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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JIMCY McGIRT,

Defendant - Appellant.

No. 21-7048

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:20-CR-00050-JFH-1)

Josh Lee, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Denver, Colorado, 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**, **KELLY**, and **MORITZ**, Circuit Judges.

HARTZ, Circuit Judge.

In July 2020 the United States Supreme Court held that extensive lands in Oklahoma are reserved to the Creek Nation and must be treated as Indian country. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020). The prevailing party in that

case was Jimcy McGirt, an enrolled member of the Seminole Nation. Mr. McGirt argued that because his alleged crimes took place on the Creek Reservation and he is an enrolled member of a tribe, the State of Oklahoma lacked jurisdiction to prosecute him. The Supreme Court agreed and his state convictions were overturned, but he was later indicted in federal court and convicted by a jury on two counts of aggravated sexual abuse in Indian country and one count of abusive sexual contact in Indian country. He was sentenced to concurrent life sentences on each count.

Mr. McGirt challenges his conviction and sentence. First, he claims the district court erred in instructing the jury that it could consider prosecution witnesses' prior inconsistent sworn testimony only for impeachment purposes and not as substantive evidence. Second, he contends that the district court plainly erred in calculating his guideline offense level on the abusive-sexual-contact count based on USSG § 2A3.1 (the guideline for criminal sexual abuse) rather than USSG § 2A3.4 (the guideline for abusive sexual contact). Also before us is Mr. McGirt's pro se motion for leave to file a supplemental brief raising two additional arguments challenging the federal court's jurisdiction: (1) that the statutes under which he was indicted and convicted (18 U.S.C. §§ 2241 and 2244) are unconstitutional as applied to him; and (2) that his prosecution violates treaties between the federal government and the Mvskoke (Muskogee Creek) Nation.

Exercising jurisdiction under 28 U.S.C. § 1291, we reverse and remand to the district court for a new trial because of the incorrect instruction. We therefore need not address the sentencing issue. We reject Mr. McGirt's jurisdictional arguments.

I. BACKGROUND

In 1996 B.C. spent August 8 to 15—the week of her fourth birthday—with her grandmother Norma Blackburn (then Norma McGirt) and her grandmother's then-husband, Mr. McGirt, in Broken Arrow, Oklahoma.[1] B.C.'s mother, DeEtte Kuswane, was away on holiday in Mexico and left B.C. in Ms. Blackburn's care. Within a few weeks of her birthday, B.C. accused Mr. McGirt of sexually abusing her during her stay at her grandparents' home.

In late 1996 Wagoner County officials charged Mr. McGirt with first-degree rape, lewd molestation, and forcible sodomy. At the state-court trial in June 1997, B.C. and Ms. Kuswane testified for the state. Ms. Blackburn testified for the defense. The jury convicted Mr. McGirt on all three counts, and the court sentenced him to two 500-year terms and one term of life without parole.

After Mr. McGirt's state conviction was overturned by the United States Supreme Court, federal prosecutors brought the case to a grand jury, which indicted Mr. McGirt on two counts of aggravated sexual abuse and one count of abusive sexual contact, all based on the same 1996 allegations. In November 2020 Mr. McGirt's case was tried to a jury in the United States District Court for the Eastern District of Oklahoma.

The government's case against Mr. McGirt rested primarily on the testimony of B.C., Ms. Kuswane (to whom B.C. reported the abuse), and Ms. Blackburn (who

[1] The parties' briefs refer to the child as B.C., so we do the same.

reported changes in B.C.'s behavior after the alleged incidents and testified to a lost letter in which Mr. McGirt confessed his misconduct). The first government witness was a pediatrician who examined B.C. in September 1996 for signs of sexual assault. He confirmed that the exam indicated no physical trauma but said that this finding was not conclusive on whether abuse had occurred. B.C., Ms. Kuswane, and Ms. Blackburn testified the following day.

In the absence of incriminating physical evidence, Mr. McGirt's defense focused almost exclusively on challenging the reliability of the testimony provided by B.C., Ms. Kuswane, and Ms. Blackburn. The defense theory was that Ms. Kuswane, already hostile to Mr. McGirt because of disagreements dating back to when Ms. Kuswane lived with him and Ms. Blackburn, manufactured the allegations of abuse. The defense also tried to prove that Mr. McGirt lacked the opportunity to commit the crimes because he was seldom alone with B.C. On cross-examination defense counsel sought to emphasize internal inconsistencies in the direct testimony of all three witnesses, suggesting to the jury that the witnesses remembered little of what happened in 1996 and were fabricating much of what they said they did remember.

In addition, and of most importance to this appeal, the defense introduced 28 excerpts from the transcripts of the testimony of B.C., Ms. Kuswane, and Ms. Blackburn at the 1997 state-court preliminary hearing and trial. The testimony in these excerpts was inconsistent with the witnesses' 2020 federal-court testimony.

On the last day of trial, defense counsel proposed a jury instruction that, citing Federal Rule of Evidence 801(d)(1)(A), provided that the government witnesses' prior sworn inconsistent statements could be used not only to assess their credibility "but also as evidence of the truth of what the witness said in the earlier statement." R., Vol. I at 404. At the jury-instruction conference, the district court proposed its own instruction that would limit the jury's use of prior inconsistent statements to impeachment. Defense counsel objected to the court's proposed instruction on two occasions but the court overruled the objections. The jury was therefore instructed as follows:

> You have heard the testimony of a number of witnesses, including [B.C.], DeEtte Kuswane and Norma Blackburn. You have also heard that, before this trial, they have made statements that differed from their testimony here in court.
>
> These earlier statements were brought to your attention only to help you decide how believable their testimony in this trial was. You cannot use it as proof of anything else. You can only use it as one way of evaluating their testimony here in court.

Id. at 427.

The jury found Mr. McGirt guilty on all three counts. The district court sentenced him to three concurrent terms of life in prison. Mr. McGirt now timely appeals both his convictions and his sentence.

II. DISCUSSION

A. Alleged Instructional Error

1. Prior Inconsistent Statements and Harmless Error

We begin—and end—with Mr. McGirt's argument that the district court erred when it instructed the jury that the government witnesses' prior inconsistent statements could be used solely for impeachment.

When a "declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding," that statement "is not hearsay." Fed. R. Evid. 801(d)(1)(A); *see United States v. Tolliver*, 730 F.3d 1216, 1227–28 (10th Cir. 2013) ("[A] prior statement made by a declarant-witness who is subject to cross-examination about the statement is not hearsay as long as the prior statement is inconsistent with the declarant's testimony and was given under penalty of perjury . . . ." (internal quotation marks omitted)). "If such a prior inconsistent statement also fulfills the usual other requirements for admissibility, such as relevance, it is admissible as substantive evidence," 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 801.21[1], at 801-33 (Mark S. Brodin, ed., 2d ed. 2022) [hereinafter *Weinstein's Federal Evidence*] (emphasis added); it may then be "offered to prove the truth of the matter asserted" and not merely for impeachment of the declarant, *id.* § 801.02[1], at 801–6; *see* 30B Charles Alan Wright & Jeffrey Bellin, *Federal Practice & Procedure [Evidence]* § 6742, at 127 (2017) ("[P]rior inconsistent statements of a testifying witness are

routinely introduced to undermine the witness' credibility. . . . [S]uch statements need not be introduced for the truth of the matter asserted"; but "[p]rior statements of testifying witnesses can also be introduced as substantive evidence if they qualify for admission under a hearsay exemption [like that found in] Federal Rule of Evidence 801(d)(1)(A)").

Mr. McGirt proposed an instruction permitting the jury to consider prior inconsistent testimony for its truth, and referenced Rule 801(d)(2)(A) in support. But the district court rejected the proposed instruction and instead gave the jury an instruction based on Tenth Circuit Criminal Pattern Jury Instruction 1.10 (perhaps overlooking the Use Note stating that it should not be given when Rule 801(d)(2)(A) applies), which prohibited use of prior inconsistent statements as substantive evidence.[2]

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[2] Pattern instruction 1.10 (together with the use note) reads as follows:

> You have heard the testimony of [name of witness]. You have also heard that, before this trial, he made a statement that may be different from his testimony here in court.
>
> This earlier statement was brought to your attention only to help you decide how believable his testimony in this trial was. You cannot use it as proof of anything else. You can only use it as one way of evaluating his testimony here in court.
>
> Use Note
>
> This instruction must be given when a prior inconsistent statement which does not fall within Fed. R. Evid. 801(d)(2)(A) has been admitted. If several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, this instruction should identify which statements were offered for impeachment purposes. It should also be given during trial as a limiting instruction, if requested under Fed. R. Evid. 105. This seems consistent

In its brief to this court, the government made two arguments that there was no error. First, the government suggested there may be no error because Mr. McGirt did not use an official version of the state-court trial transcript in introducing B.C.'s prior inconsistent statements. But the government provides no evidence that defense counsel relied upon or read into the record any inaccurate prior statements. And at trial, despite some initial confusion about transcript pagination, the court ensured all parties had the same version and the government offered no further objection. We therefore reject this argument.

Second, the government argued that the district court did not err because prior statements by B.C. and Ms. Kuswane were not really inconsistent with their 2020 testimony and that, at most, the court ought to have instructed the jury to consider only Ms. Blackburn's prior statements as substantive evidence. As best we can tell,

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with *United States v. Carter*, 973 F.2d 1509, 1512 (10th Cir. 1992); *United States v. Orr*, 864 F.2d 1505, 1509 (10th Cir. 1988); *United States v. Soundingsides*, 825 F.2d 1468, 1470 (10th Cir. 1987).

The instruction read to the jury stated:

> You have heard the testimony of a number of witnesses, including [B.C.], DeEtte Kuswane and Norma Blackburn. You have also heard that, before this trial, they have made statements that differed from their testimony here in court.
>
> These earlier statements were brought to your attention only to help you decide how believable their testimony in this trial was. You cannot use it as proof of anything else. You can only use it as one way of evaluating their testimony here in court.

R., Vol. I at 427.

the government was arguing that a prior statement about an event is not inconsistent with present testimony by the witness that she cannot recall the event. At oral argument, however, the government abandoned that contention.

The government's concession appears to us to have been a prudent one. Although this court has not addressed the issue in a published opinion, the great weight of authority treats a prior assertion of a fact as inconsistent with a present assertion of a lack of memory for purposes of Federal Rule of Evidence 801(d)(1)(A). "A witness's statement that he or she has no recollection of the subject may be treated as 'inconsistent' with a former statement concerning the now-forgotten matter." 5 *Weinstein's Federal Evidence* § 801.21, at 801-37; *see* Daniel D. Blinka, *Prior Inconsistent Statements: The Simple Virtues of the Original Federal Rule*, 84 Fordham L. Rev. 1407, 1412 (2016) ("Early cases required the judge to find reason to doubt the good faith of a witness's denial of a prior statement. Later cases, however, quietly jettisoned the predicate of dubious good faith denials, allowing the use of prior inconsistencies without distinguishing between real or feigned memory lapses." (footnote and internal quotation marks omitted)); 4 Christopher Mueller & Laird Kirkpatrick, *Federal Evidence* § 8:35, at 315 (4th ed. 2013) ("[C]laimed lack of memory at trial usually is enough to support a conclusion that a prior positive statement is inconsistent"; "showing that the trial position is feigned amounts to gilding the lily, or an additional argument in favor of finding inconsistency, but it is not necessary."); *cf.* Fed. R. Evid. 801(d)(1)(A) advisory committee's note to 1972 proposed rules (explaining the rationale for excluding prior inconsistent statements

from the definition of hearsay). There is also substantial circuit caselaw under Rule 801(d)(1)(A) admitting prior testimony of witnesses who could not recall the event at trial. *See United States v. Butterworth*, 511 F.3d 71, 74–75 (1st Cir. 2007); *United States v. Marchand*, 564 F.2d 983, 999 (2d Cir. 1977) (Friendly, J.); *United States v. Mayberry*, 540 F.3d 506, 516 (6th Cir. 2008); *United States v. Cooper*, 767 F.3d 721, 728 (7th Cir. 2014); *United States v. Russell*, 712 F.2d 1256, 1258 (8th Cir. 1983); *United States v. Milton*, 8 F.3d 39, 47 (D.C. Cir. 1993); *see also United States v. Owens*, 484 U.S. 554, 556, 561–64 (1988) (admitting under Rule 801(d)(1)(C) testimony by victim of battery that he remembered identifying the defendant as his attacker but that because of head trauma from the attack he could not remember seeing defendant during the attack).

Thus, the only issue before us is whether the error in instructing the jury was harmless. *See United States v. Holly*, 488 F.3d 1298, 1304 (10th Cir. 2007) (instructional error is subject to harmless-error review). "The burden of proving harmless error is on the government." *United States v. Benvie*, 18 F.4th 665, 670 (10th Cir. 2021) (brackets and internal quotation marks omitted). The extent of that burden depends on whether the instructional error violated a constitutional right. *See United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (en banc). A constitutional error is harmless only if "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder v. United States*, 527 U.S. 1, 15 (1999) (internal quotation marks omitted). Otherwise, the government bears a less onerous, but still stringent, burden. The Supreme Court

expressed the test in its opinion in *Kotteakos v. United States*, 328 U.S. 750, 765 (1946):

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Because reversal is required under the *Kotteakos* test, we need not decide whether the error here should be evaluated under the harmlessness test for constitutional errors, which is more favorable to a defendant.

We now turn to an examination of the evidence at trial to explain our conclusion. Unquestionably, there was sufficient evidence to sustain the verdicts. But the following summary reveals the internal inconsistencies and weaknesses in the testimony by the government witnesses and demonstrates the significance of the district court's decision to prohibit the jury from considering the witnesses' prior inconsistent statements as substantive evidence.

We are fully aware of the hazards of trying to assess the impact of testimony when we are limited to reviewing a cold record consisting of transcripts. A devastating cross-examination may appear ineffective when reviewed on a transcript, and vice versa. As a result, a reviewing court may possess grave doubts that would not be shared by anyone attending the trial. That is an unfortunate risk that occurs when error has been committed at trial.

But under our system of justice, that risk must be borne by the party that benefited from the error and bears the burden of persuasion on harmlessness.

2. Testimony of Family Members

a. B.C.'s Testimony

Day two of trial testimony began with B.C. She said that she only "[k]ind of" remembered the summer she turned four and had just "a few memories of what happened." R., Vol. III at 217. She did remember Mr. McGirt touching her vaginal area. The prosecutor asked about the times he used his mouth; B.C. answered that it occurred more than once, "mostly . . . in the living room on the couch," although sometimes in a bedroom. *Id.* at 225. She also recounted an incident in which she was in Mr. McGirt's truck, and he took her hand and placed it on his penis, which he had taken out of his pants. B.C. said that Mr. McGirt warned her not to tell anyone about the molestation because her grandmother would stop loving her and "he would go to jail." *Id.* at 226.

But B.C. was vague on a number of matters. When the prosecutor asked if Mr. McGirt touched her vaginal area with any part of his body other than his mouth, B.C. stated that she could not remember and had to be prompted about the use of his hand. She was unable to provide additional information about that abuse, testifying that "I just remember him just touching me down there. I don't remember full details." *Id.* at 223. And when asked again "if he did anything with his fingers" she responded "No, I can't remember." *Id.* She also could not remember whether the alleged contact by Mr. McGirt's hands occurred more than once. In addition, B.C. was unable to provide

information about her time with her grandparents. She could not remember, for example, who else was in the home during the week in question, testifying that her Uncle Matthew may have been there but then stating, when asked if she had memories of his presence, that she could not remember.

B.C.'s memories about her disclosure of the abuse were also limited. She testified about telling her mother while they were at home watching a movie. And she remembered telling her cousin Sabrina, aged 10 or 11 at the time. Sabrina then told her own mother, B.C.'s aunt Nena Hickman. But B.C. could not recall her aunt's audio-recording her statement of the allegations, although Ms. Kuswane later testified that a recording had been made. Nor did B.C. have any other memories of the investigation; she did not recall police interviews or the pediatrician's examination, concluding "I don't remember a whole lot, there's a bunch of gaps." *Id.* at 228.

Part of the defense strategy for cross-examination was to emphasize how little B.C. was able to remember. She had no memory of significant events that took place that week: she was unable to remember her fourth birthday or having a party, or her grandmother picking her up from her father, or her mother coming home on August 15. And she could not remember how often the abuse occurred.

Defense counsel focused particularly on how often Mr. McGirt could have been alone with her. She testified, for example, that she could not recall staying with her father at any time that week. Further, she was confused about when her grandmother, Ms. Blackburn, had been at home. She first testified that Ms. Blackburn

"usually worked nights" from 7 p.m. to 7 a.m. *Id.* at 243. But when asked if Ms. Blackburn instead worked days (from 7 a.m. to 7 p.m.) during the week B.C. stayed with her grandparents, B.C. said she could not remember. Also, B.C. testified that she could not remember taking part in activities with her grandmother that week, such as an outing to a dinosaur exhibit at a local mall, nor could she recall whether her grandmother had been at home the entire weekend of August 10th and 11th.

That cross-examination paved the way for the second part of the cross-examination strategy—namely, to introduce excerpts from B.C.'s state-court preliminary-hearing and trial testimony that were inconsistent with the testimony she had given on direct. These prior inconsistent statements were offered to support the defense theory that the allegations against Mr. McGirt were the result of coaching by B.C.'s mother and Aunt Nena, who had allegedly employed the same tactic against the aunt's former boyfriend. We provide some examples.

When asked on cross-examination whether her mother had ever told her what to say in making allegations of abuse and in testifying in court, B.C. said "No." After that exchange, defense counsel read an excerpt from B.C.'s state-court trial testimony:

> [QUESTION.] "Okay. Did your mom tell you what to say here in court today?" And your answer, you nod your head up and down. The question then is, "Yes"? "Is that a yes?" And you answer, "Yes."[3]

[3] In transcribing the federal-court transcript we employ the same typographical conventions as the court reporter. Questions and answers between counsel and the testifying witness are identified by "Q." and "A.". When the transcript indicates that

Id. at 240. Defense counsel then asked B.C. once more: "Did your mom tell you to say that [Mr. McGirt] did these things to you? Do you remember your mom telling you what to say about what Mr. McGirt allegedly did?" *Id.* B.C. answered, "I can't remember."[4] *Id.*

Counsel later asked B.C. whether she remembered "if other people besides your mom may have tried to tell you what to say in [state] court"; B.C. answered no. *Id.* at 254. Counsel then read two additional excerpts from the state-court trial transcript, in which B.C. had testified that her Aunt Nena told her what to say on the recording and a counselor named Dr. Jennifer had told her what to say in court.

In addition, defense counsel elicited testimony from B.C. about whether she had also raised sex-abuse allegations against Bill Gray, her Aunt Nena's ex-boyfriend. At a pretrial conference, defense counsel had explained the significance of allegations against Mr. Gray:

> [O]ur defense is that this accusation [against Mr. McGirt] was contrived by the two daughters, the mother and the aunt of the complaining witness, in order to get Mr. McGirt out of the home. Just like it was

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counsel is reading from the state-court transcript, questions and answers are identified by "QUESTION." and "ANSWER.".

[4] There were also internal inconsistencies in B.C.'s state-court testimony. Several minutes after the exchange quoted in the text above, defense counsel at the state trial asked B.C. once more if her mother had coached her:

> QUESTION[.] Earlier you told me your mom did tell you to say that [Mr. McGirt molested you].
> [ANSWER.] She didn't.
> QUESTION. She didn't? So you are changing your mind?
> [ANSWER. Nodding up and down.]
> [QUESTION.] Do you change your mind a lot?
> [ANSWER. Nodding up and down.]

Id. at 286–87.

> contrived in order to get Uncle Bill out of the home. So [testimony as to allegations against Mr. Gray] would go to pattern, plan, similar circumstances. . . . [I]t definitely goes to [B.C.'s] credibility and it definitely goes to her being trained.

Id. at 93. When cross-examined at trial by defense counsel, B.C. testified that she remembered Mr. Gray, but when asked, "Did you ever tell your mom that Bill Gray touched you?" she answered "No." *Id.* at 234–35. Counsel then read two excerpts from state-court transcripts, one from a preliminary hearing and a second from the trial. At the state-court preliminary hearing, B.C. testified that she had told her mother that Bill Gray had "touched" her; at the state-court trial, when asked if she had told her mother that Bill Gray had touched her, B.C. answered "[m]aybe." *Id.* at 235, 238–39.

The prosecutor sought to rehabilitate B.C. on redirect examination. She read testimony from the state trial in which B.C. denied that her mother and aunt had told her to accuse Mr. McGirt and stated she had "just said it by myself." *Id.* at 266. And the prosecutor read testimony in which B.C. ultimately denied knowing who Bill Gray was. At the conclusion of the redirect, B.C. insisted that the allegations against Mr. McGirt could not have been fabricated because she had memories of the molestation. When asked by the prosecutor to tell the jury her "strongest independent recollection of what happened to you," B.C. responded "I remember he was mowing the back yard and then he came in, and he sat me on the ledge of the couch in the living room. I remember it was a blue couch. And he put his mouth on my vagina." *Id.* at 282.

Defense counsel was permitted to question B.C. again on recross. Counsel began by asking B.C. about her clearest memory: "You just testified that your strongest memory is purportedly an oral issue. Do you know why you did not say anything about that on September 12th when you were talking with the doctor with your mom present in the room?" *Id.* at 283. B.C. answered "No." *Id.*

Counsel then read from the cross-examination of B.C. at the state trial where she admitted that she had changed her testimony about whether her mother had told her what to say; when asked "Do you change your mind a lot?" she had nodded her head up and down. *Id.* at 287.

Counsel also returned to an issue raised on cross-examination: whether Mr. McGirt had unsupervised access to B.C. He asked B.C. about whether she remembered her Uncle Matthew being in the home during the week in question. B.C. testified that she recalled his being there "a little bit" but opined that he could not have been present during the alleged abuse on the couch because she "doubt[ed] that [Mr. McGirt] would do that near him." *Id.* at 290. But, as counsel then read into the record, during the state-court trial B.C. had apparently testified to the contrary:

> QUESTION: Uncle Matt, where was he when you were staying at grandma's house?
> [ANSWER:] Um, um, oh, that was on the couch.
> QUESTION: Okay. Who was on the couch?
> ANSWER: I was.
> QUESTION: Okay. Where was Uncle Matt?
> ANSWER: In the bedroom sleeping.

Id. Counsel proceeded to ask about Ms. Blackburn's presence in the home during the alleged assaults. B.C.'s testimony was uncertain, if not outright inconsistent. At first,

B.C. testified that the alleged sexual abuse on the couch occurred during the day. She also testified that the incident in which Mr. McGirt placed her hand on his penis happened during the day. The only two instances of abuse of which she had any specific memory, then, were described as daytime events. But upon further questioning from counsel about when Ms. Blackburn was at home, B.C. appeared to say that all the abuse occurred at night because that was when her grandmother was at work:

> Q. Now, Norma, your grandma . . . you say things happened during the night; right?
> A. I said that happened during the day.
> Q. Did anything happen to you during the night? . . . Because was your grandma – you thought your grandma was at work during the night; correct?
> A. Hm-mm.
> Q. Yes?
> A. Yes.
> Q. And so your testimony is things happened at night while your grandma Norma was at work from 7 p.m. to 7 a.m.; true? Yes?
> A. Yes.
> Q. Do you remember whether your grandmother was ever home when Mr. McGirt purportedly touched you?
> A. I can't remember.

Id. at 290–91. Counsel then read into the record state-court trial testimony inconsistent with the view that the abuse must have happened at night when Ms. Blackburn was at work:

> "QUESTION: Okay. Was anybody else at home when he touched you?" And your answer was, "Grandma." And the next question is: "All the time?" And your answer, "Nods head up and down." . . . And then, "QUESTION: Sometimes?" "ANSWER: Nods head up and down."

Id. at 294.

b. Ms. Kuswane's Testimony

Ms. Kuswane, B.C.'s mother, was next to take the stand. Ms. Kuswane testified that before the alleged abuse she got along with Mr. McGirt and "wasn't necessarily upset that [he and Ms. Blackburn] got married." *Id.* at 299. She also said that during and after her trip to Mexico, B.C. seemed different: (1) when she spoke to her daughter on the phone from Mexico, B.C. kept asking when she was coming home; (2) when she picked B.C. up, the child was eager to leave; and (3) B.C.'s overall behavior changed in the months that followed, as she became angry and quiet and resisted her mother's attempts to drop her off at school.

Ms. Kuswane testified about B.C.'s disclosure of the alleged abuse, which she said occurred about three days after she returned from Mexico, while she and B.C. were at home watching a movie. She testified that she did not ask B.C. a lot of questions because she did not want B.C. to feel uncomfortable, but that on B.C.'s own initiative she told her mother additional details over the following days and months. Ms. Kuswane also said that B.C. disclosed the abuse to cousin Sabrina and then to Aunt Nena, and that the aunt recorded the disclosure. When the prosecutor asked Ms. Kuswane if she was aware of the defense's theory—that she had fabricated the allegations and coached B.C. in reporting and testifying to them—she acknowledged that she was aware of the allegation but denied it.

Ms. Kuswane also testified about the subsequent investigation and state-court proceedings. She said she took B.C. to counseling at a church before reporting the alleged abuse to police but was unable to identify exact dates for either event. She

recounted telling her mother about the allegations and recalled feeling hurt that her mother decided to remain married to Mr. McGirt. Ms. Kuswane also described a letter Mr. McGirt sent to Ms. Blackburn a few years later in which he admitted to and apologized for the abuse, and in response to which Ms. Blackburn sought a divorce. The letter was not produced at trial.

On cross-examination, defense counsel elicited background information that could suggest that Ms. Kuswane had reason to dislike Mr. McGirt long before the alleged abuse occurred. Living with Ms. Blackburn when she married Mr. McGirt were her children and their families: Ms. Kuswane, Nena, Nena's children, and Matthew. But both Ms. Kuswane and Nena (with her children) left within a matter of months. Ms. Kuswane said that the departures were voluntary—Nena left because she received a subsidized apartment of her own, and Ms. Kuswane, then pregnant with B.C., left to live in a home for unwed mothers. Ms. Kuswane denied that there had been any significant disagreement with Mr. McGirt before the alleged abuse.

Then, as with B.C., defense counsel used Ms. Kuswane's state-court testimony to contradict statements made on direct examination. For example, although Ms. Kuswane said she did not know if B.C. spent time with her father on her fourth birthday, at a preliminary hearing in state court she testified that B.C. had done so, although she did not know if B.C. had stayed through the night at her father's house.

The most significant use of state-court transcripts was as evidence that B.C. both disclosed the abuse to her mother considerably later and discussed the allegations with her mother more frequently than Ms. Kuswane admitted on direct

examination—facts supporting the defense's theory that the allegations were fabricated and that B.C. had been coached. Upon questioning by defense counsel about the disclosure timeline, Ms. Kuswane testified once more that B.C. disclosed the alleged abuse three days after returning from her grandparents' house. But during the state-court trial Ms. Kuswane had testified that B.C. did not disclose for two weeks. Then defense counsel at the federal trial asked Ms. Kuswane about how often she spoke with B.C. about the allegations:

> Q. Have you spoken to your daughter through the years about these allegations?
> A. We don't talk about it unless she brings it up.
> Q. When she would bring it up would you talk about it?
> A. We wouldn't go into details. It would just be that she had a nightmare or something. That's it.
> Q. Do you discuss it?
> A. No.
> Q. When she brings it up, do you discuss it?
> A. No.

Id. at 382–83. During the state-court trial, however, Ms. Kuswane admitted that she and B.C. had discussed the allegations on multiple occasions in the ten months between the alleged abuse and the trial:

> QUESTION: How many times have you discussed it?
> ANSWER: I can't count. It's spontaneous. She brings it up, we discuss it.
> QUESTION: More than 20?
> ANSWER: No. I don't count how many times.
> QUESTION: More than 10?
> ANSWER: Well, I guess.
> QUESTION: You just can't tell me?
> ANSWER: Maybe more than 10.

Id. at 383–84.

Ms. Kuswane also admitted a significant role in reporting the alleged abuse to authorities. She testified that when she took B.C. to the pediatrician for a limited examination, she was the one who told staff that the visit was to investigate "possible sexual abuse"; and she said that she could not recall if B.C. ever actually spoke to the doctor or made the allegations herself. Ms. Kuswane also testified about the day she and Nena brought the audio recording to a sheriff's deputy, meeting not at the sheriff's office but in a convenience-store parking lot. Ms. Kuswane recalled that the deputy listened to the recording in his vehicle and then went inside to throw up because he was "very upset from what he heard." *Id.* at 394. When asked if the deputy returned the tape, Ms. Kuswane replied "I don't remember. It was chaos. I don't remember. I don't remember details." *Id.*

c. Ms. Blackburn's Testimony

Ms. Blackburn, B.C.'s grandmother, was last to testify for the government. She corroborated Ms. Kuswane's testimony that B.C. seemed somewhat anxious during the week in question and that B.C. was more reserved after her mother returned. Ms. Blackburn also corroborated Ms. Kuswane's testimony about the letter from Mr. McGirt in which he allegedly admitted the abuse.

Overall, however, Ms. Blackburn's testimony was characterized by some confusion and an inability to remember relevant events. When asked about who was living in the home during the week in question, she said that it was "difficult to remember[;] it's been so long ago" and testified inaccurately that Ms. Kuswane was "probably" living with her at the time. *Id.* at 413. She testified that her normal work

shift was nights but could not recall if she had worked day shifts that week. She said that when she was at work either Matthew or Mr. McGirt would watch B.C., but she seemed surprised to learn that B.C. had stayed with them for eight days because she "d[id]n't remember it being that long." *Id.* at 418. In addition, she cast doubt on Ms. Kuswane's testimony that she had not disliked Mr. McGirt before the alleged abuse by admitting that there was "difficulty . . . in him becoming a stepfather to the girls" when they "felt that he was trying to be controlling" over their mother, and they had talked with her about leaving him. *Id.* at 412.

Defense counsel's cross-examination of Ms. Blackburn was extensive; the inconsistencies between her state- and federal-court testimony were significant.

Counsel asked Ms. Blackburn about the relationships Mr. McGirt had with Ms. Kuswane and Nena. Ms. Blackburn denied that when she and Mr. McGirt married, he asked Nena when she and her children were going to move out. But during the state-court trial she testified that she and Mr. McGirt asked Nena when she and her children were going to leave and acknowledged that Nena was not happy about leaving home. During the state-court trial Ms. Blackburn also testified that Ms. Kuswane was upset about having to leave and blamed Mr. McGirt rather than her mother. After defense counsel read these state-court transcript excerpts into the record, Ms. Blackburn acknowledged that relations between Ms. Kuswane and Mr. McGirt had deteriorated before the eventual allegations of abuse, saying it was because Ms. Kuswane disliked the way Mr. McGirt was treating her mother. Defense counsel then read another excerpt from the state-court transcript in which Ms.

Blackburn had described Ms. Kuswane's feelings toward Mr. McGirt, even before the allegations were made, as "[h]ostile," having told him "that he was not her father and that she didn't have to live by the house rules." *Id.* at 444. Ms. Blackburn admitted that these prior statements were true. Counsel asked Ms. Blackburn if Ms. Kuswane had advised her to leave Mr. McGirt; Ms. Blackburn responded that this had happened later in the marriage but not at the beginning. But during the state-court trial she testified that Ms. Kuswane had asked her to leave Mr. McGirt "[t]oo many times to count" and that Nena felt the "very same way." *Id.* In response, Ms. Blackburn said that neither Ms. Kuswane nor Nena felt Mr. McGirt treated her properly, but insisted the hostilities intensified after the alleged abuse. When defense counsel then read her testimony at the state-court trial that hostilities not only predated the alleged abuse but in fact predated the marriage, Ms. Blackburn admitted that neither Nena nor Ms. Kuswane liked Mr. McGirt.

Counsel next questioned Ms. Blackburn about Mr. McGirt's access to B.C. during the eight days Ms. Kuswane was away. Ms. Blackburn confirmed that she was off work and at home with B.C. the entire weekend of August 10th and 11th. She did not recall that B.C. spent time at her father's house that week, saying he did not have a place of his own. But defense counsel read into the record yet another state-court trial excerpt in which Ms. Blackburn testified that out of the eight days Ms. Kuswane was in Mexico, B.C. spent three of the days and one night with her father.

Finally, counsel challenged Ms. Blackburn's direct-examination testimony that B.C.'s behavior changed during and after the week with her grandparents. Initially,

Ms. Blackburn testified that toward the end of the week B.C. acted afraid of Mr. McGirt, cried, and had nightmares. She also testified that she was aware of symptoms of abused children and that she did not observe any of these characteristics in B.C. until after the alleged abuse occurred. But this testimony was contradicted by her state-court testimony. During the state-court trial Ms. Blackburn testified that B.C. liked being around Mr. McGirt and had never acted afraid of him, even after the alleged abuse; that B.C. exhibited no behavioral changes or other indicia of abuse after the week in question, although it was clear she missed her mother; and that B.C. had already been having severe nightmares for about a year by the time she stayed with her grandparents. Ms. Blackburn admitted that her prior testimony about B.C.'s nightmares was true.

Following a brief redirect examination of Ms. Blackburn, the government rested.

The only witness for the defense was Terry Staber, Ms. Blackburn's son and Ms. Kuswane's brother. Ms. Kuswane and Ms. Blackburn had accused Mr. Staber of stealing the letter in which Mr. McGirt allegedly admitted his guilt when Mr. Staber removed from her home a dresser in which Ms. Blackburn had stored the letter. Mr. Staber testified that in December 2017 he moved the dresser out of Ms. Blackburn's bedroom to a storage unit and returned the key to his mother but he never touched any of the contents, including any letters. Mr. Staber also denied having ever read the letter himself. Following Mr. Staber's testimony, the defense rested.

3. Harmless Error

These summaries reveal the weakness of the government's case—which in the absence of physical evidence rested almost entirely upon testimony by B.C., Ms. Kuswane, and Ms. Blackburn that suffered from faded memories and internal inconsistencies.

The impeachment of those witnesses by their prior testimony, as permitted by the district court, further weakened the government's case. Contrary to the government's argument, the verdict here was not "supported by overwhelming evidence." Aplee. Br. at 29. Additional evidence favorable to the defense may have altered the outcome. What effect, then, from the prohibition on using the prior testimony as substantive evidence?

The use of prior inconsistent statements as substantive evidence can be critical for the party with the burden of persuasion, such as a prosecutor stuck with a "turncoat witness" who refuses to implicate the defendant at trial after providing strongly incriminating testimony before a grand jury. But one can be skeptical that substantive use of such prior inconsistent statements will be of much help to a party without the burden of persuasion, such as a criminal defendant, because the party can prevail simply by undermining the credibility of adverse witnesses. As Professor Stephen Saltzburg has explained:

> Whenever a witness testifies to a fact and a prior statement repudiates that very fact, the trier of fact must choose to believe or disbelieve the fact. If the trier of fact disbelieves the trial testimony, it believes the prior statement. If it disbelieves the witness about a fact, it concludes that the fact is untrue. It really does not matter whether the rejection of the testimony is

> attributable to a prior inconsistent statement or some other flaw in the testimony.
>
> In this scenario, it actually makes no difference whether the prior inconsistent statement is admitted solely for impeachment or as substantive evidence. The reason is that the prosecution bears the burden of persuasion, and the defense wins the battle of the witness (and perhaps the case) by persuading the trier of fact to reject the witness's testimony. Because the defense bears no burden of persuasion, the prior inconsistent statement is not needed to make an affirmative case.

Stephen A. Saltzburg, *Prior Inconsistent Statements and Substantive Evidence—Federal Rule 801(d)(1)(A): The Compromise*, 84 Fordham L. Rev. 1499, 1502–03 (2016); *see* Phillip W. Broadhead, *Why Bias Is Never Collateral: The Impeachment and Rehabilitation of Witnesses in Criminal Cases*, 27 Am. J. Trial Advoc. 235, 263 (2003) ("If a key prosecution witness's testimony is effectively impeached by opposing counsel, then the burden of proof in the case may not be met by the prosecution, which would result in a verdict of not guilty. . . . Witness credibility issues such as . . . inconsistent statements . . . often precipitate the most powerfully significant evidence presented at trial, thereby overcoming, or conclusively corroborating, the presumption of innocence of the defendant. Impeachment evidence can often be more persuasive than the substantive evidence advanced during trial.").

But not so in every case. Allowing the jury to consider the witnesses' prior inconsistent statements as substantive evidence would have performed two functions essential to Mr. McGirt's defense strategy.

One use of the witnesses' prior inconsistent testimony was to create an alternate narrative of the week in question by providing the only (or stronger) evidence of particular facts. Although in some instances witnesses confronted with

inconsistent prior testimony admitted the truth of that testimony in whole or in part, in most instances they said that they did not remember testifying to those facts or offered no response at all. In addition, the prior statement by one witness could be used not only as impeachment to discredit the witness herself but also as substantive evidence to discredit other witnesses.

As for the alternate narrative, recall that Mr. McGirt wanted the jury to reach three conclusions: (1) that the allegations were the result of implanted memories and coaching by Ms. Kuswane and Aunt Nena, who felt preexisting animosity toward Mr. McGirt; (2) that he lacked the opportunity for repeated abuse because Ms. Blackburn and Matthew were often home with B.C.; and (3) that B.C. displayed no behavioral or emotional symptoms of abuse. The substance of the witnesses' prior statements provided the evidence essential for the jury to find those facts.

On the first desired conclusion, B.C.'s state-court testimony provided the sole evidence that she had been coached by Ms. Kuswane on the allegations made before and during trial. And that testimony was corroborated by Ms. Kuswane's state-court statements that she and B.C. had repeatedly discussed the allegations, contrary to her federal-court testimony that she and B.C. never discussed the allegations. B.C.'s state-court testimony also provided the sole evidence that allegations against Mr. McGirt were not only coached but were part of a broader pattern: in state court B.C. testified that she had made similar allegations against Aunt Nena's boyfriend Bill Gray.

Further support for the coaching theory came from state-court testimony by Ms. Blackburn about preexisting animus between Ms. Kuswane, Aunt Nena, and Mr. McGirt. Ms. Blackburn admitted on cross-examination that there was some tension arising from Mr. McGirt's joining the household,[5] but her prior testimony provided substantially stronger evidence that Ms. Kuswane and Nena disliked Mr. McGirt and repeatedly attempted to break up the marriage. Ms. Blackburn's state-court testimony provided the sole evidence that Mr. McGirt's moving into the home prompted Ms. Blackburn to ask Nena when she and her children were going to move out and that Nena was unhappy about leaving, that Ms. Kuswane was hostile to Mr. McGirt

[5] Although the transcript of the federal trial indicates that Ms. Blackburn conceded during cross-examination that Ms. Kuswane blamed Mr. McGirt for her having to leave the home, it appears to us that this may have been a typographical error and that the concession actually occurred during the state trial. The transcript reads as follows, with counsel reading from the state-court transcript:

> QUESTION: Okay. Was [Ms. Kuswane] happy about leaving?
> ANSWER: No.
> QUESTION: Was she upset about it?
> ANSWER: Yes.
> QUESTION: Did she blame it on anyone for having to leave?
> ANSWER: Yes.
> QUESTION: Who did she blame it on?
> A. Jimcy, but he was not -- what is it -- not to [sic] cordial to her either.

R., Vol. III at 443 (internal quotation marks omitted). The use of "A." suggests that Ms. Blackburn interrupted counsel's recitation of the state-court transcript to answer the question herself. But were this so, that would imply there was no answer to the final question in state court. "A." possibly should have been transcribed as "ANSWER." Ms. Blackburn did, however, concede that eventually Ms. Kuswane was hostile toward Mr. McGirt, attributing the hostility to the way he treated Ms. Blackburn.

before he married Ms. Blackburn, and that both daughters repeatedly—and from an early date, even before the marriage—asked her to leave Mr. McGirt.

The evidence contained in this state-court testimony produces an alternate narrative of preexisting hostility to Mr. McGirt and of a pattern of coaching B.C. in making sex-abuse allegations with a goal of disrupting relationships with male outsiders. To be sure, Ms. Blackburn's concessions during cross-examination—that neither Ms. Kuswane nor Nena felt Mr. McGirt treated Ms. Blackburn well, that her daughters and Mr. McGirt did not get along, that Ms. Kuswane blamed him for her having to leave the house,[6] and that B.C. had nightmares before the allegations arose—also assisted Mr. McGirt in establishing his alternate narrative. But the district court's decision to prevent the jury from considering the witnesses' earlier testimony as substantive evidence effectively excluded evidence that strongly supported that narrative of manufactured allegations.

Regarding the second desired conclusion, the witnesses' state-court testimony provided the strongest evidence that Mr. McGirt was seldom alone with B.C. Their federal testimony suggested that Mr. McGirt had ample opportunity for abuse: B.C.'s federal-court testimony was that the abuse most likely happened when she was alone with Mr. McGirt, and Ms. Blackburn testified that, although she was home on some of the days B.C. stayed with her and Mr. McGirt, she also left B.C. in the care of either Mr. McGirt or Matthew while she went to work. But their state-court testimony

[6] *See* footnote 5.

provided further evidence suggesting that there were additional days on which B.C. had another caregiver. For example, the prior testimony of Ms. Blackburn included the only testimony that B.C. spent a significant amount of time that week—three days and one night—with her father. And B.C.'s prior testimony indicates that at that time, not long after the alleged events, she recalled the frequent presence of Ms. Blackburn and Matthew; in fact, she testified in state court that Ms. Blackburn and/or Matthew were always in the home when the abuse occurred, a fact which, as the now-adult B.C. acknowledged on cross-examination, does not seem plausible. The witnesses' prior statements about who was in the house (and when) substantially assisted the defense's lack-of-opportunity argument.

The third conclusion that Mr. McGirt sought to convince the jury of was that B.C. demonstrated no indicia of sexual abuse. The examining pediatrician found no physical evidence, although he could not rule out abuse. The prosecution therefore focused on emotional and behavioral evidence from the child's mother and grandmother. But Ms. Blackburn's prior testimony indicated that not only were behavioral or emotional indicia absent but that B.C. was affirmatively fond of Mr. McGirt after the week with her grandparents and that the emotional problems she displayed long predated that period. There was no other evidence of those matters.

In addition to providing an alternate version of events, the prior testimony was also effective for impeachment. The prior testimony of a witness would impeach not only trial testimony by the same witness; if used substantively, the prior testimony could also undermine the testimony of other witnesses. For example, if B.C.'s prior

statement that her mother had told her what to allege and what to say in court was admitted as substantive evidence and the jury credited it as truthful, that would impeach Ms. Kuswane, who testified in federal court that she neither fabricated the allegations nor coached B.C. in testifying. Or if Ms. Blackburn's prior statement that Ms. Kuswane and Nena resented Mr. McGirt for forcing them out of the house was admitted as substantive evidence and the jury credited it as truthful, that also would impeach Ms. Kuswane, who said in federal court that the sisters had no preexisting animus toward Mr. McGirt. Although Mr. McGirt was able to impeach Ms. Kuswane with her own prior statements, the prior testimony of B.C. and Ms. Blackburn provided more compelling contradictions of Ms. Kuswane's story. But because that testimony was not admitted for its truth, the jury could not consider it for that purpose.

As stated previously, the jury could certainly have convicted Mr. McGirt even if the court had permitted it to use the prior testimony for substantive purposes. But in our view the government has not carried its burden of establishing harmlessness, even under the more forgiving nonconstitutional standard set forth in *Kotteakos*. We are left in grave doubt whether the district court's error had a substantial influence on the verdict and therefore must reverse the convictions.

We are not persuaded by the government's argument to the contrary. It attempts to minimize the significance of the prior testimony by arguing that none of the prior statements was exculpatory and therefore they would not have impacted the jury's verdict. To be sure, even if the jury credited all the prior testimony relied on by

Mr. McGirt the jury could still have concluded that Mr. McGirt abused B.C. But this was no open-and-shut case. There was no physical evidence: the medical examination showed nothing and, somehow, no one could produce the alleged confession letter or the alleged tape of B.C.'s statement to her mother and aunt. And the incriminating testimony was vague and far from fully consistent. In that light, we cannot say that the jury would necessarily have rejected Mr. McGirt's defense—based largely on the state-court testimony—to the allegations against him. The government neglects to account for the cumulative effect of the prior testimony.

The cases cited by the government are easily distinguished. In *United States v. Plum*, 558 F.2d 568, 575 (10th Cir. 1977), we found a similarly worded instruction to be harmless error. The defense used inconsistent preliminary-hearing testimony in cross-examining a co-conspirator who testified for the prosecution, and the district court instructed the jury to use these inconsistent statements only for impeachment. *See id.* at 575 & nn. 9–10. On appeal we held that even if the instruction was erroneous, the error was harmless. Because the defendant was convicted of receiving and concealing stolen bars of silver and the inconsistencies in the co-conspirator's testimony concerned only the number of silver bars involved in the transaction, the only benefit to the defense offered by the inconsistent statement "was to damage the credibility of . . . the key Government witness." *Id.* at 575. The extent of the defendant's guilt would be the same regardless of which statement of quantity the jury chose to believe. In contrast, the prior testimony introduced by Mr. McGirt

supports his theory that the accusations against him were manufactured for ulterior motives.

In *United States v. Smith*, 776 F.2d 892, 897 (10th Cir. 1985), we similarly determined that the district court's exclusion of a prior inconsistent statement of a police traffic-accident reconstruction specialist was harmless error. After the specialist gave testimony at the defendant's second trial that was inconsistent with that given at the first, the district court denied the defense's request for permission to question the specialist about his prior statements. *See id.* at 893–96. On appeal we agreed that defense counsel should have been able to question the specialist about his prior testimony but concluded the error was harmless because none of the specialist's trial testimony was harmful to the defendant (so impeachment of the specialist was unnecessary) and none of the prior testimony would have supported the defendant's theory of the case. *See id.* at 897–98. Again, as in *Plum*, and in stark contrast to this case, the excluded evidence was irrelevant to any issue in the case material to Mr. McGirt's guilt.

In sum, because the government has failed to show that the instructional error did not impact Mr. McGirt's substantial rights, we must reverse his convictions.

B. Pro Se Arguments

After his appeal was fully briefed, Mr. McGirt filed a motion for leave to file a pro se supplemental brief containing two additional arguments, both of which challenge the jurisdiction of the federal court to prosecute him on the charged offenses. Although we generally deny motions for leave to file a supplemental pro se

brief when the defendant is counseled, *see United States v. McDermott*, 64 F.3d 1448, 1450 n.1 (10th Cir. 1995), we think it prudent to proceed to assure ourselves of our jurisdiction. *But see United States v. Dunnican*, 961 F.3d 859, 882 (6th Cir. 2020) (declining to address jurisdictional arguments in pro se motion filed by counseled defendant).

Mr. McGirt's first claim is that the statutes under which he was convicted (18 U.S.C. §§ 2241(c) and 2244(a)(5)) are unconstitutional as applied because they are not sufficiently related to interstate commerce. Under the Major Crimes Act, "Any Indian . . . who commits any of the following offenses, namely, . . . a felony under chapter 109A [of Title 18], . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses." 18 U.S.C. § 1153(a). Section 2241(c) prohibits aggravated sexual abuse—in this case, "knowing[] engage[ment] in a sexual act with another person who has not attained the age of 12 years." Section 2244(a) prohibits abusive sexual contact with another person. Both offenses are felonies under chapter 109A.

The Supreme Court upheld the constitutionality of the Major Crimes Act in *United States v. Kagama*, 118 U.S. 375 (1886), based not on enumerated constitutional powers (such as the Indian commerce clause cited by Mr. McGirt), but on a theory of inherent or implied federal power over the tribes. *See id.* at 384–85; *Keeble v. United States*, 412 U.S. 205, 209 n.9 (1973) ("The constitutionality of the Major Crimes Act was upheld in [*Kagama*], where the Court rejected the argument that punishment of criminal offenses by Indians on Indian land is exclusively a state

function."); 1 *Cohen's Handbook of Federal Indian Law* § 5.01[4], at 389 (Nell Jessup Newton ed., 2012 ed.) (in *Kagama* "the Supreme Court appeared to treat federal power over tribes as inherent in national sovereignty"). The Court continues to rely on this inherent power (now commonly called plenary power) in upholding the constitutionality of federal laws—criminal and otherwise—impacting tribes and tribal members. *See Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) ("Congress has plenary authority to alter [criminal] jurisdictional guideposts, which it has exercised from time to time." (citation omitted)); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470–71 (1979) ("[C]riminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has expressly provided that State laws shall apply." (citation and internal quotation marks omitted)); *United States v. Lara*, 541 U.S. 193, 202 (2004) (upholding congressional action permitting tribes to exercise criminal jurisdiction over all Indians based on "the Constitution's 'plenary' grants of power[, which] authoriz[e Congress] to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority"). We therefore reject the argument that these statutes are unconstitutional as applied to Mr. McGirt.

Mr. McGirt's second claim, that the federal courts lack jurisdiction to prosecute because exercise of such jurisdiction violates a series of nineteenth-century treaties between the federal government and the Mvskoke (Muskogee Creek) Nation, also fails. The Supreme Court's decision in *McGirt* both acknowledges that the Major

Crimes Act violates promises of tribal self-governance made to the Mvskoke and upholds federal jurisdiction over Mr. McGirt:

> When Congress adopted the [Major Crimes Act], it broke many treaty promises that had once allowed tribes like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes. All our decision today does is vindicate that replacement promise.

140 S. Ct. at 2480; *see also id.* at 2459 ("By subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the Creek that they would be free to govern themselves. But this particular incursion has its limits—applying only to certain enumerated crimes and allowing only the federal government to try Indians."). Congress "wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties," *id.* at 2462, and—as discussed above—to carve out federal criminal jurisdiction over Indians who have committed enumerated crimes in Indian country. *See United States v. Jacobs*, 638 F.3d 567, 568 (8th Cir. 2011) ("Congress' grant of citizenship to the Indians makes them subject to all restrictions to which any other American citizen is subject, in any state, and . . . the legislative history and the language of the Major Crimes Act itself are sufficient expression of a clear Congressional intent to abrogate or modify any treaty provisions to the contrary." (citations and internal quotation marks omitted)); *Lazore v. Comm'r*, 11 F.3d 1180, 1183 (3d Cir. 1993) ("The notion that Congress has the power to unilaterally abrogate provisions of treaties with Indians is firmly established. Consistent with this power, Congress has repeatedly asserted its legislative

jurisdiction over Indians without regard to whether any treaty provisions concerned the subject of the law. Beginning with the Seven Major Crimes Act of 1885 . . . Congress has removed major criminal jurisdiction from all Indian tribes." (citations omitted)). The breach of a promise, the significance of which we do not minimize, does not nullify Congress's grant of criminal jurisdiction in the Major Crimes Act.

For these reasons, we reject Mr. McGirt's pro se arguments regarding our jurisdiction.

III. CONCLUSION

We **REVERSE** and **REMAND** this matter to the district court for a new trial. Because we reverse Mr. McGirt's convictions, we need not reach his argument regarding error at sentencing. We **GRANT** Mr. McGirt's pro se motion to file a supplemental brief.