

Cherokee Nation Supreme Court and District Court Report regarding Expansion of the District Court to the Commission for the Protection of Cherokee Nation Sovereignty

On July 9, 2020, the United States Supreme Court held in *McGirt v. Oklahoma*, that the Muscogee (Creek) Reservation had never been disestablished by Congress. Likewise, the Cherokee Nation's Reservation was never disestablished by Congress and continues in full effect today. The legal reasoning in *McGirt* impacts each of the Five Civilized Tribes based on our shared history of removal, allotment, and treaty language.

Principal Chief Chuck Hoskin Jr., by Executive Order and with participation of the other branches of government, established the Commission for the Protection of Cherokee Nation Sovereignty. In part, because an imminent need exists for an interdisciplinary approach to collaborate, coordinate, identify, analyze, and examine *McGirt* related issues, develop recommendations, and determine ways to strengthen partnerships to protect Cherokee Nation, our sovereignty, and everyone living within our Reservation boundaries.

Although *McGirt* has not changed or expanded the jurisdiction of the Cherokee Nation Courts it has illuminated the state of Oklahoma's overreaching exercise of criminal jurisdiction. Because of the *McGirt* ruling, the State will begin transferring criminal cases involving native peoples, and others, within the Cherokee Nation reservation to the appropriate tribal or federal sovereign governments.

The purpose of this report is to inform the Commission for the Protection of Cherokee Nation Sovereignty, and ultimately the Chief, Tribal Council and the Cherokee people of projected budgetary needs that will arise for the Cherokee Nation Executive branch, Marshal's service and Courts to investigate, arrest, detain, prosecute, rehabilitate and incarcerate criminal defendants and assist victims reservation wide.

The judges and justices recommend restructuring the Cherokee Nation judicial system in multiple ways, some of which are similar to that of the state of Oklahoma. There are many varying levels of services and organizational structures to consider and implement. The Court will continue to effectively implement an appropriate justice system while efficiently managing the Cherokee Nation resources entrusted to it by the Legislative and Executive branches of government.

Note this report is only estimating the cost and the needed expansion for additional criminal law matters that the McGirt opinion has or will affect in the near future. If, in the future, civil jurisdiction matters are transferred from the State to the Cherokee Nation, additional analysis will be necessary and a report will need to be issued.

Summary of Expected Increase in Budgetary Needs

	Current FY Budget	Estimated Initial Capital Expenditures	Estimated Future FY Budget
* CN Supreme Court	\$536,294.00		\$1,426,918.00
* CN District Court	\$651,784.00		\$8,138,750.00
CN District Court Juvenile Services	\$25,402.00		\$50,000.00
CN Bar Association	\$16,000.00		\$25,000.00
** Additional Budgetary Needs	\$0.00		
*** Juvenile Delinquent Programs	\$0.00		\$5,581,400.00
** Adult Rehabilitation Programs	\$0.00		
Security	\$0.00	\$290,280.00	\$451,820.00
Total:	\$1,229,480.00	\$290,280.00	\$15,673,888.00

* All current FY budget numbers come from the FY 2021 budget which were reduced by 10% from previous years. Although we are able to provide core functions such as judicial proceedings, court clerk offices, probation, salaries, supplies, rent, etc., a larger part of the total 10% reduction came from line items such as staff development and training. The total amount should be expected to re-increase by 10% especially since a large number of new judges and staff are expected to be hired.

** See sections below for additional information.

*** Cherokee Nation District Court Juvenile Services section below for range of estimated budgetary increase.

Cherokee Nation Supreme Court

Current FY 2021 Comprehensive Budget for the Cherokee Nation Supreme Court is \$536,294 (10% lower than previous years due to Covid related budget decreases).

The Supreme Court Justices are currently paid at a part-time rate but will need to be increased to fulltime. This alone will be a budgetary increase of around \$600,260 There would also be an increase need for a minimum of two deputy supreme court clerks [\$90,364], one research legal clerk to be hired on a contract/as needed basis [\$50,000], and an overall need for general office supplies and technology expenditures [\$60,000]. Plus, other costs such as online filing and payments systems estimated at \$40,000 per year.

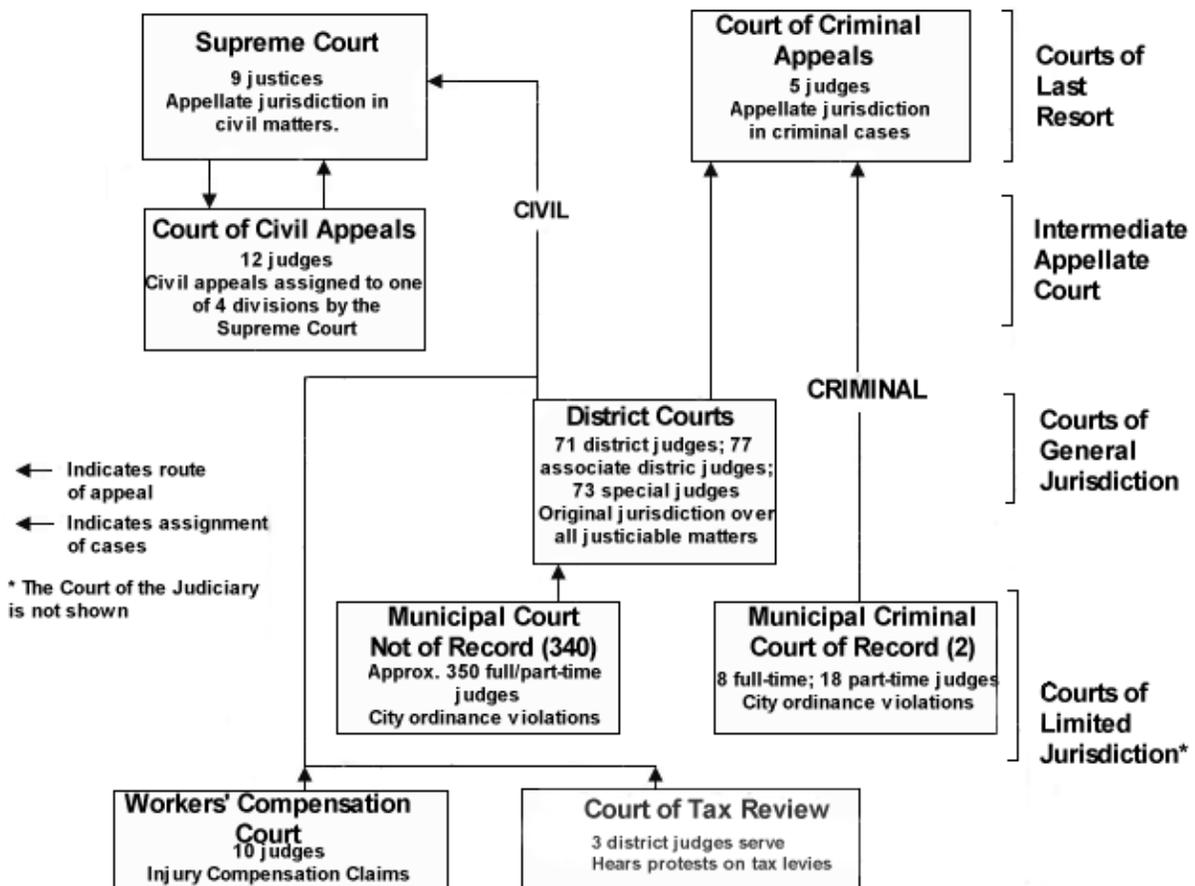
The increase in Justice salaries above is based on Oklahoma State Supreme Court salaries. Whether our supreme court is needed to be fulltime to the same extent of their state counterparts will be based on many different factors such as the ultimate end increase of cases, possible changes in the Cherokee Nation criminal code, etc.

<https://www.lcc.leg.mn/compouncil/meetings/190308/CSG-Judicial-salaries-2018.pdf>

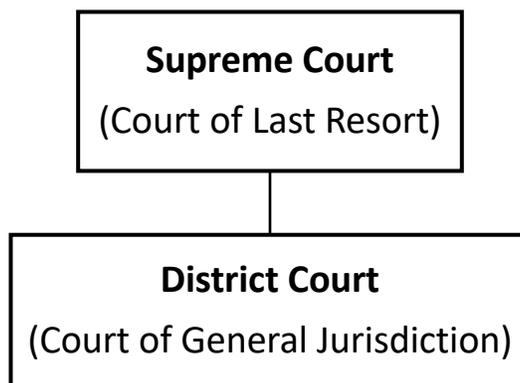
It is estimated that the total budget for the Supreme Court would increase from **\$536,294 to \$1,426,918.**

One may question why we would need a fulltime supreme court to handle the partial number up cases transferred from the Oklahoma State court system when the Oklahoma judicial system currently handles all cases from the 77 counties. It is important to understand how the Oklahoma state judicial system is structured compared to the Cherokee Nation judicial system. All Oklahoma criminal cases are appealed to the Oklahoma Court of Criminal Appeals. Oklahoma civil cases are appealed to the Oklahoma Supreme Court but are usually assigned to the Oklahoma Court of Civil Appeals. In Oklahoma there are also hundreds of thousands of cases handled by courts of limited jurisdiction such as municipal courts and administrative courts. Under the Cherokee Nation judicial system our Supreme Court hears all appealed criminal and civil matters, we do not have an intermediate appeals court between the Supreme Court and the District Court to hear any appellate cases, and the District Court does not have municipal and administrative courts to process the tens of thousands of municipal code and regulatory violations.

Oklahoma State Court Organizational Chart



Cherokee Nation Court Organizational Chart



Cherokee Nation District Court

The Cherokee Nation District Court is currently staffed by one full time Presiding District Court Judge and one part time District Court Judge, the District Court Clerk, and one Deputy District Court Clerk. A singular Court Administrator handles the administration for both the Supreme and the District Courts at this time. The Supreme Court Clerk and the Cherokee Nation Probation Officer also assist the District Court when needed.

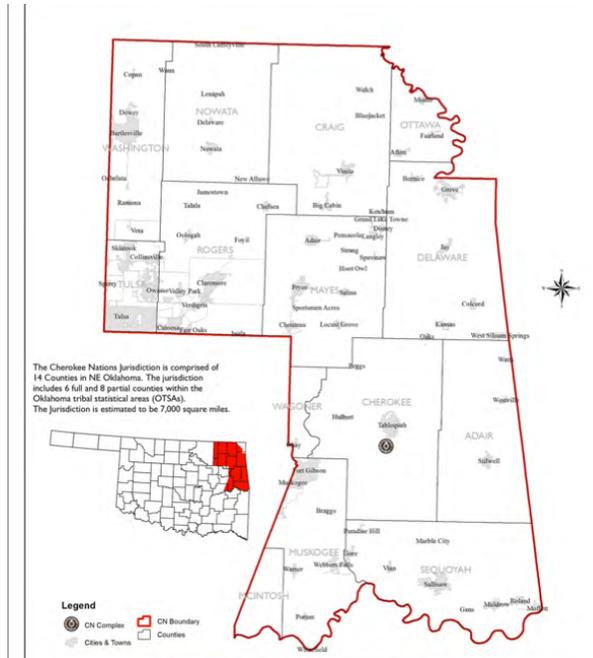
Current FY 2021 Comprehensive Budget for the Cherokee Nation District Court is \$651,784 (10% lower than previous years due to Covid related budget decreases).

In order for the District Court to sufficiently expand to process the onslaught of crimes resulting from the *McGirt* decision and ensure the due process rights of defendants are met the Court recommends the following system be created.

A. The creation of ten Cherokee Nation District Court Districts to be divided as follows:

1. Washington and Nowata;
2. Craig and Ottawa;
3. Tulsa;
4. Rogers
5. Mayes;
6. Delaware;
7. Wagoner and Cherokee;
8. Adair;
9. McIntosh and Muscogee; and
10. Sequoyah.

*** Other counties could be combined to create fewer districts which would allow for fewer clerks, court reporters, and judges. A judge could also preside over multiple districts through riding a circuit.**



B. Each district would duplicate the current Cherokee Nation District Court organizational structure and budget.

- a. Each district’s budget \$651,784.
- b. The current district court does not pay rent/lease space because it is shared with the Supreme Court. Accordingly, each District budget would need to be increased by \$155,000 (Taken from the Supreme Court budget).
 - i. It should also be noted that currently the rent/lease payments are paid to Cherokee Nation, but to rent/lease buildings elsewhere could possibly be from a non-Cherokee Nation entity or would need to be built/paid for as a capital expenditure.
- c. The Court Administrator would also need to hire multiple staff to oversee the general office administration of the district court. Estimated at five Deputy Court Administrators with total compensation packages estimated at around \$45,182 each/\$225,910 total. (Each district to pay half the cost of one Deputy)
- d. The total yearly budget for each district court would be \$856,784, and a total yearly District Court budget of \$8,138,750.

C. Judges in districts with lower caseloads will circuit ride to higher case load districts on certain days of the week to help clear dockets.

It is projected that the total budget for the District Court would increase from **\$651,784** to **\$8,138,750**.

D. If 8/10 district court districts are not created as recommended above, then the alternative recommendation is that the district court judges travel to each region of the Cherokee Nation on a daily/weekly basis to hold court. There would still need to be an increase in judges/referees, there would be less of an increase in other line items, and community buildings and or other Cherokee Nation and or Cherokee Nation Businesses properties could be rented or barrowed to use as temporary courtrooms.

Cherokee Nation District Court Juvenile Services

Current FY 2021 Comprehensive Budget for the Cherokee Nation District Court Juvenile Services is \$25,402 (10% lower than previous years due to Covid related budget decreases).

This budget covers the cost of court ordered procedures and/or events for juveniles who are wards of the court and for the parents of the juveniles. This includes but is not limited to psychological evaluations/assessments, drug tests, etc.

With the current ICWA Agreement in place between the Cherokee Nation and the State of Oklahoma the need for services provided in juvenile deprived cases (ICW/DHS involved cases that the child is placed into the custody of CN and into a family of foster care home) is not likely to fluctuate greatly, but is expected to increase some as the Cherokee Nation can now demand a case be transferred to Cherokee Nation Court whereas past agreements left the final decision to transfer or not to the State Judge. It is plausible to see a budget increase need from **\$25,402 to \$50,000**.

The need for a major budget increase under this line item will likely be when the State starts transferring juvenile delinquent cases to the Nation. A juvenile deprived case is a criminal case wherein the defendant is a minor child. When a minor child commits a crime, they are not processed through the adult justice system and if incarceration is needed, they are incarcerated in juvenile detention centers instead of adult prisons. The cost of services ordered in an average delinquent case can be tens of times greater than the average deprived case. For example, in a deprived case the housing of a child can be with family, friend, or foster home and costs around \$8,000 per year in foster payments, compared to it costing an average of \$118,000 per year in Oklahoma to house a delinquent child in a facility. Additionally, there will be a correlation from increases in delinquent case to the need for additional court ordered psychological evaluations/assessments, drug tests, etc.

Open Justice Oklahoma and Oklahoma Policy Institute analyzed data from the Office of Juvenile Affairs, Oklahoma State Bureau of Investigation, and Census data of Native children between the ages of 10 to 17. As of 2018 data they found that 33.3 per 1,000 population will be

arrested and 8.6 per 10,000 population will be incarcerated.

<https://openjustice.okpolicy.org/wp-content/uploads/sites/4/2019/09/OJO-Report-Juvenile-Justice-2019-Final.pdf>

After a review of the Cherokee Nation citizenship data, on September 9, 2020, Cherokee Nation Registrar Frankie Hargis stated there are 18,940 Cherokee Nation citizens who live within the Cherokee Nation between 10 to 17 years of age. This statistic does not include non-Cherokee Natives that are also under Cherokee Nation jurisdiction.

Conservatively there are 20,000 Cherokee and non-Cherokee Native youth between 10-17 years of age in Cherokee Nation. Thus, 17.2 will be incarcerated at a rate of \$2,029,600 for the first year alone. 666 will be arrested costing the court general increased case costs, appointed attorney fees, administration costs, evaluations, and assessments, etc. Costs range between \$200 for the simplest case to \$3,000 for a non-incarcerated but serious case with an assessment/evaluation and a plan that the child and parents will work together from home with multiple Court review dates. If purely averaged and multiplied out, it will cost \$1,065,600 per year for non-incarcerated youth delinquent cases. This doesn't include the increased cost to other departments such as the Marshal Service and ICW or a separate delinquent department that will need to be created, or the fact that the incarcerated youth numbers will compound for the next eight years as many will not be released until they reach the age of majority. If the initial yearly arrest and incarceration rates stay the same and 25% of the incarcerated numbers are compounded yearly and kept through the age of majority the final reoccurring yearly budget for delinquent cases would be around \$5,581,400 if the Court retains the housing budget, or \$1,065,600 if the Court only retains the budget for services and court costs. **(The 1,060 non-Cherokee Natives added to round out the number to 20,000 total is drastically underestimated.)**

The decision of whether to place the "housing budget" with the Marshal Service or the Court will be determined by whether Cherokee Nation wants to detain/incarcerate children or place them in facilities to rehabilitate and educate them on how to be productive citizens later on.

It is estimated that the total budget for District Court Juvenile Services would increase from **\$25,402 to \$50,000, and a new Juvenile Delinquent Programs budget of \$1,065,600, to \$5,581,400**, depending on how the new system is structured.

Cherokee Nation Bar Association

The Cherokee Nation Bar Association's current yearly budget is \$16,000. The budget reflects member fees anticipated to be received from members of the CNBA which are used by the elected officials of the Bar to cover expenses of hosting Continuing Legal Education events. Any amount in excess of the estimated need is carried over to the next budget. As the majority

of attorneys practicing in Cherokee Nation courts are located in close proximity of our single courthouse it is reasonable to expect many other attorneys to join once district courthouses start appearing in their locales. With increase in membership numbers and geographical area to be covered for CLE purposes it is reasonable to increase the budget by \$1,000 per additional district for a total yearly budget increase from \$16,000 to \$25,000.

Additional Budgetary Needs

Technology:

- a. Online filing system:
- b. Online payment system for filing fees and fines:
- c. Court records and decisions published online:
- d. Court decisions published:

Accounting Services:

- a. Restitution; Fees; Costs – Additional court staff or third-party vendor:

Adult Rehabilitation Programs

On August 27, 2020, the Council of the Cherokee Nation enacted, and the Principal Chief approved the ***Cherokee Nation Reservation, Judicial Expansion and Sovereignty Protection Act***. Section Four of said Act states “The Supreme Court is authorized to enter into agreements for rehabilitation services that may be used as an alternative to incarceration.”

Additional research of rehabilitation services must be conducted to appropriately estimate costs. Without sufficient analysis, a rough estimate is that it will take tens of millions of dollars to provide rehabilitative services, and Cherokee Nation evaluate whether to build its own rehabilitation facility or contract with outside vendors. While the average cost to incarcerate a criminal in a county jail is around \$45 per day the Office of the Surgeon General reported in the 2016 that the daily cost of inpatient rehabilitation is between \$97-133 per day. These numbers do not include initial and ongoing drug and alcohol screenings, methadone type treatments, additional counseling services that the inpatient treatment facility might not be able to provide, or aftercare outpatient treatment costs.

<https://www.ncbi.nlm.nih.gov/books/NBK424848/>

Security

Although the Court has operated for many years without increased security technology the types of cases that will be heard in the near future will require additional systems. The possibility of adverse action taken against Court or Attorney General personnel by a defendant or their loved ones dramatically increases when the courts shift from adjudicating trespass cases that may require a fine to rape and murder cases that will require years in prison.

Technology: (Capital Expenditures)

- a. 10 metal detectors: \$28,990;
- b. 10 wands: \$1,290; and
- c. 10 ex-ray machines: \$260,000.

Bailiffs: (Reoccurring FY Budget)

- a. Currently the Supreme Court and District Court is secured by the Cherokee Nation Marshal Service. The Marshal service provides one dedicated Marshal that serves as a court bailiff and process server on a regular basis, but additional Marshals are assigned to the court during large dockets and or cases that show large public interest.
- b. Although the court would prefer actual Marshal personnel assigned to each courthouse, the bailiff positions could be assigned to an internal court department of bailiffs.
 - i. If the court hires its own bailiffs, the estimated total salary and benefits compensation for 10 bailiffs is \$451,820.
 - i. It is projected that the total budget for the Court Security will increase from **\$0 to \$451,820**.

Court Reporters

The Supreme and District Courts have never employed a full-time court reporter. Court reporter services have always been contracted upon request of a party on a per hearing basis. Historically this system has worked because the majority of the court's cases have not involved an individual's constitutional rights. Once a significant amount of criminal cases are added full time court reporters will likely need to be hired for each district. The base salary for official district court reporters in Oklahoma range from \$39,160 to \$45,160. Ten court reporters with an average base salary of \$42,160 is equal to \$421,600 per year not including benefits.

<https://www.okbar.org/barjournal/aug2019/obj9006phillipscharles/>

<https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=440590>

Jury Trials

Historically Cherokee Nation has had one Spring and one Fall jury term each year. Last year the Budget was increased to four terms per year to handle the already increased case load requiring jury trials. Once the criminal case load increases due to McGirt jury terms will likely need to be increased to at least eight terms and possibly ten terms of two weeks.

Approved for submission by Justice Garrett and Judge Barteaux.