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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERIAH SCOTT BUDDER,

Defendant - Appellant.

No. 22-7027

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:21-CR-00099-DCJ-1)

James Castle, Castle & Castle, P.C., Denver, Colorado (André Bélanger, Manasseh, Gill, Knipe & Belanger, P.L.C., Baton Rouge, Louisiana, with him on the briefs), for Defendant - Appellant.

Linda A. Epperley, Assistant United States Attorney (Christopher J. Wilson, United States Attorney, with her on the brief), Office of the United States Attorney, Muskogee, Oklahoma, for Plaintiff - Appellee.

Before **HARTZ**, **McHUGH**, and **CARSON**, Circuit Judges.

HARTZ, Circuit Judge.

Just months after Defendant Jeriah Budder, an enrolled member of the Cherokee Nation, killed David Jumper, the Supreme Court made clear in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), that the land where the shooting occurred was on an Indian

reservation. Under the Major Crimes Act, 18 U.S.C. § 1153, murder or manslaughter allegedly committed by an Indian in Indian country (which includes Indian reservations, *see* 18 U.S.C. § 1151(a)) in Oklahoma must be tried in federal court rather than state or tribal court. After *McGirt*, Defendant successfully moved to dismiss state charges that had been filed against him, and he was instead charged in the United States District Court for the Eastern District of Oklahoma, where a jury convicted him of voluntary manslaughter. Defendant now claims that he was denied the due process of law guaranteed by the United States Constitution because the retroactive application of *McGirt* to his case stripped him of Oklahoma's law of self-defense, which he says is broader than the analogous defense permitted by federal law. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm Defendant's conviction and sentence. We hold that applying *McGirt* to Defendant in this case does not constitute an impermissible retroactive application of a judicial decision. And we also reject Defendant's argument that his sentence is substantively unreasonable.

I. BACKGROUND

In the evening of April 24, 2020, Dyson Hanson was with David Jumper and Lewis Thompson in Kenwood, Oklahoma, when Mr. Hanson received a call from Defendant. Defendant asked Mr. Hanson to pick him up in Tahlequah, Oklahoma, where he was living with his father, and drive him to Kenwood, where he wished to relocate. The three men drove to Tahlequah; Mr. Jumper was behind the wheel, Mr. Hanson sat in the passenger seat, and Mr. Thompson sat behind Mr. Hanson. When they arrived, Mr. Hanson went in to help Defendant pack his belongings, which

included a black trash bag of clothes, a safe, and a gun case. Upon returning to the car, Mr. Hanson once again sat in the passenger seat, while Defendant sat behind Mr. Jumper. Because the trunk was full, Defendant had his possessions with him in the backseat.

Almost immediately, Mr. Jumper realized to his dismay that Defendant was loading a magazine in a Glock semiautomatic pistol. Mr. Jumper stopped the car within 20 yards of Defendant's father's house and asked Defendant to get out, but Defendant refused. Mr. Jumper drove about 55 yards farther along the road before stopping again and repeating his request that Defendant exit the vehicle. Defendant again refused. Mr. Jumper then exited the vehicle and opened Defendant's door. A fight ensued, with Mr. Jumper punching Defendant six or seven times and trying to wrestle the gun away from Defendant. Defendant shot Mr. Jumper 12 times, including at least two shots while Mr. Jumper was lying on the ground. Mr. Jumper died at the scene.

Defendant departed before the authorities arrived but later that night voluntarily surrendered outside of his father's house. He was charged by the State of Oklahoma with first-degree manslaughter. The charges were dismissed, however, for lack of subject-matter jurisdiction in the wake of *McGirt* because Defendant is a registered citizen of the Cherokee Nation and the shooting occurred within the boundaries of the Cherokee Reservation. A federal grand jury then indicted Defendant on three charges: (1) first-degree murder in Indian country, *see* 18 U.S.C. §§ 1111(a), 1151, and 1153; (2) the use, carrying, brandishing, and discharge of a firearm during and in relation to

a crime of violence, *see* 18 U.S.C. § 924(c)(1)(A)(i)–(iii); and (3) causing the death of a person in the course of a violation of § 924(c), *see* 18 U.S.C. § 924(j).

Defendant moved for dismissal of his federal charges, claiming that to apply *McGirt* retroactively would violate his rights under the Due Process Clause of the Fifth Amendment. The court denied that motion as not yet ripe but informed the parties that the court would instruct the jury that if it found Defendant guilty of murder or a lesser-included offense, it must also answer a special interrogatory asking whether it would have convicted Defendant had Oklahoma's law of self-defense (as explained in the interrogatory) been available to him. The jury convicted Defendant of the lesser-included offense of voluntary manslaughter in Indian country, 18 U.S.C. §§ 1112(a) and 1153. But its answer to the special interrogatory was that it would not have found Defendant guilty had the state self-defense law (as explained in the interrogatory) applied.

The district court calculated the United States Sentencing Guidelines range for Defendant's crime as 70 to 87 months. The government requested an upward variance, and Defendant requested a downward variance. After stating that it had reviewed the parties' sentencing memoranda, the district court imposed a sentence of 96 months. It explained:

> Among other things, in varying upwards from the advisory guideline range, the Court considered the nature and circumstances of the offense, namely, the number of shots fired into the body of the victim, Mr. Jumper; the prior opportunity that the defendant had to withdraw from the conflict, and his immediate flight from the scene of the shooting, as well, of course, as the need for just punishment, deterrence, and protection of the public.

R., Vol. III at 608–09.

After sentencing, the court considered Defendant's now ripe argument that retroactively applying *McGirt* violated Defendant's right to due process. It concluded that *McGirt* "brought about an 'unforeseeable judicial enlargement' of the geographical scope of federal Indian Country jurisdiction in Oklahoma. . . . In doing so, the *McGirt* decision 'operated precisely like an *ex post facto* law' with respect to" Defendant. *United States v. Budder*, 601 F. Supp. 3d 1105, 1116 (E.D. Okla. 2022) (brackets omitted) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964)). Despite this statement, the district court (with evident reluctance) denied Defendant's motion to dismiss the indictment because "no analogous Tenth Circuit or Supreme Court precedent" had so held. *Id.* at 1116–17.

II. DISCUSSION

A. Retroactive Application of McGirt

Defendant argues that applying *McGirt* to him in this case is a "judicial ex post facto" decision that violates his right to due process. Aplt. Br. at 22 (internal quotation marks omitted). He contends that at the time he shot Mr. Jumper, less than three months before *McGirt* was decided, he would have believed that he would be tried for his crime in state court, where Oklahoma's self-defense law would have been available to him. Under *McGirt*, however, the land on which he shot Mr. Jumper was Indian country—so, by virtue of the Major Crimes Act, only federal self-defense law applied. *See United States v. Toledo*, 739 F.3d 562, 564-69 (10th Cir. 2014) (applying federal law of murder, manslaughter, and self-defense for prosecution under Major Crimes Act in

New Mexico federal court). Defendant says he had no fair warning that he was committing a crime properly tried in federal court.

Importantly, Defendant claims prejudice from being tried in federal court, arguing that he was disadvantaged by the retroactive application of *McGirt* to his case because Oklahoma's self-defense law is broader than its federal analogue. On Defendant's (and the district court's) account of Oklahoma law, "a person is justified in using deadly force in self-defense if that person reasonably believed that use of deadly force was necessary to: a) prevent death or great bodily harm to himself; or b) *to terminate or prevent the commission of a forcible felony against himself*." Aplt. Br. at 9 (internal quotation marks omitted; emphasis added); *accord* R., Vol. I at 172 (district court's special interrogatory).[1] In contrast, under federal law, "[a] person may use force which is intended or likely to cause death or great bodily harm only if he reasonably believes that force is necessary *to prevent death or great bodily harm to himself* [or] another." 10th Cir. Criminal Pattern Jury Instruction 1.28 (2021 ed.) (original brackets omitted; emphasis added); *accord* R., Vol. I at 160 (Jury Instruction 16). Indeed, Defendant notes, the jury that convicted him of voluntary manslaughter at his federal trial answered in the negative a special interrogatory asking whether it would have convicted him had Oklahoma's self-defense law, as it was explained to the jury, governed. Defendant contends that applying *McGirt* to his case denied him due process because, in the words of the district court's postverdict opinion, it "'brought

[1] We express no view on whether this is a correct statement of Oklahoma law.

about an "unforeseeable judicial enlargement" of the geographical scope of federal Indian Country jurisdiction in Oklahoma.'" Aplt. Br. at 8 (quoting *Budder*, 601 F. Supp. 3d at 1116 (quoting *Bouie*, 378 U.S. at 353)).

Defendant and the district court begin from the valid premise that due process requires fair notice that an act is criminal. But we disagree with Defendant's ultimate conclusion.

1. The Governing Law

The Constitution explicitly prohibits the retroactive application of laws criminalizing conduct that was legal when it occurred. *See* U.S. Const. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."). Although "[t]he *Ex Post Facto* Clause is a limitation upon the powers of the Legislature and does not of its own force apply to the Judicial Branch of government," "the principle on which the Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. 188, 191 (1977) (citation omitted). Thus, the Supreme Court has held that in certain limited circumstances the retroactive application of a judicial decision interpreting criminal law can violate the Due Process Clause of the Fifth Amendment. *See id.* at 192; *United States v. Muskett*, 970 F.3d 1233, 1242 (10th Cir. 2020) (for federal courts, "[i]t is the Due Process Clause of the Fifth Amendment that

imposes limitations on *ex post facto* judicial decisionmaking" (internal quotation marks omitted)).[2]

"[T]he prohibition of the ex post facto application of judicial decisions" under the Due Process Clause "is less extensive than the prohibition of ex post facto statutes" under Article I. *Evans v. Ray*, 390 F.3d 1247, 1251 (10th Cir. 2004). Early in the development of the law regarding retroactive judicial interpretations of criminal statutes, the Supreme Court said merely, "All the Due Process Clause requires is that the law give sufficient warning that [people] may conduct themselves so as to avoid that which is forbidden." *Rose v. Locke*, 423 U.S. 48, 50 (1975) (per curiam). This standard recognizes that there is necessarily a role for judges in defining the precise contours of criminal statutes. As the Court explained, "[I]n most English words and phrases there lurk uncertainties. Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid." *Id.* (citation and internal quotation marks omitted). Due process therefore leaves room for evolution of the law.

Nevertheless, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266

[2] For state courts, the same principles apply by virtue of the Due Process Clause of the Fourteenth Amendment, *see, e.g.*, *Bouie*, 378 U.S. at 363, whose reach here is coextensive with that of the Due Process Clause of the Fifth Amendment, *see, e.g.*, *Marks*, 430 U.S. at 191–97 (applying *Bouie* in a case involving a federal-court interpretation). For simplicity, this opinion refers to a singular Due Process Clause.

(1997). "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267; *see Johnson v. Kindt*, 158 F.3d 1060, 1063 (10th Cir. 1998) ("The test for determining whether the retroactive application of a judicial decision violates due process is essentially one of foreseeability."). This court has said that "[u]nforeseeable judicial decisions include expansion of a statute narrow and precise on its face beyond those terms; the overruling of precedent; or when an in-depth inquiry by a dedicated and educated student of the relevant law would have revealed nothing to foreshadow the controlling court opinion." *Johnson*, 158 F.3d at 1063 (original brackets, citations, and internal quotation marks omitted).

The most recent, and controlling, formulation of the due-process retroactivity test appears in *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001): "[I]f a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, the construction must not be given retroactive effect" (original brackets and internal quotation marks omitted). This approach provides the necessary breathing room for traditional judicial decisionmaking. *See id.* at 460 (declining to "extend[] the strictures of the *Ex Post Facto* Clause to the context of common law judging"). The proper concern is with "unpredictable shifts in the law," not "the resolution of uncertainty that marks any evolving legal system." *United States v. Burnom*, 27 F.3d 283, 284–85 (7th Cir. 1994).

It is instructive to review the results in some leading cases from the Supreme Court and this court. We begin with cases overturning the retroactive application of a new

interpretation of a statute. In *Bouie* the South Carolina Supreme Court construed a state statute criminalizing *entering* premises where a notice prohibited entry to mean that defendants could be convicted for *remaining* on the premises after being ordered to leave. *See* 378 U.S. at 349–50. The Supreme Court said that "[t]he interpretation given the statute by the South Carolina Supreme Court" was "clearly at variance with the statutory language" and had "not the slightest support in prior South Carolina decisions." *Id.* at 356. Accordingly, it reversed the state convictions. *See id.* at 363.

This court has overturned a conviction for violation of due process in a similar context. In *Lopez v. McCotter*, 875 F.2d 273, 273–74 (10th Cir. 1989), a bail bondsman was convicted of several assault-related charges following his attempt to apprehend in New Mexico a man with an outstanding arrest warrant from Texas. "From the outset, [the bondsman] relied on the common-law bail bondsman's privilege as his principal defense." *Id.* at 274; *see also id.* at 276 ("No one disputes that at common law bail bondsmen had very broad arrest powers."). But the New Mexico Court of Appeals "construed the Uniform Criminal Extradition Act (UCEA), enacted in 1937, to apply to the acts of [the bondsman]," thereby effectively eliminating "the common-law authority of bondsmen" and instead requiring extradition. *Id.* at 274–75 (citation omitted). We stated that "[t]he language of the UCEA could not have conveyed to [the bondsman] a fair warning that his conduct would be regarded as criminal." *Id.* at 277. Moreover, the New Mexico Court of Appeals decision was "the only case we ha[d] encountered holding that the long-standing UCEA, by itself, modifies the established rule that a bail bondsman need not resort to process—particularly extradition—in rearresting his principal in another state." *Id.* Accordingly, "[n]either the

UCEA itself nor the decisional precedents of other states could have afforded [the bondsman] a fair warning that his attempt to recapture [the arrestee] in New Mexico would be governed by the UCEA, and thus not be privileged conduct under the common law." *Id.* at 277–78. We therefore held that "the decision of the New Mexico Court of Appeals was unforeseeable and retroactively rendered [the bondsman's] conduct criminal by depriving him of the bail bondsman's privilege," in violation of the Due Process Clause. *Id.* at 278.

On the other hand, courts have often rejected such due-process challenges. In *Rose* a man was convicted "of having committed a 'crime against nature'" after violently forcing his female neighbor to engage in cunnilingus. 423 U.S. at 48. The Supreme Court rejected the man's argument that he lacked fair warning that cunnilingus was a crime against nature, noting that prior Tennessee decisions "had expressly rejected a claim that 'crime against nature' did not cover fellatio" and had "repudiat[ed] those jurisdictions which had taken a narrow restrictive definition of the offense" of a crime against nature. *Id.* at 52 (internal quotation marks omitted). One such Tennessee decision had also quoted approvingly a Maine case interpreting a crime-against-nature statute "which the Tennessee court had . . . twice equated with its own" statute. *Id.* Notably, the Maine statute "had been applied to cunnilingus before either Tennessee decision." *Id.* Hence, "the Tennessee Supreme Court had given sufficiently clear notice that [the Tennessee statute] would receive the broader of two plausible interpretations, and would be applied to [cunnilingus] when such a case arose." *Id.* The Court could readily distinguish *Bouie* because it involved a case where the defendants had "no reason even to suspect that conduct clearly outside the scope of the

statute as written [would] be retroactively brought within it by an act of judicial construction." *Id.* at 53 (internal quotation marks omitted).

Rogers (also arising in Tennessee) involved the year-and-a-day rule, which "provided that no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day of the act." 532 U.S. at 453. In the defendant's case, the Tennessee Supreme Court "abolished the rule as it had existed at common law in Tennessee and applied its decision to [the defendant] to uphold his conviction." *Id.* The United States Supreme Court rejected the defendant's argument that this ruling violated his due-process rights. *See id.* at 466–67. Not only had the year-and-a-day rule "been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue," *id.* at 463, but also it "had only the most tenuous foothold as part of the criminal law of the State of Tennessee" at the time of the offense, *id.* at 464 ("The rule did not exist as part of Tennessee's statutory criminal code. And while the Supreme Court of Tennessee concluded that the rule persisted at common law, it also pointedly observed that the rule had never once served as a ground of decision in any prosecution for murder in the State. Indeed, in all the reported Tennessee cases, the rule has been mentioned only three times, and each time in dicta."). Thus, the decision abolishing the rule "was a routine exercise of common law decisionmaking," rather than "a marked and unpredictable departure from prior precedent." *Id.* at 467; *see also Muskett*, 970 F.3d at 1236, 1243 (defendant "had fair notice that [18 U.S.C.] § 924(c)'s elements clause could ultimately be construed to encompass his commission of assault with a dangerous weapon"; among other reasons, a Supreme Court decision handed down "nearly three years before the conduct"

underlying defendant's conviction "provided notice that the logic of [a previous Tenth Circuit case holding that Colorado third-degree assault was not categorically a crime of violence] rested on shaky foundations"); *Lustgarden v. Gunter*, 966 F.2d 552, 554 (10th Cir. 1992) (Colorado Supreme Court's interpretation of parole statute was "dictated by the plain language of [the statute] and was, therefore, foreseeable").

2. Application to This Case

A due-process challenge to retroactive application of a judicial interpretation of a criminal statute presents a question of law, which we review de novo. *See Sallahdin v. Gibson*, 275 F.3d 1211, 1228 (10th Cir. 2002). Unlike the above-cited cases, the issue in this case is not the elements of the offense but the jurisdiction of the court. We can assume, however, that, as Defendant urges, the same principles apply, because under the *Rogers* standard we can easily reject Defendant's argument.

Although not everyone would agree with the Supreme Court's decision in *McGirt* (after all, four Justices dissented), we must reject any suggestion that the Court's interpretation of the applicable law was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers*, 532 U.S. at 457 (internal quotation marks omitted). Not only had this court, relying on Supreme Court precedents, come to the same conclusion before *McGirt* was handed down, *see Murphy v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam); *id.* (Tymkovich, C.J., concurring in denial of rehearing en banc) ("En banc review is not appropriate when, as here, a panel opinion faithfully applies Supreme Court precedent. An en banc court would

necessarily reach the same result, since Supreme Court precedent precludes any other outcome."), but also the Supreme Court itself declared in *McGirt* that its conclusion was compelled by precedent, *see McGirt*, 140 S. Ct. at 2462, 2464, 2470 (applying *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), and various precedents holding that allotment did not automatically disestablish reservations; concluding that "Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result. Perhaps they wish this case to be the first."). To be sure, *McGirt* changed long-standing practice of the criminal-justice system in Oklahoma. But such practice does not define the law. And in light of our decision in *Murphy*, nearly three years before Defendant killed Mr. Jumper, we think there was more notice that Oklahoma practice violated federal law than that Tennessee would abandon its year-and-a-day rule. [3]

[3] The application of *Murphy*'s (and *McGirt*'s) reasoning to reservations other than the Creek Reservation was also foreseeable because "the Creek Nation shares its relevant history in Oklahoma with the other Indian nations that composed the 'Five Civilized Tribes'—the Cherokees, Chickasaws, Choctaws, and Seminoles." *Pacheco v. El Habti*, 62 F.4th 1233, 1238 (10th Cir. 2023) (further internal quotation marks omitted). Hence, it was foreseeable that after *McGirt*, courts would "recognize[] that what held true for the Creek also held true for the Cherokee: Congress had never disestablished its reservation and, accordingly, the State lacked authority to try offenses by or against tribal members within the Cherokee Reservation." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2510 (2022) (Gorsuch, J., dissenting); *see Spears v. State*, 485 P.3d 873, 875 (Okla. Crim. App. 2021) ("Although the case now before us involves the lands of the Cherokee Nation, we find *McGirt*'s reasoning controlling.").

We therefore affirm Defendant's conviction. The court appropriately applied federal law.[4] The contours of Oklahoma law on voluntary manslaughter are irrelevant.[5]

B. Substantively Unreasonable Sentence

Defendant also argues that his 96-month sentence was substantively unreasonable. We again disagree.

"As a general matter, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Concepcion v. United States*, 142 S. Ct. 2389, 2404 (2022) (internal quotation marks omitted). The Supreme Court has therefore instructed that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). When reviewing the substantive reasonableness of a sentence, we "give substantial deference to the district court and

[4] *McGirt* also rejected Oklahoma's argument in the alternative that the Major Crimes Act never applied to eastern Oklahoma. *See* 140 S. Ct. at 2476–78. This holding was eminently foreseeable. As the Court noted, "arguments along these and similar lines have been 'frequently raised' but rarely 'accepted.'" *Id.* at 2476 (quoting *United States v. Sands*, 968 F.2d 1058, 1061 (10th Cir. 1992) ("The government urges us to adopt its frequently raised, but never accepted, argument that the State of Oklahoma retained jurisdiction over criminal offenses in Indian country. We . . . find the government's position wanting.")).

[5] Relying on his due-process arguments, Defendant further contends that his sentence is unconstitutional because "a prison sentence of any length for [his] conduct—which was not criminal at the time of its commission[]—must be considered a cruel and unusual punishment under the Eighth Amendment." Aplt. Br. at 27. But because we reject Defendant's argument that application of *McGirt* to his offense violated due process, we must also reject his argument that any punishment resulting from his conviction for that crime is for that reason cruel and unusual.

will only overturn a sentence that is arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Lawless*, 979 F.3d 849, 855 (10th Cir. 2020) (internal quotation marks omitted).

Defendant's argument on appeal is brief. He points to "the unique procedural posture of the case, the facts elicited at trial, the jury's unanimous conclusion that his conduct was justifiable self-defense under Oklahoma state law (which was the law of the land when the incident occurred), his youth (then only eighteen years old), and [Mr.] Jumper's wrongful conduct." Aplt. Br. at 27. He faults the district court for "fail[ing] to address these contentions." *Id.* He also argues that "the district court failed to appropriately consider other [18 U.S.C.] § 3553(a) factors, including [Defendant's] history and characteristics under § 3553(a)(1) and USSG § 5H1.1, his need for educational and vocational [t]raining under § 3553(a)(2)(d), and [Mr.] Jumper's wrongful conduct under USSG § 5k2.10." *Id.* at 28.

Defendant does not persuade us that the district court abused its discretion. We are not sure what Defendant means by "the unique procedural posture of the case," *id.* at 27, but if he is referring to the fact that his state charges were dismissed post-*McGirt*, we do not see how this series of events warrants a reduced sentence. Defendant also never tells us which specific "facts elicited at trial" warrant a lesser sentence, *id.*, and we will not conjure up such facts on his behalf. Meanwhile, the jury's response to the interrogatory is irrelevant in light of our discussion above rejecting the notion that "Oklahoma state law . . . was the law of the land when the incident occurred." *Id.* As for Defendant's age, criminal history, and need for education, as well as Mr. Jumper's

conduct, we presume, "[a]bsent any contrary indication in the record," that "a district court properly considered the pertinent statutory factors" in imposing a sentence. *United States v. Alvarez-Bernabe*, 626 F.3d 1161, 1167 (10th Cir. 2010) (internal quotation marks omitted); *see also United States v. Martinez-Barragan*, 545 F.3d 894, 903 (10th Cir. 2008) (a district court "need not . . . respond to every argument for leniency that it rejects in arriving at a reasonable sentence" (internal quotation marks omitted)). Defendant gives us no record-based reason to conclude that the district court failed to consider these factors. And in arguing that the district court did not "appropriately weigh" these considerations, Aplt. Br. at 29, Defendant simply asks us to re-weigh factors already presented to the district court—something we cannot and will not do, *see Lawless*, 979 F.3d at 856 ("[R]eweighing the [sentencing] factors is beyond the ambit of our review."). Although the district court's explanation was not lengthy, we perceive no abuse of discretion in its justification for its sentencing decision. Given the 12 shots fired into the body of Mr. Jumper (including multiple shots while Mr. Jumper was already lying on the ground), it was not an abuse of discretion to add nine months to the upper limit of the Guidelines range for Defendant's sentence.

III. CONCLUSION

We **AFFIRM** Defendant's conviction and sentence.

22-7027, *United States v. Budder*

McHUGH, Circuit Judge, concurring:

I concur in the majority opinion. I write separately only to address an issue not reached in the decision. Specifically, I take issue with Mr. Budder's assertion that his right of self-defense in Oklahoma is meaningfully different than the federal version of that defense. Mr. Budder contends he would have been acquitted under Oklahoma law and argues the special interrogatory proves it. But the special interrogatory did not adequately instruct on Oklahoma self-defense law and is thus a poor predictor of the result under Oklahoma law. Thus, I would conclude that, even if the application of federal law was in error, it did not prejudice Mr. Budder.

Oklahoma's self-defense statute reads:

> Justifiable homicide by any person
> A. Homicide is also justifiable when committed by any person in any of the following cases:
>
> 1. When resisting any attempt to murder such person, or to commit any felony upon him, or upon or in any dwelling house in which such person is;
> 2. When committed in the lawful defense of such person or of another, when the person using force reasonably believes such force is necessary to prevent death or great bodily harm to himself or herself or another or to terminate or prevent the commission of a forcible felony[.]
> [. . .]
>
> B. As used in this section, "forcible felony" means any felony which involves the use or threat of physical force or violence against any person.

Okla. Stat. tit. 21, § 733 (2014).

According to Mr. Budder's interpretation, Oklahoma law allows essentially unlimited force to prevent a forcible felony. But review of the Oklahoma Uniform Jury Instructions associated with this statute dispels that assertion.

> A person is justified in using deadly force in self-defense if that person reasonably believed that use of deadly force was necessary to prevent death or great bodily harm to himself/herself or to terminate or prevent the commission of a forcible felony against himself/herself. Self-defense is a defense although the danger to life or personal security may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that he/she was in imminent danger of death or great bodily harm.

Oklahoma Uniform Jury Instructions ("OUJI"), OUJI-CR 8-46. As relevant here, the comments to this instruction provide:

> [A] homicide is justifiable when a reasonable person would have used deadly force. A homicide is also justifiable when the use of deadly force is reasonably necessary because the danger appears imminent. Finally, the jury should view the circumstances from the viewpoint of the defendant. [The statute] provides that homicide is justifiable "[w]hen resisting any attempt . . . to commit any felony upon him." Nevertheless, the Court of Criminal Appeals has held that the use of deadly force is not justifiable to prevent commission of any felony. . . . *Only those felonies which involve danger of imminent death or great bodily harm may be defended against by the use of deadly force.*

Id. cmts. (emphasis added) (citing *Mammano v. State*, 333 P.2d 602 (Okla. Crim. App. 1958)) (other citations omitted). These instructions and comments leave little doubt that the right to use force against one who threatens a forcible felony is not unlimited. Deadly force is justified only when reasonably necessary. *Cf. Mammano*, 333 P.2d at 605 ("The defendant's life was not in danger and he was not about to suffer great bodily injury, at least, not under the conditions presented by this record, at the time and place of the alleged assault. The elements of self defense are lacking herein to justify the taking of the

decedent's life."); *Neill v. State*, 207 P.2d 344, 348 (Okla. Crim. App. 1949) (approving of a jury instruction that a person may use "such force as is reasonably necessary" but "when the necessity for the use of force ceased, the right to use force ceased").

This court recently elaborated on the reasonableness requirement of Oklahoma self-defense law in *United States v. Craine*, as follows:

> Under Oklahoma law, a "[h]omicide is . . . justifiable"—that is, it is not unlawful—when it is committed in perfect self-defense, defined as "the lawful defense of such person or of another, when the person using force reasonably believes such force is necessary to prevent death or great bodily harm to himself or herself or another or to terminate or prevent the commission of a forcible felony." Okla. Stat. Ann. tit. 21, § 733(A)(2). To invoke self-defense, the danger of death or serious bodily injury must be imminent. *See Mammano*[, 333 P.2d at 605].
> A defendant acts in "imperfect self-defense" if the factfinder concludes the defendant was "criminally negligent" in his "belief that deadly force was necessary to prevent death or great bodily harm." *United States v. Toledo*, 739 F.3d 562, 569 (10th Cir. 2014). If a defendant acts in imperfect self-defense, he is guilty of involuntary manslaughter, rather than murder. *Id.* . . .
> The critical difference "between perfect and imperfect self-defense [is] the reasonableness of the defendant's belief that deadly force was necessary to prevent death or great bodily harm—if reasonable, then he is entitled to a self-defense acquittal; if criminally negligent, then he is guilty of involuntary manslaughter." *Toledo*, 739 F.3d at 569 (footnote omitted). Thus, in both the perfect and imperfect self-defense contexts, the defendant must possess the subjective belief that deadly force was necessary to prevent death or great bodily harm, but only in the perfect self-defense context must the defendant's subjective belief also be objectively reasonable.

995 F.3d 1139, 1155–56 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 502 (2021) (footnotes omitted); *cf. Hommer v. State*, 657 P.2d 172, 174 (Okla. Crim. App. 1983) (explaining that "[t]he amount of force used may not exceed the amount of force a reasonable person, in the circumstances and from the viewpoint of the defendant, would have used" and

"[t]he measurement of force sufficient to repel an attack must be made by the defendant on the scene; he will be judged subsequently by the jury on the reasonableness of his reaction under the circumstances" (internal quotation marks omitted)).

Oklahoma has therefore cabined self-defense similarly to the federal application of that defense. Under federal self-defense law, "[a] person may resort to self-defense if he reasonably believes that he is in imminent danger of death or great bodily harm, thus necessitating an in-kind response." *Toledo*, 739 F.3d at 567. The Tenth Circuit's pattern jury instruction on self-defense reads:

> The defendant [name the defendant] has offered evidence that he was acting in [self-defense] [defense of another]. A person is entitled to defend [himself] [another person] against the immediate use of unlawful force. But the right to use force in such a defense is limited to using only as much force as reasonably appears to be necessary under the circumstances. *[A person may use force which is intended or likely to cause death or great bodily harm only if he reasonably believes that force is necessary to prevent death or great bodily harm to [himself] [another]]*. To find the defendant guilty of the crime charged in the indictment, you must be convinced that the government has proved beyond a reasonable doubt: *Either*, the defendant did not act in [self-defense] [defense of another], *Or*, it was not reasonable for the defendant to think that the force he used was necessary to defend [himself] [another person] against an immediate threat.

10th Cir. Crim. Pattern Jury Instruction No. 1.28 (first emphasis added).

In this case, evidence at trial showed that Mr. Budder shot Mr. Jumper at least twice after Mr. Jumper had fallen to the ground from the initial shots, at which point Mr. Jumper likely could not have posed any further threat to Mr. Budder that would justify deadly force. The special interrogatory did not instruct the jury that the force used to repel an attack may not be excessive; once the threat ceases, the right to self-defense ceases. *Mammano*, 333 P.2d at 605; *Neill*, 207 P.2d at 348. It also did not instruct the jury

on imperfect self-defense, *i.e.*, the possibility that a defendant might believe force is reasonable but that such a belief might be unreasonable, reducing the crime from voluntary to involuntary manslaughter. *Craine*, 995 F.3d at 1155–56. As a result, the jury's response to the incomplete special interrogatory is not predictive of the outcome under Oklahoma law.

In sum, I concur in the majority's reasoning for affirming Mr. Budder's conviction. And I also would affirm because Mr. Budder cannot show he was prejudiced by the application of federal self-defense law.