ORIGINAL

Case No. F-2019-247

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL GARY PARKER, JR.,

Appellant,

vs.

THE STATE OF OKLAHOMA,

Appellee.

Appeal from the
District Court of Tulsa County
District Court Case No. CF-2018-3184

SUPPLEMENTAL BRIEF AFTER REMAND

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Oklahoma Bar Assoc. No. 13000
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ATTORNEY FOR APPELLANT

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This brief is submitted on behalf of Michael Gary Parker, Jr., following a remand ordered by this Court regarding Appellant's claim alleging that under 18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), the State of Oklahoma lacked jurisdiction to try him because he is an eligible citizen of the Cherokee Nation and the crime occurred within the boundaries of the Cherokee Nation Reservation. Pursuant to this Court's remand order ("Order"), issued on August 31, 2020, the parties were directed to address only the following two issues: (1) whether the Appellant is an "Indian," and (2) whether the crime occurred within the boundaries of the Cherokee Nation Reservation. As to the first issue, this Court directed the district court to determine whether Mr. Parker had some "Indian blood," and whether he was recognized as an "Indian" by a tribe or the federal government. As to the second issue, the district court was ordered to determine whether the address of the crime scene was within the boundaries of the Cherokee Reservation.

On October 15, 2020, the Honorable Tracy Priddy held a status conference on the matter. The State of Oklahoma appeared through Assistant Attorney General Randall Young. Appellant appeared through counsel, Jamie Pybas, and his personal appearance was waived. Appellant advised the district court of the intent to seek a continuance in order to allow time to conduct further investigation, specifically DNA testing, in an effort to secure evidence to show he meets the "some degree of Indian blood" prong of the Indian status test.[1] *See Motion for Continuance*, filed October 16, 2020. The State objected, arguing a continuance was unnecessary because Mr. Parker could not establish "a *prima facie* case that he was recognized as an Indian by a tribe or the federal government

[1] Appellate counsel informed that court that the Appellant's mother, Marsha Cotton Harris, had recently received the results of genetic ancestry testing done by a direct-to-consumer ancestral company, "23 and Me" and the report indicated Ms. Harris has "Native American" ancestry. Counsel argued this information was directly relevant to the first issue the district court was asked to address on remand: Mr. Parker's status as an Indian. Counsel averred that she had located an appropriate DNA testing service equipped to perform the required forensic ethnicity/ancestry testing and analysis and asked the court to extend the deadline for conducting the remanded evidentiary hearing an additional 45 days to allow time to have this testing conducted. *See Motion for Continuance* at 2-3.

at the time of the crime, nor can he establish that he has 'some Indian blood'." *See Appellee's Objection to Appellant's Motion to Continue.* Appellant's motion for continuance was denied and an evidentiary hearing was set for October 29, 2020, on the issue of whether Appellant could meet "recognition as an Indian" under the second prong of the Indian status test. Appellant filed a *Brief on Remand* on October 26, 2020, addressing the issues to be determined by the court.

At the evidentiary hearing, the district court admitted Appellant's Exhibits A-L, noting the State's objection to the legal conclusion contained within Appellant's Exhibit K, describing the location of the offense as within the Cherokee Reservation.[2] (R.Tr. 14-15) The parties then presented argument on the question of Mr. Parker's Indian status. (R.Tr. 15-39) At the conclusion of the hearing, the district court ruled that Mr. Parker had not met his burden of establishing that he was recognized as an Indian by a federally-recognized Indian tribe (the Cherokee Nation), or the federal government. (R.Tr. 42) Accordingly, the district court determined that because Mr. Parker had failed to present a *prima facie* case that he would meet the Court's definition of an "Indian", further litigation of his claim to possessing some degree of Indian blood was moot and no continuance of the hearing was necessary to allow him to pursue DNA testing. (R.Tr. 41-43)

On January 6, 2021, the district court issued Findings of Fact and Conclusions of Law ("FFCL") in response to the Court's remand. These findings were filed in this Court on January 12, 2020. Based upon the evidence presented, the district court:

1. **Finds** that the defendant was not recognized as an Indian by a federally-recognized Indian tribe or the federal government at the time of the offense, or at the time of the hearing;

2. **Finds** that the defendant fails to set forth *prima facie* evidence of his legal status as an Indian for purposes of Indian Country jurisdiction; and

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[2] Citations to this evidentiary hearing will be referred to as (R.Tr. ___).

3. **Concludes** that the defendant is not an Indian for the purposes of Indian Country Jurisdiction, pursuant to *Diaz*, *Prentiss,* and *Goforth.*

See FFCL at 9. The district court concluded that it was unnecessary to address the issue of Appellant's degree of Indian blood as his lack of recognition was dispositive of his jurisdictional claim. For the same reason, the district court declined to reach the issue as to whether the crime occurred in Indian Country as defined by 18 U.S. C. §§ 1151-53. *See* FFCL at 3, 9.

This Court applies an "abuse of discretion" standard of review to the district court's factual findings. *Young v. State*, 2000 OK CR 17, ¶ 109, 12 P.3d 20, 43. This Court gives the trial court's findings strong deference if they are supported by the record. *Salazar v. State*, 2005 OK CR 24, ¶ 19, 126 P.3d 625, 629. However, the Court does not hesitate to make its own conclusions when the record either does not support or contradicts the trial judge's findings. *Id.* at 621, 622. Here, for the reasons set forth below, this Court should not give deference to the trial court's findings.

A. The District Court Abused Its Discretion in Finding that Mr. Parker's Claim to Indian Status Should Fail Because He Did Not Establish He Was a Recognized Indian.

Federal jurisdiction for Indian Country crimes requires proof that the defendant or the victim is an Indian. A defendant's Indian status is an essential element of a § 1153 MCA offense. Despite this jurisdictional requirement, Congress has not defined the term, leaving the task to the courts, which generally apply a two-part test derived from *United States v. Rogers*, 45 U.S. 567, 573 (1846). First, a court must determine if the person has any Indian blood. This is a question of fact and can be proven by establishing a Native American biological or genetic tie, most often through recorded family genealogy and tribal rolls. *United States v. Diaz*, 679 F.3d 1183, 1188 (10th Cir. 2012). Next, the Court must determine whether the person is a recognized Indian, meaning membership or affiliation with a federally recognized tribe. *United States v. Prentiss*, 273 F.3d 1277, 1279-83 (10th Cir. 2001). Accordingly, for purposes of determining whether Mr. Parker is an Indian, the Court of

Criminal Appeals instructed the district court to determine "whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both." *United States v. Diaz*, 679 F.3d at 1187; *United States v. Prentiss*, 273 F.3d at 1279; *see also Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

The district court disposed of Mr. Parker's jurisdictional claim by determining that he could not meet the recognition prong of this two-part test. The court noted that "[w]hile Appellant presented evidence of his descent from Cherokee Freedmen, former slaves of those belonging to members of the Cherokee Nation, the historical context does not change the standard given by the OCCA for this Court to evaluate his claim." *See* FFCL at 3. The district court was "unaware of any standard where a criminal defendant's eligibility alone qualifies someone as an Indian for the purposes of Indian Country jurisdiction." FFCL at 3-4. The court stated that "in the absence of any evidence beyond mere descent from those who were enrolled in a federally-recognized Indian tribe, this Court cannot find someone meets the recognition prong set out by law," and concluded that Mr. Parker "is not and Indian for purposes of Indian Country jurisdiction." FFCL at 4, 6. This ruling was clearly erroneous and constituted an abuse of discretion.

1. Mr. Parker is Recognized as Indian by the Cherokee Nation Tribe.

The second prong of the Indian status test asks whether the person is a recognized Indian, meaning membership or affiliation with a federally recognized tribe. *United States v. Prentiss*, 273 F.3d 1277, 1279-83 (10th Cir. 2001). The Cherokee Nation is a federally recognized tribe. In order to be eligible for citizenship in the Cherokee Nation, an applicant must "be able to provide documents that connect [him or her] to an enrolled lineal ancestor, who is listed on the 'Dawes Roll' Final Rolls of Citizens and Freedmen of the Five Civilized Tribes."*See* https://www.cherokee.org/all-services/tribal-registration/. As discussed below, Mr. Parker has met

this criteria. His membership application is currently pending with the Cherokee Nation and likely would have already been accepted were it not for the COVID-19 pandemic.[3] *See* Exhibit A.

Mr. Parker descends from a long line of Cherokee Nation citizens. Mr. Parker's mother, Marsha Lynn Cotton Harris, is a member of the Cherokee Nation, Registry No. C0421681. *See* Exhibit B. Ms. Harris was granted citizenship in the Cherokee Nation by virtue of the fact that her maternal grandfather (Mr. Parker's maternal great-grandfather) was Taylor Cotton, listed on the Dawes Final Rolls, Roll No. 620, as a Cherokee Freedmen. Mr. Parker's maternal great-great grandmother was Cynthia Cotton, Roll No. 619, also listed on the Final Dawes Roll as a Cherokee Freedmen. Mr. Parker's maternal great-great-great-grandmother was Judy Crapo, Roll No. 603, a Cherokee citizen listed on the Final Dawes Cherokee Freedmen Roll. *See* Exhibit C.

a. History of the Cherokee Freedmen.

The Cherokee Freedmen are the descendants of slaves owned by the Cherokee Nation before, during, and after the Trail of Tears. Prior to the Civil War, all of the Oklahoma tribes practiced slavery. Each tribe brought their slaves with them when they were removed to Indian Territory in the first half of the 19th Century. Slavery in the Cherokee Nation mirrored that of the South, and the Cherokee possessed more enslaved people than any other Native people. It is estimated that in the year 1860, the Cherokees owned around 4,000 slaves. *See* S. Alan Ray, *A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 Mich. J. Race & L. 387, 425-26 (2007)(*A Race or a Nation*). Cherokee enslaved people gained their freedom shortly after the Civil War as part of a series of treaties the federal government made with the Nation. *Cherokee*

[3] The Cherokee Nation Tribal Registration Office reports that the processing of enrollment applications is heavily backlogged due to closures and delays attributable to COVID-19. Inquiry to the Registration Department indicated they were "working on entering postal mail received in July and applications received in the office in August." Mr. Parker's application was sent in August, 2020.

Nation v. Nash, 267 F.Supp.3d 86, 93-99 (2017). The Cherokee Nation explicitly agreed to incorporate former slaves as full citizens in the Treaty of 1866. 14 Stat. at 801. Article IX of the Treaty states in pertinent part, "all [F]reedmen who have been liberated ... as well as free colored persons ... and their descendants, shall have all the rights of native Cherokees." After the Treaty's ratification, the Cherokee Nation amended its constitution to comply with its provisions. *Nash,* 267 F.Supp.3d at 100-01.

Within a few decades, the Nation began trying to limit the rights of Freedmen descendants to divisions of Cherokee lands and money. Bethany R. Berger, *Savage Equalities*, 94 Wash. L. Rev. 583, 631–32 (2019). The United States exacerbated this conflict when, in preparation for allotment of Cherokee land, it created census rolls that divided Cherokee citizens into "Blood," "Freedmen" and "Intermarried Whites" rolls. *See* Ariela J. Gross, *What Blood Won't Tell: a History of Race on Trial in America,* 153-58 (2008)(*What Blood Won't Tell*). Historically, the Cherokee Freedmen were indistinguishable culturally from the Cherokee themselves, as they were born and raised on the Cherokee Nation reservation, they spoke Cherokee as a first language, and the majority of Freedmen practiced Cherokee religious practices. However, even if they might have had Cherokee ancestry, Cherokee Freedmen were listed separately on the Dawes Rolls. "Although a significant number of Freedmen had Cherokee ancestry, the roll failed to reflect multiracial identity. Instead, many Freedmen were categorized by their subservient role and not their bloodline." *See* Ray, *A Race or a Nation* at 407-08, 412. These rolls were often so inaccurate that there are reports of brothers and sisters being placed on different rolls according to judgments by Dawes commissioners about who looked Indian and who Black.[4] *See* Gross, *What Blood Won't Tell* at 153-58. Nevertheless, these rolls

[4] Because they appeared 'Black' to Dawes commissioners and because they were usually identified as former slaves, Afro-Cherokees were listed on the 'freedmen' roll, which did not record degree of Cherokee blood. The Dawes

have become the official record as to Cherokee heritage and citizenship. *Id.*

After the passage of the 1976 Constitution, the Cherokee Nation began trying to limit Cherokee citizenship to those who could trace descent to the Cherokee Blood rolls. *See* Circe Sturm, *Race, Sovereignty, and Civil Rights: Understanding the Cherokee Freedmen Controversy*, 29 Cultural Anthropology 575, 577 (2014); *Nash*, 267 F. Supp. 3d at 110. After over two decades of conflicting decisions from courts and political bodies of both the United States and the Cherokee Nation, the dispute appears resolved for now. In August 2017, the U.S. District Court for the District of Columbia held that pursuant to the 1866 Treaty, all descendants of the Freedmen whose names appear on the Final Roll of Cherokee Freedmen are entitled to the same citizenship rights as native Cherokees. *Nash*, 267 F. Supp. 3d at 110-14, 140. It is estimated there were approximately 25,000 unregistered but eligible Cherokee Nation Freedmen following the *Nash* decision. While those Freedmen are now clearly eligible for citizenship in the Cherokee Nation, the question at issue here is whether these Freedmen also have a right to the federal criminal jurisdiction statutes to which native Cherokee members are entitled.

b. Eligibility to Enroll in the Cherokee Nation Tribe at the Time of the Offense Should Confer Indian Status on Mr. Parker.

As an initial matter, Mr. Parker acknowledges that he is not currently enrolled in the Cherokee Nation and was not officially enrolled at the time of the offense. The State argued this factor alone should defeat Mr. Parker's claim and urged the district court to decide that Indian status must be determined at the time of the offense and requires tribal enrollment at that time. (R.Tr. 24-25) As discussed in more detail below, Mr. Parker maintains that formal enrollment in a tribe is not

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rolls thus followed the "one-drop rule of hypodescent, anyone with one drop of Black blood was Black" and would not be considered for any sort of multiracial status, despite mixed Cherokee lineage. *See* Jeremiah Chin, *Red Law, White Supremacy: Cherokee Freedmen, Tribal Sovereignty, and the Colonial Feedback Loop*, 47 J. Marshall L. Rev. 1227, 1238 (*Red Law, White Supremacy*).

a prerequisite to recognition as an Indian. Acknowledging this fact, the district court declined the State's invitation to dismiss Mr. Parker's jurisdictional claim on his lack of enrollment and instead focused exclusively on the tribal recognition prong. FFCL at 6; n.3.

In its supplemental brief, however, the State has asked this Court to address the issue and deny Mr. Parker's claim because he was not formally enrolled in the Cherokee Nation *at the time of the offense. Brief of Respondent at* 5-9. Therefore Mr. Parker will address these issues despite the fact that the district court did not.

According to the State, even if Mr. Parker is *eligible* for membership in the Cherokee Nation, he was not an enrolled member of the Tribe on July 22, 2018, the date when Mr. Wilson was killed. *Id.* First, the State claims that to "measure Indian status at any other date than the date of the crime presents a notice problem." *Brief of Respondent* at 7. In support of this argument, the State cites dicta from a Ninth Circuit case, *United States v. Zepada*, 792 F.3d 1103, 1113 (9th Cir. 2015)(en banc), where the court held that "the defendant must establish membership in or affiliation with a Tribe as of the time of the offense."[5] The justification is that without such a rule, a defendant could manipulate which sovereign has jurisdiction simply by obtaining (or renouncing) tribal membership. This, the State claims, would undermine the "notice function" we expect criminal laws to serve. *Id.* The State also argues it would encourage forum-shopping by defendants. *Brief of Respondent* at 9. In actuality, using the requirement of tribal enrollment alone without also including eligibility for

[5] The State also cites two cases which are inapposite, an Eighth Circuit case, *Lufkins v. United States*, 542 F.2d 476, 477 (8th Cir. 1976), which deals with restrictions on allotments which can be removed when land is sold and can never be reestablished, and a juvenile case wherein the court held juvenile status on the date of the offense controls jurisdiction. *Brief of Respondent* at 5. However, age is another characteristic that changes and cannot be reverted once the youth attains a certain threshold age. *State v. Ali*, 806 N.W.2d 45, 54 (Minn. 2011). In addition, the State cites *State v. Perank*, 858 P.2d 927, 932 (Utah 1992), where the Tribe argued that Perank was not Indian under the jurisdictional statute because he was not officially enrolled as a member of the Tribe at the time of the crime. The Utah court disagreed and held that Perank was an Indian at the time of the crime for purposes of the Major Crimes Act even though he was not enrolled as "the Tribe formally recognized Perank as an Indian." 858 P.2d at 933.

enrollment creates more opportunity to manipulate jurisdiction. If enrollment *or eligibility to enroll* were the test of Indian status, as determined by the Tribe, one could not manipulate jurisdiction. Enrolled or not, one who was eligible as a citizen would be considered an Indian, thus making it an immutable status. One could not be Indian one day and not the next depending on enrollment status.

In addition, the State argues that to find the State lacked jurisdiction in this case due to Mr. Parker's later recognition as an Indian would create a jurisdictional gap and would make it nearly impossible for law enforcement in Oklahoma to determine who has jurisdiction over certain crimes in Indian Country. *Brief of Respondent* at 8. The State claims if enrollment at the time of the crime was not required, "it is difficult to imagine how officials investigating his crime have possibly determined whether he was Indian for purposes of criminal jurisdiction." *Brief of Respondent* at 9. The State argues that law enforcement should not be required to become "genealogists, researching the defendant's family history to determine if he was eligible for membership in a tribe, eligible to receive Indian benefits from the tribe or government, among other questions." *Id.* The State claims any other rule "is completely unworkable." *Id.* In fact, these questions are exactly what courts are required to evaluate currently under the tribal recognition test, as discussed in detail below.

The point here is that Indian status should be immutable, either you are an Indian or you are not. Indian status should not be something you can turn on and off. If the Supreme Court really means being an Indian is a political classification and not a racial classification, what should control is one's permanent tie and affiliation with a tribal sovereign government. Regardless, courts have not restricted the term "Indian" to enrolled members of Indian tribes. Tribal citizenship is only one way to demonstrate political recognition by a tribal government.[6]

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[6] It is the most common method of proof. Every circuit to have considered the issue has held that formal tribal citizenship alone is sufficient to meet the political recognition prong of the test. *See, e.g., United States v. Zepeda*, 792

c. The District Court Abused Its Discretion in Ruling that Mr. Parker Did not Establish Tribal Affiliation or Recognition.

Federal courts agree that one can be an Indian for Major Crimes Act purposes even if he or she is not formally enrolled in any tribe.*United States v. Antelope*, 430 U.S. 641, 646 n. 7 (1997) (enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction"); *United States v. LaBuff*, 658 F.3d 873, 877 (9th Cir. 2011); *United States v. Bruce*, 394 F.3d 1215, 1224-25 (9th Cir. 2005) (citing numerous cases holding that lack of enrollment is not determinative); *United States v. Pemberton*, 405 F.3d 656, 660 (8th Cir. 2005); *United States v. Drewry*, 365 F.3d 957, 961 (10th Cir. 2004) ; *United States v. Broncheau*, 597 F.2d 1260, 1262-63 (9th Cir. 1979); *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938).

Recognizing that tribal enrollment is not a prerequisite to Indian status, the State argues that the fatal flaw to Mr. Parker's *McGirt* claim is that he had "no recognition of any kind" as an Indian as of the date of the crime. *Brief of Respondent* at 10; R.Tr. 32-36.

In determining whether an individual is recognized as an Indian by a tribe or the federal government, courts generally consider four core factors: (1) tribal enrollment, (2) government recognition formally and informally through receipt of assistance reserved only to Indians, (3) enjoyment of the benefits of tribal affiliation, and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life. *See United States v. Drewry*, 365 F.3d at 961.[7] These criteria are generally known as the "St. Cloud factors" as they were first formulated by a federal district court in South Dakota in 1988. *St. Cloud v. United States*, 702

F.3d 1103, 1115 (9th Cir. 2015); *United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009); *United States v. Drewry*, 365 F.3d 957, 961 (10th Cir. 2004); *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988); *United States v. Torres*, 733 F.2d 449, 456 (7th Cir. 1984); *United States v. Lossiah*, 537 F.2d 1250, 1251 (4th Cir. 1976).

[7] The Ninth Circuit considers these four factors exclusively. *Zepeda*, 792 F.3d at 1114; *LaBuff*, 658 F.3d at 877; *United States v. Cruz*, 554 F.3d 840, 846 (9th Cir. 2009); *Bruce*, 394 F.3d at 1224.

F.Supp. 1456, 1461 (D.S.D. 1988). The Eighth Circuit and the Idaho Supreme Court consider all conceivable relevant facts, in no order of importance. *United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009); *State v. George*, 422 P.3d 1142, 1146 (Idaho 2018). As the Eighth Circuit explained, the St. Cloud factors may prove useful, depending upon the evidence, but they should not be considered exhaustive. Nor should they be tied to an order of importance. *Stymiest,* 581 F.3d at 764. The Tenth Circuit also uses a "totality-of-the evidence" approach. *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). The Court simply asks whether the Tribe recognizes the defendant as an Indian. There are no specific factors to balance.[8] *Scrivener v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995) There is no indication this Court has adopted any of these specific factors in determining the tribal recognition prong.

In his brief on remand, Appellant argued that, unfortunately, because Cherokee Nation citizenship was unavailable to his family for the majority of his lifetime, he was unable to show these factors. Despite his ancestral eligibility, Mr. Parker and his family did not participate in tribal events or receive tribal benefits or services so he cannot show "tribal recognition" in this way. Appellant argued that because the Cherokee Nation denied full citizenship rights to the extant descendants of Cherokee Freedmen from the mid 1980s until 2017, most of the Cherokee Freedmen will be in the same quandary Mr. Parker is in, citing to *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 140 (D.D.C. 2017). Appellant argued many of these Freedmen will not have been enrolled in the Nation until after

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[8] Despite some variation, all of these tests acknowledge that membership in a tribal political community may be informal. Courts have considered receipt of tribal services or benefits, prior exercise of jurisdiction by a tribal court, formal non-citizen status under tribal law, cultural and social participation, social recognition, residence on the reservation, and self-identification or self-presentation. *E.g., Stymiest*, 581 F.3d at 764-65 (considering self-presentation, prior tribal court prosecution, social recognition); *United States v. Pemberton*, 405 F.3d 656, 660 (8th Cir. 2005) (considering self-presentation and reservation residence); *United States v. Drewry*, 365 F.3d 957, 961 (10th Cir. 2004) (holding that participation in tribal summer program and social life and prior tribal child welfare involvement were sufficient to support a finding that the victims were Indian in a prosecution of a non-Indian defendant under § 1152); *United States v. Dodge*, 538 F.2d 770, 787 (8th Cir. 1976) (considering self-presentation).

the *Nash* decision, and they cannot show participation in Cherokee Nation tribal activities because they were denied their heritage and right to citizenship. *(Brief on Remand* at 19-20; R.Tr. 17).

In response, at the hearing on remand, the State cited a 2006 case, *Allen v. Cherokee Nation Tribal Council,* 6 Am. Tribal Law 18 (2006), to argue that Appellant's claim that the Freedmen were denied full citizenship rights from the mid 1980s until 2017 was incorrect. (R.Tr. 33-34; *Proposed Findings of Fact and Conclusions of Law* at 7-8) The district court ultimately adopted the State's argument holding that:

> Even so, the history of the Cherokee Nation's treatment of its own citizens and the record appears to call into question this narrative. Freedmen were allowed to enroll as citizens until the Cherokee Nation Counsel passed its "Act Relating to the Process of Enrolling as a Member of the Cherokee Nation §§ 4 (c), 6(a) (Sept. 12, 1992), ECF No. 235-3." *Nash*, 267 F.Supp 3d at 110. See also *Allen v. Cherokee Nation Tribal Council*, No. JAT-04-09 (Mar. 7, 2006).

FFCL at 8. The district court then concluded that "Appellant, who was born in August of 1977, was eligible for enrollment until he was 15 years old." *Id.*

On the contrary, from around the time of Mr. Parker's birth, soon after adopting the 1976 Constitution, the Cherokee Nation began restricting the Freedmen's membership and voting rights in the Tribe. During that period, the Freedmen were quietly disenfranchised and denied their rights to citizenship. *See* Circe Sturm, *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma* 179 (2002)(*Blood Politics*). The *Allen* case was focused on the 1992 codification in the Code of the Cherokee Nation, which provided that "tribal membership is derived only through proof of Cherokee blood based on the Final Rolls" of the Dawes Commission." *See* Cherokee Nation Tribal Council Legislative Act 6-92, later codified at 11 C.N.C.A. § 12. The *Allen* court determined that this provision of the Code directly conflicted with the language of the 1976 Cherokee Constitution and was unconstitutional. *Allen,* JAT-04-09, 6 Am. Tribal Law 18 (March 7, 2006).

Other sources on the history of the Cherokee Freedmen, however, indicate that between 1976 and 1992, it was *uncodified* executive policy that kept Cherokee Freedmen from full citizenship rights.

According to Principal Chief Ross Swimmer in a 1984 interview, both the voter registration committee and the tribal membership committee had introduced new rules in the period between 1977 and 1978 that declared according to the Cherokee Constitution of 1976, an individual must have a "Certificate of Degree of Indian Blood" card before enrollment or voting rights were allowed, even though the 1976 constitution made no mention of blood requirements for membership or voting rights. *See* Ray, *A Race or a Nation* at 411-12; Sturm, *Blood Politics at* 178; Jessica Jones, *Cherokee by Blood and the Freedmen Debate: The Conflict of Minority Group Rights in a Liberal State,* 22 Nat'l Black L.J. 1, 17 (2009).

In 1988, Swimmer's successor and former Deputy Chief, Wilma P. Mankiller, approved the Cherokee Registration Committee's new eligibility guidelines for tribal membership that mirrored Swimmer's previous executive order by requiring a degree of Indian blood for citizenship. *See* Council of the Cherokee Nation Legislative Research Center, "SUPPORTING THE GUIDELINES: RULES AND REGULATIONS OF THE CHEROKEE REGISTRATION COMMITTEE" (Accessible in PDF format as of January 30, 2021). Then, on September 12, 1992, these executive orders were formalized when the Cherokee Nation Council passed an act requiring all enrolled members of the Cherokee Nation to have a CDIB card. Principal Chief Mankiller signed and approved the legislation. *See* Council of the Cherokee Nation Legislative Research Center, "ACT RELATING TO THE PROCESS OF ENROLLING AS A MEMBER OF THE CHEROKEE NATION" (Accessible in PDF format as of January 30, 2021). From that point on, by official codification, until the *Nash* decision in 2017, Cherokee Nation citizenship was granted only to individuals descended directly from an ancestor on the "Cherokee by blood" rolls.

As argued below, because Mr. Parker could not show that he participated in tribal activities most of his life or that he received tribal assistance or benefits reserved only to Indians, his claim to Indian status is based on his long family connection and affiliation with the Cherokee Nation. *United States v. Prentiss*, 273 F.3d at 1279-83. Although recognizing Mr. Parker's familial history was "intertwined with the Cherokee experience," the district court adopted the State's position, holding that "[u]nder the law of the Tenth Circuit and this state, Appellent cannot show that he is recognized as an Indian by the Cherokee Nation or the federal government." *See* FFCL at 6.

This conclusion should be given no deference by this Court as it is contrary to the weight of the evidence. With all due respect, this Court should find that the district court abused its discretion. How can one say Mr. Parker has no affiliation with or recognition by the Cherokee Nation? Mr. Parker has always been *affiliated* with the Cherokee Nation through his ancestral descent. *See* Exhibit D. His ancestors were born and raised in the Cherokee Nation and were citizens of the Cherokee Nation their entire lives. *See* Exhibits E-J. They were living in the Cherokee Nation reservation at the time of the 1890, 1900, 1920, and 1940 censuses, and were officially registered on the Final Dawes Rolls. *See* Exhibits E, F.

Mr. Parker's great-great-great grandmother, a slave named Diley, was brought to Indian Territory by her slave owner, a Cherokee citizen. *See* Exhibits D, G, H. Mr. Parker's great-great-grandmother, Judy Crapo, was a slave owned by Johnson Foreman, a Cherokee by Blood. She was born in the Cherokee Nation and was a Cherokee citizen. *See* Exhibits D, G, H. Her daughter, Cynthia Foreman, nee Cotton, was born in Cherokee Nation in 1877 and was a Cherokee citizen. She received an allotment of land in Cherokee Nation in 1904. *See* Exhibit J. Cynthia's son, Taylor Cotton, was born in the Cherokee Nation in 1895 and was also a Cherokee Nation citizen. He also was given a land allotment by the Dawes Commission in 1904. *See* Exhibit J.

Mr. Parker's grandfather Roosevelt is his only maternal relative going back 150 years that was not a citizen of the Cherokee Nation. *See* Exhibit D. Roosevelt was taken from his parents around the age of 11, becoming a ward of the State and subsequently losing touch with his Cherokee Nation ties. By the time Mr. Parker's mother, Marsha Cotton Harris, learned of her Cherokee heritage, the Freedmen descendants were not allowed to join the Nation. Once they won the right to reclaim their full citizenship rights in 2017, Ms. Harris applied for citizenship and it was granted. *See* Exhibit B.

The factors that are cited to establish tribal recognition as outlined above are not exclusive and have not been adopted by the Court of Criminal Appeals. Under the common sense understanding of the terms "recognition" or "affiliation," this Court should find that these strong ancestral ties to the Cherokee Nation meet the "tribal recognition" prong and Mr. Parker is an Indian.

B. The Trial Court Abused its Discretion in Denying Appellant a Continuance to Pursue DNA Testing, Therefore this Court Should Remand the Case to the District Court to Allow Appellant the Opportunity to Establish the "Some Indian Blood" Prong of the Indian Status Test.

Even though the district court ultimately failed to address this issue because it found that the recognition prong could not be established, Appellant would ask this Court to remand the matter back to the district court to allow Appellant to address the "some Indian blood" prong of the Indian status test as it relates to his case. Notwithstanding Appellant's argument that the blood prong should be eliminated, assuming the application of the blood prong is constitutional, Mr. Parker should be afforded the opportunity to prove that he meets this prong of the Indian status test by allowing time to submit his DNA for ancestry/ethnicity testing.

1. Proof of "Some Indian Blood."

"Some Indian blood" has been defined as "ancestry living in America before the Europeans

arrived." *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). "[T]he inquiry in all cases where Indian status is in issue for jurisdictional purposes should be whether the person has some demonstrable *biological* identification as an Indian." There is no specific percentage of Indian ancestry required to satisfy the 'descent' prong of this test." Any amount will do. *Cohen's Handbook of Federal Indian Law (Cohen's Handbook)* at 177 (§ 3.03[4]). Proving lineage which ties back to pre-Columbus America is more important than proving a tie to a particular tribe so courts have held that the requirement of proof of some Indian blood does not require it be from a federally recognized tribe. *See United States v. Zepeda*, 792 F.3d 1103, 1111 (9th Cir. 2015).

Commonly, tribal members are given an associated blood quantum upon enrollment which satisfies the blood prong of the Indian status test. As discussed above, the fact that Mr. Parker is the descendant of Cherokee Freedmen complicates his ability to show "some Indian blood."

2. In the Context of Proving Criminal Jurisdiction, the Blood Quantum Requirement Should Be Eliminated. At the Very Least, The Blood Quantum Should Be Declared Unconstitutional as it Relates to Descendants of the Cherokee Freedmen Roll Members as it Violates Their Rights to Equal Protection of the Law.

Many Indian scholars have argued that the blood quantum test established by the Supreme Court in *Rogers* is obsolete and should be abandoned, especially in the case of the Freedmen. The test has been criticized for its antiquated association with objectionable, racially charged language and continuing questions over whether it violates the Equal Protection Clause because it is based on an impermissible racial classification. *United States v. Bruce*, 394 F.3d 1215, 1233-34 (9th Cir. 2005) (Rymer, J., dissenting); *See* Quinton Cushner & Jon M. Sands, *Blood Should Not Tell: The Outdated "Blood" Test Used to Determine Indian Status in Federal Criminal Prosecution*, THE FED. LAW., Apr. 2012 at 35 *(Blood Should Not Tell)*; Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 AM. INDIAN L. REV. 177, 207-08

(2011)(*Defining Indian Status*).

Scholars have argued that a "better test would discard blood and focus on whether the person is enrolled or eligible for enrollment in a federally recognized Indian tribe." Cushner, *Blood Should Not Tell* at 31. Appellant would urge this Court to find that the judicial definition of Indian status should not contain a blood requirement unless the respective tribe *requires* one for membership. Principles of tribal sovereignty should allow a tribe to define its members as it sees fit, including whether or not to use a blood quantum. In the end, "determining whether a specific individual racially belongs to a certain group is not within the province of the courts' expertise and should be left to the Indians or specific tribe." *See* Oakley, *Defining Indian Status* at 207.[9]

Regardless, the blood quantum requirement is unconstitutional as applied to those, like Mr. Parker, who trace their descendancy from their ancestors on the Dawes Cherokee Freedmen roll. Although many Indian tribes have a blood quantum requirement for membership, Cherokee Freedmen are eligible for membership whether or not they can prove a Cherokee blood quantum. *Cherokee Nation v. Nash*, 267 F. Supp. 3d at 139-40. As it currently stands, citizenship in a federally recognized tribe generally confers Indian status for purposes of federal criminal jurisdiction for all tribal members *except the Freedmen*. Because proving ancestry by reference to Freedmen rolls proves nothing more than an ancestral tie to a Freedmen; it does not prove the biological tie required by the Indian status test. Thus, although the linear descendants of those on the Dawes Cherokee Freedmen roll are considered Indians by the Cherokee Nation, under the test utilized here for determining criminal jurisdiction, they are not Indians and are not entitled to the protections of the

[9] The State has made the very same argument that "proper respect for tribal sovereignty means according deference to the Tribe's determination of who is – and who is not – a citizen of their sovereign." *See Bosse v. State,* Case No. PCD-2019-124, *Response to Petitioner's Proposition I in Light of the Supreme Court's Decision in McGirt v. Oklahoma, 140 S.Ct. 2452 (2020),* at 5.

federal criminal jurisdiction statutes.

Because the Freedmen are excluded from these statutes solely on the basis of their race, the current definition of Indian status as it is applied to the Freedmen violates the Equal Protection Clause of the Fifth and Fourteenth Amendments. Applying the blood quantum requirement in Mr. Parker's case would be to deny him Indian status even though his own Tribe would consider him a member with all the rights and privileges of a blood Cherokee citizen.

The Supreme Court has determined that classifying a person as Indian is not a suspect classification based on race. *Morton v. Mancari*, 417 U.S. 535, 552–53 (1974); *see also United States v. Antelope*, 430 U.S. 641, 646–47 (1977). In *Mancari*, the Supreme Court justified the government's providing a benefit to Indians because the "preference [was] not directed towards a 'racial' group consisting of 'Indians' . . . [but] applie[d] only to members of 'federally recognized' tribes." *Mancari*, 417 U.S. at 553 n.24. The hiring preference applied to tribal members who were racially Indian, but it did not apply to nonmembers who were racially Indian; therefore, this did not establish a racial classification. *Id.* Similarly, the Court in *Antelope* held that racially Indian tribal members being subject to federal criminal jurisdiction where racially Indian nonmembers were subject to state criminal jurisdiction was indicative of only a political classification.

According to these cases, being subjected to federal criminal jurisdiction is not because of race but because of membership in a federally recognized tribe. *Antelope*, 430 U.S. at 646–47. Thus, Indian status classifications are only justified because of the political nature of tribal membership. The Cherokee Freedmen maintain this political classification, they are members of a federally recognized Tribe, but still flunk the Indian status test for purposes of federal criminal jurisdiction solely because of their race. The only thing distinguishing the Freedmen from those possessing Indian status is a quantum of Indian blood. Although the *Rogers* test may be constitutional on its

face; it is unconstitutional as applied to the Cherokee Freedmen as it establishes an impermissible racial classification. *See Rice v. Cayetano,* 528 U.S. 495, 518-22 (2000) (statute treating Native Hawaiians differently based on race rather than membership in quasi-sovereign is unconstitutional). As such, this classification demands strict scrutiny review. Under strict scrutiny, the classification of Freedmen as non-Indians is not narrowly tailored to serve a compelling governmental interest and should be struck down. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) ; *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

Classifying the Cherokee Freedmen as non-Indians under the Indian status test also violates principles of tribal sovereignty. In order to correct this injustice and violation of federal policy, the blood quantum requirement should be removed. If this first prong were removed, Indians could prove a racial tie to their tribe by proving membership, and the Cherokee Freedmen would simply be classified as Indians. The blood test should be abandoned entirely in favor of a single bright-line test for Indian status that can be summarized in two sentences: If a person is enrolled or eligible for enrollment in a federally recognized tribe, then the person is an Indian. If not, then the person is not an Indian. *Blood Should Not Tell* at 35.

This is not a novel suggestion. Two other definitions within Title 25 of the United States Code entitled "Indians," use this simple test. Title 25 U.S.C.A. § 1903(4) defines "Indian child" as "any unmarried person who is under the age of eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." Similarly, 25 U.S.C.A. § 2201 (2) states "Indian" means "any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner (as of October 27, 2004) of a trust or restricted interest in land."

Because it is impossible, absent a DNA test, for many of the Cherokee Freedmen to prove

whether or not they have some Indian blood, they should receive the benefit of the doubt and a blood quantum should not be required to prove their Indian status. This Court should strike the "some Indian blood" requirement in this case as either unnecessary or unconstitutional and find that Mr. Parker, an eligible Cherokee Nation tribal member, qualifies as an Indian.

3. In the Alternative, Mr. Parker Should be Allowed Time to Submit a DNA Test To Prove He Has "Some Indian Blood."

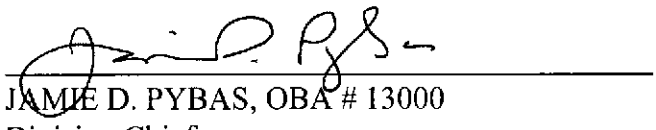
As discussed extensively above, because Mr. Parker is a direct lineal descendent of a Cherokee citizen on the Dawes "Freedmen" roll, rather than the Dawes "Blood" roll, he does not have an associated blood quantum from the Tribe. If this Court declines Appellant's invitation to eliminate the blood quantum requirement as it pertains to his case, then DNA testing appears to be his only mechanism to establish he has "some Indian blood."

Counsel located an appropriate DNA testing service in Reston, Virginia, Parabon Nanolabs, Inc., that is equipped to perform the required forensic ethnicity/ancestry testing and analysis. Counsel secured funding for the DNA testing and made arrangements with the James Crabtree Correctional Center for procuring the DNA sample from her client. The trial court denied counsel's requested continuance to allow time to pursue this testing, ultimately disposing of his claim on the sole basis that he failed to establish the recognition prong. *See* FFCL at 3, 9.

Because the district court's ruling was erroneous as to the recognition prong, Appellant would ask this Court to remand this case to the district court in order to allow DNA testing to be completed and the parties to conduct an evidentiary hearing on some "Indian blood" prong of the Indian status test.

Respectfully submitted,

MICHAEL GARY PARKER, JR.,

By: 

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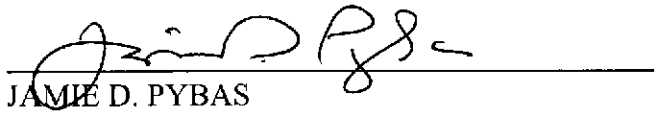
CERTIFICATE OF SERVICE

I certify that on the date of filing of the above and foregoing instrument, a true and correct copy of the same was delivered to the Clerk of this Court with instructions to deliver said copy to the Office of the Attorney General of the State of Oklahoma.



JAMIE D. PYBAS