ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT ERIC WADKINS,	)	
	)	
Appellant,	)	
v.	)	
	)	Case No. F-2018-790
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	
	)	

SUPPLEMENTAL BRIEF OF APPELLANT

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SUPPLEMENTAL BRIEF OF APPELLANT

After the Supreme Court's decision in *McGirt v. Oklahoma,* 140 S.Ct. 2452 (2020), this Court, on August 19, 2020, remanded Appellant's case to the District Court of Choctaw County for an evidentiary hearing to address his jurisdictional claim. This Court directed the district court to address Appellant's Indian status, i.e. "whether (1) Wadkins has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government" (Supp OR 4). This Court also directed the district court to determine whether the charged crimes occurred in Indian County.[1] The remand order provided: "Upon Wadkins'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" (Supp OR 3).

The parties stipulated that: 1) the locations of the charged offenses were within the historical boundaries of Choctaw Nation; 2) the federal government

[1] Due to the parties' stipulations regarding the location, Judge Brock's order, and this Court's subsequent decisions finding the Choctaw Reservation in southeastern Oklahoma intact – *Sizemore v. State,* 2021 OK CR 6, ¶ 16, _ P.3d _; *Ryder v. State,* 2021 OK CR 11, ¶ 29, _ P.3d _ - the discussion herein is limited to Appellant's Indian status.

recognizes Choctaw Nation as an Indian Tribal Entity; 3) Appellant has a 3/16 certified degree of Choctaw blood; and 4) Appellant became an enrolled member of Choctaw Nation on October 9, 2020, but he was not an enrolled member at the time of the charged offenses in June 2017 (Supp OR 88-91).

The evidentiary hearing was held on February 23, 2021, with the Honorable Gary L. Brock, Special Judge, presiding. The State appeared by and through Assistant Attorney Generals Joshua Lockett and Tessa Henry. Appellant appeared in person and was represented by appellate counsel. The Choctaw Nation appeared as *amicus curiae* by and through Jacob Keyes. On April 22, 2021, Judge Brock filed his Findings and Conclusions, holding:

> **FINDINGS**
> The Parties filed an Agreed Stipulation stipulating that (1) the location of the charged offenses were within the historical boundaries of the Choctaw Nation, the Federal Government recognizes the Choctaw Nation as an Indian Tribal Entity. See attached Stipulation.
>
> **FINDINGS OF FACT:**
> (1) The parties entered into a stipulation that Mr. Wadkins has a certificate of Degree of Indian Blood (CDIB). That degree is 3/16 Indian blood of the Choctaw Tribe.
>
> (2) Mr. Wadkins was not an enrolled member of the Choctaw Tribe at the time of the offense. He did not possess a CDIB Card, nor had he applied for one.
>
> (3) Mr. Wadkins was convicted in May of 2018. He did not become an enrolled member of the Choctaw Nation of Oklahoma until October 9, 2020. The Defendant now has a Choctaw Nation Membership Card.
>
> (4) This Court finds that at the time the crime was committed by Mr. Wadkins', failure to seek membership in the Choctaw Nation until after the conviction, voluntary associations with the "Universal Aryan Brotherhood" (a white supremacist gang), his unfamiliarity

with who tribal leaders were, lack of any credible evidence that any benefits he may have received from the tribe were exclusive to members of the Choctaw Nation, no credib[le] evidence that the Defendant had social recognition as an Indian through living on a reservation and participating in Indian social life.

The Court finds at the time of the offense and trial the Defendant fails to meet the standards set forth in the Rogers Test. The Court finds Defendant's status was not Indian at the time of the offense and trial.

The conclusion of law required for this Court's decision are based on the two prong test from US v. Rogers 45 U.S. 4; The St. Cloud factor serving as a guide when analyzing the 2nd Prong Test of the "Rogers" case, the Oklahoma Bosse case.

FINDING

(1) This Court finds the crimes charged occurred in Indian Country.

(2) This Court finds Mr. Wadkins' status was not Indian at the commission of the offense or Trial or for the purpose of denying the State of Oklahoma jurisdiction.

(Supp OR 279-280)

ARGUMENT AND AUTHORITES

MR. WADKINS IS AN INDIAN, BOTH BY BLOOD AND AFFILIATION; THE COURT ABUSED ITS DISCRETION BY CONCLUDING THAT APPELLANT FAILED THE NON-RACIAL PRONG.

A. The District Court's Findings and Conclusions.

The court's cursory findings are riddled with inaccuracies. Virtually every "fact" the court references in paragraphs "2" and "4" is either misleading or simply wrong. Contrary to Judge Brock's findings, as discussed in greater detail *infra*, Appellant testified that he had a CDIB card his entire life (R. Tr. 23-24, 79, 91), that he sought membership in the Choctaw Nation years prior to the instant conviction (R. Tr. 80-82), that he lived on the Choctaw

Reservation (R. Tr. 27, 84, 93-94), and that he participated in tribal social life (R. Tr. 42, 92, 95). This evidence was uncontroverted.

Although the Findings and Conclusions repeatedly reference the "time of the crime," the court cites Appellant's involvement with the Universal Aryan Brotherhood prison gang without mentioning the undisputed evidence from multiple sources that Appellant left the gang in 2009 (R. Tr. 39-40, 71-73, 115-117, 124-125, 127; State Exh 1 pp. 22, 48, 55; State Exh's 5.2, 5.7).

Regarding Appellant's supposed "unfamiliarity with who tribal leaders were," while no authority identifies this as a relevant factor, Appellant nevertheless demonstrated sufficient familiarity. In response to the State's pop quiz on cross examination asking who the Choctaw chief was, Appellant correctly answered that the former chief, the one present at an event he attended, was "Pyle" (R. Tr. 92). (Appellant then erroneously named the current chief as "Barns," rather than "Batton." (R. Tr. 92))

As to the court's finding of a "lack of any credible evidence" that tribal benefits Appellant received "were exclusive to members," this reveals an alarming misunderstanding of the relevant inquiry, despite both parties thoroughly briefing the issue before and after the hearing (Supp OR 102, 159, 237, 265). The question is not whether the benefits were reserved for "members," but if they were reserved for "Indians." *United States v. Drewry,* 365 F.3d 957, 961 (10th Cir. 2004) (*vacated on other grounds,* 543 U.S. 1103 (2005), *aff'd on remand,* 133 Fed. Appx. 543 (10th Cir. 2005)) (*quoting United States v. Lawrence,* 51 F.3d 150 (8th Cir. 1995)); *St. Cloud v. United States,* 702

F.Supp. 1456, 1461 (D.S.D. 1988). And evidence was in fact admitted that the tribal benefits in question – free, non-emergency medical services - were reserved for Indians (D Exh 3; R. Tr. 13).

The court also clearly failed to apply the burden-shifting standard set forth in the remand order. Appellant was only required to prove his Indian status by *prima facie* evidence, i.e., evidence that "will suffice until contradicted and overcome by other evidence." *Hill v. State*, 1983 OK CR 161, ¶ 3, 672 P.2d 308, 310 (quoting Black's Law Dictionary). Appellant was competent to be a witness. 12 O.S.2021, § 2601; 22 O.S.2021, § 701. Much of his sworn testimony was corroborated (R. Tr. 17, 39, 41, 43-44, 125; D Exh 2, 4). The State conducted a lengthy cross examination of Appellant which not only failed to cast doubt on his direct testimony, but in fact uncovered additional details supporting his Indian status (R. Tr. 53-55, 80-82, 97-98, 101). Appellant comfortably established his Indian status by *prima facie* evidence, after which point the State had the burden to disprove said status (Supp OR 3). *See Sweden v. State,* 1946 OK CR 81, 83 Okla. Cr. 1, 6, 172 P.2d 432, 435 (the State has the burden to prove jurisdiction). The State's case was meager, calling only one witness from DOC, who merely confirmed Appellant's testimony that he was formerly a member of the Universal Aryan Brotherhood (while also acknowledging Appellant's 2009 withdrawal from the gang and that DOC recognizes Appellant as Native American) (R. Tr. 121, 124-125).

By misconstruing the evidence, using erroneous tests to evaluate recognition, and ignoring the relevant burden of proof, the district court

abused its discretion in concluding that Appellant is non-Indian. *Neloms v. State,* 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (defining an abuse of discretion as "any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue").

B. Mr. Wadkins' History, Indian Heritage, and Contacts/Lack of Contacts with Choctaw Nation.

Robert Eric Wadkins, born March 29, 1981, has a 3/16th certified degree of Choctaw blood (Supp OR 88-91). He was born in Bakersfield, California to Shelia (Winkler) Leach and Ricky Dee Wadkins, both of whom are currently deceased (R. Tr. 24, 27, 49).[2] Appellant's mother had 3/8 degree Indian blood and was an enrolled member of the Choctaw Nation of Oklahoma (CN #172738) (R. Tr. 24-25, 53; Def. Exh. 1). Appellant testified that his younger brother, Rory Dee Wadkins, is also an enrolled Choctaw member (R. Tr. 25-26, 56-57, 82). Appellant testified that he did not know whether his two younger sisters were tribal members (R. Tr. 83).

Appellant described that when he was very young, he moved with his family back and forth from California to Oklahoma several times (R. Tr. 26, 51). At approximately age 9, the State of California removed him from his family and placed him in a group home for about four years (R. Tr. 26, 50-52, 56). Appellant testified that in approximately 1994, he came back to Oklahoma to live permanently (R. Tr. 26-27, 55).[3] Appellant attended junior

[2] Both parties designated Leach as a witness before her death in December (Supp OR 77, 81).
[3] Appellant believed that Choctaw Nation was behind his relocation, being the only entity with enough influence to remove a child from the State of California's custody, but he had no specific knowledge (R. Tr. 27, 55).

high and high school at Antlers Public Schools in Pushmataha County. i.e., on the Choctaw Reservation (R. Tr. 27, 84; Supp OR 64). Appellant testified that while attending Antlers Schools, he was on a meal program and was provided aid for clothing and school supplies (R. Tr. 27-28, 83-84, 87-88). Appellant was "sure" these benefits were tied to his Indian heritage (R. Tr. 27-28).[4]

Appellant was previously convicted and sentenced as an adult to prison time in Pushmataha County Case No.'s CF-1998-62 and CF-1999-53. Appellant was also convicted and sentenced in Leflore County Case No. CF-2007-26 (State Trial Exh. 30-35). Appellant estimated that since the age of 17, he has been incarcerated in Oklahoma penal institutions for19 out of the last 23 years, and that in the past 15 years he was only free for 60 days (R. Tr. 21, 28-30, 59-60, 95). Appellant testified that he primarily lived in Antlers during periods when he was not in State custody (R. Tr. 93-94).

Appellant testified that due to his degree of Indian blood, Choctaw Nation provided him, throughout his life (even when incarcerated), with free non-emergency health services, primarily at facilities in Talihina and Hugo (R. Tr. 24, 41-42, 86, 88). This testimony was corroborated by Choctaw Nation's records, admitted as Defendant's Exhibit 2 – 34 pages of tribal medical records organized in reverse chronological order – reflecting services provided on the following dates: 7/14/17, 4/21/17, 10/14/08, 7/15/08, 4/22/08, 3/18/08, 12/18/07, 9/25/07, 8/22/07, 7/23/07, 3/28/07, 2/28/07, 1/29/07,

[4] Appellant also testified that he was offered college scholarships due to his Indian status, but he never attended college (R. Tr. 90).

8/31/06, 1/9/98, 12/30/97, 1/9/97 (R. Tr. 12; Def. Exh. 2).[5] Choctaw Nation's "Eligibility for Services" webpage was admitted a Defense Exhibit 3, showing that health services are primarily reserved for Native Americans (Ev Hrg 13). Proof of Indian blood is required, either through a CDIB card, a membership card, or letter of descendancy from a federally recognized tribe. Non-Indians can be eligible for services under certain enumerated exceptions, e.g., emergencies, adopted/step/foster children of an eligible parent, or non-native spouses (limited services on a fee basis or for pregnancy services if pregnant with an eligible child) (Def. Exh. 3). In response to Judge Brock's questioning, Mr. Keyes, stated that in practice the exceptions were even more limited than the website indicated (R. Tr. 142). Regardless, Appellant received services as an adult, and he has never been married (Ev Hrg 42). The medical records indicate that services were not provided through an exception, but rather that Appellant was directly eligible due his Choctaw heritage and ties to the tribe, e.g., several documents associated with the 10/14/08 and 8/31/06 visits, state in the patient's information: "Tribe: CHOCTAW NATION OF OKLAHOMA"..."Eligibility: CHS & DIRECT"; and several documents associated with other visits in 2007 and 2008 state in the patient's information: "TRIBE: CHOCTAW NATION OF OKLAHOMA" (Def. Exh. 2, pp. 9-11, 13-29). *See Drewry,* 365 F.3d at 961 (evidence of the child victims' Indian status was sufficient, which included receipt of treatment from Indian Medical Services

[5] Notably, the two 2017 visits were approximately six weeks before and six weeks after the charged offenses on June 6, 2017.

where "such care was not predicated on a determination that they fell within one of the two exceptions allowing for the provision of care to non-Indians. Rather, evidence indicated their medical care was based on an assumption that they were Indians eligible for such treatment").

Appellant testified that Choctaw Nation issued him a CDIB identification card when he was young which he relied on throughout life, never having a driver's license or other state identification (R. Tr. 23-24, 79, 91). Although he could not initially recall his current worker's name, Appellant testified that his family was regularly assigned a Choctaw Nation social worker (R. Tr. 42, 91, 103-104).

Appellant testified that his mother taught him tribal history and passed down to him certain spiritual beliefs of the Choctaw people, to which he stills adheres (R. Tr. 44, 97-98). This testimony was corroborated by a Choctaw County Jail property receipt, which indicated that when he was arrested in the instant case in 2017, Appellant had in his possession "1 FEATHER"; Appellant described that the feather was from a red-tailed hawk and provided protection and guidance (R. Tr. 16-17, 43, 99; Def. Exh. 4). During cross-examination, Appellant clearly enunciated a phrase from the Choctaw language; he testified that he knows other phrases and some letters, which he learned from his mother (R. Tr. 53-55). Appellant testified that he participated in Native sweat lodges in prison to purify himself, although he has not done so in approximately ten years, because most DOC facilities do not allow sweats (R. Tr. 42-43, 95). Appellant testified that one of his hobbies in prison is creating

art, including Native-American art, describing that both his mother and brother were also Native artists (R. Tr. 44-45, 82, 100-102). Appellant testified that he attends the annual Choctaw Nation Powwow in Tuskahoma when he is able, and he has done so more than once (R. Tr. 42, 94-95). Appellant recalled attending a cookout at the Choctaw Community Center with his mother and cousin, where the chief at the time, Chief Pyle, was present (R. Tr. 92).

Appellant testified that he has never been "arrested tribal" or prosecuted in tribal court (R. Tr. 59). Appellant acknowledged that he has never voted in a tribal election (R. Tr. 94).

Appellant testified that in 2000 when he was 19 years old, he joined the Universal Aryan Brotherhood ("UAB") while serving a term at the violent Diamondback Correctional Facility (R. Tr. 31-32, 61-63). When questioned about his decision to join that particular prison gang, Appellant explained that there were other Indians in the Aryan Brotherhood; that at the time, the UAB and the Indian Brotherhood gangs were aligned and almost as one; that there were obstacles to joining the Indian Brotherhood (minimum amount of DOC time requirement, initiation only during certain months); and that his numerological and astrological beliefs played a role (R. Tr. 32-38, 64-71; D. Exh 6). Appellant testified that he is a biracial individual (Indian and Caucasian) and that while joining the Aryan gang was consistent with his Caucasian heritage, he did not view it as inconsistent with his Indian heritage (R. Tr. 38, 64-66, 76-77, 103). Appellant denied any intention of disassociating himself from the Choctaw tribe by joining UAB (R. Tr. 38-39, 73). Appellant

testified that he "covered" his two UAB tattoos and left the gang in 2009 - approximately eight years before the instant charges (R. Tr. 39-40, 72-73). This was corroborated by DOC testimony, reports, and photographs (R. Tr. 115-117, 124-125; State Exh 1 pp. 22, 48, 55 (i.e., case notes from 3/31/10, 5/17/10, 8/1/18, 7/18/20), 5.2, 5.7).

DOC identifies Appellant's race as Indian (R. Tr. 124; D Exh 7; State Exh 4; OR 66). Local law enforcement and the OSBI identify Appellant as Indian (OR 4, 6; State Trial Exh 27-28). State courts, as reflected on his current and former judgment and sentence documents, identify Appellant as Indian (OR 141; State Trial Exh 30, 32).

Appellant was not formally enrolled in Choctaw Nation in 2017, the time of the charged offenses, but he became an official tribal citizen in October 2020 (CN #172734) (OR 88; Def Exh 5). Appellant denied enrolling in the Choctaw Nation because of *McGirt*; he testified that he completed the application paperwork in 2020 to appease his mother who had always wanted him to do so, and who, along with the tribal social worker, provided the necessary forms (R. Tr. 78-80). Appellant described that he previously attempted to enroll by going to the tribal headquarters in Hugo when he was 17, but he became frustrated when notified that he would need an adult signature; at the time, he decided pursuing formal membership was unnecessary, as he already knew who he was, i.e., a Choctaw (R. Tr. 80-82).

At the hearing, Appellant held himself out as an Indian, and he testified that he does so whenever asked about his race (R. Tr. 47). Mr. Wadkins

testified: "[W]ho better to tell you who I am than myself, you know, so, yes. I'm Native American. I always have been, and I always will be" (R. Tr. 49).

C. Defining "Indian" in the Federal Criminal Statutes.

As an initial matter, this Court should decline the State's invitation to adopt a new "bright-line" test - that only individuals enrolled in the tribe at the time of the offense can qualify as Indians under 18 U.S.C. §§ 1152, 1153 (Supp OR 146, 152-159, 263-264; R. Tr. 137). Courts universally reject the notion that formal membership is a requirement to qualify as an Indian. "Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative." *United States v. Broncheau,* 597 F.2d 1260, 1263 (9th Cir. 1979). *See United States v. Stymiest,* 581 F.3d 759, 764 (8th Cir. 2009); *Ex parte Pero,* 99 F.2d 28, 31 (7th Cir. 1938); *State v. George,* 163 Idaho 936, 940, 422 P.3d 1142, 1145 (2018); *State v. LaPier,* 242 Mont. 335, 342, 790 P.2d 983, 987 (1990); *State v. Perank,* 858 P.2d 927, 933 (Utah 1992); *State v. Daniels,* 104 Wash. App. 271, 279, 16 P.3d 650, 653 (2001); *United States v. Antelope,* 430 U.S. 641, 646, n. 7 (1977). "[T]he State has not cited – and our independent research has not unearthed – precedent from any jurisdiction treating lack of enrollment as dispositive." *State v. Salazar,* 461 P.3d 946, 949-50 (N.M. Ct. App. 2020). Further, the State's proposed membership-requirement approach directly conflicts with that of the Tenth Circuit. *Drewry,* 365 F.3d at 961. *See Bosse v. State,* 2021 OK CR 3, ¶¶ 16-17, _ P.3d _ (refusing to deviate from the Tenth Circuit's flexible test).

As the term "Indian" in 18 U.S.C. §§ 1152, 1153, is not statutorily defined, courts have developed the two-prong analysis set forth in the remand order, which derives from *United States v. Rogers,* 45 U.S. 567, 572-73 (1846), i.e., the individual must 1) have some Indian blood, and 2) be recognized as an Indian by the federal government or by a tribe. *United States v. Prentiss,* 273 F.3d 1277, 1279-80 (10th Cir. 2001). The test should be applied using "a totality-of-the-evidence approach," and it determines the status of both victims and perpetrators. *United States v. Diaz,* 679 F.3d 1183, 1187 (10th Cir. 2012).

The second prong asks whether the individual is recognized as an Indian by either a tribe *or* by the federal government. *United States v. Bruce,* 394 F.3d 1215, 1224-25 (9th Cir. 2005) (the prong is disjunctive, and if an individual is recognized by a tribe, then recognition by the federal government is not required). The second prong "probes whether the Native American has a sufficient non-racial link to a formerly sovereign people." *Id.* (*quoting St. Cloud,* 702 F.Supp. at 1461). The inquiry is whether the individual "has been socially or legally recognized as an Indian." *Prentiss,* 273 F.3d at 1280 (internal quotation omitted). Analysis is required from the perspective of both the tribe and the individual. *United States v. Cruz,* 554 F.3d 840, 850 (9th Cir. 2009).

Courts typically use the four "*St. Cloud* factors" as a guide when analyzing the second *Rogers* prong:

> In declining order of importance, these factors are: 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in

Indian social life.

St. Cloud, 702 F.Supp. at 1461.

The *St. Cloud* factors "have emerged as a widely accepted test for Indian status". *State v. Sebastian,* 243 Conn. 115, 132, 701 A.2d 13, 24 (1997). More recent opinions clarify that the four guiding factors are neither exclusive nor tied to an order of importance. *Stymiest,* 581 F.3d at 764; *United States v. Maggi,* 598 F.3d 1073, 1081 (9th Cir. 2010) (*overruled on other grounds by United States v. Zepeda,* 792 F.3d 1103 (9th Cir. 2015)).[6]

The term "Indian" in the federal criminal statutes, is entitled to "broad construction" due to A) the special trust relationship between the federal government and Indians, and B) "the maxim that statutes should be construed to favor Native Americans." *St. Cloud,* 702 F.Supp. at 1462. State courts should be hesitant to deny Indian status to a racial Indian who considers himself an Indian. "[D]efendants who hold themselves out to be Indians and who are of Indian blood are Indians under § 1153." *United States v. Pemberton,* 405 F.3d 656, 660 (8th Cir. 2005) (*citing United States v. Dodge,* 538 F.2d 770, 786 (8th Cir. 1976)). *See Bosse,* 2021 OK CR 3, ¶ 10, _ P.3d _

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[6] The State contends that a rigid application of the *St. Cloud* factors does not suit Oklahoma's unique situation (Supp OR 146). Appellant agrees. For instance, in other jurisdictions, courts often consider receipt of health care under the second factor, as Indian hospitals are typically operated by the federal government. *See United States v. LaBuff,* 658 F.3d 873, 878 (9th Cir. 2011). Similar evidence in Oklahoma should not be entitled to less weight where tribes like Choctaw Nation operate their own medical facilities. Further, effects from the State's decades of lawless prosecutions must be considered when relevant. *See McGirt,* 140 S.Ct. at 2480 (describing the "magnitude" of Oklahoma's "legal wrong"). E.g., the State's historical exercise of jurisdiction diminished tribal arrests and prosecutions, which can be critical under *St. Cloud. See Bruce,* 394 F.3d at 1226-27; *Stymiest,* 581 F.3d at 764. Also, pertinent to this case, the impact of illegal state incarcerations on an individual's life must be taken into account.

(rejecting a minimum blood requirement, because "we find it inappropriate for this Court to be in the business of deciding who is an Indian").

Case law teaches that ethnic Indians are rarely considered "non-Indian" and only in circumstances that do not apply to Appellant - 1) where the person is ineligible for membership in a federally recognized tribe, or 2) where there is absolutely no evidence of tribal recognition/affiliation as an adult:

- *Goforth v. State*, 1982 OK CR 48, ¶ 7, 644 P.2d 114, 116: "The record is devoid [] of any evidence tending to show that the appellant was recognized as an Indian."

- *Cruz,* 554 F.3d at 847-48 (reversing Cruz's federal conviction based on his meritorious claim of non-Indian status): The defendant was not even eligible for tribal membership, never participated in Native American ceremonies, and never carried a tribal identification card.

- *Maggi,* 598 F.3d at 1082-83 (reversing Maggi's federal conviction based on his meritorious claim of non-Indian status): Maggi was not even eligible for tribal membership. He only used Indian health services once.

- *United States v. Lawrence,* 51 F.3d 150, 153 (8th Cir. 1995) (*abrogated on other grounds by Stymiest,* 581 F.3d 759) (government appeal; affirming the district court's dismissal order based on victim being non-Indian): The victim was not even eligible for tribal membership, and the evidence of eligibility/receipt of tribal services was questionable.

- *United States v. Driver,* 755 F.Supp. 885, 888-89 (D.S.D. 1991) (acquittal of Driver's federal conviction granted based on insufficient evidence that he was recognized as an Indian): The defendant was eligible to apply for tribal membership, but there was no guarantee of admittance. He was only treated once at an Indian clinic, was denied other benefits, and mostly lived in other cities or out of state as an adult.

- *State v. Bonaparte,* 114 Idaho 557, 579, 759 P.2d 83, 85 (Ct. App. 1988) (*overruled on other grounds by State v. Larson,* 158 Idaho 130, 344 P.3d 910) (affirming denial of state post-conviction relief based on Bonaparte's claim that he is Indian): The defendant was not even eligible for tribal membership.

- *Lewis v. State,* 137 Idaho 882, 885, 55 P.3d 875, 878 (Idaho Ct. App. 2002) (affirming denial of post-conviction relief based on Lewis' claim that he is Indian): Lewis had only "minor contacts" with the tribe. He moved away from the reservation as a child, and as an adult he had no interactions with the tribe, communicated little with Indian relatives, participated in no tribal activities, and did not practice Indian religions.

- *LaPier,* 242 Mont. at 341-44, 790 P.2d at 987-88 (denying LaPier's appellate claim that he is Indian): LaPier was affiliated with two tribes, one of which was not federally recognized. LaPier was not even eligible for membership with the tribe that was federally recognized.

- *Daniels,* 104 Wash. App. at 277-82, 16 P.3d at 652-55 (denying Daniels' appellate claim that he is Indian): Daniels' tribe was Canadian and not recognized by the United States government.

- *State v. Nobles,* 373 N.C. 471, 474-84, 838 S.E.2d 373, 376-82 (2020) (denying Nobles' appellate claim that he is Indian): Nobles was not a tribal member and only "eligible to be designated as a first descendant." There was no evidence of tribal assistance since he became an adult. He never participated in cultural activities or had a tribal identification card. On numerous documents, Nobles listed his race as "white."

D. The Effect of Appellant's Subsequent Enrollment.

Although he didn't formally enroll in Choctaw Nation until 2020, Appellant has been part of the tribe since birth. "The Choctaw Nation of Oklahoma shall consist of all Choctaw Indians by blood whose names appear on the final rolls of the Choctaw Nation...and their lineal descendants." Choctaw Const. art. II, § 1. *See Perank,* 858 P.2d at 933 ("[e]nrollment merely formalized the right" to membership conferred by the tribal constitution).

Assuming *arguendo* that Appellant's birthright is not itself sufficient to satisfy the second *Rogers* prong, what then is the effect of his subsequent formal enrollment? Is it dispositive of Indian status, is it a factor to be considered, or does it have no relevance whatsoever?

Appellant submits that tribal enrollment, even if it occurs after the offense, is nevertheless determinative. *See Cole v. State,* 2021 OK CR 10, ¶ 19, _ P.3d _ (posthumously-enrolled victim deemed an Indian). Membership alone normally resolves the recognition prong. *Diaz,* 679 F.3d at 1187; *United States v. Lossiah,* 537 F.2d 1250, 1251 (4th Cir. 1976); *United States v. Torres,* 733 F.2d 449, 455 (7th Cir. 1984). Enrollment is a "one-way street," i.e., while a non-member can demonstrate recognition by other evidence, members are automatically recognized. *Stymiest,* 581 F.3d at 764. *See Sebastian,* 243 Conn. at 133-34, 701 A.2d at 24-25 (for the second prong, courts need only examine tribal "affiliation" factors where tribal "membership" is lacking). This approach gives proper deference to tribal sovereignty. *See Bruce,* 394 F.3d at 1225 (determining its own members is one of a tribe's most basic powers); *Bosse,* 2021 OK CR 3, ¶ 19, _ P.3d _. Significantly, the State identifies no published case where an enrolled member of a federally recognized tribe fails the second *Rogers* prong - regardless of the date of enrollment.

If this Court holds that subsequent enrollment is not dispositive of recognition, it should still consider the same as a factor under the "totality" test. *Bosse,* 2021 OK CR 3, ¶ 15, _ P.3d _. *See Perank,* 858 P.2d at 933 (subsequent enrollment considered among the recognition evidence). Certainly, Choctaw Nation's act of formally enrolling Appellant as a *member* in 2020, is strong proof that the tribe recognized Appellant was an *Indian* in 2017. At the least, Appellant's subsequent enrollment unequivocally shows that he was eligible for membership at the time of the charges, which itself is

significant (*see* cases *supra* establishing ineligibility for membership as a common theme for failing the non-racial prong).[7]

Finally, the State argues (R. Tr. 137; Supp OR 263-265), and Judge Brock apparently concluded, that subsequent enrollment is entitled to no weight at all, i.e., the date of the crime is not just the most relevant point in time, it is the only relevant point. Appellant urges this Court to reject such an approach, which disregards tribal sovereignty and is inconsistent with the Tenth Circuit's "totality" evaluation. *Diaz,* 679 F.3d at 1187. Regardless, however, Appellant's evidence described *supra* – consistent receipt of tribal health services for 20 years, issuance of and reliance on a tribal identification card, enrolled relatives, involvement of tribal social workers, familiarity with the Choctaw language, Native spiritual beliefs, participation in "sweats," attending cultural events, holding himself out as an Indian under oath, identification as Indian by state courts and law enforcement, living on the reservation, etc. – is similar to, if not stronger than, evidence in other cases where courts found that non-members were adequately recognized to qualify as Indians. *See Drewry,* 365 F.3d at 961; *United States v. Nowlin,* 555 F.App'x 820, 823-24 (10th Cir. 2014); *Bruce,* 394 F.3d at 1224, 1226; *LaBuff,* 658 F.3d at 878-79; *Stymiest,* 581 F.3d at 764-65; *Pemberton,* 405 F.3d at 660; *George,* 163 Idaho at 939-40, 422 P.3d at 1145-46; *Perank,* 858 P.2d at 933.

[7] Further, while Congress does not define "Indian" in §§ 1152, 1153, the term is defined elsewhere in the federal code and includes persons merely eligible for membership. *See* 25 U.S.C. § 2201(2)(A) (in the Indian-land-consolidation context, "'Indian' means any person who is a member of any Indian tribe [or] is eligible to become a member of any Indian tribe...").

CONCLUSION

The State does not contend that Appellant was *never* sufficiently affiliated with Choctaw Nation, e.g., when it began prosecuting him at the age of 17 (R. Tr. 29; State Trial Exh 30). Rather, the State points to certain tribal benefits and contacts now being too "remote[] in time" and "sporadic," due to Appellant spending "the bulk of his adult life in prison" (where he also joined the wrong gang) (Supp OR 267-271). The State essentially argues that it *converted* Appellant into a non-Indian through its suspect Indian-Country prosecutions in Pushmataha County Case No.'s CF-1998-62, CF-1999-53, and Leflore County Case No. CF-2007-26, and the resulting prison terms. This Court should reject the State's assimilation argument.

Judge Brock abused his discretion, as Appellant presented *prima facie* evidence of both *Rogers* prongs, and the State failed to meet its burden. Because the alleged offenses occurred on the Choctaw Reservation, state courts lack jurisdiction, and Appellant's Rape and Kidnapping convictions should be vacated and remanded with instructions to dismiss. 18 U.S.C. §§ 1151, 1153; *Sizemore,* 2021 OK CR 6, ¶¶ 16-17, _ P.3d _.

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CERTIFICATE OF SERVICE

This is to certify that on June 11, 2021, a true and correct copy of the foregoing Supplemental Brief was caused to be mailed via United States Postal Service, postage pre-paid, to Appellant at the last-known address, and a copy was served upon the Attorney General by leaving a copy with the Clerk of the Court of Criminal Appeals for submission to the Attorney General.

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