

APPENDIX TABLE OF CONTENTS

Opinion of the Court of Criminal Appeals, State of Oklahoma (October 28, 2021)	1a
District Court of Rogers County, State of Oklahoma, Findings of Fact and Conclusions of Law (Signed June 2, 2021, Filed June 7, 2021)	23a
Joint Stipulations (April 28, 2021)	26a
Order of the Court of Criminal Appeals, State of Oklahoma, Remanding for Evidentiary Hearing (March 26, 2021)	29a

**OPINION OF THE COURT OF CRIMINAL
APPEALS, STATE OF OKLAHOMA
(OCTOBER 28, 2021)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MARQUISE PETEY WHITE,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

Case No. C-2020-113

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

**OPINION GRANTING CERTIORARI
IN PART AND DENYING IN PART**

HUDSON, VICE PRESIDING JUDGE:

On September 6, 2019, Petitioner entered blind pleas of guilty in the District Court of Rogers County in the following cases:

CF-2017-762—Count 1: Murder in the First Degree; **Count 2:** Robbery With a Dangerous Weapon; **Count 3:** Assault While Masked or Disguised; **Count 5:** Conspiracy to Commit a Felony; **Count 7:** Assault With a Dangerous Weapon; **Count 8:** Burglary in the First Degree; and **Count 9:** Kidnapping. (Counts 4, 6, 10 and 11 were dismissed).

CF-2018-9—Count 1: Assault and Battery Upon a Police Officer.

Sentencing was delayed to allow preparation of the presentence investigation report. On December 20, 2019, Petitioner was sentenced as follows:

CF-2017-762—Count 1: Life Without Parole; **Count 2:** Ten years imprisonment; **Count 3:** Five years imprisonment; **Count 5:** Five years imprisonment; **Count 7:** Five years imprisonment; **Count 8:** Ten years imprisonment; and **Count 9:** Ten years imprisonment.

CF-2018-9—Count 1: Two years imprisonment.

The trial court imposed various costs and fees, ordered credit for time served and ordered the sentences in CF-2017-762 to run concurrently each to the other and concurrently with the sentence imposed in CF-2018-9.

On December 30, 2019, Petitioner filed a *pro se* motion to withdraw his guilty pleas in both cases. At a hearing held on January 24, 2020, the Honorable Kassie McCoy, Associate District Judge, denied the motion. Petitioner now appeals and seeks a writ of certiorari.

1. Jurisdictional Challenge to CF-2017-762, Count 1.

In his second proposition, Petitioner contends that the District Court of Rogers County lacked jurisdiction to try him for the murder. Appellant cites *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) and 18 U.S.C. §§ 1151-1153 in support of this proposition. Petitioner argues Dakota Rex, the victim of the first degree murder charged in Count 1 of CF-2017-762, was a citizen of the Muscogee (Creek) Nation and the crimes occurred within the boundaries of the Cherokee Reservation. At our request, the State of Oklahoma filed a response to this proposition of error.

In *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Supreme Court held that the Creek Reservation in eastern Oklahoma was never disestablished by Congress and, thus, constitutes Indian Country for purposes of federal criminal jurisdiction. We remanded this case to the District Court for an evidentiary hearing with instructions to determine whether the victim had some Indian blood and was recognized as an Indian by a tribe or the federal government. We also directed the District Court on remand to determine whether the crimes in this case occurred in Indian Country.

The parties entered into written stipulations during the remanded proceedings that Dakota Rex was an enrolled Muscogee (Creek) Indian at the time of the crime with 1/64th Indian Blood and that his murder occurred within the historical boundaries of the Cherokee Reservation as established by previous federal treaties. The parties further stipulated that the Cherokee Nation's historical boundaries have been explicitly recognized by this Court as establishing a reservation for purposes of federal criminal jurisdiction.

See Spears v. State, 2021 OK CR 7, ¶¶ 11-16, 485 P.3d 873, 876-77; *Hogner v. State*, 2021 OK CR 4, ¶ 18, ___ P.3d ___. In its written findings of fact and conclusions of law, the District Court accepted and found the facts as stipulated by the parties.

The District Court's findings of fact and conclusions of law are fully supported by the stipulations jointly made by the parties at the remanded hearing. Appellant has thus met his burden of establishing the victim's status as an Indian, having 1/64th degree Creek blood and being a member of the Muscogee (Creek) Nation Tribe at the time of the crime. *See Parker v. State*, 2021 OK CR 17, ¶ 36, ___ P.3d ___. Appellant has also met his burden of proving that the murder in this case occurred on the Cherokee Reservation and, thus, occurred in Indian Country for purposes of federal law. *See* 18 U.S.C. § 1151; *McGirt, supra*.

The State argues in light of these stipulations and findings that it has concurrent jurisdiction with the federal government over the murder in this case. Specifically, the State claims it has concurrent jurisdiction over all crimes committed by non-Indians against Indian victims in Indian Country.

The State of Oklahoma does not have jurisdiction to prosecute Appellant for the murder alleged in this case.¹ This Court recently rejected the State's concurrent jurisdiction argument in *Roth v. State*, 2021 OK CR 27, ___ P.3d ___ and we apply that holding here.² To

¹ The State preserved its concurrent jurisdiction argument by including it in the joint stipulation submitted during the remanded hearing in District Court and in its response brief to this Court.

² This Court first rejected the State's concurrent jurisdiction argument in *Bosse v. State*, 2021 OK CR 3, ¶¶ 23-28, 484 P.3d

summarize, federal law broadly preempts state criminal jurisdiction over crimes committed by, or against, Indians in Indian Country. 18 U.S.C. §§ 1151-1153. Title 18 U.S.C. § 1152, the Indian Country Crimes Act, specifically governs Appellant’s case. Under Section 1152, the United States has jurisdiction in Indian Country over crimes that non-Indians commit against Indians. *McGirt*, 140 S. Ct. at 2479; *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946). Section 1152 “extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country, except for those offenses committed by one Indian against the person or property of another Indian.” *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (internal quotation omitted).

“Historically, based on principles of federal preemption and Indian sovereignty, ‘criminal 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.’” *United States v. Burch*, 169 F.3d 666, 668-69 (10th

286, 294-95, and *Ryder v. State*, 2021 OK CR 11, ¶¶ 13-28, 489 P.3d 528. However, we recently overruled *Bosse* and *Ryder* on other grounds in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___ (holding that *McGirt* and our *post-McGirt* reservation rulings shall not apply retroactively to void a final state conviction). Based on *Matloff*, we vacated the previous orders and judgments granting post-conviction relief, and withdrew the accompanying opinions, in *Bosse* and *Ryder*. See *Bosse v. State*, 2021 OK CR 23, ___ P.3d ___; *Ryder v. State*, 2021 OK CR 25, ___ P.3d ___. *Matloff* has no applicability to the present case because this is a direct appeal. However, our full analysis of the concurrent jurisdiction issue in *Roth* is now controlling authority on this issue in Oklahoma and should be relied upon exclusively by the bench, bar and public going forward.

Cir. 1999) (quoting *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979)). Congress has authorized States to assume criminal jurisdiction over Indian Country in limited circumstances. “Upon cession of such jurisdiction to a state, federal law no longer preempts the state’s exercise of its inherent police power over all persons within its borders, and the state is automatically vested with jurisdiction in the absence of state law to the contrary.” *Burch*, 169 F.3d at 671. The State of Oklahoma, however, has never asserted its right under existing federal law to assume jurisdiction over any portion of Indian Country within its borders. *McGirt*, 140 S. Ct. at 2478. *McGirt* specifically held that federal law thus applied in Oklahoma “according to its usual terms” because the State had never complied with the requirements to assume jurisdiction over the Creek Reservation and Congress had never expressly conferred jurisdiction on Oklahoma. *See id.* Pursuant to *McGirt*, the State therefore has no jurisdiction as part of its inherent police power over the murder committed in this case. Under federal law, jurisdiction over the murder in the present case rests exclusively with the federal government.

We cannot ignore, or attempt to bypass, any aspect of *McGirt* based on the State’s simple assertion of concurrent jurisdiction. It is the Supreme Court’s “prerogative alone to overrule one of its precedents[.]” *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016), not ours. Adoption of the State’s novel theory of concurrent jurisdiction is a political matter which may be addressed by Congress, not this Court, *See Negonsott*, 507 U.S. at 103; *United States v. John*, 437 U.S. 634, 652-54 (1978). We have no choice but to dismiss Appellant’s

murder conviction for lack of jurisdiction under the Supremacy Clause, *see* Article VI, Clause 2 of the United States Constitution, and Article 1, § 1 of the Oklahoma Constitution.

Based upon the foregoing, we find the State of Oklahoma did not have jurisdiction to prosecute Appellant for the first degree murder of Dakota Rex charged in Count 1 of Rogers County Case No. CF-2017-762. This portion of Petitioner's Judgment and Sentence is hereby reversed and the case remanded to the District Court of Rogers County with instructions to dismiss.³ Relief is granted for Proposition II.

The record shows the remaining counts in Rogers County Case No. CF-2017-762, and the sole count charged in Rogers County Case No. CF-2018-9, had other victims, none of whom are alleged by Petitioner to be Indian. The remaining counts in CF-2017-762 and CF-2018-9 are therefore unaffected by our ruling in Proposition II. We address the merits of Petitioner's challenges to these remaining counts below.

2. Challenges to the Remaining Counts.

In his first, third, fourth, fifth, and sixth propositions, Petitioner challenges the District Court's denial of his motion to withdraw his guilty pleas and raises other substantive claims challenging his remaining convictions and sentences. Petitioner contends that he

³ 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. *E.g.*, *State v. Lawhorn*, 2021 OK CR 37, ___ P.3d ___ (Hudson, V.P.J., Specially Concurs); *Hogner*, 2021 OK CR 4 (Hudson, J., Specially Concurs).

was not represented by conflict-free counsel at the hearing on his motion to withdraw (Proposition D); that his guilty pleas were not knowingly, voluntarily and intelligently entered (Proposition III); that his convictions on Counts 1, 3, 7, 8 and 9 in CF-2017-762 amount to double punishment in violation of 21 O.S.2011, § 11 (Proposition IV); that he was prejudiced at the sentencing hearing by prosecutorial misconduct (Proposition V); and that counsel was ineffective for failing to raise the various issues presented in this appeal (Proposition VI).

This Court reviews the denial of a motion to withdraw a guilty plea for an abuse of discretion. *Anderson v. State*, 2018 OK CR 13, ¶ 4, 422 P.3d 765, 767. Our review on certiorari is limited to two inquiries: (1) whether the plea was knowing and voluntary; and (2) whether the district court accepting the plea had jurisdiction. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. A voluntary guilty plea waives all non-jurisdictional defects. *Frederick v. State*, 1991 OK CR 56, ¶ 5, 811 P.2d 601, 603.

The district court did not abuse its discretion in denying Petitioner's motion to withdraw his guilty pleas. The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Hopkins v. State*, 1988 OK CR 257, ¶ 2, 764 P.2d 215, 216. The Supreme Court has defined a "voluntary" guilty plea in pertinent part as one made by a defendant who is "fully aware of the direct consequences[.]" *Brady v. United States*, 397 U.S. 742, 755 (1970) (internal quotation omitted). We have held that:

Before entering a guilty or nolo contendere plea, a defendant should be advised of the punishment range for the offense. He should also be advised of all material consequences flowing directly from the decision to plead.

Ferguson v. State, 2006 OK CR 36, ¶ 3, 143 P.3d 218, 219 (internal citations omitted). A plea “cannot be entered into knowingly where the defendant is not aware of the possible sentence” and, thus, the district court must advise the defendant of the possible sentence prior to accepting the guilty plea. *Hunter v. State*, 1992 OK CR 1, ¶ 4, 825 P.2d 1353, 1355.

a) Validity of Pleas and Double Punishment.

In his third proposition, Petitioner complains that his blind pleas of guilty were not knowingly and voluntarily entered because his medication prevented him from understanding what was going on; plea counsel led him to believe he would get a split sentence or some type of probation; and counsel allowed him to plead guilty to several felony charges in CF-2017-762 that stem from the same acts and event. In his fourth proposition, Petitioner sets forth in full his double punishment challenges to his convictions in CF-2017-762.

Petitioner did not raise a double punishment claim in the motion to withdraw. Nor did he raise this particular issue in any way at the hearing on his motion to withdraw. Petitioner has therefore waived this aspect of his Proposition III claim, along with the entirety of Proposition IV, from appellate review by failing to raise it during the proceedings on his motion to withdraw plea and in the petition for writ of certiorari. Rules 4.2(B) and 4.3(C)(5), *Rules of the Oklahoma*

Court of Criminal Appeals, Title 22, Ch.18, App. (2019); *Weeks v. State*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d 650, 657.

Petitioner's claim that his medication prevented him from understanding what was going on, and that he believed he would get a split sentence or some type of probation, was preserved for our review. The District Court did not abuse its discretion in denying Petitioner's motion to withdraw on these grounds. Petitioner entered his guilty pleas on the eve of trial. The record shows the plea form was fully completed and that plea counsel reviewed the answers on the Plea of Guilty–Summary of Facts Form with Petitioner prior to entering the pleas. The plea form fully advised Petitioner of the possible punishment range for each crime and that the District Court could choose any punishment within the stated range for each count.

During the plea colloquy, which was transcribed, Petitioner expressed no difficulty understanding the proceedings, let alone hesitation about entering his blind pleas. Petitioner responded appropriately to the District Court's questions and acknowledged reviewing the plea form and the sentencing range for each count with counsel. Petitioner specifically denied being under the influence of alcohol, medication or substances that could affect his decisions in connection with the guilty pleas. When questioned by the trial court, Petitioner denied there was any medication he should be taking but was not; he also denied having ever been treated for mental illness.⁴

⁴ Question No. 8 on the plea form indicated without elaboration that Petitioner had been treated, or confined in a hospital, for

During the plea hearing the District Court, *inter alia*, elicited from Petitioner that he understood all the questions that were asked on the plea form; that his answers were truthful to the best of his knowledge; and that he was entering into the blind plea agreement voluntarily. The District Court also advised Petitioner of the various sentencing ranges for each charge as well as the applicability of the 85% Rule to his case. At the conclusion of the plea proceedings, the District Court found that Petitioner had knowingly and voluntarily entered his guilty pleas and formally accepted them.

The total record shows Petitioner was fully aware of the direct, material consequences of entering his plea. The record further shows Petitioner entered his blind pleas in the hopes of receiving a partially suspended life sentence on the first degree murder charge. At sentencing, plea counsel urged the District Court to impose a life sentence with the last fifteen years suspended. The record contradicts Petitioner's claim that his pleas were anything other than knowingly, intelligently and voluntarily entered. The record does not support Petitioner's claim that the influence of his medications, or some misunderstanding or misapprehension as to the possible punishment he faced, invalidated his blind pleas. The record fully supports the District Court's conclusion that Petitioner's blind

PTSD and anxiety. Petitioner, however, mentioned neither condition during the plea colloquy with the District Court. In addition, a presentence investigation report that addressed, *inter alia*, Petitioner's mental health history was ordered and received by the District Court prior to sentencing. At sentencing, Petitioner's plea counsel did not challenge any of the findings in the PSI report.

pleas represented a voluntary and intelligent choice among alternative courses of action open to him. Based on the foregoing, relief is denied for Propositions III and IV.

b) Prosecutorial Misconduct.

In his fifth proposition, Petitioner alleges that prosecutorial misconduct deprived him of a fundamentally fair sentencing proceeding. These prosecutorial misconduct claims, however, were not raised in Petitioner's motion to withdraw. Nor did Petitioner raise these claims at the hearing on his motion to withdraw. They were also not raised in the petition for writ of certiorari filed with this Court. Proposition V is waived from review. Rules 4.2(B) and 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019); *Weeks*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d at 657. Proposition V is denied.

c) Ineffective Assistance of Counsel.

In his first proposition, Petitioner contends that he was not represented by conflict-free counsel at the hearing on his motion to withdraw and, thus, counsel was ineffective. Petitioner argues that his motion to withdraw his pleas was based upon inadequate representation and poor counsel. Petitioner urges that, at the hearing on the motion to withdraw, counsel was "ineffective and conflicted" and did not advocate at all for his client. Instead, Petitioner says plea counsel was there to defend himself and merely justified and explained his legal representation throughout the proceedings. Counsel's failure to present testimony from Petitioner in support of the motion to withdraw also in Petitioner's view demonstrates a conflict.

The record shows Petitioner was represented by the same counsel, Mark Schantz, throughout the district court proceedings in this case including the plea, sentencing and motion to withdraw hearing. A criminal defendant is entitled to effective assistance of counsel at a hearing on a motion to withdraw. *Carey v. State*, 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 1117; *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316. The right to effective assistance of counsel includes the correlative right to representation that is free from conflicts of interest. *Carey*, 1995 OK CR 55, ¶ 8, 902 P.2d at 1118 (citing *Wood v. Georgia*, 450 U.S. 261, 271 (1981)).

To prevail on an ineffective assistance of counsel claim based on a conflict of interest, a defendant who raised no objection at trial or at the hearing on a motion to withdraw a guilty plea need not show prejudice but “must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.” *Carey*, 1995 OK CR 55, ¶ 10, 902 P.2d at 1118 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). A conflict of interest arises where counsel owes conflicting duties to the defendant and some other person or counsel’s own interests. *Allen v. State*, 1994 OK CR 30, ¶ 11, 874 P.2d 60, 63. However, “[t]he mere appearance or possibility of a conflict of interest is not sufficient to cause reversal.” *Rutan v. State*, 2009 OK CR 3, ¶ 67, 202 P.3d 839, 853 (quoting *Banks v. State*, 1991 OK CR 51, ¶ 34, 810 P.2d 1286, 1296).

This Court does not have a rule that plea counsel and withdrawal counsel cannot be the same attorney. Petitioner’s handwritten motion to withdraw his pleas does not explicitly refer to ineffective assistance of counsel although he does reference that counsel was not “adequate enough”. Petitioner also did not challenge

counsel's effectiveness at the withdrawal hearing or otherwise testify on his own behalf. Instead, defense counsel argued various points championing the claims raised in Petitioner's motion to withdraw and mentioned the possibility of ineffective assistance. This is not a case, like *Carey*, where the defendant and counsel argued against each other and counsel's approach was "oriented to protect" counsel's interests in saving his right to practice law rather than establishing why the guilty pleas were not knowing and voluntary. *Carey*, 1995 OK CR 55, ¶ 7,902 P.2d at 117.

The record does not show defense counsel pursuing his own interests over those of Petitioner. The record does show, however, that a knowing and voluntary guilty plea had been entered. A voluntary guilty plea waives all non-jurisdictional defects. *Lewis*, 2009 OK CR 30, ¶ 4, 220 P.3d at 1142. Complaints concerning double punishment, prosecutorial misconduct and other non-jurisdictional issues were waived by the voluntary plea. Counsel challenged the knowing and voluntary nature of the pleas even though the District Court ultimately denied relief. Based on this record, Petitioner fails to demonstrate that an actual conflict of interest adversely affected his lawyer's performance at the hearing on the motion to withdraw. Petitioner has not demonstrated that counsel had an actual conflict with Petitioner's interests or that an actual conflict of interest adversely affecting counsel's performance relating to the remaining counts in CF-2017-762 and CF-2018-9. Relief is denied for Proposition I.

In his sixth proposition, Petitioner complains that counsel was ineffective during the plea and sentencing proceedings, as well as during the motion to withdraw hearing, for failing to raise various substantive issues.

To prevail on an ineffective assistance of counsel claim, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). See *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (summarizing *Strickland* two-part test).

Petitioner's complaint that counsel was ineffective for failing to raise the jurisdictional challenge set forth in Proposition II is rendered moot by our decision above to reverse and remand his murder conviction with instructions to dismiss.

We also rejected in Proposition III Petitioner's claim that his pleas were not knowingly, voluntarily and intelligently entered. Further, counsel was not ineffective for failing to present the claims of double punishment and prosecutorial misconduct raised in Propositions III, IV and V. Such non-jurisdictional defects are waived by Petitioner's voluntary guilty plea. See *Lewis*, 2009 OK CR 30, ¶ 4, 220 P.3d at 1142. We note too that all of Petitioner's sentences were ordered to run concurrently, thus undermining any real prejudice from the alleged double punishment. Finally, Petitioner's claim that counsel was constitutionally ineffective during the plea proceeding itself is waived from review because this issue was not raised in the motion to withdraw. All things considered, Proposition VI is denied.

3. Request For Modification of Judgment and Sentence.

In his seventh proposition, Petitioner complains that the judgment and sentence does not mention that he was granted credit for time served as pronounced

by the District Court at sentencing. We **REMAND** this matter to the District Court to determine whether correction is needed and, if necessary, to issue an order *nunc pro tunc* correcting the judgment and sentence documents in both cases to include credit for time served. Relief is granted for Proposition VII.

4. **Cumulative Error.**

In his eighth proposition, Petitioner complains that cumulative error warrants relief. Appellant has not demonstrated the existence of two or more errors in this appeal that we can cumulate. This is simply not a case where numerous irregularities during the proceedings below tended to prejudice his rights or otherwise deny him a fair proceeding. *See Mahdavi v. State*, 2020 OK CR 12, ¶ 49. 478 P.3d 449, 461. Proposition VIII is denied.

Decision

The Petition for Writ of Certiorari is **GRANTED IN PART AND DENIED IN PART**. The Judgment and Sentence of the District Court in Rogers County Case No. CF-2017-762 is **AFFIRMED** except that Petitioner's conviction in Count 1 for Murder in the First Degree is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. The Judgment and Sentence of the District Court in Rogers County Case No. CF-2018-9 is **AFFIRMED**. This matter is **REMANDED** to the District Court to determine whether correction of the judgment and sentence documents in both cases is needed concerning credit for time served and, if necessary, to issue an order *nunc pro tunc* correcting the judgment and sentence documents.

The **MANDATE** is not to be issued until twenty days from the delivery and filing of this decision.⁵

**AN APPEAL FROM THE DISTRICT COURT OF
ROGERS COUNTY THE HONORABLE
J. DWAYNE STEIDLEY ACTIVE
RETIRED DISTRICT JUDGE***

*** Sitting by Order of the Oklahoma Supreme Court**

APPEARANCES BELOW

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⁵ The State's request to stay and abate this appeal, presented in its June 7, 2021, brief, is **DENIED**. However, this ruling is without prejudice to any future request by the State to stay the mandate in this case pending the timely filing and disposition of a petition for writ of certiorari in the United States Supreme Court.

APPEARANCES ON APPEAL

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No Response from the State

Opinion by: Hudson, V.P.J.

Rowland, P.J.: Concur

Lumpkin, J.: Concur in Results

Lewis, J.: Concur in Results

Lumpkin, Judge, Concurring in Results:

This certiorari appeal involves two separate District Court cases with multiple counts. I agree with the denial of certiorari as to all counts in both cases except count I in CF-2017-762 which is a conviction of Murder in the First Degree. Those counts do not implicate an application of the *McGirt* decision and the convictions arising from the pleas are appropriately affirmed. My analysis and reluctant agreement with the result in the murder conviction are set out below.

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

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,

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 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.

while the costs of Federal administration of these lands have steadily mounted, must be terminated.” (emphasis added).

Lewis, Judge, Concur in Results:

I concur that White's murder conviction must be reversed with instructions to dismiss under *McGirt* and *Spears*, and that counsel's representation at the plea withdrawal under these circumstances did not deny White the right to counsel. The opinion correctly notes that this Court recently rejected the State's concurrent jurisdiction theory in *Roth*. We should simply apply that holding here with the conclusion that the State has no jurisdiction at the top of page 5, and the following sentence that ends with a citation to *Roth*. The three-page discussion beginning after the citation to *Roth*, including footnote 2 already published in *Roth*, to the sentence beginning "This portion of Petitioner's Judgment and Sentence," etc., is unduly repetitive of matters well-established elsewhere. I also have come to doubt the need for further indefinite stays of the mandate in our decisions pending certiorari review as alluded to in footnote 5, but that decision is for another day.

**DISTRICT COURT OF ROGERS COUNTY,
STATE OF OKLAHOMA, FINDINGS OF FACT
AND CONCLUSIONS OF LAW
(SIGNED JUNE 2, 2021, FILED JUNE 7, 2021)**

IN THE DISTRICT COURT OF
ROGERS COUNTY, STATE OF OKLAHOMA

MARQUISE PETEY WHITE,

Defendant/Petitioner,

v.

STATE OF OKLAHOMA,

Plaintiff/Respondent.

Case No. C-2020-113

Rogers County Case No. CF-2017-762, CF-2018-9

Before: J. Dwayne STEIDLEY, District Court Judge.

Comes now the Court in response to the Honorable Oklahoma Court of Criminal Appeals Order Remanding for Evidentiary Hearing and would Find and Order as follows:

1. That the State and Defendant have entered into a Joint Stipulation, approved by counsel for each addressing the issues the Court of Criminal Appeals directed a response to. A copy of said Stipulation is attached hereto as Exhibit 1.

2. That the District Court adopts said stipulations as its findings, and approves of the same.
3. That accordingly, the District Court finds that the victim, Dakota Rex, in case CF-17-762 was at the time of the Murder in Count One (1) a member of the Muscogee (Creek) Nation; the same being a Tribe recognized by the Federal Government. The same, Dakota Rex, having 1/64th Indian blood.
4. That in accordance with the Stipulation referenced herein as well as previous rulings of this Court whereby this Court has reviewed various Treaties and Federal Statutes relating to the Cherokee Nation and the other Five Civilized Tribes; the Court finds that a Cherokee Reservation was established by the Federal Government, and that said Reservation has not been disestablished. Further, that the crime of Murder at issue herein occurred at 609 South Maryland Avenue, Claremore—Rogers County—Oklahoma, and that said address falls within the boundaries of the recognized Cherokee Indian Reservation and qualifies as “Indian Country”.
5. That the Court notes that the State does not waive its right to assert the legal argument that it has concurrent jurisdiction over the non-Indian Defendant/Petitioner’s crimes, irrespective of the victim’s status.
6. That the Court would respectfully request that this Response/Order be filed even same is being submitted outside the original deadline set by the Court of Criminal Appeals.

7. Further saith the Court not.

Dated this 2nd day of June, 2021.

/s/ J. Dwayne Steidley
Active Retired District Judge
J. Dwayne Steidley Sitting by
Order of the Oklahoma Supreme Court

**JOINT STIPULATIONS
(APRIL 28, 2021)**

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

MARQUISE PETEY WHITE,

Defendant/Petitioner,

v.

STATE OF OKLAHOMA,

Plaintiff/Respondent.

Rogers County District Court
Case No. CF-2017-762, CF-2018-9

Court of Criminal Appeals Case No. C-2020-113

**JOINT STIPULATIONS AND REQUEST
TO STRIKE EVIDENTIARY HEARING**

This case is before the Court pursuant to an Order Remanding for Evidentiary Hearing from the Oklahoma Court of Criminal Appeals (OCCA), dated March 26, 2021. In that Order, the OCCA directed this Court to make findings of fact on two issues: (1) whether the victim, Dakota Rex, has “some Indian blood” and “is recognized as an Indian by a tribe or the federal government” and (2) whether the crime occurred within “Indian Country.”

Furthermore, the OCCA ordered that an evidentiary hearing be held within sixty (60) days from the date of the Order, which would require a hearing to be held on or before May 20, 2021.

The parties wish to see the current matter resolved with judicial efficiency and economy. This sentiment is in accordance with the OCCA's directive that, in the event the parties agree as to what evidence will show at any such hearing—and thus enter into written stipulations—“no hearing on the questions presented is necessary.” Accordingly, the parties agree that the matter can be addressed by stipulations on the factual issues, thus striking the need for an evidentiary hearing. As such, in response to the two questions this Court has been directed to answer, the parties have reached the following stipulations:

1. As to the status of the victim, Dakota Rex, the parties hereby stipulate and agree as follows:

- a. The victim, Dakota Rex, has 1/64 Indian blood and was a member of the Muscogee (Creek) Nation at the time of the crime. The Muscogee (Creek) Nation is an Indian Tribal Entity recognized by the federal government.

2. As to the location of the crime, the parties hereby stipulate and agree as follows:

- a. The crime in this case occurred at 609 South Maryland Avenue, Claremore, Oklahoma. This location falls within the boundaries of the Cherokee Nation.
- b. These boundaries have been explicitly recognized as establishing a reservation, as defined by 18 U.S.C. § 1151(a), and affirmed by the

OCCA in *Spears v. State*, 2021 OK CR 7, ¶ 16, ___ P.3d ___ and *Hogner v. State*, 2021 OK CR 4, ¶ 18, ___ P.3d ___.

3. The parties further stipulate and agree that the evidentiary hearing applies only to the defendant/petitioner's conviction for First Degree Murder (Count I), in Rogers County District Court, Case No. CF-2017-762. The defendant/petitioner does not allege that any of the other victims in Rogers County District Court, Case Nos. CF-2017-762 and CF-2018-9, were Indians or that his jurisdictional claim impacts any of his convictions in those cases, aside from Count I of CF-2017-762.¹

/s/ Virginia Sanders

OBA #12641

Counsel for Defendant/Petitioner

/s/ Matt Ballard

District Attorney Rogers County

/s/ Ashley Willis

OBA #22210

Assistant Attorney General

Counsel for Plaintiff/ Respondent

¹ In joining the stipulations and motion to strike, the State does not waive its legal argument that it has concurrent jurisdiction over the non-Indian defendant/petitioner's crimes, irrespective of the victim's status. The time for filing a petition for writ of certiorari from the OCCA's decision in *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___ has not yet expired.

**ORDER OF THE COURT OF CRIMINAL
APPEALS, STATE OF OKLAHOMA,
REMANDING FOR EVIDENTIARY HEARING
(MARCH 26, 2021)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MARQUISE PETEY WHITE,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

Case No. C-2020-113

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

**ORDER REMANDING
FOR EVIDENTIARY HEARING**

On September 6, 2019, Petitioner entered blind pleas of guilty in the District Court of Rogers County in the following cases:

CF-2017-762: Count 1—Murder in the First Degree; Count 2—Robbery With a Dangerous

Weapon; Count 3—Assault While Masked or Disguised; Count 5—Conspiracy to Commit a Felony; Count 7—Assault With a Dangerous Weapon; Count 8—Burglary in the First Degree; and Count 9—Kidnapping.¹

CF-2018-9: Count 1—Assault and Battery Upon a Police Officer.

Sentencing was delayed to allow preparation of the presentence investigation report. On December 20, 2019, Petitioner was sentenced as follows:

CF-2017-762: Count 1—life without parole; Count 2—ten years imprisonment; Count 3—five years imprisonment; Count 5—five years imprisonment; Count 7—five years imprisonment; Count 8—ten years imprisonment; and Count 9—ten years imprisonment.

CF-2018-9: Count 1—two years imprisonment.

The trial court also imposed various costs and fees, ordered credit for time served and ordered the sentences in CF-2017-762 to run concurrently each to the other and concurrently with the sentence imposed in CF-2018-9.

On December 30, 2019, Petitioner filed a motion to withdraw his guilty pleas in both cases. At a hearing held on January 24, 2020, the Honorable Kassie McCoy, Associate District Judge, denied the motion. Petitioner now appeals and seeks a writ of certiorari.

In Proposition II of his brief in chief, Petitioner claims the District Court lacked jurisdiction to try

¹ Counts 4, 6, 10 and 11 were dismissed.

him. Petitioner argues Dakota Rex, the victim of the first degree murder charged in Count 1 of CF-2017-762, was a citizen of the Muscogee (Creek) Nation and the crimes occurred within the boundaries of the Cherokee Reservation. The record shows the remaining counts in CF-2017-762 and the sole count charged in CF-2018-9 had other victims, none of whom are alleged by Petitioner to be Indians. At our request, the State of Oklahoma filed a response to this proposition of error.

Pursuant to *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), Petitioner's claim raises two separate questions: (a) the Indian status of Dakota Rex, and (b) whether the murder occurred on the Cherokee Reservation. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Rogers County, for an evidentiary hearing to be held within sixty (60) days from the date of this Order. Only Petitioner's first degree murder conviction is at issue for the remanded proceedings.

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Petitioner'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 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, Dakota Rex's status as an Indian. The District Court must determine whether (1) Dakota Rex had some Indian blood, and (2) was recognized as an Indian by a tribe or the federal government.²

Second, whether the murder occurred on the Cherokee Reservation. In making this determination the District Court should consider any evidence the parties provide, 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 Petitioner, 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

² See *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116. See also *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).

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 Rogers County: the "Brief of Appellant" filed November 10, 2020; the Application for Evidentiary Hearing, filed November 10, 2020; and the State's Response Brief, filed March 5, 2021. The present order renders **MOOT** any request made to date for supplemental briefing by either party in this case as well as any request to file an amicus brief.

IT IS SO ORDERED.

**WITNESS OUR HANDS AND THE SEAL OF
THIS COURT** this 26th day of March, 2021.

/s/ Dana Kuehn
Presiding Judge

/s/ Scott Rowland
Vice Presiding Judge

/s/ Gary L. Lumpkin
Judge

/s/ David B. Lewis
Judge

/s/ Robert L. Hudson
Judge

ATTEST:

/s/ John D. Hadden
Clerk