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OPINION OF THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA (OCTOBER 14, 2021)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ROBERT TAYLOR BRAGG,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2017-1028

Before: Scott ROWLAND, Presiding Judge,
Robert L. HUDSON, Vice Presiding Judge,
Gary L. LUMPKIN, Judge, David B. LEWIS, Judge.

OPINION

ROWLAND, PRESIDING JUDGE:

Appellant Robert Taylor Bragg was tried by jury and convicted of six counts of Child Abuse by Injury in the District Court of Tulsa County, Case No. CF-2014-4641. In accordance with the jury's recommendation, the Honorable William J. Musseman, Jr. sentenced Bragg to life imprisonment on Count 1 and to twenty years imprisonment on each of Counts 2, 3, 4, 5, and 6 and ordered the sentences to be served concurrently.

Bragg must serve 85% of his sentence before he is eligible for parole consideration.

Bragg appeals raising the following issues:

(1) whether his confession was the result of deceptive police tactics;

(2) whether he was denied his rights under *Miranda v. Arizona*;

(3) whether the exclusion of expert testimony was reversible error;

(4) whether the State of Oklahoma lacked jurisdiction to prosecute him;

(5) whether the admission of an animated video was prejudicial error; and

(6) whether his sentence is excessive.

We find relief is required on Bragg's jurisdictional challenge in Proposition 4, rendering his other claims moot. Bragg claims the State of Oklahoma did not have jurisdiction to prosecute him. He relies on 18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020).

On August 19, 2020, this Court remanded this case to the District Court of Tulsa County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) the Indian status of his victim, R.B., and (b) whether the crimes occurred in Indian Country. Our order provided that, if the parties agreed as to what the evidence would show with regard to the questions presented, the parties could enter into a written stipulation setting forth those facts, and no hearing would be necessary.

On October 15, 2020, the parties appeared for an evidentiary hearing on the remand order. The parties agreed by written stipulation that: (1) the victim, R.B., was born on August 14, 2014; (2) R.B. has some Indian blood; (3) the incident giving rise to this case occurred on or about September 19, 2014; (4) R.B.'s mother was an enrolled member of the Cherokee Nation at the time of R.B.'s birth and at the time of the incident; (5) R.B.'s maternal grandmother was an enrolled member of the Cherokee Nation at the time of R.B.'s birth and on the date of the incident; (6) the Cherokee Nation received R.B.'s enrollment application on or about September 23, 2014; (7) R.B.'s name was entered on the Cherokee Register on January 6, 2016; and (8) the Cherokee Nation is a federally recognized tribe. As to the second question on remand, whether the crimes were committed in Indian country, the parties agreed by stipulation that the charged crimes occurred within the historical geographic area of the Cherokee Nation as designated by various treaties.

On December 21, 2020, the District Court filed its Findings of Fact and Conclusions of Law. The District Court found that the stipulated facts were supported by evidence presented at the evidentiary hearing. In addition, the court found that pursuant to Title 11A of the Cherokee Nation Citizenship Act, R.B. was admitted as a citizen of the Cherokee Nation upon birth and for a period of 240 days thereafter. Thus, the District Court concluded that:

> Although not formally enrolled as a member of the Cherokee Nation at the time of the offense, these stipulated facts and evidence are determinative of [whether R.B. was recognized as an Indian by a tribe or the federal

> government]. Because R.B. was born to a direct descendant of an original enrollee, she was automatically admitted as a citizen of the Cherokee Nation for a period of 240 days following her birth on August 14, 2014. This incident occurred on September 19, 2014, within the 240 day temporary citizenship period and therefore, R.B. was recognized as an Indian by a tribe or the federal government.

Based upon the stipulations, evidence and argument of counsel, the District Court concluded that the victim, R.B. had some Indian blood and is recognized as an Indian by a tribe or the federal government; R.B. is an Indian.

As to the question of whether the crimes occurred in Indian Country, the District Court examined the treaties between the Cherokee Nation and the United States of America. The District Court concluded that the treaties established a reservation for the Cherokee Nation and that no evidence was presented showing that Congress had ever erased the boundaries of, or disestablished, the Cherokee Reservation. Thus, the District Court concluded that the crimes at issue occurred in Indian Country. This Court adopted this same conclusion of law in *Spears v. State*, 2021 OK CR 7, 485 P.3d 873. For purposes of federal criminal law, the land upon which the parties agree Bragg allegedly committed the crimes is within the Cherokee Reservation and is thus Indian country.

The District Court's findings and conclusions are supported by the record. The ruling in *McGirt* governs this case and requires us to find the District Court of Tulsa County did not have jurisdiction to prosecute

Bragg. Accordingly, we grant relief based upon argument raised in Proposition 4.[1]

DECISION

The Judgment and Sentence of the district court is **VACATED.** The matter is **REMANDED WITH INSTRUCTIONS TO DISMISS**. The State's Motion to Stay and Abate Proceedings is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), the **MANDATE** is **ORDERED** to issue in twenty days from the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY THE HONORABLE
WILLIAM J. MUSSEMAN, JR., DISTRICT JUDGE

APPEARANCES AT TRIAL

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[1] The State filed a Motion to Stay and Abate Proceedings after the conclusion of the remand proceedings in the district court. The State maintains it has concurrent jurisdiction to prosecute Bragg, a non-Indian, for the abuse of an Indian child and asks the Court to reserve ruling in this case pending the outcome of the ongoing litigation concerning concurrent jurisdiction in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, *opinion vacated and withdrawn by* 2021 OK CR 23, ___ P.3d ___. We continue to reject the State's concurrent jurisdiction argument. *Roth v. State*, 2021 OK CR 27, ___ P.3d ___. Accordingly, we decline to grant the State's request to stay and abate Bragg's direct appeal.

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Opinion by: Rowland, P.J.
Hudson, V.P.J.: Specially Concur
Lumpkin, J.: Concur in Results
Lewis, J.: Concur

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCURS

Today's decision dismisses convictions for six counts of child abuse by injury from the District Court of Tulsa County based on the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). This decision is unquestionably correct as a matter of *stare decisis*. The record shows that the infant victim had some Indian blood, was recognized as an Indian at the time of the crimes by the tribe and/or federal government, and the crimes themselves took place within the historic boundaries of the Cherokee Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the crimes in this case. Instead, Appellant must be prosecuted in federal court where the exclusive jurisdiction for these crimes lies. *See Roth v. State*, 2021 OK CR 27, ___ P.3d ___. I therefore as a matter of *stare decisis* fully concur in today's decision.

Further, I maintain my previously expressed views on the significance of *McGirt*, its far-reaching impact on the criminal justice system in Oklahoma and the need for a practical solution by Congress. *See, e.g., Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867 (Hudson, J., Concur in Results).

LUMPKIN, JUDGE:
CONCURRING IN RESULTS:

Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, ___ U.S. ___, 140 S. Ct. 2452 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt*, I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas, I was forced to conclude the Majority had totally failed to follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

My quandary is one of ethics and morality. One of the first things I was taught when I began my service in the Marine Corps was that I had a duty to follow lawful orders, and that same duty required me to resist unlawful orders. Chief Justice Roberts's scholarly and judicially penned dissent, actually following the Court's precedents and required analysis, vividly reveals the failure of the majority opinion to follow the rule of law and apply over a century of precedent and history, and

to accept the fact that no Indian reservations remain in the State of Oklahoma.[1] The result seems to be some form of "social justice" created out of whole cloth rather than a continuation of the solid precedents the Court has established over the last 100 years or more.

The question I see presented is should I blindly follow and apply the majority opinion or do I join with Chief Justice Roberts and the dissenters in *McGirt* and recognize "the emperor has no clothes" as to the

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[1] Senator Elmer Thomas, D-Oklahoma, was a member of the Senate Committee on Indian Affairs. After hearing the Commissioner's speech regarding the Indian Reorganization Act (IRA) in 1934, Senator Thomas opined as follows:

> I can hardly see where it (the IRA) could operate in a State like mine where the Indians are all scattered out among the whites and **they have no reservation,** and they could not get them into a community without you would go and buy land and put them on it. Then they would be surrounded very likely with thickly populated white sections with whom they would trade and associate. I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly-settled population. (emphasis added).

John Collier, Commissioner of Indian Affairs, *Memorandum of Explanation* (regarding S. 2755), p. 145, hearing before the United States Senate Committee on Indian Affairs, February 27, 1934. Senator Morris Sheppard, D-Texas, also on the Senate Committee on Indian Affairs, stated in response to the Commissioner's speech that in Oklahoma, he did not think "we could look forward to building up huge reservations such as we have granted to the Indians in the past." *Id.* at 157. In 1940, in the Foreword to Felix S. Cohen, *Handbook of Federal Indian Law* (1942), Secretary of the Interior Harold Ickes wrote in support of the IRA, "[t]he continued application of the allotment laws, **under which Indian wards have lost more than two-thirds of their reservation lands**, while the costs of Federal administration of these lands have steadily mounted, must be terminated." (emphasis added).

adherence to following the rule of law in the application of the *McGirt* decision?

My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.

DISTRICT COURT OF TULSA COUNTY, STATE OF OKLAHOMA, FINDINGS OF FACT AND CONCLUSIONS OF LAW (DECEMBER 11, 2020)

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,

Plaintiff/Appellee,

v.

ROBERT TAYLOR BRAGG,

Defendant/Appellant.

Tulsa County District Court Case No. CF-2014-4641

Court of Criminal Appeals Case No. F-2017-1028

Before: Tracy PRIDDY, District Court Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before the Court on October 15, 2020, in accordance with the remand order of the Oklahoma Court of Criminal Appeals issued on August 19, 2020. The State appeared by and through Assistant Attorney General Randall Young. Defendant, who is incarcerated, appeared by and through Vicki Behenna, Rachel Jordan and Joseph Thai. Cherokee

Nation, Amicus, appeared by and through Attorney General, Sara Hill. The Court makes its findings based upon the stipulations and evidence presented by the parties, review of the pleadings and attachments in this Court and the Oklahoma Court of Criminal Appeals, and the briefs and argument of counsel.

Appellant, in his Brief-In-Chief filed on October 5, 2018, claims the District Court lacked jurisdiction to try him as, while he is not Indian, his victim, R.B., is a citizen of the Cherokee Nation and the crime occurred within the boundaries of the Cherokee Reservation. In the August 19, 2020, Order Remanding for Evidentiary Hearing, the Oklahoma Court of Criminal Appeals directed this Court to make findings of fact and conclusions of law as to two separate questions: (a) the Indian status of his victim, R.13., and (b) whether the crime occurred in Indian Country. Further, the Oklahoma Court of Criminal Appeals directed this Court as follows:

The District Court shall address only the following issues:

> First, the victim, R.B.'s status as an Indian. The District Court must determine whether (1) R.B. has some Indian blood, and (2) was recognized as an Indian by a tribe or the federal government.[1]

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[1] *See United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001). *See generally Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

> Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt* [*v. Oklahoma*, 140 S. Ct. 2452 (2020)], determining (1) whether Congress established a reservation for the Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation.[2]

Defendant/Appellant filed Brief of Defendant on Indian Status Reservation Establishment and Jurisdiction on October 29, 2020. The Cherokee Nation filed its Amicus Brief with 11 attachments on September 22, 2020.

The parties stipulated and agreed as follows:[3]

1. As to the status of the victim:
    a. R.B. was born on August 14, 2014.
    b. R.B. has blood quantum of 31256 Cherokee blood.
    c. The incident giving rise to this case occurred on or about September 19, 2014.
    d. R.B.'s mother, A.S., was an enrolled member of the Cherokee Nation at the time of R.B.'s birth and at the time of the incident.
    e. R.B.'s maternal grandfather, J.S., was an enrolled member of the Cherokee Nation

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[2] Order Remanding for Evidentiary Hearing.

[3] Appellant's Exhibit 1, Stipulated Facts.

at the time of R.B.'s birth and at the time of the incident.

f. The Cherokee nation received R.B.'s enrollment application on or about September 23, 2014.

g. R.B.'s name was entered on the Cherokee Register on January 6, 2016.

h. The Cherokee Nation is a federally recognized tribe.

2. As to the location of the incident giving rise to this case:

a. The incident occurred at 233 E. Zion Street, Tulsa, Oklahoma.

b. The above-referenced location is within the geographic area reserved for the Cherokee Nation in the Treaty with the Cherokee, December 29,1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by the Act of March 3, 1893, 27 Stat. 612.

Additionally, Appellant moved to admit Exhibits 1-25. The State objected to the admission of Exhibit 24 on the basis that the exhibit contains a legal conclusion that the address at which the crimes occurred is located within the Cherokee Nation Reservation. Exhibits 1-25 including Exhibit 24 were admitted as evidence, over the objection of the State as to Exhibit 24.

I. Victim's Status as an Indian

In determining Indian status, the Court must make findings that the victim has some Indian blood

and that the victim was recognized as an Indian by a tribe or the federal government. The State of Oklahoma and Appellant have stipulated as to several facts which are considered in determining the victim's status as an Indian. As to the first prong, the stipulated fact is that R.B. has a blood quantum of 3/256 Cherokee blood. As to the second prong, the stipulated facts include: R.B. was born on August 14, 2014; the incident giving rise the case occurred on or about September 19, 2014; R.B.'s mother, A.S., and her maternal grandfather, J.S. were enrolled members of the Cherokee Nation at the time of R.B.'s birth and at the time of this incident. These facts are further supported by Appellant's Exhibits 1, 2 and 3. Appellant further argued that pursuant to Title 11A of the Cherokee Nation Citizenship Act, R.B. was admitted as a citizen of the Cherokee Nation upon birth and for a period of 240 days thereafter.[4] Although not formally enrolled as member of the Cherokee Nation at the time of the offense, these stipulated facts and evidence are determinative of the second prong. Because R.B. was born to a direct descendant of an original enrollee, she was automatically admitted as a citizen of the Cherokee Nation for a period of 240 days following her birth on August 14, 2014. This incident occurred on September 19, 2014, within the 240 day temporary citizenship period and therefore, R.B. was recognized as an Indian by a tribe or the federal government. Appellant presented further evidence of R.B. receiving assistance reserved only for Indians[5] and being subject to the

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[4] Appellant's Exhibits 14-16.

[5] Appellant's Exhibit 4.

Indian Child Welfare Act[6], which would require analysis under a set of factors adopted by the Tenth Circuit, however, this Court finds that consideration of further evidence under the factors set forth in *United States v. Nowlin*, 555 F. Appx. 820, 823 (10th Cir. 2014) is not necessary to reach a conclusion regarding her status an Indian. Based upon the stipulations, evidence and arguments of counsel, the Court specifically finds the victim, R.B. (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government. R.B., the victim is an Indian.

II. Whether the Crime Occurred in Indian Country

In determining whether the crime occurred in Indian Country, the Court must follow the analysis set out in *McGirt* [*v. Oklahoma*, 140 S. Ct. 2452 (2020)], determining (1) whether Congress established a reservation for the Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation.

As to the establishment of the Cherokee Nation Reservation, the Appellant admitted into evidence a series of treaties with the Cherokee.[7] Appellant argues that through these treaties a permanent home was established for the Cherokee Nation. Further, that the 1833 and 1835 treaties describe the lands in precise geographic terms and the 1846 Treaty with the Cherokee, reiterates the pledges that this land was for the common use and benefit of the Cherokee people.

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[6] Appellant's Exhibits 5-8, 10, 12.

[7] Appellant's Exhibits 18, 19 and 20.

As to whether the Cherokee Nation Reservation boundaries were disestablished, Appellants admitted evidence of the 1866 Treaty, 1891 Agreement and the Act of July 1, 1902[8] supporting their argument, in short, that although the Cherokee ceded portions of its land to the United States, thus reducing the size of the Cherokee Nation, the cessation did not disestablish the boundaries of what is presently known as the Cherokee Nation. These positions were further argued by the Cherokee Nation in its Amicus Brief, adopted by the Appellants, and entered into the record by Sara Hill, Attorney General for the Cherokee Nation.

In response, the State advised the Court that it is not taking a position one way or another, as to whether or not there was a Cherokee reservation in the first place and, if there was a reservation whether or not that reservation remains intact.

A. Did Congress Establish a Reservation for the Cherokee Nation?

Whether Congress established a reservation for the Cherokee Nation, the Court finds as follows:

1. Cherokee Nation is a federally recognized Indian tribe. 84 C.F.R. § 1200 (2019).

2. The current boundaries of Cherokee Nation encompass lands in **a** fourteen-county area within the borders of the State of Oklahoma (Oklahoma), including **all** of Adair, Cherokee, Craig, Nowata, Sequoyah, and Washington Counties, and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Tulsa, and Wagoner Counties.

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8 Appellant's Exhibits 21, 22, 23.

3. The Cherokee Nation's treaties must be considered on their own terms, in determining reservation status. *McGirt*, 140 S. Ct. at 2479.

4. In *McGirt*, the United States Supreme Court noted that Creek treaties promised a "permanent home" that would be "forever set apart," and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. *McGirt*, 140 S.Ct. at 2461-62. As such, the Supreme Court found that, "Under any definition, this was a [Creek] reservation." *Id.* at 2461.

5. The Cherokee treaties were negotiated and finalized during the same period as the Creek treaties, contained similar provisions that promised a permanent home that would be forever set apart, and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state.

6. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokees on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414.

7. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of the new Cherokee lands, and provided that a patent would issue as soon as reasonably practical. Art. 1, 7 Stat. 414.

8. The 1835 Cherokee treaty was ratified two years later "with a view to re-unite their people in one body and to secure to them a permanent home for themselves and their posterity," in what became known as Indian Territory, "without the territorial limits of the state sovereignties," and "where they could establish and enjoy a government of their choice, and perpetuate

such a state of society as might be consonant with their views, habits and condition." Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 and *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872).

9. Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." Art. 2, 7 Stat. 478.

10. The 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation of the new lands in Indian Territory as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government . . . within their own country," so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Arts. 1, 5, 8, 19, 7 Stat. 478.

11. On December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new lands in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The title was held by Cherokee Nation "for the common use and equal

benefit of all the members." *Cherokee Nation v. Hitchcock*, 187 U.S. at 307; *See also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894). Fee title is not inherently incompatible with reservation status, and establishment of a reservation does not require a "particular form of words." *McGirt*, 140 S. Ct. at 2475 (citing *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)).

12. The 1846 Cherokee treaty required federal issuance of a deed to the Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the "Neutral Lands") and the "outlet west." Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871.

13. The 1866 treaty resulted in Cherokee cessions of lands in Kansas and the Cherokee Outlet and required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council." Treaty with the Cherokee, July 19, 1866, art. 21, 14 Stat. 799.

14. The 1866 Cherokee treaty "re-affirmed and declared to be in full force" all previous treaty provisions "not inconsistent with the provisions of" the 1866 treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. Art. 31, 14 Stat. 799.

15. Under *McGirt*, the "most authoritative evidence of [a tribe's] relationship to the land . . . lies in the treaties and statutes that promised the land to the Tribe in the first place." *McGirt*, 140 S. Ct. at 2475-76.

As a result of the treaty provisions referenced above and related federal statutes, this Court hereby finds Congress did establish a Cherokee Reservation as required under the analysis set out in *McGirt*.

B. Did Congress Specifically Erase the Boundaries and Disestablish the Reservation?

Whether Congress specifically erased the boundaries or disestablished the Cherokee Reservation, the Court finds as follows:

1. The current boundaries of Cherokee Nation are as established in Indian Territory in the 1833 and 1835 Cherokee treaties, diminished only by two express cessions.

2. First, the 1866 treaty expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. Art. 17, 14 Stat. 799.

3. Second, the 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet); and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country . . . until thus sold and occupied, after which their jurisdiction and right of possession

to terminate forever as to each of said districts thus sold and occupied." Art. 16, 14 Stat. 799.

4. The Cherokee Outlet cession was finalized by an 1891 agreement ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43.

5. The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (*i.e.*, the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906).

6. The 1893 statute that ratified the 1891 Agreement required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. 27 Stat. 612, 640-43; *United States v. Cherokee Nation*, 202 U.S. at 112.

7. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time.

8. The original 1839 Cherokee Constitution established the boundaries as described in the 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may be made necessary" by the 1866 treaty. 1839

Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, reprinted in Volume I of West's Cherokee Nation Code Annotated (1993 ed.).

9. Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." 1999 Cherokee Constitution, art. 2.

The State has argued the burden of proof regarding whether Congress specifically erased the boundaries or disestablished the reservation rests solely with Appellant. The State also made clear that the State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation. No evidence or argument was presented by the State specifically regarding disestablishment or boundary erasure of the Cherokee Reservation, The Order Remanding for Evidentiary Hearing states, "Upon Bragg's presentation of *prima facie* evidence as to the victim's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction."[9]

On this point, *McGirt* provides that once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S. Ct. at 2468. Reading the order of remand together with *McGirt*, regardless of where the burden of production is placed, no evidence was presented to this Court to establish Congress explicitly erased or disestablished

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[9] Order Remanding for Evidentiary Hearing at 4.

the boundaries of the Cherokee Nation or that the State of Oklahoma has jurisdiction in this matter.

The State of Oklahoma and Appellant stipulated that the crime occurred at 233 E. Zion Street in Tulsa, Oklahoma. The parties further stipulated that this location is within the geographic area reserved for the Cherokee Nation in the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by the Act of March 3, 1893, 27, Stat. 612. Appellant also admitted into evidence a memorandum from the Cherokee Nation Real Estate Services[10] indicating this address is located within the boundaries of the Cherokee Nation territory as described by the patents of 1838 and 1846 as well as a series of maps[11] showing the physical location of this address to be within the boundaries of what is considered to be the boundaries of the Cherokee Nation.

WHEREFORE, as a result of the findings of fact and conclusions of law above, this Court finds the victim, R.B., is an Indian and that the crime occurred at a location within the boundaries of the Cherokee Nation, which would be defined as Indian Country for purposes of the General Crimes Act, 18 U.S.C. § 1152 and the Major Crimes Act, 18 U.S.C. § 1153.

IT IS SO ORDERED this 11 day of December, 2020.

/s/ Tracy Priddy
District Court Judge

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[10] Appellant's Exhibit 24.

[11] Appellant's Exhibit 25.

COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA, ORDER REMANDING FOR EVIDENTIARY HEARING (AUGUST 19, 2020)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ROBERT TAYLOR BRAGG,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2017-1028

Before: David B. LEWIS, Presiding Judge, Dana KUEHN, Vice Presiding Judge, Gary L. LUMPKIN, Judge, Robert L. HUDSON, Judge, Scott ROWLAND, Judge.

ORDER REMANDING FOR EVIDENTIARY HEARING

Appellant Robert Taylor Bragg was tried by jury and convicted of six counts of Child Abuse by Injury in the District Court of Tulsa County, Case No. CF-2014-4641. In accordance with the jury's recommendation, the Honorable William J. Musseman, Jr. sentenced Bragg to life imprisonment on Count 1 and to twenty

years imprisonment on each of Counts 2, 3, 4, 5, and 6 and ordered the sentences to be served concurrently. Bragg must serve 85% of his sentence before he is eligible for parole consideration. Bragg appeals his Judgment and Sentence.

In Proposition 4 of his Brief-in-Chief filed on October 5, 2018, Bragg claims that the District Court lacked jurisdiction to try him. Bragg argues that while he is not Indian, his victim, R.B., is a citizen of the Cherokee Nation and the crime occurred within the boundaries of the Cherokee Nation Reservation. Bragg, in his direct appeal, relies on jurisdictional issues addressed in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), which was affirmed by the United States Supreme Court in *Sharp v. Murphy*, 591 U.S. ___, 140 S.Ct. 2412 (2020) for the reasons stated in *McGirt v. Oklahoma*, 591 U.S., 140 S.Ct. 2452 (2020).[1]

Bragg's claim raises two separate questions: (a) the Indian status of his victim, R.B., and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Tulsa County, for an evidentiary hearing to be held within sixty (60) days from the date of this Order.

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the

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[1] On March 27, 2019, we held Bragg's direct appeal in abeyance pending the resolution of the litigation in *Murphy*. Following the decision in *McGirt*, both parties have asked for additional time to brief and address the jurisdictional issue. On August 3, 2020, the Cherokee Nation filed an unopposed application for authorization to file amicus brief and tendered the same for filing. In light of the present order, there is no need for additional responses at this time and these requests are **DENIED.**

Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Bragg's presentation of *prima fade* evidence as to the victim's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

The hearing shall be transcribed, and the court reporter shall file an original and two (2) certified copies of the transcript within twenty (20) days after the hearing is completed. The District Court shall then make written findings of fact and conclusions of law, to be submitted to this Court within twenty (20) days after the filing of the transcripts in the District Court. The District Court shall address only the following issues:

First, the victim, R.B.'s, status as an Indian. The District Court must determine whether (1) R.B. has some Indian blood, and (2) was recognized as an Indian by a tribe or the federal government.[2]

Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In making this determination the District Court should consider any evidence the parties provide,

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[2] *See United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001). *See generally Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

including but not limited to treaties, statutes, maps, and/or testimony.

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record, to the Clerk of this Court, and counsel for Bragg, within five (5) days after the District Court has filed its findings of fact and conclusions of law. Upon receipt thereof, the Clerk of this Court shall promptly deliver a copy of that record to the Attorney General. A supplemental brief, addressing only those issues pertinent to the evidentiary hearing and limited to twenty (20) pages in length, may be filed by either party within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed in this Court.

Provided however, in the event the parties agree as to what the evidence will show with regard to the questions presented, they may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. In this event, no hearing on the questions presented is necessary. Transmission of the record regarding the matter, the District Court's findings of fact and conclusions of law and supplemental briefing shall occur as set forth above.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit copies of the following, with this Order, to the District Court of Tulsa County: Appellant's Brief-in-Chief with Appendix and Application for Evidentiary Hearing and to Supplement the Record each filed on October 5, 2018, Appellee's Answer

Brief filed on January 28, 2019, and Appellant's Reply Brief filed February 18, 2019.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 19th day of August, 2020.

/s/ David B. Lewis
Presiding Judge

/s/ Dana Kuehn
Vice Presiding Judge

/s/ Gary L. Lumpkin
Judge

/s/ Robert L. Hudson
Judge

/s/ Scott Rowland
Judge

ATTEST:

/s/ John D. Hadden
Clerk