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

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IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

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DAMEON LAMAR LEATHERS,

*Appellant,*

v.

THE STATE OF OKLAHOMA,

*Appellee.*

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NOT FOR PUBLICATION

Case No. F-2019-962

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

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**OPINION**

**ROWLAND, PRESIDING JUDGE:**

Dameon Lamar Leathers was tried by jury in the District Court of Tulsa County, Case No. CF-2018-1340, and convicted of First Degree Murder, in violation of 21 O.S.Supp.2012, § 701.7(A), and Robbery with a Firearm, in violation of 21 O.S.2011, § 801. In accordance with the jury's recommendation, the Honor-

able Dawn Moody sentenced Leathers to life imprisonment without the possibility of parole on the first degree murder conviction and forty-five years imprisonment for robbery with a firearm.

Leathers appeals his Judgment and Sentence raising the following issues:

- (1) whether the State of Oklahoma lacked jurisdiction to prosecute him;
- (2) whether the evidence was sufficient to prove all elements of first degree murder and robbery with a firearm beyond a reasonable doubt;
- (3) whether the trial court abused its discretion in allowing the same jury that witnessed his post-guilty verdict conduct determine his sentence;
- (4) whether prosecutorial misconduct denied him a fair trial;
- (5) whether he received ineffective assistance of counsel; and
- (6) whether cumulative error denied him a fair trial.

Because we find relief is required on Leathers' jurisdictional challenge in Proposition 1, his other claims are moot. Leathers claims the State of Oklahoma did not have jurisdiction to prosecute him relying upon 18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 591 U.S. \_\_\_, 140 S. Ct. 2452 (2020).

Leathers filed his brief in chief on September 14, 2020. On this same date, Leathers also filed a motion requesting to supplement the record and remand for

an evidentiary hearing, challenging the State's jurisdiction. Leathers claimed that he is an enrolled member of the Muscogee Creek Nation and that the crimes were committed within the boundaries of the Cherokee Nation Reservation. Leathers moved to supplement the record on appeal with documentation showing that he possesses some degree of Indian blood and has been an enrolled member of the Muscogee Creek Nation since August 27, 1993. Leathers also proffered documentation stating that the scene of the crime is located within the boundaries of the Cherokee Nation Reservation.

On October 23, 2020, the State filed a motion to stay briefing schedule and response to Leathers' motion to supplement the record on the jurisdictional claim. In its motion, the State did not dispute that Leathers is an enrolled member of the Muscogee Creek Nation, with 1/32 of Indian blood, and that the crimes occurred within the historical boundaries of the Cherokee Nation. The State also noted that this Court remanded several cases to district courts to address the issue of whether Congress established a reservation for the Cherokee Nation and if so, whether Congress ever disestablished the reservation. As of the date of the State's motion this Court had not addressed the issue. Accordingly, the State requested its briefing schedule be stayed pending a ruling by this Court on this issue.

In an order handed down on November 13, 2020, this Court granted the State's motion to stay the briefing schedule "until this Court decides the status of the Indian Country issue in a case or cases currently pending before the district courts." This issue was subsequently decided in *Spears v. State*, handed

down on April 1, 2021, wherein this Court held that Congress established a Cherokee Nation Reservation and that the Cherokee Reservation remains in existence. *Spears v. State*, 2021 OK CR 7, ¶¶ 11-16, 485 P.3d 873, 876-77.

On April 27, 2021, this Court granted Leathers' prior request to remand the case to the District Court for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Leathers' status as an Indian; and (b) whether the crime occurred in Indian Country, namely within the boundaries of the Cherokee Nation 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 parties, wishing to see the matter resolved with judicial efficiency and economy, entered agreed written stipulations and joint motion to strike status conference and waive evidentiary hearing. May 25, 2021, the District Court filed its Findings of Fact and Conclusions of Law. We discuss the stipulations and District Court's Findings of Fact and Conclusions of Law below.

The parties agreed by stipulation that (1) Leathers' has some Indian blood; (2) he was an enrolled member of the Muscogee Creek Nation on the date of the charged offense; and (3) the Muscogee Creek Nation is a federally recognized tribe. The District Court accepted this stipulation and reached the same conclusion in its Findings of Fact and Conclusions of Law.

As to the second question on remand, whether the crime was committed in Indian Country, the stipulation of the parties was less dispositive. They agreed that the charged crime occurred within the historical geographic area of the Cherokee Nation as designated by various treaties.<sup>1</sup>

The District Court found without discussion that the crime occurred within the boundaries of the Cherokee Nation Reservation. This finding is supported by this Court's opinion in *Spears v. State*, wherein this Court upheld the District Court's Findings of Fact and Conclusions of Law, that treaties between the Cherokee Nation and the United States of America established a Cherokee Reservation and that no evidence showed that Congress had ever erased the boundaries of, or disestablished, the Cherokee Reservation. *Spears*, 2021 OK CR 7, ¶¶ 11-16, 485 P.3d at 876-77.

We hold that for purposes of federal criminal law, the land upon which the parties agree Leathers allegedly committed the crimes is within the Cherokee Reservation and is thus Indian Country. The ruling in *McGirt* governs this case and requires us to find the District Court of Tulsa County did not have jurisdiction to prosecute Leathers. Accordingly, we grant relief based upon argument raised in

The Judgment and Sentence of the District Court is **VACATED**. The matter is **REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to

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<sup>1</sup> A Memorandum from the Cherokee Nation Real Estate Services stating that the address at which the crime was committed was "[l]ocated within the Cherokee Nation Reservation" is attached to the parties' stipulation.

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  
TULSA COUNTY THE HONORABLE DAWN  
MOODY, DISTRICT JUDGE**

**Appearances at Trial**

Jenny Proehl-Day  
Attorney at Law  
410 North Main Street  
Tulsa, OK 74103  
Counsel for Defendant

Kevin Gray  
Asst. District Attorney  
Tulsa County Courthouse  
500 South Denver  
Tulsa, OK 74103  
Counsel for State

**APPEARANCES ON APPEAL**

Katie Bourassa  
Capital Post Conviction Division  
Oklahoma Indigent Defense System  
P.O. Box 926  
Norman, OK 73070  
Counsel for Appellant

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

**APPEARANCES ON REMAND**

Steve Kunzweiler  
District Attorney  
Tulsa County Courthouse  
500 South Denver  
Tulsa, OK 74103  
Counsel for State

Kristi Christopher  
Division Chief  
Capital Post Conviction Division  
Oklahoma Indigent Defense System  
P.O. Box 926  
Norman, OK 73070  
Counsel for Appellant

Dawn Cash  
Acting Attorney General of Oklahoma  
Randall Young  
Joshua R. Fanelli  
Assistant Attorneys General  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
Counsel for State

**Opinion by: Rowland, P.J.**

Hudson, V.P.J.: Specially Concur

Lumpkin, J.: Concur in Results

Lewis, J.: Concur

**HUDSON, JUDGE, SPECIALLY CONCUR:**

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Today's decision applies *McGirt v. Oklahoma*, 140 U.S. 2452 (2020) to the facts of this case and dismisses felony convictions from the District Court of Tulsa County for first degree murder and robbery with a firearm. I fully concur in the majority's opinion based on the stipulations below concerning the Indian status of Appellant and the location of these crimes within the historic boundaries of the Cherokee Nation 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, 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); and *Krafft v. State*, No. F-2018-340 (Okl. Cr., Feb. 25, 2021) (Hudson, J., Specially Concurs) (unpublished).

**LUMPKIN, JUDGE, CONCURRING IN RESULTS:**

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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.

The question I see presented is should I blindly follow and apply the majority opinion or do I join

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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).

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.

**DISTRICT COURT OF TULSA COUNTY,  
STATE OF OKLAHOMA, FINDINGS OF FACT  
AND CONCLUSIONS OF LAW  
(MAY 25, 2021)**

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IN THE DISTRICT COURT OF TULSA  
COUNTY, STATE OF OKLAHOMA

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DAMEON LEATHERS,

*Defendant/Appellant,*

v.

THE STATE OF OKLAHOMA,

*Plaintiff/Appellee.*

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Tulsa County District Court Case No. CF-2018-1340

Court of Criminal Appeals Case No. F-2019-962

Before: Dawn MOODY, District Judge.

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**FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

This case is before the Court pursuant to an Order remanding for an evidentiary hearing from the Oklahoma Court of Criminal Appeals, dated April 27, 2021. In that Order, the Court of Criminal Appeals directed this Court to make findings of fact on two issues: (1) defendant/appellants's Indian status. and (2) whether the crimes occurred within the boundaries of the Cherokee Nation Reservation. An evidentiary

hearing was not held pursuant to the filing of agreed stipulations and joint motion to strike status conference and waive evidentiary hearing filed on May 24, 2021.

The Appellant claims the District Court lacked jurisdiction to try his case as he is an enrolled member of the Muscogee Creek Nation and that the crime occurred within the boundaries of the Cherokee Nation Reservation. Appellant's claim raises two questions: (a) his Indian status, and (b) whether the crime occurred on the Cherokee Nation Reservation. These issues require fact-finding to be addressed by the District Court per the Oklahoma Court of Criminal Appeals Order Remanding.

### **I. Petitioner's status as an Indian**

To determine the Indian status of the Petitioner, the Oklahoma Court of Criminal Appeals directed the District Court to make findings of fact as to whether (1) Petitioner has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government. The Court finds as follows:

#### **Findings of Fact**

1. Dameon Leathers is the named Defendant/Appellant in the above-entitled matter.
2. The parties hereto stipulated and agreed that Mr. Leathers has a blood quantum of 1/32.
3. The parties hereto stipulated and agreed that Mr. Leathers is a citizen of the Muscogee Creek nation and was so at the time of the crime.

4. The parties hereto stipulated and agreed that the Muscogee Creek Nation is an Indian Tribal Entity recognized by the federal government.

5. The verification for Mr. Leather's tribal enrollment and blood quantum are attached to this stipulation.

### **Conclusions of Law**

Regarding the first determination, the Court answers the first inquiry in the affirmative. The Court adopted the parties' Agreed Stipulation including the attached documentation from the Muscogee (Creek) Nation of Oklahoma Citizenship Board filed on May 24, 2020 and made findings of fact thereon. Dameon Leathers has a Muscogee Creek blood quantum of 1/32. Therefore, this Court concludes Dameon Leathers has some Indian blood.

Additionally, the Court answers the second part of the inquiry in the affirmative. The Court adopted the Agreed Stipulation and made findings of fact thereon. Dameon Leathers was a citizen of the Muscogee (Creek) Nation as of December 16, 1993 and was so at the time of the crime. The Muskogee Creek Nation is an Indian Tribal Entity recognized by the federal government. Therefore, Dameon Leathers is recognized as an Indian by a tribe or the federal government.

Having answered both inquiries in the affirmative, this Court concludes Dameon Leathers is an Indian.

## **II. Whether the Crime Occurred on the Creek Reservation**

The Oklahoma Court of Criminal Appeals further ordered the District Court to determine whether the crime occurred within the boundaries of the Cherokee Nation Reservation. The Court finds as follows:

### **Findings of Fact**

1. The parties hereto stipulated that the crime in this case occurred within the Cherokee Nation Reservation boundaries.

### **Conclusions of Law**

The final inquiry is answered in the affirmative. This Court adopted the parties' Agreed Stipulation and made findings of fact thereon. The parties stipulated that the crimes at issue in this case were committed at 5469 N. Hartford Place, Tulsa, Oklahoma which is within the historical boundaries of the Cherokee Nation as set out in the Treaty with the Cherokee, December 29, 1835. 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799 and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612. The parties agreed that the location where the crime occurred was within the Cherokee Nation Reservation boundaries. Based upon the Supreme Court's ruling in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), this Court concludes that the crime occurred on the Cherokee Nation Reservation which is Indian Country.

**WHEREFORE**, this Court finds that Dameon Leathers is an Indian and that the crime for which he was convicted occurred in Indian Country for pur-

App.16a

poses of the General Crimes Act, 18 U.S.C. § 1152 and the Major Crimes Act, 18 U.S.C. § 1153.

**IT IS SO ORDERED this 25 day of May, 2021.**

/s/ Dawn Moody

District Judge

**AGREED STIPULATIONS  
(MAY 24, 2021)**

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IN THE DISTRICT COURT OF TULSA  
COUNTY, STATE OF OKLAHOMA

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DAMEON LEATHERS,

*Defendant/Appellant,*

v.

THE STATE OF OKLAHOMA,

*Plaintiff/Appellee.*

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Tulsa County District Court Case No. CF-2018-1340  
Court of Criminal Appeals Case No. F-2019-962

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**AGREED STIPULATIONS AND JOINT  
MOTION TO STRIKE STATUS CONFERENCE  
AND WAIVE EVIDENTIARY HEARING**

This case is before the Court pursuant to an Order remanding for evidentiary hearing from the Oklahoma Court of Criminal Appeals, dated April 27, 2021. In that Order, the Court of Criminal Appeals directed this Court to make findings of fact on two issues: (1) defendant/appellant's Indian status, and (2) whether the crimes occurred within the boundaries of the Cherokee Nation Reservation. (Remand Order, p. 4). The Court of Criminal Appeals ordered that the evidentiary hearing be held within sixty (60) days from

the date of the Order, which would require a hearing to be held on or before June 26, 2021. On April 29, 2021, the Court set this matter for status conference on May 25, 2021, at 9:00 a.m.

The parties wish to see the matter resolved with judicial efficiency and economy. This sentiment is in accordance with the Court of Criminal Appeals' directive that, in the event the parties agree as to what the evidence will show at any such hearing—and thus enter into written stipulations—"no hearing on the questions presented is necessary" (Remand Order p. 5). Accordingly, the parties agree that the matter can be addressed by stipulations, thus eliminating the need for an evidentiary hearing or status conference. As such, in response to the two questions this Court has been directed to answer, the parties hereby announce, and request this Court to accept, the following stipulations:

In response to the two issues that this Court has been directed to address, the parties have reached the following stipulations:

1. As to the status of defendant/appellant, Mr. Leathers, the parties hereby stipulate and agree as follows:

That Mr. Leathers is currently and was at the time of the crimes for which he has been charged and convicted of in this case an enrolled member of the Muscogee Creek Nation (Membership Number 48997), a federally recognized tribe, with some degree of Indian Blood. (Exhibit 1).

2. As to the location of the crime, the parties hereby stipulate and agree as follows:

That the crimes at issue in this case were committed at 5469 N. Hartford Place in Tulsa, Oklahoma, within the historical boundaries of the Cherokee Nation as set out the Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, as modified under the Treaty of July 19, 1866, 14 Stat. 799, and as modified under the 1891 agreement ratified by Act of March 3, 1893, 27 Stat. 612. (Exhibit 2).

Respectfully submitted this \_\_\_ day of May, 2021.

/s/ Kristi Christopher

Oklahoma Indigent Defense System  
Counsel for Defendant/Appellant

/s/ Randall Young

Oklahoma Attorney General's Office  
Counsel for Plaintiff/Appellee

/s/ Steve Kunzweiler

Tulsa County District Attorney  
Counsel for Plaintiff/Appellee

EXHIBIT 1  
TRIBAL CITIZENSHIP CARD AND  
CERTIFICATE OF INDIAN BLOOD

MUSCOGEE NATION  
CITIZENSHIP BOARD



MUSCOGEE ETV' LWV  
TVSE' KIA EN COKV  
HAYE APOKON

CITIZENSHIP CARD

THIS IS TO CERTIFY THAT Dameon Lamar Leathers  
BORN 12-24-81 IS ENROLLED WITH THE MUSCOGEE TRIBE,  
DEGREE CREEK BLOOD 1/32 ROLL NO. 48997  
08-27-93 [Signature]  
DATE AUTHORIZED SIGNATURE



UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF INDIAN AFFAIRS  
OKMULGEE OFFICE

CERTIFICATE OF DEGREE OF INDIAN BLOOD

This is to certify that Dameon Lamar Leathers  
born 12-24-81 is 1/32 degree Indian blood  
of the Creek Tribe.  
DEC 16 1993 [Signature]  
Date Issuing Officer

**MEMORANDUM VERIFYING CRIME  
LOCATION IN INDIAN COUNTRY**

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**CHEROKEE NATION  
REAL ESTATE SERVICES  
MEMORANDUM**

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To: Laura Giblin

From: Lane Kindle, Realty Specialist,  
Real Estate Services

Thru: Ginger Reeves, Director, Cherokee Nation  
Real Estate Services

Subject: 5469 N. Hartford Place, Tulsa, OK.

Date: September 9, 2020

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Legal Description: None Given

Finding Directions/Street Address:  
5469 N. Hartford Place, Tulsa, OK.

Type of Property: Fee Property

Location: Located within the Cherokee Nation Reser-  
vation, boundaries of the Cherokee Nation  
territory shall be those described by the  
patents of 1838 and 1846 diminished only  
by the Treaty of July 19, 1866, and the Act  
of Mar. 3, 1893. 1999 Cherokee Constitution,  
art. 2

App.22a

Should you have further questions or if I may be of further assistance, please contact me at (918) 453-5350.

**ORDER OF THE COURT OF CRIMINAL  
APPEALS, STATE OF OKLAHOMA,  
REMANDING MATTER FOR  
EVIDENTIARY HEARING  
(APRIL 27, 2021)**

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IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

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DAMEON LAMAR LEATHERS,

*Appellant,*

v.

THE STATE OF OKLAHOMA,

*Appellee.*

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Case No. F-2019-962

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

Appellant Leathers filed his brief in chief on September 14, 2020, appealing from his conviction in the District Court of Tulsa County, Case No. CF-2018-1340. On this same date Appellant also filed a motion requesting to supplement the record and remand for an evidentiary hearing, challenging the State's jurisdiction pursuant to the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. \_\_\_, 140 S. Ct. 2452 (2020). Appellant claims that he is an enrolled member of the Muscogee Creek Nation and that the crimes were committed within the boundaries of the Cherokee Nation Reservation. Appellant moved to supplement the record on appeal with documentation showing that he possesses some degree of Indian blood and has been an enrolled member of the Muscogee Creek Nation since August 27, 1993. Appellant also proffered documentation stating that the scene of the crime is located within the boundaries of the Cherokee Nation Reservation.

On October 23, 2020, the State filed a motion to stay briefing schedule and response to Appellant's motion to supplement the record on the jurisdictional claim. In its motion, the State did not dispute that Appellant is an enrolled member of the Muscogee Creek Nation, with 1/32 of Indian blood, and that the crimes occurred within the historical boundaries of

the Cherokee Nation. The State also noted that this Court remanded several cases to district courts to address the issue of whether Congress established a reservation for the Cherokee Nation and if so, whether Congress ever disestablished the reservation. As of the date of the State's motion, however, this Court had not addressed the issue. Accordingly, the State requested its briefing schedule be stayed pending a ruling by this Court on this issue.

In an order handed down on November 13, 2020, this Court granted the State's motion to stay the briefing schedule "until this Court decides the status of the Indian Country issue in a case or cases currently pending before the district courts." This issue was subsequently decided in *Spears v. State*, wherein this Court held that Congress established a Cherokee Nation Reservation and that the Cherokee Reservation remains in existence. *Spears v. State*, 2021 OK CR 7, ¶¶ 11-16, \_\_\_ P.3d. \_\_\_.

**IT IS THEREFORE THE ORDER OF THIS COURT** that Appellant's request to remand for evidentiary hearing 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**. The State's motion to stay briefing schedule is **EXTENDED** pending the outcome of the evidentiary hearing.

Appellant's claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred on the Cherokee Nation Reservation. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Tulsa 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 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 within the boundaries of the Cherokee Nation Reservation. In making this determination the District Court should consider any evidence the parties provide, including

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<sup>1</sup> 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).

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. Additionally, if the State wishes to file a response brief to Appellant's brief in chief, it should advise this Court of its intent within ten days after the District Court files its findings of fact and conclusions of law and a briefing schedule will be restored.

Provided however, in the event the parties agree as to what the evidence will show with regard to the questions presented, they may enter into a written stipulation setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. In this event, no hearing on the questions presented is necessary. Transmission of the record regarding the matter, the District Court's findings of fact and conclusions of law and supplemental briefing shall occur as set forth above.

**IT IS FURTHER ORDERED** that the Clerk of this Court shall transmit copies of the following, with

this Order, to the District Court of Tulsa County: Appellant's Brief in Chief and his Motion to Supplement the Record, each filed September 14, 2020; and the State's Motion to Stay Briefing Schedule and Response to the Appellant's Motion, filed October 23, 2020.

The Clerk of this Court is **DIRECTED** to transmit a copy of this Order to the Court Clerk of Tulsa County; the District Court of Tulsa County, the Honorable Dawn Moody, District Judge; Appellant, the State of Oklahoma, and all counsel of record.

**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 27th 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

**ORDER OF THE COURT OF CRIMINAL  
APPEALS, STATE OF OKLAHOMA,  
DENYING MOTION TO STAY MANDATE  
PENDING CERTIORARI REVIEW  
(AUGUST 30, 2021)**

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IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

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DAMEON LAMAR LEATHERS,

*Appellant,*

v.

THE STATE OF OKLAHOMA,

*Appellee.*

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Case No. F-2019-962

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

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**ORDER DENYING MOTION TO STAY  
MANDATE PENDING CERTIORARI REVIEW**

Before the Court is the State of Oklahoma's request to the stay the mandate in the above styled cause. The Court previously vacated Leathers' Judgment and Sentence for First Degree Murder and Robbery with a Firearm based upon *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), holding that the

State of Oklahoma lacked jurisdiction to prosecute him. We remanded this case to the district Court of Tulsa County with instructions to dismiss and further ordered that the mandate be issued twenty days from the delivery and filing of this decision. *Leathers v. State*, Case No. F-2019-962 (August 5, 2021) (unpublished).

The State now seeks to preserve Leathers' conviction to give the United States Supreme Court the opportunity to overrule its own decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), as the State requested in its motion for certiorari review in *Oklahoma v. Bosse*, Case No. 21-186. The United States Supreme Court has, to date, not granted certiorari review in *Bosse*. That it will grant the State's request for certiorari review and the relief requested is speculative. We will not stay the mandate in this case without more. The State has not shown good cause for its request and it is, accordingly, denied.

**THEREFORE IT IS THE ORDER OF THIS COURT** that the State's Motion to Stay the Mandate is **DENIED**.

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 30th day of August, 2021.

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/s/ Scott Rowland  
Presiding Judge

/s/ Robert L. Hudson  
Vice Presiding Judge

/s/ Gary L. Lumpkin  
Judge

/s/ David B. Lewis  
Judge

ATTEST:

/s/ John D. Hadden  
Clerk

**SUPPLEMENTAL BRIEF OF APPELLEE  
STATE OF OKLAHOMA AFTER REMAND  
(JUNE 11, 2021)**

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IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

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DAMEON LAMAR LEATHERS,

*Appellant,*

v.

THE STATE OF OKLAHOMA,

*Appellee.*

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Case No. F-2019-962

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**SUPPLEMENTAL BRIEF OF  
APPELLEE AFTER REMAND**

Dameon Lamar Leathers, hereinafter referred to as the defendant, was tried and convicted by a jury for the crimes of Murder in the First Degree, in violation of 21 O.S.Supp.2012, § 701.7(A) (Count I), and Robbery with a Firearm, in violation of 21 O.S.2011, § 801 (Count IV), in Case No. CF-2018-1340, in the District Court of Tulsa County before the Honorable Dawn Moody, District Judge (O.R. 258-65).<sup>1</sup> The jury

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<sup>1</sup> Citations to the two (2) volume Original Record in Tulsa County Case No. CF-2018-1340 will be referred to as (O.R. \_\_\_\_). Citations to the four (4) volume transcript of the jury trial held

set punishment at life imprisonment without parole on Count I and forty-five (45) years imprisonment on Count IV (O.R. 180, 182; Tr. IV, 934-35). The trial court sentenced the defendant in accordance with the jury's verdicts (O.R. 258-65; Sent. Tr. 4).

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 September 14, 2020, the defendant filed his Brief in Chief in this Court, raising six (6) propositions of error. In Proposition I, 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" (Appellant's Brief at 7-15). Specifically, the defendant claimed that he is and was an enrolled member of the Muscogee (Creek) Nation with some degree of Indian blood, and that his crimes occurred within the historical boundaries of the Cherokee Nation (Appellant's Brief at 8-9). The defendant raised a correlative ineffective assistance of counsel claim in Proposition V(A) of his Brief in Chief, challenging trial counsel's failure to preserve

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between November 18, 2019, and November 22, 2019, will be referred to by volume as (Tr. I, \_\_\_), (Tr. II, \_\_\_). *et seq.* Citations to the transcript of the sentencing hearing held on January 7, 2019, will be referred to as (Sent Tr. \_\_\_).

an Indian Country claim in the proceedings below (Appellant's Brief at 42).

In support, Appellant contemporaneously filed in this Court a Notice of Extra-Record Evidence Supporting Proposition V (hereinafter "3.11 Application"), pursuant to this Court's Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020). In that 3.11 Application, Appellant appended a series of affidavits from himself, his mother, his trial counsel, and from an Investigator with the Oklahoma Indigent Defense System (OIDS), supporting his Indian Country claim, as well as various related exhibits (3.11 Application, Attachments 1-4; Exhibits 1-5). Among those exhibits were photocopies of Appellant's Muscogee (Creek) Nation Citizenship Card showing that Appellant is an enrolled member of thy Muscogee (Creek) Tribe with 1/32. Creek blood and an enrollment date of August 27, 1993, as well as a Certificate of Degree of Indian Blood (CDIB) Card reflecting the same (3.11 Application, Exhibit 1). Further, Appellant attached a letter from the Cherokee Nation Real Estate Services verifying that the location of the crimes in this case, 5469 North Hartford Place, Tulsa, Oklahoma, is fee property located within the historical boundaries of the Cherokee Nation, as well as maps bolstering that assertion (3.11 Application, Exhibits 2-3).

On October 23, 2020, the State, by and through the undersigned, filed a Motion to Stay Briefing Schedule and Response to Appellant's Motion for Supplementation of Record on Indian Country Jurisdictional Claim (hereinafter "Response"). There, the State explained that, after investigation of the defendant's Indian Country claim, the State did not dispute that

the defendant had been an enrolled member of the Muscogee (Creek) Nation, a federally recognized tribe, since August 27, 1993, with a Creek blood quantum of 1/32 (Response, at 3). Further, the State did not dispute that the defendant's crimes in this case occurred within the historical boundaries of the Cherokee Nation in Tulsa County (Response, at 3). Instead, the State noted that the record in this matter should be supplemented by stipulation without the need for a remanded hearing, thereby incorporating the Indian Country evidence by agreement (Response, at 3-4). Regardless, the State respectfully asked this Court to hold in abeyance the briefing schedule pending resolution of the Cherokee Nation reservation question, *i.e.*—whether Congress established a reservation for the Cherokee Nation, and if so, whether Congress specifically erased those boundaries and disestablished that reservation, a question which, at the time of that Response's filing, was already before this Court in a number of other cases (Response, at 4).

Subsequently, on November 13, 2020, this Court granted the State's Motion to Stay Briefing Schedule, acknowledging that “[t]he State seeks a stay of the briefing schedule until this Court decides the status of the Indian Country issue in a case or cases currently pending before the district courts,” and announcing that, pursuant to the State's request, the matter “is **STAYED** pending further order of this Court” (Order Granting Stay, at 2 (bold and capitalization in original)).

Then, on April 27, 2021, this Court entered an Order Denying Appellant's Motion for Supplementation of Record; Granting Request to Remand for Evidentiary Hearing; Remanding Matter for Evidentiary Hearing;

and Extending Stay of State’s Briefing Schedule Pending Outcome of Evidentiary Hearing. In that Order, this Court noted that the matter had been stayed pending resolution of the Indian Country issue in other cases, and that the issue “was subsequently decided in *Spears v. State*, wherein this Court held that Congress established a Cherokee Nation Reservation and that the Cherokee Nation Reservation remains in existence. *Spears v. State*, 2021 OK CR 7, ¶¶ 11-16, \_\_\_ P.3d \_\_\_” (Order Remanding, at 2-3). Thus, this Court granted the defendant’s request to remand for an evidentiary hearing, and reasoned that since “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,” the defendant’s request to supplement the record was denied (Order Remanding, at 3). This Court also extended the stay of the State’s briefing schedule until the evidentiary hearing was held and the matter was resolved (Order Remanding, at 3).

Moreover, in that Order Remanding, this Court directed the district court to hold a hearing to determine “Appellant’s status as an Indian,” and “whether the crime occurred within the boundaries of the Cherokee Nation Reservation” (Order Remanding, at 4). 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 (Order Remanding, at 5).

On April 29, 2021, the district court set a status conference on this Court’s remand for May 25, 2021. In the meantime, however, the parties filed a document

titled “Agreed Stipulations and Joint Motion to Strike Status Conference and Waive Evidentiary Hearing” on May 24, 2021 (hereinafter “Agreed Stip.”). 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 status conference set for May 25, 2021 (Agreed Stip., at 1-2). 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 “currently and was at the time of the crimes for which he has been charged and convicted of in this case an enrolled member of the Muscogee Creek Nation (Membership Number 48997), a federally recognized tribe, with some degree of Indian Blood” (Agreed Stip., at 2). Further, the parties agreed that the locations of the charged crimes “were within the historical boundaries of the Cherokee Nation” as established by the treaties of 1835, 1866, and 1891 (Agreed Stip., at 2). Attached to that stipulation was a photocopy of the defendant’s Certificate of Degree of Indian Blood (CDIB) Card issued by the United States Department of the Interior, the defendant’s Muscogee Nation Citizenship Card, and a letter from the Cherokee Nation Real Estate Services showing the location at issue in this case was fee property located within the historical boundaries of the Cherokee

Nation (Agreed Stip., Exs. 1 & 2). In that agreed stipulation, the defendant was represented by Kristi Christopher with the Oklahoma Indigent Defense System (OIDS). The State of Oklahoma was represented by Randall Young, Assistant Attorney General, as well as a representative from the Tulsa County District Attorney's Office (Agreed Stip., at 2).

On May 25, 2021, the Honorable Dawn Moody, District Judge, issued Findings of Fact and Conclusions of Law (hereinafter "Findings"). The district court announced that "[a]n evidentiary hearing was not held pursuant to the filing of agreed stipulations and joint motion to strike status conference and waive evidentiary hearing filed on May 24, 2021" (Findings, at 1). Based on the stipulations discussed above, the district court found the defendant had "some Indian blood" and "is recognized as an Indian by a tribe or the federal government," and thus, "this Court concludes Dameon Leathers is an Indian" (Findings, at 2-3).

Further, the district court found, based on the stipulations submitted, that the locations of the charged crimes were "within the Cherokee Nation Reservation boundaries," and therefore, based on *McGirt*, 140 S. Ct. at 2452, "this Court concludes that the crime occurred on the Cherokee Nation Reservation which is Indian Country"<sup>2</sup> (Findings, at 4). *See Spears v.*

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<sup>2</sup> The State argued in the *McGirt* litigation that the Muscogee (Creek) Nation did not have a reservation. The State recognizes that this Court is bound by *McGirt*, and that it has recently applied *McGirt* to hold that the Cherokee Nation has a reservation. *See Bosse v. Oklahoma*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1, 2 (2016) (only the Supreme Court can overrule itself); *Hogner v. State*, 2021 OK CR 4, ¶ 18, \_\_\_ P.3d \_\_\_, \_\_\_ (affirming the district court's finding that the Cherokee Nation has a reservation that has not

*State*, 2021 OK CR 7, ¶ 16, \_\_\_ P.3d \_\_\_, \_\_\_ (finding that “for purposes of federal criminal law, the land upon which the parties agree Spears allegedly committed the crime is within the Cherokee Reservation and is thus Indian country,” and further finding that the, “ruling in *McGirt* governs this case and requires us to find the District Court of Rogers County did not have jurisdiction to prosecute Spears”); *Hogner*, 2021 OK CR 4, ¶ 18, \_\_\_, P.3d at \_\_\_ (concluding that the “District Court appropriately applied *McGirt* to determine that Congress did establish a Cherokee Reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Cherokee Reservation or that the State of Oklahoma had jurisdiction in this matter,” and further holding that “the State of Oklahoma did not have jurisdiction to prosecute Appellant in this matter”).

Ultimately, the district court held the following: **“WHEREFORE**, this Court finds that Dameon

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been disestablished by Congress); *Spears v. State*, 2021 OK CR 7, ¶ 16, \_\_\_ P.3d \_\_\_, \_\_\_ (holding that, for purposes of federal criminal law, the land upon which the crime was committed “is within the Cherokee Reservation and is thus Indian country”). However, the State strenuously disagrees with the holdings in *McGirt*, *Hogner*, and *Spears*, and preserves the right to ask the Supreme Court to review those holdings. As explained by Chief Justice Roberts in his 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 these reasons and others, the State should have jurisdiction in this case because the crime was not committed within Indian Country as defined by 18 U.S.C. § 1151(a).

Leathers is an Indian and that the crime for which he was convicted occurred in Indian Country for purposes of the General Crimes Act, 18 U.S.C. § 1152 and the Major Crimes Act, 18 U.S.C. § 1153” (Findings, at 4 (bold and capitalization in original)). A copy of the district court’s Findings was subsequently filed in this Court on May 27, 2021.

Should this Court find the defendant is entitled to relief based on the district court’s Findings issued on May 25, 2021, the State respectfully asks this Court to stay the mandate for twenty (20) days. *See Spears*, 2021 OK CR 7, ¶ 17, \_\_\_ P.3d at \_\_\_ (vacating the appellant’s Judgment and Sentence and remanding the matter to the district court with instructions to dismiss based on the Cherokee Nation reservation question, but nonetheless staying issuance of the mandate for twenty (20) days from the delivery and filing of the decision); *Bosse v. State*, 2021 OK CR 3, ¶ 30, 484 P.3d 286, 295 (same); Rule 3.15(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

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Respectfully submitted,

**Dawn Cash**  
**Acting Attorney General**  
**of Oklahoma**

/s/ Joshua R. Fanelli

Joshua R. Fanelli, OBA #33503

Assistant Attorney General

313 N.E. 21st Street

Oklahoma City, Oklahoma 73105

(405) 522-4423

(405) 522-4534 (Fax)

**Attorneys for Appellee**