APPENDIX TABLE OF CONTENTS

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

2021 OK CR 6

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DEVIN WARREN SIZEMORE,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2018-1140

FOR PUBLICATION

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

OPINION

ROWLAND, VICE PRESIDING JUDGE:

¶ 1 This appeal turns on whether Appellant Devin Warren Sizemore is an Indian as defined by federal law, and whether he committed murder and assault and battery upon a police officer within Indian

country as that term is defined by federal law. Because the answer to both questions is yes, federal law grants exclusive criminal jurisdiction to the federal government on the murder charge at the very least and possibly the assault charge as well. Regardless, the State of Oklahoma was without jurisdiction to prosecute him.

1. Factual Background

¶ 2 In July of 2016, police in Krebs, Oklahoma were contacted by Sizemore's family members, worried about his and his twenty-one month old daughter's safety. Some fifteen hours after this call to police, officers searching for the pair heard screaming from a local pond and discovered Sizemore there. Upon seeing the police, he fled into the water and officers encountered him near what appeared to be a small body floating face down. Attempts to subdue him resulted in a fight both in and out of the water, but the officers eventually took him into custody. His young daughter was pulled from the water but did not survive; she had drowned.

¶ 3 Sizemore was tried by jury in the District Court of Pittsburg County, Case No. CF-2016-593, and convicted of First Degree Murder (Count 1), in violation of 21 O.S.Supp.2012, § 701.7 and Battery/Assault and Battery on a Police Officer (Count 2), in violation of 21 O.S.Supp.2015, § 649. In accordance with the jury's verdict, the Honorable Tim Mills, Associate District Judge, sentenced Sizemore to life imprisonment without the possibility of parole on Count 1 and five years imprisonment on Count 2, with the sentences to be served concurrently.

¶ 4 In this direct appeal, Sizemore alleges the following errors:

(1) The State of Oklahoma lacked jurisdiction to prosecute him because he is an "Indian" and the crime occurred in "Indian Country";

(2) He received ineffective assistance of trial counsel;

(3) The evidence was insufficient to prove all elements of First Degree Murder beyond a reasonable doubt;

(4) The district court erred in admitting his recorded interrogation;

(5) The district court erred by denying his motion to quash his arrest; and

(6) An accumulation of error deprived him of a fair trial.

¶ 5 Because, as noted above, we find relief is required on Sizemore's jurisdictional challenge in Proposition 1, his other claims are moot.

2. The Legal Background

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 Count 1, the murder charge, fits squarely within the Major Crimes Act and its exclusive federal jurisdiction, but whether Count 2 is among these enumerated crimes is much less clear. It may constitute a "felony assault under section 113", but that is not something we must decide today. If the assault on a police officer is not covered by Section 1153, it is subject to the Act's sister statute, 18 U.S.C. § 1152 (1948), which applies to other offenses and provides for federal or tribal jurisdiction. In either event, the State of Oklahoma was without jurisdiction to prosecute such an assault by an Indian within Indian country. *See State v. Klindt,* 1989 OK CR 75, ¶ 3, 782 P.2d 401, 403 ("[T]he State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.")

B. *McGirt v. Oklahoma*

¶ 8 Nothing we have said thus far is in any way new, as these 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,* 591 U.S. ___, 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 has never explicitly disestablished it. Although the case now before us involves the lands of the Choctaw Nation, we find *McGirt's* reasoning controlling.

3. Two Questions Upon Remand

A. Sizemore's Status as Indian

¶ 9 After *McGirt* was decided, this Court, on August 19, 2020, remanded this case to the District Court of Pittsburgh County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Sizemore's status as an Indian; and (b) whether the crime occurred in Indian Country, namely within the boundaries of the Choctaw Nation Reservation. Our Order provided that, if the parties agreed as to what the evidence would show with regard to the questions presented, the parties could enter into a written stipulation setting forth those facts, and no hearing would be necessary. On October 14, 2020, the parties stipulated to the first of these requirements, agreeing that (1) Sizemore has some Indian blood; (2) he was an enrolled member of the Choctaw Nation on the date of the charged offenses; and (3) the Choctaw Nation is a federally recognized tribe. Judge Mills accepted this stipulation and found that on the date of the charged crimes, Sizemore was an Indian for purposes

of federal law. We adopt the district court's findings and conclusion.

B. Whether Crimes Were Committed in Indian Country

1. Congress Established a Choctaw Reservation in the 1800s

¶ 10 As to the second question on remand, whether the crimes were committed in Indian country, the stipulation of the parties was less dispositive. They acknowledged only that the charged crimes occurred within the historical geographic area of the Choctaw Nation as designated by various treaties. The stipulation went on to state that the crimes occurred in Indian country "only if the Court determines that those treaties established a reservation, and if the Court further concludes that Congress never explicitly erased those boundaries and disestablished that reservation."

¶ 11 In a thorough and well-reasoned order, Judge Mills examined the 19th century treaties between the Choctaw Nation and the United States of America. He concluded that the land set aside for the Choctaw Nation, beginning with the Treaty of Dancing Rabbit Creek in 1830, as reaffirmed and modified by the Treaty of Washington in 1855, and further modified by the post-civil war Treaty of Washington in 1866, established a Choctaw Reservation.

¶ 12 This finding is consistent with *McGirt,* where the majority found it "obvious" that a similar 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. Following the reasoning in *McGirt,* Judge Mills ruled that through its treaties with the Choctaw Nation, Congress established a Choctaw Reservation in the 1800's.

2. Congress Has Never Disestablished the Choctaw 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 Choctaw 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.[1] 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 *Solem 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 Choctaw Nation Reservation, and citing language from *McGirt* noting that allotment of individual plots of land within this area do not equate to disestablishment, Judge Mills found that the Choctaw 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 Sizemore

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[1] The State presented no evidence or argument on whether a reservation was ever established or disestablished for the Choctaw Nation.

allegedly committed these crimes is within the Choctaw Reservation and is thus Indian country. The ruling in *McGirt* governs this case and requires us to find the District Court of Pittsburgh County did not have jurisdiction to prosecute Sizemore. Accordingly, we grant Proposition 1.

DECISION

¶ 17 The Judgment and Sentence of the district court is VACATED and this 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 PITTSBURG COUNTY THE HONORABLE TIMOTHY E. MILLS ASSOCIATE DISTRICT JUDGE

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Opinion by: Rowland, V.P.J.
Kuehn, P.J.: Concur
Lumpkin, J.: Concur in Result
Lewis, J.: Specially Concur
Hudson, J.: Specially Concur

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.[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.

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

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

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

¶ 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 Choctaw 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, JUDGE, CONCUR IN RESULTS:

¶ 1 Today's decision applies *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020) to the facts of this case and dismisses convictions from Pittsburg County for first degree murder and assault and battery on a police officer. 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 Choctaw 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 Choctaw Reservation. Here, the State took no position below on whether the Choctaw 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 Choctaw Nation was never disestablished based on this record.

¶ 3 Finally, I write separately to note that *McGirt* resurrects an odd sort of Indian reservation. One where a vast network of cities and towns dominate the regional economy and provide modern cultural, social, educational and employment opportunities for all people on the reservation. Where the landscape is

blanketed by modern roads and highways. Where non-Indians own property (lots of it), run businesses and make up the vast majority of inhabitants. On its face, this reservation looks like any other slice of the American heartland—one dotted with large urban centers, small rural towns and suburbs all linked by a modem infrastructure that connects its inhabitants, regardless of race (or creed), and drives a surprisingly diverse economy. This is an impressive place—a modern marvel in some ways—where Indians and non-Indians have lived and worked together since at least statehood, over a century.

¶ 4 *McGirt* orders us to forget all of that and instead focus on whether Congress expressly disestablished the reservation. We are told this is a cut-and-dried legal matter. One resolved by reference to treaties made with the Five Civilized Tribes dating back to the nineteenth century. Ignore that Oklahoma has continuously asserted jurisdiction over this land since statehood, let alone the modern demographics of the area.

¶ 5 The immediate effect under federal law is to prevent state courts from exercising criminal jurisdiction over a large swath of Greater Tulsa and much of eastern Oklahoma. Yet the effects of *McGirt* range much further. Crime victims and their family members in a myriad of cases previously prosecuted by the State can look forward to a do-over in federal court of the criminal proceedings where *McGirt* applies. And they are the lucky ones. Some cases may not be prosecuted at all by federal authorities because of issues with the statute of limitations, the loss of evidence, missing witnesses or simply the passage of

time. All of this foreshadows a hugely destabilizing force to public safety in eastern Oklahoma.

¶ 6 *McGirt* must seem like a cruel joke for those victims and their family members who are forced to endure such extreme consequences in *their* case. One can certainly be forgiven for having difficulty seeing where—or even when—the reservation begins and ends in this new legal landscape. Today's decision on its face does little to vindicate tribal sovereignty and even less to persuade that a reservation in name only is necessary for anybody's well-being. The latter point has become painfully obvious from the growing number of cases that come before this Court where non-Indian defendants are challenging their state convictions using *McGirt* because *their victims* were Indian.

¶ 7 Congress may have the final say on *McGirt.* In *McGirt,* the court recognized that Congress has the authority to take corrective action, up to and including disestablishment of the reservation. We shall see if any practical solution is reached as one is surely needed. In the meantime, cases like Appellant's remain in limbo until federal authorities can work them out. Crime victims and their families are left to run the gauntlet of the criminal justice system once again, this time in federal court. And the clock is running on whether the federal system can keep up with the large volume of new cases undoubtedly heading their way from state court.

DISTRICT COURT OF PITTSBURG COUNTY, STATE OF OKLAHOMA, ORDER WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW (SIGNED OCTOBER 27, 2020, FILED OCTOBER 28, 2020)

IN THE DISTRICT COURT OF PITTSBURG COUNTY, STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff/Appellee.

v.

DEVIN WARREN SIZEMORE,

Defendant/Appellant,

Pittsburg County Case No.: CF-2016-593

Court of Criminal Appeals: F-2018-1140

Before: Tim MILLS, Associate District Judge Pittsburg County.

COURT ORDER WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW IN ACCORDANCE WITH ORDER REMANDING FOR EVIDENTIARY HEARING ISSUED AUGUST 19, 2020

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before the Court on October 14, 2020, in accordance with the Oklahoma Court of Criminal Appeals remand order issued on August 19, 2020. Defendant/Appellant, Mr. Sizemore, appeared by and through Oklahoma Indigent Defense System attorney Katie Bourassa. The State appeared by and through District Attorney Chuck Sullivan, and Assistant Attorneys General Jennifer Crabb and Caroline Hunt. Defendant previously waived his right to be present. The Choctaw Nation appeared as *Amicus Curiae* by and through Jacob Keyes. A record was taken by Certified Court Reporter, Emily Wright. The Court makes its findings based upon the stipulations, evidence,[1] and argument presented at the hearing, and the pleadings and attachments filed in this Court[2] and the Oklahoma Court of Criminal Appeals ("OCCA").

In the August 19, 2020 Order Remanding for Evidentiary Hearing, the Oklahoma Court of Criminal Appeals directed this Court to address only the following issues:

> First, Sizemore's status as an Indian. The District Court must determine whether (1)

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[1] At the hearing, this Court admitted into evidence the entirety of Defendant's Evidentiary Hearing Exhibits ("Def. Ex.") packet, with the exception of Exhibit 21 (Indian Country Criminal Jurisdictional Chart) and Exhibit 22 (Choctaw Nation Cross-Deputization Agreements List (1994-2020)).

[2] Prior to the hearing, this Court read Defendant's Remanded Hearing Brief Applying *McGirt* Analysis to Choctaw Nation Reservation and the *Amicus Curiae* Choctaw Nation's Brief in Support of the Continued Existence of the Choctaw Reservation and Its Boundaries, each filed October 9, 2020. These were the only pleadings filed in this Court in relation to this hearing.

> Sizemore has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.
>
> Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt [v. Oklahoma,* 140 S. Ct. 2452 (2020)], determining (1) whether Congress established a reservation for the Choctaw Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation.

Order Remanding for Evidentiary Hearing at 3 (footnote omitted), *Sizemore v. State,* No. F-2018-1140 (Okla. Crim. App. Aug. 19, 2020). This Court will address each issue separately.

MR. SIZEMORE'S STATUS AS AN INDIAN

The OCCA directed this Court to address: "First, Sizemore's status as an Indian. The District Court must determine whether (1) Sizemore has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government." Order Remanding for Evidentiary Hearing at 3 (footnote omitted).

Findings of Fact

Prior to the hearing, the parties stipulated as follows:

> Devin Sizemore has 1/128 Choctaw blood and was an enrolled member of the federally recognized Choctaw Nation at the time of the crime. Verification of Mr. Sizemore's tribal membership from the Choctaw Nation

is appended to this Stipulation as Exhibits 1 and 2.

Def. Exs. 1-3.

This Court adopts these stipulations as facts. Based upon these stipulated facts, this Court finds Devin Sizemore (1) has some Indian blood, and (2) was recognized as Indian by a tribe or the federal government.

Conclusions of Law

Having answered the above questions in the affirmative, this Court finds that Devin Sizemore is an Indian.

WHETHER THE CRIMES OCCURRED IN INDIAN COUNTRY

The OCCA directed this Court to address: "Second, whether the crimes 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 Choctaw Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation." Order Remanding for Evidentiary Hearing at 3. The Court finds as follows:

Findings of Fact

1. "[The Choctaw Nation] and other Indian Nations occupied much of what are today the southern and southeastern parts of the United States." *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 622 (1970). In the early nineteenth century, Congress sought to

remove all Indian tribes from their native lands to west of the Mississippi River. *Id.* at 623. Southern states were attempting to force the Indians out to satisfy pressure from settlers for land. Georgia "asserted jurisdiction over the Cherokees and prepared to distribute the Cherokee lands. Mississippi soon followed suit, abolishing tribal government and extending its laws to Choctaw territory." *Choctaw Nation,* 397 U.S. at 625. These developments led to the enactment of the Indian Removal Act of 1830, 4 Stat. 411. (Def. Ex. 8).

2. The Indian Removal Act authorized the President to divide public domain lands into defined "districts" for tribes removing west of the Mississippi River. It authorized "the President . . . to assure the [Nations] . . . that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and if they prefer it . . . the United States will cause a patent or grant to be made and executed to them for the same." The Indian Removal Act, §§ 1, 3, 4 Stat. 411; (Def. Ex. 8); *see also McGirt,* 140 S. Ct. at 2460 (quoting Indian Removal Act, § 3, 4 Stat. 411).

3. The 1830 Treaty of Dancing Rabbit Creek, Sep. 27, 1830, 7 Stat. 333 ("1830 Treaty") (Def. Ex. 9), used precise geographical terms and secured to the Choctaw Nation "a tract of country west of the Mississippi River, in fee simple to them and their descendants, to insure to them while they shall exist as a

nation and live on it." The 1830 Treaty secured to the Choctaw Nation "the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted them shall ever be embraced in any Territory or State." *Id.* at art 4. The 1830 Treaty was "a guarantee that [the Choctaw] would not again be forced to move." *Choctaw Nation,* 397 U.S. at 625.

4. The Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573 ("1837 Treaty") (Def. Ex. 10), art. 1, secured to the Chickasaw Nation a "district" within the Choctaw Nation's reservation, using precise geographic terms to describe the Chickasaw district. *Id.* at art. 2. The Chickasaw Nation was to hold its district "on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws[])." *Id.* at art. 1.

5. In 1842, President John Tyler conveyed fee patented title to the Treaty Territory to the Choctaw Nation. 1842 Patent (Def. Ex. 11). The patent recited the terms of Article 2 of the 1830 Treaty and reserved the lands from sale without the Nation's consent. *Id*

6. The 1855 Treaty of Washington, June 22, 1855, 11 Stat. 611 (Def. Ex. 12), reaffirmed the 1830 and 1837 Treaties and modified the western boundary of the Choctaw Reservation. The 1855 Treaty made the Choctaw

and Chickasaw governments independent of each other. *Id* pmbl., art. 4. The Choctaw, for the benefit of the Chickasaw, specifically relinquished any claim to territory west of 100th degree west longitude. *Id.* at art. 9. The boundaries of "Choctaw and Chickasaw country" were again specifically set forth in geographic terms. *Id.* at art 1. The United States explicitly asserted that "pursuant to [the Indian Removal Act], the United States do hereby forever secure and guarantee the lands embraced within the said limits" to the Choctaw and Chickasaw and explicitly reserved those lands from sale "without the consent of both tribes." *Id.* The 1855 Treaty repeated the promise to secure to the Choctaw and Chickasaw "the unrestricted right of self-government, and full jurisdiction, over persons and property." *Id*. at art. 7.

7. Following the Civil War, the Choctaw and Chickasaw Nations negotiated another treaty with the United States. In the 1866 Treaty of Washington, Apr. 28, 1866, 14 Stat. 769 ("1866 Treaty") (Def. Ex. 13), the Nations explicitly "cede[d] to the United States the territory west of the 98 degrees west longitude, known as the leased district," *id.* at art. 3, which altered only the western boundary of the Chickasaw and Choctaw Nations. The United States expressly "re-affirm[ed] all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to" the Civil War. *Id.* at art. 10. The 1866

Treaty reaffirmed the Nations' right to self-governance by expressly providing that no legislation "shall [] in anywise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw Nations respectively." *Id.* at art 7. The 1866 Treaty reaffirmed all pre-existing Treaty rights of the Chickasaw and Choctaw Nations not inconsistent with its terms. *Id.* arts. 10, 45. This treaty was the last to diminish boundaries of the Choctaw Reservation.

8. In 1893, Congress established 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 may be agreed upon." § 16, 27 Stat. 612, 645-46. The Commission reported in 1894 that the Creek Nation "would not, under any circumstances, agree to cede any portion of their lands." *McGirt,* 140 S. Ct. at 2463 (citation and internal quotation marks omitted). Although *McGirt* referenced only the Creek Nation in this statement, the Commission's 1894 report reflects that each of the Five Tribes refused to cede tribal lands to the United States. Ann. Rept. of the Comm. Five Civ. Tribes of 1894, 1895, and 1896 (1897) (Def. Ex. 17) at 14. The Commission's 1900 annual report also reflects this refusal: "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) (Pet. Ex. 18) at 9 (emphasis added).

9. Under continued pressure, the Choctaw and Chickasaw Nations agreed to the allotment of their reservations under the Atoka Agreement, the terms of which were set forth in the Curtis Act, Act of June 28, 1898, ch. 517, 30 Stat. 495 (Def. Ex. 19), § 29, and the Choctaw/Chickasaw 1902 Supplemental Allotment Agreement, Act of July 1, 1902, 32 Stat. 641 ("1902 Act") (Def. Ex. 20). The central purpose of these Agreements was to facilitate transfer of title from the Nation to individual tribal citizens. 30 Stat. at 505-06 (Def. Ex. 19); 32 Stat. at 642 (Def. Ex. 20). Some lands were exempt from allotment, including capitol buildings of both Choctaw and Chickasaw Nations, as well as "all court-houses and jails and other public buildings," and lands for schools, seminaries, orphanages, and churches. 30 Stat. at 506 (Def. Ex. 19). The Agreements relied on reservation boundaries to implement the terms. *See id.* at 508, 509,

510. They contained no cessions of land to the United States.

10. Prior to the hearing, the parties stipulated:

> The crime occurred "within the historical geographic area of the Choctaw Nation, as set forth in the 1830, 1837, 1855, and 1866 treaties between the Choctaw Nation, the Chickasaw Nation, and the United States."

Def. Ex. 1. *See also* Def. Exs. 9-13. This Court adopts this stipulation as facts.

11. The State offered no evidence or argument as to whether a reservation was ever established or disestablished for the Choctaw Nation. The State takes no position as to the facts underlying the existence, historically or now, of the Choctaw Nation Reservation.

12. There is no evidence before the Court that Congress has acted to erase or diminish the Choctaw Nation boundaries set forth in the 1855 and 1866 Treaties.

13. The Choctaw Nation is a federally recognized Indian tribe, *see* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5465 (Jan. 30, 2020), that exercises sovereign authority under a Constitution approved by the Secretary of Interior, *see* 1983 Choctaw Constitution.

14. Prior to the hearing, the parties stipulated:

> If the Court determines that those treaties established a reservation, and if the Court further concludes that Congress never explicitly erased those boundaries and disestablished that reservation, then the crime occurred within Indian Country as defined by 18 U.S.C. § 1151(a).

CONCLUSIONS OF LAW

Following the *McGirt* analysis, this Court must first determine whether Congress established a reservation for the Choctaw Nation. In *McGirt v. Oklahoma,* 140 S. Ct. 2452, 2475 (2020), the Supreme Court explained it has "never insisted on any particular form of words . . . when it comes to establishing [a reservation]." The Court noted that the "early treaties did not refer to the Creek lands as a 'reservation'—perhaps because that word had not yet acquired such distinctive significance in federal Indian law. But we have found similar language in treaties from the same era sufficient to create a reservation." *Id.* at 2461 (citation omitted). The Supreme Court explained that "the Creek were promised not only a 'permanent home' that would be 'forever set apart'; they were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State." *Id* at 2461-62. The Court found, "Under any definition, this was a reservation." *Id.* at 2462.

In applying the analysis set out in *McGirt* to the case at bar, this Court finds that a reservation was established for the Choctaw Nation by the treaties described above. Like Creek treaty promises, the

United States' treaty promises to Choctaw Nation "weren't made gratuitously." *McGirt,* 140 S. Ct. at 2460. Like Creek treaties, the Choctaw treaties involved exchange of tribal homelands for a new homeland in Indian Territory, and promised "a 'permanent home' that would be 'forever set apart' and "a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State." *Id.* at 2461-61 It is clear that Congress established a reservation for the Choctaw Nation.

Upon finding that Congress established a reservation for the Choctaw Nation, this Court must next determine whether Congress erased those boundaries and disestablished the reservation. As the Supreme Court made clear in *McGirt,* "No determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *Id.* at 2462. "[T]he only 'step' proper for a court of law" is "to ascertain and follow the original meaning of the law" before it. *Id* at 2468. The constitutional authority to breach Congress's promises and treaties "belongs to Congress alone." *Id.* at 2462 (citing *Lone Wolf v. Hitchcock,* 187 U.S. 553, 566-68) (1903)). The Supreme Court will not "lightly infer such a breach once Congress has established a reservation." *McGirt* at 2468 (citing *Solem v. Bartlett,* 465 U.S. 463, 470 (1984)). "[O]nce a reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'" *McGirt* at 2469 (quoting *Solem,* 465 U.S. at 470).

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* at 2462 (quoting *Solem,* 465 U.S. at 470) (internal quotation marks

omitted). It also may direct that tribal lands be "restored to the public domain," *McGirt* at 2462 (quoting *Hagen v. Utah,* 510 U.S. 399, 412 (1994)) (internal quotation marks omitted), or state that a reservation is "discontinued, abolished, or vacated." *McGirt* at 2463 (quoting *Mattz v. Arnett,* 412 U.S. 481, 504, n.22 (1973) (internal quotation marks omitted)). *See also DeCoteau v. Dist. Cnty. Court for Tenth Judicial Dist.,* 420 U.S. 425, 439-40, n.22 (1975). While "[d]isestablishment has 'never required any particular form of words,'" *McGirt* at 2463 (quoting *Hagen,* 510 U.S. at 411), "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.'" *McGirt* at 2463 (quoting *Nebraska v. Parker,* 136 S. Ct. 1072, 1079 (2016)).

No evidence was presented to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation or that the State of Oklahoma has jurisdiction in this matter. The relevant allotment-era statutes applicable to the Choctaw Nation—the Atoka Agreement and the 1902 Act—did not erase the boundaries of or disestablish the Choctaw Reservation. There is no language in these statutes "that could plausibly be read as an Act of disestablishment." *McGirt,* 140 S. Ct. at 2468. As *McGirt* makes clear, "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *Id.* at 2464 (citations omitted). "Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its

destination." *Id.* at 2465. Without "a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands," *id.* at 2464, this Court finds the Choctaw Reservation was not disestablished.

This Court finds that Congress established a reservation for the Choctaw Nation, and Congress never specifically erased those boundaries and disestablished the reservation. Therefore, the crimes occurred in Indian Country.

CONCLUSION

As a result of the findings and conclusions set forth above, the Court concludes Devin Warren Sizemore was an Indian and this crime occurred in Indian Country.

IT IS SO ORDERED this 27th day of October, 2020.

/s/ Tim Mills
Associate District Judge
Pittsburg County

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

DEVIN WARREN SIZEMORE,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2018-1140

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

Devin Warren Sizemore was tried by jury in the District Court of Pittsburg County, Case No. CF-2016-593, and convicted of First Degree Murder (Count 1), in violation of 21 O.S.Supp.2012, § 701.7; and Battery/Assault and Battery on a Police Officer (Count 2), in violation of 21 O.S.Supp.2015, § 649. In accordance with the jury's recommendation, the Honorable Tim Mills, sentenced Sizemore to life

imprisonment without the possibility of parole on Count 1 and five years imprisonment on Count 2, and further ordered the sentences to be served concurrently. Sizemore appeals his Judgment and Sentence.

In Proposition 1 of his Brief-in-Chief, filed September 18, 2019, Sizemore claims the District Court lacked jurisdiction to try him. Sizemore argues that he is a citizen of the Choctaw Nation and that the crimes occurred within the boundaries of the Choctaw Nation Reservation.[1] Sizemore, 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]

Sizemore's claim raises two separate questions: (a) his Indian status and (b) whether the crime

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[1] Sizemore also claims that defense counsel was ineffective in part for failing to properly litigate the issue of jurisdiction. In a Notice of Extra-Record Evidence Supporting Proposition II(A), (B), and (C) of Brief of Appellant and/or Alternatively Application for Evidentiary Hearing on Sixth Amendment Claims, tendered for filing, he asks the Court to either supplement the record on appeal with, among other items, documentation bearing on the issue of jurisdiction or alternatively to order an evidentiary hearing for the purpose of developing the record with regard to his claims.

[2] On February 21, 2020, we held Sizemore'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 Sizemore's jurisdictional claim and Sizemore 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.**

occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Pittsburgh 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 Sizemore'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, Sizemore's status as an Indian. The District Court must determine whether (1) Sizemore has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.[3]

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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.

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 Choctaw Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the 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 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 con-

clusions of law and supplemental briefing shall occur as set forth above.

IT IS FURTHER ORDERED that Sizemore's pending motion to file under seal his Notice of Extra-Record Evidence Supporting Proposition II (A), (B), and (C) of Brief of Appellant and/or Alternatively Application for Evidentiary Hearing on Sixth Amendment Claims is **GRANTED.** The Clerk of this Court is directed to file the Notice tendered for filing under seal. The Clerk of this Court shall transmit copies of the following, with this Order, to the District Court of Pittsburg County: Appellant's Brief in Chief filed September 18, 2019, as well as the sealed Notice of Extra-Record Evidence Supporting Proposition II (A), (B), and (C) of Brief of Appellant and/or Alternatively Application for Evidentiary Hearing on Sixth Amendment Claims; Appellant's Reply Brief filed February 3, 2020; and Appellee's Response Brief filed January 16, 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

ATTEST:

/s/ John D. Hadden
Clerk