ORIGINAL

No. F-2018-790

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT ERIC WADKINS,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE AFTER REMAND

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Comes now the Appellee, the State of Oklahoma, by and through Dawn Cash, Acting Attorney General, and files this Supplemental Brief of Appellee After Remand. As will be shown, Robert Eric Wadkins's (hereinafter referred to as the defendant) Indian County jurisdictional claim presently before this Court is without merit. As such, relief must be denied.

I. Procedural History.

On August 19, 2020, this Court remanded this case to the District Court of Choctaw County for an evidentiary hearing and ordered the trial court to address two issues with respect to the defendant's Indian Country jurisdictional claim: 1) the defendant's "status as an Indian"; and 2) "whether the crime[s] occurred in Indian Country" (Supp. O.R. 4).[1]

At the hearing on February 23, 2021, the parties presented joint stipulations to the trial court (which had been formally filed on January 12, 2021):

1. The locations of the crimes charged in Choctaw County Case No. CF-2017-126 are within the historical boundaries of the Choctaw Nation—boundaries as set forth in, and adjusted by, the 1855 and 1866 treaties between the Chickasaw Nation, the Choctaw Nation, and the United States.

2. The Choctaw Nation is an Indian Tribal Entity recognized by the federal government.

3. Robert Eric Wadkins ("Appellant"), born March 29, 1981, has a Certificate of Degree of Indian Blood (CDIB) and is three sixteenths (3/16) degree Indian Blood of the Choctaw Tribe. (*See* Attachment A).

4. Appellant became an enrolled member of the Choctaw Nation of Oklahoma on October 9, 2020. As of June 6, 2017, the time of the charged offenses, Appellant was not an enrolled member of the Choctaw Nation (*See* Attachment A). Although the September 2020 letter from the Choctaw Nation, which confirmed that Appellant was not an enrolled member as of that date, included a "CN" number, a "CN" number is automatically assigned when an application is received by the Tribe and is not, in and of

[1] Citations to the Supplemental Original Record in this case will be referred to as (Supp. O.R. __). Citations to the transcript of the evidentiary hearing will be referred to as (Tr. __). Citations to the exhibits admitted by the State and the defendant at the hearing will be referred to as (S. Ex. __) and (Def. Ex. __), respectively.

itself, indicative of membership (*See* Attachments A, B).

(Supp. O.R. 88-91). In addition to these stipulations, the parties also presented various witnesses and exhibits, discussed in detail below.

In its subsequent Findings and Conclusions, the trial court determined that the defendant committed his crimes within Indian Country (Supp. O.R. 280).[2] However, with respect to the defendant's Indian status, the trial court found the following: 1) the defendant possesses 3/16 degree of Indian blood of the Choctaw Tribe; 2) the defendant was not an enrolled member of the Choctaw Nation at the time of his crimes; and 3) the defendant became an enrolled member of the Choctaw Nation on October 9, 2020 (Supp. O.R. 279). However, based on the evidence presented at the hearing, the trial court concluded that, "at the time of the offense[s] and trial[,] the Defendant fail[ed] to meet the standards set forth in the *Rogers*[3] Test"; thus, the "Defendant's status was not Indian at the time of the offense[s] and trial" or "for the purpose of denying the State of Oklahoma jurisdiction" (Supp. O.R. 280 (italics added)). As will be shown, the trial court did not abuse its discretion in determining that the defendant was not Indian—for the purposes of federal criminal jurisdiction—at the time of his crimes. *Ryder v. State*, 2021 OK CR 11, ¶ 29, __ P.3d __, __.

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[2] In the proceedings below, the State ultimately took no position as to Indian Country, while acknowledging the district court had ruled in a previous case that the Choctaw Nation has a reservation (Supp. O.R. 166-36, 273-74). The State argued in the *McGirt* litigation that the Muscogee (Creek) Nation did not have a reservation. *See McGirt v. Oklahoma*, __ U.S. __, 140 S. Ct. 2452 (2020). However, the State recognizes that lower courts are bound by *McGirt*, and that this Court has recently applied *McGirt* to hold that the Choctaw Nation has a reservation. *See Bosse v. Oklahoma*, __ U.S. __, 137 S. Ct. 1, 2 (2016) (noting that only the Supreme Court can overrule itself); *Sizemore v. State*, 2021 OK CR 6, ¶¶ 10-16, 485 P.3d 867, 869-71. The State strenuously disagrees with the holdings in *McGirt* and *Sizemore*, and it preserves the right to ask the Supreme Court to review those holdings. As explained by Chief Justice Roberts in his dissent in *McGirt*, Congress disestablished any reservations created for the Muscogee (Creek), Choctaw, Cherokee, Chickasaw, and Seminole Nations. *See McGirt*, 140 S. Ct. at 2482-2500 (Roberts, C.J., dissenting). In particular, *McGirt* is inconsistent with the Supreme Court's cases that do not require the use of any particular words to disestablish a reservation. *Id.* at 2486-89 (Roberts, C.J., dissenting). For these reasons and others, the State should have jurisdiction in this case because the crime was not committed within Indian Country as defined by 18 U.S.C. § 1151(a).

[3] *United States v. Rogers*, 45 U.S. 567 (1846).

II. Argument and Authority.

A. Applicable Law Regarding Indian Status.

"The term 'Indian' is not statutorily defined, but courts have judicially explicated its meaning." *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005) (quotation marks omitted). A "number of courts" have read the Supreme Court's decision in *United States v. Rogers*, 45 U.S. 567 (1846), "to establish a two-part test of whether a person is an Indian under federal criminal jurisdiction . . . ." *St. Cloud v. United States*, 702 F. Supp. 1456, 1460 (D.S.D. 1988). Under the *Rogers* test, in order to qualify as an "Indian" for purposes of federal criminal jurisdiction, a defendant must prove two facts: 1) that he or she has "some" Indian blood; and 2) that he or she is recognized as an Indian by a tribe or the government. *Id. See United States v. Zepeda*, 792 F.3d 1103, 1113-15 (9th Cir. 2015) (*en banc*); *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001); *Bosse v. State*, 2021 OK CR 3, ¶ 12, 484 P.3d 286, 291; *see also* (Supp. O.R. 4). Importantly, "[a] person claiming Indian status must satisfy both prongs" of the *Rogers* test. *Bruce*, 394 F.3d at 1223. The State does not contest the district court's determination that the defendant has "some" Indian blood, but it will demonstrate below that the defendant is *not* recognized as an Indian.

B. "Recognition" as an Indian.

Generally, in order to satisfy the second prong of the *Rogers* test, a defendant must be *affiliated* with a tribe that is recognized by the federal government. *See United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977); *Zepeda*, 792 F.3d at 1110-12; *State v. Daniels*, 16 P.3d 650, 654 (Wash. Ct. App. 2001). Importantly, "Indian blood alone is not enough to warrant federal criminal jurisdiction because jurisdiction over Indians in Indian country does not derive from a racial classification but from the special status of a formerly sovereign people"; thus, the second prong

of the *Rogers* test "probes whether the Native American *has a sufficient non-racial link to a formerly sovereign people*." *St. Cloud*, 702 F. Supp. at 1461 (emphasis added). *See also Antelope*, 430 U.S. at 646; *Bruce*, 394 F.3d at 1224; *State v. Nobles*, 838 S.E.2d 373, 377 (N.C. 2020).

Currently, many courts utilize an in-depth and intensive factor approach to determine "recognition" or "affiliation" with a federally-recognized tribe:

> 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. These factors do not establish a precise formula for determining who is an Indian. Rather, they merely guide the analysis of whether a person is recognized as an Indian.

St. Cloud, 702 F. Supp. at 1461 (court's footnote omitted). *See also United States v. Nowlin*, No. 13-8028, 555 F. App'x 820, 823 (10th Cir. Feb. 19, 2014) (unpublished); *United States v. Cruz*, 554 F.3d 840, 846 (9th Cir. 2009); *United States v. Loera*, 190 F. Supp. 3d 873, 880 (D. Ariz. 2016). Additionally, "[s]ome courts deem the four factors set out in *St. Cloud* to be exclusive and consider them 'in declining order of importance'"; meanwhile, other courts have found the *St. Cloud* factors far from exclusive and have looked to other relevant factors to assist in determining "affiliation" or "recognition." *Nobles*, 838 S.E.2d at 378 (quoting *Bruce*, 394 F.3d at 1224).

Notably, although the State fully recognizes the widespread use of the *St. Cloud* factors in determining recognition, the State believes a *different* approach should be applied in Oklahoma. Thus, before discussing the *St. Cloud* factors and their application to the defendant's case, the State asserts below that a simpler and more straightforward test (or bright-line test) should be utilized in determining recognition. This bright-line test, rather than focusing on a multitude of complicated factors, would simply focus on a defendant's membership (or lack thereof) with a federally-recognized tribe at the time of his or her crime(s). However, as will be discussed below, regardless

of what test this Court employs regarding the second prong of the *Rogers* test, this Court's focus should be on a defendant's affiliation (or lack thereof) with a tribe *at the time of his or her crime(s).*

1. Jurisdiction Measured as of the Time of the Crime.

As a preliminary matter, regardless of the test employed, a defendant must establish recognition *as of the time of the offense. Zepeda*, 792 F.3d at 1113; *Deerleader v. Crow*, No. 20-CV-0172-JED-CDL, 2021 WL 150014, at *5 (N.D. Okla. Jan. 15, 2021) (unpublished) ("This evidence demonstrates that Deerleader was an 'Indian,' under federal law, in 2015 when he committed the crimes for which he was convicted."); *Ryder*, 2021 OK CR 11, ¶ 10, __ P.3d at __; *Hogner v. State*, 2021 OK CR 4, ¶ 18, __ P.3d __, __; *State v. Perank*, 858 P.2d 927, 932 (Utah 1992). *See United States v. Lamy*, 521 F.3d 1257, 1267 (10th Cir. 2008); *Lufkins v. United States*, 542 F.2d 476, 477 (8th Cir. 1976).[4] *See also Mollan v. Torrance*, 22 U.S. 537, 539 (1824) ("It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."). In the proceedings below, the defendant argued that his membership, although occurring *after* the crimes, "retroactively" satisfies the second *Rogers* prong; further, the defendant also argued that his "eligibility" for membership in 2017 (irrespective of his involvement with the Choctaw Nation) should automatically satisfy the second prong (Supp. O.R. 96-107, 232-42). For a number of reasons, this cannot be. *See Mollan*, 22 U.S. at 539.

First, as recognized by the *en banc* United States Court of Appeals for the Ninth Circuit, to measure Indian status at any date other than the date of the crime presents a notice problem, both for defendants and the government:

[4] In an analogous context, appellate courts examining whether a defendant was subject to the jurisdiction of a juvenile court or a non-juvenile trial court have held that a defendant's age *on the date of the offense* controls. *See, e.g., State v. Ali*, 806 N.W.2d 45, 54 (Minn. 2011); *Matter of D.M.*, 611 S.W.2d 880, 883 (Tex. Civ. App. 1980); *Russell v. State*, 494 S.W.2d 30, 35 (Mo. 1973).

> In a prosecution under the IMCA [Indian Major Crimes Act], the government must prove that the defendant was an Indian at the time of the offense with which the defendant is charged. If the relevant time for determining Indian status were earlier or later, a defendant could not "predict with certainty" the consequences of his crime at the time he commits it. *Apprendi v. New Jersey*, 530 U.S. 466, 478, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Moreover, the government could never be sure that its jurisdiction, although proper at the time of the crime, would not later vanish because an astute defendant managed to disassociate himself from his tribe. This would, for both the defendant and the government, undermine the "notice function" we expect criminal laws to serve. *United States v. Francisco*, 536 F.2d 1293, 1296 (9th Cir. 1976).

Zepeda, 792 F.3d at 1113. *See also Goforth v. State*, 1982 OK CR 48, ¶ 7, 644 P.2d 114, 116.

Second, to find that the State lacked jurisdiction in this case, due to the defendant's *later* enrollment, would create a jurisdictional gap. To illustrate, imagine that it was known in 2017 that these crimes occurred on a reservation. As in any other federal prosecution based on the Indian Major Crimes Act, the federal government would have been required to allege in the indictment, and prove to the jury beyond a reasonable doubt, that the defendant was Indian.[5] *United States v. Prentiss*, 206 F.3d 960, 974-80 (10th Cir. 2000). *See United States v. Langford*, 641 F.3d 1195, 1196 (10th Cir. 2011). But, here, the federal government would not have been able to do so in 2017, as the defendant was neither a member of, nor sufficiently affiliated with, the Choctaw Tribe (Supp. O.R. 88-91, 279-80). To entertain the defendant's argument that his 2020 membership retroactively satisfies the recognition prong for his crimes, committed *in 2017*, means that the federal government would somehow have had to prove beyond a reasonable doubt that the defendant would *become* a tribal member at some point in the future. Certainly, this would have been impossible in 2017. Thus, accepting the defendant's "retroactivity" argument, neither the

[5] For example, the Ninth Circuit's pattern jury instructions for crimes charged under 18 U.S.C. § 1153 requires that a jury find that a defendant "was a member of, or affiliated with, a federally recognized tribe at the time of the offense." Instruction No. 8.113, United States Court of Appeals for the Ninth Circuit's Manual of Model Criminal Jury Instructions (2019) (available at https://www.ce9.uscourts.gov/jury-instructions/node/571).

State nor the federal government had jurisdiction over his crimes. This cannot be.

Third, to allow *later* recognition as an Indian to control jurisdiction, or to allow "eligibility" for membership to satisfy recognition, would make it nearly impossible for law enforcement in Oklahoma to determine who has jurisdiction over certain crimes in Indian Country. Law enforcement cannot be expected to be clairvoyant, nor can law enforcement predict that a defendant will later obtain recognition as an Indian. Further, there are currently 574 federally recognized Tribes. *See* The Federal Register, *Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs,* https://www.federalregister.gov/documents/2021/01/29/2021-01606/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of (last visited June 11, 2021). Neither police officers nor district attorney's offices can possibly investigate whether every defendant (and victim, *see Bosse*, 2021 OK CR 3, ¶¶ 23-28, 484 P.3d at 294-95) has an ancestor who was enrolled in an Indian tribe such that the defendant (or victim) might be eligible for enrollment. This is preposterous. Thus, it must be that recognition is determined at the time of the crime(s). Any other rule is completely unworkable.

Fourth, if Indian status is not determined as of the date of the crime, then it would encourage forum-shopping by defendants.[6] *See Goforth*, 1982 OK CR 48, ¶ 7, 644 P.2d at 116 ("Absent such recognition, we cannot hold that the appellant is an Indian under federal law, since such a determination at this point would allow the appellant to assert Indian heritage only when necessary to evade a state criminal action."). *See also Zepeda*, 792 F.3d at 1113 ("Moreover, the government could never be sure that its jurisdiction, [assuming that it is] proper at the time of the crime, would not later vanish because an astute defendant managed to disassociate himself from

[6] In fact, at the evidentiary hearing, the Choctaw Nation admitted the defendant could choose, if he so wished, to withdraw from membership with the Choctaw Nation (Tr. 143-44).

his tribe"; "[t]his would, for both the defendant and the government, undermine the 'notice function' we expect criminal laws to serve." (citing *United States v. Francisco*, 536 F.2d 1293, 1296 (9th Cir. 1976))). Such result is unimaginable. Thus, the State asserts that jurisdiction *must* be determined by examining a defendant's recognition at the time of his or her crime(s).

2. Bright-Line Test.

The Supreme Court has never ruled whether any evidence beyond enrollment with a federally-recognized tribe can satisfy the second prong of the *Rogers* test. *See Antelope*, 430 U.S. at 647 n.7 ("Since respondents are enrolled tribal members, we are not called on to decide whether nonenrolled Indians are subject to 18 U.S.C. § 1153, and we therefore intimate no views on the matter."). Simply, the *St. Cloud* factors are too onerous, intrusive, and likely to yield inconsistent results, and "case outcomes have not formed a consistent pattern," which has caused "commentators [to] criticize[] these inconsistencies, and urge[] adoption of a single, clearly articulated definition." *Cohen's Handbook of Federal Indian Law*, § 3.03[4]. As this Court recently recognized, it seems "*inappropriate for this Court to be in the business of deciding who is Indian*. As sovereigns, tribes have the authority to determine tribal citizenship." *Bosse*, 2021 OK CR 3, ¶ 19, 484 P.3d at 293 (emphasis added). Yet, if the *St. Cloud* factors apply, this Court will have to review the evidence presented below and determine whether the defendant was "Indian enough." Thus, proper respect for tribal sovereignty, constitutional considerations, and judicial economy all should mean that *only* those with Indian blood who are enrolled with a federally-recognized Indian tribe—at the time of the crime(s) at issue—should be subject to the provisions of 18 U.S.C. §§ 1152-53. This is so for three important reasons.

First, proper respect for tribal sovereignty means according deference to a tribe's determination of who is—and who is not—a citizen of their sovereign. *See Plains Commerce Bank*

v. Long Family Land & Cattle Co., 554 U.S. 316, 327 (2008); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978); Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 AM. INDIAN L. REV. 177, 207 (2011). And because, in modern times, tribes consistently "keep formal, written rolls," there is no need to resort to generalized tests that focus on uncertain criteria. *Cohen's*, *supra*, at § 3.03[2].

Second, ensuring that only those with official "political" affiliations with a tribe are accorded the special treatment of federal law avoids the constitutional pitfalls of giving the term "Indian" a racial definition that could run afoul of the Equal Protection Clause. *Bruce*, 394 F.3d at 1233-34 (Rymer, J., dissenting); Oakley, *supra*, at 207-08. Federal law treats Indians differently from others without engaging in race discrimination because such law treats "Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Morton v. Mancari*, 417 U.S. 535, 554 (1974). Thus, what is important to avoid constitutional prohibitions on race discrimination is treating Indians differently only because of their *membership* in the tribe. *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 was unconstitutional).

Third, creating a bright-line test that focuses on tribal enrollment rather than a myriad of pliable factors will promote consistency and ease judicial administration of what is now the most populous Indian reservation in the United States. *See* Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Multifactor tests that require fact-finding beyond tribal enrollment only breed confusion, force development of complex jury instructions on Indian status, and demand largely non-Indian judges and juries to adjudicate whether someone is "Indian enough" for immunity from state jurisdiction.

> How might a court, presumably comprised of non-Indians, know what it means to live an Indian lifestyle? . . . Tribes have already established clear, definite

> membership requirements, which allows for both consistency and objectivity. There is no new information that would need to be gathered or created. *When a court is presented with an individual claiming Indian status, it would simply have to defer to the tribe to determine whether that individual is a member.*

Oakley, *supra*, at 207 (emphasis added).

Specifically with regard to the *St. Cloud* factors, *supra*, unlike the first and most important factor (membership), the other three factors (receipt of governmental benefits available only to Indians, enjoyment of tribal affiliation, and participation in Indian social life) fail to defer to formal tribal determinations of citizenship and are so malleable that they inhibit efficient judicial administration of jurisdictional boundaries. For example, focusing on governmental assistance *outside* the Indian Major Crimes Act (the second factor) is problematic because "[w]ho counts as an Indian for purposes of federal Indian law varies according to the legal context. There is no universally applicable definition." *Cohen's*, *supra*, at §§ 3.03[1], 3.03[4]. It cannot simply be assumed that when Congress classifies a person as an Indian for one purpose, it necessarily classifies that person as an Indian for other purposes, such as the criminal provisions of 18 U.S.C. §§ 1152-53. That is why "the federal government increasingly associates being an Indian with being a tribal member according to tribal law." *Id.*

Furthermore, the third and fourth *St. Cloud* factors are even more problematic. Receiving benefits from a tribe does not help with determining Indian status because tribes, especially those in Oklahoma, offer services such as healthcare to Indians *and* non-Indians alike. And to the extent an individual receives benefits from a tribe, but is not afforded tribal membership or citizenship, that choice by the tribe or individual should be respected. The fourth factor, focusing on social ties, both involves adjudication of complex facts and is perilous given the many non-Indians that participate in tribal communities. *See Bruce*, 394 F.3d at 1234 (Rymer, J., dissenting). All these fact-intensive inquiries will ultimately yield disparate and unequal determinations of Indian status.

Thus, a test that focuses solely on enrollment is the fairest, and most efficient, one to administer. And, importantly, under this bright-line test, the defendant's claim fails. However, even if this Court declines to adopt this bright-line test, the State emphasizes that tribal membership *must* remain *the most important factor*. *See Zepeda*, 792 F.3d at 1114.[7]

3. No Matter the Test, it is Clear the Defendant was not Recognized as an Indian at the Time of his Crimes.

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[7] The State emphasizes that Oklahoma's situation is unique, and because of its uniqueness, the *St. Cloud* factors are not well-suited to determining jurisdiction under the Indian Major Crimes Act *within* Oklahoma. For instance, as a result of *McGirt*, "unbeknownst to anyone for the past century, a huge swathe of Oklahoma is" now a reservation belonging to the Muscogee (Creek) Nation. *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting). Furthermore, "the Court's reasoning portends that there are . . . more such reservations in Oklahoma," and such reservations could encompass millions of acres and millions of people. *Id.* And, unlike other tribes, many of Oklahoma's largest federally-recognized tribes have extremely generous membership requirements that allow any lineal descendant of an individual on the Dawes Commission Rolls to apply for membership. *See, e.g.*, Cherokee Nation Const. art. IV, § 1; Chickasaw Nation Const. art. II, § 1; Choctaw Nation Const. art. II, § 1; Muscogee (Creek) Nation Const. art. III, § 2; Osage Nation Const. art. III, § 2; Seminole Nation Const. art. II.

Yet, in other areas of the country, reservations have existed (with public knowledge) for decades, reservations are not so vast that they unexpectedly encompass a large portion of a state, and tribes often have strict requirements for enrollment/membership. *Cruz*, 554 F.3d at 847 (defendant did not meet tribe's stringent membership requirements); *Loera*, 190 F. Supp. 3d at 881 (same). Thus, in those areas, the *St. Cloud* factors prove essential. *St. Cloud*, 702 F. Supp. at 1461. For instance, these factors prove helpful when, for example, a person cannot enroll as a member of a tribe due to that tribe's stringent membership requirements. Then, in those instances, examining whether a person receives governmental benefits, receives tribal benefits, lives and works on a reservation, and is integrated into Indian society is important. *Cf. Antelope*, 430 U.S. at 647 n.7 (noting that "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and 'maintained tribal relations with the Indians thereon'" (quoting *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938))). And, if an unenrolled person otherwise receives tribal and governmental assistance and benefits, resides on a reservation with enrolled family members, and actively participates in an Indian social life, three of the four *St. Cloud* factors prove critical. *St. Cloud*, 702 F. Supp. at 1461.

But, in Oklahoma, the generous membership policies of the largest tribes typically avoid situations where individuals ineligible for membership are forced to prove they are Indian *through other means*. Furthermore, both the vastness of the potential reservations in Oklahoma, and the fact that, for over a century, Oklahomans have lived under the assumption that there are *no* reservations in Oklahoma, render useless a significant portion of the fourth *St. Cloud* factor. *See Nobles*, 838 S.E.2d at 381 (when looking to the fourth *St. Cloud* factor, courts "consider whether defendant received 'social recognition as an Indian through residence on a reservation and participation in Indian social life.'" (quoting *Bruce*, 394 F.3d at 1224)). For instance, living, working, and participating in social life on a reservation for one's entire life is not as unique when millions of other individuals have also been unknowingly living, working, and socializing on a reservation. *Id.* Thus, while the *St. Cloud* factors may prove necessary in other jurisdictions, such factors are not necessary in Oklahoma. Therefore, a bright-line test based on membership is sensible.

The defendant also cannot prove his Indian status via the *St. Cloud* factors. Again, "[i]n declining order of importance," the 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 (footnote omitted). The State will address each factor in turn.

First, the evidence remains undisputed that the defendant was *not* an enrolled member of the Choctaw Nation at the time of his crimes—in fact, he enrolled *years later* (Tr. 88-91, 279-80). In the proceedings below, the defendant mainly relied upon his *current* membership and former *eligibility* for membership to attempt to satisfy the recognition prong of the *Rogers* test (Supp. O.R. 96-107, 232-42). However, the defendant points to no authority, binding or persuasive, demonstrating that *eligibility* for membership, in and of itself, is sufficient to satisfy the recognition prong of the *Rogers* test, or that one can be retroactively recognized as an Indian. *Cf. Cruz*, 554 F.3d at 849 ("Given that many descendants of Indians are *eligible* for tribal benefits based exclusively on their blood heritage, the government's argument would effectively render the second [*Rogers*] factor a *de facto* nullity, and in most, if not all, cases would transform the entire [*Rogers*] analysis into a 'blood' test." (emphasis in original)); *Loera*, 190 F. Supp. 3d at 881 (under the *St. Cloud* factors, eligibility for membership or status as a descendent of an enrolled member, "like [lack of] tribal enrollment, it is not dispositive of Indian status"). Because jurisdiction must be determined at the time of the crimes, the defendant simply cannot satisfy the first (and most important) *St. Cloud* factor due to his lack of membership at the time of his crimes. *Zepeda*, 792 F.3d at 1113; *Lewis v. State*, 55 P.3d 875, 878 (Idaho 2002).

Second, the defendant also cannot satisfy the second *St. Cloud* factor. With respect to the second *St. Cloud* factor, courts may consider "governmental recognition" via an individual's

receipt of benefits, services, and personal assistance. *St. Cloud*, 702 F. Supp. at 1461. Further, courts should focus on the time period encompassing the crimes or at least in close proximity thereto. Importantly, the second factor can be satisfied *only* if a defendant has actually *received* governmental benefits, such as medical services or financial assistance, and not merely by the fact that he or she *may be eligible* for such benefits. *Nobles*, 838 S.E.2d at 380. *See also Cruz*, 554 F.3d at 849. Furthermore, a defendant must receive benefits that are available *only to Indians* (and, in some cases applying the *St. Cloud* factors, benefits that are available *only* to enrolled members or to persons eligible for enrollment). *St. Cloud*, 702 F. Supp. at 1461. *See also Zepeda*, 792 F.3d at 1114; *Loera*, 190 F. Supp. 3d at 882.

At the hearing, the defendant testified that, while attending Antlers Public Schools, he received school supplies, clothing, and was enrolled in a meal program due to his "heritage" (Tr. 28-29, 87-88). He could not recall, however, when he received these benefits or how many times he received these benefits (Tr. 88). Further, the defendant, again without more explanation or detail as to when he received such benefits, testified that he previously received "[m]edical, school supplies, commodities, food, [and] clothes" from the Choctaw Nation (Tr. 84). Finally, the defendant testified that he sought medical treatment and assistance from the Choctaw Nation (Tr. 41-42, 85-88).[8] The defendant's medical records indicate he sporadically received treatment from the Choctaw Nation several times in 1997, 1998, 2006, 2007, 2008, and 2017 (Tr. 41, 85-88; Def. Ex. 2). However, the defendant admitted that he also received treatment at non-Indian facilities

[8] There is some ambiguity in the case law regarding whether "governmental" assistance means assistance from the federal government, the tribal government, or both. *See, e.g.*, *Nowlin*, No. 13-8028, 555 F. App'x at 823; *United States v. LaBuff*, 658 F.3d 873, 878 (9th Cir. 2011); *Loera*, 190 F. Supp. 3d at 882; *St. Cloud*, 702 F. Supp. at 1461; *Nobles*, 838 S.E.2d at 380, 382. The defendant's alleged receipt of school supplies is his only possible evidence of assistance from the federal government and is surely insufficient to satisfy the recognition prong. However, even assuming the defendant's receipt of medical treatment from the Choctaw Nation qualified as "governmental" assistance, such treatment still could not satisfy the second *St. Cloud* factor due to the fact that, as will be shown, the Choctaw Nation provides health services to non-Indians.

(Tr. 88-89). Ultimately, the defendant's receipt of medical treatment and various other "benefits" from the Choctaw Nation is insufficient to satisfy the second factor of the *St. Cloud* test.

In light of the ambiguity in the case law (discussed in footnote 8, *supra*), even assuming the defendant's receipt of medical treatment from the Choctaw Nation qualified as "governmental" assistance, such treatment still could not satisfy the second *St. Cloud* factor due to the fact that the Choctaw Nation provides health services to non-Indians. According to the Choctaw Nation's "Eligibility for Services" policy, health benefits and services are not reserved *only* for enrolled members or persons eligible for membership (Def. Ex. 3). For instance, non-Indian adopted children, stepchildren, and foster children of eligible parents can receive medical benefits from the Choctaw Nation (Def. Ex. 3). Additionally, a non-eligible person with an eligible spouse can receive "limited services on a fee basis," and a non-eligible person pregnant with an eligible child can receive all services related to pregnancy (Def. Ex. 3).[9] Thus, clearly, because non-Indians can receive treatment under this policy, the defendant's sporadic receipt of medical benefits, services, and treatments from the Choctaw Nation—much of which was remote in time from the crimes—simply cannot satisfy the second *St. Cloud* factor. *St. Cloud*, 702 F. Supp. at 1461. *See also Loera*, 190 F. Supp. 3d at 882; *United States v. Loera*, 952 F. Supp. 2d 862, 871 (D. Ariz. 2013).

With respect to the school supplies, clothing, food, and "commodities" the defendant claimed he received while in school due to his "heritage," the defendant provided absolutely no detail regarding these benefits (Tr. 28-29, 84, 87-88). In light of this ambiguous and dubious testimony, this Court cannot know with certainty how often the defendant received these benefits, when he received these benefits, and whether these benefits were reserved only for Indians. Further, these childhood benefits, which served to aid his mother at least as much as him, do not

[9] An eligible parent/spouse of a non-eligible person must have "a CDIB card (Certificate Degree of Indian Blood), a Membership card, or letter of descendancy from a federally recognized tribe . . . ." (Def. Ex. 3).

establish recognition *at the time of the crimes*. Thus, the defendant's receipt of school supplies, clothing, food, and "commodities" cannot satisfy the second factor of the *St. Cloud* test. *St. Cloud*, 702 F. Supp. at 1461. *See also Zepeda*, 792 F.3d at 1114. Therefore, because there is no evidence within the record that the defendant received governmental benefits or assistance reserved *only* for Indians or members of a tribe, he fails to fulfill the second *St. Cloud* factor. Consequently, the defendant cannot satisfy the two most important *St. Cloud* factors. *Cruz*, 554 F.3d at 848.

Third, the defendant can fulfill the third *St. Cloud* factor, but this factor should be given little weight. With respect to the third *St. Cloud* factor, courts can consider broader benefits arising from tribal affiliation (i.e., benefits that are *beyond* the type of governmental assistance reserved only for Indians). Hunting and fishing rights, tribal employment, and free access to tribal facilities are some examples of the benefits of tribal affiliation. *Loera*, 190 F. Supp. 3d at 882; *Nobles*, 838 S.E.2d at 380-81. *See also Cruz*, 554 F.3d at 848. Thus, whereas courts have limited the second *St. Cloud* factor to benefits reserved *only* for Indians (or for members or those eligible for membership), the third factor encompasses such benefits where they are provided to descendants of Indians or to those who are affiliated with a tribe other than through membership. *See Loera*, 190 F. Supp. 3d at 883. However, because the *St. Cloud* factors are ordered in decreasing importance, the receipt of benefits under the third factor carries less weight than the receipt of benefits under the second factor. *St. Cloud*, 702 F. Supp. at 1461.

As noted, at the evidentiary hearing, the defendant broadly testified that he received school supplies, clothing, food assistance, and "commodities" due to his Indian "heritage" (Tr. 28-29, 87-88). He could not recall, however, when he received these benefits or how many times he received these benefits (Tr. 88). The defendant testified that he sporadically sought medical treatment and assistance from the Choctaw Nation over the years, and his medical records support that testimony

(Tr. 41-42, 85-88; Def. Ex. 2). Finally, the defendant believed he was offered college scholarships because of his heritage, but he did not attend college, and he testified that the Choctaw Nation may have assisted him with an electric bill at one point, but he could not recall when (Tr. 89-90). In light of this—particularly in light of the defendant's receipt of medical benefits—it is clear that the defendant did enjoy *some* benefits of tribal affiliation via his mother's connection to the Choctaw Nation and via his own blood quantum/heritage.

However, this factor should be given little weight in light of the ambiguity of the defendant's testimony and the remoteness of many of the claimed benefits.[10] The defendant's testimony about his receipt of school supplies, clothing, food, "commodities," scholarships, and help with an electric bill lacked any detail and was not supported by any other testimony or evidence (in contrast to his testimony regarding receipt of medical benefits). Furthermore, any benefits the defendant received were, based on his testimony, received many, many years before the crimes at issue (when he was in junior high and high school). *See Loera*, 190 F. Supp. 3d 873, 882-83 ("This admonition does not render the benefits Loera received as a child immaterial, but *Zepeda*'s guidance does suggest that a reviewing court should attribute greater weight to evidence of the defendant's Indian status that is more contemporaneous with the underlying crime than evidence from a long-time past"; thus, "while Loera received tutoring, meals, and summer classes from the Tribe during his childhood, those benefits weigh little on the overall calculation of his Indian status."). Moreover, with respect to the defendant's receipt of medical benefits, the Choctaw

[10] This is especially true when considering the *litany* of benefits available to those affiliated with the Choctaw Nation. For example, at the hearing, the defendant acknowledged that he has never participated in the Choctaw Nation Adult Education Program, the career development program, the Choctaw Nation College Connect program, tutoring or mentoring programs, substance abuse treatment, credit programs, housing or rental assistance programs, or reintegration programs for convicted felons through either the Choctaw Nation or the federal government (Tr. 90-92). The defendant believed he may have applied for a "Pell grant" while incarcerated, but he did not receive the grant (Tr. 93). Further, the defendant has never had a tribal car tag, and he has never applied for a Choctaw Nation hunting/fishing license (Tr. 92-93).

Nation has an especially liberal and generous "Eligibility for Services" policy, and these medical benefits/services are widely available. The defendant's receipt of medical benefits, while entitled to more weight than the ambiguous claim of benefits while in school, is thus still entitled to little weight. *See LaBuff*, 658 F.3d at 878 (a defendant's *frequent* receipt of "healthcare services on the basis of [his] status as a descendent of an enrolled member," from 1979 to the early 2000s, satisfied the third factor); *Loera*, 190 F. Supp. 3d at 883 (although a defendant received certain benefits via tribal affiliation (such as medical benefits), such factor had little importance or weight due to the defendant's failure to satisfy the two most important factors). Thus, while the defendant has presented some evidence in support of the third *St. Cloud* factor (particularly the medical evidence), this factor should be given little weight.

Fourth and finally, the defendant can also fulfill the fourth St. Cloud factor, but this factor should also be given little to no weight. With respect to the fourth and final *St. Cloud* factor, courts may consider, among other things, a defendant's residence on a reservation,[11] attendance at an Indian school, participation in Indian family and social life, involvement with Indian culture, participation in Indian religious or spiritual events, and involvement in tribal politics. *Bruce*, 394 F.3d at 1224; *Nobles*, 838 S.E.2d at 381. Further,

> courts have determined that this factor *weighs against a finding of Indian status* under the IMCA [Indian Major Crimes Act] as to defendants who have never been involved in Indian cultural, community, or religious events; never participated in tribal politics; and *have not placed any emphasis on their Indian heritage*.

Nobles, 838 S.E.2d at 381 (emphasis added).[12] With respect to this factor, the defendant testified

[11] In Oklahoma, this means next to nothing, as no one, including the Five Tribes and the federal government, governed the territory at issue as Indian Country. Further, there is no evidence the defendant lived in Antlers because he believed he was living on a reservation and wished to live on a reservation.

[12] At the hearing, the defendant admitted defendant has never voted in Choctaw tribal elections, and he has never participated in Choctaw Nation sports (Tr. 94-96). In fact, the defendant could not name the current Chief of the Choctaw Nation, and he guessed that the Chief was named "Barns" (Tr. 92). The defendant's

that he spoke certain words and phrases of the Choctaw language, that he attended community events such as pow-wows and a Veteran's Day cookout, that he attended spiritual events such as sweat lodges and intimate conversations with his mother, that he wore traditional Choctaw clothing on at least one occasion, that he possessed a feather he believed had medical and spiritual properties, and that he created Native American art[13] (Tr. 42-45, 53-55, 92, 95-98, 99-100). However, much like the evidence in support of the third factor, the evidence in support of the fourth factor is entitled to little weight due to its remoteness, ambiguity, and lack of corroboration.

With respect to the community events, spiritual events, and traditional clothing, the defendant testified that he attended a handful of these events *over a decade ago*; moreover, the defendant failed to present any corroborative evidence (Tr. 42-43, 95-96, 98). In fact, the trial court specifically found that the defendant failed to provide any *credible* evidence that he participated in Indian social life (Supp. O.R. 280). Furthermore, while the defendant may have believed that he attended tribal "spiritual" events, this Court should not consider the defendant's conversations with his mother as *legitimate* tribal events. In addition, certain facts weigh against the defendant's claimed Indian social life: he exclusively attended public school, he resided outside of Oklahoma for a portion of his life in the custody of the State of California, he did not participate in tribal elections or sports, he could not name the current Chief of the Choctaw Nation, he spent the bulk of his adult life in prison and not immersed in tribal life, and he joined a notorious *white-supremacist* gang while incarcerated (despite the fact that Indian gangs existed within the DOC)[14]

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membership card lists the current Chief of the Choctaw Nation as Gary Batton (Def. Ex. 5).

[13] The defendant testified that he creates art, including "Native American art" and "old western type" art; however, he also explained that he does all kinds of art and does not "just stick to one genre" (Tr. 44-45). Notably, the defendant did not present any of this "Native American art" as evidence (Tr. 100).

[14] Importantly, since 1998, the defendant has only spent approximately *four* years *out* of prison (Tr. 28-30, 59-60). Despite his extensive criminal history, the defendant was never arrested by tribal authorities or

(Tr. 26-30, 32, 49-51, 56, 59-60, 63, 84-85, 92-96, 118-23; S. Ex. 5.14).

Ultimately, the defendant's evidence of an Indian "social life" is underwhelming, inconsistent, dubious, and certainly not as extensive and intimate as evidence in other cases. *See, e.g., United States v. Reza-Ramos*, 816 F.3d 1110, 1122 (9th Cir. 2016) (Indian victim spoke the tribal language and worked, lived, and was buried on the reservation); *United States v. Stymiest*, 581 F.3d 759, 765 (8th Cir. 2009) (defendant lived *and* worked on the reservation, participated in Indian social life, and identified himself as an Indian); *St. Cloud*, 702 F. Supp. at 1462 (defendant lived on reservation, received federally-provided housing, was a member of the local community and involved in Indian social life, identified as an Indian, and was "not at all integrated into non-Indian society"). Thus, while the defendant has presented *some* evidence in support of the fourth *St. Cloud* factor, this factor must be given little to no weight in light of the weak and inconsistent evidence. *St. Cloud*, 702 F. Supp. at 1461.

Ultimately, although the defendant claims he has "maintained sufficient, consistent contacts with the tribe," the evidence adduced at the evidentiary hearing demonstrates that the defendant was not "recognized" as an Indian by a tribe or the federal government at the time of his

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prosecuted in tribal court (Tr. 59). In approximately 1999 or 2000, the defendant joined the Universal Aryan Brotherhood ("UAB")—a white supremacist prison gang—for "self-personification" (Tr. 32, 63-65, 118-23; S. Exs. 1-2, 5.14). In addition to providing dubious explanations regarding "numerology" and "astrology" to explain why he joined the UAB, the defendant also claimed that he joined the UAB because the UAB and the Indian Brotherhood ("IAB") "ran together," "ate together," "sat together," "played together," "fought together," and "coexisted nearly as one," so the UAB appeared to be the best of both worlds (Tr. 33-38, 65-66, 76-77; Def. Exs. 6-7). He claimed he was not the only mixed-race person in the UAB at that time (Tr. 38). However, the defendant's testimony about the UAB's alleged racial acceptance was not credible. At the evidentiary hearing, Agent Michael Williams (with the DOC) testified that "most people join a gang based on racial lines and ideological lines" and "what they believe" (Tr. 108, 123). Agent Williams testified that the UAB "is made up of predominantly white members, almost exclusively white members, with a [] white supremacist ideology" (Tr. 111). Additionally, the IAB is a *completely separate* gang, and Agent Williams noted that he was not aware of any current alliance between the UAB and the IAB, and "[t]hroughout history, different gangs do align with each other periodically, but that is a very loose alliance, and it's oftentimes not long-lasting" (Tr. 111-12).

crimes. Importantly, the defendant was not an enrolled member of the Choctaw Nation at the time of his crimes (Supp. O.R. 107, 279-80). Further, the defendant's sporadic receipt of medical benefits, unspecified receipt of benefits while in school, participation in a few tribal events over a decade ago, and his "spiritual" interactions with his mother are underwhelming and do not come close to satisfying the remaining *St. Cloud* factors (Supp. O.R. 279-80). *Cruz*, 554 F.3d at 848. Thus, the defendant does not meet the second prong of the *Rogers* test. Consequently, in light of the defendant's failure to satisfy both prongs of the *Rogers* test, the defendant is not an Indian for the purposes of federal jurisdiction. *See Zepeda*, 792 F.3d at 1113-14; *Diaz*, 679 F.3d at 1187; *Bruce*, 394 F.3d at 1223; *Prentiss*, 273 F.3d at 1280-81; *St. Cloud*, 702 F. Supp. at 1461.

III. Conclusion.

Based on the above, the State asserts that the defendant cannot satisfy both prongs of the *Rogers* test and therefore cannot demonstrate that he is an Indian for purposes of federal criminal jurisdiction. No matter the test this Court applies (the State's proposed bright-line test dependent on membership or the fact-intensive *St. Cloud* factors), the evidence adduced at the evidentiary hearing simply cannot show that the defendant had sufficient affiliation with, and recognition by, the Choctaw Nation at the time of his crimes. And, additionally, although the State disagrees with the Supreme Court's ruling in *McGirt* and this Court's ruling in *Sizemore*, the State acknowledges that this Court is bound by the Supreme Court's ruling in *McGirt*. Ultimately, irrespective of whether the defendant's crimes occurred within Indian Country, the defendant's jurisdictional claim must fail based upon his failure to demonstrate Indian status. Consequently, the State asserts that the trial court did not abuse its discretion in finding that the State of Oklahoma properly exercised jurisdiction in this case. The defendant's convictions and sentences must be affirmed.

Respectfully submitted,

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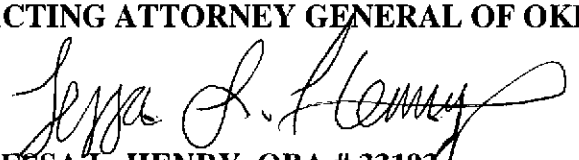

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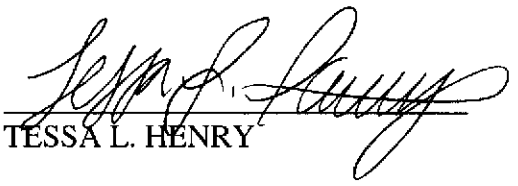

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