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**OPINION OF THE COURT OF CRIMINAL  
APPEALS, STATE OF OKLAHOMA  
(JUNE 17, 2021)**

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IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

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JUSTIN DALE LITTLE,

*Appellant,*

v.

THE STATE OF OKLAHOMA,

*Appellee.*

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Case No. F-2020-125

NOT FOR PUBLICATION

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

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**OPINION**

**ROWLAND, VICE PRESIDING JUDGE:**

Appellant Justin Dale Little was tried by jury and convicted of First Degree Murder, in violation of 21 O.S.Supp.2012, § 701.7, in the District Court of Tulsa County, Case No. CF-2018-1700. In accordance with the jury's recommendation, the Honorable Sharon

Holmes, District Judge, sentenced Little to life in prison with the possibility of parole. Little raises eight issues for review. This appeal turns on whether Little is an Indian as defined by federal law, and whether the alleged crime was committed within Indian country as that term is defined by federal law. Because the answer to both questions is yes, federal law grants exclusive criminal jurisdiction to the federal government. Because we find relief is required on Little's jurisdictional challenge in Proposition 1, his other claims are moot.

### **1. Controlling Law: *McGirt v. Oklahoma***

In *McGirt v. Oklahoma*, 591 U.S. \_\_\_, 140 S.Ct. 2452 (2020), the Supreme Court held that land set aside for the Muscogee Creek Nation in the 1800's was intended by Congress to be an Indian reservation, and that this reservation remains in existence today for purposes of federal criminal law because Congress has never explicitly disestablished it.

### **2. Jurisdiction**

Federal and tribal governments, not the State of Oklahoma, have jurisdiction to prosecute crimes committed by or against Indians on the Muscogee Reservation. 18 U.S.C. §§ 1152, 1153; *McGirt*, 140 S.Ct. at 2479-80. The charge of first degree murder filed against Little in this case fits squarely within the crimes subject to exclusive federal jurisdiction. *See State v. Klindt*, 1989 OK CR 75, ¶ 3, 782 P.2d 401, 403 (“[T]he State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.”)

### 3. Two Questions Upon Remand

On January 15, 2021, this Court remanded this case to the District Court of Tulsa County for an evidentiary hearing for fact finding on Little's claim that the State of Oklahoma did not have jurisdiction to prosecute him because he is an Indian and his crime occurred in Indian country. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Little's status as an Indian; and (b) whether the crime occurred within the boundaries of the Muscogee 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.

On February 19, 2021, the parties entered a written joint stipulation in which they agreed: (1) that Little has some Indian blood; (2) that he was a registered member of the Seminole Nation on the date of the charged offense; (3) that the Seminole Nation is a federally recognized tribe; and (4) that the charged crime occurred within the boundaries of the Muscogee Reservation. The District Court accepted the parties' stipulation.

The District Court filed its Findings of Fact and Conclusions of Law in this Court on May 6, 2021. The District Court found the facts recited above in accordance with the stipulation. The District Court concluded that Little is an Indian under federal law and that the charged crime occurred within the boundaries of the Muscogee Reservation. The District Court's findings and conclusions are supported by the record. The ruling in *McGirt* governs this case and requires us to find the

State of Oklahoma was without jurisdiction to prosecute Little. Accordingly, we grant Little's Proposition 1.

**DECISION**

The Judgment and Sentence of the District Court is **VACATED** and this 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 TULSA COUNTY THE HONORABLE  
SHARON HOLMES, DISTRICT JUDGE**

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

Kuehn, P.J.: Concur  
Lumpkin, J.: Concur in Results  
Lewis, J.: Concur  
Hudson, J.: Specially Concur

**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 with Chief Justice Roberts and the dissenters in *McGirt*

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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).

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.

**HUDSON, J., SPECIALLY CONCURS:**

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Today's decision dismisses a conviction for first degree murder from the District Court of Tulsa County based on the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). This decision is unquestionably correct as a matter of *stare decisis* based on the Indian status of Appellant and the occurrence of these crimes on the Muscogee Reservation. Under *McGirt*, the State has no jurisdiction to prosecute Appellant for the crimes charged in this case. Instead, Appellant must be prosecuted in federal court. I therefore as a matter of *stare decisis* fully concur in today's decision. Further, I maintain my previously expressed views on the significance of *McGirt*, its far-reaching impact on the criminal justice system in Oklahoma and the need for a practical solution by Congress. *See, 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 Concur); and *Krafft v. State*, No. F-2018-340 (Okl. Cr., Feb. 25, 2021) (Hudson, J., Specially Concur) (unpublished).

**DISTRICT COURT OF TULSA COUNTY,  
STATE OF OKLAHOMA, FINDINGS OF  
FACT AND CONCLUSIONS OF LAW  
(MAY 6, 2021)**

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IN THE DISTRICT COURT FOR TULSA COUNTY  
STATE OF OKLAHOMA

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JUSTIN DALE LITTLE,

*Appellant,*

v.

THE STATE OF OKLAHOMA,

*Appellee.*

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Case Nos.: F-2020-125

Before: Sharon HOLMES, District Court Judge.

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**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

The following Findings of Fact and Conclusions of Law follow the Oklahoma Court of Criminal Appeals' ("OCCA") January 15, 2021 Order Granting Appellant's Request to Remand for Evidentiary Hearing; Denying Appellant's Motion for Supplementation of Record; Remanding Matter for Evidentiary Hearing, and Granting State's Motion to Stay Briefing Schedule Pending Outcome of Evidentiary Hearing ("Remand Order"). Nicole Dawn Herron appeared on behalf of

Appellant, Justin Dale Little, whose appearance was waived. This Court finds an evidentiary hearing is unnecessary, as “the parties agree as to what the evidence will show with regard to the questions presented,” and have accordingly entered “into a written stipulation setting forth those facts upon which they agree and which answer the questions presented.” Order Remanding at 5.

The Appellant, in Proposition One of his brief claims that the District Court lacked jurisdiction to try him as he is a citizen of the Seminole Nation and the crimes occurred within the boundaries of the Creek Nation Reservation. Appellant’s claim raises two questions: (a) his Indian status, and (b) whether the crimes occurred in the Creek Nation Reservation. These issues require fact-finding to be addressed by the District Court per the OCCA Order Remanding.

### **I. Appellant’s status as an Indian**

To determine the Indian status of Appellant, the OCCA directed the District Court to make findings of fact as to whether (1) Appellant 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. Justin Dale Little is the named Appellant in the above-styled matter.
2. The parties stipulated that the crimes alleged against defendant occurred on April 22, 2018.
3. The parties stipulated that Appellant has been enrolled with the Seminole Nation since September 18, 1997, and he possesses a 45/64 degree of Seminole Blood.

4. The parties stipulated that the Seminole Nation is an Indian Tribe Entity recognized by the federal government.

5. The parties stipulated that the crimes occurred at or near 600 North Birch Street in Jenks, Oklahoma. This location falls within the Muscogee (Creek) Reservation.

### **Conclusions of Law**

Regarding the first determination, the Court answers the first question in the affirmative. The Court adopts the Agreed Stipulations filed by the parties on February 19, 2021. Justin Dale Little is the named Defendant in this matter and he has 45/64 degree of Seminole blood.

Additionally, the Court answers the second part of the inquiry in the affirmative. The Court adopts the Agreed Stipulations and makes findings of fact thereon. Justin Dale Little has been recognized as a citizen of the Seminole Nation since September 18, 1997 and was recognized as a citizen of the Seminole Nation at the time of the offense. Finally, the Muscogee (Creek) Nation is a federally recognized tribe. Therefore, Justin Dale Little is recognized as an Indian by a tribe and the federal government.

Having answered both inquires in the affirmative, this Court concludes that Justin Dale Little is an Indian.

## **II. Whether the Crime Occurred in Indian Country**

The OCCA further ordered the District Court to determine whether the crime occurred within the

boundaries of the Creek Reservation, referred to as Indian Country. The Court finds as follows:

### **Findings of Fact**

1. The parties stipulated that the crimes occurred at or near 600 North Birch Street in Jenks, Oklahoma.
2. The parties stipulated that the above-described location falls within the Muscogee (Creek) Reservation.

### **Conclusions of Law**

The final inquiry is answered in the affirmative. This Court adopts the parties' Agreed Stipulations and makes findings of fact thereon. The crime occurred at a location that is within the boundaries of the Creek Nation's Reservation. These boundaries were established through a series of treaties between the Creek Nation and the United States, and are explicitly recognized as a reservation defined by 18 U.S.C. § 1151(a). This Court concludes that the crimes for which Appellant was convicted occurred within the Creek Nation Reservation. Based upon the Supreme Court's ruling in *McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), the Creek Nation Reservation is Indian Country.

WHEREFORE, this Court finds that Justin Dale Little is an Indian and the crimes 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.

App.14a

**IT IS SO ORDERED this 6th day of May, 2021.**

/s/ Sharon Holmes  
District Court Judge

Approved as to form:

/s/ Randall Young  
Assistant Attorney General

/s/ Nicole Herron  
Assistant Public Defender

**COURT OF CRIMINAL APPEALS,  
STATE OF OKLAHOMA, ORDER  
REMANDING FOR EVIDENTIARY HEARING  
(JANUARY 15, 2021)**

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IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

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JUSTIN DALE LITTLE,

*Appellant,*

v.

THE STATE OF OKLAHOMA,

*Appellee.*

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Case No. F-2020-125

Before: Dana KUEHN, Presiding Judge.,  
Scott ROWLAND, Vice President 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 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 July 20, 2020, appealing his First Degree Murder conviction in the District Court of Tulsa County, Case No. CF-2018-1700. His first claim on appeal challenges the State's jurisdiction to prosecute him. Appellant also filed, on that same day, a Motion for Supplementation of the Record and Request to Remand for Evidentiary Hearing, challenging defense counsel's effectiveness, namely counsel's failure to raise in the district court the State's lack of subject-matter jurisdiction to prosecute him. *McGirt v. Oklahoma*, 591 U.S., 140 S.Ct. 2452 (2020). Appellant claims the State lacked jurisdiction to prosecute him because he is an Indian and the crime was committed in Indian country. Appellant requests this Court remand the matter for an evidentiary hearing to supplement the record concerning his ineffective assistance of counsel claim.

On November 17, 2020, the State of Oklahoma, by and through Mike Hunter, Attorney General of the State of Oklahoma, filed a motion to stay briefing schedule. The State's response brief was due November 17, 2020. Appellant's motion asks the Court's permission to supplement the record on appeal with his Seminole Tribal Membership card which shows his degree of Indian blood (45/64 Indian blood). In its Motion, the State does not dispute that Appellant is an enrolled member of the Seminole Nation, a federally recognized tribe, with a blood quantum of 45/64; that he was an enrolled member at the time the crime was committed; and that the crime occurred within the boundaries of the Muscogee Creek Nation Reservation.

To resolve Appellant's jurisdiction and ineffective assistance of counsel claims, we must determine whether Appellant is an Indian who committed a major

crime on an Indian reservation. Because these claims 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 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 pending the outcome of the evidentiary hearing is **GRANTED**.

Appellant's claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred on the Muscogee Creek 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 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 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, 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 Creek Nation Reservation. In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony.

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record, to the Clerk of this Court, and counsel for 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.

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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).

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 July 20, 2020; and the State's Motion to Stay Briefing Schedule and Response to the Appellant's Motion, filed November 17, 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 Sharon K. Holmes, 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 \_\_\_ day of \_\_\_\_\_, 2021.

App.20a

/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