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

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MICHAEL EUGENE SPEARS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2019-330

An Appeal from the District Court of Rogers County
the Honorable Sheila Condren, District Judge

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

OPINION

ROWLAND, VICE PRESIDING JUDGE:

¶ 1 Michael Eugene Spears was tried by jury in the District Court of Rogers County, Case No. CF-2017-1013, and convicted of First Degree Murder, in violation of 21 O.S.Supp.2012, § 701.7. In accordance

with the jury's recommendation, the Honorable Sheila Condren sentenced Spears to life imprisonment with the possibility of parole.

¶ 2 Spears appeals his Judgment and Sentence raising the following issues:

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

(2) whether the evidence was sufficient to prove all elements of first degree murder;

(3) whether he was prejudiced by the admission of improper and speculative expert opinion testimony;

(4) whether the trial court erred in allowing the prosecution to define reasonable doubt; and

(5) whether he received ineffective assistance of counsel.

¶ 3 Because we find relief is required on Spears's jurisdictional challenge in Proposition 1, his other claims are moot. Spears claims the State of Oklahoma did not have jurisdiction to prosecute him relying upon 18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020).

¶ 4 On August 19, 2020, this Court remanded this case to the District Court of Rogers County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Spears's status as an Indian; and (b) whether the crime occurred in Indian Country, namely within the boundaries of the Cherokee 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.

¶ 5 On September 28, 2020, the parties appeared for an evidentiary hearing and filed written stipulations. On November 12, 2020, the District Court filed its Findings of Fact and Conclusions of Law. We discuss the stipulations and District Court's Findings of Fact and Conclusions of Law below.

A. The Major Crimes Act

¶ 6 Title 18 Section 1153 of the United States Code, known as the Major Crimes Act, grants exclusive federal jurisdiction to prosecute certain enumerated offenses committed by Indians within Indian country. It reads in relevant part as follows:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153(a) (2013).

¶ 7 The first degree murder charge fits squarely within the Major Crimes Act and its exclusive federal jurisdiction.

B. *McGirt v. Oklahoma*

¶ 8 Federal statutes asserting federal criminal jurisdiction in Indian country are more than one hundred years old. What has recently changed is the definition of Indian country, within the borders of Oklahoma, for purposes of these statutes. In *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) the Supreme Court held that land set aside for the Muscogee Creek Nation in the 1800's was intended by Congress to be an Indian reservation, and that this reservation exists today for purposes of federal criminal law because Congress never explicitly disestablished it. Although the case now before us involves the lands of the Cherokee Nation, we find *McGirt*'s reasoning controlling.

C. Questions Upon Remand

1. Spears's Status as Indian

¶ 9 The parties agreed by stipulation that (1) Spears has some Indian blood (2) he was an enrolled member of the Cherokee Nation on the date of the charged offense; and (3) the Cherokee Nation is a federally recognized tribe. The District Court accepted this stipulation and reached the same conclusion in its Findings of Fact and Conclusions of Law.

2. Whether Crime Was Committed in Indian Country

¶ 10 As to the second question on remand, whether the crime was committed in Indian country,

the stipulation of the parties was less dispositive. They agreed only that the charged crime occurred within the historical geographic area of the Cherokee Nation as designated by various treaties.

a. Establishment of the Cherokee Reservation

¶ 11 In a thorough and well-reasoned order, the District Court examined the 19th century treaties between the Cherokee Nation and the United States of America. The court noted that "[t]he Cherokee treaties were negotiated and finalized during the same period of time as the Creek treaties, contained similar provisions that promised a permanent home that would be forever set apart, and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state."[1] The District Court concluded that the current boundaries of the Cherokee Nation are as established in the 1833 Treaty with the Western Cherokee, 1835 Treaty with the Cherokee, 1846 Treaty with the Cherokee, and the 1866 Treaty with the Cherokee.

¶ 12 The District Court found, "[l]ike Creek treaties, the Cherokee treaties that promised land in Indian Territory to the Cherokee Nation established the tribe's relationships with that land and created a reservation." This finding is consistent with *McGirt*, where the majority found it "obvious" that a similar

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1 This Court has also acknowledged that, "[t]he treaties concerning the Five Tribes which were resettled in Oklahoma in the mid-1800s (the Muscogee Creek, Cherokee, Chickasaw, Choctaw, and Seminole) have significantly similar provisions; indeed, several of the same treaties applied to more than one of those tribes." *Bosse v. State*, 2021 OK CR 3, ¶ 5, ___ P.3d ___.

course of dealing between Congress and the Creeks had created a reservation, even though that term had not always been used to refer to the lands set aside for them, "perhaps because that word had not yet acquired such distinctive significance in federal Indian law." *McGirt*, 140 S.Ct. at 2461.

b. Failure to Disestablish the Cherokee Reservation

¶ 13 "To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt*, 140 S.Ct. at 2462. No particular words or verbiage are required, but there must be a clear expression of congressional intent to terminate the reservation.

> History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land." *Ibid.* Other times, Congress has directed that tribal lands shall be 'restored to the public domain.'" *Hagen v. Utah*, 510 U.S. 399, 412, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (emphasis deleted). Likewise, Congress might speak of a reservation as being "'discontinued,'" "'abolished,'" or "'vacated.'" *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). Disestablishment has "never required any particular form of words," *Hagen*, 510 U.S., at 411, 114 S.Ct. 958. But it does require that Congress clearly express its intent to do so, "[c]ommon[ly

> with an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'" *Nebraska v. Parker*, 577 U.S. 481, ___ __ ___, 136 S.Ct. 1072, 1079, 194 L.Ed.2d 152 (2016).

Id. 140 S.Ct. 2462-63.

¶ 14 The record before the District Court in this case, similar to that in *McGirt*, shows Congress, through treaties, removed the Cherokee people from one area of the United States to another where they were promised certain lands. Subsequent treaties redefined the geographical boundaries of those lands, but nothing in any of those documents showed a congressional intent to erase the boundaries of the reservation and terminate its existence. Congress, and Congress alone, has the power to abrogate those treaties, and "this Court [will not] lightly infer such a breach once Congress has established a reservation." *McGirt*, 140 S.Ct. at 2462 (citing *Salem v. Bartlett*, 465 U.S. 463, 470 (1984)).

¶ 15 Noting that the State of Oklahoma presented no evidence to show that Congress erased or disestablished the boundaries of the Cherokee Nation Reservation, the District Court found that the Cherokee Reservation remains in existence. This finding is supported by the record.

¶ 16 We hold that for purposes of federal criminal law, the land upon which the parties agree Spears allegedly committed the crime is within the Cherokee Reservation and is thus Indian country. The ruling in *McGirt* governs this case and requires us to find the District Court of Rogers County did not have jurisdic-

tion to prosecute Spears. Accordingly, we grant relief based upon argument raised in Proposition 1.

DECISION

¶ 17 The Judgment and Sentence of the District Court is **VACATED**. 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 ROGERS COUNTY THE HONORABLE SHEILA CONDREN, 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.: Concur in Results

LUMPKIN, JUDGE:
CONCURRING IN RESULTS:

¶ 1 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.

¶ 2 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.[2] 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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[2] Senator Elmer Thomas, D-Oklahoma, was a member of the Senate Committee on Indian Affairs. After hearing the Commissioner's speech regarding the Indian Reorganization Act (IRA) in 1934, Senator Thomas opined as follows:

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

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

¶ 3 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?

¶ 4 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 mis-characterization 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:

¶ 1 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 specially concur. Following the precedent of *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), Oklahoma has no jurisdiction over an Indian who commits a crime in Indian Country, or over any person who commits a crime against an Indian in Indian Country. This crime occurred within the historical boundaries of the Cherokee Nation Reservation and that Reservation has not been expressly disestablished by the United States Congress. Additionally, Appellant is an Indian, thus the jurisdiction is governed by the Major Crimes Act found in the United States Code.

¶ 2 Oklahoma, therefore, has no jurisdiction, concurrent or otherwise, over 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., CONCUR IN RESULTS:

¶ 1 Today's decision applies *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) to the facts of this case and dismisses a first degree murder conviction from Rogers County. I concur in the results of the majority's opinion based on the stipulations below concerning the Indian status of Appellant and the location of this crime within the historic boundaries of the Cherokee Reservation. Under *McGirt*, the State cannot prosecute Appellant because of his Indian status and the occurrence of this murder within Indian Country as defined by federal law. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶ 2 I disagree, however, with the majority's adoption as binding precedent that Congress never disestablished the Cherokee Reservation. Here, the State took no position below on whether the Cherokee Nation has, or had, a reservation. The State's tactic of passivity has created a legal void in this Court's ability to adjudicate properly the facts underlying Appellant's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. We should find no abuse of discretion based on the record evidence presented. But we should not establish as binding precedent that the Cherokee Nation was never disestablished based on this record.

¶ 3 Finally, 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).

ORDER ON REMAND OF THE DISTRICT COURT OF ROGERS COUNTY STATE OF OKLAHOMA (NOVEMBER 12, 2020)

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

THE STATE OF OKLAHOMA,

Plaintiff,

v.

MICHAEL E. SPEARS,

Defendant.

Rogers County District Court
Case No.: CF-2017-1013

Court of Criminal Appeals Case No.: F-2019-330

Before: Kassie N. MCCOY, District Court Judge.

ORDER ON REMAND

This matter came on for hearing before the Court on September 28, 2020, in accordance with the remand order of the Oklahoma Court of Criminal Appeals issued on August 19, 2020. The State appeared by and through District Attorney Matthew Ballard. Defendant appeared by and through attorney James Lockard. Cherokee Nation, Amicus, appeared by and through Attorney General Sara Hill. Based upon the

stipulations and evidence presented by the parties, review of the pleadings, and the briefs and argument of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

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

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

3. Cherokee Nation's government, headquartered in Tahlequah, consists of executive, legislative, and judicial branches, including active district and appellate courts.

4. Cherokee Nation provides law enforcement through its Marshal Service, and maintains cross-deputation agreements with state, county, and city law enforcement agencies for protection of citizens and non-citizens.

5. Approximately 139,000 Cherokee citizens reside within the boundaries of Cherokee Nation.

6. Cherokee Nation provides services to communities within its boundaries, including, among others, health and medical centers, veteran's center, employment, housing, bus transit, waterlines, sewers, water treatment, bridge and road construction, food distribution, child support services, child welfare, youth

shelter, victim services, donations to public schools and fire departments, and charitable contributions. "Rising Together, 2018 Annual Report to the Cherokee People" (FY 2018 Rep.) and "Popular Annual Financial Report for FY 2019, Cherokee Nation" (FY 2019 Rep.), available at https://www.cherokee.org/media/lufhr5rp/fy2018-annual-report-final-online.pdf; https://www.cherokee.org/media/gaahnswb/pafr-fy19-final-v-2.pdf.

7. Cherokee Nation is one of five tribes that have been treated as a group for purposes of federal legislation (Cherokee, Muscogee (Creek), Choctaw, Chickasaw, and Seminole Nations, historically referred to as the "Five Civilized Tribes" or "Five Tribes").

8. Cherokee Nation was originally located in what are now the states of Georgia, Alabama, Tennessee, South Carolina, North Carolina, and Kentucky. Wilkins, Thurman, Cherokee Tragedy: The Ridge Family and the Decimation of a People 22, 91, 209, 254 (rev. 2d ed. 1986).

9. The Indian Removal Act of 1830, Act of May 28, 1830, ch. 148, § 1, 4 Stat. 411, which implemented the national removal policy, authorized the President to divide public domain lands into defined "districts" for tribes removing west of the Mississippi River.

10. The Indian Removal Act also provided that the United States would "forever secure and guaranty" such lands to the removed tribes, "and if they prefer it . . . the United States will cause a patent . . . to be made and executed to them for the same[.]" § 3, 4 Stat. 411.

11. The Cherokees exchanged lands in the Southeast for new lands in Indian Territory in the 1830s under treaties with the United States.

12. Removal of Cherokees was completed in 1838, with many deaths occurring during the removal process. *See The Western Cherokee Indians v. United States*, 27 Ct. at Cl. 1, 3, 1800 WL 1779 (1891); Rogin, Michael Paul, Fathers & Children: Andrew Jackson and the Subjugation of the American Indian 241 (1991).

13. After removal, the Five Tribes occupied almost the entire area of what is now Oklahoma until after the civil war, when their treaties required cessions of lands in what is now western Oklahoma.

14. Since 1881, decades before Oklahoma statehood, states' criminal jurisdiction has been limited to offenses committed by non-Indians against non-Indians in Indian country. *United States v. McBratney*, 104 U.S. 621, 624 (1881); *see also Solem v. Bartlett*, 465 U.S. 463, 465 n. 2 (1984) ("Within Indian country, State jurisdiction is limited to crimes by non-Indians against non-Indians . . . and victimless crimes by non-Indians.").

15. In 1890, Congress authorized the establishment of Oklahoma Territory in the western portion of Indian Territory, and a territorial government was formed there. Act of May 2, 1890, ch. 182, §§ 1-28, 26 Stat. 81 (1890 Act).

16. "The lands in the east held by the Five Civilized Tribes remained Indian Territory, subject only to federal and tribal authority." *Indian Country, U.S.A.*, 829 F.2d 967, 977(10th Cir. 1987); §§ 29-44, 26 Stat. 81.

17. "No territorial government was ever created in the reduced Indian Territory, and it remained subject directly to tribal and federal governance." *Indian Country, U.S.A.*, 829 F.2d at 974, citing *Jefferson v.*

Fink, 247 U.S. 288, 290-91 (1918); *Southern Surety Co. v. Oklahoma*, 241 U.S. 582, 584 (1916).

18. Criminal prosecutions in Indian Territory were split between tribal and federal courts. *McGirt*, 140 S.Ct. 2452, 2476 (2020), citing the 1890 Act, § 30, 26 Stat. 81, 94; *see also Talton v. Mayes*, 163 U.S. 376, 381 (1896) (finding that Cherokee Nation had exclusive jurisdiction over an 1892 Cherokee murder in Cherokee Nation under its treaties and the 1890 Act).

19. In 1906, Congress authorized the joinder of Oklahoma Territory and Indian Territory to form the State of Oklahoma. Act of June 16, 1906, ch.3335, 34 Stat. 267, as amended by the Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286) (Enabling Act).

20. The Enabling Act required transfer to the federal courts in Oklahoma of prosecutions of "all crimes and offenses" committed within Indian Territory "which, had they been committed within a State, would have been cognizable in the Federal courts." § 16, 34 Stat. 267, 276, as amended by § 1, 34 Stat. 1286.

21. The State of Oklahoma entered the Union in 1907. Proclamation, 35 Stat. 2160-61 (Nov. 16, 1907).

CONCLUSIONS OF LAW

Criminal Jurisdiction in Indian Country

1. Federal statutes define federal and state jurisdiction over crimes committed by or against Indians in Indian country. Indian Country Criminal Jurisdictional Chart, available on United States Attorney Western District of Oklahoma website at: https://www.justice.gov/usaowdok/page/file/1300046/download).

2. Oklahoma failed to assume criminal and civil jurisdiction under Public Law 280, 25 U.S.C. § 1321, before it was amended to require tribal consent, and has thus never acquired jurisdiction over Indian country through that law. *Indian Country, U.S.A.*, 829 F.2d at 980 n.6; *see Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277, 279 (Okla. Crim. App. 1992) ("The State of Oklahoma has never acted pursuant to Public Law 83-280," quoting *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 403 (Okla. Crim. App. 1989). *See also McGirt*, 140 S.Ct. at 2478 ("Oklahoma doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over Creeks").

3. Congress has not enacted any law conferring criminal jurisdiction on Oklahoma over crimes committed by or against Indians in Indian country. *See McGirt*, 140 S.Ct. at 2476-78 (rejecting the State's arguments that allotment-era statutes granted Oklahoma jurisdiction over all crimes in Indian country); *United States v. Ramsey*, 271 U.S. 467, 469, 472 (1926) (Federal court had jurisdiction over prosecution of a non-Indian for the murder of an Osage Indian on restricted Osage allotment in Oklahoma).

4. "When Oklahoma won statehood in 1907, the Major Crimes Act, 18 U.S.C. § 1153 (MCA), applied immediately according to its plain terms" and crimes covered by the MCA "belonged in federal court from day one, wherever they arose within the new state [of Oklahoma]." *McGirt*, 140 S.Ct. at 2477. "Only the federal government, not the State, can prosecute Indians for major crimes committed in Indian country." *Id.* at 2478.

5. The MCA, 18 U.S.C. § 1153(a), governs jurisdiction only as to Indian offenders and only as to certain listed qualifying crimes:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

6. Under the MCA, federal courts have exclusive jurisdiction, as to Oklahoma, over prosecutions for the listed crimes committed by Indians—whether against Indians or non-Indians—in Indian country. *See McGirt*, 140 S.Ct. at 2476-79 (Oklahoma had no jurisdiction to prosecute a Seminole citizen for crimes committed on fee lands within the Creek Reservation under the MCA); *see also Murphy v. Royal*, 875 F.3d 896, 921 (10th Cir. 2017), *aff'd, Sharp v. Murphy*, 591 U.S. ___, 140 S.Ct. 2412 (2020) (*Murphy*) (murder of an Indian by another Indian on the Creek Reservation is subject to exclusive federal jurisdiction under the MCA); *United States v. Sands*, 968 F.2d 1058, 1061-62 (10th Cir. 1992) *cert. denied*, 506 U.S. 1056 (1993) ("The State of Oklahoma does not have jurisdiction over a criminal offense committed by one Creek Indian against another in Indian country.")

7. The State of Oklahoma does not have subject-matter jurisdiction over the criminal offense of Murder committed by Mr. Spears, who is citizen of the Cherokee Nation, if such crime was committed in Indian country.

Definition of Indian Country

1. It is well-established that trust and restricted allotments in Oklahoma constitute Indian Country as defined by 18 U.S.C. § 1151(c) ("all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same"), and that Oklahoma does not have jurisdiction over crimes committed on such lands. *Cravatt*, 825 P.2d at 279, overruling *Ex parte Nowabbi*, 1936 OK CR 123, 61 P.2d 1139, 1154; *State v. Klindt*, 782 P.2d at 403 (no state jurisdiction over assault with dangerous weapon by or against Indian on Cherokee trust allotment).

2. The present case concerns the definition of "Indian country" in 18 U.S.C. § 1151(a) ("all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.")

3. Tribal lands held in trust by the United States and unallotted tribal lands are classified as reservations for jurisdictional purposes. *See United States v. John*, 437 U.S. 634, 649 (1978) (Mississippi Choctaw tribal trust lands are reservation lands); *Ross v. Neff*, 905 F.2d at 1352 (Cherokee tribal trust land is Indian country under 18 U.S.C. § 1151); *Indian Country, U.S.A.*, 829 F.2d at 976 (unallotted Creek lands are reservation lands).

4. "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909).

5. "The purchase of lands by non-Indians is not inconsistent with reservation status. *McGirt*, 140 S.Ct. at 2464 n.3, citing *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-358 (1962).

6. "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *McGirt*, 140 S.Ct. at 2468, citing *Solem v. Bartlett*, 465 U.S. at 470.

Cherokee Reservation Establishment

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

2. As noted by the Supreme Court, in *McGirt*, Creek treaties promised a "permanent home" that would be "forever set apart," and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. *McGirt*, 140 S.Ct. at 2461-62 (describing in detail provisions in Treaty with the Creeks, arts. I, XII, XIV, XV, Mar. 24, 1832, 7 Stat. 366-68; Treaty with the Creeks, preamble, arts. III, IV, IX, Feb. 14, 1833, 7 Stat. 417, 419; Treaty with Creeks and Seminoles, arts. IV, XV, Aug. 7, 1856, 11 Stat. 699, 700, 704; and Treaty Between the United States and the Creek Indians, arts. III and IX, June 14, 1866, 14 Stat. 785, 786, 788.

3. "Under any definition, this was a [Creek] reservation." *McGirt*, 140 S.Ct. at 2461.

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

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

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

7. The 1835 Cherokee treaty, Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478, was ratified two years later "with a view to re-unite their people in one body and to secure to them a permanent home for themselves and their posterity," in what became known as Indian Territory, "without the territorial limits of the state sovereignties," and "where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be consonant with their views, habits and condition." *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872) (emphasis added).

8. Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S.Ct. at 2460.

9. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478.

10. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." Art. 2, 7 Stat. 478.

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

12. After removal, on December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new lands in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902).

13. The title was held by Cherokee Nation "for the common use and equal benefit of all the members." *Cherokee Nation v. Hitchcock*, 187 U.S. at 307; *see also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894).

14. Fee title is not inherently incompatible with reservation status, and establishment of a reservation

does not require a "particular form of words." *McGirt*, 140 S.Ct. at 2475, citing *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902).

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

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

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

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

19. Like Creek treaties, the Cherokee treaties that promised land in Indian Territory to the Cherokee Nation established the tribe's relationships with that land and created a reservation.

Current Cherokee Nation Boundaries

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

2. First, the 1866 treaty expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. Art. 17, 14 Stat. 799. *See* Map, Goins, Charles Robert, and Goble, Danney, "Historical Atlas of Oklahoma" (4th Ed. 2006) at 61).

3. Second, the 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet); and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country . . . until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." Art. 16, 14 Stat. 799.

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

5. The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim,

and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (*i.e.*, the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906). *See* Map, Goins, Charles Robert, and Goble, Danney, "Historical Atlas of Oklahoma" (4th Ed. 2006) at 61).

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

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

8. The original 1839 Cherokee Constitution established the boundaries as described in the 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may be made necessary" by the 1866 treaty. 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, reprinted in Volume I of West's Cherokee Nation Code Annotated (1993 ed.).

9. Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The

boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." 1999 Cherokee Constitution, art. 2.

Statutory Text Governing Reservation Disestablishment Inquiry

1. Courts do not lightly infer that Congress has exercised its power to disestablish a reservation. *McGirt*, 140 S.Ct. at 2462, citing *Solem*, 465 U.S. at 470. There is a "presumption" against disestablishment. *Murphy v. Royal*, 875 F. 3d at 918, citing *Solem*, 465 U.S. at 481.

2. The only "step" proper for a court of law to consider in a disestablishment analysis is "to ascertain and follow the original meaning of the law" before it. *McGirt*, 140 S.Ct. at 2468.

3. Once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S.Ct. at 2468, citing *Solem*, 465 U.S.at 470.

4. Congress must clearly express its intent to disestablish, commonly by "'[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'" *McGirt*, 140 S.Ct. at 2463, citing *Nebraska v. Parker*, 577 U.S. 481, 136 S.Ct. 1072, 1079 (2016).

5. A statute disestablishing a reservation may provide an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land." *McGirt*, 140 S.Ct. at 2462, citing *Solem*, 465 U.S. at 470.

6. A statute disestablishing a reservation may direct that tribal lands be "'restored to the public domain,'" *McGirt*, 140 S.Ct. at 2462, citing *Hagen v. Utah*, 510 U.S. 399, 412 (1994), or state that a reservation is "'discontinued,'" "'abolished,'" or "'vacated.'" *McGirt*, 140 S.Ct. at 2463, citing *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22 (1973); *see also DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 439-440 n.22 (1975).

7. In 1893, Congress established the Commission to the Five Civilized Tribes (popularly known as the Dawes Commission) to negotiate agreements with the Five Tribes for "the extinguishment of the national or tribal title to any lands" in 'Indian Territory "either by cession," by allotment, or by such other method as agreed upon. § 16, 27 Stat. 612, 645-646.

8. According to an 1894 Dawes Commission report, the Five Tribes "would not, under any circumstances, agree to cede any portion of their lands." Ann. Rept. of the Comm. Five Civ. Tribes of 1894, 1895, and 1896 (1897) at 14. *See McGirt*, 140 S.Ct. at 2463.

9. This refusal to cede tribal lands is also reflected in the Dawes Commission's 1900 annual report: "Had it been possible to secure from the Five Tribes a cession to the United States of the entire territory at a given price, . . . the duties of the commission would have been immeasurably simplified . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty . . . it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment, no matter how simple its evolutions." Seventh Ann. Rept.

of the Comm. Five Civ. Tribes (1900) at 9. (emphasis added).

10. Where Congress contemplates, but fails to enact, legislation containing express disestablishment language, the statute represents "a clear retreat from previous congressional attempts to vacate the . . . Reservation in express terms[.]" *DeCoteau*, 420 U.S. at 448.

11. The "'present and total surrender of all tribal interests' in the affected lands" required for disestablishment is missing from the Creek allotment agreement, Act of Mar. 1, 1901, ch. 676, 31 Stat. 861 (Creek Agreement). *McGirt*, 140 S.Ct. at 2464.

12. The Cherokee Nation ratified the Cherokee allotment agreement in 1902. Act of July 1, 1902, ch. 1375, 32 Stat. 716 (Cherokee Agreement).

13. Like the Creek Agreement, the "'present and total surrender of all tribal interests' in the affected lands" required for disestablishment is missing in the Cherokee Agreement.

14. The central purpose of the 1902 Cherokee Agreement, like that of the Creek Agreement, was to facilitate transfer of title from the Nation of "allottable lands" (defined in § 5, 32 Stat. 716, as "all the lands of the Cherokee tribe" not reserved from allotment) to tribal citizens individually. Ninth Ann. Rept. of the Comm. Five Civ. Tribes (1902) at 11.

15. Lands reserved from allotment included schools, colleges, and town sites "in Cherokee Nation," cemeteries, church grounds, an orphan home, the Nation's capital grounds, its national jail site, and its newspaper office site. §§ 24, 49, 32 Stat. at 719-20,

724; *see also* Creek Agreement, § 24, 31 Stat. at 868-869.

16. With exceptions for certain pre-existing town sites and other special matters, the Cherokee Agreement established procedures for conveying allotments to individual citizens who could not sell, transfer, or otherwise encumber their allotments for a number of years (5 years for any portion, 21 years for the designated "homestead" portion). §§ 9-17, 32 Stat. at 717; *see also McGirt*, 140 S.Ct. at 2463, citing Creek Agreement, §§ 3, 7, 31 Stat. 861, 862-864.

17. The restricted status of the allotments reflects the Cherokee Nation's understanding that allotments would not be acquired by non-Indians, would remain in the ownership of tribal citizens, and would be subject to federal protection.

18. Cherokee citizens were given deeds that conveyed to them "all the right, title, and interest" of the Cherokee Nation. § 58, 32 Stat. at 725; *see also McGirt*, 140 S.Ct. at 2463, citing Creek Agreement, § 23, 31 Stat. at 867-868.

19. As of 1910, 98.3% of the lands of Cherokee Nation (4,348,766 acres out of 4,420,068 acres) had been allotted to tribal citizens; an additional 21,000 acres were reserved for town sites, schools, churches, and other uses; and only 50,301 acres scattered throughout the nation remained unallotted (approximately one percent of Cherokee Nation lands). Ann. Rept. of the Comm. Five Civ. Tribes (1910) at 169, 176.

20. Allotment alone does not disestablish a reservation. *McGirt*, 140 S.Ct. at 2464, citing *Mattz*, 412 U.S. at 496-97 (explaining that Congress's expressed policy during the allotment era "was to continue the

reservation system," and that allotment can be "completely consistent with continued reservation status"); and *Seymour*, 364 U.S. at 356-58 (allotment act "did no more than open the way for non-Indian settlers to own land on the reservation").

21. Allotment-era statutes "did not abrogate the federal government's authority and responsibility, nor allow jurisdiction by the State of Oklahoma" over those [Creek] allotments). *United States v. Sands*, 968 F.2d at 1061-62.

22. The Act of June 28, 1898, ch. 517, 30 Stat. 495 (Curtis Act) recognized continuation of Cherokee boundaries, by referencing a "permanent settlement in the Cherokee Nation" and "lands in the Cherokee Nation." §§ 21, 25, 30 Stat. at 502, 504.

23. Statutory provisions related to tribal self-governance during the allotment era were "serious blows" to the promised right to Creek self-governance, but did not prove disestablishment. *McGirt*, 140 S.Ct. at 2466.

24. "[P]erhaps in an effort to pressure the Tribe to the negotiating table," the Curtis Act included provisions for termination of tribal courts. *McGirt*, 140 S.Ct. at 2465, citing § 28, 30 Stat. 495, 504-505.

25. The 1901 Creek Agreement expressly recognized the continued applicability of the Curtis Act's abolishment of Creek courts, by providing that nothing in that agreement "shall be construed to revive or re-establish the Creek courts which have been abolished" by former laws. § 47, 31 Stat. at 873.

26. The Curtis Act's abolishment of Creek courts did not result in Creek reservation disestablishment. *McGirt*, 140 S.Ct. at 2465-66.

27. Unlike the Creek Agreement, the Cherokee Agreement did not describe tribal courts as "abolished" by the Curtis Act or prohibit revival of tribal courts.

28. The Five Tribes Commission's early efforts to conclude an agreement with Cherokee Nation were futile, "owing to the disinclination of the Cherokee commissioners to accede to such propositions as the Government had to offer." Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899 at 9-10.

29. The final ratified Cherokee Agreement omitted provisions in earlier unratified versions that consented to extinguishment of Cherokee courts, Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899), Appendix No. 2, § 71 at 49, 57, or that prohibited revival of Cherokee courts, Seventh Ann. Rept. of the Comm. Five Civ. Tribes (1900) at 13, Appendix No. 1, § 80 at 37,45, Act of Mar. 1, 1901, ch. 675, pmbl. and § 72, 31 Stat. 848, 859 (unratified by Cherokee voters).

30. Section 73 of the Cherokee Agreement, 32 Stat. at 727, provided that "no Act of Congress or treaty provision inconsistent with this agreement shall be in force in said Nation" except sections 14 and 27 of the Curtis Act, concerning towns in Indian Territory and an Indian inspector, "which shall continue in force as if this agreement had not been made."

31. Treaty provisions not inconsistent with the Cherokee Agreement included the 1866 Treaty's provision that Cherokee courts would "retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation,

by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." Art. 13, 14 Stat. 799.

32. Another "serious blow" to Creek governmental authority was a provision in the Creek Agreement that conditioned the validity of Creek ordinances "affecting the lands of the Tribe, or of individuals after allotments, or the moneys or other property of the Tribe, or of the citizens" thereof, on approval by the President. *McGirt*, 140 S.Ct. at 2465, citing § 42, 31 Stat. at 872.

33. This provision did not result in reservation disestablishment, in light of the absence of any of the hallmarks for disestablishment in the Creek Agreement, such as cession and compensation. *See McGirt*, 140 S.Ct. at 2465 and n.5.

34. The Cherokee Agreement does not contain a similar provision limiting the Cherokee Nation's legislative authority by requiring Presidential approval of certain ordinances

35. Like the Creek Agreement, § 46, 31 Stat. 872, the Cherokee Agreement provided that tribal government would not continue beyond March 4, 1906. § 63, 32 Stat. at 725.

36. Two days before the March 4 deadline, Congress approved a Joint Resolution continuing Five Tribes governments "in full force and effect" until distribution of tribal property or proceeds thereof to tribal citizens. Act of Mar. 2, 1906, 34 Stat. 822.

37. The following month, Congress enacted the Five Tribes Act, which expressly continued the gov-

ernments of all of the Five Tribes "in full force and effect for all purposes authorized by law, until otherwise provided by law." *McGirt*, 140 S.Ct. at 2466, citing Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137, 148.

38. The Five Tribes Act authorized the President to remove and replace the Five Tribes' principal chiefs, instructed the Secretary of the Interior to assume control of tribal schools, and limited the number of tribal council meetings to no more than 30 days annually. *McGirt*, 140 S.Ct. at 2466, citing §§ 6, 10, 28, 34 Stat. 139-140, 148.

39. The Five Tribes Act also addressed the handling of the Five Tribes' funds, land, and legal liabilities in the event of dissolution. *McGirt*, 140 S.Ct. at 2466, citing §§ 11, 27, 34 Stat. at 141, 148.

40. The congressional intrusions on Creek preexisting treaty rights "fell short of eliminating all tribal interests in the land." *McGirt*, 140 S.Ct. at 2466.

41. Congressional intrusions on Cherokee treaty rights, which were less severe than intrusions on Creek treaty rights, likewise did not eliminate the Cherokee Nation's tribal interest in its lands.

42. Congress left the Five Tribes "with significant sovereign functions over the lands in question." *McGirt*, 140 S.Ct. at 2466.

43. For example, Creek Nation retained the power to collect taxes; to operate schools; and to legislate through tribal ordinances (subject to Presidential approval of certain ordinances as required by the Creek Agreement, § 42, 31 Stat. 872). *McGirt*, 140 S.Ct.

at 2466, citing Creek Agreement, §§ 39, 40, 42, 31 Stat. at 871-872.

44. The Cherokee Agreement similarly required that the Secretary operate schools under rules "in accordance with Cherokee laws;" required that funds for operating tribal schools be appropriated by the Cherokee National Council; required the Secretary's collection of a grazing tax for the benefit of Cherokee Nation; and confirmed treaty rights. §§ 3, 32, 34, 72, 32 Stat. at 721, 727.

45. As with the Creek Agreement, there is no hallmark language in the Cherokee agreement of cession or compensation or other text that disestablished the reservation.

46. There is no ambiguous language in any of the relevant allotment-era statutes applicable to Cherokee Nation, including its allotment agreement, "that could plausibly be read as an Act of disestablishment." *See McGirt*, 140 S.Ct. at 2468 (reaching same conclusion as to Creek Nation).

Events Surrounding Enactment of Cherokee Allotment Legislation and Later Demographic Evidence

1. A court may not favor contemporaneous or later practices instead of the laws Congress passed. *McGirt*, 140 S.Ct. at 2468.

2. "There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning." *McGirt*, 140 S.Ct. at 2469.

3. Because there is no ambiguous language in any of the relevant allotment-era statutes applicable to Cherokee Nation "that could plausibly be read as an Act of disestablishment," *McGirt*, 140 S.Ct. at 2468, it is unnecessary to consider events surrounding enactment of Cherokee allotment legislation and later demographic evidence as second and third steps for purposes of a reservation disestablishment inquiry. *McGirt*, 140 S.Ct. at 2468.

4. Even when these steps are considered, "the carefully selected history" Oklahoma and the dissent recited in *McGirt* supplies the Court "with little help in discerning the law's meaning and much potential for mischief." *McGirt*, 140 S.Ct. at 2474.

5. The consideration of the events surrounding enactment of Cherokee allotment legislation and later demographic evidence is unnecessary and contributes nothing to the clear meaning of the statutes at issue.

6. However, consideration of the events surrounding the enactment of Cherokee allotment legislation confirms the clear meaning of the statutes.

7. Federal statutes enacted near the beginning of statehood recognized the existence of the Cherokee Reservation as a distinct geographic area. *See* Enabling Act, § 6, 34 Stat. 277 (the third district for the House of Representatives must "(with the exception of that part of recording district numbered twelve, which is in the Cherokee and Creek nations) comprise all the territory now constituting the Cherokee, Creek, and Seminole nations and the Indian reservations lying northeast of the Cherokee Nation, within said State"); Act of June 21, 1906, ch. 3504, 34 Stat. 325, 342-43 (drawing recording districts in the Indian Territory,

including district 27, with boundaries along the northern and western "boundary line[s] of the Cherokee Nation," and district 28, described as "lying within the boundaries of the Cherokee Nation"); Act of June 30, 1913, ch. 4, § 18, 38 Stat. 77, 95 ("common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations"); Act of May 25, 1918, ch. 86, 40 Stat. 561, 581 ("common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations").

8. Demographic evidence, including the "speedy and persistent movement of white settlers" onto Five Tribes land throughout the late nineteenth and early twentieth centuries, is not helpful in discerning statutory meaning. *McGirt*, 140 S.Ct. at 2473.

9. Historical statements by tribal officials and others supporting an idea that "everyone" in the late nineteenth and twentieth centuries believed the reservation system and Creek Nation would be disbanded, without reference to any ambiguous statutory direction, were merely prophesies that were not self-fulfilling. *McGirt*, 140 S.Ct. at 2472.

10. As was the case for the Creek Nation, "Congress never withdrew its recognition" of the Cherokee government, and "none of its [later] adjustments would have made any sense if Congress thought it had already completed that job." *McGirt*, 140 S.Ct. at 2466.

11. Congress shifted its national Indian policy from assimilation to tribal self-governance in the early twentieth century. *See McGirt*, 140 S.Ct. at 2467.

12. The 1934 Indian Reorganization Act (IRA) officially ended the allotment era for all tribes. Act of

June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 5101, et seq.)

13. The IRA excluded Oklahoma tribes from applicability of five IRA sections, 25 U.S.C. § 5118, but all other IRA sections applied to Oklahoma tribes, including provisions ending allotment.

14. The 1936 OIWA included a section acknowledging tribal authority to adopt constitutions and corporate charters, and repealed all acts or parts of acts inconsistent with the OIWA. 25 U.S.C. §§ 5203, 5209.

15. Oklahoma's long historical practice of asserting jurisdiction over Indians in state court, even for serious crimes on reservations, is "a meaningless guide for determining what counted as Indian country." *McGirt*, 140 S.Ct. at 2471.

16. The Five Tribes spent the better part of the twentieth century battling the consequences of the "bureaucratic imperialism" of the Bureau of Indian Affairs (BIA), which promoted the erroneous belief that the Five Tribes possessed only limited governmental authority. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.D.C.1976), affd sub nom. *Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978) (finding that the evidence "clearly reveals a pattern of action on the part of the BIA "designed to prevent any tribal resistance to the Department's methods of administering those Indian affairs delegated to it by Congress," as manifested in "deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by § 28 of the [Five Tribes] Act.").

17. The BIA's treatment of the Five Tribes, which impeded the Tribes' ability to fully function as governments for decades, has limited interpretive value and cannot overcome lack of statutory text demonstrating disestablishment. *McGirt*, 140 S.Ct. at 2469, n. 8, citing *Parker*, 136 S.Ct. at 1082.

18. Oklahoma's fears concerning challenges to past convictions based on a finding of Creek reservation status cannot force the Court "to ignore a statutory promise when no precedent stands before us at all." *McGirt*, 140 S.Ct. at 2480.

19. Cherokee Nation's government, like those of other tribes, was strengthened by the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975. Act of Jan. 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 5301, et seq.).

CONCLUSION

The State has argued the burden of proof regarding whether Congress specifically erased the boundaries or disestablished the reservation rests solely with Defendant/Petitioner. The State also made clear that the State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation. No evidence or argument was presented by the State specifically regarding disestablishment or boundary erasure of the Cherokee Reservation. The Order Remanding for Evidentiary Hearing states, "Upon Petitioner's presentation of *prima facie* evidence as to Mr. Spears' 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." Order Remanding for Evidentiary Hearing at 3.

On this point, *McGirt* provides that once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S.Ct. at 2468. Reading the order of remand together with *McGirt*, regardless of where the burden of production is placed, no evidence was presented to this Court to establish Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma has jurisdiction in this matter. As a result, the Court finds Mr. Spears is an Indian and that the crime occurred in Indian Country.

IT IS SO ORDERED this 12th day of November, 2020.

/s/ Kassie N. McCoy
Judge of the District Court

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

MICHAEL EUGENE SPEARS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2019-330

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

Michael Eugene Spears was tried by jury in the District Court of Rogers County, Case No. CF-2017-1013, and convicted of First Degree Murder, in violation of 21 O.S.Supp.2012, § 701.7. In accordance with the jury's recommendation, the Honorable Sheila Condren sentenced Spears to life imprisonment with the

possibility of parole. Spears must serve 85% of his sentence before he is eligible for parole consideration. Spears appeals his Judgment and Sentence.

In Proposition 1 of his Brief-in-Chief, filed December 17, 2019, Spears claims the District Court lacked jurisdiction to try him. Spears argues that he is a citizen of the Cherokee Nation and that the crime occurred within the boundaries of the Cherokee Nation Reservation.[1] Spears, 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]

Spears's claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred in Indian Country. 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.

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[1] Spears also claims that defense counsel was ineffective for failing to raise the issue of jurisdiction and asks the Court to order an evidentiary hearing for the purpose of developing the record with regard to his claims.

[2] On May 18, 2020, we held Spears's direct appeal in abeyance pending the resolution of the litigation in *Murphy*. Following the decision in *McGirt*, the State asked to file a supplemental response to Spears's jurisdictional claim and Spears objected. 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**.

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 Spears'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, Spears's status as an Indian. The District Court must determine whether (1) Spears has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.[3]

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

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[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.

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 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: Appellant's Brief in Chief and Application for Evidentiary Hearing filed December 17, 2019; Appellant's

Reply Brief filed June 4, 2020; and Appellee's Response Brief filed April 7, 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

/s/ Dana Kuehn
Vice Presiding Judge

/s/ Gary L. Lumpkin
Judge

/s/ Robert L. Hudson
Judge

/s/ Scott Rowland
Judge