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**OPINION OF THE COURT OF CRIMINAL  
APPEALS, STATE OF OKLAHOMA  
(JUNE 3, 2021)**

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IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

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FLOYD JOSEPH BALL, JR.,

*Appellant,*

v.

STATE OF OKLAHOMA,

*Appellee.*

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NOT FOR PUBLICATION

Case No. F-2020-54

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

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**OPINION**

**HUDSON, JUDGE:**

Appellant, Floyd Joseph Ball, Jr., was convicted at a jury trial for the crimes of Kidnapping (Count 1); Assault and Battery with a Dangerous Weapon (Count 2); Aggravated Assault and Battery (Count 3); and Disrupt/Prevent/Interrupt an Emergency Telephone

Call (Count 4), in the District Court of McClain County, Case No. CF-2018-157. The jury recommended sentences of twenty years imprisonment on Count 1, five years imprisonment on Count 2, five years imprisonment on Count 3, and one year in the county jail plus a \$3,000.00 fine on Count 4.

The Honorable Charles Gray, Associate District Judge, presided at trial and sentenced Appellant in accordance with the jury's verdicts. Judge Gray ordered the sentences for Counts 1-3 to run consecutively each to the other but concurrently with the Count 4 sentence.

Ball now appeals and raises nine propositions of error. In Proposition VIII, Appellant complains that trial counsel was ineffective for not objecting to the state court's jurisdiction in this case. Appellant claims that he is an Indian for purposes of federal law and that the crimes charged in this case occurred in Indian Country. Appellant also filed an Application to Supplement Record or for Evidentiary Hearing on Sixth Amendment Claims challenging defense counsel's effectiveness for failing to raise the jurisdictional claim set forth in Proposition VIII. *See McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

Pursuant to *McGirt*, Appellant's claim raises three separate questions: (a) his Indian status, (b) whether the crimes occurred in Indian Country; and (c) whether trial counsel was constitutionally ineffective for failing to challenge jurisdiction based on these factors. These issues require fact-finding. We therefore remanded this case to the District Court of McClain County for an evidentiary hearing on these issues.

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 in Indian Country, the burden shifts to the State to prove it has jurisdiction. The District Court was ordered to determine whether Appellant has some Indian blood and is recognized as an Indian by a tribe or the federal 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. Finally, we ordered the District Court to determine whether trial counsel was constitutionally ineffective for failing to raise this issue under the two-part standard for evaluating claims of ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

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.

The record before this Court shows the parties presented a written stipulation to the District Court concerning the above issues in lieu of an evidentiary

hearing. On March 26, 2021, Judge Gray entered a written order adopting the parties' stipulations and making written findings of fact and conclusions of law relating to the three questions in our remand order. The record indicates that attorneys from the Oklahoma Attorney General's Office, the McClain County District Attorney's Office and counsel for Appellant authored and signed the stipulation and presented it to the District Court.

In its written findings of fact and conclusions of law, the District Court found that Appellant is 1/8th degree Indian blood of the Mississippi Choctaw Tribe; that Appellant was an enrolled member of the Choctaw Nation of Oklahoma on the date of the charged crimes; that the Choctaw Nation of Oklahoma is recognized by the federal government; and that the charged crimes in this case occurred within the Chickasaw Reservation. The District Court concluded based on these findings that Appellant was an Indian and that the location of Appellant's crimes occurred in Indian country for purposes of criminal jurisdiction.

Concerning Appellant's claim that trial counsel was constitutionally ineffective for failing to raise this jurisdictional claim, the trial court found as follows: "The parties stipulate, and this court finds that it lacks jurisdiction of defendant Ball for which reason his ancillary claim of ineffective assistance of trial counsel for failing to raise the jurisdictional claim in the trial court is moot"

Although the agreed stipulation of the parties was not made part of the record on appeal transmitted to this Court, Appellant has attached it to his supplemental brief as Exhibit A. It is signed by counsel for

the parties and fully supports the District Court's written findings.

On April 26, 2021, both parties filed supplemental briefs with this Court after remand. Both parties acknowledge our recent decision in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286 recognizing the Chickasaw Nation's continuing existence. Both parties also cite and attach to their briefs our unpublished decision in *Floyd Joseph Ball v. State of Oklahoma*, No. C-2019-263, slip op. (Okl. Cr. Apr. 1, 2021), an appeal from McIntosh County, in which we acknowledged Appellant's Indian status in that case. 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 Appellant is entitled to relief based on the District Court's findings, this Court should stay any order reversing the convictions for twenty (20) days.

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 on remand. We therefore find Appellant 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 Appellant met his burden of proving the crimes in this case occurred on the Chickasaw Reservation and, thus, occurred in Indian Country. Pursuant to

*McGirt*, we find the State of Oklahoma did not have jurisdiction to prosecute Appellant in this matter.<sup>1</sup> The trial court did not abuse its discretion in concluding that this finding renders the ancillary claim of ineffective assistance of counsel moot. The Judgment and Sentence in this case is hereby reversed and the case remanded to the District Court of McClain County with instructions to dismiss the case.<sup>2</sup>

### DECISION

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.

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<sup>1</sup> 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. *E.g.*, *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286 (Hudson, J., Concur in Results); *Hogner v. State*, 2021 OK CR 4, \_\_\_ P.3d \_\_\_ (Hudson, J., Specially Concurs).

<sup>2</sup> This resolution renders the other eight propositions of error raised in Appellant's brief moot.

**AN APPEAL FROM  
THE DISTRICT COURT OF MCCLAIN  
COUNTY THE HONORABLE CHARLES GRAY  
ASSOCIATE DISTRICT JUDGE**

**APPEARANCES AT TRIAL**

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**Opinion by: Hudson, J.**

Kuehn, P.J.: Concur

Rowland, V.P.J.: Concur

Lumpkin, J.: Concur in Results

Lewis, J.: Concur in Results

**LUMPKIN, JUDGE,  
CONCURRING IN RESULT:**

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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.<sup>1</sup> 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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<sup>1</sup> 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.

**LEWIS, JUDGE, CONCUR IN RESULTS:**

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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 results in the decision to dismiss this case for the lack of state jurisdiction.

**ORDER OF THE DISTRICT COURT OF  
MCCLAIN COUNTY, STATE OF OKLAHOMA,  
APPROVING LITIGANTS' AGREED  
STIPULATIONS AND STRIKING  
EVIDENTIARY HEARING  
(MARCH 26, 2021)**

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IN THE DISTRICT COURT OF MCCLAIN  
COUNTY, STATE OF OKLAHOMA

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FLOYD JOSEPH BALL,

*Appellant,*

v.

THE STATE OF OKLAHOMA,

*Appellee.*

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McClain County Case No. CF-2018-157

OCCA No. F-2020-54

Before: Charles N. GRAY, Associate District Judge.

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**ORDER APPROVING LITIGANTS'  
AGREED STIPULATIONS AND STRIKING  
EVIDENTIARY HEARING**

**PURSUANT TO THE DIRECTIVE OF THE  
OKLAHOMA COURT OF CRIMINAL APPEALS**  
as filed February 26, 2021, and after reviewing the  
proposed Stipulations of counsel, this Court finds the  
same to be proper in all respects and hereby approves

the same. Said Stipulations hereby adopted and made Order of the Court.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** by the court, to wit:

1. Floyd Joseph Ball, Appellant, is 1/8-degree Indian blood of the Miss. Choctaw Tribe; Appellant was an enrolled member of the Choctaw Nation of Oklahoma at the time of the charged offenses; the Choctaw Nation of Oklahoma is an Indian Tribal Entity recognized by the federal government. Accordingly, Appellant is an “Indian” for purposes of criminal jurisdiction. *See Bosse v. State*, 2021 OK CR 3, ¶ 7, \_\_\_ P.3d \_\_\_.
2. The locations of the crimes charged in McClain County Case No. CF-2018-157 were within the boundaries of the Chickasaw Reservation, and thus in Indian Country. *See Bosse v. State*, 2021 OK CR 3, ¶ 12, \_\_\_ P.3d \_\_\_.
3. The parties stipulate, and this court finds that it lacks jurisdiction of defendant Ball for which reason his ancillary claim of ineffective assistance of trial counsel for failing to raise the jurisdictional claim in the trial court is moot.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** by the court that the Evidentiary Hearing scheduled for the 1st day of April, 2021 at 10:00 a.m. is hereby stricken.

App.15a

Dated this 26th day of March, 2021.

/s/ Charles N. Gray  
Associate District Judge  
Twenty-First Judicial District,  
McClain County  
State of Oklahoma



**ORDER OF THE COURT OF CRIMINAL  
APPEALS, STATE OF OKLAHOMA,  
REMANDING MATTER FOR  
EVIDENTIARY HEARING  
(FEBRUARY 26, 2021)**

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IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

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FLOYD JOSEPH BALL,

*Appellant,*

v.

STATE OF OKLAHOMA,

*Appellee.*

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NOT FOR PUBLICATION

Case No. F-2020-54

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

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**ORDER GRANTING APPELLANT'S REQUEST  
TO REMAND FOR EVIDENTIARY HEARING;  
DENYING APPELLANT'S MOTION FOR  
SUPPLEMENTATION OF THE RECORD;  
REMANDING MATTER FOR EVIDENTIARY  
HEARING; AND GRANTING STATE'S MOTION  
TO STAY BRIEFING SCHEDULE PENDING  
OUTCOME OF EVIDENTIARY HEARING**

Appellant filed his brief in chief on August 13, 2020, appealing his convictions for Kidnapping, Assault and Battery with a Dangerous Weapon, Aggravated Assault and Battery and Disrupt/Prevent/Interrupt an Emergency Telephone Call, in the District Court of McClain County, Case No. CF-2018-157. In Proposition VIII, Appellant complains that trial counsel was ineffective for not objecting to the state court's jurisdiction in this case. Appellant claims that he is an Indian for purposes of federal law and that the crimes charged in this case occurred in Indian Country. Appellant also filed, on that same day, an Application to Supplement Record or for Evidentiary Hearing on Sixth Amendment Claims, challenging defense counsel's effectiveness for failing to raise the jurisdictional claim set forth in Proposition VIII. *See McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Appellant requests this Court remand the matter for an evidentiary hearing to supplement the record concerning his ineffective assistance of counsel claim.

On December 9, 2020, the State of Oklahoma, by and through Assistant Attorney General Theodore M. Peeper, filed a motion to stay briefing schedule. The State's response brief was due December 11, 2020. Appellant's motion asks the Court's permission to supplement the record on appeal with his Choctaw

Nation tribal membership card and U.S. Bureau of Indian Affairs certificate both showing his degree of Indian blood (1/8 Indian blood). In its Motion, the State does not dispute that Appellant is an enrolled member of the Choctaw Nation, a federally recognized tribe, with a blood quantum of 1/8; that he was an enrolled member at the time the crimes in this case were committed; and that the crimes occurred within the historic boundaries of the Chickasaw Nation. The State tells us that, because there are no facts in dispute, there is no need for an evidentiary hearing to resolve factual issues.

On December 21, 2020, Appellant filed an objection to the State's request to stay briefing. Appellant argues the State's failure to file a timely response brief in this case resulted in his various claims being deemed confessed and, thus, reversal is warranted for this reason.

To resolve Appellant's claim that trial counsel was ineffective for failing to raise a jurisdictional challenge based on *McGirt*, we must determine whether Appellant is an Indian who committed a major crime on an Indian reservation. Because this claim may be dispositive of this appeal, the State requests briefing in this matter be stayed pending this Court's ruling on Appellant's motion to supplement and his request for an evidentiary hearing.

**IT IS THEREFORE THE ORDER OF THIS COURT** that Appellant's Application for Evidentiary Hearing on Sixth Amendment Claims is **GRANTED**. Because the parties will have the opportunity to present evidence or stipulations for the District Court's consideration on remand, which will become part of the appellate record, Appellant's Motion to Supplement

the Record is **DENIED**. Appellant's objection to the State's request to stay briefing and his motion for the propositions of error in his brief in chief to be deemed confessed are likewise **DENIED**. The State's Motion to Stay Briefing Schedule is **GRANTED** pending the outcome of the evidentiary hearing.

Pursuant to *McGirt*, Appellant's claim raises three separate questions: (a) his Indian status, (b) whether the crimes occurred in Indian Country; and (c) whether trial counsel was constitutionally ineffective for failing to challenge jurisdiction based on these factors. These issues require fact-finding. We therefore **REMAND** this case to the District Court of McClain 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 fade* 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.<sup>1</sup>

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 Chickasaw 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.

Third, whether trial counsel was constitutionally ineffective for failing to raise this issue. In resolving this issue, the trial court shall apply the two-part standard for evaluating claims of ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

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

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<sup>1</sup> 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).

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 McClain County: Appellant's Brief in Chief, filed August 13, 2020.

**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 26th day of February, 2021.

App.22a

/s/ Dana Kuehn  
Presiding Judge

/s/ Scott Rowland  
Vice Presiding Judge

/s/ Gary L. Lumpkin  
Judge

/s/ David B. Lewis  
Judge

/s/ Robert L. Hudson  
Judge

ATTEST:

/s/ John D. Hadden  
Clerk