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OPINIONS AND ORDERS

OPINION IN RELATED CASE

OPINION OF THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA (OCTOBER 28, 2021)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ROBERT ERIC WADKINS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2018-790

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

OPINION

ROWLAND, PRESIDING JUDGE:

Appellant Robert Eric Wadkins appeals his Judgment and Sentence from the District Court of Choctaw County, Case No. CF-2017-126, for First Degree Rape (Count 1), in violation of 21 O.S.2011, § 1115 and Kidnapping (Count 2), in violation of 21 O.S.Supp. 2012, § 741, each after former conviction of two or more felonies. The Honorable Gary L. Brock, Special Judge,

presided over Wadkins's jury trial and sentenced Wadkins, in accordance with the jury's verdict, to forty years imprisonment on Count 1 and five years imprisonment on Count 2, to be served consecutively.[1] Wadkins raises seven claims on appeal. We find relief is required on Wadkins's jurisdictional challenge in Proposition 1, rendering his other claims moot.

1. Jurisdiction

We must decide whether Wadkins sufficiently demonstrated he qualifies as Indian and thus was not subject to the jurisdiction of Oklahoma's courts. Wadkins claims Oklahoma lacked jurisdiction because he is Indian and the charged crimes occurred in Indian country. *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In *McGirt*, the Supreme Court held the reservation Congress established for the Muscogee (Creek) Nation remains in existence today because Congress has never explicitly disestablished it. That ruling meant Oklahoma lacked jurisdiction to prosecute McGirt, an Indian, because he committed his crimes on the Creek Reservation, *i.e.* in Indian country, and the federal government has jurisdiction of such criminal matters under the federal Indian Major Crimes Act (IMCA), 18 U.S.C. § 1153. In light of *McGirt*, we remanded this case to the district court to conduct an evidentiary hearing to determine: (1) Wadkins's Indian status; and (2) whether the crime occurred in Indian country pursuant to *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280

[1] Under 21 O.S.Supp.2015, § 13.1, Wadkins must serve 85% of his sentence of imprisonment on Count 1 before he is eligible for parole consideration.

(10th Cir. 2001); *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

There is no dispute that the charged rape and kidnapping took place in Indian Country, *i.e.* the Choctaw Reservation.[2] This claim turns on the district court's resolution of the first question on remand, namely Wadkins's Indian status.[3] Indian status has two components. Defendants, like Wadkins, must produce *prima facie* evidence that: (1) he or she has some Indian blood; and (2) he or she was recognized as an Indian by a tribe or the federal government. *See State v. Klindt*, 1989 OK CR 75, ¶ 5, 782 P.2d 401,403 (holding a defendant has the burden to prove his or her Indian status for dismissal based on lack of state jurisdiction). The parties agree that Wadkins has some Indian blood and satisfies the first prong of the Indian status test. Indian blood alone, however, is insufficient to warrant federal criminal jurisdiction because "jurisdiction over Indians in Indian country does not derive from a racial classification but from the special status of a formerly sovereign people." *St. Cloud v. United States*, 702 F.Supp. 1456, 1461 (D.S.D. 1988). Within the ambit of federal criminal jurisdiction, the term "Indian" "includes both racial and political components of the Indian community." *Parker v. State*, 2021 OK CR 17, ¶ 39, ___ P.3d ___.

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[2] In *Sizemore v. State*, 2021 OK CR 6, ¶¶ 14-16, 485 P.3d 867, 870-71, the Court held that Congress established a reservation for the Choctaw Nation and that it remains in existence because Congress has not disestablished it. Hence, the Choctaw Nation Reservation is Indian country.

[3] The Indian status test is often referred to as the *Rogers* test because it is derived from *United States v. Rogers*, 45 U.S. 567 (1846) (holding a white man could not become an Indian despite the man's adoption into the Cherokee Indian Tribe).

The recognition prong "in essence probes whether the Native American has a sufficient non-racial link to a formerly sovereign people." *St. Cloud*, 702 F.Supp. at 1461. While recognition is often proven by evidence of tribal membership, *Parker*, 2021 OK CR 17, ¶ 36, recognition is in dispute in this case because Wadkins, although presently a citizen of the Choctaw Nation, was not a member when the charged offenses occurred.

At the evidentiary hearing, the district court accepted the parties' Agreed Stipulation that: (1) the locations of the charged crimes are within the historical boundaries of the Choctaw Nation; (2) the Choctaw Nation is a federally recognized tribe; (3) Wadkins has some Indian blood; and (4) he became an enrolled member of the Choctaw Nation after the commission of the charged offenses. The evidentiary portion of the hearing focused on whether or not Wadkins was recognized by the Choctaws at the time of the charged offenses. The district court heard from three witnesses, including Wadkins, and took the matter under advisement. It later concluded that Wadkins failed to show through his testimony and admitted exhibits that he was recognized as Indian by the Choctaws or the federal government at the time of the crimes. The district court issued written Findings of Fact and Conclusions of Law, memorializing its ruling, stating:

1. The parties entered into a stipulation that Mr. Wadkins has a Certificate of Degree of Indian Blood (CDIB). That degree is 3/16 Indian blood of the Choctaw Tribe.

2. Mr. Wadkins was not an enrolled member of the Choctaw Tribe at the time of the offense.

He did not possess a CDIB Card, nor had he applied for one.

3. Mr. Wadkins was convicted in May of 2018. He did not become an enrolled member of the Choctaw Nation of Oklahoma until October 9, 2020. The Defendant now has a Choctaw Nation Membership Card.

4. This Court finds that at the time the crime was committed by Mr. Wadkins [he was not recognized as Indian because of his] failure to seek membership in the Choctaw Nation until after the conviction, [his] voluntary associations with the "Universal Aryan Brotherhood" (a white supremacist gang), his unfamiliarity with who tribal leaders were, [the] lack of any credible evidence that any benefits he may have received from the tribe were exclusive to members of the Choctaw Nation, land] no credibel (sic) evidence that the Defendant had social recognition as an Indian through living on a reservation and participating in Indian social life.

Based upon these findings, the district court concluded that Wadkins failed to meet "the standards set forth in the *Rogers* Test." Although it concluded the crimes occurred in Indian country, the district court concluded "Mr. Wadkins' status was not Indian at the commission of the offense or Trial or for the purpose of denying the State of Oklahoma jurisdiction."

We set forth our standard of review of a district court's rulings involving Indian country jurisdiction in *Parker*, 2021 OK CR 17, ¶ 34:

> We afford a district court's factual findings that are supported by the record great deference and review those findings for an abuse of discretion. *Young v. State*, 2000 OK CR 17, ¶ 109, 12 P.3d 20, 48. We decide the correctness of legal conclusions based on those facts without deference. *See Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1141-42 (reviewing a trial court's ruling on a motion to suppress evidence based on a complaint of an illegal search and seizure with deference to the trial court's factual findings unless not supported by competent evidence and a trial court's legal conclusions based on those facts *de novo*); *Salazar v. State*, 2005 OK CR 24, ¶ 19, 126 P.3d 625, 630 (giving district court's factual findings strong deference, but deciding without deference ultimate claim of trial counsel effectiveness).

Wadkins maintains on appeal that his subsequent tribal enrollment coupled with his membership eligibility at the time of the charged offenses is sufficient to prove recognition. The State, on the other hand, asks us to adopt a "bright line" test which bases recognition solely on tribal enrollment at the time of the offense(s). In *Parker*, we rejected a claim that eligibility alone was sufficient to establish tribal recognition and upheld the district court's ruling that Parker failed to prove the recognition prong of the Indian status test. *Id.* 2021 OK CR 17, ¶¶ 37-42. We also rejected the State's plea to adopt a "bright line" test basing recognition solely on tribal enrollment at the time of the offense. *Id.* 2021 OK CR 17, ¶ 37. We accepted as settled that a person may be Indian for purposes of federal criminal

jurisdiction whether or not the person is formally enrolled in any tribe and cited with approval the factors (sometimes referred to as the *St. Cloud* factors) that most courts consider in some fashion in determining recognition. *Id.* 2021 OK CR 17, ¶¶ 36, 40. *See also United States v. Bruce*, 394 F.3d 1215, 1224-25 (9th Cir. 2005) (citing numerous cases holding that lack of enrollment is not determinative of recognition); *United States v. Drewry*, 365 F.3d 957, 961 (10th Cir. 2004), *vacated on other grounds by Drewry v. United States*, 543 U.S. 1003 (2005) (affirming tribal enrollment is not the only way to prove a person is Indian for federal criminal jurisdiction); *St. Cloud*, 702 F.Supp. at 1461 (accepting a person may still be an Indian though not enrolled with a recognized tribe). The factors courts consider for Indian recognition are:

> 1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life.

Parker, 2021 OK CR 17, ¶ 40. *See also Bruce*, 394 F.3d at 1224; *Drewry*, 365 F.3d at 961.[4]

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[4] The Tenth Circuit uses a totality of the evidence approach in its determination of Indian status. *Diaz*, 679 F.3d at 1187. The Ninth Circuit considers these factors exclusively for recognition. *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015). The Eighth Circuit considers all relevant facts for recognition in no order of importance. *United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009). The court in *St. Cloud* considered these factors for recognition in declining order of importance. *St. Cloud*, 702 F.Supp. at 1461.

The district court considered these factors and found that all the factors weighed against recognition.[5] The district court gave no weight to Wadkins's tribal eligibility or subsequent enrollment. It found Wadkins's admitted medical records showing receipt of Indian health services throughout his life of little weight because such care is not reserved exclusively to tribal members. It also gave little, if any, weight to his testimony about his involvement with tribal social life, finding his testimony self-serving and opportunistic.[6] It gave significant weight to Wadkins's nine year membership (2000-2009) in the Universal Aryan Brotherhood prison gang, his misidentification of the Choctaw tribal chief, and his lack of a CDIB card at the time of the charged offenses.

Our review of the record shows that the district court erred in holding Wadkins failed to satisfy the recognition prong of the Indian status test. Wadkins presented ample prima facie evidence he is an Indian. "Prima facie evidence is evidence that is 'good and sufficient on its face,' *i.e.*, 'sufficient to establish a given fact, or the group or chain of facts constituting the defendant's claim or defense, and which if not rebutted or contradicted, will remain sufficient to sustain a judgment in favor of the issue which it supports.'" *Tryon v. State*, 2018 OK CR 20, ¶ 74, 423 P.3d 617, 639 (quoting *Black's Law Dictionary* 1190 (6th ed. 1990)).

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[5] In its conclusions, the district court stated it used the *St. Cloud* factors as a "guide" in its analysis of the second prong of the *Rogers* test.

[6] Wadkins did not produce documentary evidence to support his testimony about his tribal affiliation with the exception of his medical records.

A. Tribal Enrollment

Tribal enrollment is the first factor in the Indian recognition analysis. Tribal membership is generally dispositive of recognition. *United States v. Nowlin*, 555 Fed.Appx 820, 823 (10th Cir. 2014) (observing first factor is dispositive if the defendant is an enrolled tribal member). The evidence showed Wadkins received his formal tribal membership card from the Choctaw Nation in December 2020, after the commission of the instant offenses. He testified, without dispute, that he attempted to apply for a membership card nearly twenty years earlier, but was unable to complete the process because he was not yet eighteen and could not sign the application on his own.

Although Wadkins was not an enrolled member of the Choctaw Nation until 2020, he testified, without challenge, that he had a Certificate of Degree of Indian Blood (CDIB) card with reference numbers since infancy.[7] Wadkins also testified that his CDIB number was the same as the number on his Tribal Membership Card. Notably, the State did not refute Wadkins's assertions about his CDIB card nor object to them.

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[7] Wadkins testified:

> I had two identification cards [issued by the Choctaw Nation]. One was a blue one and a white one. I've had them since I was an infant. They're for my CDIB reference numbers. It's the same number that's on my membership card, which is XXXXXX, and it will give you the degree of Indian blood, which would be three-sixteenths. It's the same information as before, and those were different. They were laminated. One was blue, one was white; one's for when you're a child, and then another is for you to sign when you become an adult. . . . And I've had them all my life.

Instead, the State accepted, for all intents and purposes, that Wadkins possessed a CDIB card. The district court's conclusion that Wadkins did not possess a CDIB card and had not applied for one is therefore not supported by the record.

B. Receipt of Government Assistance Reserved for Indians

Formal or informal government recognition of an Indian may be established through receipt of assistance reserved only for Indians. Here, Wadkins received a CDIB card from the Choctaw Nation in infancy which he used to access medical care at Choctaw medical facilities for more than twenty years. He testified that he presented his CDIB card and was not charged for his treatment at Choctaw medical facilities. Wadkins's admitted medical records listed his information as "Tribe: CHOCTAW NATION OF OKLAHOMA" and "Eligibility: CHS & DIRECT" (Def. Exh. 2, pp 9-11, 13-29). While his medical records showed treatment at Choctaw facilities dating back to 1997, Wadkins's most recent medical treatment at tribal medical centers in 2017 occurred approximately six weeks before and six weeks after the charged offenses.

To show the medical services were reserved to Indians only, Wadkins admitted the Choctaw Nation's "Eligibility for Services" webpage. According to the webpage, eligibility for care at Choctaw Nation Health Service facilities is reserved exclusively for Native Americans with a few exceptions (Def. Exh. 3). A Native American must present a CDIB card, membership card, or letter of descendancy from a federally recognized tribe to be eligible for free health services. Non-Indians

can receive services under a few enumerated exceptions—emergencies, adopted/step/foster children of an eligible parent, and non-eligible spouses.[8] Wadkins received treatment as an eligible Native American as stated in his medical records and not under any exceptions (Def. Exh. 2). Courts have accepted evidence of consistent medical treatment of an eligible Native American at an Indian health facility as sufficient proof of government recognition by providing assistance reserved solely for Indians. *Compare United States v. Stymiest*, 581 F.3d 759, 765-66 (8th Cir. 2009) (observing Indian Health Service (IHS) doctors must provide emergency care to any patient but non-tribal member defendant's use of IHS clinic's non-emergent care showed he was an Indian); *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996) (holding non-tribal member child victim's receipt of medical services at Indian hospital was a factor in establishing she was Indian) *with State v. Nobles*, 373 N.C. 471, 481-82, 838 S.E.2d 373, 380 (N.C. 2020), *cert. denied*, 141 S.Ct. 365 (2020) (holding evidence of five childhood visits to Indian hospital insufficient to establish non-tribal member defendant's recognition as Indian as an adult). Contrary to the district court's finding, the kind of free, non-emergent care provided to Wadkins as an adult was based on his status as a recognized Indian by the tribe and such care, based on the evidence, is exclusive to Indians.

C. Benefits of Tribal Affiliation

Enjoyment of benefits of tribal affiliation may also be used to show recognition. Here, as discussed

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[8] Non-eligible spouses qualify for limited services on a fee basis. Emergent care is also provided on a fee basis.

above, Wadkins had a CDIB card which gave him the benefit of free non-emergent medical care at Choctaw medical facilities. The CDIB card also served as his primary identification because he never had a driver's license or state identification. Wadkins testified that he received school supplies, books, clothes, and food from the tribe as a teenager. He also received the assistance of a tribal case manager or social worker in applying for official tribal membership. Admittedly there are many benefits of tribal affiliation that Wadkins did not enjoy (tribal employment, hunting and fishing rights, voting in tribal elections, etc.), but the record shows he has been unable to do so because of his lengthy incarceration over the past twenty years. The tribal benefits he might have accrued are unavailable while incarcerated.

D. Social Recognition

Social recognition is also a consideration. Here, Wadkins testified about social recognition as an Indian because of his participation in Indian social life. He had a red-tail hawk feather in his possession at the time of his arrest. He said it signified guidance and protection for him. Wadkins's mother (now deceased) and brother are enrolled members of the Choctaw Nation along with various aunts, uncles, and cousins. He attended multiple powwows outside of prison and at least one sweat lodge ceremony while in prison. He created Native American art, and learned various Choctaw language phrases and alphabet letters from his mother. Furthermore, he held himself out as Indian.

The Tenth Circuit has determined that the St. Cloud factors "are not exclusive." *Nowlin*, 555 Fed.Appx. at 823. In addition to the forgoing evidence, Wadkins

also presented evidence that he is identified as Native American by the State of Oklahoma and the Department of Corrections (DOC) as exhibited on both his custody assessment form at intake from his first arrest and his current DOC badge. He also testified he was given a green tag in prison that identified him as Native American even while he was a member of the Universal Aryan Brotherhood (UAB). Although a nine-year member of the UAB, Wadkins testified that during his affiliation, the UAB and Indian Brotherhood were aligned. He explained that he did not join the Indian Brotherhood because he did not meet the group's length of incarceration requirement for membership. He maintained his membership in the UAB did not alter his identification as Indian because he is bi-racial (both white and Indian). He left the UAB approximately eight years before the instant offenses and covered his UAB affiliated tattoos.

The State's evidence did not refute Wadkins's evidence of recognition in any meaningful way. The State called one witness, namely Michael Williams, a special agent with the Department of Corrections with expert knowledge of the current prison gangs. Williams testified that the UAB is a white supremacist gang. While there are presently five to ten Native American gangs, he admitted the only Indian gang in existence when Wadkins first went to prison was the Indian Brotherhood. He was unaware of any present affiliation between the UAB and Indian Brotherhood gangs, but admitted gangs sometimes align. He confirmed that DOC records reflected that Wadkins is a former member of the UAB and that Wadkins's UAB tattoos have been defaced. His testimony neither refuted Wadkins's evidence of tribal recognition nor showed Wadkins's

membership in the UAB was a renouncement of his Indian status.

The district court's conclusion—that Wadkins failed to establish recognition—is not supported by the record. While eligibility for tribal membership alone is insufficient to prove recognition, Wadkins's subsequent enrollment coupled with the other factors, specifically his possession of a CDIB card since childhood and receipt of Indian health services, showed he was recognized as Indian by the Choctaw Nation. Because he is an Indian for purposes of federal criminal law and the charged crimes occurred in Indian Country, the State lacked jurisdiction over this matter.

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.

AN APPEAL FROM THE DISTRICT COURT OF CHOCTAW COUNTY THE HONORABLE GARY L. BROCK SPECIAL JUDGE

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

HUDSON, VICE PRESIDING JUDGE: SPECIALLY CONCURS

Today's decision dismisses convictions for first degree rape and kidnapping from the District Court of Choctaw County based on the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). This decision is unquestionably correct as a matter of *stare decisis*. The record shows Appellant had some Indian blood and was recognized as an Indian by a tribe and/or the federal government at the time of the crimes. The record further shows the crimes in this case took place within the historic boundaries of the Choctaw Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the crimes in this case. Instead, Appellant must be prosecuted in federal court where the exclusive jurisdiction for these crimes lies. *See Roth v. State*, 2021 OK CR 27, ___ P.3d ___. I therefore as a matter of *stare decisis* fully concur in today's decision.

Further, 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, e.g.*, *State v. Lawhorn*, 2021 OK CR 37, ___ P.3d ___ (Hudson, V.P.J., Specially Concurs); *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867 (Hudson, J., Concur in Results).

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.

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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).

The question I see presented is should I blindly follow and apply the majority opinion or do I join with Chief Justice Roberts and the dissenters in *McGirt* and recognize "the emperor has no clothes" as to the adherence to following the rule of law in the application of the *McGirt* decision?

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

ORDER OF THE OKLAHOMA COURT OF CRIMINAL APPEALS GRANTING MOTION FOR PUBLICATION (JANUARY 20, 2022)

2022 OK CR 1
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ROBERT ERIC WADKINS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

FOR PUBLICATION

Case No. F-2018-790

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

ORDER GRANTING MOTION FOR PUBLICATION

¶ 1 This Court handed down an Opinion in the above-styled case on October 28, 2021. The opinion addressed Wadkins's meritorious claim that the State of Oklahoma lacked jurisdiction over the charged crimes because he is an Indian and the crimes occurred in

Indian Country. On November 18, 2021, Wadkins, by and through his counsel Chad Johnson, filed a motion requesting publication of the opinion in this matter.

¶ 2 For good cause shown, the Court **GRANTS** the request for publication, and the Opinion, as corrected, is hereby released for publication.

¶ 3 **IT IS THEREFORE THE ORDER OF THIS COURT** that the Opinion, as corrected and paragraphed, is hereby **AUTHORIZED FOR PUBLICATION.**

¶ 4 The Clerk of this Court is directed to transmit a copy of this order to the Court Clerk of Choctaw County; the District Court of Choctaw County, the Honorable Gary L. Brock, Special Judge; and counsel of record.

¶ 5 IT IS SO ORDERED.

¶ 6 WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 20th day of January, 2022.

/s/ Scott Rowland
Presiding Judge

/s/ Robert L. Hudson
Vice Presiding Judge

/s/ Gary L. Lumpkin
Judge

/s/ David B. Lewis
Judge

ATTEST:
/s/ John D. Hadden
Clerk

FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT OF CHOCTAW COUNTY, STATE OF OKLAHOMA (APRIL 26, 2021)

IN THE DISTRICT COURT OF
CHOCTAW COUNTY, STATE OF OKLAHOMA

ROBERT ERIC WADKINS,

Appellant.

v.

THE STATE OF OKLAHOMA,

Appellee,

OCCA Case No. F-2018-790

Choctaw County Case No. CF-17-126

Before: Gary L. BROCK, District Court Judge.

FINDINGS AND CONCLUSIONS

On August 19, 2020, the OCCA remanded this case for the Court to determine the following issues.

(1) Appellant (Mr. Wadkins') status as an Indian, and

(2) Whether the charged crimes occurred in Indian Country.

FINDINGS

The Parties filed an Agreed Stipulation stipulating that (1) the locations of the charged offenses were within the historical boundaries of the Choctaw Nation, the Federal Government recognizes the Choctaw Nation as an Indian Tribal Entity. See attached Stipulation.

FINDING OF FACT:

(1) The parties entered into a stipulation that Mr. Wadkins has a certificate of Degree of Indian Blood (CDIB). That degree is 3/16 Indian blood of the Choctaw Tribe.

(2) Mr. Wadkins was not an enrolled member of the Choctaw Tribe at the time of the offense. He did not possess a CDIB Card, nor had he applied for one

(3) Mr. Wadkins was convicted in May of 2018. He did not become an enrolled member of the Choctaw Nation of Oklahoma until October 9, 2020. The Defendant now has a Choctaw Nation Membership Card.

(4) This Court finds that at the time the crime was committed by Mr. Wadkins', failure to seek membership in the Choctaw Nation until after the conviction, voluntary associations with the "Universal Aryan Brotherhood" (a white supremacist gang), his unfamiliarity with who tribal leaders were, lack of any credible evidence that any benefits he may have received from the tribe were exclusive to members of the Choctaw Nation, no credible evidence that the Defendant had social recognition as an Indian through living on a reservation and participating in Indian social life.

The Court finds at the time of the offense and trial the Defendant fails to meet the standards set

forth in the *Rogers* Test. The Court finds Defendant's status was not Indian at the time of the offense and trial.

The conclusion of law required for this Court's decision are based on the two prong test from *U.S. v. Rogers*, 45 U.S. 4; The *St. Cloud* factor serving as a guide when analyzing the 2nd Prong Test of the "*Rogers*" case, the Oklahoma *Bosse* case.

FINDING:

(1) This Court finds the crimes charged occurred in Indian Country.

(2) This Court finds Mr. Wadkins' status was not Indian at the commission of the offense or Trial or for the purpose of denying the State of Oklahoma jurisdiction.

/s/ Gary L. Brock
Judge of the District Court

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

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ROBERT ERIC WADKINS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2018-790

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

ORDER REMANDING FOR EVIDENTIARY HEARING

Robert Eric Wadkins was tried by jury in the District Court of Choctaw County, Case No. CF-2017-126, and convicted of First Degree Rape, After Former Conviction of Two or More Felonies (Count 1), in violation of 21 O.S.2011, § 1115; and Kidnapping, After Former Conviction of Two or More Felonies (Count 4),

in violation of 21 O.S. Supp.2012, § 741. In accordance with the jury's recommendation, the Honorable Gary L. Brock, Special Judge, sentenced Wadkins to forty years imprisonment on Count 1 and five years imprisonment on Count 4, and further ordered the sentences to be served consecutively. Wadkins must serve 85% of his sentence on Count 1 before he is eligible for parole consideration. Wadkins appeals his Judgment and Sentence.

In Proposition 1 of his Brief-in-Chief, filed February 19, 2019, Wadkins claims the District Court lacked jurisdiction to try him. Wadkins argues that he is a citizen of the Choctaw Nation and that the crimes occurred within the boundaries of the Choctaw Nation Reservation.[1] Wadkins, 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]

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[1] Wadkins also claims that defense counsel was ineffective for failing to properly litigate the issue of jurisdiction and asks the Court to either supplement the record on appeal with documentation bearing on the issue of jurisdiction or to order an evidentiary hearing for the purpose of developing the record with regard to his claims.

[2] On July 16, 2019, we held Wadkins's direct appeal in abeyance pending the resolution of the litigation in *Murphy*. Following the decision in *McGirt*, Wadkins filed a motion to vacate his convictions and sentences and to remand to the district court with instructions to dismiss, or in the alternative allow supplemental briefing by the parties. Also, post *McGirt*, the State asked to file a supplemental response to Wadkins's jurisdictional claim. In

Wadkins's claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Choctaw 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 Wadkins'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:

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light of the present order, there is no need for additional responses from the parties at this time and their requests are **DENIED.**

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

Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the 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.

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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.

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 Choctaw County: Appellant's Brief in Chief and Notice of Extra-Record Evidence Supporting Propositions I and IV of Brief of Appellant and/or Alternatively Application for Evidentiary Hearing on Sixth Amendment Claims filed February 19, 2019; Appellant's Reply Brief filed July 8, 2019; and Appellee's Response Brief filed June 19, 2019.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 19 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

BOSSE v. OKLAHOMA
OPINION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS GRANTING POST-CONVICTION RELIEF (MARCH 11, 2021)

2021 OK CR 3

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHAUN MICHAEL BOSSE,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

No. PCD-2019-124

FOR PUBLICATION

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

OPINION GRANTING POST-CONVICTION RELIEF

KUEHN, Presiding Judge:

¶1 Shaun Michael Bosse was tried by jury and convicted of three counts of First Degree Murder and one count of First Degree Arson in the District Court of McClain County, Case No. CR-2010-213. He was sentenced to death on the murder counts and to thirty-five (35) years imprisonment and a $25,000.00 fine for the arson count.

¶2 On direct appeal, this Court upheld Petitioner's convictions and sentences.[1] Petitioner's first Application for Post-Conviction Relief in this Court was denied.[2] Petitioner filed this Successive Application for Post-Conviction Relief on February 20, 2019. The crux of Petitioner's Application lies in his jurisdictional challenge.

¶3 In Proposition I Petitioner claims the District Court lacked jurisdiction to try him. Petitioner argues that his victims were citizens of the Chickasaw Nation, and the crime occurred within the boundaries of the Chickasaw Nation. He relies on *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) in which the United States Supreme Court reaffirms the basic law regarding federal, state and tribal jurisdiction over crimes, which is based on the location of the crimes themselves and the Indian status of the parties. The Court first determined that Congress, through treaty and statute, established a reservation for the Muscogee Creek Nation. *Id.*, 140 S. Ct. at 2460-62. Having established

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1 *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834, *reh'g granted and relief denied*, 2017 OK CR 19, 406 P.3d 26, *cert. denied*, 138 S. Ct. 1264 (2018).

2 *Bosse v. State*, No. PCD-2013-360 (Okl. Cr. Dec.16, 2015) (not for publication).

the reservation, only Congress may disestablish it. *Id.*, 140 S. Ct. at 2463; *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Congress must clearly express its intent to disestablish a reservation, commonly with an "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt*, 140 S. Ct. at 2462 (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016)). The Court concluded that Congress had not disestablished the Muscogee Creek Reservation. *McGirt*, 140 S. Ct. at 2468. Consequently, the federal and tribal governments, not the State of Oklahoma, have jurisdiction to prosecute crimes committed by or against Indians on the Muscogee Creek Reservation. 18 U.S.C. §§ 1152, 1153.

¶4 The question of whether Congress has disestablished a reservation is primarily established by the language of the law-statutes and treaties-concerning relations between the United States and a tribe. *McGirt*, 140 S. Ct. at 2468. "There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms." *McGirt*, 140 S. Ct. at 2469. Neither historical practices, nor demographics, nor contemporary events, are useful measures of Congress's intent unless there is some ambiguity in statute or treaty language. *Id.* at 2468-69; *see also Oneida Nation v. Village of Hobart*, 968 F.3d 664, 675 n.4 (7th Cir. 2020) (*McGirt* "establish[ed] statutory ambiguity as a threshold for any consideration of context and later history."). Thus our analysis begins, and in the case of the Chickasaw Nation, ends, with the plain language of the treaties.

¶5 *McGirt* itself concerns only the prosecution of crimes on the Muscogee Creek Reservation. However, its

reasoning applies to every claim that the State lacks jurisdiction to prosecute a defendant under 18 U.S.C. §§ 1152, 1153. Of course, not every tribe will be found to have a reservation; nor will every reservation continue to the present. "Each tribe's treaties must be considered on their own terms. . . . " *McGirt*, 140 S. Ct. at 2479. The treaties concerning the Five Tribes which were resettled in Oklahoma in the mid-1800s (the Muscogee Creek, Cherokee, Chickasaw, Choctaw, and Seminole) have significantly similar provisions; indeed, several of the same treaties applied to more than one of those tribes. It is in that context that we review Petitioner's claim.

¶6 On August 12, 2020, this Court remanded this case to the District Court of McClain County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) the victims' status as Indians; and (b) whether the crime occurred in Indian Country, within the boundaries of the Chickasaw Nation Reservation. Our Order provided that the parties could enter into written stipulations. On October 13, 2020, the District Court filed its Findings of Fact and Conclusions of Law in the District Court.

Stipulations Regarding Victims' Indian Status

¶7 The parties stipulated that all three victims of the crime, Katrina and Christian Griffin and Chasity Hammer, were members of the Chickasaw Nation. This stipulation included recognition that the Chickasaw Nation is a federally recognized tribe. The District Court concluded as a matter of law that all three victims had some Indian blood and were recognized as Indian by a tribe or the federal government. We adopt

these findings and conclusions, and find that the victims in this case were members of the Chickasaw Nation.

District Court Findings of Fact

¶8 The District Court found that Congress established a reservation for the Chickasaw Nation of Oklahoma. The District Court found these facts:

(1) The Indian Removal Act of 1830 authorized the federal government to negotiate with Native American tribes for their removal to territory west of the Mississippi River in exchange for the tribes' ancestral lands. Indian Removal Act of 1830, § 3, 4 Stat. 411, 412.

(2) The 1830 Treaty of Dancing Rabbit Creek (1830 Treaty) granted citizens of the Choctaw Nation and their descendants specific land in fee simple, "while they shall exist as a nation and live on it," in exchange for cession of the Choctaw Nation lands east of the Mississippi River. Treaty of Dancing Rabbit Creek, art. 2, Sept. 27, 1830, 7 Stat 333. The Treaty provided that any territory or state should have neither the right to pass laws governing the Choctaw Nation nor embrace any part of the land granted the Choctaw Nation by the treaty. *Id.* art. 4. The land boundaries were:

> [B]eginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork; if in the limits of the

> United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning.

Id. art. 2.

(3) The 1837 Treaty of Doaksville (1837 Treaty) granted the Chickasaw Nation a district within the boundaries of the 1830 Treaty of Dancing Rabbit Creek, to be held by the Chickasaw Nation on the same terms as were granted to the Choctaw Nation. 1837 Treaty of Doaksville, art. 1, Jan. 17, 1837, 11 Stat 573.

(4) Congress modified the western boundary of the Chickasaw Nation in the 1855 Treaty of Washington (1855 Treaty), pledging to "forever secure and guarantee" the land to those tribes, and reserving them from sale without both tribes' consent. 1855 Treaty of Washington with the Choctaw and the Chickasaw, art. 1, 2, June 22, 1855, 11 Stat. 611. This Treaty also reaffirmed the Chickasaw Nation's right of self-government. *Id.* art. 7.

(5) In 1866, the United States entered into the 1866 Treaty of Washington (1866 Treaty), which reaffirmed both the boundaries of the Chickasaw Nation and its right to self-governance. 1866 Treaty of Washington with the Chickasaw and Choctaw, art. 10, Apr. 28, 1866, 14 Stat. 699.

(6) The parties stipulated that the location of the crime, 15634 212th St., Purcell, OK, is within

the boundaries of the Chickasaw Nation set forth in the 1855 and 1866 Treaties.

(7) The property at which the crime occurred was transferred directly in 1905 from the Choctaw and Chickasaw Nations to George Roberts, in a Homestead Patent. Title may be traced directly to the Reservation lands granted the Choctaw and Chickasaw Nations, and subsequently allotted to individuals, and was never owned by the State of Oklahoma.

(8) The Chickasaw Nation is a federally recognized Indian tribe, exercising sovereign authority under a constitution approved by the United States Secretary of the Interior.

(9) No evidence before the District Court showed that the treaties were formally nullified or modified in any way to reduce or cede Chickasaw lands to the United States or to any other state or territory.

(10) The parties stipulated that if the District Court determined the treaties established a reservation, and if the District Court concluded that Congress never explicitly erased the boundaries and disestablished the reservation, then the crime occurred within Indian Country as defined by 18 U.S.C. § 1151(a).

District Court Conclusions of Law

¶9 The District Court first found, and this Court agrees, that the absence of the word "reservation" in the 1855 and 1866 Treaties is not dispositive. *McGirt*, 140 S. Ct. at 2461. The court emphasized the language in the 1830 Treaty that granted the land "in fee simple

to them and their descendants, to inure to them while they shall exist as a nation." 1830 Treaty, art. 2. The 1830 Treaty secured rights of self-government and jurisdiction over all persons and property with Treaty territory, promising that no state should interfere with the rights granted under the Treaty. *Id.* art. 4. That treaty applies to the Chickasaw Nation under the 1837 Treaty of Doaksville, which guaranteed the Chickasaw Nation the same privileges, rights of homeland ownership and occupancy granted the Choctaw Nation by the 1830 Treaty. 1837 Treaty, art.1. In the 1855 Treaty, the United States promised to "forever secure and guarantee" specific lands to the Choctaw and Chickasaw Nations, and reaffirmed those tribes' rights to self-government and full jurisdiction over persons and property within their limits. 1855 Treaty arts. 1, 7. This was reaffirmed in the 1866 Treaty, by which the Chickasaw and Choctaw Nations agreed to cede defined lands to the United States for a sum certain. 1866 Treaty, art. 3. Thus, the District Court concluded, the treaty promises to the Chickasaw Nation were not gratuitous. *McGirt*, 140 S. Ct. at 2460.

¶10 Based on this law, the District Court concluded that Congress established a reservation for the Chickasaw Nation. We adopt this conclusion of law.

¶11 The District Court found that Congress has not disestablished the Chickasaw Nation Reservation. After Congress has established a reservation, only Congress may disestablish it, by clearly expressing its intent to do so; usually this will require "an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt*, 140 S. Ct. at 2463 (quoting *Parker*, 136 S. Ct. at 1079). The District Court found no explicit indication

or expression of Congressional intent to disestablish the Chickasaw Reservation. The Court specifically stated, "No evidence was presented that the Chickasaw reservation was 'restored to public domain," discontinued, abolished or vacated.' Without, [sic] explicit evidence of a present and total surrender of all tribal interests, the Court cannot find the Chickasaw reservation was disestablished." Findings of Fact and Conclusions of Law, CF-2010-213, PCD-2019-124, Oct. 13, 2020 at 9-10 (internal citations omitted).

¶12 Based on the evidence, the District Court concluded that Congress never erased the boundaries and disestablished the Chickasaw Nation Reservation. The Court further concluded that the crimes at issue occurred in Indian Country. We adopt these conclusions.

The State's Arguments

¶13 After the evidentiary hearing, a supplemental brief was filed on behalf of the State of Oklahoma by the District Attorney for McClain County. The Attorney General and District Attorney ask this Court to find that the State of Oklahoma has concurrent jurisdiction with the federal and tribal governments where, as here, a non-Indian commits a crime against Indian victims in Indian Country. The Attorney General and the District Attorney suggest that various procedural defenses should apply. The District Attorney also raises a separate claim, arguing that this Court should alter its definition of Indian status, an argument not raised by the Attorney General.

Blood Quantum

¶14 The District Attorney states that the District Judge avoided the issue of blood quantum when making her findings and conclusions.[3] He now requests that this Court require a specific blood quantum to meet the definition of Indian status to avoid a "jurisdictional loophole". In the Remand Order, and in the numerous similar Orders in which we remanded other cases for consideration of the jurisdictional question, this Court clearly set out the definition of Indian it expected lower courts to use. We directed the District Court to "determine whether (1) the victims had some Indian blood, and (2) were recognized as an Indian by a tribe or by the federal government." This test, often referred to as the *Rogers*[4] test, is used in a majority of jurisdictions, including in cases cited by the District Attorney.

¶15 In stating this test we cited two cases from the Tenth Circuit, *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).[5] The references clearly state the test to be used in determining

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[3] The Judge did not avoid the issue. She refused to set a quantum amount as requested by the District Attorney and followed this Court's Remand Order directing her to find "some" Indian blood under the definitions recognized by the Tenth Circuit opinions referenced.

[4] *United States v. Rogers*, 45 U.S. 567, 572-73 (1846).

[5] In support of his claim that more than "some" Indian blood is required, Respondent cites dicta in *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116. With almost a quarter blood quantum, the defendant easily met the requirement of the first prong, and this Court did not further analyze that issue. However, in referring

Indian status. *Prentiss* discusses the history, wide acceptance, and application of the *Rogers* test. The opinion notes that the first prong of the test may be proved by a variety of evidence, which may include a certificate of tribal enrollment which sets forth the person's degree of Indian blood, or a listing on a tribal roll which requires a certain degree of Indian blood. *Prentiss*, 273 F.3d at 1282-83. *Diaz* states that the Tenth Circuit uses a "totality-of-the-evidence approach," which may include proof of blood quantum, but only if a particular tribe requires it. *Diaz*, 679 F.3d at 1187.

¶16 The District Attorney correctly observes that a minority of courts have chosen to impose a particular blood quantum, or to state in individual cases whether a specific blood quantum meets the threshold of "some blood." The State of Oklahoma is within the jurisdictional boundaries of the Tenth Circuit. If the jurisdictional test is met and it is determined that a particular case must be prosecuted in a federal district court, the Tenth Circuit definition will govern in that court. There is simply no rhyme nor reason to require a test for Indian status in our Oklahoma state courts that is significantly different from that used in the comparable federal courts.[6] Consistency and economy

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to the two-part test, this Court in a 1982 decision, used the word "significant" rather than "some." *Id.* This single word, describing an issue not the focus of the appeal, does not substitute for the entire body of state and federal jurisprudence correctly stating the test.

[6] Interestingly, the District Attorney argues instead that a "loophole" will exist if we do not have the same standard as the Tenth Circuit.

of judicial resources compel us to adopt the same definition as that used by the Tenth Circuit.[7]

¶17 Without any foundation in law, the District Attorney speculates that, without a precise blood quantum requirement, a defendant might claim he is Indian in a state court—thus defeating state court jurisdiction—and yet be found not Indian in federal court, escaping criminal prosecution altogether. He cites no relevant or persuasive law to support this speculation. The District Attorney relies on a single case from the State of Washington, *State v. Dennis*, 840 P.2d 909 (Wash. App. 1992). Blood quantum was not an issue in that case and is not mentioned in the opinion. The defendant, a member of a Canadian tribe, was charged in state court with murdering his wife. In state court, defendant successfully argued that he was an Indian under the Major Crimes Act, Section 1153, and thus not subject to State jurisdiction. Of course, the federal district court found otherwise, since defendant was not a member of a federally recognized tribe. *Id.*, 840 P.2d at 910. The State never appealed the

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[7] In addition, to require a specific blood quantum would be out of step with other recent developments. In 2018, Congress amended the Stigler Act. Enacted in 1947, that Act was one of several Acts restricting the conveyance of lands that were allotted to citizens of the Five Tribes, if the owner had one-half or more of Indian blood. The restrictions on conveyance were designed to protect tribal citizens. As time passed, requiring such a high blood quantum stripped those protections from many owners and reduced the amount of restricted land. The recent amendment struck this provision, replacing it with the phrase "of whatever degree of Indian blood." Stigler Act Amendments of 2018, P.L. 115-399, Sec. 1(a). We will not disregard this clear statement of Congressional intent regarding a blood quantum requirement for the Five Tribes.

initial dismissal in state district court. After federal charges were dismissed, the State of Washington attempted to reinstate the charges. The Washington Court of Appeals found that, given the State's failure to appeal the initial state court ruling, the State was precluded by statute from reinstating the case. *Id.* at 910-11. The appellate court specifically noted that the problem in this case was not the defendant's claim, but that the trial court made a mistake of law in concluding defendant was Indian under the Major Crimes Act. *Id.* If anything, this case underscores the utility and flexibility of the *Rogers* test, when correctly applied. It is clear that, using that test, jurisdiction always lay with the State of Washington.

¶18 There simply is no jurisdictional loophole as described by the District Attorney. To cure this nonexistent problem, the State would have this Court adopt a test which is different from, and potentially more restrictive than, the test used in our corresponding federal system. This would be far more likely to result in the kind of confusion the District Attorney warns against. Say this Court were to adopt a particular blood quantum number. A defendant could be a member of a federally recognized tribe, with Indian blood less than that quantum. He would not be Indian in state court, and the State would retain jurisdiction. However, when the convicted defendant filed a writ of habeas corpus in federal court, because he had some Indian blood, he would meet the *Rogers* test. The federal court would find that the State had no jurisdiction, and the defendant should have been tried in federal court to begin with—just like *McGirt.* Consistency and economy of judicial resources compel us to

adopt the same definition as that used by the Tenth Circuit.

¶19 Furthermore, we find it inappropriate for this Court to be in the business of deciding who is Indian. As sovereigns, tribes have the authority to determine tribal citizenship. *Plains Commerce Bank v. Long Family Land & Cattle co.*, 554 U.S. 316, 327 (2008); *see also United States v. Antelope*, 430 U.S. 641, 646 (1977) (Indian status determined by recognition by tribe acting as separate sovereign, not by racial classification). Some tribes have a blood quantum requirement, and some do not. Of those that do, the percentage differs among individual tribes. If a person charged with a crime has some Indian blood, and they are recognized as being an Indian by a tribe or the federal government, this Court need not second-guess that recognition based on an arbitrary mathematical formula. The District Court correctly followed this Court's instructions in the Order remanding this case, determining that the victims had some Indian blood.

Procedural Defenses

¶20 Both the Attorney General and the District Court ask this Court to consider this case barred for a variety of procedural reasons: waiver under the successive capital post-conviction statute, 22 O.S. 2011, § 1089(D), and waiver of the jurisdictional challenge; failure to meet the sixty-day filing deadline to raise a previously unavailable legal or factual basis in subsequent post-conviction applications under Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021); and the doctrine of laches. Through the District Attorney, the State admits that

this Court has resolved these issues in this case in our Order remanding for an evidentiary hearing:

> Under the particular facts and circumstances of this case, and based on the pleadings in this case before the Court, we find that Petitioner's claim is properly before this court. The issue could not have been previously presented because the legal basis for the claim was unavailable. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

Bosse v. State, PCD-2019-124, *Order Remanding for Evidentiary Hearing* at 2 (Okl. Cr. Aug. 12, 2020). The State asks us to reconsider this determination, but offers no compelling arguments in support.[8]

¶21 It is settled law that [s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). The District Attorney admits that generally litigants "cannot waive the argument that the district court lacks subject-matter jurisdiction," citing *United States v. Green*, 886 F.3d 1300, 1304 (10th Cir. 2018); *see also United States v. Garcia*, 936 F.3d 1128, 1140-41 (10th Cir. 2019) (parties can neither waive subject-matter jurisdiction

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8 The State argues both that application of *McGirt* will have significant consequences for criminal prosecutions, and that waiver should apply because there is really nothing new about the claim. Taken as a whole, the arguments advanced by the State in both its Response and Supplemental Brief support a conclusion that, although similar claims may have been raised in the past in other cases, the primacy of State jurisdiction was considered settled and those claims had not been expected to prevail. The legal basis for this claim was unavailable under Section 1089(D).

nor consent to trial in a court without jurisdiction). This Court has repeatedly held that the limitations of post-conviction or subsequent post-conviction statutes do not apply to claims of lack of jurisdiction. *Wackerly v. State*, 2010 OK CR 16, ¶ 4, 237 P.3d 795, 797; *Wallace v. State*, 1997 OK CR 18, ¶ 15, 935 P.2d 366, 372; *see also Murphy v. State*, 2005 OK CR 25, 5-7, 124 P.3d 1198, 1200 (recognizing limited scope of post-conviction review, then addressing newly raised jurisdictional claim on the merits). In *Wackerly*, we also held the time limit on newly raised issues in Rule 9.7 did not apply to jurisdictional questions. *Wackerly*, 2010 OK CR 16, ¶ 4, 237 P.3d at 797.[9]

¶22 *McGirt* provides a previously unavailable legal basis for this claim. Subject-matter jurisdiction may—indeed, must—be raised at any time. No procedural bar applies, and this issue is properly before us. 22 O.S. §§ 1089(D)(8)(a), 1089(D)(9)(a).

There Is No Concurrent Jurisdiction.

¶23 The General Crimes Act and the Major Crimes Act give federal courts jurisdiction over crimes committed by or against Indians in Indian Country. 18 U.S.C. §§ 1152, 1153. Congress provides that crimes committed in certain locations or under some specific circumstances are within the sole and exclusive jurisdiction of the United States. Section 1152, the General Crimes Act, brings crimes committed in Indian Country

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[9] The principle that subject-matter jurisdiction may not be waived also settles the State's argument based on laches—that Petitioner waited too long to raise his claim, and the passage of time makes resolution of the issue, or a grant of relief, difficult to determine or implement. None of the cases on which the State relies concern a claim of lack of jurisdiction.

within that jurisdiction, unless they lie within the jurisdiction of tribal courts or jurisdiction is otherwise expressly provided by federal law. 18 U.S.C. § 1152; *see also* 18 U.S.C. § 1153 (Major Crimes Act). This gives federal courts jurisdiction over Indians and non-Indians who commit crimes against Indians in Indian Country. By explicitly noting that it may expressly provide otherwise, Congress has preempted jurisdiction over these crimes in state courts. Indeed, this Court has held that federal law preempts state jurisdiction over crimes committed by or against an Indian in Indian Country. *Cravatt v. State*, 1992 OK CR 6, ¶ 20, 825 P.2d 277, 280. State courts retain jurisdiction over non-Indians who commit crimes against non-Indians in Indian Country. *Id.; Salem*, 463 U.S. at 465 n.2; *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946).

¶24 The State argues that, despite the clear language of both statute and case law, federal and state courts have concurrent jurisdiction over non-Indians under the General Crimes Act. The law does not support this argument. The Attorney General relies in part on United *States v. McBratney*, 104 U.S. 621 (1881) to support his argument. However, in *McBratney*, a non-Indian murdered another non-Indian within the boundaries of the Ute Reservation. The Supreme Court held that the federal government had no jurisdiction to prosecute a crime committed in Indian Country where neither the perpetrator nor the victim were Indian. *Id.*, 104 U.S. at 624. Nothing in that opinion supports a conclusion that, where federal jurisdiction exists by statute, states have concurrent jurisdiction as well. And the Supreme Court itself later refuted any such interpretation. In *Donnelly v. United States*, the

Court held that *McBratney* did not apply to "offenses committed by or against Indians," which were subject to federal jurisdiction. *Donnelly*, 228 U.S. 243, 271-72 (1913). In the context of federal criminal jurisprudence and Indian Country, *Donnelly* reaffirmed Congress's preemption of state jurisdiction over crimes by or against Indians.[10] More recently, the Court has noted that where federal jurisdiction lies under Section 1153, it preempts state jurisdiction. *United States v. John*, 437 U.S. 634, 651 (1978); *see also Goforth v. State*, 1982 OK CR 48, ¶ 5, 644 P.2d 114, 115-16 (federal jurisdiction under §§ 1152, 1153 preempts state jurisdiction except as to crimes among non-Indians).

¶25 The General Crimes Act provides that federal jurisdiction may be changed by law. 18 U.S.C. § 1152. And Congress has done so, giving the State of Kansas criminal jurisdiction on Indian reservations in that state. The Kansas Act conferred jurisdiction on Kansas courts for offenses of state law committed by or against Indians on reservations in Kansas. 18 U.S.C. § 3243. The Supreme Court determined that this Act confers concurrent jurisdiction on State courts only to the extent that the State of Kansas may prosecute people

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[10] Respondent also misunderstands the discussion in *Ex parte Wilson*, 140 U.S. 575 (1891). There, the defendant and victim were non-Indian. The defendant argued that the federal government could not retain jurisdiction over crimes committed by and against Indians while allowing state jurisdiction over crimes involving non-Indians committed on a reservation; he claimed that either the federal government had sole and exclusive jurisdiction over every crime, or it had none at all. *Id.* at 577. The Court rejected this argument, noting that Congress had the power to grant and limit jurisdiction in federal courts. *Id.* at 578.

for state law offenses that are also punishable as offenses under federal law; otherwise, the jurisdiction to prosecute federal crimes committed on Kansas reservations lies with the federal government. *Negonsott v. Samuels*, 507 U.S. 99, 105-106 (1993).

¶26 Congress also created the opportunity for six specific states to exercise jurisdiction over crimes committed in Indian Country by enacting Public Law 280. Act of Aug. 15, 1953, Pub. L. No. 67, Stat. 588, codified at 18 U.S.C. § 1162, 25 U.S.C. § 1321-26; 18 U.S.C. § 1162(a). In a separate provision, P.L. 280 created a framework for other states to assume jurisdiction over crimes committed in Indian Country, with the consent of the affected tribe; the state and the federal government may have concurrent jurisdiction if the affected tribe requests it and with the consent of the Attorney General. 25 U.S.C. § 1321(a). Oklahoma has not exercised the options for criminal jurisdiction afforded by P.L. 280. *Cravatt*, ¶ 15, 825 P.2d at 279.

¶27 The Kansas Act and P.L. 280 would have been unnecessary if, as the State argues, state and federal governments already have concurrent jurisdiction over non-Indians who commit crimes in Indian Country. Rather, these Acts are examples of how Congress may implement the provision in Section 1152, allowing for an exception to federal jurisdiction. Congress has written no law similarly conferring jurisdiction on Oklahoma courts, or otherwise modifying the statutory provisions granting jurisdiction for prosecution of crimes in Indian Country to federal courts in Oklahoma. Respondent does not suggest it has.

¶28 Absent any law, compact, or treaty allowing for jurisdiction in state, federal or tribal courts, federal and tribal governments have jurisdiction over

crimes committed by or against Indians in Indian Country, and state jurisdiction over those crimes is preempted by federal law. The State of Oklahoma does not have concurrent jurisdiction to prosecute Petitioner.

Conclusion

¶29 Petitioner's victims were Indian, and this crime was committed in Indian Country. The federal government, not the State of Oklahoma, has jurisdiction to prosecute Petitioner. Proposition I is granted. Propositions II and III are moot.

DECISION

¶30 The Judgment and Sentence of the District Court of McClain County is **REVERSED** and the case 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 **STAYED** for twenty (20) days from the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF MCCLAIN COUNTY THE HONORABLE
LEAH EDWARDS, DISTRICT JUDGE

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OPINION BY KUEHN, P.J.

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Lumpkin, J.:	CONCUR IN RESULTS
Lewis, J.:	SPECIALLY CONCUR
Hudson, J.:	CONCUR IN RESULTS