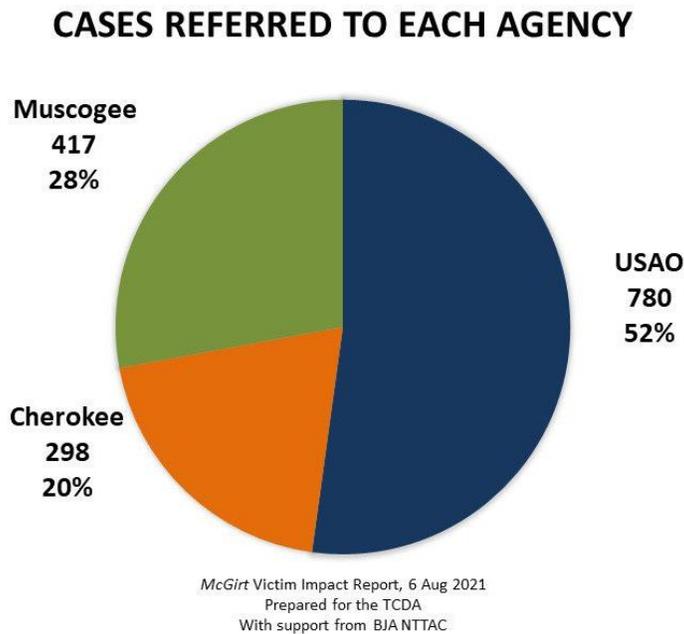
<sup>4</sup> Note: sealed indictments cannot be included as that information is not public.

<sup>5</sup> This research can only confirm an indictment following referral. Similar to sealed USAO indictments, it is possible that existing Cherokee or Muscogee indictments have occurred but not included in the data. It is also possible that all three agencies will indict cases included in the data at a future time. This is a point in time empirical analysis of indictments that have indeed occurred and nothing more.

**Table 1: TCDA Referrals – *McGirt* Docket**

Agency	Agency Referrals	Agency Indictments
USAO	780 (52%)	76 (10%)
Cherokee	298 (20%)	115 (39%)
Muscogee	417 (28%)	Not Available
<b>Total</b>	<b>1495 (100%)</b>	<b>191 (13%)</b>
<b>Total Excluding Muscogee</b>	<b>1078 (100%)</b>	<b>191 (18%)</b>

**Figure 1: Visualization of TCDA Referrals – *McGirt* Docket**



The TCDA referred 780 cases to the USAO Northern District, 417 cases to the Muscogee Nation, and 298 cases to the Cherokee Nation. Overall, the researchers identified 191 (13%) indictments resulting from these referrals. The USAO Northern District filed 76 indictments resulting from TCDA referrals. The Cherokee Nation filed 115 indictments resulting from TCDA referrals. Due to data collection challenges, as discussed above and detailed further below, the researchers were unable to confirm if any of the TCDA referrals to the Muscogee Nation were indicted.

Excluding the referrals to the Muscogee Nation, the 191 indictments represent 18% of all TCDA referrals (See Table 1 above). The Cherokee Nation indicted at the highest rate, filing indictments on 39% of cases referred by the TCDA (115 indictments). Of the 780 referrals to the USAO Northern District resulted in a lower rate of indictment at approximately 10% (76 indictments).

**Table 2: TCDA Referrals by Charge Type**

Charge Type	Total Referrals	USAO	Cherokee	Muscogee
Crimes Against Children (nv)	60 (5%)	51 (7%)	9 (4%)	0 (0%)
Domestic Non-Violent	3 (<1%)	2 (<1%)	1 (<1%)	0 (0%)
Drugs	156 (12%)	64 (9%)	39 (15%)	49 (14%)
Financial	65 (5%)	38 (6%)	9 (4%)	18 (5%)
Property	255 (20%)	182 (27%)	40 (16%)	33 (9%)
Public Order	251 (19%)	95 (14%)	53 (21%)	97 (28%)
Sexual Crimes (nv)	24 (2%)	14 (2%)	3 (1%)	7 (2%)
Traffic	218 (17%)	46 (7%)	59 (23%)	111 (32%)
Violent	272 (21%)	193 (28%)	45 (17%)	33 (9%)

*Data Trends*

In order to identify possible data trends suggesting systematic variation in whether case referrals result in indictments, the cases were categorized by severity and charge type. Severity designates if the case is a felony or misdemeanor, or possibly either and was determined by cross-referencing the charge listed in the TCDA database with current statutes. Charge type places the case in one of nine categories: crimes against children (non-violent), domestic (non-violent), drugs, financial, property, public order, sexual crimes (non-violent), traffic, and violent. As noted above, the nine categories are based on the existing FBI and TCDA classification schemes. Given conversations with the TCDA and other law enforcement personnel, there seemed to be an expectation that referred cases are more likely to be indicted when severe and/or violent.

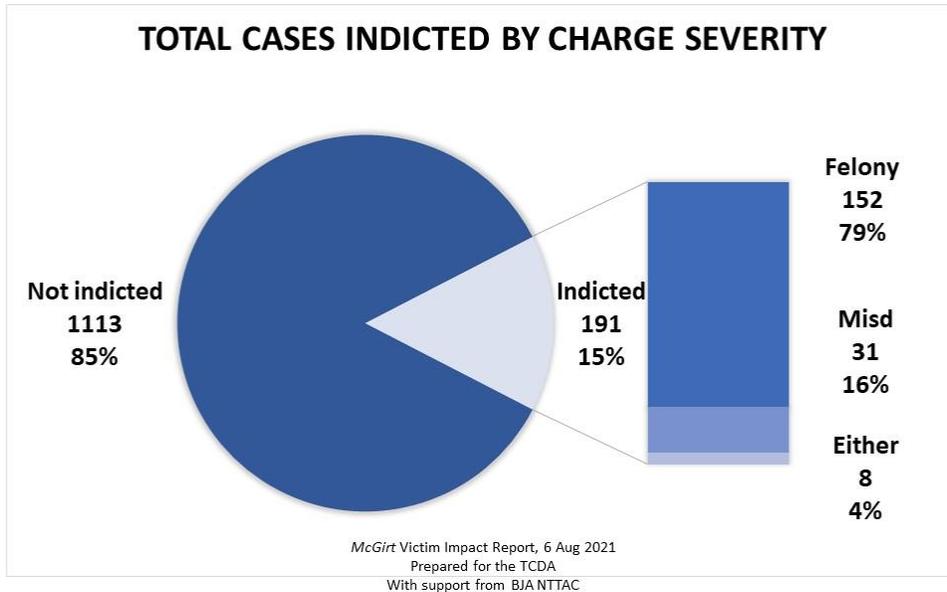
Based on severity, there is a clear pattern showing felony cases are more than twice as likely to be indicted by the referred agency (see Table 3). Figure 2 provides visualization noting that of the 191 indictments resulting from referrals, 152 (79%) are for felony charges. This supports the informal hypothesis of law enforcement that felony referrals may be given higher priority.

**Table 3: Severity of Cases and Indictments**

Severity	TCDA Cases charged as...	Indictments by Other Agencies
Felony	795 (61%)	152 (19%)
Misdemeanor	402(31%)	31 (8%)
Either	105 (8%)	8 (7%)
<b>Total</b>	<b>1304 (100%)</b>	<b>191 (15%)</b>

*\*In this table, percentages of indictments reflect the percentage of referred cases indicted for that category.*

**Figure 2: Visualization of Indictments by Severity**



The pattern appears to hold across agencies as well. Figure 3 and Figure 4 visualize the same concept, but for the USAO and the Cherokee Nation respectively. Of the 74 *McGirt* cases indicted by the USAO, 96% (71) were felony cases. This suggests felony referrals are a clear priority for the USAO, having only indicted three other cases at the time of this report. A similar pattern regarding felony referrals appears to hold for the Cherokee Nation as well. Of the 115 Cherokee Nation indictments of *McGirt* cases, 79 (70%) are felonies. The difference between the indictment patterns of the agencies can be found with non-felony cases and overall indictment activity. The Cherokee Nation indicted non-felony cases at a much higher rate than the USAO. The Cherokee Nation indicts on 30% more case referrals overall compared to the USAO.

Figure 3: Visualization of USAO Indictments by Severity

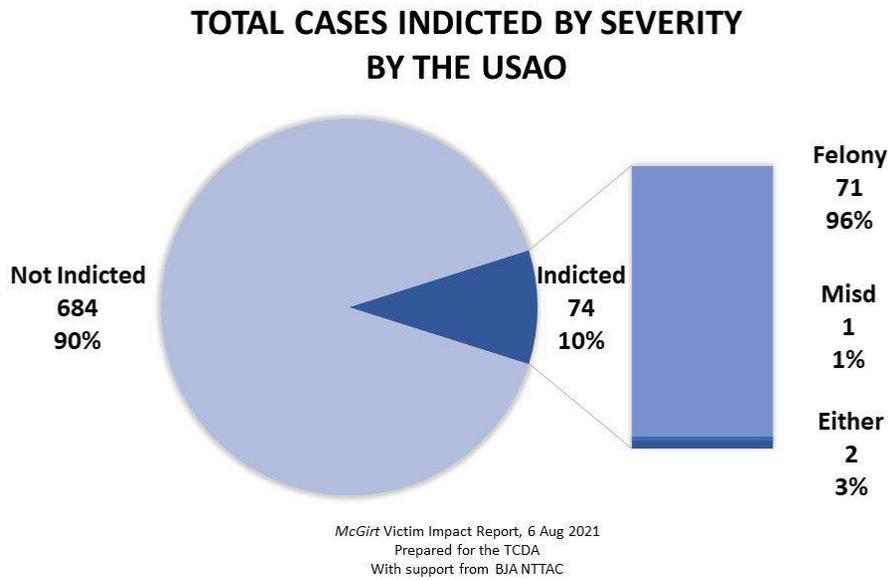
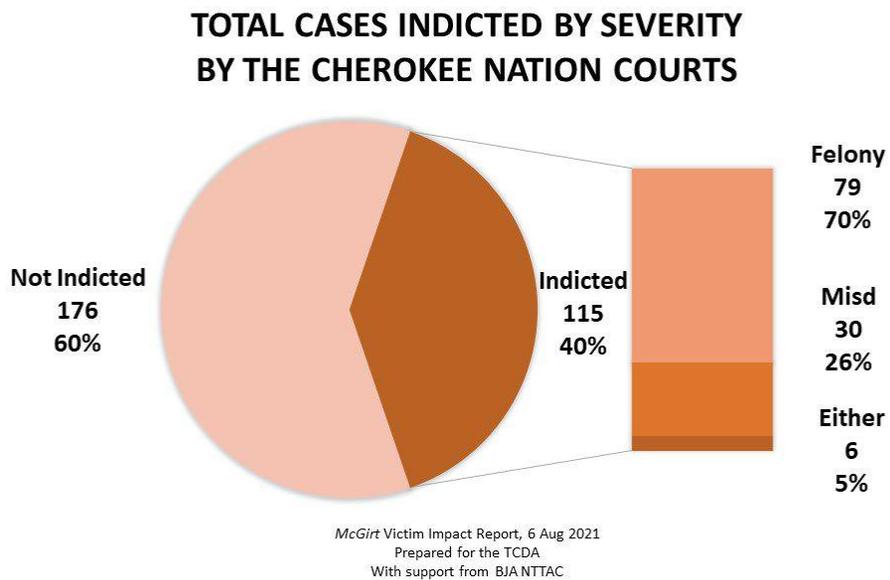


Figure 4: Visualization of Cherokee Indictments by Severity



When examining indictments by FBI/TCDA charge type, the informal hypothesis of law enforcement expecting violent crimes to be given priority also holds. Across all indictments by the USAO and Cherokee Nation, more than one-third are in cases with violent charges. While violent charge types

represented the largest indicted classification for both agencies, it represents a much larger proportion of USAO indictments (47%) compared to Cherokee Nation indictments (26%). As shown in Table 4, most USAO indictment activity involved charges classified as violent, crimes against children, and public order. Cherokee Nation indictment activity was much more diverse regarding charge classification than the USAO. Violent and property classification both represented 26% (30) of indictments. Public order, drugs, and traffic classifications were the next most active classifications.

**Table 4: Indictments by Charge Types using FBI and TCDA Classifications**

Charge Type	Total Indictments	USAO	Cherokee
Crimes Against Children (nv)	17 (9%)	<b>15 (20%)</b>	2 (2%)
Domestic Non-Violent	0 (0%)	0 (0%)	0 (0%)
Drugs	20 (10%)	4 (5%)	<b>16 (14%)</b>
Financial	4 (<1%)	1 (1%)	3 (3%)
Property	39 (20%)	9 (12%)	<b>30 (26%)</b>
Public Order	30 (16%)	<b>11 (14%)</b>	<b>19 (16%)</b>
Sexual Crimes (nv)	0 (0%)	0 (0%)	0 (0%)
Traffic	15 (8%)	0 (0%)	<b>15 (13%)</b>
Violent	66 (35%)	<b>36 (47%)</b>	<b>30 (26%)</b>

*\*Totals may not equal 100% due to rounding. Bold numbers reflect indictments rates that are at least proportional to the percentage of referrals.*

Table 5 and Table 6 show the number and percentage of referrals and to the USAO and Cherokee and the resulting indictments, by charge type respectively. This breakdown illuminates the charge types that are either disproportionately ignored or addressed by the USAO and Cherokee. The USAO indicts on crimes against children and violent crimes at a much higher rate than other offenses. The USAO indicts on public order charges proportionately to referrals received. However, for all other charge types, the USAO indicts rarely, if ever.

**Table 5: USAO Referrals and Indictments by Charge Types using FBI and TCDA Classifications**

Charge Type	Referrals to USAO (%)	USAO Indictments
Crimes Against Children (nv)	51 (7%)	<b>15 (20%)</b>
Domestic Non-Violent	2 (<1%)	0 (0%)
Drugs	64 (9%)	4 (5%)
Financial	38 (6%)	1 (1%)
Property	182 (27%)	9 (12%)
Public Order	95 (14%)	<b>11 (14%)</b>
Sexual Crimes (nv)	14 (2%)	0 (0%)
Traffic	46 (7%)	0 (0%)
Violent	193 (28%)	<b>36 (47%)</b>

*\*Totals may not equal 100% due to rounding. Bold numbers reflect indictments rates that are at least proportional to the percentage of referrals.*

As Table 6 demonstrates, Cherokee indictments follow some different patterns than the USAO. Similarly, Cherokee indictments of violent referrals occur at a relatively high rate and public order indictments occur at a proportional rate. Unlike the USAO, Cherokee indictments of drug, property, and traffic charges happen at a much higher rate than seen with the USAO. The comparison of the activity could suggest that USAO indictments emphasize crimes against victims while Cherokee indictments seemingly represent general criminal prosecution. This difference could be a matter of resources and/or case load. As noted above, USAO received nearly three times the number of referrals as the Cherokee Nation and nearly double that of the Muscogee Nation. All entities faced immediate resource challenges following the *McGirt* ruling and continue ramping up organizational capacity as of the time of this report.

**Table 6: Cherokee Referrals and Indictments by Charge Types using FBI and TCDA Classifications**

Charge Type	Referrals to Cherokee (%)	Cherokee Indictments
Crimes Against Children (nv)	9 (4%)	2 (2%)
Domestic Non-Violent	1 (<1%)	0 (0%)
Drugs	39 (15%)	<b>16 (14%)</b>
Financial	9 (4%)	3 (3%)
Property	40 (16%)	<b>30 (26%)</b>
Public Order	53 (21%)	<b>19 (16%)</b>
Sexual Crimes (nv)	3 (1%)	0 (0%)
Traffic	59 (23%)	<b>15 (13%)</b>
Violent	45 (17%)	<b>30 (26%)</b>

*\*Totals may not equal 100% due to rounding. Bold numbers reflect indictments rates that are at least proportional to the percentage of referrals.*

To explore the possibility of indictment trends related to case age, the time between the date of referral and the original case date listed in the TCDA database was calculated. As shown in Table 7, more than half of the referred cases are less than one year old and over 80% are less than three years old. There is no discernable pattern relating the age of the cases to the likelihood of indictment post-referral as the proportions of indictments by case age reflects similar proportions for referral by case age.

**Table 7: Time between Case Date and TCDA Referral, and Post-Referral Indictment**

Time	TCDA Referral	Post-Referral Indictments
Less than 1 year	685 (53%)	109 (57%)
1-3 years	358 (27%)	56 (26%)
4-5 years	102 (8%)	11 (6%)
6-7 years	44 (3%)	7 (4%)
Over 7 years	99 (8%)	7 (4%)
<b>Total</b>	<b>1288</b>	<b>190</b>

*\*All cases not included due to missing data regarding case date.*

Regarding how long it takes referred agencies to act following a referral from the TCDA, it takes just under two months, on average, for a USAO indictment to be issued in all cases except for the one misdemeanor indictment which happened after just over six months. Given the USAO has only indicted one misdemeanor case, little can be extrapolated from this artifact.

On average, indictments by the Cherokee Nation follow between three- and four-months following referral. It is likely that the slower response time for Cherokee indictments compared to the USAO is related to the required ramp up of resources and systems.

**Table 8: Days between Referral and Indictment**

	USAO				Cherokee			
	<i>Mean</i>	<i>Median</i>	<i>SD</i>	<i>Number</i>	<i>Mean</i>	<i>Median</i>	<i>SD</i>	<i>Number</i>
Overall	55	36	53	76	101	106	59	115
Felony	53	36	52	73	108	109	63	79
Misd.	189	189	n/a	1	87	82	53	30
Either	52	52	39	2	98	114	47	6

*\*All cases not included due to missing data regarding case date.*

In terms of overall activity, the tribal criminal courts and the USAO Northern District appear to have seen a dramatic increase in caseload since the *McGirt* decision. The anecdotal observations of the research team and news reports suggest tribal law enforcement and judicial systems are working to increase capacity due to significantly increasing activity.

The increase in activity at the federal level by the USAO is verifiable. According to the National Judicial Caseload Profile for the United States District Courts, from March 2020 to March of 2021 the USAO Northern Oklahoma district has seen a dramatic increase in pending cases and criminal filings. Considering the information provided in the above discussion, this is likely not a result of old cases being referred to the agencies but is most likely related to new, post-*McGirt* increases in criminal prosecution by the USAO and the tribes.

*Please note*, due to the lack of data, case referrals to the Muscogee Nation were not included in the above discussion of agency specific data trends.

**Data Challenges (Deliverable 3)**

Research was hindered by multiple data challenges. The following discussion seeks to explain those challenges.

*Identifying McGirt Cases.* The research was made feasible due to the TCDA’s provision of the condensed *McGirt* docket. OSCN provides the necessary information to identify *McGirt* cases in theory. However, this requires a researcher to read the full details of every case listed on a county’s docket for an action related to post-*McGirt* relief.

*Muscogee Nation Referrals.* The research team is unable to confirm if any TCDA referrals did or did not result in an indictment by the Muscogee Nation. To the research team's knowledge, the TCDA has not received information on referred cases from the Muscogee Nation. The research team attempted to contact Muscogee Nation court officials, including the Clerk's Office and the AG's office but were unsuccessful. Additionally, there have been changes to the Muscogee Nation's online docket availability during the span of the research contract. It appears that online access was down for an extended period and when dockets became available it was limited to a current day or two, but back dated information is not available. We were able to download some dockets as it appears there is a significant increase in Muscogee Nation District Court activity, but of the dockets the research team was able to access, none of the cases matched with TCDA referrals. This aggregation of data challenges resulted in the inability to confirm any Muscogee indictments and thus referrals to the Muscogee Nation were not included in much of the analysis presented above.

*Cherokee Nation Data.* Cherokee Nation indictment data was provided to the researcher by the TCDA. The TCDA received the information from Cherokee Nation prosecutors. The research team cannot confirm the completeness or incompleteness of the data.

*Cross-Deputization.* One of the immediate responses to the *McGirt* ruling was cooperation across law enforcement jurisdictions via cross-deputization. We know that City of Tulsa Police and Lighthorse Police are cross-deputized. Additional cross-deputizations have occurred with municipal, state, and other county law enforcement. However, it is unclear what new cases, if any, have been initiated due to cross-deputization efforts and how those cases, if any, are moving through the system as it is not clear to the authors how to identify such cases.

*Case Disposition.* This project did not track the final outcomes of referred cases post indictment. Given the various challenges posed by the unique law-enforcement and judicial environments, it is unclear how many of the indicted cases have reached a conclusion. Future research would need to access the federal PACER system for USAO case information, tracking cases one by one. In the case of the Muscogee Nation and Cherokee nation, it appears researchers would need access to courthouse records to track the cases individually. Individual case tracking will be a labor-intensive legal research process that was beyond the scope of this research project.

*COVID-19 Protocols.* For nearly the entire period of this research contract, courthouses at all levels of government were closed to the public due to the COVID-19 pandemic. This limited the research team's ability to access any data beyond what is available electronically online or provided electronically through sources. COVID-19 protocols may have also reduced the responsiveness of individual courthouses as contacting the tribal courts was often difficult and responsiveness was minimal.

#### *Data Recommendations:*

If the TCDA seeks to maintain an ongoing record keeping process to track referred cases to disposition, some recommendations are:

- 1) The creation of data liaisons in each agency to improve interoperability of existing court database systems. If the tribes, the USAO, and the counties so choose, there could be a collaborative data partnership that actively shares information on *McGirt* related cases. This would likely be a time and resource intensive process but could create reasoning for increased communication.

2) Expand the OSCN online system to include tribal court networks. This would require cooperation between the state and the tribal court networks. It likely requires only minimal resource investment but may require acts of law by both the state and the tribes individually to allow. The tribes may not find this recommendation politically appealing as they would be, in some sense, opting into the state court system in a visible way.

3) Support/advocate for the expansion of tribal court network online databases through federal resources. The United State Congress could allocate funding to allow the tribes to bolster their data-transparency capabilities. It would be in the interest of the state and counties to advocate for such resources.

#### **Qualitative Analysis: Victim Impact (Deliverable 4)**

Initial research requests and discussions included a desire to gather qualitative anecdotes from victims impacted by the *McGirt* decision. The goal was to provide perspective on the emotional impact, if any, victims face in light of post-*McGirt* relief granted to convicted perpetrators and other defendants. Both the TCDA and the research team were hopeful that interviews with victims and family members would be possible despite the challenges posed by the ongoing COVID-19 pandemic.

Unfortunately, victim impact statements could not be obtained. Even after COVID-19 rules were relaxed statewide, victims were unwilling to speak in formal interviews with TCDA or ORU despite joint outreach efforts. The TCDA and ORU collaborated on an interview request and solicitation to be distributed to individuals identified by the TCDA on ORU letterhead. The solicitation yielded zero response. TCDA hoped the researchers could interview victims and families of victims in light of situations like the dismissed case of Kimberly Graham. Graham was sentenced to 107 years for killing five people in a DUI hit and run incident in 2007. On April 8, 2021, the conviction was vacated and the case dismissed as Graham, being a tribal citizen, should not have been tried in state court, according to *McGirt*. The case of Shaun Bosse is another example of a case giving prosecutors concern for victims. Bosse, a death-row inmate, was convicted in 2012 for the murders of Katrina Griffin (24 years old) and her 8-year-old son and 6-year-old daughter. The case was dismissed under post-*McGirt* relief because the victims were all members of the Chickasaw Nation and the murders took place on Chickasaw land.

Due to the unsuccessful attempts in recruiting victim interviews, sources for anecdotal evidence of victim impact are limited to sources such as news reports and the July 13<sup>th</sup> *McGirt* Town Hall held in Tulsa, Oklahoma. News coverage of the impact of the *McGirt* decision is mixed. Victim statements in local news articles seem to indicate concerns about uncertainties caused by the *McGirt* decision and frustrations about the possibility of the release of criminals with violent records.

Actions by elected officials resulted in similar mixed emotions. The research team was present at the July 13<sup>th</sup> *McGirt* Tulsa town hall meeting. Tribal members and activists were a vocal presence at the meeting responding strongly to certain speakers, words, or action and attending receptively to others. Specifically, the vocal groups were receptive to efforts by some District Attorneys but were highly responsive to statements by the Governor. Tribal members responded highly negatively to the term “victim” or “victim impact.” The meeting was regularly disrupted and was ended early by the Governor. The purpose of hearing from victims at the event was never achieved.

The research team recommends that future language used during attempts to garner public support and concern more strategically consider the current political environment and ongoing political tensions between the state and the tribes.

### **Legal Implications/Questions (Deliverable 5)**

Despite the *McGirt* ruling coming more than one year ago, there are still many legal implications and questions yet to be resolved.

*Retroactivity.* On August 12, 2021, the Oklahoma Court of Criminal Appeals ruled that the *McGirt* decision is not retroactive. The court noted that changes in procedure typically apply to cases pending direct appeal. This somewhat narrows the possible impact of *McGirt* in those convictions already upheld upon appeal may no longer be subject to further jurisdictional appeals targeting post-*McGirt* relief. Judge Lumpkin stated “we now adopt the federal policy and established precedent of selective retroactive application in such cases due to the ramifications retroactive application would have on the criminal justice system and victims. This is hard to explain in an objective legal context but provides a just and pragmatic resolution to the *McGirt* dilemma.”

*Petition to Overturn.* On August 6, 2021, Oklahoma Attorney General John O’Connor filed a petition with the Supreme Court of the United States asking The Court to overturn the *McGirt (2020)* ruling and to narrow any application of the decision.

*Oklahoma v. Bosse (2021).* On May 26, 2021, SCOTUS granted the application to stay the mandate given by the Oklahoma Court of Criminal Appeals granting post-conviction relief to Bosse, a state death row inmate, in light of *McGirt*. Shaun Michael Bosse was convicted by jury of three counts of First-Degree Murder and one count of First-Degree Arson. Though Bosse is not Native American, all three victims were citizens of the Chickasaw Nation and the crime occurred within the boundaries of the Chickasaw nation. Based on the jurisdictional challenge, post-conviction relief was granted but SCOTUS followed by granting the State of Oklahoma a stay. The State of Oklahoma is asking The Court if the state can prosecute crimes committed against native peoples by non-native perpetrators in Indian Country? It is possible that SCOTUS will hear the case during the coming year. It is hard to predict the outcome of the case as The Court’s makeup is markedly different given the passing of Justice Ginsburg and her replacement with Justice Barrett. *McGirt* was a 5-4 decision that could easily be reversed.

*Civil Rights Law/Best Practices conflict.* Current civil rights law and best practices prevent/recommend against disclosing race, ethnicity, and/or citizenship of individuals on public facing documents. Race/ethnicity/tribal citizenship of perpetrators and victims is the critical variable in identifying *McGirt* impacted cases. In order to create publicly accessible information that would allow for a detailed tracking of such cases, best practices would be violated.

*Jurisdiction of Tribal Law Enforcement over Non-Indians.* In the long term, the extent of jurisdiction held by tribal law enforcement agencies over tribal non-citizens is unclear. For example, see *U.S. v. Cooley (2021)* considering *Montana v. U.S. (1981)*. At some point, clarity will be needed going forward in eastern and northeastern Oklahoma.

*Civil Recourse.* What civil recourse, if any, do victims of previously settled cases have if referred cases are not indicted by USAO or tribal courts? If the retroactivity of *McGirt* were to continue, and referred

cases are not picked up by agencies of jurisdiction, can victims seek civil remedies against the perpetrator(s) or the agencies of jurisdiction?

*Non-criminal jurisdiction.* Many have speculated that the impact of *McGirt* goes beyond criminal jurisdiction. If that is the case, tax laws became a critical question. Warehouse Market Inc. has filed suit suggesting the Oklahoma Tax Commission cannot require the business to pay state taxes as it is already paying tribal taxes. The question has also been raised for Indian Country in general, if tribal citizens are subject to state taxes? Several Native Americans in Oklahoma have filed tax protests seeking exemptions. The revenue implications for the state are real depending on the future of such challenges.

*Legislative Actions.* The majority opinion in *McGirt* seems to prefer that Congress should take legislative action to address some of the legal questions resulting from the Court's decision. To date, a few attempts at legislative action have been made. Most directly responding to *McGirt* is H.R. 3091. The bill was introduced in May 2021 by Representative Tom Cole from the Fourth District of Oklahoma. Its purpose is to create additional Constitutional pathways for compacting between the Cherokee and Chickasaw Nations, respectively, with the State of Oklahoma for criminal justice. The bill attempts to resolve issues of federal preemption with criminal jurisdiction in Indian Territory and would provide a legislative solution allowing tribal nations to compact with states in a manner like other domains of intergovernmental relations. At the time of this report, the measure has yet to see floor action in Congress and has mixed support from tribal leaders. Other efforts, such as Amendment 147 to H.R. 4502 which sought to increase funding for "tribal justice needs related to the McGirt decision" by redirecting existing allocations, have also failed. While legislative action is the preferred solution in the *McGirt* majority opinion, the process is moving slowly.