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**OPINION OF THE COURT OF CRIMINAL
APPEALS FOR THE STATE OF OKLAHOMA
(MARCH 25, 2021)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JOHNNY EDWARD MIZE, II,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2019-68

An Appeal from the District Court of Tulsa County
the Honorable Dawn Moody, District Judge

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

OPINION

ROWLAND, VICE PRESIDING JUDGE:

Appellant Johnny Edward Mize, II, appeals from his conviction in Tulsa County District Court, Case No. CF-2017-3891, for First Degree Manslaughter (Heat of Passion), in violation of 21 O.S. 2011, § 711(2).

The Honorable Dawn Moody, District Judge, presided over Mize's jury trial and sentenced him to twenty-five years imprisonment. Mize appeals raising the following issues:

- (1) whether the evidence was insufficient to disprove self-defense beyond a reasonable doubt;
- (2) whether the trial court gave unnecessary jury instructions which confused and mislead the jury;
- (3) whether the prosecutor injected personal opinion into closing arguments and vouched for the credibility of a State's witness;
- (4) whether the State of Oklahoma had jurisdiction to prosecute him;
- (5) whether he received the effective assistance of trial counsel;
- (6) whether his sentence was excessive; and
- (7) whether cumulative error requires relief.

We find relief is required on Mize's jurisdictional challenge in Proposition 4, rendering his other claims moot. Mize 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 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, Jake Ulrich, and (b) whether the crime occurred within the boundaries of the Muscogee Creek 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 25, 2020, the parties appeared before the Honorable Tracy L. Priddy for a status conference. The parties agreed at the status conference and entered written stipulations in which they agreed: (1) that the victim, Jake Ulrich, had 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 Reservation. The district court accepted the parties' stipulations.

On November 16, 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 stipulations. The District Court concluded that the victim, Jake Ulrich, was an Indian under federal law and that the charged crime occurred within the boundaries of the Muscogee Creek Reservation. The District Court's findings are supported by the record.

While the State conceded that the victim was an Indian under federal law and that the charged crime occurred within the boundaries of the Muscogee Creek Reservation, the State did not concede that the federal courts have exclusive jurisdiction over crimes committed against Indians in Indian Country pursuant to 18 U.S.C. §§ 1152. Rather, it argued that the State has concurrent jurisdiction with federal courts over crimes committed by non-Indian defendants against Indian victims in Indian Country. We rejected the

State's argument regarding concurrent jurisdiction in *Bosse v. State*, 2021 OK CR 3, ¶¶ 23-28, ___ P.3d ___. Based upon this precedent, we reject the State's argument regarding concurrent jurisdiction.

The District Court of Tulsa County did not have jurisdiction to prosecute Mize and 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 TULSA COUNTY THE HONORABLE DAWN MOODY, DISTRICT JUDGE

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Opinion by: Rowland, V.P.J.

Kuehn, P.J.: Concur

Lumpkin, J.: Concur in Results

Lewis, J.: Specially 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.

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).

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.

LEWIS, JUDGE, SPECIALLY CONCURRING

I write separately to note that I am bound by my special writings in *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___ and *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___. Following the precedent of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), Oklahoma has no jurisdiction over persons who commit crimes against Indians in Indian Country. This crime occurred within the historical boundaries of the Muscogee (Creek) Nation Reservation and that Reservation has not been expressly disestablished by the United States Congress. Additionally, the crime occurred against Indian victims, thus the jurisdiction is governed by the Major Crimes Act found in the United States Code.

Oklahoma, therefore, has no jurisdiction, concurrent or otherwise, over the appellant in this case. Thus, I concur that this case must be reversed and remanded with instructions to dismiss. Jurisdiction is in the hands of the United States Government.

HUDSON, J., SPECIALLY CONCURS

Today's decision dismisses a first degree manslaughter conviction 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* based on the Indian status of the victim and the occurrence of this crime on the Creek Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the homicide 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 Concurs); and *Krafft v. State*, No. F-2018-340 (Okl.Cr., Feb. 25, 2021) (Hudson, J., Specially Concurs) (unpublished).

**DISTRICT COURT OF TULSA COUNTY,
STATE OF OKLAHOMA, AMENDED FINDINGS
OF FACT AND CONCLUSIONS OF LAW
(SIGNED NOVEMBER 5, 2020,
FILED NOVEMBER 6, 2020)**

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

JOHNNY EDWARD MIZE, II,

Defendant/Appellant,

v.

THE STATE OF OKLAHOMA,

Plaintiff/Appellee.

Tulsa County District Court Case No. CF- 2017-3891

Court of Criminal Appeals Case No. F- 2019-68

Before: Tracy L. PRIDDY, District Judge

This matter came on for a status conference on September 25, 2020 pursuant to the remand order of the Oklahoma Court of Criminal Appeals (“OCCA”) issued August 19, 2020. James Lockard appeared on behalf of Appellant, Johnny Edward Mize, whose appearance was waived. Assistant Attorney General Julie Pittman appeared for Appellee. Tulsa County First Assistant District Attorney Erik M. Grayless also appeared. An evidentiary hearing was not held

pursuant to the parties' announcement that they had agreed and stipulated to facts supporting the issues to be determined by this Court.

The Appellant, in his Brief-In-Chief asserted a claim that the State of Oklahoma lacked subject matter jurisdiction to try him as the victim in this case, Jake Ulrich, was a citizen of the Cherokee Nation and the crime occurred within the boundaries of the Creek Reservation. Appellant's claim raises two questions: (a) the Indian status of his victim, Jake Ulrich, and (b) whether the crime occurred in Indian Country. These issues require fact-finding to be addressed by the District Court per the OCCA Order Remanding.

I. Jake Ulrich's Status as an Indian

To determine the Indian status of the victim, the OCCA directed the District Court to make findings of fact as to whether (1) the victim had some Indian blood, and (2) was recognized as an Indian by a tribe or the federal government.¹ The Court finds as follows:

Findings of Fact

1. Jake Ulrich was the named victim in the above-entitled matter.

2. The parties hereto stipulated and agreed that Jake Ulrich had 3/64ths Cherokee blood, and was recognized as a citizen of the Cherokee Nation at the

¹ *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). *Generally Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

time of the offense. The Cherokee Nation is an Indian Tribal Entity recognized by the federal government.²

Conclusions of Law

Regarding the first determination, the Court answers the first inquiry in the affirmative. The Court adopted the Stipulations filed by the parties on September 25, 2020 and made findings of fact thereon. Jake Ulrich had 3/64ths Cherokee Blood. Although the term “Indian” is not statutorily defined and various terms such as “sufficient”³, “substantial”⁴, “significant percentage of”⁵ or “some”⁶ have been used by courts in an attempt to define the quantity of Indian blood required to satisfy this inquiry, the OCCA mandate ordered this Court to determine “whether the victim had some Indian blood.”⁷ Thus, according to the term used by the OCCA in its Order, this Court concludes Jake Ulrich had some Indian blood.

Additionally, the Court answers the second part of the inquiry in the affirmative. The Court adopted the Stipulations and made findings of fact thereon. Jake Ulrich was recognized as a citizen of the Cherokee Nation at the time of the offense and the Cherokee Nation is an Indian Tribal Entity recognized by the

² Exhibit 1, Stipulations (2).

³ *United States v. LaBuff*, 658 F. 3d 873, 874-75 (9th Cir. 2011)

⁴ *Vialpando v. State*, 640 P.2d 77, 79-80 (Wyo. 1982).

⁵ *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

⁶ *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012).

⁷ Order Remanding for Evidentiary Hearing August 19, 2020.

federal government. Therefore, Jake Ulrich was recognized as an Indian by a tribe or the federal government.

Having answered both inquiries in the affirmative, this Court concludes Shannon Jake Ulrich was an Indian victim.

II. Whether the Crime Occurred in Indian Country

The OCCA further ordered the District Court to determine whether the crime occurred within the boundaries of the Creek Reservation, referred to as Indian Country.⁸ The Court finds as follows:

Findings of Fact

1. The parties hereto stipulated that the crime occurred at 615 South 65th West Avenue, Tulsa, OK 74127.⁹

2. The parties further stipulated that the above address is located within the boundaries of the Creek Nation's Reservation — boundaries established through a series of treaties between the Creek Nation and the United States.¹⁰

3. Additionally, these boundaries have been explicitly recognized as establishing a reservation as defined by 18 U.S.C. § 1151(a), by the United States Supreme Court.¹¹

⁸ *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020); 18 U.S.C. §§ 1152, 1153.

⁹ Exhibit 1, Stipulations (1)(a).

¹⁰ Exhibit 1, Stipulations (1)(b).

¹¹ *Id.*

Conclusions of Law

The final inquiry is answered in the affirmative. This Court adopted the parties' Stipulations and made findings of fact thereon. The crime occurred at a location identified by a specific address that is within the boundaries of the Creek Nation's Reservation. These boundaries were established through a series of treaties between the Creek Nation and the United States, and are explicitly recognized as a reservation defined by 18 U.S.C. § 1151(a). Based upon the Supreme Court's ruling in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), this Court concludes that the crime occurred in Indian Country.

WHEREFORE, this Court finds that Jake Ulrich was an Indian victim and that the crime for which Appellant was convicted occurred in 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 5th day of November, 2020.

/s/ Tracy L. Priddy
District Judge

**STIPULATIONS
(SEPTEMBER 25, 2020)**

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

JOHNNY EDWARD MIZE, II,

Defendant/Appellant,

v.

THE STATE OF OKLAHOMA,

Plaintiff/Appellee.

Tulsa County District Court Case No. CF-2017-3891

Court of Criminal Appeals Case No. F-2019-68

Before: Tracy L. PRIDDY, District Judge

STIPULATIONS

In response to the questions this Court has been directed to answer by the Court of Criminal Appeals, the parties have reached the following stipulations:

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

- a. The crime in this case occurred at 615 South 65th West Avenue, Tulsa, OK 74127, That address is within the boundaries of the Creek Nation's Reservation—boundaries established through a series of treaties

between the Creek Nation and the United States.

- b. These boundaries have been explicitly recognized as establishing a reservation, as defined by 18 U.S.C. § 1151(a), by the United States Supreme Court in *McGirt v. Oklahoma*, ___ U.S. ___, 140 S.Ct. 2452, 207 L.2d 985 (2020).

2. As to the status of the victim, the parties hereby stipulate and agree that the victim, Jake Ulrich, had 3/64ths Cherokee, Blood, and was recognized as a citizen of the Cherokee Nation at the time of the crime. The Cherokee Nation is an Indian Tribal Entity recognized by the federal government.

Respectfully submitted,

/s/ Julie Pittman

Counsel for Plaintiff/ Appellee

/s/ James H. Lockhard

Counsel for Defendant/ Appellant

/s/ Erik M. Grayless

Tulsa County District Attorney's Office
First Assistant District Attorney

**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

JOHNNY EDWARD MIZE, II,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2019-68

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 Johnny Edward Mize, II appeals from his conviction in Tulsa County District Court, Case No. CF-2017-3891, for First Degree Manslaughter (Heat of Passion), in violation of 21 O.S.2011, § 711(2). The Honorable Dawn Moody, District Judge, presided over Mize's jury trial and sentenced him to twenty-

five years imprisonment. Mize must serve 85% of his sentence before he his [sic] eligible for parole.

In his Brief-in-Chief, filed on August 29, 2019, Mize claims the District Court lacked jurisdiction to try him. Mize argues that while he is not Indian, his victim, Jake Ulrich, was a citizen of the Cherokee Nation and the crime occurred within the boundaries of the Creek Reservation. Mize, in his direct appeal, relied on the 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

Mize's claim raises two separate questions: (a) the Indian status of his victim, Jake Ulrich, 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 Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Mize's presentation of *prima facie* evidence as to the victim's legal status as an

¹ On February 21, 2020, we held Mize's direct appeal in abeyance pending the resolution of the litigation in *Murphy*. Following the decision in *McGirt*, the State asked for additional time in which to file a response to Mize'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**.

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

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 Mize, within five (5) days after the District Court has filed its findings of fact

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.

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 filed August 29, 2019; Appellee's Answer Brief filed December 13, 2019; and Appellant's Reply Brief filed January 2, 2020.

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

App.23a

/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