

APPENDIX TABLE OF CONTENTS

Opinion of the Court of Criminal Appeals, State of Oklahoma (April 1, 2021)	1a
District Court of McIntosh County, State of Oklahoma Entry of Facts and Conclusions of Law (Signed September 23, 2020, Filed September 24, 2020)	12a
Agreed Stipulation (September 23, 2020)	15a
Court of Criminal Appeals, State of Oklahoma, Order Remanding for Evidentiary Hearing (August 21, 2020)	18a

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

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FLOYD JOSEPH BALL, JR.,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

Case No. C-2019-263

An Appeal from the District Court of McIntosh
County, the Honorable Brendon Bridges Associate
District Judge

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

OPINION

HUDSON, JUDGE:

Petitioner, Floyd Joseph Ball, Jr., entered a blind plea of guilty in McIntosh County District Court, Case No. CF-2018-89, to Count 1: Rape in the First Degree,

in violation of 21 O.S.Supp.2017, § 1114(A)(5); and Count 2: Kidnapping, in violation of 21 O.S.Supp.2012, § 741. The Honorable Brendon Bridges, Associate District Judge, accepted Petitioner's plea and sentenced Petitioner to twenty-four years imprisonment on Count 1 and twenty years imprisonment on Count 2 with credit for time served. Judge Bridges ordered these sentences to run consecutively. Petitioner must serve 85% of his Count 1 sentence before becoming eligible for parole consideration. Petitioner's subsequent motion to withdraw his blind plea was denied and Petitioner now seeks a writ of certiorari.

In Proposition One, Petitioner claims the District Court lacked jurisdiction to accept his plea. Petitioner argues that he is a citizen of the Mississippi Choctaw Nation and the crimes occurred within the boundaries of the Creek Reservation. Pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), Petitioner's claim raises two separate questions: (a) his Indian status; and (b) whether the crimes occurred on the Creek Reservation. These issues require fact-finding. We therefore remanded this case to the District Court of McIntosh County for an evidentiary hearing.

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we requested the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Petitioner's presentation of *prima facie* evidence as to Petitioner's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has jurisdiction. The District Court was ordered to determine whether Petitioner has some Indian blood and is recognized as an Indian by a tribe or the fed-

eral government. The District Court was further ordered to determine whether the crimes in this case occurred in Indian Country. In so doing, the District Court was directed to consider any evidence the parties provided, including but not limited to treaties, statutes, maps, and/or testimony.

We also directed the District Court that in the event the parties agreed as to what the evidence would show with regard to the questions presented, the parties 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. The District Court was also ordered to file written findings of facts and conclusions of law with this Court.

A status hearing was held in this case on September 23, 2020, before the Honorable Brendon Bridges, Associate District Judge. A written findings of fact and conclusions of law from that hearing was timely filed with this Court along with a transcript of the hearing. The record indicates that appearing before the District Court on this matter were attorneys from the Oklahoma Attorney General's Office, the McIntosh County District Attorney's Office and counsel for Petitioner.

In its written findings of fact and conclusions of law, the District Court stated that the parties have jointly stipulated that the evidence will show Petitioner is 1/8th degree Indian blood of the Mississippi Choctaw Tribe; that Petitioner was an enrolled member of the Choctaw Nation of Oklahoma on the date of the charged crimes; that the Choctaw Nation of Oklahoma is an Indian Tribal Entity recognized by the federal government; and that the charged crimes in this case

occurred within the Creek Reservation. The District Court attached as Joint Exhibit 1 to its findings of facts and conclusions of law a document entitled Agreed Stipulation signed by all counsel reflecting these stipulations.

The District Court accepted and adopted the stipulations made by the parties and concluded in its findings of fact and conclusions of law that Petitioner has some Indian blood, that he is also recognized as an Indian by a tribe and the federal government and therefore Petitioner is an Indian under federal law. Finally, the District Court accepted and adopted the stipulation of the parties that the crimes in this case occurred on the Creek Reservation.

On November 12, 2020, the State filed with this Court a supplemental brief after remand. In its brief, the State acknowledges the District Court accepted the parties' stipulations as discussed above and the District Court's findings. The State contends in its brief that should this Court find Petitioner is entitled to relief based on the District Court's findings, this Court should stay any order reversing the convictions for thirty (30) days so that the appropriate authorities can review his case, determine whether it is appropriate to file charges and take custody of Petitioner. *Cf.* 22 O.S.2011, § 846.

After thorough consideration of this proposition and the entire record before us on appeal including the original record, transcripts and the briefs of the parties, we find that under the law and evidence relief is warranted. Based upon the record before us, the District Court's findings of fact and conclusions of law are supported by the stipulations jointly made by the parties at the status hearing. We therefore find

Petitioner has met his burden of establishing his status as an Indian, having 1/8th degree Indian blood of the Mississippi Choctaw Tribe and being a member of the Choctaw Nation of Oklahoma. We further find Petitioner met his burden of proving the crimes in this case occurred on the Creek Reservation and, thus, occurred in Indian Country. Pursuant to *McGirt*, we find the State of Oklahoma did not have jurisdiction to prosecute Petitioner in this matter.¹ The Judgment and Sentence in this case is hereby reversed and the case remanded to the District Court of McIntosh County with instructions to dismiss the case.²

DECISION

The Petition for Writ of Certiorari is **GRANTED**. The Judgment and Sentence of the District Court is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. The **MANDATE** is not to be issued until twenty (20) days from the delivery and filing of this decision.³

¹ I maintain my previously expressed views on the significance of *McGirt*, its far-reaching impact on the criminal justice system in Oklahoma and the need for a practical solution by Congress. See *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___ (Hudson, J., Concur in Results); *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___ (Hudson, J., Specially Concurs); and *Krafft v. State*, No. F-2018-340 (Okl. Cr., Feb. 25, 2021) (Hudson, J., Specially Concurs) (unpublished).

² This resolution renders the other five propositions of error raised in Petitioner's brief moot.

³ By withholding issuance of the mandate for twenty days, the State's request for time to determine further prosecution is rendered moot.

AN APPEAL FROM THE DISTRICT COURT
OF MCINTOSH COUNTY THE
HONORABLE BRENDON BRIDGES
ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

Chad Johnson
Garrett Marshall
Okla. Indigent Def. System
P.O. Box 926
Norman, OK 73070
Counsel for Defendant

Carol Iski
District Attorney
Greg Stidham
Asst. District Attorney
McIntosh County
110 North 1st St.
Eufaula, OK 74432
Counsel for the State

Mike Hunter
Attorney General of Oklahoma
Joshua Fanelli
Asst. Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
Counsel for the State

APPEARANCES ON APPEAL

Lisbeth L. McCarty
Okla. Indigent Def. System
P.O. Box 926
Norman, OK 73070
Counsel for Petitioner

Mike Hunter
Attorney General of Oklahoma
Joshua R. Fanelli
Asst. Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
Counsel for the Respondent

OPINION BY: HUDSON, J.
KUEHN, P.J.: CONCUR IN RESULTS
ROWLAND, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
LEWIS, 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.⁴ 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

⁴ 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).

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.

LEWIS, JUDGE, CONCURRING IN RESULTS:

Based on my special writings in *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___ and *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___, I concur in the decision to dismiss this case for the lack of state jurisdiction.

**DISTRICT COURT OF MCINTOSH COUNTY,
STATE OF OKLAHOMA ENTRY OF FACTS
AND CONCLUSIONS OF LAW
(SIGNED SEPTEMBER 23, 2020,
FILED SEPTEMBER 24, 2020)**

IN THE DISTRICT COURT OF
McINTOSH COUNTY, STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

FLOYD JOSEPH BALL, JR.,

Defendant.

Case No. CF-18-89

Court of Criminal Appeal Number C-2019-263

Before: Brendon BRIDGES, Associate District Judge.

**JOURNAL ENTRY OF FACTS AND
CONCLUSIONS OF LAW IN ACCORDANCE
WITH ORDER REMANDING FOR EVIDENTIARY
HEARING ISSUED AUGUST 21, 2020**

Now on the 23rd day of September, 2020, comes on for evidentiary hearing for the purpose of determining the following: (a) Defendant's Indian status and (b) whether the crimes occurred on the Creek Reservation. The Defendant appears in person and with counsel,

Chad Johnson and Garrett Marshall. The State appears by and through McIntosh County District Attorney, Carol Iski, and assistant district attorney, Greg Stidham. The Oklahoma Attorney General's Office appears by and through counsel, Joshus R. Fanelli and Hannah K. White.

After receiving argument and evidentiary stipulations the Court hereby FINDS and ORDERS as follows:

FINDINGS OF FACT AND CONCLUSION OF LAW

The first issue for adjudication is the Defendant's status as an Indian as defined by federal law. The Tenth Circuit's decision in *United States v. Diaz*, 679 F.3d 1183 (10th Cir. 2012) articulates the test for making such determination. As *Diaz* states:

To find that a person is an Indian the court must first make factual findings that the person has some Indian blood and, second, that the person is recognized as an Indian by a tribe or by the federal government.

Id. at 1187 (internal quotations omitted); *see also Goforth v. State*, 1982 OK CR 48, 644 P.2d 114. Applied to the present matter, the parties jointly stipulate in writing the evidence will show "the [Defendant] is one-eight (1/8) degree Indian blood of the Miss. Choctaw Tribe." *See Joint Exhibit 1* (attached). In addition, "[t]he [Defendant] was an enrolled member of the Choctaw Nation of Oklahoma on May 4 and 5, 2018, the dates of the charged offenses." *Id.* Finally, "[t]he Choctaw Nation of Oklahoma is an Indian Tribal Entity recognized by the federal government." *Id.* The Court accepts and attaches these stipulations to the Court's

Findings of Facts and Conclusions of Law. Applying elements of *Diaz* to the evidentiary stipulations in the present matter, the Court finds the Defendant has “some Indian blood” and is also “recognized as an Indian by a tribe and the federal government.” For this reason, the Court finds the Defendant is an Indian under federal law.

Having found the Defendant is an Indian under federal law, this Court must now determine if the crime occurred on the Creek Reservation. As *McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020) explains “[t]he 1833 Treaty fixed borders for what was to be a ‘permanent home to the whole Creek nation of Indians.’” *Id.* at 2461. The parties in this matter stipulate “[t]he charged crimes occurred within the Creek Reservation.” For this reason, the Court adopts the stipulation and finds the crime occurred on the Creek Reservation.

In accordance with the directives of the Oklahoma Court of Criminal Appeals, the court reporter shall file an original and two certified copies of the transcript of this hearing within (20) days. This District Court Clerk shall transmit the record of the evidentiary hearing, this Journal Entry of Findings of Facts and Conclusions of Law with attachments, and the transcript of this proceeding to the Clerk of the Court of Criminal Appeals.

BE IT SO ORDERED

/s/ Brendon Bridges
Associate District Judge
McIntosh County State of Oklahoma

**AGREED STIPULATION
(SEPTEMBER 23, 2020)**

IN THE DISTRICT COURT OF MCINTOSH
COUNTY STATE OF OKLAHOMA

FLOYD JOSEPH BALL, JR.,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

COCA No. C-2019-263

McIntosh County No. CF-2018-89

AGREED STIPULATION

Following the United States Supreme Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), the Oklahoma Court of Criminal Appeals remanded Petitioner's case to this Court on August 21, 2020, for an evidentiary hearing to determine 1) Petitioner's status as an Indian, and 2) whether the crimes occurred on the Creek Reservation. The parties hereby announce, and request this Court to accept, the following stipulations:

1. Petitioner is one-eighth (1/8) degree Indian blood of the Miss. Choctaw Tribe.
2. Petitioner was an enrolled member of the Choctaw Nation of Oklahoma on May 4 and 5, 2018, the dates of the charged offenses.
3. The Choctaw Nation of Oklahoma is an Indian Tribal Entity recognized by the federal government.
4. The charged crimes occurred within the Creek Reservation.

Respectfully submitted this 23rd day of September, 2020.

/s/ Chad Johnson

No. 32432

Garrett Marshall

No. 33960

General Appeals Division

Oklahoma Indigent Defense System

P.O. Box 926

Norman, Oklahoma 73070

(405) 801-2727

/s/ Joshua R. Fanelli

No. 33503

Hannah K. White

No. 34192

Oklahoma Attorney General's Office

Assistant Attorneys General

313 N.W. 21st Street

Oklahoma City, OK 73105

(405) 521-3921

App.17a

/s/ Carol Iski

District Attorney

McIntosh County District Attorney's Office

P.O. Box 127

Eufaula, Oklahoma 74432

**COURT OF CRIMINAL APPEALS,
STATE OF OKLAHOMA, ORDER REMANDING
FOR EVIDENTIARY HEARING
(AUGUST 21, 2020)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FLOYD JOSEPH BALL, JR.,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

No. C-2019-263

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**

Petitioner, Floyd Joseph Ball, Jr., entered a blind plea of guilty in McIntosh County District Court, Case No. CF-2018-89, to Count 1: Rape in the First Degree, in violation of 21 O.S.Supp.2017, § 1114(A)(5); and Count 2: Kidnapping, in violation of 21 O.S.Supp.2012, § 741. The Honorable Brendon Bridges, Associate Dis-

strict Judge, accepted Petitioner's plea and sentenced Petitioner to twenty-four years imprisonment on Count 1 and twenty years imprisonment on Count 2 with credit for time served. Judge Bridges ordered these sentences to run consecutively. Petitioner must serve 85% of his Count 1 sentence before becoming eligible for parole consideration. Petitioner's motion to withdraw his blind plea was denied and Petitioner now seeks a writ of certiorari.

In Proposition One, Petitioner claims the District Court lacked jurisdiction to accept his plea. Petitioner argues that he is a citizen of the Mississippi Choctaw Nation and the crimes occurred within the boundaries of the Creek Reservation.

Pursuant to *McGirt v. Oklahoma*, No. 18-9526 (U.S. July 9, 2020), Petitioner's claim raises two separate questions: (a) his Indian status and (b) whether the crimes occurred on the Creek Reservation. These issues require fact-finding. We therefore **REMAND** this case to the District Court of McIntosh 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 Petitioner's presentation of *prima facie* evidence as to the Petitioner's legal status as an 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 Petitioner's status as an Indian. The District Court must determine whether (1) Petitioner has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.¹

Second, whether the crimes occurred on the Creek 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 Petitioner, 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.

¹ See *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. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001).

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 McIntosh County: Petitioner's Brief in Chief, filed August 5, 2019. The present order renders **MOOT** any request made to date for supplemental briefing by either party in this case as well as any request to file an amicus brief.

IT IS SO ORDERED.

**WITNESS OUR HANDS AND THE SEAL OF
THIS COURT** this 21st 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