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DISTRICT COURT  
FILED

DON NEWBERRY, Court Clerk  
STATE OF OKLA. TULSA COUNTY

**Appellee.**

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) **Tulsa County District Court**  
) **Case No. CF-2015-6478**  
)  
) **Court of Criminal Appeals**  
) **Case No. F-2017-1203**  
)

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

DEC 21 2020

JOHN D. HADDEN  
CLERK

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findings of fact and conclusions of law as to two separate questions: (a) the Indian status of his victim, A.C., and (b) whether the crime occurred in Indian Country. Further, the Oklahoma Court of Criminal Appeals directed this Court as follows:

The District Court shall address only the following issues:

First, his victim, A.C.'s status as an Indian. The District Court must determine whether (1) A.C. has some Indian blood, and (2) was recognized as an Indian by a tribe or the federal government.<sup>1</sup>

Second, whether the crime occurred in Indian Country within the boundaries of either the Creek Reservation or the Cherokee Reservation. The existence and boundaries of the Creek Reservation are not in dispute. If however, the District Court finds that the crime did not occur within the boundaries of the Creek Reservation the District Court is directed to follow the analysis set out in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)], 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.<sup>2</sup>

Defendant/Appellant filed Brief of Defendant addressing the issues raised by the Oklahoma Court of Criminal Appeals on October 6, 2020. The Cherokee Nation filed its Amicus Brief with 11 attachments on September 22, 2020.

The State filed State's Brief on Concurrent Jurisdiction on October 1, 2020. The Appellant filed his Reply to State's Brief on Concurrent Jurisdiction on October 13, 2020. This Court declined to hear arguments of counsel, issue any rulings, make findings of fact or conclusions of law regarding this question, but allowed the parties to file their respective

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<sup>1</sup> See *United States v. Diaz*, 679 F.3d 1183, 1187 (10<sup>th</sup> Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10<sup>th</sup> Cir. 2001). See generally *Goforth v. State*, 1982 OK CR 48, ¶ 6, 644 P.2d 114, 116.

<sup>2</sup> Order Remanding for Evidentiary Hearing.

pleadings with the District Court to preserve this argument for the Oklahoma Court of Criminal Appeals.

The parties stipulated and agreed as follows:<sup>3</sup>

1. Regarding the status of the victim:
  - A. A.C. has a blood quantum of 61/512.
  - B. A.C. is a citizen of the Eastern Band of Cherokee Indians as of 9/22/2011 and was so at the time of the crimes.
  - C. The Eastern Band of Cherokee Indians is an Indian Tribal Entity recognized by the federal government.
2. Regarding the location of the crime:
  - A. The crime in this case occurred 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.

Additionally, Appellant moved to admit Exhibits A and B. The State did not object to the admission of these exhibits and therefore, Exhibits A and B are admitted as evidence. Appellant further requested to incorporate any arguments made in the amicus brief filed by the Cherokee Nation.

#### **I. Victim's Status as an Indian.**

The State of Oklahoma and Appellant have stipulated as to the Indian status of Appellant's victim, A.C., by virtue of the victim's tribal membership and proof of blood quantum. Based upon the stipulations provided, the Court specifically finds the victim,

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<sup>3</sup> Exhibit 1, Agreed Stipulation filed October 8, 2020.

A.C. (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government. A.C., the victim is an Indian.

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

The State of Oklahoma and Appellant stipulated that the crime occurred within the historical boundaries of the Cherokee Nation. The State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation.

Whether Congress established a reservation for the Cherokee Nation, the Court finds as follows:

1. Cherokee Nation is a federally recognized Indian tribe. 84 C.F.R. § 1200 (2019).
2. The current boundaries of Cherokee Nation encompass lands in a fourteen-county area within the borders of the State of Oklahoma (Oklahoma), including all of Adair, Cherokee, Craig, Nowata, Sequoyah, and Washington Counties, and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Tulsa, and Wagoner Counties.
3. The Cherokee Nation's treaties must be considered on their own terms, in determining reservation status. *McGirt*, 140 S. Ct. at 2479.
4. In *McGirt*, the United States Supreme Court noted that Creek treaties promised a "permanent home" that would be "forever set apart," and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. *McGirt*, 140 S.Ct. at 2461-62. As such, the Supreme Court found that, "Under any definition, this was a [Creek] reservation." *Id.* at 2461.
5. The Cherokee treaties were negotiated and finalized during the same period as the Creek treaties, contained similar provisions that promised a permanent home that would be forever set apart, and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state.
6. 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.

7. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of the new Cherokee lands, and provided that a patent would issue as soon as reasonably practical. Art. 1, 7 Stat. 414.
8. The 1835 Cherokee treaty was ratified two years later "with a view to re-unite their people in one body and to secure to them 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." Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 and *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872).
9. Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Under the 1835 treaty, Cherokee Nation "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 to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." Art. 2, 7 Stat. 478.
10. The 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation of the new lands in Indian Territory 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," so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Arts. 1, 5, 8, 19, 7 Stat. 478.
11. On December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new lands in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The title was held by Cherokee Nation "for the common use and equal benefit of all the members." *Cherokee Nation v. Hitchcock*, 187 U.S. at 307; *See also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894). Fee title is not inherently incompatible with reservation status, and establishment of a reservation does not require a "particular form of words." *McGirt*, 140 S. Ct. at 2475 (citing *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)).
12. The 1846 Cherokee treaty 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.

13. The 1866 treaty resulted in Cherokee cessions of lands in Kansas and the Cherokee Outlet and required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council." Treaty with the Cherokee, July 19, 1866, art. 21, 14 Stat. 799.
14. The 1866 Cherokee treaty "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. Art. 31, 14 Stat. 799.
15. Under *McGirt*, the "most authoritative evidence of [a tribe's] relationship to the land...lies in the treaties and statutes that promised the land to the Tribe in the first place." *McGirt*, 140 S. Ct. at 2475-76.

As a result of the treaty provisions referenced above and related federal statutes, this Court hereby finds Congress did establish a Cherokee reservation as required under the analysis set out in *McGirt*.

Whether Congress specifically erased the boundaries or disestablished the Cherokee Reservation, the Court finds as follows:

1. The current boundaries of Cherokee Nation are as established in Indian Territory in the 1833 and 1835 Cherokee treaties, diminished only by two express cessions.
2. First, the 1866 treaty expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. Art. 17, 14 Stat. 799.
3. Second, the 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet); and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country...until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." Art. 16, 14 Stat. 799.
4. The Cherokee Outlet cession was finalized by an 1891 agreement ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43.

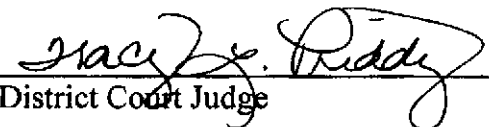
5. The 1891 Agreement provided that Cherokee Nation “shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory” encompassing a strip of land bounded by Kansas on the North and Creek Nation on the south, and located between the 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).
6. The 1893 statute that ratified the 1891 Agreement 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. 27 Stat. 612, 640-43; *United States v. Cherokee Nation*, 202 U.S. at 112.
7. 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 cession has occurred since that time.
8. The original 1839 Cherokee Constitution established the boundaries as described in the 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. 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.).
9. 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.

The State has argued the burden of proof regarding whether Congress specifically erased the boundaries or disestablished the reservation rests solely with Appellant. The State also made clear that the State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation. No evidence or argument was presented by the State specifically regarding disestablishment or boundary erasure of the Cherokee Reservation. The Order Remanding for Evidentiary Hearing states, “Upon

Castro-Huerta's presentation of *prima facie* evidence as to the victim's 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."<sup>4</sup>

On this point, *McGirt* provides that once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S. Ct. at 2468. Reading the order of remand together with *McGirt*, regardless of where the burden of production is placed, no evidence was presented to this Court to establish Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma has jurisdiction in this matter. As a result, the Court finds the victim, A.C., is an Indian and that the crime occurred in Indian Country.

IT IS SO ORDERED this 8 day of December, 2020.

  
District Court Judge

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<sup>4</sup> Order Remanding for Evidentiary Hearing at 4.