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**OPINION OF THE COURT OF CRIMINAL
APPEALS, STATE OF OKLAHOMA
(MARCH 18, 2021)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

CHRISTOPHER JASON HATHCOAT,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2018-898

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

ROWLAND, VICE PRESIDING JUDGE:

Appellant Christopher Jason Hathcoat was tried by jury and convicted of First Degree Murder in the District Court of McIntosh County, Case No. CF-2016-207. In accordance with the jury's verdict, the Honorable James R. Pratt sentenced Hathcoat to life imprisonment with the possibility of parole. Hathcoat must serve 85% of his sentence before he is eligible

for parole consideration. Hathcoat appeals his Judgment and Sentence and raises the following issues:

- (1) whether the district court erred by instructing the jury that evidence of his defense was insufficient as a matter of law;
- (2) whether the district court erred by failing to instruct the jury on the lesser offense of accessory;
- (3) whether prosecutorial misconduct deprived him of a fair trial;
- (4) whether the State of Oklahoma had jurisdiction to prosecute him;
- (5) whether he received effective assistance of counsel; and
- (6) whether an accumulation of errors deprived him of a fair trial.

We find relief is required on Hathcoat's jurisdictional challenge in Proposition 4, rendering his other claims moot. Hathcoat claims the State of Oklahoma did not have jurisdiction to prosecute him. He relies on 18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020).

On August 19, 2020, this Court remanded this case to the District Court of McIntosh County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Hathcoat's status as an Indian; and (b) whether the crime occurred within the boundaries of the Muscogee Creek Nation Reservation. 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 September 23, 2020, the parties appeared before the Honorable Brendon Bridges for a status conference and entered a written Agreed Stipulation in which they agreed: (1) that Hathcoat has some Indian blood; (2) that he was a registered citizen of the Cherokee Nation on the date of the charged offense; (3) that the Cherokee Nation is a federally recognized tribe; and (4) that the charged crime occurred within the Muscogee Creek Nation Reservation. The district court accepted the parties' stipulation.

On November 24, 2020, the District Court filed its Findings of Fact and Conclusions of Law. The District Court found the facts recited above in accordance with the stipulation. The District Court concluded that Hathcoat is an Indian under federal law and that the charged crimes occurred within the boundaries of the Muscogee Creek Nation Reservation. The District Court's findings are supported by the record. The ruling in *McGirt* governs this case and requires us to find the District Court of McIntosh County did not have jurisdiction to prosecute Hathcoat. Accordingly, we grant relief on Proposition 4.

DECISION

The Judgment and Sentence of the district court is VACATED and the matter is REMANDED WITH INSTRUCTIONS TO DISMISS. 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 (20) days from the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF
MCINTOSH COUNTY, THE HONORABLE JAMES
R. PRATT, ASSOCIATE DISTRICT JUDGE**

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OPINION BY: ROWLAND, V.P.J.

KUEHN, P.J.: Concur

LUMPKIN, J.: Concur in Results

LEWIS, J.: Concur

HUDSON, J.: Specially Concur

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' 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

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 section 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).

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.

HUDSON, J., SPECIALLY CONCURS

Today's decision dismisses a first degree murder conviction from the District Court of McIntosh 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* based on the Indian status of Appellant and the occurrence of the crime on the Creek Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the murder in this case. Instead, Appellant must be prosecuted in federal court. 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 Bosse v. State*, 2021 OK CR 3, ___ P.3d ___ (Hudson, J., Concur in Results); *Hogner v. State*, 2021 OK CR 4, P.3d (Hudson, J., Specially Concur); and *Krafft v. State*, No. F-2018-340 (Okl. Cr., Feb. 25, 2021) (Hudson, J., Specially Concur) (unpublished).

**DISTRICT COURT OF MCINTOSH COUNTY,
STATE OF OKLAHOMA, JOURNAL ENTRY
OF FACTS AND CONCLUSIONS OF LAW
IN ACCORDANCE WITH ORDER REMANDING
FOR EVIDENTIARY HEARING
(SEPTEMBER 24, 2020)**

IN THE DISTRICT COURT OF
MCINTOSH COUNTY, STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

CHRISTOPHER JASON HATHCOAT,

Defendant.

Case No. CF-16-207

Court of Criminal Appeals Case No. F-2018-898

**JOURNAL ENTRY OF FACTS AND CONCLUSIONS OF
LAW IN ACCORDANCE WITH ORDER REMANDING FOR
EVIDENTIARY HEARING ISSUED AUGUST 19, 2020**

Now on the 23rd day of September, 2020, comes on for evidentiary hearing for the purpose of determining the following: (a) Defendant's Indian status and (b) whether the crimes occurred on the Creek Reservation. The Defendant appears in person and with counsel, Chad Johnson and Garrett Marshall. The

State appears by and through McIntosh County District Attorney, Carol Iski, and assistant district attorney, Greg Stidham. The Oklahoma Attorney General's Office appears by and through counsel, Joshus R. Fanelli and Hannah K. White.

After receiving argument and evidentiary stipulations the Court hereby FINDS and ORDERS as follows:

FINDINGS OF FACT AND CONCLUSION OF LAW

The first issue for adjudication is the Defendant's status as an Indian as defined by federal law. The Tenth Circuit's decision in *United States v. Diaz*, 679 F.3d 1183 (10th Cir. 2012) articulates the test for making such determination. As *Diaz* states:

To find that a person is an Indian the court must first make factual findings that the person has some Indian blood and, second, that the person is recognized as an Indian by a tribe or by the federal government.

Id. at 1187 (internal quotations omitted); *see also Goforth v. State*, 1982 OK CR 48, 644 P.2d 114. Applied to the present matter, the parties jointly stipulate in writing the evidence will show "the [Defendant] is one-sixteenth (1/16) degree Indian blood." *See Joint Exhibit 1* (attached). In addition, "[t]he [Defendant] was a registered citizen of the Cherokee Nation on August 4, 2016, the dates of the charged offenses." *Id.* Finally, "[t]he Cherokee Nation is an Indian Tribal Entity recognized by the federal government." *Id.* The Court accepts and attaches these stipulations to the Court's Findings of Facts and Conclusions of

Law. Applying elements of *Diaz* to the evidentiary stipulations in the present matter, the Court finds the Defendant has “some Indian blood” and is also “recognized as an Indian by a tribe and the federal government.” For this reason, the Court finds the Defendant is an Indian under federal law.

Having found the Defendant is an Indian under federal law, this Court must now determine if the crime occurred on the Creek Reservation. As *McGirt v. Oklahoma*, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020) explains “[t]he 1833 Treaty fixed borders for what was to be a ‘permanent home to the whole Creek nation of Indians.’” *Id.* at 2461. The parties in this matter stipulate “[t]he charged crimes occurred within the Creek Reservation.” For this reason, the Court adopts the stipulation and finds the crime occurred on the Creek Reservation.

In accordance with the directives of the Oklahoma Court of Criminal Appeals, the court reporter shall file an original and two certified copies of the transcript of this hearing within (20) days. This District Court Clerk shall transmit the record of the evidentiary hearing, this Journal Entry of Findings of Facts and Conclusions of Law with attachments, and the transcript of this proceeding to the Clerk of the Court of Criminal Appeals.

BE IT SO ORDERED

/s/ Brendon Bridges
Associate District Judge McIntosh
County State of Oklahoma

CERTIFICATE OF MAILING

I hereby certify on the 24th day of September, 2020, I mailed a true and correct copy of the foregoing document to the following:

Chad Johnson
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and

Joshua R. Fanelli
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and

Carol Iski
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Signed: /s/ KaLee Beezley
Office of Associate District Judge
Brendon Bridges McIntosh County

**AGREED STIPULATION
(SEPTEMBER 23, 2020)**

IN THE DISTRICT COURT OF
MCINTOSH COUNTY, STATE OF OKLAHOMA

CHRISTOPHER JASON HATHCOAT,
Appellant,

v.

STATE OF OKLAHOMA,
Appellee.

COCA No. F-2019-898
McIntosh County No. CF-2016-207

Following the United States Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Oklahoma Court of Criminal Appeals remanded Appellant's case to this Court on August 19, 2020, for an evidentiary hearing to determine 1) Appellant's status as an Indian, and 2) whether the crimes occurred on the Creek Reservation. The parties hereby announce, and request this Court to accept, the following stipulations:

1. Appellant is one-sixteenth (1/16) degree Indian blood.
2. Appellant was a registered citizen of the Cherokee Nation on August 4, 2016, the dates of the charged offenses.

3. The Cherokee Nation is an Indian Tribal Entity recognized by the federal government.
4. The charged crimes occurred within the Creek Reservation

Respectfully submitted this 23rd day of September, 2020.

/s/ Chad Johnson

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

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

CHRISTOPHER JASON HATHCOAT,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

Case No. F-2019-898

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

Appellant Christopher Jason Hathcoat was tried by jury and convicted of First Degree Murder in the District Court of McIntosh County, Case No. CF-2016-207. In accordance with the jury’s recommendation, the Honorable James R. Pratt sentenced Hathcoat to life imprisonment with the possibility of parole. Hathcoat must serve 85% of his sentence before he is eligible for parole consideration. Hathcoat appeals his Judgment and Sentence.

In Proposition 4 of his Brief-in-Chief, filed March 1, 2019, Hathcoat claims the District Court lacked jurisdiction to try him. Hathcoat argues that he is a citizen of the Cherokee Nation and that his crime occurred within the boundaries of the Creek Reservation.¹ Hathcoat, in his direct appeal, relied 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).²

Hathcoat's claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred on the Creek Reservation. These issues require fact-finding. We therefore **REMAND** this case to the District Court of McIntosh 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 Attorney General and District Attorney work in coordination to effect uniformity and completeness in

¹ Hathcoat also claims that defense counsel was ineffective for failing to raise the issue of jurisdiction and asks the Court to either supplement the record on appeal with documentation bearing on the issue of jurisdiction or to order an evidentiary hearing to develop the record with regard to his ineffective assistance of counsel claim.

² On July 26, 2019, we held Hathcoat's direct appeal in abeyance pending the resolution of the litigation in *Murphy*. Following *McGirt*, the State asked to file a response to Hathcoat's jurisdictional claim. In light of the present order, there is no need for an additional response from the State at this time and that request is **DENIED**.

the hearing process. Upon Hathcoat's presentation of *prima facie* evidence as to his 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, Hathcoat's status as an Indian. The District Court must determine whether (1) Hathcoat has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.³

Second, whether the crime occurred within the boundaries of the Creek 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 Appellant, within five (5)

³ 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.

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 McIntosh County: Appellant's Brief-in-Chief and Appellant's Motion to Supplement the Record on Appeal or, in the Alternative, Application for Evidentiary Hearing on Sixth Amendment Claim filed March 1, 2019; and Appellee's Answer Brief filed July 1, 2019.

IT IS SO ORDERED.

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

App.21a

/s/ David B. Lewis
Presiding Judge

/s/ Dana Kuehn
Vice President Judge

/s/ Gary L. Lumpkin
Judge

/s/ Robert L. Hudson
Judge

/s/ Scott Rowland
Judge

ATTEST

/s/ John D. Hadden
Clerk