

APPENDIX TABLE OF CONTENTS

Opinion of the Court of Criminal Appeals, State of Oklahoma (April 29, 2021).....	1a
Amended Order of the District Court of Craig County, State of Oklahoma, with Findings of Fact and Conclusions of Law (March 5, 2021).....	14a
Order of the Court of Criminal Appeals, State of Oklahoma, Directing Response or Compliance with Remand Order (February 24, 2021).....	24a
Order of the District Court of Craig County, State of Oklahoma, with Findings of Fact and Conclusions of Law (January 25, 2021).....	27a
Order of the Court of Criminal Appeals, State of Oklahoma, Remanding for Evidentiary Hearing (August 19, 2020)	30a

**OPINION OF THE COURT OF CRIMINAL
APPEALS, STATE OF OKLAHOMA
(APRIL 29, 2021)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHAWN LEE MCDANIEL,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2017-357

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

OPINION

ROWLAND, VICE PRESIDING JUDGE:

Appellant Shawn Lee McDaniel appeals his conviction in Muskogee County District Court, Case No. CF-2015-249, for First Degree Murder, in violation of 21 O.S.Supp.2012, § 701.7(A). The Honorable Thomas H. Alford, District Judge, presided over McDaniel's jury trial and sentenced him, in accordance with the jury's verdict, to life imprisonment. McDaniel raises

seven issues for review. His jurisdiction challenge, contesting the State's jurisdiction to prosecute him, requires relief. We address only that claim and find his other claims are moot.

This appeal turns on whether the murder victim was an Indian as defined by federal law, and whether the alleged crime was committed 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.

1. Controlling Law: *McGirt v. Oklahoma*

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 remains in existence 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 Cherokee Nation, *McGirt's* reasoning is nevertheless controlling.

2. Jurisdiction

Federal and tribal governments, not the State of Oklahoma, have jurisdiction to prosecute crimes committed by or against Indians on an Indian reservation. 18 U.S.C. §§ 1152, 1153; *McGirt*, 140 S.Ct. at 2479-80. The charge of first degree murder filed against McDaniel in this case fits squarely within the crimes subject to exclusive federal jurisdiction. *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.”)

3. Two Questions Upon Remand

A. McDaniel's Status as Indian

After *McGirt* was decided, this Court, on August 19, 2020, remanded this case to the District Court of Muskogee County for an evidentiary hearing. We directed the District Court to make findings of fact and conclusions of law on two issues: (a) the victim'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.

On September 29, 2020, the parties appeared for an evidentiary hearing before the Honorable Bret Smith, District Judge. The District Court admitted the parties' joint stipulation, acknowledged the presence of the Cherokee Nation's deputy attorney general appearing as *amicus curiae*, and accepted the *amicus* brief filed on behalf of the tribe. The joint stipulation provided that: (1) the charged crime occurred within the historic boundaries of the Cherokee Nation; (2) the victim has some Indian blood; (3) the victim was a recognized citizen of the Cherokee Nation on the date of his death; and (4) the Cherokee Nation is a federally recognized tribe.

On March 12, 2021, the District Court filed its Second Amended Findings of Fact and Conclusions of Law. The District Court found the facts recited above in accordance with the joint stipulation. The District Court correctly concluded that, on the date of his death,

the victim, Billy Fools, was an Indian under federal law.¹ We adopt this ruling.

B. Whether the Crime Was Committed in Indian Country

As to the second question on remand, whether the crime was committed in Indian country, the stipulation of the parties was less dispositive. They acknowledged only that the charged crime occurred within the historical geographic area of the Cherokee Nation as designated by various treaties. At the evidentiary hearing, the State took no position on whether Congress established a reservation for the Cherokee Nation or whether Congress ever erased those boundaries and disestablished the reservation. Based on the parties' stipulation and the materials submitted by McDaniel and the Cherokee Nation at the evidentiary hearing, the District Court concluded that Congress established a reservation for the Cherokee Nation, that the charged crime against McDaniel occurred within the boundaries of that reservation, and that Congress never disestablished the Cherokee Nation Reservation. We agree. *See Spears v. State*, 2021 OK CR 7, ¶¶ 11-15, ___ P.3d ___ (holding Congress established a reservation for the Cherokee Nation and it remains intact because Congress has not disestablished it). Hence, for purposes of federal criminal law, the land upon which the

¹ In its Supplemental Brief after remand, the State "accepts" the District Court's findings and conclusions concerning the victim's Indian status.

parties agree McDaniel committed the crime is Indian country.²

While the State concedes that the victim was an Indian under federal law and that the charged crime occurred within Indian country, the State maintains that federal jurisdiction over crimes committed against Indians in Indian Country pursuant to 18 U.S.C. §§ 1152 is not exclusive. The State argues in its Supplemental Brief that Oklahoma has concurrent jurisdiction with federal courts over crimes committed by non-Indian defendants against Indian victims in Indian country. We rejected the State’s same argument regarding concurrent jurisdiction in *Bosse v. State*, 2021 OK CR 3, ¶ 23-28, ___ P.3d ___. Under the analysis in *McGirt*, we must therefore hold that the District Court of Muskogee County was without jurisdiction to prosecute McDaniel. Accordingly, we grant McDaniel’s Proposition 1.

DECISION

The Judgment and Sentence of the district court is **VACATED** and the matter is **REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), the **MANDATE** is **ORDERED** to issue in twenty (20) days from the delivery and filing of this decision.

² In its Supplemental Brief after remand, the State “accepts” the District Court’s findings and conclusions concerning reservation status of the crime’s situs.

**AN APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY, THE HONORABLE
BRET SMITH, DISTRICT JUDGE**

APPEARANCES AT TRIAL

Roger Hilfiger
Attorney at Law
620 West Broadway
Muskogee, OK 74401
Counsel for Defendant

Tim King
Asst. District Attorney
Muskogee CO. Courthouse
220 State St., Suite 1
Muskogee, OK 74401
Counsel for State

APPEARANCES ON APPEAL

James H. Lockard
Deputy Division Chief
Homicide Direct
Appeals Division
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070
Counsel for Appellant

Mike Hunter
Attorney General of Oklahoma
Matthew D. Haire
Ashley L. Willis
Asst. Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
Counsel for Appellee

APPEARANCES ON REMAND

Orvil Loge
District Attorney
Muskogee CO. Courthouse
220 State St., Suite 1
Muskogee, OK 74401
Counsel for State

Mike Hunter
Attorney General of Oklahoma
Julie Pittman
Randall Young
Assistant Attorneys General
313 N.E. 21st Street
Oklahoma City, OK 73105
Counsel for State

James H. Lockard
Alex Richard
Homicide Direct Appeals Division
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070
Counsel for Defendant/Appellant

Roger Hilfiger
Attorney at Law
620 West Broadway
Muskogee, OK 74401
Counsel for Defendant/Appellant

Sara Hill
Attorney General
Chrissi Nimmo
Deputy Attorney General
Paiten Taylor-Gualls
Asst. Attorney General

Cherokee Nation
17675 S. Muskogee Ave.
Tahlequah, OK 74465-1533
Amicus Curiae

Opinion by: Rowland, V.P.J.

Kuehn, P.J.: Concur

Lumpkin, J.: Concur in Result

Lewis, J.: Specially Concur

Hudson, J.: Concur in Result

**LUMPKIN, JUDGE
CONCURRING IN RESULTS:**

Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, ___ U.S. ___, 140 S. Ct. 2452 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt*, I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas, I was forced to conclude the Majority had totally failed to follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

My quandary is one of ethics and morality. One of the first things I was taught when I began my service in the Marine Corps was that I had a duty to follow lawful orders, and that same duty required me to resist unlawful orders. Chief Justice Roberts'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.

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*

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).

and recognize “the emperor has no clothes” as to the adherence to following the rule of law in the application of the *McGirt* decision?

My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority’s mischaracterization of Congress’s actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.

HUDSON, J., CONCUR IN RESULTS:

Today's decision applies *McGirt u. Oklahoma*, 140 S. Ct. 2452 (2020) to the facts of this case and dismisses convictions from Johnston County for first degree burglary, aggravated assault and battery, and three counts of assault with a dangerous weapon. 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 these crimes within the historic boundaries of the Chickasaw Reservation. Under *McGirt*, the State cannot prosecute Appellant because of his Indian status and the occurrence of these crimes within Indian Country as defined by federal law. I therefore as a matter of *stare decisis* fully concur in today's decision.

I disagree, however, with the majority's definitive conclusion that Congress never disestablished the Chickasaw Reservation. Here, the State took no position below on whether the Chickasaw 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 conclude definitively that the Chickasaw Nation was never disestablished based on this record.

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).

**AMENDED ORDER OF THE DISTRICT COURT
OF CRAIG COUNTY, STATE OF OKLAHOMA,
WITH FINDINGS OF FACT AND
CONCLUSIONS OF LAW
(MARCH 5, 2021)**

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

SHAWN LEE MCDANIEL,

Defendant-Appellant,

v.

THE STATE OF OKLAHOMA,

Plaintiff-Appellee.

OCCA Case No. F-2017-357

Muskogee County Case No. CF-2015-249

Before: Bret A. SMITH, District Judge.

AMENDED ORDER

NOW on this 5th day of March, 2021, the Court amends and supplements the previous order dated January, 25th 2021. On September 29, 2020 an evidentiary hearing was held wherein the State appeared through the Oklahoma Attorney General's Office by Randall Young and Julie Pittman and through the Muskogee County District Attorney's Office by Orvil Loge. Shawn Lee McDaniel appeared through the

Oklahoma Indigent Defense System by James Lockard and Alex Richard and private counsel Roger Hilfiger.¹ Additionally, the Cherokee Nation appeared as amici through Chrissi Nimmo. After considering the argument of parties, reviewing the admitted exhibits, and accepting the stipulations of the parties, this court makes the following findings of fact:

FINDINGS OF FACT

1. The Indian status of Billy Fools, the Defendant/Appellant's victim is, by stipulation of the parties, one quarter (1/4) Cherokee blood. Further, Billy Fools was a registered citizen of the Cherokee Nation at the time of the crime.

2. This Court finds, by stipulation of the parties, that the Cherokee Nation is a federally recognized tribe.

3. This Court finds, by stipulation of the parties, that the crime committed by Shawn Lee McDaniel occurred at 25510 South 110th Street, in Porum, Oklahoma.

4. This Court finds, by stipulation of the parties, that 52210 South 110th Street, in Porum Oklahoma, is within the geographic area set out in the Treaty of the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612.

¹ Mr. McDaniel was not present at the evidentiary hearing.

CONCLUSIONS OF LAW

I. Defendants/Appellant's Victim's Status as an Indian.

I. The State of Oklahoma and the Defendant/Appellant stipulated to the Defendant/Appellant's victim's (Billy Fools) Indian Status by virtue of his tribal membership and proof of blood quantum. Based on the stipulation provided, the Court specifically finds Billy Fools, the victim, is one quarter (1/4) Cherokee Indian and is recognized as such by the Cherokee Nation. Thus, the Defendant/Appellants' victim is an Indian.

II. Was the Crime Situs in Indian Country.

The State of Oklahoma and Defendant/Appellant stipulated that the crime occurred within the historical boundaries of the Cherokee Nation. The State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation. In regard to whether Congress established a reservation for the Cherokee Nation, the Court finds as follows:

1. The Cherokee Nation is a federally recognized Indian tribe. 84 C.F.R. § 1200 (2019).
2. The current boundaries of the Cherokee Nation encompass lands in a fourteen-county area within the borders of the State of 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 as indicated in Combined Hearing Exhibit 1, Tab 3.

3. The Cherokee Nation's treaties are to be considered on their own terms, in determining reservation status. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).
4. In *McGirt*, the United States Supreme Court noted that 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. As such, the Supreme Court found that, "Under any definition, this was a [Creek] reservation." *McGirt*, 140 S.Ct. at 2461.
5. 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.
6. 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.
7. 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.

8. The 1835 Cherokee treaty 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.” Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 and *Holden v. Joy*, 84 U.S. 211, 237-38 (1872).
9. Like the Creek treaty promises, the United States’ treaty promises to Cherokee Nation “weren’t made gratuitously.” *McGirt*, 140 S.Ct. at 2460. 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. 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.
10. 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 they were consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Arts. 1, 5, 8, 19, 7 Stat. 478.

11. 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). The title was held by the 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). 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).
12. The 1846 Cherokee treaty required federal issuance of a deed to the Cherokee 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.

13. The 1866 Cherokee treaty resulted in Cherokee cessions of lands in Kansas and the Cherokee Outlet and 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.
14. 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.
15. Under *McGirt*, 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.

As a result of the treaty provisions referenced above and related federal statutes, this Court hereby finds Congress did establish a Cherokee reservation as required under the analysis set out in *McGirt v. Oklahoma*, 591 U.S. ____ (2020), 140 S. Ct. 2452 (2020).

In regard to whether Congress specifically erased the boundaries or disestablished the Cherokee Reservation, the Court finds as follows:

1. The current boundaries, indicated on the map found at Tab 3 of the Combined Hearing Exhibit 1, are the established boundaries of the Cherokee Reservation by 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.
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 the 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 the 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).

6. The 1893 federal statute that ratified the 1891 Agreement required payment of a sum certain to the Cherokee 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. No evidence was presented that any 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.

During oral argument and in selected portions of their brief, the State argues the burden of proof regarding whether Congress specifically erased the boundaries or disestablished the reservation rests solely with the Defendant/Appellant. The State also made it clear through argument and briefing the State of Oklahoma "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.

No evidence was presented that to the Court that Congress erased or disestablished the boundaries of the Cherokee Nation. The State of Oklahoma has no jurisdiction in this matter because the Defendant/Appellant's victim, Billy Fools, is an Indian and the crime occurred in the Cherokee Nation.

Signed this 5th day of March, 2021.

/s/ Honorable Bret A. Smith
District Court Judge

**ORDER OF THE COURT OF CRIMINAL
APPEALS, STATE OF OKLAHOMA,
DIRECTING RESPONSE OR COMPLIANCE
WITH REMAND ORDER
(FEBRUARY 24, 2021)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHAWN LEE MCDANIEL,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2017-357

Before: Dana KUEHN, Presiding Judge.

**ORDER DIRECTING RESPONSE OR
COMPLIANCE WITH REMAND ORDER**

After the Supreme Court decided *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020), this Court, on August 19, 2020, remanded this case to the District Court of Muskogee County for an evidentiary hearing to be held within sixty days from the date of the Remand Order. We directed the District Court to make findings of fact and conclusions of law on two issues: (a) the victim's status as an Indian; and (b)

whether the crime occurred in Indian Country, namely within the boundaries of the Cherokee Nation Reservation. We ordered the District Court to issue written Findings of Fact and Conclusions of Law within twenty days after the filing of the transcripts in the District Court and further ordered the District Court Clerk to 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 this Court's Clerk within five days after the District Court filed its Findings of Fact and Conclusions of Law.

The appellate record shows our Court Clerk filed the transcript from the evidentiary hearing held September 29, 2020, Defendant's exhibits, and an amicus exhibit on December 14, 2020. Appellant filed his Supplemental Brief on January 4, 2021. The State of Oklahoma filed a Notice of Incomplete Record on January 8, 2021, claiming the record was incomplete because the District Court of Muskogee County had yet to file its Findings of Fact and Conclusions of Law in compliance with this Court's Remand Order. On January 15, 2021, we ordered the District Court to respond and either forward its Findings of Fact and Conclusions of Law or prepare and file them within ten days of the Order.

The District Court entered an Order on January 25, 2021 with only Findings of Fact based upon the parties' stipulations. The Order contained no Conclusions of Law and failed to address whether Congress established a reservation for the Cherokee Nation and, if so, whether Congress erased those boundaries and disestablished the reservation. The State subsequently filed a Second Notice of Incomplete Record.

THEREFORE, the District Court of Muskogee County, the Honorable Bret Smith, or his designated representative, is directed to respond to the State's incomplete record claim, namely that no Conclusions of Law have been issued in the above-referenced matter in accordance with this Court's Remand Order of August 19, 2020. If the District Court has already complied with this Court's Remand Order and issued written Conclusions of Law, a certified copy of those Conclusions shall be forwarded to this Court. If written Conclusions have not yet been issued, the District Court shall file them within ten (10) days from the date of this order. Upon the filing of the Conclusions of Law, the District Court Clerk is directed to supplement the record as directed in our Remand Order of August 19, 2020. All other deadlines in the Remand Order remain in effect.

The Clerk of this Court is directed to transmit a copy of this order to the Court Clerk of Muskogee County, the District Court of Muskogee County, the Honorable Bret Smith, District Judge, Appellant, and counsel of record.

IT IS SO ORDERED.

WITNESS MY HAND AND THE SEAL OF THIS COURT this 24th day of February, 2021.

/s/ Dana Kuehn
Presiding Judge

ATTEST:

/s/ John D. Hadden
Clerk

**ORDER OF THE DISTRICT COURT OF
CRAIG COUNTY, STATE OF OKLAHOMA,
WITH FINDINGS OF FACT AND
CONCLUSIONS OF LAW
(JANUARY 25, 2021)**

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

SHAWN LEE MCDANIEL,

Defendant-Appellant,

v.

THE STATE OF OKLAHOMA,

Plaintiff-Appellee.

OCCA Case No. F-2017-357

Muskogee County Case No. CF-2015-249

Before: Bret A. SMITH, District Judge.

ORDER

NOW on this 25th day of January, 2021, the above styled matter comes on before the undersigned Judge pursuant to an August 19, 2020 order from the Oklahoma Court of Criminal Appeals remanding this case for an evidentiary hearing. On September 29, 2020 an evidentiary hearing was held wherein the State appeared through the Oklahoma Attorney General's Office by Randall Young and Julie Pittman and through

the Muskogee County District Attorney's Office by Orvil Loge. Shawn Lee McDaniel appeared through the Oklahoma Indigent Defense System by James Lockard and Alex Richard and private counsel Roger Hilfiger.¹ Additionally, the Cherokee Nation appeared as amici through Chrissi Nimmo. After considering the argument of parties, reviewing the admitted exhibits, and accepting the stipulations of the parties, this court makes the following findings of fact:

FINDINGS OF FACT

1. The Indian status of Billy Fools, the Defendant/Appellant's victim is, by stipulation of the parties, 1/4 Cherokee blood. Further, Billy Fools was a registered citizen of the Cherokee Nation at the time of the crime.

2. This Court finds, by stipulation of the parties, that the Cherokee Nation is a federally recognized tribe.

3. This Court finds, by stipulation of the parties, that the crime committed by Shawn Lee McDaniel occurred at 25510 South 110th Street, in Porum, Oklahoma.

4. This Court finds, by stipulation of the parties, that 52210 South 110th Street, in Porum Oklahoma, is within the geographic area set out in the Treaty of the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612.

¹ Mr. McDaniel was not present at the evidentiary hearing.

App.29a

Signed this 25th day of January, 2021.

/s/ Honorable Bret A. Smith
District Court Judge

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

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHAWN LEE MCDANIEL,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2017-357

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

**ORDER REMANDING FOR
EVIDENTIARY HEARING**

Appellant Shawn Lee McDaniel appeals from his conviction in Muskogee County District Court, Case No. CF-2015-249, for Murder in the First Degree, in violation of 21 O.S. Supp. 2012, § 701.7. The Honorable Thomas A. Alford, District Judge, presided over

McDaniel's jury trial and sentenced him to life imprisonment. McDaniel must serve 85% of his sentence before he is eligible for parole.

In Proposition 1 of his Brief-in-Chief and related Application for Evidentiary Hearing filed on February 1, 2018, McDaniel claims that the District Court lacked jurisdiction to try him. McDaniel argues that while he is not Indian, his victim, Billy Fools, was a citizen of the Cherokee Nation and the crime occurred within the boundaries of the Cherokee Reservation. McDaniel, in his direct appeal, relies upon jurisdictional issues addressed in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), which was affirmed by the United States Supreme Court in *Sharp v. Murphy*, 591 U.S. ___, 140 S.Ct. 2412 (2020) for the reasons stated in *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020).¹

McDaniel's claim raises two separate questions: (a) the Indian status of his victim, Billy Fools, and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Muskogee County, for an evidentiary hearing to be held within sixty (60) days from the date of this Order.

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the

¹ On March 25, 2019, we held McDaniel's direct appeal in abeyance pending the resolution of the litigation in *Murphy*. Following the decision in *McGirt*, the State asked for additional time in which to file a response to McDaniel's jurisdictional claim. Additionally, the Cherokee Nation filed an unopposed application for authorization to file amicus brief and tendered the same for filing. In light of the present order, there is no need for an additional responses at this time and these requests are **DENIED**.

Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon McDaniel's presentation of *prima facie* evidence as to the victim's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

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

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

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 Court should consider any evidence the parties provide,

² See *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001). See generally *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

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 McDaniel, 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 Muskogee County: Appellant's Brief-in-Chief and Application for Evidentiary Hearing filed on February 1, 2018; Appellee's Answer Brief filed on June 1, 2018; and Appellant's Reply Brief filed on June 21, 2018.

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