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**OPINION OF THE COURT OF CRIMINAL  
APPEALS, STATE OF OKLAHOMA  
(APRIL 1, 2021)**

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IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

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JOSEPH STANLEY HARJO,

*Appellant,*

v.

STATE OF OKLAHOMA,

*Appellee.*

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Case No. F-2017-889

An Appeal from the District Court of Muskogee  
County the Honorable Norman Thygesen  
Associate District Judge

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

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**OPINION**

**HUDSON, JUDGE:**

Appellant, Joseph Stanley Harjo, was tried by a jury and convicted of Child Sexual Abuse, in violation of 21 O.S.Supp.2014, § 843.5(E), in the District Court

of Muskogee County, Case No. CF-2016-692. The jury recommended a sentence of life imprisonment. The Honorable Norman D. Thygesen, Associate District Judge, presided at trial and sentenced Harjo in accordance with the jury's verdict. Appellant must serve 85% of the sentence imposed before becoming eligible for parole. Appellant now appeals from this conviction and sentence.

In Proposition I of his brief in chief, Appellant claims the District Court lacked jurisdiction to try him. Appellant argues that he is a citizen of the Creek Nation and the crime in this case occurred within the boundaries of the Creek Reservation. Pursuant to *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), Appellant's claim raises two separate questions: (a) his Indian status; and (b) whether the crimes occurred on the Creek Reservation. These issues require fact-finding. We therefore remanded this case to the District Court of Muskogee County for an evidentiary hearing.

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we requested the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Appellant's presentation of *prima facie* evidence as to Appellant'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 District Court was ordered to determine whether Appellant has some Indian blood and is recognized as an Indian by a tribe or the federal government. The District Court was further ordered to determine whether the crimes in this case occurred in Indian Country. In so doing, the District Court was directed to consider any evidence

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

We also directed the District Court that in the event the parties agreed as to what the evidence would show with regard to the questions presented, the parties 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. The District Court was also ordered to file written findings of fact and conclusions of law with this Court.

On remand, the parties filed with the District Court an Agreed Stipulation announcing and requesting the Court accept the following stipulations: 1) Appellant is 1/4th degree Indian blood; 2) Appellant is an enrolled member of the Muscogee (Creek) Nation and was such in 2016 at the time of the charged crime; 3) the Muscogee (Creek) Nation is an Indian Tribal Entity recognized by the federal government; and 4) the charged crime occurred within the Creek Reservation. The Agreed Stipulation was signed by counsel for both parties including attorneys from the Oklahoma Attorney General's Office, the Muskogee County District Attorney's Office and counsel for Appellant.

On October 14, 2020, Judge Thygesen filed an Order containing his written findings of fact and conclusions of law. This Order thereafter was timely filed with this Court along with the Agreed Stipulation which is included as an attachment. The District Court accepted and adopted the stipulations made by the parties and concluded in its findings of fact and conclusions of law that Appellant has some Indian blood, that he is also recognized as an Indian by a

tribe or by the federal government and therefore Appellant is an Indian under federal law. Finally, the District Court accepted and adopted the stipulation of the parties that the crime in this case occurred on the Creek Reservation.

On November 9, 2020, the State filed with this Court a supplemental brief after remand. In its brief, the State acknowledges the District Court accepted the parties' stipulations as discussed above and references the District Court's findings. The State contends in its brief that should this Court find Appellant is entitled to relief based on the District Court's findings, this Court should stay any order reversing the conviction for thirty (30) days so federal authorities may secure custody of Appellant. *Cf.* 22 03.2011, § 846.

After thorough consideration of this proposition and the entire record before us on appeal including the original record, transcripts and the briefs of the parties, we find that under the law and evidence relief is warranted. Based upon the record before us, the District Court's findings of fact and conclusions of law are supported by the stipulations jointly made by the parties on remand. We therefore find Appellant has met his burden of establishing his status as an Indian, having 1/4th degree Indian blood and being a member of the Muscogee (Creek) Nation. We further find Appellant met his burden of proving the crimes in this case occurred on the Creek Reservation and, thus, occurred in Indian Country.

Pursuant to *McGirt*, we find the State of Oklahoma did not have jurisdiction to prosecute Appellant in this

matter.<sup>1</sup> The Judgment and Sentence in this case is hereby reversed and the case remanded to the District Court of Muskogee County with instructions to dismiss the case.<sup>2</sup>

## DECISION

The Judgment and Sentence of the District Court is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. The **MANDATE** is not to be issued until twenty (20) days from the delivery and filing of this decision.<sup>3</sup>

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<sup>1</sup> 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).

<sup>2</sup> This resolution renders the other seven propositions of error raised in Appellant's brief moot.

<sup>3</sup> By withholding issuance of the mandate for twenty days, the State's request for time to secure Appellant's arrest by federal authorities is rendered moot.

**AN APPEAL FROM THE DISTRICT COURT  
OF MUSKOGEE COUNTY  
THE HONORABLE NORMAN THYGESEN  
ASSOCIATE DISTRICT JUDGE**

**APPEARANCES AT TRIAL**

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**Opinion by: Hudson, J.**  
Kuehn, P.J.: Concur In Results  
Rowland, V.P.J.: Concur  
Lumpkin, J.: Concur in Results  
Lewis, J.: Concur in Results



**LUMPKIN, JUDGE:  
CONCURRING IN RESULTS**

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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.<sup>4</sup> 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.

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<sup>4</sup> 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, CONCURRING IN RESULTS**

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Based on my special writings in *Bosse v. State*, 2021 OK CR 3, \_\_\_ P.3d \_\_\_ and *Hogner v. State*, 2021 OK CR 4, \_\_\_ P.3d \_\_\_, I concur in results to the decision to dismiss this case for the lack of state jurisdiction.

**ORDER OF THE DISTRICT COURT OF  
MUSKOGEE COUNTY STATE OF OKLAHOMA  
(OCTOBER 14, 2020)**

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IN THE DISTRICT COURT OF MUSKOGEE  
COUNTY STATE OF OKLAHOMA

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JOSEPH STANLEY HARJO,

*Appellant,*

v.

THE STATE OF OKLAHOMA,

*Appellee.*

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COCA No. F-2017-889

Muskogee County No. CF-2016-692

Before: Norman D. THYGESEN,  
Associate District Judge.

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**ORDER**

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 21, 2020, for an evidentiary hearing to determine Appellant's status as an Indian and whether the crimes occurred on the Creek Reservation.

On October 5, 2020, the parties filed an Agreed Stipulation, announcing and requesting this Court to accept the following stipulations:

1. Appellant is one-fourth (1/4) degree Indian blood.
2. Appellant is an enrolled member of the Muscogee (Creek) Nation and was such in 2016, the time of the charged offense.
3. The Muscogee (Creek) Nation is an Indian Tribal Entity recognized by the federal government.
4. The charged crime occurred within the Creek Reservation.

This Court hereby accepts the stipulations. Further, this Court makes the following findings of fact and conclusions of law, which the parties agree to.

The first issue for adjudication is Appellant'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. As to the present matter, the parties jointly stipulate in writing the evidence will show "Appellant is one-fourth (1/4) degree Indian blood." *See Agreed Stipulation*

(Attachment A). In addition, “Appellant is an enrolled member of the Muscogee (Creek) Nation and was such in 2016, the time of the charged offense.” *Id.* Finally, “[t]he Muscogee (Creek) Nation is an Indian Tribal Entity recognized by the federal government.” *Id.* Applying the elements of *Diaz* to the evidentiary stipulations in the present matter, the Court finds Appellant has “some Indian blood” and is also “recognized as an Indian by a tribe or by the federal government.” For this reason, the Court finds Appellant is an Indian under federal law.

Having found Appellant 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 (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 crime occurred within the Creek Reservation.” For this reason, the Court adopts the stipulations and finds the crime occurred on the Creek Reservation. The Remand Order provides:

[I]n 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.

Remand Order p.4. Accordingly, as this Court accepts the Agreed Stipulation, which “answer[s] the questions presented,” the evidentiary hearing currently scheduled

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for October 14, 2020, at 1:30 p.m., is hereby stricken. In accordance with the directives of the Oklahoma Court of Criminal Appeals, the District Court Clerk shall transmit this Order with attachments to the Clerk of the Court of Criminal Appeals.

BE IT SO ORDERED

/s/ Norman D. Thygesen  
Associate District Judge  
Muskogee County  
State of Oklahoma



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

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IN THE DISTRICT COURT OF MUSKOGEE  
COUNTY STATE OF OKLAHOMA

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JOSEPH STANLEY HARJO,

*Appellant,*

v.

THE STATE OF OKLAHOMA,

*Appellee.*

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COCA No. F-2017-889

Muskogee County No. CF-2016-692

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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 21, 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-fourth (1/4) degree Indian blood.

2. Appellant is an enrolled member of the Muscogee (Creek) Nation and was such in 2016, the time of the charged offense.
3. The Muscogee (Creek) Nation is an Indian Tribal Entity recognized by the federal government.
4. The charged crime occurred within the Creek Reservation.

Respectfully submitted this 23rd day of September, 2020.

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**COURT OF CRIMINAL APPEALS,  
STATE OF OKLAHOMA, ORDER REMANDING  
FOR EVIDENTIARY HEARING  
(AUGUST 21, 2020)**

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IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

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JOSEPH STANLEY HARJO,

*Appellant,*

v.

STATE OF OKLAHOMA,

*Appellee.*

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Case No. F-2017-889

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

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**ORDER REMANDING FOR  
EVIDENTIARY HEARING**

Appellant, Joseph Stanley Harjo, was tried by a jury and convicted of Child Sexual Abuse, in violation of 21 O.S.Supp.2014, § 843.5(E), in the District Court of Muskogee County, Case No. CF-2016-692. The jury recommended a sentence of life imprisonment. The Honorable Norman D. Thygesen, Associate Dis-

trict Judge, presided at trial and sentenced Harjo in accordance with the jury's verdict. Appellant must serve 85% of the sentence imposed before becoming eligible for parole. Appellant now appeals from this conviction and sentence.

In Proposition I of his brief in chief, Appellant claims the District Court lacked jurisdiction to try him. Appellant argues that he is a citizen of the Creek Nation and the crime in this case occurred within the boundaries of the Creek Reservation.

Pursuant to *McGirt v. Oklahoma*, No. 18-9526 (U.S. July 9, 2020), Appellant'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 Muskogee 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 Appellant's presentation of *prima facie* evidence as to the Appellant's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

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

days after the filing of the transcripts in the District Court. The District Court shall address only the following issues.

First, the Appellant's status as an Indian. The District Court must determine whether (1) Appellant has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.<sup>1</sup>

Second, whether the crime occurred on 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) 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

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<sup>1</sup> 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).

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 Muskogee County: Appellant's Brief in Chief, filed March 28, 2018; and Appellee's Response Brief, filed May 18, 2018. 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 21st day of August, 2020.

/s/ David B. Lewis  
Presiding Judge

/s/ Dana Kuehn  
Vice Presiding Judge

/s/ Gary L. Lumpkin  
Judge

/s/ Robert L. Hudson  
Judge

/s/ Scott Rowland  
Judge