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

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DAVID DEVAL MARTIN,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2016-1030

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

OPINION

LUMPKIN, JUDGE:¹

¹ As stated in my separate writing in *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___, (Lumpkin, J., concurring in result), I am bound by my oath and adherence to the Federal-State relationship under the U.S. Constitution to apply the edict of the majority opinion in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). However, I continue to share the position of Chief Justice Roberts' dissent in *McGirt*, that at the time of Oklahoma Statehood in 1907, all

Appellant David Deval Martin was tried by jury and convicted of First Degree Murder (21 O.S. Supp. 2012, § 701.7), After Former Conviction of Two or More Felonies, in the District Court of McIntosh County, Case No. CF-2014-14. In accordance with the jury's recommendation the Honorable James D. Bland, District Judge, sentenced Appellant to life in prison without the possibility of parole. Appellant appeals from this conviction and sentence.

In Proposition I, Appellant claims the District Court lacked jurisdiction to try him. Appellant argues that he is a citizen of the Muscogee (Creek) Nation and the crime occurred within the boundaries of the Creek Nation.

Pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) Appellant'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 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 Appellant's presentation of *prima facie* evidence as to his legal status as an Indian and as to the location of the crime as Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction. The District Court was ordered to determine whether Appellant has some Indian blood and is recognized as an Indian by a tribe

parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed.

or the federal government. The District Court was also directed to determine whether the crime occurred in Indian Country. The District Court was directed to follow the analysis set out in *McGirt* to determine: (1) whether Congress established a reservation for the Creek Nation; and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. 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 fact and conclusions of law with this Court.

An evidentiary hearing was timely held before the Honorable Michael Hogan, District Judge, and an order entitled *Journal Entry of Facts and Conclusions of Law in Accordance with Order Remanding for Evidentiary Hearing* was timely filed with this Court. The record indicates that appearing before the District Court were attorneys from the office of the Attorney General of Oklahoma, the McIntosh County District Attorney's Office, and defense counsel.

In its Order, the District Court stated that Appellant and the State of Oklahoma stipulated: 1) the evidence would show that Appellant is "9/128 degree Indian blood of the Muscogee (Creek) Nation Tribe" and that he is an "enrolled member of the

Muscogee (Creek) Nation of Oklahoma on the dates of the charged offenses”; and 2) “the Muscogee (Creek) Nation of Oklahoma is an Indian Tribal Entity recognized by the federal government.” This was based on documentation from the Muscogee (Creek) Nation Citizenship Board and the Muscogee (Creek) Nation Realty Office. The District Court accepted the stipulations and concluded that Appellant “had some Indian blood” and is also “recognized as an Indian by a tribe and the federal government”. For these reasons, the court found Appellant “is an Indian under federal law.”

Regarding whether the crime occurred in Indian country, the Order states that the parties stipulated that “[the] charged crimes occurred within the Creek Reservation”. The court stated that it adopted the stipulation and found the crime occurred on the Creek Reservation.

Both Appellant and the State were given the opportunity to file response briefs addressing issues from the evidentiary hearing. Appellant did not file a response brief. The State filed a response brief acknowledging the District Court’s acceptance of the stipulations regarding Appellant’s status as an Indian and the location of the crime as occurring within the Muscogee (Creek) Reservation. The State argued that should this Court find Appellant is entitled to relief, this Court should stay any order reversing the conviction for thirty (30) days to allow the United States Attorney’s Office for the Eastern District of Oklahoma to secure custody of Appellant. *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 briefs of the parties, we find that under the law and the evidence

relief is warranted. Under the record before us, we find the District Court did not abuse its discretion and its findings are supported by the evidence presented at the evidentiary hearing. *See State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194. We find Appellant has met his burden of establishing his status as an Indian, having 9/128 degree Indian blood of the Muscogee (Creek) Nation Tribe and is an enrolled member of the Muscogee Creek Nation of Oklahoma on the dates of the charged offense and that the charged crime occurred within the Muscogee (Creek) Reservation. Pursuant to *McGirt*, we find Congress established a reservation for the Muscogee (Creek) Nation and has not taken steps to disestablish that reservation.

We therefore find that under *McGirt*, the State of Oklahoma did not have jurisdiction to prosecute Appellant in this matter.² The Judgments and Sentences in this case are hereby reversed and the case remanded to the District Court of McIntosh County with instructions to dismiss the case.³

² While Art. 7 of the Oklahoma Constitution vests the district courts of Oklahoma with “unlimited original jurisdiction of all justiciable matters,” the federal government has pre-empted the field as it relates to major crimes committed by or against Indians in Indian country.

³ This resolution renders the other seven (7) propositions of error raised in Appellant’s brief moot.

DECISION

The **JUDGMENTS and SENTENCES are 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.⁴

**AN APPEAL FROM THE DISTRICT COURT OF
McINTOSH COUNTY THE HONORABLE
MICHAEL HOGAN, DISTRICT JUDGE**

APPEARANCES IN DISTRICT COURT

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⁴ By withholding the issuance of the mandate for 20 days, the State's request for time to determine further prosecution is rendered moot.

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

**LEWIS, JUDGE,
CONCURRING IN RESULTS:**

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

HUDSON, J., SPECIALLY CONCURS:

Today's decision dismisses a conviction for first degree murder from the District Court of McIntosh 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* based on the Indian status of Appellant and the occurrence of the crimes on the Creek Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the murder in this case. Instead, Appellant must be prosecuted in federal court. 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 *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 Concur); and *Krafft v. State*, No. F-2018-340 (Okl. Cr., Feb. 25, 2021) (Hudson, J., Specially Concur) (unpublished).

**DISTRICT COURT OF McINTOSH COUNTY,
STATE OF OKLAHOMA, JOURNAL ENTRY OF
FACTS AND CONCLUSIONS OF LAW
(OCTOBER 1, 2020)**

IN THE DISTRICT COURT OF
McINTOSH COUNTY, STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

DAVID DEVAL MARTIN,

Defendant.

Case No. CF-2014-14

Court of Criminal Appeal Number F-2016-1030

Before: Michael HOGAN, 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 24th day of September, 2020, this case 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 did not appear, but

appeared through counsel, Katrina Conrad Ledger. 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, Joshua R. Fanelli.

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. Dior*, 679 F.3d 1183 (10th Cir. 2012) articulates the test for making such determination. As *Dias* states:

To End 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. Stare*, 1982 DK CR 48, 644 P.2d 114. Applied to the present matter, the parties jointly stipulate in writing the evidence will show "the Defendant, David Martin is 9/128-degree Indian blood of the Muscogee (Creek) Nation Tribe." *See Joint Exhibit I* (attached). In addition, "Defendant Martin was an enrolled member of the Muscogee Creek Nation of Oklahoma on the dates of the charged offenses." *Id.* Finally, "[t]he Muscogee (Creek) 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 the 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 1813 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 "Nile 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/ Michael Hogan
District Judge McIntosh County
State of Oklahoma

**COURT OF CRIMINAL APPEALS,
STATE OF OKLAHOMA, ORDER REMANDING
FOR EVIDENTIARY HEARING
(AUGUST 14, 2020)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DAVID DEVAL MARTIN,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

No. F-2016-1030

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

**ORDER REMANDING FOR
EVIDENTIARY HEARING**

Appellant David Deval Martin was tried by jury and convicted of First Degree Murder (21 O.S. Supp. 2012, § 701.7), After Former Conviction of Two or More Felonies, in the District Court of McIntosh County, Case No. CF-2014-14. In accordance with the jury's recommendation the Honorable James D. Bland,

District Judge, sentenced Appellant to life in prison without the possibility of parole. Appellant appeals from this conviction and sentence.

In Proposition I, Appellant claims the District Court lacked jurisdiction to try him. Appellant argues that he is a citizen of the Muscogee (Creek) Nation and the crime occurred within the boundaries of the Creek Nation.

Pursuant to the recent decision in *McGirt v. Oklahoma*, No. 18-9526 (U.S. July 9, 2020), Appellant's claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred in the Creek Nation. 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 Appellant's presentation of *prima facie* evidence as to the Appellant's legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

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

Court. The District Court shall address only the following issues.

First, the 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.¹

Second, whether the crime 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

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).

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: Appellant's Brief in Chief filed October 4, 2017; and Appellee's Response Brief, filed February 1, 2018.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 14th 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