



ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
OKLAHOMA CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 19 2021

JOHN D. HADDEN
CLERK

JEFFREY DON MCCLAIN,
Appellant,
v.
THE STATE OF OKLAHOMA,
Appellee.

Case No. F-2020-420

APPELLANT'S MOTION TO REMAND FOR AN EVIDENTIARY HEARING

Appellant, through his attorney of record, Nicollette Brandt, moves this Court to remand Appellant's case for an evidentiary hearing on grounds that the State lacks jurisdiction because Appellant was an Indian at the time of the offense and because the offenses occurred in Indian Country.

Pursuant to the federal "Major Crimes Act," Oklahoma has no jurisdiction to prosecute certain crimes, including rape by instrumentation and lewd act with a child under 16, if either the defendant or alleged victim is an "Indian" and the crime occurred in "Indian Country." See 18 U.S.C. § 1153(a) (2013) (any "Indian" who commits "a felony under chapter 109A . . . within the Indian country, shall be . . . within the exclusive jurisdiction of the United States."); 18 U.S.C. § 109A (2013) (enumerates crimes of sexual abuse, including sexual abuse of a minor). See also Cravatt v. State, 1992 OK CR 6, ¶ 16, 825 P.2d 277, 279 ("The State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.").

Though there was no official determination of Appellant's Indian status

in the district court nor was the information included in the Brief of Appellant filed December 18, 2020, Appellant's family recently provided appellate counsel with proof that he is an Indian under federal law. According to a membership card issued September 6, 2013, Jeffrey Don McClain, born July 24, 1989, is a registered member of the Choctaw Nation. (Exhibit A) A United States Department of the Interior Bureau of Indian Affairs Certificate of Degree of Indian Blood Card issued on November 1, 1991, documents that Appellant is of 5/32-degree of Indian blood of the Choctaw/Creek Tribes. (Exhibit A) Appellate counsel obtained official verification from the Choctaw Nation of Oklahoma, CDIB & Tribal Membership Department, that Appellant holds an assigned Choctaw Nation Number (CN153069) and a Certified Degree of Indian Blood (CDIB). (Exhibit B) As such, Appellant submits that he is recognized as an Indian by the federal government.

Title 18, Section 1151, Subsection (a) of the United States Code defines "Indian Country" as:

all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1949).

The alleged acts charged against Appellant occurred in McCurtain

County, Oklahoma. McCurtain County clearly falls within the recognized boundaries of the Choctaw Nation. See Choctaw Const., art. I., § 2; Map of the Choctaw Nation Service Area obtained from the Oklahoma Department of Transportation - produced map of Tribal Jurisdictions in Oklahoma, found at [https://www.ok.gov/health2/documents/map\\_tribal\\_jurisdictions.pdf](https://www.ok.gov/health2/documents/map_tribal_jurisdictions.pdf) (last visited May 18, 2021). (Exhibit C)

Likewise, the Choctaws' subsequent use of their land and demographics of the Choctaw Nation are submitted as illustrated in the Maps of the Choctaw Service Area and Tourism Destinations, that further establish how the Choctaw Nation continues to flourish and provide services, assistance, education, preservation and cultural enrichment within the Nations' long-established borders. See [https://www.choctawnation.com/sites/default/files/2015/09/29/tourismlocations\\_original.pdf](https://www.choctawnation.com/sites/default/files/2015/09/29/tourismlocations_original.pdf) (last visited May 18, 2021). The submitted materials individually, and/or in combination, weigh heavily in favor of finding the Choctaw Nation jurisdictional boundaries remain intact.

Congress has taken no action to disestablish the Choctaw "reservation." As a result, the boundaries of the Choctaw Nation remain intact. See *Murphy*, 875 F.3d 896, 966 (finding Creek Nation's historical boundaries still intact and thus still maintains its status as 5 "Indian Country"); *Nebraska v. Parker*, 136 S.Ct. 1072, 1076-1082, 194 L.Ed.2d 152 (2016); *Solem v. Bartlett*, 465 U.S. 463, 481, 104 S.Ct.1161, 1171, 79 L.Ed.2d 443 (1984).

Both the United States Supreme Court and this Court have recently recognized that federal and tribal governments, not the State of Oklahoma, have exclusive jurisdiction to prosecute crimes committed by or against Indians on reservations. *Bosse v. State*, 2021 OK CR 3, ¶ 3, \_\_ P.3d \_\_ (citing *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020)). In *McGirt*, the Supreme Court held that Congress had not disestablished the Muscogee Creek Reservation, and thus only the federal and tribal governments hold jurisdiction to prosecute crimes committed by or against Indians within the Muscogee Creek Reservation. *Bosse*, 2021 OK CR 3, ¶ 3, \_\_ P.3d \_\_ (citing *McGirt*, 140 S.Ct. at 2468; 18 U.S.C. §§ 1152, 1153).

In *Bosse*, the Court reversed the defendant's conviction after finding that the victims of the defendant's crime had "some Indian blood" and were recognized as Indian by a tribe or the federal government. *Bosse*, 2021 OK CR 3, ¶ 7, \_\_ P.3d \_\_. The Court also found that the crime occurred within the Chickasaw Nation Reservation, and that Congress had not disestablished the reservation. *Id.*, 2021 OK CR 3, ¶ 8. Based on these findings, the Court reversed the Judgment and Sentence entered against the defendant, and the Court held that since the victims were Indian and the crime was committed within an Indian Reservation, only the federal government had jurisdiction to prosecute the defendant. *Id.*, 2021 OK CR 3, ¶ 29.


Counsel brings this information to the attention of the Court for a proper determination of jurisdiction and to provide the procedural and

substantive due process to which he is entitled. See U.S. Const. Amends. VI, XIV; Okla. 20, art. II, §§ 7, 20; *Evits v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *Williamson v. Ward*, 110 F.3d 1508, 1522 (10th Cir. 1997); *Wilhoit v. State*, 1991 OK CR 50, ¶¶ 3-5, 816 P.2d 545, 546-547; 22 O.S.2011, § 1051. Matters implicating the Court's jurisdiction are never waived and can be raised at any time. *Id.*, 2021 OK CR 3, ¶ 21. Therefore, Appellant requests this Court remand this case for an evidentiary hearing on Appellant's Indian status so that the convictions in this case be properly reversed and dismissed.

Respectfully submitted,

JEFFREY DON MCCLAIN

By:

  
\_\_\_\_\_  
Nicollette Brandt, Bar No. 30996  
General Appeals Division  
Oklahoma Indigent Defense System  
PO Box 926  
Norman, Oklahoma 73070  
(405) 801-2727  
FAX: (405) 801-2758  
ATTORNEY FOR APPELLANT

### CERTIFICATE OF SERVICE

This is to certify that on May 19, 2021, a true and correct copy of the foregoing Motion to Dismiss for Lack of Jurisdiction or Alternatively, to Remand For an Evidentiary Hearing 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.

  
\_\_\_\_\_  
Nicollette Brandt



UNITED STATES  
 DEPARTMENT OF THE INTERIOR  
 BUREAU OF INDIAN AFFAIRS  
 TALIHINA AGENCY  
 Certificate of Degree of Indian Blood

This is to certify that 444-96-9253  
JEFFREY DON MCCLAIN  
 born 7-24-89 is 5/32 degree Indian blood  
 of the CHOCTAW/CREEK Tribe  
NOV 01 1991 *[Signature]*  
 Date Issuing Officer



Membership Card  
 Choctaw Nation of Oklahoma  
 P.O. Box 1210  
 Durant, OK 74702-1210

Date Approved 09/06 2013

This is to certify that Jeffrey Don McClain , born 07/24/1989,  
 is 5/32 degree of Choctaw/Creek and is a member by blood  
 of the Choctaw Nation Of Oklahoma.

*[Signature]*  
 Gregory E. Pyle  
 Chief

Exhibit A



**Choctaw Nation of Oklahoma  
CDIB/Tribal Membership**

PO Box 1210  
Durant, Oklahoma 74702-1210  
580-924-8280, Ext. 4030  
1-800-522-6170

May 12, 2021

To Whom It May Concern:

This letter is to certify that Jeffrey Don McClain, born 07/24/1989, social security number XXX-XX-9253, has a Certificate of Degree of Indian Blood (CDIB). Jeffrey Don McClain is a Tribal Member of the Choctaw Nation of Oklahoma (Membership #CN153069).

If you have any questions please, contact this office at the number listed above.

Sincerely,

A handwritten signature in cursive script that reads "Terry Stephens".

Terry Stephens  
Director, CDIB/Membership  
Choctaw Nation of Oklahoma

