

ORIGINAL



Case No. F-2019-330

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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MICHAEL EUGENE SPEARS,

Appellant,

vs.

THE STATE OF OKLAHOMA,

Appellee.

Appeal from the  
District Court of County

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

DEC - 8 2020

JOHN D. HADDEN  
CLERK

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SUPPLEMENTAL BRIEF OF APPELLANT

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Deputy Division Chief  
Oklahoma Bar Assoc. No. 18099  
Homicide Direct Appeals Division  
Oklahoma Indigent Defense System  
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ATTORNEY FOR APPELLANT

December 8, 2020

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Appellant, Michael Eugene Spears, by and through undersigned counsel, submits this Supplemental Brief "addressing only those issues pertinent to the evidentiary hearing" ordered by this Court on August 19, 2020. *See* Order Remanding for Evidentiary Hearing (hereinafter "Remand Order"); (Supp. O.R. 239-34).<sup>1</sup>

## **BACKGROUND**

Appellant filed his *Brief of Appellant* on December 17, 2019. As relevant here, Proposition I in Mr. Spears's brief challenged the State's jurisdiction to prosecute him. *See Brief of Appellant* at 4-10. More specifically, Mr. Spears asserted exclusive jurisdiction rests with the federal courts because he is a citizen of the Cherokee Nation and the crimes for which he was charged and convicted occurred within the boundaries of the Cherokee Nation Reservation. *Id.* On May 20, 2020, because authority upon which Appellant's claim relied had not yet become final, this Court *sua sponte* held the matter in abeyance pending the final decision of the United States Supreme Court in *Murphy v. Royal*, 875 F.3d 896 (10<sup>th</sup> Cir. 2017), *aff'd sub nom Sharp v. Murphy*, 140 S.Ct. 2412 (July 9, 2020) (mem).

On the same day it handed down the *Murphy* ruling, the Supreme Court also decided *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). IN both cases, the Supreme Court acted to reverse the rulings of this Court, concluding Congress had never disestablished the Creek Reservation. The crimes in both cases occurred in Indian Country, thus depriving the Oklahoma courts of jurisdiction.

This Court remanded Mr. Spears's case to the Rogers County District Court for an evidentiary hearing to determine two questions. Specifically, this Court directed that:

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<sup>1</sup> Pursuant to this Court's Remand Order, supplemental briefs of no more than 20 pages may be filed by either party within 20 days of the filing in this Court of the District Court's findings of fact and conclusions of law and must address "only those issues pertinent to the evidentiary hearing." *See* Remand Order at 4; (Supp. O.R. 232).

The District Court shall address only the following issues:

First, Spears's status as an Indian. The District Court Must determine whether (1) Spears has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.

Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In making this determination the District Court should consider any evidence the parties provide, including but not limited to treaties, statutes, maps, and/or testimony.

Remand Order at 3-4; (Supp. O.R. 231-32).

Rogers County District Court Judge Kassie N. McCoy conducted the evidentiary hearing on September 28, 2020, and filed her Findings of Fact and Conclusions of Law in this Court on November 18, 2020. The transcript of the hearing along with submitted exhibits and a supplemental Original Record were filed in this Court on November 30, 2020. The matter is therefore now ripe for this Court to decide that the State had no jurisdiction over Mr. Spears's alleged crimes.

### **STIPULATIONS OF THE PARTIES**

Prior to the remanded evidentiary hearing, the parties stipulated as follows:

1. As to the location of the crime, the parties hereby stipulate and agree that the crime in this case occurred at 500 N. Dorothy Avenue, Lot #29, Claremore, OK 74017. This address is within the geographic area 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.
2. The parties further hereby stipulate and agree that the defendant, Michael Eugene Spears, has *Yi* Cherokee Blood, and was recognized as a citizen of the Cherokee Nation at the time of the crime. The Cherokee Nation is an Indian Tribal Entity recognized by the federal government.

*Stipulations*, filed September 28, 2020. (Supp. O.R. 337)

### **EVIDENCE PRESENTED AT THE HEARING**

At the evidentiary hearing, in addition to the stipulations of the parties, Appellant presented various treaties, statutes, maps, and other official documents. *See* Def. Exh. 1 (Tabs 1-3). The State did not refute or respond to any of the documentary evidence presented by Mr. Spears. In fact, the State did not present any evidence at the hearing and made no argument regarding any of the questions upon which this Court remanded for a hearing. (Evid. Hrg. Tr. 16) Indeed, even in its post-hearing brief to this Court, the State makes no other argument other than to request this Court to issue a thirty-day stay of "of any order reversing the conviction in this case ... so that the appropriate authorities can review his case and determine whether it is appropriate to file charges and take custody of the defendant." *Supplemental Brief of Appellee* at 2-3 (citing OKLA. STAT. tit. 22, § 846 (2011)).

### **THE STATE NEVER HAD JURISDICTION OVER MR. SPEARS**

Based on the Clear Record developed at the evidentiary hearing, there is no legitimate question as to whether the State of Oklahoma had jurisdiction to charge, try, and sentence Mr. Spears, an Indian, for crimes which occurred in Indian Country. The answer is clearly no. The parties stipulated that Mr. Spears has some Indian blood and is recognized as a citizen of the Cherokee Nation, which is a federally recognized tribe. (Supp. O.R. 337) The district court agreed that "Mr. Spears is an Indian and that the crime occurred in Indian Country." (Supp. O.R. 354)

Cherokee Nation is a federally recognized Indian tribe. It is one of the five tribes that are often treated as a group for purposes of federal legislation (Cherokee, Muscogee (Creek), Choctaw, Chickasaw, and Seminole Nations, historically referred to as the "Five Civilized Tribes" or "Five Tribes"). The Cherokee Reservation boundaries encompass lands in a fourteen-county area, including

all of Adair, Cherokee, Craig, Nowata, and Washington Counties and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Sequoyah, Tulsa, and Wagoner Counties, within the borders of the State of Oklahoma.

For the Cherokee, as for the Creek, there was a promise "[o]n the far end of the Trail of Tears." *McGirt*, 140 S. Ct. at 2459. Cherokee Nation was originally located in what are now the states of Georgia, Alabama, Tennessee, South Carolina, North Carolina, and Kentucky. Wilkins, Thurman, *Cherokee Tragedy: The Ridge Family and the Decimation of a People*, 22, 91, 209, 254 (rev. 2d ed. 1986) (*Cherokee Tragedy*). Like the Creeks, the Cherokees exchanged lands in the Southeast for new lands in Indian Territory under pressure of the national removal policy. The Indian Removal Act of 1831, Act of May 28, 1830, ch. 148, 4 Stat. 411, authorized the President to divide public domain lands into defined "districts" for tribes removing west of the Mississippi River. *Id.* at § 1. It provided that the United States would "forever secure and guaranty" such lands to the removed tribes, "and if they prefer it ... the United States will cause a patent ... to be made and executed to them for the same." *Id.* at 3.

The Cherokee Reservation in Indian Territory was finally established by 1833 and 1835 treaties. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokees on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of those lands, and provided that "a patent" would issue as soon as reasonably practical. *Id.* at art. 1. It confirmed the treaty obligation of the parties upon ratification. *Id.* at art. 7.

The 1833 treaty failed to achieve removal of the majority of Cherokee citizens. In 1835 another treaty was signed. New Echota Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478. This treaty was ratified to secure to the Cherokee "a permanent home for themselves and their posterity,"



in what became known as Indian Territory, "*without the territorial limits of the state sovereignties,*" and "*where they could establish and enjoy a government of their choice,* and perpetuate such a state of society as might be consonant with their views, habits and condition." *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872) (emphasis added).

Like Creek treaty promises, the United States's treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S.Ct. at 2460. The Cherokee "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return, the United States agreed to convey by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." *Id.* at art. 2. The 1835 Cherokee treaty described the United States's conveyance to the Cherokee Nation as a cession, required Cherokee removal to the new lands, covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent, and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government ...within their own country." *Id.* at arts. 1, 5, 8; art. 19, 7 Stat. 478.

This Court should "[s]tart with what should be obvious," as the *McGirt* Court did: Congress established a reservation for the Cherokee. *McGirt*, 140 S.Ct. at 2460. These early treaties, like the early treaties of the Creeks, did not refer to the Cherokee lands as a "'reservation' -perhaps because that word had not yet acquired such distinctive significance in federal Indian law." *Id.* at 2461. But the Supreme Court does not insist "on any particular form of words" when it comes to establishing a reservation. *Id.* at 2475. Like the Creek, the Cherokee were promised a permanent home, assured the right of self-government on those homelands, and promised the lands "would lie outside both the legal jurisdiction and geographic boundaries of any State. *Under any definition, this was a*

reservation." *Id.* at 2462 (emphasis added).

The Cherokee received the additional protection they bargained for when President Van Buren executed a fee patent to the Cherokee Nation for its reservation in 1838. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The patent recited the United States's treaty commitments to convey the land to the Nation and provided title in the Cherokee Nation "for the common use and equal benefit of all the members." *Id.* at 307; *see also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894).

By the end of 1838 most of the remaining Cherokees had been forcibly removed, suffering many deaths "during the removal march." Rogin, Michael Paul, *Fathers & Children: Andrew Jackson and the Subjugation of the American Indian*, 241 (1991). *See* Cherokee Nation Amicus Brief for Cherokee history during the removal period.

An 1846 treaty between Cherokee Nation and the United States also required federal issuance of a deed to the Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the "Neutral Lands") and the "outlet west." Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871. The treaty did not disestablish Cherokee Nation reservation boundaries.

Like Creek Nation, Cherokee Nation negotiated a treaty with the United States after the Civil War. Treaty with the Cherokee, July 19, 1866, art. 4, 14 Stat. 799. The 1866 treaty altered boundaries of Cherokee Nation reservation but reaffirmed its existence and provided Cherokee Nation would "retain the right of possession of and jurisdiction" over all of remaining country. It guaranteed "to the people of the Cherokee Nation the quiet and peaceable possession of their country," and promised federal protection against "intrusion from all unauthorized citizens of the United States" and removal of persons not "lawfully residing or sojourning" in Cherokee Nation. *Id.* at arts. 26, 27. It "*re-affirmed and declared to be in full force*" all previous treaty provisions "not

inconsistent with the provisions of' the 1866 treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. *Id.* at art. 31 (emphasis added).

The current boundaries of Cherokee Nation are as established in the 1833 and 1835 treaties, diminished only by the express cessions in the 1866 treaty, and by an 1891 agreement ratified by Congress in 1893 (1891 Agreement).<sup>2</sup> Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43.

The original 1839 Cherokee Constitution established the boundaries as described in its 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries "subject to such modification as may be made necessary" by the 1866 treaty.<sup>3</sup> Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The 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.

Applying the reasoning from *McGirt*, the plain wording of the treaties discussed above demonstrates the Cherokee lands were set aside for the Cherokee people and their descendants and

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<sup>2</sup> The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the north and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (*i.e.*, the Cherokee Outlet). See *United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906); see also Goins, Charis Robert, and Goble, Danney, "Historical Atlas of Oklahoma" (4<sup>th</sup> ed. 2006) at 61, (showing the Cherokee Outlet ceded by the 1891 Agreement, as well as the Kansas lands, known as the Neutral Lands, and the Cherokee Strip ceded by the 1866 Treaty). The 1893 ratification statute required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. *Id.* at 112. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other session has occurred since that time.

<sup>3</sup> 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866, amendment to art. I, § 1, reprinted in Volume I of West's Cherokee Nation Code Annotated (1993 ed.).

assured the right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. Having established a reservation for the Cherokee Nation, Congress has never diminished or disestablished that reservation.

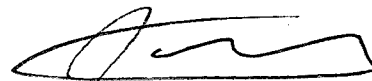
### CONCLUSION

This Court remanded Mr. Spears' s case to the Rogers County District Court for an evidentiary hearing to resolve two questions: ( 1) whether Mr. Spears is "Indian" and (2) whether his crimes occurred in Indian Country. The answers to both of those questions are a resounding yes. As the district court recognized, the State of Oklahoma does not have jurisdiction over crimes committed by or against Indians in Indian Country and therefore lacked jurisdiction to charge Mr. Spears for the crime at issue in this case. (Supp. O.R. 354) This Court must remand Mr. Spears's case to the district court with instructions to vacate the judgment and sentence against him.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on the date of filing of the above and foregoing instrument, a true and correct copy of the same was mailed to:

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