


IN THE DISTRICT COURT IN AND FOR OTTAWA COUNTY  
STATE OF OKLAHOMA

FILED  
DISTRICT COURT  
OTTAWA CO. OKLA.

NOV 03 2020

THE STATE OF OKLAHOMA, )  
 )  
Plaintiff, )  
v. )  
 )  
WINSTON BRESTER, )  
 )  
Defendant. )

CASSIE KEY COURT CLERK  
BY 

Case No.: CF-20-129  
CF-20-177  
CF-20-178

**SECOND AMENDED MOTION TO DISMISS FOR LACK OF JURISDICTION**

**COMES NOW** Winston Brester, Defendant, by and through his attorney Andrew R. Meloy, and moves this Court to dismiss this matter against the Defendant. In support thereof, the Defendant states as follows:

**ARGUMENT AND AUTHORITIES**

**I. THE DEFENDANT IS A MEMBER OF A FEDERALLY RECOGNIZED TRIBE AND THE STATE LACKS JURISDICTION TO PROSECUTE**

To qualify as an Indian, the Defendant or alleged victim must: have some degree of Indian blood and be recognized as an Indian by the tribe or federal government. *U.S. v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). Defendant is a member of the Seneca-Cayuga Nation. *See Exhibit A*. The Seneca-Cayuga Nation is a federally recognized tribe. The crimes' location occurred within the boundaries of the Ottawa Nation. *See Exhibit B*. The United States Supreme Court in *McGirt v. Oklahoma*, 591 U.S. \_\_\_\_ (2020) ruled that where Congress has not disestablished a tribe's reservation boundaries, all land within those boundaries is "Indian Land" for purposes of establishing jurisdiction.

On the same day as the *McGirt* decision, the U.S. Supreme Court vacated orders from the Oklahoma Court of Criminal Appeals regarding four cases including *Patrick J. Terry v.*

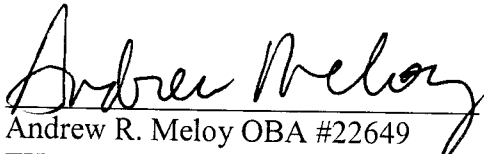
*Oklahoma*, Case No. 19-9901. Mr. Terry was prosecuted in Ottawa County for Manufacturing CDS within 2000 feet of a Public School, Possession of CDS, and Possession of Drug Paraphernalia. He is a member of the Cherokee Nation and the crime occurred within the Ottawa Nation boundaries.

Matters implicating the District Court's jurisdiction are never waived and can be raised at any time. *Smith v. State*, 1997 OK CR 317, ¶13. Subject matter jurisdiction is not subject to waiver, nor can it be conferred by consent of the parties. *United States v. Cotton*, 535 U.S. 625, 630 (2002). The State of Oklahoma has no jurisdiction over crimes committed on Indian Land by or against an Indian. *State v. Klindt*, 1985 OK CR 75. The State bears the burden of showing that the boundaries of an Indian reservation do not exist or have otherwise been diminished or disestablished. *Solem v. Bartlett*, 465 U.S. 463, 481 (1984). Jurisdiction on Indian Land is determined by the parties involved and the nature of the crime. 18 U.S.C. § 1152, 18 U.S.C. § 1153. Once the Defendant has presented prima facie evidence as to Indian status and the location of the crime being in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction. *See Shaun Michael Bosse v. The State of Oklahoma*, No. PCD-2019-124 (Okla. Cr. August 12, 2020) (unpublished). The Defendant has established that he is an enrolled member of the Seneca-Cayuga Nation and the alleged crime occurred on Ottawa Nation tribal land. Counsel for Defendant has found no evidence that Congress has expressly disestablished the Ottawa Nation reservation. The burden is on the State to show otherwise and prove it has jurisdiction over the Defendant.

### CONCLUSION

The Defendant is a member of a federally recognized tribe, and the crime occurred on reservation land that has not been expressly disestablished by Congress. The State lacks jurisdiction to prosecute the Defendant and this matter must be dismissed.

Respectfully submitted,

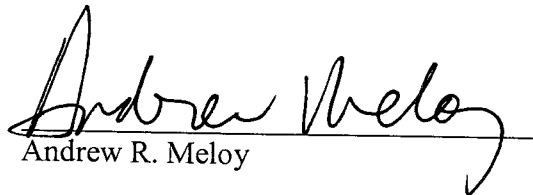
BY:   
Andrew R. Meloy OBA #22649  
THE HARTLEY LAW FIRM, PLLC  
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Miami, OK 74354  
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*Attorney for Defendant*

**CERTIFICATE OF SERVICE**

I, Andrew R. Meloy, hereby certify that on this the \_\_\_\_\_ day of \_\_\_\_\_, 2020, a copy of the foregoing motion was hand delivered to:

Honorable Judge Becky Baird

Ottawa County District Attorney's Office

  
Andrew R. Meloy



Seneca-Cayuga Nation  
PO Box 453220  
Goway, OK 74345-3220  
Phone: (918) 787-5452  
Email: [enccoy@scribe.com](mailto:enccoy@scribe.com)  
Website: [www.scribe.com](http://www.scribe.com)

Monday, September 21, 2020

### Certificate of Indian Blood

Name: **Winston Whitecrow Brester**  
Date of Birth: 4/16/1992 Enrollment Status: Enrolled  
Resolution Number: Enrollment Number: 2954-428  
Resolution Date:

Mother: Father: **William Brian Brester**

Address (Mailing): 900 West 3rd  
City: Owsipaw, OK 74363 County: Ottawa

Address (Street): 900 West 3rd Street  
City: Owsipaw, OK 74363 County: Ottawa

#### Ethnic Affiliation/Blood Quantum

Total Quantum All Tribes: 3/128  
Enrichity: Seneca-Cayuga Nation - (R) Blood Quantum: 3/128  
Culture: (unknown)

Enrollment Officer  
Leslie McCarty

Authorizing Signature

Printed by:  
**Progeny**

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Goway, OK 74345-3220  
Phone: (918) 787-5452  
Email: [enccoy@scribe.com](mailto:enccoy@scribe.com)  
Website: [www.scribe.com](http://www.scribe.com)

EXHIBIT

A

## A detailed road map of Cherokee, Oklahoma, showing major highways, local streets, and landmarks. The map includes labels for Cherokee, Bartlesville, Muskogee, and other nearby towns. It also shows the location of the Cherokee National Forest and the Cherokee National Monument.

This inset map, titled "Inset of Northeast Corner", provides a broader geographical context. It shows the intersection of major roads including US-50, US-89, US-15, and US-163. Key locations labeled include CRAG, CHURCH, CLARK, WYANDOTTE, PEGORIA, EASTERN SHAWNEE, SHAWNEE, and MODOC. The map also indicates the location of the study area, marked with a small rectangle near the intersection of US-15 and US-163. The map is oriented with North at the top.

