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**OPINION OF THE OKLAHOMA COURT
OF CRIMINAL APPEALS
(DECEMBER 2, 2021)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

EMMITT G. SAM,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. F-2017-1300

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

OPINION

LEWIS, JUDGE:

Emmitt G. Sam, Appellant, was tried by jury and convicted of Count 1, murder in the first degree, in violation of 21 O.S.Supp.2012, § 701.7, Count 3, robbery with a firearm, in violation of 21 O.S.2011, § 801, and Count 4, robbery with a firearm, in violation of 21 O.S.2011, § 801, in Tulsa County District Court, Case No. CF-2016-3789, before the Honorable Doug

Drummond, District Judge. The jury set punishment at life imprisonment and a \$10,000.00 fine on Count 1, seven (7) years imprisonment and a \$3,000.00 fine on Count 3, and seven (7) years imprisonment and a fine of \$3,360.25 on Count 4, Judge Drummond sentenced accordingly and ordered that the sentences be served consecutively with credit for time served.¹ Appellant appeals from these convictions and sentences raising ten propositions of error, we find that the issues raised in Propositions Six and Seven require that the convictions be reversed and remanded with instructions to dismiss.

In Proposition Six Appellant claims the District Court lacked jurisdiction to try him and in Proposition Seven Appellant claims that trial counsel was ineffective for failing to properly preserve this issue at trial (along with a motion to supplement the record and request for an evidentiary hearing). Appellant claims that he is a citizen of the Cherokee Nation and the crimes occurred within the boundaries of the Muscogee (Creek) Nation Reservation. Appellant, in his direct appeal relies on *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).

Appellant's claim raises two separate questions: (a) his Indian status and (b) whether the crimes occurred within the historical boundaries of the Muscogee (Creek) Nation Reservation. These issues required fact-finding; therefore, we remanded the case to the District Court

¹ These crimes require serving 85% of the sentences before becoming eligible for parole consideration.

of Tulsa County, for an evidentiary hearing which was completed on February 23, 2021, by the Honorable Tracy Priddy, District Judge. The trial court filed its findings of fact and conclusions of law with this Court on July 1, 2021.

By stipulation, the parties agreed that the crimes for which Appellant was convicted occurred within Indian Country as they occurred within the historical boundaries of the Muscogee (Creek) Nation Reservation. *See McGirt*, 140 S.Ct. at 2468. The parties disputed whether Appellant is Indian for purposes of establishing federal jurisdiction over the crimes he committed in Indian Country.

In determining whether a person is an Indian for purposes of the federal Indian Major Crimes Act (MCA), two questions must be answered, (1) whether a defendant has some Indian blood; and (2) whether a defendant was recognized as an Indian by a tribe or the federal government. *State v. Klindt*, 1989 OK CR 75, ¶ 5, 782 P.2d 401, 403; *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001). On appeal, the Appellant bears the burden of producing *prima facie* evidence that he has some Indian blood and that he was recognized as an Indian. *Klindt*, 1989 OK CR 75, ¶ 5, 782 P.2d at 403. This Court considers a defendant's status as an Indian at the time the offense was committed. *See United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015).

The parties stipulated that Appellant has a blood quantum of 41/128ths of Cherokee Indian Blood and that he became a citizen of the Cherokee Nation on August 13, 2018 [over two years after the commission of the crimes]. The State disputed the claim that

Appellant was a recognized member of an Indian tribe at the time he committed these crimes.

We follow the rule that a person may be Indian for purposes of federal criminal jurisdiction whether or not the person is formally enrolled in the federally recognized tribe of which he claims membership. *Parker v. State*, 2021 OK CR 17, ¶¶ 36, 40, ___ P.3d ___. We follow the determining factors that most courts consider in some respects in determining recognition. *Id.* These factors are usually referred to as the *St. Cloud* factors, *Id.* See *St. Cloud v. United States*, 702 F.Supp. 1456, 1461 (D.S.D. 1988). The factors are non-racial and are listed in declining order of importance.

- 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.

Id. These factors merely guide the analysis of whether a person is recognized as an Indian. *Id.* See also *United States v. Drewry*, 365 F.3d 957, 961 (10th Cir. 2004), *vacated on other grounds by Drewry v. United States*, 543 U.S. 1103 (2005).

The trial court used this analysis to inform its decision in this case. The trial court was faced with a defendant who was seventeen at the time he committed these crimes, but had not been granted formal membership into a federally recognized tribe. The trial court

understood that lack of tribal membership is not dispositive. *See United States v. Bruce*, 394 F.3d 1215, 1224-25 (9th Cir. 2005) At the evidentiary hearing, Appellant presented witnesses to support his claim that he is a recognized member of the Cherokee Nation.

Appellant's mother testified that she was an enrolled member of the Cherokee Nation and has been a member of the tribe since birth. She testified that Appellant was raised in a predominantly Cherokee community until they moved to Tulsa in 2005. Appellant spent time with his paternal grandmother who spoke Cherokee as her primary language. Even after moving to Tulsa he spent time with his Cherokee relatives and attended Cherokee social events.

When Appellant was one year old, he was removed from the home, because of his abusive father and he was required to be in an Indian Child Welfare Act compliant placement. Appellant's father died when Appellant was young and his uncle was influential in his life. His uncle was a chief in the family's stomp grounds.

The family utilized W.W. Hastings Hospital, where Appellant was born. Hastings hospital cares exclusively for federally recognized tribal members. The family also used Wilma Mankiller Health Center, and the Indian Healthcare Resource Center of Tulsa. As a juvenile, Appellant received services reserved only to Indians because of his mother's tribal membership.

Throughout his life, Appellant received school benefits such as tutoring, school supplies and counseling, which were funded by a program only available to tribal members. He was also involved in spring break and summer camps provided solely to Indians during

his youth, due to his treatment at the Indian Health Resource Center.

Appellant's mother applied for membership for Appellant several times, but the applications were unsuccessful due to Appellant's father's absence on the birth certificate and due to his father being deceased. Without the father's involvement in the application process the applications were returned. Appellant's mother applied again and the application was granted in 2018.

In rebuttal, the State presented evidence that Appellant was a member of an African American street gang, although Native American street gangs were available to him. The State also presented evidence that Appellant did not receive services through the Cherokee Nation in his own name, but would have received benefits through his mother. The Cherokee Nation only had information about one membership application submitted by an unknown person when Appellant was about 11 years old.

The trial court found "that from birth until shortly before the offenses were committed, . . . [Appellant] received assistance reserved only for Indians, was subject to the Indian Child Welfare Act . . . , enjoyed benefits through tribal affiliation and participated in Indian social life with his extended family." The trial court concluded "that Appellant was formally and informally recognized as an Indian by a tribe or the federal government at the time of the offense."

We find that the trial court did not abuse its discretion in its findings of fact and conclusions of law as the record supports the findings and conclusions. We adopt the trial court's findings of fact and conclusions of

law. Appellant presented sufficient evidence to meet his burden of producing *prima facie* evidence that he has some Indian blood and that he was recognized as an Indian. The State's evidence was insufficient to overcome Appellant's *prima facie* evidence.

The crime for which Appellant was convicted occurred within the boundaries of a recognized Indian reservation, and Appellant is a member of a federally recognized tribe. We therefore find that the State of Oklahoma did not have jurisdiction to prosecute Appellant in this matter. The Judgments and Sentences in this case are hereby reversed and the case remanded to the District Court of Tulsa with instructions to dismiss.

DECISION

The Judgments and Sentences of the District Court of Tulsa County are **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.

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY THE HONORABLE DOUG DRUMMOND, DISTRICT JUDGE

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Opinion by: Lewis, J.

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

**HUDSON, VICE PRESIDING JUDGE:
SPECIALLY CONCURS**

Today's decision dismisses convictions for first degree murder and robbery with a firearm from the District Court of Tulsa 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 Creek 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 Concur); *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.

The question I see presented is should I blindly follow and apply the majority opinion or do I join with Chief Justice Roberts and the dissenters in *McGirt*

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

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

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

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

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

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF THE
DISTRICT COURT OF TULSA COUNTY,
STATE OF OKLAHOMA
(SIGNED JUNE 28, 2021; FILED JUNE 29, 2021)**

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

EMMIT G. SAM,

Defendant/Appellant.

v.

STATE OF OKLAHOMA,

Plaintiff/Appellee,

Tulsa County District Court Case No. CF-2016-3789
Court of Criminal Appeals Case No. F-2017-1300
Before: Tracy L. PRIDDY, District Court Judge.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter came on for hearing before the Court on January 29, 2021 and was continued to February 23, 2021, in accordance with the remand order of the Oklahoma Court of Criminal Appeals (“OCCA”) issued on August 24, 2020. At the January 29, 2021 evidentiary hearing, the State appeared by and through Assistant Attorney General Randall Young and First Assistant

District Attorney for Tulsa County, Erik Grayless; Emmet Sam (“Appellant”), who is incarcerated, appeared by and through his counsel Danny Joseph and Nicollette Brandt, who waived his appearance for the hearing. The same appearances were made at the February 23, 2021 evidentiary hearing with the exception of the Appellant being present pursuant to a Writ of Habeas Corpus.

In his Brief, Appellant claims the District Court lacked jurisdiction to try him as he is Native American [Cherokee] and the crime occurred within the boundaries of the Creek Nation. This claim raises two separate questions: (a) his Indian status, and (b) whether the crime occurred within the boundaries of the Creek Nation.

In the August 24, 2020, Order Remanding for Evidentiary Hearing, the Oklahoma Court of Criminal Appeals directed this Court as follows:

The District Court shall address only the following issues:

First, Appellant’s status as an Indian. The District Court must determine whether (1) Appellant has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government. In footnote 3, OCCA cited state and federal case law including *United States v. Drewry*, 365 F.3d 957, 960-61 (10th Cir. 2004).

Second, whether the crime occurred within the boundaries of the Creek Nation.

By way of stipulation this Court finds that the crimes of which Appellant has been convicted occurred

within the historical boundaries of the Muscogee (Creek) Reservation.¹ The disputed issue before the court is whether the Appellant is Indian for purposes of establishing federal jurisdiction over crimes committed in Indian Country. Oklahoma courts presume jurisdiction unless and until a defendant makes a *prima facie* showing that a party's Indian status triggers federal preemption. The Court makes its findings as to this issue based upon the evidence presented by the parties, including certain stipulations and exhibits, review of the pleadings in this Court and the OCCA, and the briefs and argument of counsel.

At the January 29, 2021 evidentiary hearing, Appellant presented stipulations in support of his Indian status as follows:²

1. Regarding the status of the Appellant:
 - A. Mr. Sam has a blood quantum of 41/128 (32%).
 - B. Mr. Sam is a citizen of the Cherokee Nation as of 8/13/2018.
 - C. The Cherokee Nation is an Indian Tribal Entity recognized by the federal government.
 - D. The verification for Mr. Sam's tribal enrollment and blood quantum are attached to this stipulation and the parties agree they should be admitted into the record of this case.
 - E. The crimes in the case occurred on 6/25/2016.

Appellant then called two witnesses, Manuella Golden, Appellant's mother, and Debbie Greever, Union Public

¹ Agreed Stipulation filed September 25, 2020 *see* 2.A.

² Agreed Stipulation with attached verifications.

Schools high school counselor to testify regarding Appellant's Indian status. Additionally, Appellant admitted into evidence his medical records, Exhibits 1 and 2, along with an Agreed Stipulation as to the dates of services for Appellant's medical treatment at the Indian Health Care Resource Center of Tulsa and W.W. Hastings Indian Hospital.

I. Appellant's Status as an Indian

As recognized by the Court in *United States v. Prentiss*, 273 F.3d 1277 (10th Cir. 2001) there is no statutory definition for the term "Indian" addressing criminal jurisdiction in Indian country, and thus the federal circuit courts have applied a two-part test to determine whether a defendant is subject to federal jurisdiction under § 1153. The court must make factual findings that the defendant (1) has some Indian blood; and (2) is recognized as an Indian by a tribe or the federal government, citing *Scrivner v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995). *Id.* at. 1280.

Moreover, in determining Indian status, this Court considers his status at the time of the offense. *United States v. Zepeda*, 792 F.3d. 1103 (9th Cir. 2015). As noted by the *Zepeda* court, under the Major Crimes Act, ("IMCA") the government must prove that the defendant was an Indian at the time of the offense with which the defendant is charged. *Id.* at 1113. The jurisdictional component of criminal prosecution should not be a moving target. The defendant should be able to "predict with certainty" the consequences of his crime at the time it is committed and the government should not be required to operate under the burden of having proper jurisdiction at the time of filing charges, only to have it vanish at a later time.

A. Appellant has some Indian blood

Based upon the stipulated facts, Appellant has shown that he has a blood quantum of 41/128 Cherokee blood. Therefore, this Court finds he has some Indian blood and has satisfied the first prong of the test under *Prentiss*.

B. Appellant Is Recognized as an Indian by a Tribe or the Federal Government

The second or “recognition” prong of the test is in dispute as Appellant, a minor when these crimes were committed, was not an enrolled member or citizen of the Cherokee Nation. Given the unique history and vast Indian heritage of the State of Oklahoma, the question of Indian status for purposes of criminal jurisdiction is complex as many citizens of the state have some Indian blood and may have family history intertwined with an Indian tribe, but may not be recognized as Indian. While having some Indian blood and proof of membership in a federally recognized tribe at the time of the offense is dispositive of the issue, not all Indians are enrolled members or citizens of their tribe, leading the federal circuit courts to expand the scope of factors to be considered to satisfy the second prong. The Tenth Circuit adopted factors from *United States v. Lawrence*, 51 F.3d 150 (8th Cir. 2009), to include: 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.

United States v. Drewry, 365 F.3d 957 (10th Cir. 2005).³ Although other circuit courts utilizing these factors have considered them in declining order of importance, the Tenth Circuit has “approved a totality-of-the-evidence approach to determine Indian status.” *Diaz*, 679 F.3d at 1187.

The Court takes the Appellant’s age at the time the offenses were committed into consideration for purposes of analysis under *Drewry*. Unlike the majority of offenders committing major crimes, Appellant was a minor when he committed these offenses and thus reliant on his mother to make application for his membership in the tribe and for access to benefits and services. Arguably, his participation in social and/or cultural activities were also dependent on his mother’s decisions in that regard. The Court finds this case to be distinguishable from others wherein the offender is an adult and wholly responsible for establishing membership in a tribe, gaining access to benefits or services and making choices to participate in Indian social life or cultural activities.

Appellant presented evidence that he received assistance reserved only to Indians and enjoyed benefits of tribal affiliation. Appellant was born at W.W. Hastings Hospital in 1998 and continued to receive medical treatment there through the end of 2002. According to his mother, Manuella Golden, he received treatment at Wilma Mankiller Health Center in Stillwell until the Indian Health Resource Center (“IHRC”) was opened in Tulsa where he began receiving medical treatment and benefits. The treatment records

³ See also *United States v. Nowlin*, 555 Fed. Appx. 820, 823 (10th Cir. 2014).

from IHRC indicate dates of service from October 2012 to March 2016. Appellant's medical records from W.W. Hastings, Exhibit 1, and IHRC, Exhibit 2, indicate visits for routine pediatric checks and vaccinations as well as acute illness and injuries. In addition to medical treatment services, Appellant by virtue of being a patient at IHRC, attended spring break and summer camps for Indian youth where they learned about tribal cultures and participated in cultural activities and recreation. Ms. Golden who is employed by IHRC, testified that none of these medical facilities provide services to non-Indians, and to receive treatment at IHRC, you must be a member of a federally recognized tribe. She further testified that a child whose mother is a member has access to these services until age 18, when they [the minor recipient] are required to obtain their own roll number and membership card to continue receiving services. Appellant, as a minor and by way of his mother's membership with the Cherokee Nation, received these benefits from birth until March 2016, three months before the crimes were committed and before he reached 18 years of age.

Although minors can have their own roll number and membership card, the enrolled parent must make application on behalf of the minor child. Ms. Golden testified that she attempted enrollment for Appellant on several occasions, but for a variety of reasons, was unable to secure his roll number and membership card until 2018. Appellant did not have a choice as to whether she pursued membership for him as a minor child.

Evidence of other assistance and benefits by way of tribal affiliation was presented through both Manuella Golden and Debbie Greever. Ms. Golden testified that Appellant received "stuff" from school under Title 19.

She stated he received tutoring, school supplies and counseling. When a child is enrolled with the school, the parent must show documentation of enrollment which enrolls the student in the government assisted fund for Native American students. Debbie Greever, is a Native American counselor at Union Public Schools, formerly the Native American Coordinator, working with students in 9th through 12th grades. She testified that she works through the Bureau of Indian Affairs in conjunction with the Muscogee Creek Nation to make sure all Native American students at Union are enrolled in the Native American program and receive services such as tutoring, counseling and other modifications. Her job title and contract requires that she provide 100% of her services to Native American students. Appellant was one of her Native American students in the fall of 2013.

Manuella Golden, a member of the Cherokee Nation since birth, testified as to her family's Cherokee heritage and involvement as well as Appellant's involvement in Cherokee social life. She testified that Appellant had been raised in a traditional Cherokee environment until moving to the city in 2005. After moving to Tulsa, Appellant visited the family at his former home on weekends, holidays and during the summer. Appellant spent time with his paternal grandmother, who spoke her first language of Cherokee far more often than she spoke English. Appellant also spent time with other family members who held positions of importance at a family stomp ground where pow wows and other religious ceremonies were held. When Appellant was about a year old, DHS removed Appellant from his mother's custody due to domestic abuse in the home, but because he was Cherokee, he had to be placed in

an Indian Child Welfare Act compliant foster home. He was placed with her first cousin.

The State urged the adoption of a bright line rule to overcome the inadequacy of a balancing or factors test to determine Indian status, but given the Court of Criminal Appeals' footnote citing *Drewry* in its Remand Order, the Court declines to adopt such a rule. Absent proof of enrollment at the time these offenses were committed, Appellant's evidence went to the three remaining factors outlined in *Drewry*. Appellant was 17 years old at the time these crimes were committed and while unable to satisfy the first factor of tribal enrollment, the evidence presented regarding the other factors is clearly determinative of the second "recognition" prong of the *Prentiss* test. Having established a *prima facie* case of Indian status, the burden shifts to the State of Oklahoma to demonstrate that it should retain jurisdiction.

In its efforts, the State of Oklahoma presented two witnesses, David Cathey, former supervising agent with the Office of Inspector General, Oklahoma Department of Corrections and Jay Long, Chief Investigator for the Tulsa County District Attorney's Office. The State also admitted into evidence, Exhibit 1 and Exhibit 2.

When working for the Department of Corrections, Mr. Cathey was assigned to the intelligence unit for approximately a year where he learned about various security threat groups within the Department of Corrections. During that time he conducted an investigation related to the Appellant and reviewed notes from his admission at Lexington in December 2017. According to these notes and through his investigation, his unit identified Appellant as a member of the 52 Red Mob Gangsters, a subset of the Blood gang, which

he described as a black street gang. In October 2020, Appellant was questioned by correctional staff at Lawton Correctional Facility and stated that he was a member of the 52 Red Mob. Further, Mr. Cathey testified that although there are Native gangs in the correctional facilities, such as Native Family, Savage Boys and Indian Brotherhood, Appellant did not identify with any of those gangs and actually had a physical altercation with a member of Native Family, which would be considered a rival of the 52 Red Mob. Finally, Mr. Cathey described and identified paw print tattoos on Appellant's right arm known as a "typical Blood tattoo", as seen in State's Exhibit 1.

Mr. Long was asked to conduct an investigation into Appellant's background. He contacted Brian Carter with the Cherokee Marshal Service who had access to information regarding Appellant's contacts with the Cherokee Nation. According to information he received, Appellant did not have any contacts or receive any services in his own name through the Cherokee Nation, but would have had access to medical services through his mother. Additionally, the information he received indicated a single application for membership submitted by an unknown person on Appellant's behalf when he was about 11 years old which was denied for an unknown reason.

Although the State argues there is no articulated standard for the State to prove it should retain jurisdiction in comparison to the Appellant's very low burden, even applying a similar standard for the State, the evidence presented was not sufficient to rebut the evidence presented by the Appellant on the issue of Indian status. Notwithstanding Appellant's apparent association with a black street gang, as opposed to

an Indian gang, particularly once incarcerated, Appellant's evidence showed that from birth until shortly before the offenses were committed, he received assistance reserved only for Indians, was subject to the Indian Child Welfare Act when taken from his mother's custody, enjoyed benefits through tribal affiliation and participated in Indian social life with his extended family. Based upon the foregoing, the Court finds the Appellant was formally and informally recognized as an Indian by a tribe or the federal government at the time of offense.

Conclusions of Law

This Court accordingly finds that Appellant met his burden of establishing his Indian status under *Prentiss*, that the State's evidence did not rebut Appellant's showing of Indian status. Thus, this Court concludes that Appellant is an Indian and that his crimes were committed within the historical boundaries of the Muscogee [Creek] Nation or Indian Country for the purposes of federal jurisdiction. *See* 18 U.S.C. §§ 1151-53.

IT IS SO ORDERED this 28 day of June, 2021.

/s/ Tracy L. Priddy
District Court Judge

**ORDER OF THE OKLAHOMA COURT
OF CRIMINAL APPEALS,
REMANDING FOR EVIDENTIARY HEARING
(AUGUST 24, 2020)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

EMMITT G. SAM,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

No. F-2017-1300

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**

Emmitt G. Sam, Appellant, was tried by jury and convicted of Count 1, murder in the first degree, in violation of 21 O.S.Supp.2012, § 701.7, Count 3, robbery with a firearm, in violation of 21 O.S.2011, § 801, and Count 4, robbery with a firearm, in violation of 21 O.S.2011, § 801, in Tulsa County District Court, Case

No. CF-2016-3789, before the Honorable Doug Drummond, District Judge. The jury set punishment at life imprisonment and a \$10,000.00 fine on Count 1, seven (7) years imprisonment and a \$3,000.00 fine on Count 3, and seven (7) years imprisonment and a fine of \$3,360.25 on Count 4. Judge Drummond sentenced accordingly and ordered that the sentences be served consecutively with credit for time served.¹ Appellant appeals from these convictions and sentences.

In Proposition Six Appellant claims the District Court lacked jurisdiction to try him and in Proposition Seven Appellant claims that trial counsel was ineffective for failing to properly preserve this issue at trial (along with a motion to supplement the record and request for an evidentiary hearing). Appellant claims that he is a citizen of the Cherokee Nation and the crimes occurred within the boundaries of the Creek Nation. Appellant, in his direct appeal relies on *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).

Appellant's claim raises two separate questions: (a) his Indian status and (b) whether the crimes occurred in the Creek Nation. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Tulsa County, for an evidentiary

¹ Appellant must serve 85% of his sentences on counts one, three, and four before becoming eligible for parole consideration.

hearing to be held within sixty (60) days from the date of this Order.²

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 Appellant's presentation of *prima facie* evidence as to the Appellant's legal status as Indian and as to the location of the crimes in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

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

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

² In light of this order, Appellee's request to file a response filed July 16, 2020, and subsequent motions by the parties, are rendered moot. The motions are, in effect, denied.

³ See *e.g.* *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116. See also *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Drewry*, 365 F.3d 957, 960-61 (10th Cir. 2004); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001).

Second, whether the crimes occurred within the boundaries of the Creek Nation. In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony.

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record, to the Clerk of this Court, and counsel for Appellant, within five (5) days after the District Court has filed its findings of fact and conclusions of law. Upon receipt thereof, the Clerk of this Court shall promptly deliver a copy of that record to the Attorney General. A supplemental brief, addressing only those issues pertinent to the evidentiary hearing and limited to twenty (20) pages in length, may be filed by either party within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed in this Court.

Provided however, in the event the parties agree as to what the evidence will show with regard to the questions presented, they may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. In this event, no hearing on the questions presented is necessary. Transmission of the record regarding the matter, the District Court's findings of fact and 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 Tulsa County: Appellant's Brief in Chief filed July 30, 2018; Appellee's

Response Brief, filed November 27, 2018; and Appellant's Reply Brief filed December 17, 2018.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 24th 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