ATTORNEY GENERAL'S INTERIM REPORT TO COMMISSION

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CHEROKEE NATION®

MCGIRT V. OKLAHOMA

Summary

In 1996, an Oklahoma state court convicted Jimcy McGirt of three heinous sexual offenses. A jury recommended sentences of five hundred years each for first degree rape and lewd molestation, and life imprisonment without the possibility of parole for forcible sodomy.

On August 8, 2017, the Tenth Circuit held in *Murphy v. Royal* that Congress had never disestablished the Creek Reservation and that the state therefore lacked jurisdiction pursuant to the Major Crimes Act ("MCA"), 18 U.S.C. § 1153, to convict an Indian offender for a murder committed on that land. 866 F.3d 1164 (10th Cir. 2017). Under the MCA, any crime involving an Indian victim or perpetrator, occurring within Indian country, is subject to the federal jurisdiction of the United States.

As a result of the Tenth Circuit's holding in *Murphy*, on September 29, 2017, McGirt began arguing through the post-conviction appeal process, that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation and his crimes took place on the Creek Reservation. His appeal ultimately hinged on the statutory definition of Indian country as it applies to federal criminal law under the MCA.

The United States Supreme Court ruled that: the Muscogee (Creek) Reservation was established by treaty; Congress never disestablished the reservation; all land, including fee land, within the reservation is Indian country under 18 U.S.C. § 1151(a); federal statutes concerning the Five Tribes near the time of statehood did not grant jurisdiction to Oklahoma over crimes committed by Indians on the reservation; the MCA, 18 U.S.C. § 1153, applies to certain listed crimes committed by Indians on the reservation; and Oklahoma had no jurisdiction to prosecute a Seminole citizen for crimes committed on fee lands within the reservation under the MCA.

In so holding, the Court began its analysis with an obvious fact: Congress had established a reservation for the Creek Nation. Certain treaties fixed the borders of the reservation and promised that the United States would eventually grant a patent for the land; such promises were not "made gratuitously" and were not "meant to be delusory." The Court was careful to note, though these early treaties do not expressly refer to the Creek lands as a "reservation," the relevant treaty language is still sufficient to create a reservation. The treaty promises of a "permanent home" that would be "forever set apart," under any definition creates a reservation.

After recognizing land fractionation prevalent on the Creek Reservation, the Court unequivocally restates that a test for a reservation's existence is based only in the Acts of Congress. The Court is clear, "States have no authority to reduce federal reservations lying within their borders." If they did, the *Opinion* highlights mere persistence could work to nullify promises made in the name of the United States, thereby violating the Constitution and "leav[ing] tribal rights in the hands of the very neighbors who might be least inclined to respect them." The Court reminds us that legislating is made to be deliberately difficult under the Constitution, and the courts do not exist to relieve

Congress of the embarrassment an attempt to disestablish a reservation would cause. In sum, if Congress wants to go back on their word—no matter how many other treaty promises the federal government has already broken—they must clearly express their intent to do so.

In its effort to convince the Court that Congress had disestablished the Creek Reservation, the State pointed to the allotment era. Lacking in the State's attempt here, however, was any statute showing express Congressional intent to disestablish the Creek Reservation. The Creek Reservation survived allotment and the notion offered by the State that allotment automatically ended reservations was rejected, as it has been in the past. So to, the Court clarifies that private land ownership within reservation boundaries is contemplated in the statute defining Indian country, analogizing this statutory scheme to the federal government's historical attempts to promote westward expansion. The Court is no more convinced by the argument that allotment evinced Congress' overall plan to disestablish the Creek Reservation. Congress is well within its power to create the conditions of disestablishment, however, their follow-through is key and absent that—a reservation remains.

Oklahoma then turned to the argument that additional incursions on tribal authority throughout history proved Congress' intent to disestablish the Creek Reservation. The Court again, declines to agree finding no "Act of Congress ever dissolved the Creek Tribe or disestablished its reservation." In so doing, the Court seems to remind the State that sovereignty is uniquely perseverant and "Congress can welcome Native Americans to participate in a broader political community without sacrificing their tribal sovereignty."

The Court dismissed the State's next argument that historical practices and changing demographics alone support disestablishment. The opinion is quick to clarify that extra-textual evidence is unnecessary when the language of the statute at issue is clear. The State cited no ambiguous language in any applicable statute and where a reservation is established, it remains until expressly disestablished by Congress.

No matter how pragmatic it may seem, states and courts are not allowed to complete work Congress has seemingly left unfinished. Likewise, neither are allowed to "treat Native American claims of statutory right as less valuable than others." The Court cautions that there are "perils of substituting stories for statutes" and a history of practices, no matter how persistent, is not evidence that those practices were justified. Perhaps the opinion's only agreement with the State comes in conceding that ignoring the law as written, in favor of practicality would of course be the easiest route. However, the Court recognizes "[t]hat would be the rule of the strong, not the rule of law."

Finding the Court unconvinced by any prior argument, the State moved to arguing that Congress had never established a Creek reservation to begin with. Instead, the State urges that what the Creek have is only a "dependent Indian community." The Court dispatches with this logic quickly, prompting the State to recall that dependent Indian communities are still considered Indian country under the statutory definition and even still, a host of federal statutes support the fact that the Creek have a reservation. Undeterred, the State then premised their argument on the fact that the Creek Nation originally held fee title to their lands, therefore they could not be considered a reservation. The Court also flatly rejects this notion, observing that "fee title is not somehow inherently incompatible with reservation status" and rebuffing the idea that the federal government, in offering fee title to provide more protection for tribal lands, had in reality provided less.

Regardless still, the State then attempted to argue that the MCA does not—and never has—applied to eastern Oklahoma. The Court remained unmoved by the various historical documents cited and again, declined to defer to the State's usual practices instead of federal law. Any argument based on gaps in federal law was equally unmoving. The Court plainly states that Oklahoma failed to claim that it complied with the requirements to voluntarily assume jurisdiction over Creek lands and Congress never conferred jurisdiction on Oklahoma. Therefore, the MCA applies to all portions of Oklahoma under its usual application and only the federal government may prosecute Indians for major crimes committed in Indian country.

Finally, lacking any other argument based in law, Oklahoma insisted that the Court take recognition that the Creek Reservation was never disestablished, and other tribes will similarly seek to redeem their own treaty promises. The Court cautioned that "[e]ach tribe's treaties must be considered on their own terms, and the only question before [the Court] concerns the Creek." Despite both the State and the dissent offering several speculative consequences of the Court's decision to recognize the Creek Reservation, the *Opinion* is straightforward in announcing—"the magnitude of a legal wrong is no reason to perpetuate it."

The Court explains that the only question before it in this case concerns the statutory definition of "Indian country" as it applies in federal criminal law under the MCA. This case does not examine any issues concerning civil or regulatory law. Even still, the Court moves past any possible consequences by stating "dire warnings are just that, and not a license for [this Court] to disregard the law." The opinion draws to a conclusion by recognizing practical consequences may indeed exist, but both the Tribes and State have a long history of working out disputes. The Court expresses confidence in the same ability to do so here and prompts that Congress "has no shortage of tools at its disposal" to supplement its established laws. At last, the Court ends by recognizing:

> *Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.*

Cherokee Nation Reservation

The Cherokee Nation has always and will continue to maintain that the Cherokee Reservation has never been disestablished. The following list of cases are pending before Oklahoma state courts, wherein Defendants may offer a "*McGirt* Argument" that their cases should be dismissed for lack of jurisdiction. The Office of the Attorney General is currently monitoring over 100 state court cases awaiting a possible recognition of Reservation status.

The Cherokee Nation Reservation is roughly 7,000 square miles, which is approximately 10% of the land base of the state of Oklahoma. According to the 2018 American Community Survey, there were an estimated 513,452 people living inside the Cherokee Nation Oklahoma Tribal Statistical Area ("OTSA"), which represents 13.03% of the total population of Oklahoma. There are 143,704 Cherokee citizens living within the reservation boundaries, which is 28% of the total population living in the Cherokee Nation OTSA.

CURRENT PROSECUTIONS

The Office of the Attorney General ("OAG") filed 62 total criminal cases in 2019. Between January and August of 2020, the OAG has filed 20 cases.

Criminal Cases Filed	**2019**	**2020**
Domestic A&B by Strangulation	1	
Domestic A&B	1	5
Domestic A&B in the Presence	1	
A&B	1	
Simple Assault	1	
Resisting Arrest	1	
Rape	1	1
Sexual Assault	1	
Child Abuse	1	
Failure to Register as a Sex Offender	1	
Burglary	1	
Robbery with a Dangerous Weapon	1	
Possession of Firearm	1	1
Public Intoxication	1	8
Possession of Marijuana	1	1
Possession of Drug Paraphernalia	1	1
Possession of Methamphetamine	1	
Posession of Controlled Dangerous Substance	1	1
Embezzlement	1	
Violation of Protective Order	1	
Indecent Exposure	1	
Trespassing	1	
Grand Larceny	1	1
Larceny of Lost Property	1	1
Leaving the Scene of an Accident	1	
Totals:	**62**	**20**

DELINQUENT OFFENDERS

Past Cherokee Nation Programs

The tribe is currently not prosecuting or handling delinquent juveniles through any type of juvenile court proceedings. In the past and within the last 10 years, we have prosecuted Indian children, through a delinquent petition process, if a crime was committed on Indian land. CN had a juvenile drug court program that covered our 14 counties (although some counties such as Adair, Cherokee, and Delaware were priority) and a tribal drug court program, if substance abuse was an issue. The CN tribal workers were employed through grant money within human services or marshal service. The juvenile social workers traveled to the court houses located in the county seat to speak on behalf of the juvenile as a secondary tribal worker, and would inform the state court about the juvenile's participation in the drug court program. For the juvenile drug court, a tribal judge and the same workers solely handled crimes on tribal land. Court was held once a month in the evening, and case progress was reviewed at that time. CN also had a truancy court for juveniles who were not attending school as required.

Past Procedure

In the past, once a juvenile was arrested, CN used detention centers to house juveniles needing a secured placement. A bond hearing was held in accordance with statute, and either a bond was set or the juvenile was released to parent, guardian, etc. This was able to take place because CN had contracts with a few detention centers. In the past, CN contracted with one tribal facility Sac and Fox detention center in Stroud, Oklahoma and is likely a good future partner, although several will be needed because these facilities are sometimes have no beds available. Others facilities CN used were located in Muskogee (currently closed), Durant, Norman, and Craig Counties. CN utilized other more long-term placements if they child pled or was found guilty, as the case progressed, if it was determined the child needed a placement program or drug treatment to try to rehabilitate the juvenile (which is the goal of all delinquent cases). CN had contracts with a few placement centers and on a case by case basis children would be placed in different facilities to work the program as part of their probation. A member of the court staff/marshal service served as the juvenile probation officer. He is still employed as a probation officer today and his office is housed with court. He would monitor progress, prepare reports, use ankle monitors if helpful, perform drug testing, work with parents, law enforcement, and all agencies involved. Currently, he serves as the only probation officer for adults as well.

Near future requirements

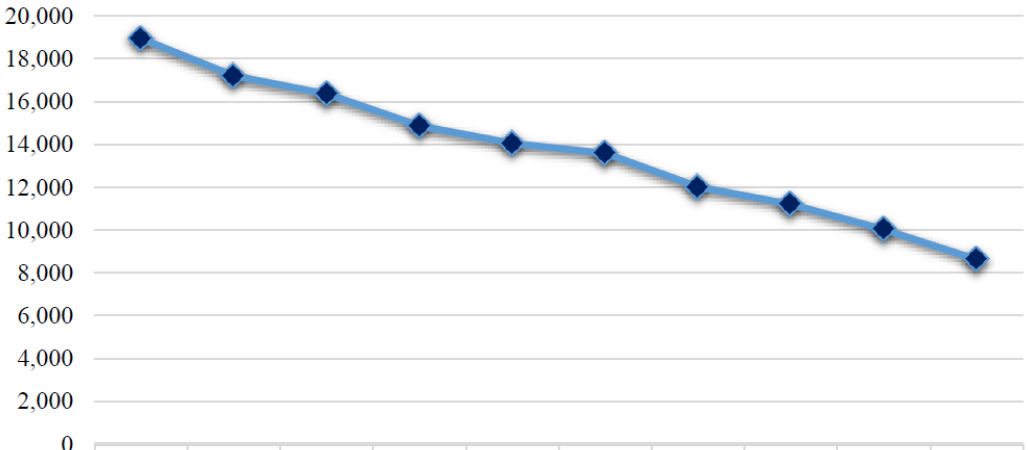
To get up and running again, contracts would need to be initiated with State and/or tribal detention centers. This is usually handled by the CN Marshal Service, as they are the ones that transport juvenile delinquents after arrest or to and from facilities. On occasion, if the child is not a flight risk and represents no threat of harm to himself/herself or others, juveniles can be placed at the Cherokee Nation John Ketcher Youth Shelter for up to 30 days. Jack Brown is also a placement

option for drug treatment and additional contracts might be needed to prosecute juveniles and place with them.

Once the re-occurring docket is established, cases could begin to be heard in CN tribal court. A juvenile caseworker would need assigned to meet with the child and parents. This worker is quasi-social worker and quasi-probation officer and functions as both throughout the case. The number of caseworkers needed depends upon the number of cases the Nation files.

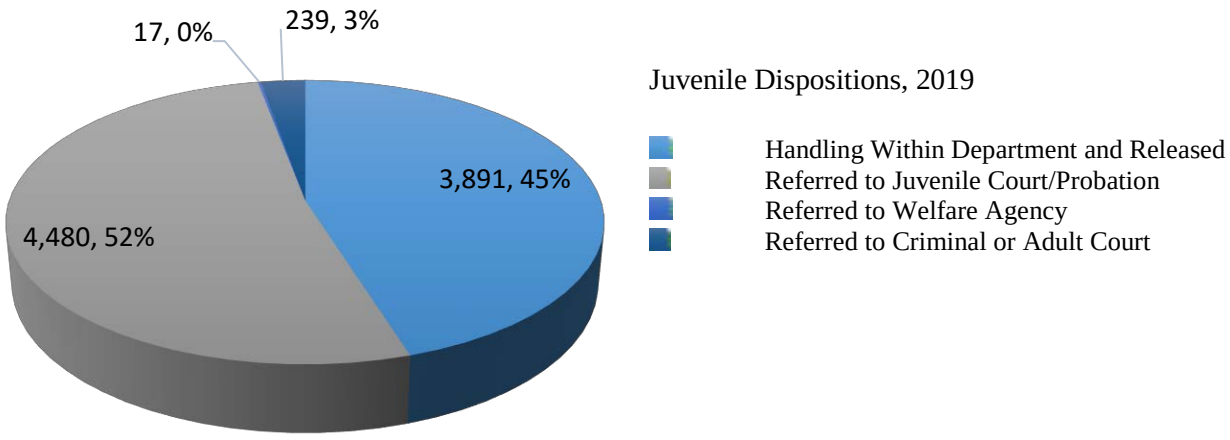
One immediate issue is the need for a system to handle delinquent offenders. The Cherokee Nation has no infrastructure to handle juvenile offenders; the Indian Child Welfare department caseworkers only work with children who have been adjudicated deprived. In 2019, 8624 juvenile were arrested which accounted for 8.0% of all arrests.

Figure 33. Juvenile Arrests, 2010-2019



	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Juvenile Arrests	18,943	17,205	16,357	14,868	14,048	13,590	12,013	11,202	10,025	8,627

Of those arrests, 52% were referred to juvenile court or probation, and 45% were handled within the department and released. The remainder of juvenile arrestees were referred to criminal or adult court (3%) or referred to a welfare agency.


17, 0%
239, 3%
3,891, 45%
4,480, 52%
Juvenile Dispositions, 2019
Handling Within Department and Released
Referred to Juvenile Court/Probation
Referred to Welfare Agency
Referred to Criminal or Adult Court

DOMESTIC VIOLENCE

ESTIMATING TRIBAL JURISDICTION

The following graph contains estimates of the number of domestic violence crimes committed by Indians in counties entirely located within the boundaries of the Cherokee Reservation in 2019.

There are three different possible scenarios for these crimes: An Indian commits a crime against another Indian, an Indian commits a crime against a non-Indian, or a non-Indian commits a crime against an Indian. The Nation would have jurisdiction over crimes committed by the Indians, but only the United States would have jurisdiction over the non-Indians who commit crimes against Indians. The Nation would only have jurisdiction over two of the three categories of offenses, so ***only two-thirds of these offenses are being attributed to tribal jurisdiction***.

METHODOLOGY #1[1]

	2019				
County	Murder	Sex Crimes	Assault	A&B	Estimate of Total DV Crimes
Adair	1	7	15	48	71
Cherokee	1	8	24	91	124
Craig	0	4	4	22	30
Delaware	0	5	8	70	83
Mayes	0	5	8	56	69
Nowata	0	1	3	11	15
Rogers	0	5	12	70	87
Sequoyah	0	7	16	82	105
Washington	0	0	0	30	30
Totals	2	42	90	480	614

Under this estimation, the Nation would have prosecuted approximately **409 of the total domestic violence crimes** that were committed in the nine counties located completely within the Cherokee Nation in 2019.[2] The two murders would have been prosecuted by the United States.

[1] This scenario does not include Indians who are not citizens of the Cherokee Nation.
[2] This is the minimum number estimation that could be expected under this scenario, since it excludes non-Cherokee Indians.

Domestic Abuse within the 14 Counties partially or wholly located within the Cherokee Reservation: Methodology #2

These totals include non-Indians and all of the population within the reservation, and therefore the calculation is somewhat different. The Cherokee Nation can exert jurisdiction over non-Indians for certain domestic violence related crimes and will certainly have to, given the increase in the number of cases in the local federal district courts. Assuming the Nation would be capable of prosecuting roughly three quarters of all crime in this category (but assuming only ¼ of the crime in Tulsa occurs within the Cherokee Nation) the Nation would have had jurisdiction over 3,968 assault and battery cases, and 1,633 assaults.

County	2019			
	Murder	Sex Crimes	Assault	A&B
Adair	1	12	26	87
Cherokee	1	13	42	157
Craig	0	13	12	64
Delaware	0	14	24	202
Mayes	0	14	23	166
McIntosh	0	7	23	86
Muskogee	0	25	81	679
Nowata	0	3	9	36
Ottawa	0	7	8	119
Rogers	1	21	55	317
Sequoyah	1	20	47	242
Tulsa	13	137	1807	5877
Wagoner	0	19	19	137
Washington	0	1	2	210
Totals	17	306	2,178	8,376

ESTIMATED INDEX OFFENSES IN THE CHEROKEE NATION

OSBI data for 2019 provided an opportunity for a county-by-county analysis of which crimes would have been before the Cherokee Nation tribal court, if those crimes occurred within the Cherokee Nation Reservation and had been prosecuted in accordance with federal law. Counties located partially within the Reservation required estimates. For instance, Owasso Police respond entirely within the Cherokee Reservation, while Tulsa Police respond across three separate reservations. This makes it difficult to be precise, because data is collected by counties and by cities without regard to reservation boundaries.

For 2019, there would have been an estimated 5,856 offenses occurring within the Cherokee Reservation and eligible for prosecution by the Cherokee Nation for the crimes of murder, rape, robbery, felonious assault, breaking and entering, larceny, motor vehicle theft, and arson. District 27, which contains all of Wagoner, Cherokee, Adair and Sequoyah Counties, prosecuted 3,213 such crimes in 2019. Presuming that all crimes would follow the pattern observed for index crimes reported by the OSBI, and further presuming that the Cherokee Nation's Office of the Attorney General would be roughly as efficient with staff as District 27 is today, the Office of the Attorney General would need to be just shy of twice the size of the District 27 to carry that case load. Of course, District 27's cases are spread across district courts in four counties, while the Cherokee Nation's District Court has one courthouse and one full-time District Court Judge.

Some of the index offenses are major crimes as defined in the federal Major Crimes Act, and the United States may prosecute those crimes in federal court. However, with the expansion of federal jurisdiction over the reservations of the Five Tribes, it may well be that all but the most heinous and violent major crimes will need to be prosecuted in tribal court.

ALTERNATIVES TO INCARCERATION

Alternatives to incarceration will originate under a uniform and comprehensive approach to case processing within the Office of the Attorney General, with each case of a person accused of a crime having several key decision points. The key decision points in a case have been collectively explained as follows[3]:

1. The Decision to Arrest
2. The Decision to Request Pre-Trial Detention
3. The Decision to Prosecute
4. The Decision to Request Release from Pre-Trial Detention
5. The Decision of Guilt or Innocence
6. The Decision to Request Sentencing
7. The Decision to Request Sentence Modification

Decision to Arrest

Following a report or observation of an offense, law enforcement has several options in dealing with the alleged perpetrator. The officer may elect to:

- Warn and release
- Issue a citation
- Divert or refer the alleged perpetrator to other services
- Make the arrest and transport the alleged perpetrator to jail

At this decision point, some policy and practice options to incorporate include: policies authorizing citations in lieu of arrests for specific offenses; policies authorizing diversion practices in lieu of arrests for specified offenses; judicial policies authorizing summons in lieu of arrests for persons with active warrants; and mental health crisis intervention training for law enforcement officers. Due to broad cross-deputization across the reservation, it will take both time and consensus-building for state law enforcement officers to take into account tribal policing preferences. Since the Marshal Service will not be the primary law enforcement agency on the reservation, at least for now, developing consensus policies with local law enforcement is critical.

Alternative programs/strategies to consider at this stage include:

- Detoxification facilities/services
- Emergency mental health services
- Mobile crisis intervention services
- Law enforcement diversion programs

These alternative programs/strategies depend upon growing capacity across the reservation and across jurisdictional lines.

The Decision to Request Pre-Trial Detention

[3] NAATAP Project Guide: Alternatives to Incarceration of Offenders

Once the alleged perpetrator is taken into custody, a decision regarding the need for pre-trial detention is made. This decision is usually based on an evaluation that may consider the severity of the charges, the alleged offender's level of stability in the community, and the alleged offender's behavior during the arrest. The dual goals at this stage in the case is to prevent further offending and to assure the availability of the accused for appearance in court.

A pre-trial screening process and supervision policy could be established under, a pre-trial release program which would ideally provide an in-depth background assessment of the alleged perpetrator and use risk assessment procedures to measure and predict the risk of re-offending.

At this decision point, some policy and practice options to incorporate include: some type of Court delegated release authority; established bail schedule and procedures; established procedures for adequate risk evaluations; procedures for pre-trial release and diversion screening.

Alternative programs/strategies to consider at this stage include:

- Pre-trial services program
- Community supervision
- Electronic monitoring
- Day reporting
- House arrest
- Urinalysis
- Access to mental health and substance abuse services

The Nation currently contracts with "Alternative Sentencing Solutions" for the use of ankle monitoring devices. Child Support Services and the Marshal Service both utilize this alternative. Each monitor used costs $8.75 per day. However, if more than eight monitors are in use at any one time, the cost is reduced to $8.00 per day.

In FY '19, Child Support Services and the Marshal Service spent a combined $8,513.75 on ankle monitoring. To date in FY '20, Child Support Services and the Marshal Service have spent a combined $997.50 on ankle monitoring.

If a device cannot be recovered for some reason, the individual being monitored is responsible for a $1,500 replacement fee. The Nation agrees to front this cost and seek reimbursement from the individual under the initial agreement entered into with the individual.

The greatest expense to the Nation would be an increased probation and parole department. Ankle monitoring only works if you have an officer keeping close track of the individuals being monitored, and following up on issues with offenders as they arise. While this is certainly less expensive than traditional incarceration, it will require significant resources to scale-up our current system to cope with the new demands that will be placed upon the system.

<u>The Decision to Prosecute</u>

At this decision point, the prosecutor may proceed with the original charge, amend the charge based upon the facts of the case, or decline to prosecute. Here, the prosecutor may also elect to

defer prosecution, typically accomplished under a "Deferred Prosecution Agreement", while giving the accused the option of participating in an eligible diversion program.

Some policy and practice options to incorporate at this point include: early case screening; accelerated calendar practices for jail/detention cases; and the use of diversion programs.

Alternative programs/strategies to consider at this stage include:

- Diversion programs
- Dispute resolution/mediation programs
- Access to mental health and substance abuse services
- Community service and competency development programs

The Decision to Request Release from Pre-Trial Detention

If an individual is initially detained upon arrest, he or she has the right to a detention hearing before a judge. The judge may elect to release the accused from detention with or without conditions. The goal of the system at this stage is to provide the level of supervision and structure necessary to prevent further offending and to assure the availability of the accused for court.

At this decision point, some policy and practice options to incorporate include: prompt bail settings practices; realistic bail schedules; timely bond review hearings; a range of non-bail release options[4]; a range of bail release options; unsecured bail; deposit bail; property bail; surety bail; full cash bail; and appropriate access to counsel at initial hearings.

Alternative programs/strategies to consider at this stage include:

- Pre-trial release screening programs
- Community supervision
- Electronic monitoring
- Day reporting
- House arrest
- Urinalysis
- Access to treatment and support services as needed

The Decision of Guilt or Innocence

As the case moves forward, there will come the ultimate determination of guilt or innocence from the Court. The timeliness and efficiency of the trial process has a significant impact on the overall use of the jail and other resources. A number of policy and program options serve to reduce the amount of time accused offenders spend in jail awaiting the outcome of their case.

At this decision point, some policy and practice options to incorporate include: effective calendaring practices; allowing docket priority for in-custody cases; implementation of case progression standards; and sustained periodic bond review.

[4] Such as, supervised or unsupervised release on an individual's own recognizance; third party release; and conditional release.

Alternative programs/strategies that support efficiency at this stage include:

- Expediter program
- Community supervision
- Electronic monitoring
- Day reporting
- House arrest
- Urinalysis
- Access to services

The Decision to Request Sentencing

If the offender is found guilty at trial or upon adjudication, several options come into play. The Court may order a pre-sentence investigation, impose immediate sanction, or defer sentencing pending successful completion of specified conditions.

The timeliness and efficiency of the pre-sentence investigation process is a large factor at this stage. Time delays between the finding of guilt and the imposition of sentence impact detention decisions. Having a range of sentencing options available at this stage provides the court with the flexibility to impose sanctions and conditions that may be more effective in addressing the offending behavior.

At this decision point, some policy and practice options to incorporate include: establishing a system to provide for preparation of pre-sentence investigations; enhanced case advocacy at sentencing; established criteria for use of alternative sanctions; risk assessment tools to decide the appropriate level of supervision.

Alternative programs/strategies to be considered to provide a range of sanctioning options include:

- Fines/restitution
- Community service
- Day fines
- Community supervision/case management
- Intensive community supervision
- Electronic monitoring
- Day reporting
- Drug testing
- Alternative education programs
- Job training/placement services
- Mediation/Victim reconciliation programs
- Counseling
- Substance abuse treatment
- Family support services
- Work programs
- Residential programs (halfway houses, foster and group home care for youth, residential treatment)

The Decision to Request Sentence Modification

After conviction or a finding of delinquency, the sentences offenders or delinquents receive may be modified under certain circumstances. For some, good behavior and compliance with the provisions of their sentences can lead to early release or discharge. More often, sentence modifications occur as a result of a violation of a condition of probation or parole. When a probation or parole violation is alleged, the offender/delinquent is often placed into jail/detention pending a hearing on the matter.

When limited options are available to respond to such violations, revocation often results in additional jail time for offenders, thus a sizable portion of our potential jail population could be comprised of probation and parole violators.

At this decision point, some policy and practice options to incorporate include: establishing and using graduated sanctions in lieu of detention for probation/parole violations; establishing time sensitive policies regarding detainers and revocations; and establishing and using incentives including early release or discharge for good behavior.

VICTIM'S SERVICES

An immediate and urgent need will be to fully engage the Cherokee Nation's victim's services staff with the Attorney General's Office. The Cherokee Nation has one full-time victim witness coordinator and available grant funding for multiple victim advocate positions through the One Fire office.

One of the consequences of the McGirt decision is that convictions will be challenged by defendants who will argue that Oklahoma lacked jurisdiction over them because a) the crime occurred within "Indian country" as that term is defined by federal law, and b) either the defendant, the victim, or both are or were Indians when the crime occurred. Many victims of crime will need to be notified that the defendant may be released from jail. In some cases, victims may need to be located so they can testify when the defendant is re-tried for his or her crimes in federal or tribal court.

The One Fire department has been part of the Attorney General's Office in the past, but was transferred over to the Human Services over the last year. Because of both the need in the Attorney General's Office for victim witness coordination and victim advocates, there needs to be a closer working relationship between the Attorney General's office and One Fire. Resources to hire additional victim witness coordinators, which will certainly be needed, may be available from existing resources at DOJ, given the increase in workload expected at the Cherokee Nation.

DETENTION

HISTORIC DETENTION EXPENSES

Detention Center Costs FY 2017-2020	2017	2018	2019	2020
Adair County	$6,468	n/a	$2,520	$3,610
Cherokee County Detention Center	$13,356	$8,064	$21,294	$8,022
Delaware County	n/a	n/a	$126	n/a
Mayes County Board of Commissioners	$756	n/a	n/a	n/a
Muskogee County	n/a	n/a	n/a	n/a
Rogers County	n/a	n/a	n/a	n/a
Totals:	**$20,580**	**$8,064**	**$23,940**	

Estimated Detention Costs – County Jails Only

	Avg. Daily Occupancy	Percentage of GWY	Avg. Cost per day	Avg. GWY Occupancy	Totals
Adair	100	56.1%	$48	56	$982,872
Sequoyah	135	34.2%	$48	46	$805,920
Cherokee	169	57.7%	$48		$1,708,427
Wagoner	120	20.2%	$48	24	$420,480
Mayes	150	33.5%	$48	50	$880,380
Delaware	60	34.7%	$48	21	$364,766
Nowata	50	30.7%	$48	15	$268,932
Ottawa	124	22.8%	$48	28	$495,325
Washington	226	14.1%	$48	32	$558,292
Total					**$6,485,394**

Estimated Detention Costs – DOC Statewide

	Total Population in the 14 counties in 2008	Percentage of Cherokee Population on Reservation	Percentage of DOC Budget Total Population on Reservation	Percentage of DOC Budget attributable to Cherokees on the Reservation
Adult	513,452	28%	$72,222,776	**$20,222,377**
Juvenile	513,452	28%	$12,583,363	**$3,523,341**
Total				**$23,745,718**

Current (and Incomplete) Estimate[5]

Estimated County Jail detention to date[6]	$6.49 million
Estimated DOC Detention[7]	$23.7 million
Total	$30.19 million

LIST OF IDENTIFIED IMMEDIATE NEEDS

1. **Detention**. The detention budget is going to be wholly insufficient for the Nation's needs. To the extent possible, it seems wise to a) increase the number of jails with which we have contracts; b) consider an immediate budget mod to increase the detention budget and c) find and contract with a facility that will accept juvenile offenders.

2. **AG Staff.** While I have several attorneys who can at least be temporarily reassigned to handle criminal prosecutions, I am short-staffed - particularly with support personnel – to handle the situation that is developing. By adding support staff, the attorneys I do have can accomplish more work. The Attorney General's office will need to add victim/witness coordinators, paralegals, investigators, and additional attorneys to handle the influx of cases. It may be beneficial to have our criminal division broken up into two parts: one that addresses criminal cases on appeal or in the post-conviction relief stage, and one that addresses incoming criminal cases. As soon as practicable, this office needs to begin hiring additional staff. It also needs to invest in a new prosecutorial software program, and space needs must be addressed as well.

3. **Juvenile Offenders.** There are a couple of people at the Cherokee Nation who may be utilized as resources as the Nation considers options for creating and implementing a juvenile offender program. Jennifer Kirby, from Human Services, has a background working with youth. Brandon Armstrong, the Nation's sole probation/parole officer at this time, historically dealt with juvenile offenders in the drug court when it was in operation. Additional information from OJA, which should be quickly forthcoming, will help the Nation better estimate the number of cases that will be filed or transferred to the Nation. Future reports can more comprehensively these issues.

4. **Technology Upgrades.** There is no online system for ticketable offenses within our current justice system. Such a ticketing system could take a significant burden off of both the court and individual citizens. Other technological upgrades could assist both the courts, our

[5] All of these estimates exclude non-Cherokee Indians living on the Reservation.
[6] Does not include detention in in the remaining counties in the Cherokee Reservation,
[7] These numbers are estimates based on state expenditures, and do not take into account the additional costs that will be passed along to tribal governments. For instance, the counties/state built all detention facilities and operate them to meet their own needs - so they are depreciating the facility and paying facility expenses. The counties and state will not give the tribes the same at-cost pricing. One night in jail for an offender may cost the state $27 per night in costs, but they may charge the tribe $48 per night in the same facility. Therefore, this should be considered an exceedingly conservative estimate.

state/federal law enforcement partners, victims, witnesses, and defendants since the Nation currently only one District Court location and one Attorney General's office location.

Some other tribes with large reservations utilize tele-court services to accommodate their citizens who live further away from the Nation's courts. This is another possible way of handling dockets throughout the reservation.

5. **Criminal Code/Procedure.** The Cherokee Nation criminal code does not "match up" with the Oklahoma Criminal Code, because it has been updated in a piecemeal fashion. The criminal procedure code is also in even more desperate need of an update. A strategy that lines up the Cherokee Nation's criminal code closely with the Oklahoma criminal code will make it easier for officers, prosecutors, defense attorneys, and the court.

Practical Considerations

The Cherokee Nation's FY 2021 budget did not include any increases in the budget for law enforcement, prosecution, or additional expenses of the court. Initial and conservative estimates indicate that approximately $30 million for detention, $20 million for expanded court operations and $7 million for prosecution will be necessary to adequately address the practical shifts in responsibility under the *McGirt* ruling. This estimate excludes significant areas of cost, such as: costs to create and operate a juvenile detention program, costs for increases to the Marshal Service, and costs to increase civil programs that may need to be established in the wake of the court's ruling. As the Commission continues its work, better cost estimates will become available.

The Nation is actively involved in a number of cases, and anticipates at least an initial ruling from one of the state District Courts no later than October 31, 2020. No later than November 5, 2020, the issue of the Cherokee Nation Reservation will have been submitted to the Oklahoma Court of Criminal Appeals ("OCCA"). No later than November 25th, 2020, any supplemental briefing at the OCCA will be concluded. The OCCA could then issue its ruling at any time. Depending upon the outcome, there may be appeals.

When the legal issue of the Cherokee Reservation is authoritatively addressed, criminals serving sentences for serious offenses will have those charges dismissed against them by the state courts. Due to statute of limitations issues, some of these criminals will be released back into the community. Notifying victims and the families of victims, that these offenders are being released will be critically important work. At the same time, hundreds of criminal cases – both post-conviction/appeal cases and new criminal cases - will begin flowing to the Cherokee Nation Attorney General's office and the Cherokee Nation District Court.

A decision on the issue of the Cherokee Reservation is likely weeks away.

Given this short timeline, the Commission should consider making the following interim recommendations to the Principal Chief:

I. Budget Modification. It is recommended that a budget modification be considered as soon as possible to meet the immediate needs of the most directly impacted

departments. An initial $20 million appropriation to cover detention, increased staffing at the AG's office, and increased staffing at the Nation's courts should be given immediate consideration so that Cherokee Nation's law enforcement and judicial branches have the resources to respond immediately to a decision by the state or federal courts. Additional budget authority to re-allocate or increase these budgets can be taken up as the situation develops.

II. **Federal legislation**. It is recommended that the Principal Chief engage with federal lawmakers regarding the possibilities for state/tribal compacting for criminal jurisdiction, in a similar manner to the state/tribal compacting for jurisdiction over juvenile deprived and child custody matters. Such an arrangement could allow some types crimes – such as those that involving non-Indian offenders – to stay in state courts. That would give the Nation and the State an opportunity to transition law enforcement obligations in a way that allows for tribal capacity building over time. In addition, new federal funding could help offset the added expenses the Nation will bear for law enforcement throughout the reservation boundaries.