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**OPINION OF THE COURT OF CRIMINAL
APPEALS, STATE OF OKLAHOMA
(AUGUST 5, 2021)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

CHANDLER KYLE NED,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

Case No. C-2020-789

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

OPINION

ROWLAND, PRESIDING JUDGE:

Chandler Kyle Ned entered a guilty plea to Second Degree Burglary and two misdemeanor drug counts in the District Court of Johnston County, Case Nos. CF-2020-23 and CM-2020-45. Pursuant to the plea agreement, Ned entered drug court. The plea agreement provided that, upon successful completion of

drug court, the district court would sentence Ned to five years probation on the burglary count and one year probation on each of the drug counts, with all counts running concurrently. Failure to complete drug court would result in the district court's imposition of five years imprisonment to serve on the burglary count and one year to serve on each of the drug counts, with all sentences running concurrently. The district court terminated Ned from drug court after he failed to go to treatment and the court imposed the negotiated sentence. Ned filed a pro se motion to withdraw his plea which the district court denied. Ned appeals the denial of this motion, raising five issues.

We find relief is required on Ned's jurisdictional challenge in Proposition 1, rendering his other claims moot. He claims the State of Oklahoma did not have jurisdiction to prosecute and punish him because he is Indian and the crimes occurred in Indian Country. *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020).

On April 23, 2021, this Court remanded this case to the District Court of Johnston County for an evidentiary hearing. We directed the district court to make findings of fact and conclusions of law on two issues: (a) Ned's status as an Indian; and, (b) whether the crime occurred within the boundaries of the Chickasaw Reservation. Our order provided that if the parties agreed as to what the evidence would show with regard to the questions presented, the parties could enter into a written stipulation setting forth those facts, and no hearing would be necessary.

The Honorable Wallace Coppedge set the hearing on remand for June 14, 2021. On June 1, 2021, the

parties filed “Agreed Stipulations and Joint Motion to Strike Evidentiary Hearing” in which they agreed: (1) that Ned has some Indian blood; (2) that he was a recognized member of the Choctaw Nation on the date of the charged offenses; (3) that the Choctaw Nation is a federally recognized tribe; (4) that Ned is an Indian for purposes of federal criminal jurisdiction; and (5) that the charged crimes occurred within the historical boundaries of the Chickasaw Reservation.

The district court accepted the parties’ stipulations and, on June 11, 2021, issued its written Order striking the evidentiary hearing. That Order contained the district court’s findings and conclusions. The district court found the facts recited above in accordance with the stipulations. The district court concluded that Ned is an Indian under federal law and that the charged crimes occurred within the boundaries of the Chickasaw Reservation.¹ The district court’s findings and conclusions are supported by the record.² The ruling in *McGirt* governs this case and requires us to find the District Court of Johnston County did not have jurisdiction to prosecute Ned. Accordingly, we grant relief based on the jurisdictional defect raised in Proposition 1.

¹ In *Bosse v. State*, 2021 OK CR 3, ¶¶ 12 & 29, 484 P.3d 286, 291 & 295, the Court held that Congress established a reservation for the Chickasaw Nation and that it remains in existence because Congress has not disestablished it. Hence, the Chickasaw Nation Reservation is Indian country.

² The State filed a brief in the district court and one in this Court after the conclusion of the remand proceedings to preserve its argument that the holdings in *McGirt* and *Bosse* are in error and that the crimes in this case were not committed in Indian Country.

DECISION

The Judgment and Sentence of the district court is **VACATED** and the matter is **REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), the **MANDATE** is **ORDERED** to issue in twenty (20) days from the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT
OF JOHNSTON COUNTY THE HONORABLE
WALLACE COPPEDGE, DISTRICT JUDGE**

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Opinion by: Rowland, P.J.

Hudson, V.P.J.: Specially Concur

Lumpkin, J.: Concur in Results

Lewis, J.: Concur

HUDSON, JUDGE, SPECIALLY CONCURRING:

Today's decision applies *McGirt v. Oklahoma*, 140 U.S. 2452 (2020) to the facts of this case and dismisses a second degree burglary conviction and two misdemeanor drug counts from the District Court of Johnston County. I fully concur in the majority's opinion based on the stipulations below concerning Appellant's Indian status and the location of these crimes within the historic boundaries of the Chickasaw Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant. 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*, 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); and *Krafft v. State*, No. F-2018-340 (Okl. Cr., Feb. 25, 2021) (Hudson, J., Specially Concurs) (unpublished).

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

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).

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.

**DISTRICT COURT OF JOHNSTON COUNTY,
STATE OF OKLAHOMA,
ORDER ACCEPTING STIPULATIONS
(JUNE 11, 2021)**

IN THE DISTRICT COURT OF JOHNSTON
COUNTY, STATE OF OKLAHOMA

CHANDLER KYLE NED,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

OCCA Case No. F-2020-789

Johnston County: CF-20-23/CM-20-45

Before: Wallace COPPEDGE, District Judge.

ORDER STRIKING HEARING

All relevant parties and counsel have entered into an agreed stipulation as to the issues to be determined at the evidentiary hearing ordered by the Oklahoma Court of Criminal Appeals (hereinafter "OCCA"). This Court accepts the stipulation and therefore finds as follows:

1. Chandler Kyle Ned, Petitioner, born November 29, 1988, is 33/128 degree of Indian blood of the Choctaw/Miss. Choctaw Tribe; appel-

lant 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, Hogner v. State*, 2021 OK CR 4 ¶ 8, P.3d;

2. The locations of the charged crimes were within the historical boundaries of the Chickasaw Nation as set forth in the 1855 and 1866 treaties between the Chickasaw Nation, the Choctaw Nation, and the United States. *See, Remand Order* pp. 3-4.

Accordingly, the evidentiary hearing set for June 14, 2021, at 9:00 a.m. is stricken. The Court Clerk is ordered to send this Order to the OCCA and all parties and counsel.

It is so ordered this 3rd day of June, 2021.

/s/ Wallace Coppedge
District Judge

**ORDER OF THE COURT OF CRIMINAL
APPEALS, STATE OF OKLAHOMA,
REMANDING FOR EVIDENTIARY HEARING
(APRIL 23, 2021)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

CHANDLER KYLE NED,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

Case No. C-2020-789

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

**ORDER REMANDING
FOR EVIDENTIARY HEARING**

Before the Court is Chandler Kyle Ned's certiorari appeal and application to supplement appeal record or alternatively motion for evidentiary hearing on Sixth Amendment claims. He entered a guilty plea to Second Degree Burglary and two misdemeanor drug counts in the District Court of Johnston County,

Case Nos. CF-2020-23 and CM-2020-45. Pursuant to the plea agreement, Ned entered drug court. The plea agreement provided that, upon successful completion of drug court, the District Court would sentence Ned to five years probation on the burglary count and one year probation on each of the drug counts, with all counts running concurrently. Failure to complete drug court would result in the District Court's imposition of five years imprisonment to serve on the burglary count and one year to serve on each of the drug counts, with all sentences running concurrently. The District Court terminated Ned from drug court after he failed to go to treatment and imposed the negotiated sentence. Ned filed a pro se motion to withdraw his plea which the District Court denied and he appeals.

Ned now claims that the District Court lacked jurisdiction to accept his plea and sentence him based on *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020) and *Sharp v. Murphy*, 591 U.S. ___, 140 S. Ct. 2412 (2020). Ned argues that he is a citizen of the Choctaw Nation and that the crime occurred within the boundaries of the Chickasaw Nation Reservation.

Ned's claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Johnston 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 Ned'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 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, Ned's status as an Indian. The District Court must determine whether (1) Ned has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.¹

Second, whether the crime occurred in Indian Country. In *Bosse v. State*, 2021 OK CR 3, ¶¶ 9-12, ___ P.3d ___, we held that Congress established a reservation for the Chickasaw Nation and that Congress had not erased those boundaries and disestablished the reservation. Hence, the Chickasaw Nation Reservation remains intact and is Indian country for purposes of federal criminal law. *Id.*, 2021 OK CR 3, ¶ 29. The District Court must decide whether the crimes in this case occurred on the Chickasaw Nation Reservation.

¹ I See *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001). See generally *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

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 Ned, 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 Johnston County: Ned's Certiorari Brief filed March 24, 2021 and his Application to Supplement Appeal Record or, in the Alternative, Remand for Evidentiary Hearing on Sixth Amendment Claims filed March 22, 2021.

IT IS SO ORDERED.

**WITNESS OUR HANDS AND THE SEAL OF
THIS COURT** this 23rd day of April, 2021.

/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

**SUPPLEMENTAL BRIEF OF RESPONDENT
STATE OF OKLAHOMA AFTER REMAND
(JULY 2, 2021)**

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

CHANDLER KYLE NED,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

No. C-2020-789

**SUPPLEMENTAL BRIEF OF
RESPONDENT AFTER REMAND**

On February 23, 2020, Chandler Kyle Ned, hereinafter referred to as the defendant, was charged with one count of Burglary in the First Degree, in violation of 21 O.S.2011, § 1431, in District Court of Johnston County Case No. CF-2020-23 (O.R. I, 1-4).¹

¹ Citations to the Original Record in District Court of Johnston County Case No. CF-2020-23 will be referred to as (O.R. I, ____). Citations to the Original Record in District Court of Johnston County Case No. CM-2020-45 will be referred to as (O.R. II, ____). Citations to the transcript of the Motion to Terminate from Drug Court hearing held on August 31, 2020, will be referred to as (Term. Tr. ____). Citations to the transcript of the

On that same day, the defendant was charged with one count of Possession of Controlled Dangerous Substance—Methamphetamine (Count I), and one count of Possession of CDS—Marijuana (Count II), each in violation of 63 O.S.Supp.2017, § 2-402, in District Court of Johnston County Case No. CM-2020-45 (O.R. II, I). On April 30, 2020, the defendant entered a plea of guilty in Case No. CF-2020-23 to the amended charge of Burglary in the Second Degree, in violation of 21 O.S.Supp.2018, § 1435, and a plea of guilty to both misdemeanor possession counts in Case No. CM-2020-45 (O.R. I, 19, 20-31; O.R. II, 2Q, 21-32).

As part of the defendant's plea agreement, the defendant was admitted to the Johnston County Drug Court Program. The defendant agreed that if he successfully completed the requirements of the drug court program, he would receive a five (5) year suspended sentence on the felony charge in Case No. CF-2020-23, and a one (1) year suspended sentence on each misdemeanor count in Case No. CM-2020-45 (O.R. I, 19, 23, 27; O.R. II, 20, 24, 28). However, if the defendant did not complete the program successfully, he agreed that he would serve five (5) years imprisonment on his felony charge in Case No. CF-2020-23, and

Sentencing from Drug Court Termination hearing held on October 1, 2020, will be referred to as (Sent. Tr. ____). Citations to the transcript of the Motion to Withdraw Plea of Guilty hearing held on October 15, 2020, will be referred to as (Withdraw Tr. ____). Citations to the Supplemental Original Record in Johnston County Case No. CF-202023, filed in this Court on June 14, 2021, will be referred to as (Supp. O.R. I, ____). Citations to the Supplemental Original Record in Johnston County Case No. CM-2020-45, filed in this Court on June 14, 2021, will be referred to as (Supp. O.R. II, ____).

one (1) year in county jail on each misdemeanor count in Case No. CM-2020-45 (O.R. I, 19, 23, 27; O.R. II, 20, 24, 28).

On June 16, 2020, the State filed in Case No. CF-2020-23 a Motion to Terminate from Drug Court Program, alleging that the defendant “has not complied with the Drug Court Program Rules”; a formal annotation of the defendant’s drug court history, including his violations in the program, was filed on that same day (O.R. I, 36, 37). The defendant was subsequently accepted into the residential recovery H.O.W. Foundation Recovery Center on August 12, 2020, and was ordered to be transported there by his mother (O.R. I, 45, 47; O.R. II, 41, 43). The defendant never arrived, however, and on August 13, 2020, the defendant instead phoned the H.O.W. Foundation to let them know that he did not want to enter the recovery program (O.R. I, 49; O.R. II, 45). On August 14, 2020, a bench warrant was issued for the defendant’s arrest (O.R. I, 50; O.R. II, 46).

The parties convened on the State’s Motion to Terminate from Drug Court on August 31, 2020, and the defendant stipulated to the State’s termination motion (O.R. I, 56-57; O.R. II, 51-52; Term. Tr. 3-4). At the sentencing proceeding on October 1, 2020, the Honorable Wallace Coppedge, District Judge, imposed the sentences previously agreed upon in both cases, with each count to run concurrently and with credit for time served (O.R. I, 75; O.R. II, 53; Sent. Tr. 3-4).

Prior to sentencing, on September 24, 2020, the defendant filed a *pro se* Motion to Withdraw Plea of Guilt (O.R. I, 58). The State filed a Response to the defendant’s motion on October 1, 2020 (O.R. I, 60-62). On October 15, 2020, the parties appeared for the

hearing on the defendant's Motion to Withdraw Plea of Guilt, and after hearing testimony from the defendant, the trial court denied the defendant's request to withdraw his pleas, finding the defendant had entered his pleas knowingly and voluntarily (O.R. I, 82; O.R. II, 55; Withdraw Tr. 2-6). A formal Judgment and Sentence was imposed in each case on October 26, 2020 (O.R. I, 83-84; O.R. II, 56-57).² Subsequently, on December 8, 2020, the defendant filed in Case No. CF-2020-23 a "Motion of Evidentiary Hearing," suggesting that he was an "Indian" and that the crime occurred "in Indian Country" (O.R. I, 97). No action on that motion was taken by the district court.

During the pendency of this case, on July 9, 2020, the United States Supreme Court decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), holding that, for purposes of the Major Crimes Act (18 U.S.C. § 1153), the Muscogee (Creek) Nation's reservation had not been disestablished by Congress. On that same day, and for the reasons stated in *McGirt*, the Supreme Court also affirmed the Tenth Circuit's decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). See *Sharp v. Murphy*, 140 S. Ct. 2412 (2020).

On March 24, 2021, the defendant filed his Brief in Chief in this Court, raising five (5) propositions of error. In Proposition 1, the defendant claimed the State lacked jurisdiction to prosecute him for the crimes in this case, because he is an "Indian," and his crimes occurred in "Indian Country" (Petitioner's

² The defendant's Judgment and Sentence in Case No. CF-2020-23 incorrectly lists the defendant's crime as Burglary in the First Degree, rather than his amended charge of Burglary in the Second Degree (O.R. I, 83).

Brief at 4-8). Specifically, the defendant claimed that he is and was an enrolled member of the Choctaw Nation with some degree of Indian Blood, and that his crimes occurred within the historical boundaries of the Chickasaw Nation. The defendant raised a correlative ineffective assistance of counsel claim in Proposition IV of his Brief in Chief, challenging trial counsel's failure to properly preserve an Indian Country claim in the proceedings below (Petitioner's Brief at 14-18).

In support, the defendant filed in this Court an Application to Supplement Appeal Record or, in the Alternative, Remand for Evidentiary Hearing on Sixth Amendment Claim (hereinafter "3.11 Application"), pursuant to this Court's Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). In that 3.11 Application, the defendant attached a series of maps of the historical boundaries of Indian Country, as well as a copy of a Certificate Degree of Indian Blood ("CDIB") Card showing the defendant is 33/128 degree Choctaw/Mississippi Choctaw and is a member by blood of the Choctaw Nation of Oklahoma (3.11 Application, Exs. A-D). The defendant also attached a letter from the Choctaw Nation Tribal Membership Department showing he has a CDIB and has been a member of the Choctaw Nation of Oklahoma (Membership #CN200459) since May 10, 2007 (3.11 Application, Ex. E).

On April 23, 2021, this Court entered an Order Remanding for Evidentiary Hearing. In that Order, this Court directed the district court to hold a hearing within sixty (60) days to determine "Ned's status as an Indian," and "whether the crimes in this case occurred on the Chickasaw Nation Reservation" (Supp. O.R. I, 11-12; Supp. O.R. II, 8-9). This Court authorized the

parties to “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 which event a hearing would be unnecessary (Supp. O.R. I, 12-13; Supp. O.R. II, 9-10).

On May 4, 2021, the district court set the evidentiary hearing on remand for June 14, 2021, at 9:00 a.m. (Supp. O.R. I, 15-16). In the meantime, however, the parties filed a document titled “Agreed Stipulations and Joint Motion to Strike Evidentiary Hearing” on June 1, 2021 (Supp. O.R. I, 17-18; Supp. O.R. II, 12-13). In that document, the parties stipulated to the questions presented by this Court in its Order Remanding and requested that the district court strike the hearing set for June 14, 2021 (Supp. O.R. I, 17-18; Supp. O.R. II, 12-13). The parties sought to resolve this Court’s questions via stipulations in an effort to conserve judicial resources and streamline the hearing process. *See Hogner v. State*, 2021 OK CR 4, ¶¶ 2-3, P.3d ___, ___ (Kuehn, P.J., concurring in result) (commending the parties for reaching factual stipulations ahead of the remanded evidentiary hearing, in the interest of “conserving judicial resources and entering into the spirit of our Order”).

Furthermore, in that stipulation, the parties agreed that the defendant “is 33/128 degree Indian blood of the Choctaw/Miss. Choctaw Tribe,” that the defendant “was an enrolled member of the Choctaw Nation of Oklahoma at the time of the charged offenses,” that “the Choctaw Nation of Oklahoma is an Indian Tribal Entity recognized by the federal government,” and that, accordingly, the defendant “is an ‘Indian’ for purposes of criminal jurisdiction” (Supp.

O.R. I, 18; Supp. O.R. II, 13). The parties also agreed that “[Me locations of the charged crimes were within the historical boundaries of the Chickasaw Nation as set forth in the 1855 and 1866 treaties between the Chickasaw Nation, the Choctaw Nation, and the United States” (Supp. O.R. I, 18; Supp. O.R. II, 13). In that agreed stipulation, the defendant was represented by Chad Johnson with the Oklahoma Indigent Defense System (OIDS). The State of Oklahoma was represented by Joshua R. Fanelli, Assistant Attorney General, as well as Fern Smith, Johnston County Assistant District Attorney (Supp. O.R. I, 18; Supp. O.R. II, 13).

On June 7, 2021, the State, by and through the undersigned, filed in the district court a document titled “State’s Brief Preserving Challenge to *McGirt*” (Supp. O.R. I, 19-23; Supp. O.R. II, 14-18). After reciting the procedural history of the case on appeal and correlative remand, the undersigned made the following argument to the district court, for preservation purposes:

The State argued in the *McGirt* litigation that the Muscogee (Creek) Nation did not have a reservation. The State recognizes that this Court, as well as the other state district courts and the OCCA, are all bound by *McGirt*, and that the OCCA has also recently applied *McGirt* to hold that the Chickasaw Nation has a reservation. See *Bosse v. Oklahoma*, ___U.S. ___, 137 S. Ct. 1, 2 (2016) (only the Supreme Court can overrule itself); *Bosse*, 2021 OK CR 3, ¶¶ 12, 29, 484 P.3d at 291, 295 (adopting the district court’s conclusion that the Chickasaw

Nation has a reservation that has not been disestablished by Congress). However, the State strenuously disagrees with the holdings in *McGirt* and *Bosse*, and preserves the right to ask the Supreme Court to review those holdings. As explained by Chief Justice Roberts in his *McGirt* dissent, Congress disestablished any reservations created for the Muscogee (Creek), Choctaw, Cherokee, Chickasaw, and Seminole Nations. See *McGirt*, 140 S. Ct. at 2482-2500 (Roberts, C.J., dissenting). *McGirt* is inconsistent with the Supreme Court's cases that do not require the use of any particular words to disestablish a reservation. *Id.* at 2486-89 (Roberts, C.J., dissenting). For preservation purposes, the State notes that the crimes in this case were not committed within Indian Country as defined by 18 U.S.C. § 1151(a).

The State acknowledges that this matter is before this Court for the limited purpose of a remand, and the narrow questions of Indian status and the location of the crimes are the only issues before this Court. The State still agrees that the matter can be resolved by stipulation, without the need for an evidentiary hearing, but nonetheless respectfully asks this Court for the right to preserve a challenge to *McGirt's* holding, should the State wish to pursue that argument in future proceedings, including on appeal.

(Supp. O R. I, 21-22; Supp. O.R. II, 16-17) (paragraph numbering omitted).³

On June 11, 2021, the Honorable Wallace Coppege, District Judge for Judicial District 20, entered an “Order Striking Nearing” (hereinafter “Order Striking”). The district court recognized that relevant parties and counsel have entered into an agreed stipulation as to the issues to be determined at the evidentiary hearing ordered by the Oklahoma Court of Criminal Appeals,” and in so doing, the district court accepted the stipulations submitted (Supp. O.R. I, 24; Supp. O.R. H, 19). The district court incorporated and block-quoted the stipulations submitted by the parties, announcing the following:

1. Chandler Kyle Ned, Petitioner, born November 29, 1988, is 33/128 degree of Indian blood of the Choctaw/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, Hogner v. State*, 2021 OK CR 4 ¶ 18, P.3d; [sic]
2. The locations of the charged crimes were within the historical boundaries of the Chickasaw Nation as set forth in the 1855 and 1866 treaties between the Chickasaw Nation,

³ The State hereby reaffirms and again advances that same argument here, in the instant brief, for purposes of preservation.

the Choctaw Nation, and the United States.
See, Remand Order pp. 3-4.

(Supp. O.R. I, 24; Supp. O.R. II, 19) (citations and grammatical structure in original). Further, the district court announced that the evidentiary hearing set for June 14, 2021, at 9:00 a.m. was to be stricken from the docket (Supp. O.R. I, 24; Supp. O.R. II, 19). A copy of the district court's Order Striking (subsumed within each Supplemental Original Record) was subsequently filed in this Court on June 14, 2021 (Supp. O.R. I, 24; Supp. O.R. II, 19).

Should this Court find the defendant is entitled to relief based on the district court's Order Striking issued on June 11, 2021, the State respectfully asks this Court to stay the mandate for twenty (20) days. *See Bosse v. State*, 2021 OK CR 3, ¶ 30, 484 P.3d 286, 295 (vacating the appellant's Judgment and Sentence and remanding the matter to the district court with instructions to dismiss based on an application of *McGirt*, but nonetheless staying issuance of the mandate for twenty (20) days from the delivery and filing of the decision); Rule 3.15(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

App.27a

Respectfully submitted,

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**STATE OF OKLAHOMA BRIEF
PRESERVING CHALLENGE TO *MCGIRT*
(JUNE 7, 2021)**

IN THE DISTRICT COURT OF JOHNSTON
COUNTY STATE OF OKLAHOMA

CHANDLER KYLE NED,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

Oklahoma Court of Criminal No. C-2020-789
District Court of Johnston County Case Nos.
CF-2020-23, CM-2020-45

**STATE'S BRIEF PRESERVING
CHALLENGE TO *MCGIRT***

Comes now Respondent, the State of Oklahoma, by and through Dawn Cash, Acting Attorney General of the State of Oklahoma, as well as Joshua R. Fanelli, Assistant Attorney General, and hereby shows this Court the following:

1. Chandler Kyle Ned, hereinafter referred to as Petitioner, entered a plea of guilty to Burglary in the Second Degree, in violation of 21 O.S.Supp.2018, § 1435, in District Court of Johnston County Case

No. CF-2020-23, and a plea of guilty to one count of Possession of Controlled Dangerous Substance (CDS)—Methamphetamine and one count of Possession of CDS—Marijuana, each in violation of 63 O.S. Supp. 2017, § 2-402, in District Court of Johnston County Case No. CM-2020-45. Petitioner pled into drug court but was subsequently terminated by this Court after he failed to attend treatment, and this Court imposed the negotiated sentence. Petitioner filed a *pro se* motion to withdraw his plea, which was denied, and Petitioner then perfected an appeal to the Oklahoma Court of Criminal Appeals (hereinafter “OCCA” in Case No. C-2020-789).

2. On April 23, 2021, the OCCA entered an Order Remanding for Evidentiary Hearing, based on Petitioner’s appellate claim that he is a citizen of the Choctaw Nation and that his crimes allegedly occurred within the historical boundaries of the Chickasaw Nation. The OCCA directed this Court, upon remand, to hold an evidentiary hearing within sixty (60) days of the date of that Order, and to consider “Ned’s status as an Indian,” as well as “whether the crime occurred in Indian Country” (Order Remanding, at 2-3). On the latter question, the OCCA directed this Court to consider “whether the crimes in this case occurred on the Chickasaw Nation Reservation,” in light of the OCCA’s recent published decision in *Bosse v. State*, 2021 OK CR 3, ¶ 29, 484 P.3d 286, 295, which held that Congress had not erased or disestablished the historical boundaries of the Chickasaw Nation for purposes of federal criminal law (Order Remanding, at 4). The OCCA permitted the parties to enter a written stipulation “setting forth those facts upon which they agree and which answer the

questions presented,” in which case no hearing would be necessary (Order Remanding, at 4-5).

3. In the spirit of cooperation and for purposes of judicial economy, the parties drafted written stipulations setting forth the following:

Chandler Kyle *Ned*, Petitioner, born November 29, 1988, is 33/128 degree Indian blood of the Choctaw/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 Hogner v. State*, 2021 OK CR 4, ¶ 18, ___P.3d ___.

The locations of the charged crimes were within the historical boundaries of the Chickasaw Nation as set forth in the 1855 and 1866 treaties between the Chickasaw Nation, the Choctaw Nation, and the United States. *See Remand Order* pp. 3-4.

(Agreed Stip., at 2). That stipulation was filed in this Court on June 1, 2021. Petitioner Was represented by Chad Johnson with the Oklahoma Indigent Defense System. The State was represented by Joshua R. Fanelli, Assistant Attorney General, as well as Fern Smith, Assistant District Attorney for District 20. The parties moved this Court to strike the evidentiary hearing set for June 14, 2021, and rule based on the stipulations submitted. *See Hogner v. State*, 2021 OK CR 4, ¶¶ 2-3, ___ P.3d ___, ___ (Kuehn, P.J., concurring in result) (commending the parties for reaching factual

stipulations ahead of the remanded evidentiary hearing, in the interest of “conserving judicial resources and entering into the spirit of our Order”).

4. The State argued in the *McGirt* litigation that the Muscogee (Creek) Nation did not have a reservation. The State recognizes that this Court, as well as the other state district courts and the OCCA, are all bound by *McGirt*, and that the OCCA has also recently applied *McGirt* to hold that the Chickasaw Nation has a reservation. *See Bosse v. Oklahoma*, ___ U.S. ___, 137 S. Ct. 1, 2 (2016) (only the Supreme Court can overrule itself); *Bosse*, 2021 OK CR 3, ¶¶ 12, 29, 484 P.3d at 291, 295 (adopting the district court’s conclusion that the Chickasaw Nation has a reservation that has not been disestablished by Congress). However, the State strenuously disagrees with the holdings in *McGirt* and *Bosse*, and preserves the right to ask the Supreme Court to review those holdings. As explained by Chief Justice Roberts in his *McGirt* dissent, Congress disestablished any reservations created for the Muscogee (Creek), Choctaw, Cherokee, Chickasaw, and Seminole Nations. *See McGirt*, 140 S. Ct. at 2482-2500 (Roberts, C.J., dissenting). *McGirt* is inconsistent with the Supreme Court’s cases that do not require the use of any particular words to disestablish a reservation. *Id.* at 2486-89 (Roberts, C.J., dissenting). For preservation purposes, the State notes that the crimes in this case were not committed within Indian Country as defined by 18 U.S.C. § 1151(a).

5. The State acknowledges that this matter is before this Court for the limited purpose of a remand, and the narrow questions of Indian status and the location of the crimes are the only issues before this

Court. The State still agrees that the matter can be resolved by stipulation, without the need for an evidentiary hearing, but nonetheless respectfully asks this Court for the right to preserve a challenge to *McGirt's* holding, should the State wish to pursue that argument in future proceedings, including on appeal.

Wherefore, for the reasons given above, the State respectfully prays this Court permit the State to preserve a later challenge to McGirt's reasoning, notwithstanding the stipulation and joint motion to strike already filed in this Court. This brief is submitted in good faith and not for the purpose of delay.

Respectfully submitted,

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