IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Nos. PCD-2020-611**
	)	**CF-1999-4583**
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND

This Court issues the following Findings of Fact and Conclusions of Law on Remand following an evidentiary hearing on the Indian County jurisdiction claim raised by John Fitzgerald Hanson, hereinafter referred to as Petitioner:

INTRODUCTION

1. These Findings of Fact and Conclusions of Law follow an evidentiary hearing held according to the Oklahoma Court of Criminal Appeals' ("OCCA") April 2, 2021 Order Remanding for Evidentiary Hearing ("Order Remanding"). Order Remanding, *Hanson v. State*, PCD-2020-611 (Okla. Crim. App. Apr. 2, 2021). The Order Remanding directed this Court to address (1) Petitioner's Indian status, and (2) whether his crimes occurred in Indian Country. Order Remanding, 2. This Court held a bifurcated evidentiary hearing, calling the case for hearing on May 25, 2021 and June 3, 2021. This Court has considered the evidence submitted at the hearing, as well as the arguments advanced through the parties' pre-hearing briefs and oral argument, in developing these Findings of Fact and Conclusions of Law.

2. A Tulsa County jury convicted Petitioner of (Count One) First Degree Malice Murder, in violation of 21 O.S.Supp.1998, § 701.7(A); and (Count Two) First Degree Felony Murder, in violation of 21 O.S.Supp.1998 § 701.7(B). *Hanson v. State*, 2003 OK CR 12, ¶ 1, 72 P.3d 40, 45. The jury also found three aggravating circumstances for Count One, and two aggravating circumstances for Count Two. *Hanson*, 2003 OK CR 12, ¶ 1, 72 P.3d at 45. The Honorable Linda G. Morrissey, District Court Judge, fixed punishment in accordance with the jury's recommendation, sentencing Petitioner to death for Count One and life without the possibility of parole for Count Two. *Id.*

3. The OCCA found "error in jury selection and second stage" and remanded Count One for resentencing. *Id.* The Honorable Caroline E. Wall, District Court Judge, called Petitioner's case for resentencing on January 9-24, 2006. *Hanson v. State*, 2009 OK CR 13, ¶ 1, 206 P.3d 1020, 1024. Again, the jury found three aggravating circumstances and sentenced Petitioner to death. *Id.* The OCCA affirmed Petitioner's sentence. *Id.*

4. Petitioner has since failed to obtain further relief in both state and federal courts. *See Hanson v. Oklahoma*, 558 U.S. 1081 (2009)(denying *certiorari*); *Hanson v. State*, PCD-2006-614 (Okla. Crim. App. June 2, 2009)(unpublished); *Hanson v. State*, PCD-2011-58 (Okla. Crim. App. March 22, 2011)(unpublished); *Hanson v. Sherrod*, 10-CV-113-CVE-TLW (N.D. Okla. July 1, 2013)(unpublished), *aff'd by Hanson v. Sherrod*, 797 F.3d 810 (10th Cir. Aug. 13, 2015), *cert. denied*, 136 S. Ct. 2013 (2016). Not once in the twenty-one years between the murders and the Supreme Court's

decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) did Petitioner assert his alleged Indian status to challenge the State's jurisdiction.

5. Petitioner filed the instant successive application seeking post-conviction relief on September 8, 2020 ("Successive Application"). His sole proposition is that the State of Oklahoma lacked jurisdiction to prosecute him because he is an Indian who committed his murders in the Cherokee Nation Reservation. Successive Application, 6. The OCCA issued its Order Remanding on April 2, 2020, directing this Court to address "(a) [Petitioner's] Indian status; and (b) whether the crime[s] occurred in Indian Country." Order Remanding, 2. Specific to Petitioner's status, the OCCA tasked this Court with determining "whether (1) Hanson has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government." Order Remanding, 4.

6. This Court called Petitioner's case for status on May 4, 2021. There, the parties agreed to admit an enrollment verification from the Muscogee Nation, Petitioner's Exhibit 1, as well as a set of documents from the Cherokee Nation Real Estate Services, Petitioner's Exhibit 2, while reserving argument for briefing. This Court accordingly invited the parties to submit briefing on or before May 25, 2021, and set an argument date for June 3, 2021. Both parties duly submitted briefing to this Court.

7. At the June 3, 2021 hearing, Petitioner submitted two more exhibits without objection, both of which related to Petitioner's familial connections to the Muscogee Nation. Petitioner's Exhibits 3 and 4. This Court heard argument from the parties, and announced its ruling that "Petitioner was not an Indian at the time of the offense,

and, therefore, is not an Indian for purposes of jurisdiction over these crimes." 6/3 Tr., 30.

8. Based upon the evidence admitted at the evidentiary hearing, and counsels' arguments and briefing, this Court makes the following findings of fact and conclusions of law.

DISCUSSION[1]

The Major Crimes Act ("MCA"), 18 U.S.C. § 1153, provides the federal government "exclusive jurisdiction" over murders committed by Indians in Indian Country. Petitioner committed his crimes, both murders, nearby a dirt pit outside Owasso on August 31, 1999. *Hanson*, 2003 OK CR 12, ¶ 2, 72 P.3d at 40. He committed these crimes in Indian Country. Pet. Ex. 2; 18 U.S.C. § 1151; and *Hogner*, 2021 OK CR 4, ¶ 17. The question here is whether Petitioner is an Indian for the purposes of the MCA. This Court finds that Petitioner was not recognized as an Indian at the time of the offense. And because the appropriate focal point for this Court's jurisdictional analysis lies with the time of the offense, not whenever the jurisdictional claim itself is raised, Petitioner cannot show that he was an Indian for the purposes of the MCA. Nor does this Court accept Petitioner's invitation to adopt a new standard that looks to eligibility alone in determining recognition. Accordingly, this Court concludes that Petitioner fails to set forth *prima facie* evidence of his Indian status relevant to this Court's inquiry.

[1] The forgoing analysis does not address Respondent's asserted procedural defenses, namely waiver and laches. Resp. Br., 4, n. 1.

INDIAN STATUS: APPLICABLE LAW

It is true that "[t]he term 'Indian' is not statutorily defined, but courts have judicially explicated its meaning." *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005) (quotation marks omitted). In fact, a "number of courts" have read the Supreme Court's decision in *United States v. Rogers*, 45 U.S. 567 (1846), "to establish a two-part test of whether a person is an Indian under federal criminal jurisdiction . . . ." *St. Cloud v. United States*, 702 F. Supp. 1456, 1460 (D.S.D. 1988). Under the *Rogers* test, in order to qualify as an "Indian" for purposes of invoking an exception to state jurisdiction, a defendant must prove two facts: 1) that he or she has some Indian blood, and 2) that he or she is recognized as an Indian by a tribe or the government. *Id. See also United States v. Zepeda*, 792 F.3d 1103, 1113-15 (9th Cir. 2015) (noting that there must be "some quantum of Indian blood"); *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); *Goforth v. State*, 1982 OK CR 48, ¶¶ 4-7, 644 P.2d 114, 115-16. Importantly, though, "[a] person claiming Indian status must satisfy both prongs" of the *Rogers* test. *Bruce*, 394 F.3d at 1223. The OCCA recently confirmed that the *Rogers* test applies in Oklahoma. *See Bosse v. State*, 2021 OK CR 3, ¶ 12, __ P.3d __, __.

INDIAN STATUS: SOME INDIAN BLOOD

A. Findings of Fact

1. Petitioner admitted evidence, without objection, showing he possesses a 1/32 Muscogee blood quantum. Pet. Ex. 1.

B. Conclusions of Law

1. Under the first prong of the *Rogers* test, "the defendant must have a blood connection to a 'once-sovereign political communit[y],'" and "'[t]he first prong requires ancestry living in America before the Europeans arrived.'" *Zepeda*, 792 F.3d at 1110 (quoting *United States v. Antelope*, 430 U.S. 641, 646 (1977); *Bruce*, 394 F.3d at 1223, respectively). *See also Bruce*, 394 F.3d at 1224 (discussing requirement of "some" Indian blood). But it is not necessary that a defendant's blood derives from a federally-recognized tribe—federal recognition of a tribe is only necessary for the second prong of the *Rogers* test. *Zepeda*, 792 F.3d at 1113.

2. Because Petitioner possesses 1/32 Muscogee blood, this Court concludes that he meets the first prong of the *Rogers* test. *See Bosse*, 2021 OK CR 3, ¶¶ 14-19, __ P.3d at ___.

INDIAN STATUS: RECOGNITION

A. Findings of Fact

1. Petitioner was born on April 8, 1964. Pet. Ex. 1.

2. Petitioner enrolled with the Muscogee Nation on October 28, 2020. Pet. Ex. 1.

3. Petitioner's paternal great-grandmother, Lilia Taylor Quapaw Hanson, was enrolled appears on the Dawes Commission's Census Card no. 1147 in 1900. Pet. Ex. 3 and 4.

4. Petitioner's family includes a number of enrolled Muscogee citizens. Pet. Ex. 5-7.

B. Conclusions of Law

1. This Court finds that Petitioner was not recognized as an Indian by any tribe or the federal government at the time of the offense. While Petitioner is now enrolled with the Muscogee Nation, his post-offense enrollment—twenty years post-offense—cannot vitiate the absence of this essential component, necessary for application of the MCA.[2] Pet. Ex. 1; Pet. Br., 8-10. Nor does this Court find any support for Petitioner's argument in favor of a new standard that looks to eligibility alone in determining recognition. Pet. Br., 11-12. Similarly, this Court finds his familial history and descent from enrolled citizens of the Muscogee Nation insufficient.

2. The OCCA has not yet authoritatively spoken on what constitutes "recognition" as an Indian. The Tenth Circuit embraces "a totality-of-the-circumstances approach to determining legal status," warning "certain types of evidence, by themselves, may not be sufficient." *Diaz*, 679 F.3d at 1187.

3. The Tenth Circuit's analysis embraces a reaching, fact-sensitive, inquiry. Until the OCCA provides further guidance, this Court will follow the Tenth Circuit's approach. *See Bosse*, 2021 OK CR 3, ¶ 18, 484 P.3d at 293 (adopting the same test for Indian blood as that used by the Tenth Circuit). In any event, in this case, Petitioner offers no evidence of recognition beyond his enrollment (in 2020) in the Muscogee Nation.

4. Many courts use a multi-factor test for determining recognition, and this Court accordingly looks to:

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[2] Petitioner's enrollment verification indicates that be enrolled with the Muscogee Nation as of October 28, 2020. Pet. Ex. 1.

> In declining order of importance, these factors are: 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life.

St. Cloud, 702 F. Supp. at 1461 (footnote in brackets added) (court's footnote omitted). *See also Zepeda*, 792 F.3d at 1114; *United States v. Nowlin*, No. 13-8028, 555 F. App'x 820, 823 (10th Cir. Feb. 19, 2014) (unpublished); *United States v. Cruz*, 554 F.3d 840, 846 (9th Cir. 2009); *Bruce*, 394 F.3d at 1224; *United States v. Loera*, 190 F. Supp. 3d 873, 880 (D. Ariz. 2016); *Nobles*, 838 S.E.2d at 377. Additionally, "[s]ome courts deem the four factors set out in *St. Cloud* to be exclusive and consider them 'in declining order of importance'"; meanwhile, other courts have found the *St. Cloud* factors far from exclusive and have looked to other relevant factors to assist in determining "affiliation" or "recognition." *Nobles*, 838 S.E.2d at 378 (quoting *Bruce*, 394 F.3d at 1224).

5. This Court looks to August 31, 1999, the date of Petitioner's crimes, in determining his Indian status. In support, this Court looks to the OCCA's recent holdings which have affirmatively placed the burden on criminal defendants to show their Indian status as of the date of their offenses. While the OCCA's holdings provide this Court direction, those decisions offer little analysis. So, this Court embraces the Ninth Circuit's analysis in *Zepeda* to buttress a number of practical reasons for looking to the time of the offense in fixing jurisdiction. 792 F.3d at 1113.

6. This analysis begins with the recognition that Indian status, at least as far as criminal jurisdiction is concerned, is not immutable. *See Plains Commerce Bank v.*

Long Family Land & Cattle Co., 554 U.S. 316, 327 (2008)(citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978)). *See also United States v. Antelope*, 430 U.S. 641, 646 (1977)(Indian status determined through recognition by tribe acting as separate sovereign, not by racial classification); *cf. Goforth*, 1982 OK CR 48, ¶ 6, 644 P.2d at 116 ("Absent such recognition, we cannot hold that the appellant is an Indian under federal law, since such a determination at this point would allow the appellant to assert Indian heritage only when necessary to evade a state criminal action."). It is precisely because recognition is subject to change this Court must anchor its jurisdictional inquiry at some point in time.

7. The OCCA has held in recent decisions that the burden lies with criminal defendants in showing their Indian status at the time of the offense. In evaluating the petitioner's jurisdictional claim in *Ryder v. State*, the OCCA held "Petitioner has met his burden of establishing the status of his victims as Indian on the date of the crime." 2021 OK CR 11, ¶ 29, ___ P.3d ___. The OCCA similarly held in *Hogner*, that "Appellant has met his burden of establishing his status as an Indian, having ¼ degree Indian blood and being a member of the Miami Tribe of Oklahoma on the date of the crime." 2021 OK CR 4, ¶ 18. The holdings comport with other indications from members of the OCCA that it is "of paramount importance... for the district court to determine whether at the time of this crime, [the defendant] was recognized as an Indian by his tribe or the federal government." *Cody Allen Bruner v. State*, PC-2020-843, slip op. at 1 (Okla. Crim. App. Mar. 4, 2021)(Rowland, V.P.J., specially concurring). The OCCA has unequivocally fixed its jurisdictional analysis under the

MCA on the date of the offense.

8. Petitioner's resistance to these holdings under *Cole* is unconvincing. He argues the OCCA's holding that the petitioner in that case "met his burden of establishing B.C.'s status as an Indian, having 1/16 Cherokee blood quantum and being a posthumously enrolled member of the Cherokee Nation" shows that recognition at the time of the offense is not essential to divest the State of jurisdiction. Pet. Br., 9-10 (citing *Cole v. State*, 2021 OK CR 10, ___ P.3d ___). But all the OCCA did was evaluate B.C.'s status in the totality of the circumstances, as it had counselled the parties to do. Order Remanding for Evidentiary Hearing, *Cole v. State*, PCD-2020-529, n. 1 (Okla. Crim. App. Aug. 24, 2020)(citing *Diaz*, 679 F.3d at 1187; *Prentiss*, 273 F.2d at 1280-81). *See also Bosse*, 2021 OK CR 3, ¶ 14-15 (holding these references to "clearly state the test to be used in determining Indian status").

9. In *Cole*, the parties had stipulated that an application for B.C.'s enrollment with the Cherokee Nation had been filed on August 28, 2002, and was pending before her death on December 20, 2002. Order on Remand, *Cole v. State*, PCD-2020-529 (Okla. Crim. App. Nov. 12, 2020). And, as the State noted at the June 3, 2021 hearing, the Cherokee Nation has legislated 240 days of automatic membership for all eligible children under Title 11A of the Cherokee Nation Citizenship Act. 6/3 Tr., 23-24. As B.C. was nine months old at the time of her death, her lack of enrollment was essentially a function of administrative delay. *Cole v. State*, 2007 OK CR 27, ¶ 2, 164 P.3d 1089, 1089. This Court therefore takes the OCCA's analysis in *Cole* to do nothing more than consider the totality of the unique circumstances of that case. *See Bosse*,

2021 OK CR 3, ¶¶ 14-15, 484 P.3d at 292; *accord Diaz*, 679 F.3d at 1187. Indeed, there is nothing to suggest in *Cole*, or any other case cited by Petitioner, that posthumous (or other post-offense) enrollments in other circumstances are capable of divesting the State of jurisdiction.

10. The OCCA's holdings in *Ryder* and *Hogner* are in good company. In *Zepeda*, the Ninth Circuit explained the necessity of showing Indian status at the time of the offense:

> In a prosecution under the IMCA, the government must prove that the defendant was an Indian at the time of the offense with which the defendant is charged. If the relevant time for determining Indian status were earlier or later, a defendant could not "predict with certainty" the consequences of his crime at the time he commits it. *Apprendi v. New Jersey*, 530 U.S. 466, 478, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Moreover, the government could never be sure that its jurisdiction, although proper at the time of the crime, would not later vanish because an astute defendant managed to disassociate himself from his tribe. This would, for both the defendant and the government, undermine the "notice function" we expect criminal laws to serve. *United States v. Francisco*, 536 F.2d 1293, 1296 (9th Cir.1976).

Zepeda, 792 F.3d at 1113.[3] These deeply-rooted principles underlie the entire field of criminal law, and should be afforded due consideration. *Zepeda*'s latter point is especially true here, where the State, having devoted tremendous resources convicting Petitioner and defending those convictions for more than twenty years, is

[3] The Supreme Court of Utah has issued a similar holding, albeit with less analysis than *Zepeda*. *See State v. Perank*, 858 P.2d 927, 933 (Utah 1992). The Eighth Circuit has also fixed the status of the land at the time of the offense for the purposes of determining Indian County jurisdiction. *See Lufkins v. United States*, 542 F.2d 476, 477 (8th Cir. 1976)(holding federal government had jurisdiction under Indian Major Crimes Act where there was no "dispute that the described [land] was allotted to an Indian in 1888 and that, *as of the date of the offense*, the Indian title had not been extinguished" (emphasis added)).

at risk of having its jurisdiction stripped away simply because Petitioner astutely managed to associate himself with the Muscogee Nation more than twenty years after his crimes.

11. Looking to any other time than that of the offense would invite gaps in jurisdiction. Had everyone known that Petitioner had committed his crimes in the Muscogee Reservation in 1999, the federal government would have had to prove his Indian status beyond a reasonable doubt. *Prentiss*, 206 F.3d at 974-80; *see also United States v. Langford*, 641 F.3d 1195, 1196 (10th Cir. 2011)("The Indian/non-Indian statuses of the victim and the defendant are essential elements of any crime charged under 18 U.S.C. § 1152")(quotation omitted). *But see United States v. Tony*, 637 F.3d 1153, 1158-59 (10th Cir. 2011)("The Indian Country nexus, like other similar nexuses in the context of federal crimes, has been called a 'jurisdictional element' but it is 'jurisdictional' only in the shorthand sense that without that nexus, there can be no federal crime.")(internal quotes omitted). In this case, the federal government would have undoubtedly been hard up for facts in support of Petitioner's Indian status. Petitioner was not enrolled with the Muscogee Nation. And, as discussed more fully below, federal courts do not look to eligibility alone, nor does family history alone suffice. Simply put, the federal government would have been unable to prosecute Petitioner under the MCA.

12. Allowing post-offense enrollment to affect jurisdiction would make it nearly impossible for U.S. Marshals, Cherokee Nation Marshals, or Tulsa Police to determine who among them has jurisdiction over any given crime in Indian Country.

Where, as here, the criminal defendant was not enrolled with the Muscogee Nation at the time of the offense, those investigating his crimes could not have determined whether he was an Indian for the purpose of criminal jurisdiction. And whoever would have ultimately charged Petitioner would essentially have had to make a bet as to whether he would seek membership with the Muscogee Nation in the future. Such an outcome is preposterous, and anathema to the administration of criminal law. So, recognition must be determined at the time of the offense; any other rule is completely unworkable.

13. To fix jurisdiction at any time other than the offense would invite jurisdictional gamesmanship. This Court notes that, with limited exception, the statute of limitations for most non-capital crimes under federal law is five years. 18 U.S.C. § 3282(a). While Oklahoma law provides varied limitations on numerous crimes, most range between three and seven years. 22 O.S.2021, § 152. The Cherokee Nation's code similarly provides that most prosecutions must begin within five to seven years of the crime's commission. 22 CNCA § 152. Most astute criminal defendants enrolled or eligible to be enrolled with a federally-recognized tribe would therefore need only serve five to seven years of any sentence—no matter the seriousness of the offense—before enrolling with or disassociating from a tribe to evade justice. *See Bosse*, 2021 OK CR 3, ¶ 7, 484 P.3d at 297 (Rowland, J., concurring in result)(expressing concern that the jurisdictional implications of a *McGirt* claim could allow a defendant to forum shop for the best outcome); and *Goforth*, 1982 OK CR 48, ¶ 7, 644 P.2d at 116.

14. Looking to Petitioner's status at the time of the offense is not only relevant, but necessary in evaluating his jurisdictional claim. Such a conclusion is supported by the OCCA's recent holdings in *Ryder* and *Hogner*, as well as the analysis of *Zepeda*, and a number of other practical considerations. And as discussed more fully below, Petitioner's lack of contemporaneous recognition by the Muscogee Nation or the federal government is dispositive of his jurisdictional claim.

15. Unable to show enrollment at the time of the offense, and with nothing more than family history to otherwise support his contemporaneous recognition, Petitioner attempts to sidestep the recognition prong as courts know it altogether. Pet. Br., 10-12. Instead, he advocates for "a single bright-line test for Indian status: If a person is enrolled or eligible for citizenship, then the person is Indian." Pet. Br., 10. This test, according to Petitioner, would avoid jurisdictional gamesmanship in the first place.[4] Pet. Br., 10; 6/3 Tr., 20. Three reasons compel rejection of this test.

16. First, enacting this bright-line rule would come at the expense of tribal sovereignty. The OCCA wisely stated in *Bosse* that it was "inappropriate for this Court to be in the business of deciding who is Indian." *Bosse*, 2021 OK CR 3, ¶ 19, 484 P.3d at 293. It is not simply that tribes maintain the authority to determine their tribal membership, that ability a core aspect of their sovereignty. *Long Family Land*

[4] While this might be true, Petitioner ignores that there are 574 federally recognized Indian tribes. 85 Fed. Reg. 5462, 5466-5467. It is simply impossible for law enforcement to determine whether every person accused of a crime—and their victims, *see Bosse*, 2021 OK CR 3, ¶¶ 23-28, 494 P.3d at 294-95 (holding the federal government has exclusive jurisdiction over crimes committed by non-Indian defendants against Indians)—is eligible for enrollment in one of these hundreds of tribes.

& Cattle Co., 554 U.S. at 327; *Martinez*, 436 U.S. at 55. Much less is it appropriate for this Court to determine who is *eligible* for citizenship with any of the 574 federally-recognized tribes in the United States. *See* 85 Fed. Reg. 5462, 5466-5467. To make Oklahoma's courts the arbiters of who is, and who is not, eligible for citizenship with a tribe is a gross encroachment on that tribe's prerogatives, and runs the risk of adjudicating someone's eligibility incorrectly.

17. Second, Petitioner's test would also create a jurisdictional gap. Petitioner fails to offer any example since *Rogers* was decided in 1846 where a court—state or federal—has found someone an Indian based upon their eligibility alone. Rather, he asks this Court to embrace a test advocated for exclusively by some scholars. Pet. Br., 10 (citing Quintin Cushner & Jon M. Sands, *Blood Should Not Tell: the Outdated "Blood" Test Used to Determine Indian Status in Federal Criminal Prosecution*, 59 Fed. Law. 31, 35 (Apr. 2012)). Petitioner ignores the disparities between this expansive approach and the standard articulated by the Tenth Circuit; eligibility alone is patently irreconcilable with the fact-sensitive inquiry conducted by federal courts, looking to the totality of the circumstances. *Diaz*, 679 F.3d at 1187; *Prentiss*, 273 F.2d at 1280-81. In the absence of any past example of a court finding recognition based upon eligibility alone, the likelihood of such a test falling short in federal courts is high.

18. Third, making eligibility the sole prerequisite to recognition would transmute the *Rogers* test into little more than a blood test. In *United States v. Cruz*, the government argued that a petitioner's eligibility for services reserved for Indians was

sufficient to prove recognition. *United States v. Cruz*, 554 F.3d 840, 849 (9th Cir. 2009). The Ninth Circuit declined to expand its precedent:

> Given that many descendants of Indians are eligible for tribal benefits based exclusively on their blood heritage, the government's argument would effectively render the second *Bruce* factor a *de facto* nullity, and in most, if not all, cases would transform the entire *Bruce* analysis into a "blood" test.

Id. at 849–50 (internal quotations and citations omitted). Similarly, given that many descendants are eligible for enrollment based exclusively on their blood heritage, Petitioner's test would devolve into little more than a blood test. *See* Muscogee Nation Code, Title 7, § 1-102(3)("Persons eligible for citizenship... shall consist of Muscogee (Creek) Indians by blood... and persons who are lineal descendants of those Muscogee (Creek) Indians by blood whose names appear on the final rolls[.]"). The practical result of such a rule would transmute the *Rogers* analysis into a blood test, rather than reserving Indian status for those who have chosen to affiliate themselves with a tribe. *See Zepeda*, 792 F.3d 1103, 1113 (holding the recognition prong is necessary to "insulate a prosecution under the [MCA] from an equal protection challenge"). *See also United States v. Antelope*, 430 U.S. 641, 646 (1977)("respondents were not subject to federal criminal jurisdiction because they are of the Indian race, but because they are enrolled members of the Coeur d'Alene Tribe.").

19. For these reasons, this Court declines Petitioner's invitation to adopt a test looking to eligibility alone. Such a test raises profound concerns for tribal sovereignty; it would create a jurisdictional gap; and it would render Indian status for the purposes of the MCA a racial classification. Instead, this Court looks to determine

whether Petitioner has presented *prima facie* evidence of his Indian status at the time of the offense in light of the Tenth Circuit's totality-of-the-circumstances approach.

20. Petitioner fails to present *prima facie* evidence of his Indian status as of August 31, 1999. As discussed above, his post-offense enrollment is irrelevant to this Court's inquiry. Pet. Ex. 1.

21. Petitioner equally fails to show any evidence of "government recognition formally and informally through providing the person assistance reserved only to Indians." *St. Cloud*, 702 F. Supp. at 1461.

22. Petitioner fails to show that he enjoyed any benefit of tribal affiliation at the time of the offense. *St. Cloud*, 702 F. Supp. at 1461.

23. Petitioner fails to show that he was socially recognized as an Indian by living on a reservation and participating in Indian social life. *St. Cloud*, 702 F. Supp. at 1461.

24. The only other evidence presented in support of recognition consists of documents showing Petitioner's lineal descent from enrolled members of the Muscogee Nation. Pet. Ex. 3, 4. He argues that because he "comes from an Indian family with a long line of enrolled members" that the totality of the circumstances weigh in his favor. Pet. Br., 15. This Court finds that evidence of his descent alone fails to constitute *prima facie* evidence of Indian status.

25. To be sure, "descendant status carries some weight," but "it is not as important as actual enrollment in the tribe." *United States v. Loera*, 952 F. Supp. 2d 862, 871

(D. Ariz. 2013)(citing *United States v. Maggi*, 598 F.3d 1073, 1082 (9th Cir. 2010)). For his part, Petitioner maintains "[i]f subsequent enrollment is not dispositive, it is nonetheless a significant factor in a totality-of-the-circumstances review." Pet. Br., 12 (citing *State v. Perank*, 858 P.2d 927, 933 (Utah 1992)). It is certainly the case that descent is relevant.

26. But nowhere does Petitioner show that descent itself is dispositive. Petitioner fails to offer this Court any case law where a court has found as much. This Court notes that the Supreme Court of Utah looked in *Perank* to the defendant's affidavit showing that "he has lived as an Indian by maintaining social, political, and spiritual relations as an Indian, including participation in Indian rituals." *Perank*, 858 P.2d at 933. In fact, that court noted that the defendant had been "convicted of three offenses in the Ute Tribal Court." *Id.* Petitioner's comparison to that case is inapt where he offers nothing more here than family history. So while this Court does not discount the relevance of his descent to its inquiry, that is not the same as finding the fact of his descent alone is sufficient to avail himself of the MCA. In the absence of any controlling or persuasive authority, this Court cannot find that Petitioner was recognized at the time of his offenses simply because of his genealogy.

27. While descent and eligibility for enrollment may differ in some cases, they are functionally indistinguishable for the purposes of this Court's analysis here when it comes to the Muscogee Nation, in which eligibility for enrollment is determined solely by reference to ancestry. To that end, this Court shares the Supreme Court of North Carolina's concern that looking to descent alone "would reduce the *Rogers* test into a

purely blood-based inquiry, thereby conflating the two prongs of the *Rogers* test into one." *State v. Nobles*, 838 S.E.2d 373, 378-79 (N.C. 2020). Like the Petitioner here, the defendant in *Nobles* argued that his status as a "first descendant" of an enrolled member "conclusively" established recognition as a matter of law. *Id.* at 378. The Supreme Court of North Carolina looked to the Ninth Circuit's analysis in *Cruz*, noting that because "many descendants of Indians are eligible for tribal benefits based exclusively on their blood heritage" descent alone "would effectively render the second [*Rogers* prong] a *de facto* nullity," and largely render it a "blood test." *Id.* at 379 (quoting *Cruz*, 554 F.3d at 849). That same concern is present here, where descent and eligibility operate from the same set of facts.

28. Descent—and by extension eligibility based solely upon that descent—cannot in and of itself prove recognition. While Petitioner has finally availed himself of citizenship with the Muscogee Nation, he had not done so when he committed his crimes. Nor can his post-offense enrollment vitiate that lack of recognition twenty years ago. And, for the reasons already discussed at length, this Court declines to embrace a model for recognition that devolves *Rogers*' two-prong test into little more than a racial classification—one which would also undoubtedly create jurisdictional gaps, encroach on tribal sovereignty, and potentially violate the Equal Protection Clause. *See Zepeda*, 792 F.3d 1103, 1113;

29. Because Petitioner fails to meet the two-part test set out by the OCCA in *Bosse*, and in its Order Remanding, this Court concludes that Petitioner was not an Indian, for purposes of the MCA, at the time of his crimes. *Bosse*, 2021 OK CR 3, ¶¶

14-15, 484 P.3d 291-92; Order Remanding, 4. Consequently, the MCA does that apply in this case and the State has jurisdiction over his crimes.

INDIAN COUNTRY: APPLICABLE LAW

The United States Supreme Court stated in *McGirt*: "[t]o determine whether a tribe continues to hold a reservation, there is only one place [courts] may look: *the Acts of Congress.*" *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020)(emphasis added). Also, "[h]istory 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." *Id.* at 2462-63 (citations omitted) (quotation marks omitted). "Other times, Congress has directed that tribal lands shall be restored to the public domain," and "[l]ikewise, Congress might speak of a reservation as being discontinued, abolished, or vacated." *Id.* (quotation marks omitted)(quoting *Hagen v. Utah*, 510 U.S. 399, 412 (1994); *Mattz v. Arnett*, 412 U.S. 481, 504, n.22 (1973)). "Disestablishment has never required any particular form of words," 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." *Id.* (alterations in original) (quotation marks omitted)(quoting *Nebraska v. Parker*, 577 U.S. 481, __, 136 S. Ct. 1072, 1079 (2016); *Hagen*, 510 U.S. at 411).

The main focus, then, is on the clear *language* of Congress; however, "[t]o be sure, if during the course of [a court's] work an ambiguous statutory term or phrase emerges, [a court] will sometimes consult contemporaneous usages, customs, and

practices to the extent they shed light on the meaning of the language in question at the time of enactment." *Id.* at 2468. However, again, such consultation should only be done when statutory language is ambiguous. *Id.* Furthermore, "disestablishment may not be lightly inferred and treaty rights are to be construed in favor [of], not against, tribal rights." *Id.* at 2469-70 (citing *Solem*, 465 U.S. at 472). In fact, in *McGirt*, the Supreme Court explicitly noted that "[i]n saying [allotment did not affect disestablishment it said] nothing new." *Id.* at 2464. "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 (footnote omitted). Ultimately, however, although the Supreme Court in *McGirt* found the existence of a reservation that had not been disestablished, "[e]ach tribe's treaties must be considered on their own terms, and the only question before [the Supreme Court in *McGirt*] concern[ed] the Creek." *Id.* at 2479.

INDIAN COUNTRY: CHEROKEE RESERVATION

A. Findings of Fact

1. The facts relating to the location of Petitioner's crimes are not in dispute. Petitioner shot and killed Ms. Bowles, and his accomplice shot and killed Mr. Thurman, nearby a dirt pit in Owasso. *Hanson*, 2003 OK CR 12, ¶ 2, 72 P.3d at 40.

2. Petitioner moved to admit a set of documents from the Cherokee Nation's Real Estate Service at the May 4, 2021 setting, and this Court admitted them without objection. 5/4 Tr., 5-6; Pet. Ex. 2. These documents pinpoint the location of the

offenses, placing them squarely within the historical boundaries of the Cherokee Nation. Pet. Ex. 2.

3. This Court therefore finds that Petitioner's crimes were committed within those historical boundaries.

B. Conclusions of Law

1. Under the OCCA's ruling in *Hogner*, this Court recognizes that the Cherokee Reservation remains intact. *Hogner*, 2021 OK CR 4, ¶ 17.

2. Petitioner committed his crimes in Indian Country. 18 U.S.C. § 1151(a).

CONCLUSION

This Court has therefore met the OCCA's directives, and will submit these Findings of Fact and Conclusions of Law to the OCCA within twenty days after the OCCA lifts its order staying this case, entered June 11, 2021.

IT IS SO ORDERED this 30 day of JUN, 2021.

DAWN MOODY
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

This Court certifies that a true and correct copy of the above Findings of Fact and Conclusions of Law was emailed and mailed on the filing date to:

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