IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOE JOHNSON, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. PC-2018-343**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	
	)	

ORDER AFFIRMING DENIAL OF PETITIONER'S ELEVENTH AND SUBSEQUENT APPLICATION FOR POST-CONVICTION RELIEF; HIS MOTION TO VACATE FOR LACK OF SUBJECT MATTER JURISDICTION; AND HIS MOTION TO DISMISS CRF-1977-65 UNDER THE MAJOR CRIMES ACT

Petitioner, Joe Johnson, Jr., appeals to this Court from an order of the District Court of Seminole County, Case No. CRF-1977-65, denying Petitioner's eleventh application for post-conviction relief. Petitioner was convicted by a jury in 1977 of First Degree Murder and was sentenced in accordance with the jury's verdict to life imprisonment.[1] Petitioner's judgment and sentence was affirmed on direct appeal by this Court in a published decision handed down on June 29, 1979. *Johnson v. State*, 1979 OK CR 65, 597 P.2d 340.

[1] The Honorable Rudolph Hargrave, District Judge, presided at Petitioner's trial.

Appendix "A"

Petitioner thereafter filed numerous post-conviction proceedings that were denied by the District Court and affirmed if appealed to this Court. *E.g.*, *Johnson v. State*, No. PC-2017-645 (Okl. Cr. Sept. 8, 2017) (unpublished); *Johnson v. State*, No. PC-2017-362 (Okl. Cr. Apr. 27, 2017) (unpublished); *Johnson v. State*, No. PC-2013-1151 (Okl. Cr. Apr. 23, 2014) (unpublished); *Johnson v. State*, No. PC-2006-267 (Okl. Cr. Jun. 8, 2006) (unpublished); *Johnson v. State*, No. PC-2002-1322 (Okl. Cr. Dec. 12, 2002) (unpublished); *Johnson v. State*, No. PC-1999-1163 (Okl. Cr. Nov. 1, 1999) (unpublished).

Petitioner's current application was filed with the District Court on September 13, 2017 and represents his eleventh application for post-conviction relief. In his current application, Petitioner claims that the State of Oklahoma lacked jurisdiction to try him because he is an enrolled citizen of the Seminole Nation and the crime occurred within the boundaries of the Seminole Nation Reservation. Petitioner also filed with the District Court a supporting motion to vacate for lack of subject matter jurisdiction along with a motion to dismiss Case No. CRF-1977-65 under the Major Crimes Act. The District Court thereafter denied post-conviction relief in a March 29, 2018, order without conducting an evidentiary hearing.

Petitioner appealed from the denial of his application for post-conviction relief and we affirmed. *Johnson v. State*, No. PC-2018-343 (Okl. Cr. Jul. 24, 2018) (unpublished). Petitioner sought review of our decision by the United States Supreme Court and that Court vacated our post-conviction order and remanded the case for further consideration in light of *McGirt v. Oklahoma*. 140 S. Ct. 2452 (2020). *See Johnson v. Oklahoma*, 141 S. Ct. 192 (Jul. 9, 2020) (Mem). We thereafter remanded the case to the District Court for an evidentiary hearing to address two separate questions: (1) Petitioner's Indian status; and (2) whether the crime occurred in Indian country.

We instructed the District Court to determine whether Petitioner had some Indian blood and was recognized as an Indian by a tribe or the federal government. The District Court was further ordered to determine whether the crimes in this case occurred in Indian Country. In so doing, the District Court was directed to consider any evidence the parties provided, including but not limited to treaties, statutes, maps, and/or testimony.

We also directed the District Court that in the event the parties agreed as to what the evidence would show with regard to the questions presented, the parties may enter into a written stipulation

setting forth those facts upon which they agree and which answer the questions presented and provide the stipulation to the District Court. Finally, the District Court was ordered to file written findings of fact and conclusions of law with this Court.

A hearing was held in this case on January 19, 2021, before the Honorable Timothy L. Olsen, District Judge. Petitioner was represented by court-appointed counsel, M. Bradley Carter, at the hearing. The State was represented by counsel from the Oklahoma Attorney General's Office along with Paul B. Smith, Seminole County District Attorney. Counsel for the Seminole Nation also appeared on behalf of the Tribe. At the hearing, the Court heard arguments, accepted stipulations and received testimony and exhibits. An order containing the District Court's findings of fact and conclusions of law from that hearing was timely filed with this Court along with a transcript of the hearing.

The record shows Petitioner is an enrolled member of the Seminole Tribe with a blood quantum of 3/8 Seminole blood. The record further shows, however, that Petitioner's enrollment date in the Seminole Tribe was on February 23, 2011, which is nearly thirty

years after the murder in this case.[2] Petitioner nonetheless testified that he was born at the Talihina Indian Hospital and grew up in an established Native American community outside of Wewoka. According to his testimony, Petitioner attended stomp dances and pow wows at the tribal grounds and throughout his life visited different places within the Native American community including church and hospitals. While growing up, Petitioner associated primarily with Native Americans at his church and while hunting and fishing. Petitioner admitted on cross-examination that he never asserted his Indian heritage to support a jurisdictional challenge prior to filing his eleventh application for post-conviction relief.

The parties stipulated that the murder in this case occurred within the historic boundaries of the Seminole Reservation. The parties also agreed to the incorporation of evidence and argument submitted to the District Court in previous cases concerning the creation and ongoing existence of the Seminole Reservation.

In its written findings of fact and conclusions of law, the District Court found that Petitioner has some degree of Indian blood and is

[2] According to the direct appeal opinion, the murder in this case occurred on or about March 1, 1977. *Johnson*, 1979 OK CR 65, ¶ 2, 597 P.2d at 341.

recognized by the federal government or tribe as Indian. However, the District Court ruled Petitioner did not meet the definition for legal status as an Indian at the time of the murder in 1977. The District Court concluded that Petitioner "offered no proof that he met the legal definition of 'Indian' at the time the crime occurred." The District Court further concluded the Seminole Reservation was never disestablished and that the murder in this case occurred within Indian country for purposes of federal criminal jurisdiction.[3]

We review the District Court's determination of a post-conviction relief application for abuse of discretion. *Stevens v. State*, 2018 OK CR 11, ¶ 12, 422 P.3d 741, 745. In the present case, Petitioner fails to establish entitlement to any relief in this subsequent post-conviction proceeding. We recently held in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, __P.3d__, "that *McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction[.]" *Matloff*, 2021 OK CR 21, ¶ 40. We concluded *McGirt* "announced a new rule of criminal procedure that

[3] We recently held that Congress has not disestablished the Seminole Reservation and that the Seminole Nation is "Indian Country" for purposes of criminal law jurisdiction. *See Grayson v. State*, 2021 OK CR 8, ¶¶ 10-11, 485 P.3d 250, 254. Nothing in today's ruling, or in our recent decision in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, __P.3d__, discussed *infra*, impacts that holding.

we decline to apply retroactively in a state post-conviction proceeding to void a final conviction." *Matloff*, 2021 OK CR 21, ¶ 6. We further held that "[a]ny statements, holdings, or suggestions to the contrary in our previous cases are hereby overruled." *Id.* at ¶ 15.

Applying *Matloff* to the present case, we find no abuse of discretion from the District Court's denial of post-conviction relief. Petitioner's conviction became final in 1979 upon the expiration of the time in which he could seek certiorari review with the Supreme Court from our denial of his direct appeal. The current jurisdictional challenge was filed in Petitioner's eleventh post-conviction application and represents a collateral challenge to his judgment and sentence. *McGirt* does not apply retroactively in this subsequent post-conviction relief proceeding over forty years after Petitioner's conviction became final.

Therefore, the order of the District Court of Seminole County, Case No. CRF-1977-65, denying Petitioner's eleventh and subsequent application for post-conviction relief; denying his motion to vacate for lack of subject matter jurisdiction; and denying his motion to dismiss CRF-1977-65 under the Major Crimes Act should be, and is hereby, **AFFIRMED**. All of Petitioner's other motions filed

in this matter are **DENIED**. The State's motion to stay and abate proceedings in this case is now **MOOT**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued forthwith upon the filing of this decision with the Clerk of this Court.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 25th day of August, 2021.

Scott Rowland

SCOTT ROWLAND, Presiding Judge

Robert L. Hudson

ROBERT L. HUDSON, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

ATTEST:

John D. Hadden

Clerk

**IN THE DISTRICT COURT IN AND FOR SEMINOLE COUNTY
STATE OF OKLAHOMA**

JOE JOHNSON, JR.,,
Defendant/Petitioner,

v.

THE STATE OF OKLAHOMA,
Plaintiff/Respondent.

Seminole County District
Court Case No. S-CRF-77-65

Court of Criminal Appeals
Case No. PC-2018-343

**DISTRICT COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW ON REMAND FROM
THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

STATEMENT OF THE CASE

Defendant/Petitioner Joe Johnson, Jr. was convicted by a jury of First Degree Murder in 1977 in the District Court of Seminole County. On November 23, 2020, the Court of Criminal Appeals of the State of Oklahoma ordered this Court to hold an evidentiary hearing on Defendant/Appellant's claim in his Application for Post-conviction Relief filed on September 13, 2017, alleging that the State of Oklahoma lacked jurisdiction to try him because he is a citizen of the Seminole Nation and the crime occurred within the boundaries of the Seminole Nation Reservation.

This Court noticed the parties for hearing and invited the Seminole Nation of Oklahoma to file a brief regarding the important jurisdictional issue at stake. The Seminole Nation filed an *amicus curiae* brief on January 13, 2021. This Court appointed Brad Carter to represent the Defendant/Petitioner for the Hearing on Remand.

On January 19, 2021, this Court conducted an evidentiary hearing with the parties, counsel, and the Seminole Nation present. The State of Oklahoma appeared by and

APPENDIX "B"

through District Attorney Paul Smith and Assistant Attorneys General Theodore Peeper and Joshua Fanelli. The Defendant/Appellant appeared via video with counsel, Brad Carter present in court. The Seminole Nation appeared by and through counsel, Brett Stavin, via video. The Court heard arguments, accepted stipulations, and received exhibits from the parties.

In the "Order Remanding for Evidentiary Hearing" (**Order**), the Court of Criminal Appeals directed this Court to address only the following two questions:

> **First**, Appellant's Indian status. The District Court must determine whether (1) Appellant has some Indian blood, and (2) is recognized as Indian by a tribe or by the federal government.
>
> **Second**, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Seminole Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In making this determination the District Court should consider any evidence the parties provide including, but not limited to, treaties, statutes, maps and/or testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the stipulations and exhibits, as well as argument of the parties, which included oral argument from a representative of the Seminole Nation, and review of the pleadings and briefs of counsel, this Court makes the following findings of fact and conclusions of law regarding the two issues remanded for resolution.

I. Does the Defendant/Appellant meet the definition of an "Indian" for purposes of criminal jurisdiction?

The first question this Court must resolve is Petitioner's Indian status. The Court of Criminal Appeals in its remand order set out the test for whether Defendant/Petitioner is Indian for purposes of criminal jurisdiction. ***U.S. v. Diaz*, 679 F.3d 1183, 1187 (10th**

Cir. 2012) and *U.S. v. Prentiss*, 273 F.3d 1277, 1279 (10th Cir. 2001). This Court must be satisfied that Defendant/Petitioner has "some Indian blood" and is "recognized as an Indian by a tribe or by the federal government." *Diaz*, 679 F.3d at 1187.

Defendant/Petitioner Joe Johnson, Jr., DOB 4/14/1956 established through his exhibits, testimony and stipulations of the parties that he is recognized by the federal government as an Indian, Seminole Tribe, with a blood quantum of 3/8 by issuance of a CDIB Card on September 22, 2005. Further, he is an enrolled member of the Seminole Nation, Roll Number 200-1525, with a date of enrollment of 2/23/2011.

Based upon the stipulation, testimony, and statements of counsel, the test for Indian status is satisfied. Defendant/Appellant has some degree of Indian blood and is recognized as an Indian by the Seminole Nation of Oklahoma, a federally recognized tribe. However, Petitioner did not meet the definition for legal status as an "Indian" at the time the crime was committed. He offered no proof that he met the legal definition of "Indian" at the time the crime occurred.

II. Did the crime occur in "Indian Country" as defined by the "McGirt" decision?

The second question this Court must answer is whether under the analysis set out in *McGirt*, the crime at issue occurred in "Indian country." In order to answer this question, the court must determine whether Congress established a reservation for the Seminole Nation, and if so, whether Congress specifically erased those boundaries and disestablished the reservation. The State takes no position as to the facts underlying the existence, now or historically, of the alleged Seminole Nation Reservation. The District Court of Seminole County has previously determined that the Seminole Nation is "Indian Country" as defined by *McGirt*, as set forth in the following analysis. The District Court's

prior decision is currently on appeal. This Court incorporates the Exhibits admitted in CF-2015-370, F-2018-1229 (specifically, Defendant/Appellant's Exhibits, Relevant Treaties and Congressional Acts attached hereto as Addendum #1).

A. Did Congress set aside a reservation for the Seminole Nation of Oklahoma?

It is clear from the record before the Court that Congress established a reservation for the Seminole Nation of Oklahoma. The following facts are uncontroverted, based on the history provided by the Seminole Nation and Defendant/Appellant.

Originally hailing from what is now the State of Florida, the Seminoles began their forced westward journey after the **Treaty of Payne's Landing. 7 Stat. 368 (1832) (Defendant's Exhibit #2)**. The Payne's Landing Treaty was part of President Andrew Jackson's implementation of the **Indian Removal Act, Pub. L. 21-148, 4 Stat. 411 (1830)**, which authorized the President to negotiate with the southeastern tribes for their removal west of the Mississippi River. The treaty provided that the Seminoles would "relinquish to the United States, all claims to the lands they at present occupy in the Territory of Florida, and agree to emigrate to the country assigned to the Creek, west of the Mississippi River." **7 Stat. 368. Art. I.**

One year after Payne's Landing, the United States entered into the **Treaty with the Creeks, 7 Stat. 417 (1833 Treaty) (Defendant's Exhibit #3).** That treaty was designed, in part, to "secure a country and permanent home to the whole Creek nation of Indians, including the Seminole nation who are anxious to join them...." ***Id.*, Preamble**. To that end, the treaty stated that "it is also understood and agreed that the **Seminole Indians...shall also have a permanent and comfortable home** on the lands hereby set

apart as the country of the Creek nation (emphasis added)." ***Id.*** **Art. IV.** It provided further that "they (the Seminoles) will hereafter be considered a constituent part of said nation, but are to be located on some part of the Creek country by themselves – which location will be selected for them by the commissioners who have signed these articles of agreement of convention." ***Id.*** After examining the lands designated for them, the Seminoles entered into a treaty with the federal government confirming the Creek Treaty on March 28, 1833. **(Defendant's Exhibit #4).**

The arrangement created by the 1833 Treaty, whereby the Seminoles were to be "considered a constituent part of" the Creek Nation, brought about tension between the two tribes. The Seminoles did not desire to be a "constituent" of the Creek Nation, as they were their own sovereign government. They wished to have genuine political autonomy, entirely separate from the Creeks. Continued dissensions resulted in the need for a new treaty, which was entered into on August 7, 1856. **11 Stat. 699 (Defendant's Exhibit #5).** The **1856 Treaty** was intended to bring peace among the two tribes. Among its other provisions, Article 1 defined specific boundaries for the Seminoles, described as:

> **[B]eginning on the Canadian River, a few miles east of the ninety-seventh parallel of west longitude, where Ock-hi-appo, or Pond Creek, enters into the same; thence, due north to the north fork of the Canadian; thence up said north fork of the Canadian to the southern line of the Cherokee country; thence, with that line, west, to the one hundredth parallel of west longitude; thence, south along said parallel of longitude to the Canadian River, and thence down and with that river to the place of beginning."**
> **11 tat, 699, Art. 1.**

But the 1856 Treaty territory would not remain their homeland for long. Ten years later, the United State and the Seminoles entered into yet another treaty. ***See* Treaty with the Seminoles, 14 Stat. 755 (1866) (Defendant's Exhibit #6).** By this time, the Civil War

had just ended. There was a tense relationship between the Seminoles and the federal government, as most of the Seminoles had aligned with the Confederacy during the war. Meanwhile, on top of the complications brought on by the Reconstruction, westward expansion continued its relentless pace. Settlers demanded more land, and Congress accommodated. Thus, while the 1866 Treaty was in part designed to make peace between the Nation and the federal government, as more germane to this proceeding, it also redefined the Nation's reservation territory – this time, with a much smaller land base. ***See* 14 Stat. 755 (1866).**

Under **Article 3 of the 1866 Treaty**, the Seminoles agreed to "cede and convey to the United States their entire domain" that had previously been guaranteed to them under the 1856 Treaty. ***Id.* Art 3.** In return, they were paid a fixed sum of $325,362.00, or fifteen cents per acre.

Article 3 then established a new reservation for the Seminoles, made of lands that the United States had just recently acquired from the Creeks. It was defined this way:

> **The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter described, *which shall constitute the national domain of the Seminole Indians.*** (emphasis added)
>
> **Beginning on the Canadian River where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian River; thence up said fork of the Canadian River a distance sufficient to make two hundred thousand acres by running due south to the Canadian River; thence down said Canadian River to the place of beginning.**

Of course, in granting the Seminoles a "national domain," the 1866 Treaty does not use the word "reservation." But the presence of that exact word has never been a prerequisite to finding that Congress indeed created a reservation. ***See McGirt*, 140 S. Ct. at 2461** (noting that in 1866 "that word had not yet acquired such distinctive significance in federal Indian law"); ***e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968)** (reservation created when Congress provided for "a home, to be held as Indian lands are held"). In any event, even if the particular word "reservation" was not in the 1866 Treaty, Congress's intent to create a reservation for the Seminoles can be seen in subsequent legislation. ***E.g.*, Act of March 3, 1891, 26 Stat. 989, 1016 (1891)** (referencing the "western boundary line of the Seminole Reservation"); ***see also* 11 Cong. Rec. 2351 (1881)** (referring to the Creek and Seminole "reservations"). Accordingly, just as the 1866 Treaty with the Creeks established a reservation, so too did the 1866 Treaty with the Seminoles.

As this definition indicates, to ascertain the exact metes and bounds of this new reservation, it was necessary to first identity "the line dividing the Creek lands according to the terms of their sale to the United States." Unfortunately, it would prove difficult for the United States to accurately locate that boundary.

The dividing line was originally drawn by a surveyor named Rankin in 1867, but this survey was never approved by the Department of the Interior. Instead, in 1871, another surveyor, Bardwell, placed the dividing line seven miles *west* of the Rankin line. The Department adopted the Bardwell line, and the dimensions were measured based on that starting point. In the meantime, however, it seemed that a number of Seminoles had settled and "made substantial improvements" on lands to the east of the Bardwell line, i.e., in what appeared to be Creek territory. See ***Seminole Nation v. United States*, 316 U.S. 310, 313 (1942).** Seeking an equitable solution, the United States decided to purchase those lands for the Seminoles. Consequently, in a purchase negotiated in 1881,

the Creeks were paid $175,000 – a dollar per acre – and the extra land became part of the Seminole Reservation. ***Id.; see also* 22 Stat. 257, 265 (1882).**

It is *this* Reservation – first defined in the 1866 Treaty and then supplemented with the 1881 land purchase from the Creeks – that constitutes the Seminole Nation of Oklahoma Reservation.

B. Did Congress specifically erase the reservation boundaries and disestablished the Seminole Nation Reservation?

McGirt affirmed a longstanding tenet of federal Indian law; once a reservation is established, only Congress can disestablish that reservation, and to do so, it "must clearly express its intent to do so, commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." **140 S. Ct. at 2463**. Here, because Congress has not explicitly indicated an intent to disestablish the Seminole Reservation – by language of cession or otherwise – it remains intact.

(i) Allotment did not disestablish the Reservation.

Starting in the 1880s, Congress embraced a policy of allotting tribal lands, through which it sought to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." ***County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992)**. The policy of allotment was eventually repudiated in 1934 with the passage of the **Indian Reorganization Act, 48 Stat. 984**, but not before it had reached the Seminole Nation. Still, although allotment did ultimately result in the much Seminole land passing into non-Indian hands, it did *not* disestablish the Reservation.

In 1893, Congress formally authorized allotment of the Five Tribes' reservations. Act of March 3, 1893, 27 Stat. 612, at 645 **(Defendant's Exhibit #9).** Negotiations were delegated to the Dawes Commission, which reached an agreement with the Seminoles on December 16, 1897, ratified by Congress on July 1, 1898, **30 Stat. 567 (Defendant's Exhibit #10).** The agreement created three classes of land, to be appraised at $5, $2.50, and $1.25 per acre, respectively. *Id.* Each tribal member would be allotted a share of land of equal value, for which they would have the sole right of occupancy. *Id.* Allotments were inalienable until the date of patent, though leases were allowed under some conditions. *Id.*

Importantly, *nothing* in either the statute authorizing allotment or the resulting agreement contained any of the hallmarks of disestablishment. There was no language of cession, no mention of a fixed sum in return for the total surrender of tribal claims, or any other textual evidence of intent to disestablish the Seminole Reservation. To be sure, the congressional policy of allotment itself might have been intended to "create the conditions for disestablishment," but as ***McGirt*** explains, "to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination." 140 S. Ct. at 2465; see also ***Mattz v. Arnett*, 412 U.S. 481, 497 (1973)** (explaining that allotment "is completely consistent with continued reservation status."). Accordingly, the Seminole Reservation maintained its existence during and after the allotment process.

(ii) Restrictions on tribal sovereignty did not disestablish the Reservation.

The Seminole Nation acknowledges that Congress has taken measures in the past that have restricted the Nation's sovereignty – indeed, even contemplated the

extinguishment of the Nation's government altogether- but none of those actions evinced any explicit intent to disestablish the Reservation.

Of course, there were numerous actions on Congress's part that put dents in the Nation's rights to self-governance. Most threatening of all of Congress's campaigns against Seminole sovereignty was the Act of March 3, 1903, which explicitly contemplated that "the tribal government of the Seminole Nation shall not continue longer than [March 4, 1906]." **34 Stat. 982, 1008** (1903) **(Defendant's Exhibit #12)**. But when that date came about, Congress took a different path, enacting what would be known as the **Five Tribes Act**. Instead of terminating the Seminole Nation's government, the Act expressly recognized "[t]hat the tribal existence and present tribal government" of the Seminole Nation "continued in full force and effect for all purposes authorized by law." **Five Tribes Act, 34 Stat. 137, 148 (1906) (Defendant's Exhibit #13)**. Granted, the Five Tribes Act *did* restrict various tribal governmental powers (e.g., by prohibiting the tribal council from meeting more than thirty days per year) but it stopped far short of terminating the Nation altogether – and it certainly did not provide any language expressly indicating an intent to disestablish the Reservation.

In short, it is beyond dispute that Congress has not always lived up to its trust responsibilities to the Nation, and that discrete aspects of the Nation's sovereignty have been targeted from time to time. But that is not enough to take away the Nation's very home. As Justice Gorsuch put it: **"[I]t's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so."** ***Id.*** **at 2462.** Here, as evident from every relevant Act of Congress referencing the Seminole Nation, Congress has not done so.

(iii) **Oklahoma's statehood did not disestablish the Reservation.**

Shortly after Congress expressly preserved the Seminole Nation's government, it passed the **Oklahoma Enabling Act, 34 Stat. 267 (1906)**, paving the way for Oklahoma statehood. But like every other congressional statute that might potentially be cited by the State, nothing in the Oklahoma Enabling Act contained any language suggesting that Congress intended to terminate the Seminole Reservation.

In fact, if anything, the Oklahoma Enabling Act shows that Congress intended that Oklahoma statehood shall *not* interfere with existing treaty obligations (i.e., reservations). The Act explicitly prohibited Oklahoma's forthcoming constitution from containing anything that could be construed as limiting the federal government's role in Indian affairs, e.g., its authority "to make any law or regulation respecting such Indians." **34 Stat. at 267**.

Ultimately, because no Act of Congress bears any of the textual evidence of intent to disestablish the Seminole Reservation, it simply does not matter that Oklahoma has undergone changes since 1866. Nor does it matter that State officials might have presumed for the last hundred or so years that the Seminole Reservation no longer exists.

Following the analysis in ***McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020),** as it applies to the Seminole Nation's own legal and historical background, makes it clear that Congress never specifically erased the boundaries and/or otherwise disestablished the Seminole Reservation. Therefore, the reservation established by Congress for the Seminole Nation of Oklahoma exists to this day.

C. What are the boundaries of the Seminole Nation Reservation?

This court has previously determined the boundaries to be as follows:

Specifically, the Reservation boundaries mainly track the borders of Seminole County, with a slight deviation. County lines were defined in the Oklahoma Constitution, with Seminole County described as follows:

> **Beginning at a point where the east boundary line of the Seminole nation intersect the center line of the South Canadian River; thence north along the east boundary line of said Seminole nation to its intersection with the township line between townships seven and eight North; thence east along said township line to the southwest corner of section thirty-five, township eight North, range eight East; thence north along the section line between sections thirty-four and thirty-five, in said township and range, projected to its intersection with the center line of the North Canadian River; thence westward along the center line of said river to its intersection with the east boundary line of Pottawatomie County; thence southward along said east boundary line to its intersection with the center line of the South Canadian River; thence down along the center line of said river to the point of beginning. Wewoka is hereby designated the County Seat of Seminole County.**
> **Okla. Const., Art. 17, § 8.**

As the constitutional description shows, the boundaries of Seminole County are defined largely by reference to the Seminole Reservation boundaries. The deviation lies in the northeastern region. County lines depart from the Reservation border beginning at the point where the Reservation's eastern boundary intersects with the line between townships seven and eight north (just southwest of the intersection of East/West Rd. 131 and State Highway 56). From that point, the County line runs due east for slightly less than three miles (until reaching the southwest corner of section 35 of Township 8 North, Range 8 East). Then the County line runs due north until the midpoint of the North Canadian River, at which point the County line runs along the river back toward the Seminole Nation. The map attached to the Seminole Nation Brief as **Exhibit A** displays both the County lines and the Reservation boundaries.

The State of Oklahoma and Defendant/Petitioner stipulated that the location of the commission of the crime at issue is within the historical boundaries of the Seminole Nation of Oklahoma.

Conclusion

In accordance with the stipulation of the parties, testimony, exhibits and statements of counsel, this Court finds that:

1. The Defendant/Petitioner is an "Indian" as defined by the Court of Criminal Appeals of Oklahoma. Defendant/Petitioner was not an "Indian" as defined by the Court of Criminal Appeals of Oklahoma in 1977 when the crime was committed.
2. By applying the analysis set out in ***McGirt***, Congress established a reservation for the Seminole Nation of Oklahoma.
3. By applying the analysis set out in ***McGirt***, Congress has not specifically erased the reservation boundaries and disestablished the Seminole Nation Reservation.
4. The Seminole Nation of Oklahoma is "Indian Country" for purposes of criminal law jurisdiction.
5. The Crime that Defendant/Petitioner was convicted of occurred in Indian Country.

Dated this 22 day of February, 2021.

HONORABLE TIMOTHY L. OLSEN
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 22 day of February, 2021 a copy of this Order has been delivered by **mail/in person/or E-Mail** to the following parties and or attorneys of record:

Paul B. Smith District Attorney Seminole County Courthouse P.O. Box 1300 Wewoka, Oklahoma 74884 e-mail: Paul.Smith@dac.state.ok.us Wyatt Rosette, Rosette Law Firm Attorney General 4111 Perimeter Center Pl Oklahoma City, OK 73112 e-mail: wrosette@rosettelaw.com Court of Criminal Appeals Oklahoma Judicial Center 2100 N. Lincoln Blvd., Suite 4 Oklahoma City, Oklahoma 73105	Brad Carter Attorney at Law (via e-mail) Chief Greg P. Chilcoat The Seminole Nation of Oklahoma P.O. Box 1498 Wewoka, Oklahoma 74884 e-mail: chief@sno-nsn.gov e-mail: Lincoln.s@sno-nsn.gov Oklahoma Indigent Defense System P.O. Box 926 Norman, Oklahoma 73070-0926

Kim Davis
Court Clerk/Deputy Court Clerk/Secretary-Bailiff

WESTLAW

Johnson v. Oklahoma
Supreme Court of the United States. July 9, 2020 141 S.Ct. 192 (Mem) 207 L.Ed.2d 1117 *(Approx. 1 page)*

141 S.Ct. 192
Supreme Court of the United States.

Joe JOHNSON, Jr., Petitioner,

v.

OKLAHOMA.

No. 18-6098.
July 9, 2020

Opinion

On petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma. Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Judgment vacated, and case remanded to the Court of Criminal Appeals of Oklahoma for further consideration in light of *McGirt* v. *Oklahoma*, 591 U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020).

All Citations

141 S.Ct. 192 (Mem), 207 L.Ed.2d 1117

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APPENDIX "C"

WESTLAW

State ex rel. Matloff v. Wallace
Court of Criminal Appeals of Oklahoma. May 21, 2021 --- P.3d ---- 2021 WL 2069659 (Mem) 2021 OK CR 15 *(Approx. 2 pages*

2021 WL 2069659
Court of Criminal Appeals of Oklahoma.

STATE EX REL. Mark MATLOFF, District Attorney, Petitioner

v.

The Honorable Jana WALLACE District Judge, Respondent.

Decided: 05/21/2021

ORDER GRANTING STAY OF PROCEEDINGS AND DIRECTING SUPPLEMENTAL BRIEFS

*1 ¶1 The State of Oklahoma, by Mark Matloff, District Attorney of Pushmataha County, petitions this Court for the writ of prohibition against enforcement of Judge Jana Wallace's April 13, 2021 order granting post-conviction relief, vacating and dismissing the second degree murder conviction of Clifton Merrill Parish in Pushmataha County Case No. CF-2010-26.

¶2 Parish was tried by jury and found guilty of second degree felony murder in March, 2012. The jury sentenced him to twenty-five years imprisonment. This Court affirmed the conviction on direct appeal in *Parish v. State*, No. F-2012-335 (Okl.Cr., March 6, 2014)(unpublished). Parish did not petition for rehearing, and apparently did not petition the United States Supreme Court for a writ of certiorari within the allowed ninety-day time period. On or about June 4, 2014, Parish's conviction became final. [1]

¶3 In August, 2020, Parish sought post-conviction relief, alleging that the State of Oklahoma lacked subject matter jurisdiction to try him for murder under the Supreme Court's decision in *McGirt v. Oklahoma*, —— U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). Judge Wallace held a hearing and found that Parish was an Indian and committed his crime within the Choctaw Reservation, the continued existence of which was recently recognized by this Court, applying *McGirt*, in *Sizemore v. State*, 2021 OK CR 6, ¶ 16, —— P.3d ——, ——.

¶4 Because the Choctaw Reservation is Indian Country, Judge Wallace found that the State lacked subject matter jurisdiction to try Parish for murder under the Major Crimes Act, 18 U.S.C. § 1153. Applying the familiar rule that defects in subject matter jurisdiction can never be waived, and can be raised at any time, Judge Wallace held that Parish's conviction for second degree murder was void and ordered the charge dismissed.

¶5 Judge Wallace initially stayed enforcement of the order until April 21, 2021, then effectively extended the stay by setting the matter for status conference on June 10, 2021.

APPENDIX "D"

Petitioner Matloff filed in this Court a verified request for a stay of all trial court proceedings, which is hereby **GRANTED**. Pursuant to Rules 10.1(C)(2), (3), and (4), and 10.5(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), Petitioner Matloff is hereby directed to file with the Clerk of this Court a certified copy of the original record containing the documents previously designated, with an original or certified copy of the transcript of proceedings, if any.

*2 ¶6 Petitioner Mark Matloff and Attorney Debra K. Hampton, post-conviction counsel for party-in-interest Clifton Parish, are hereby directed within twenty days of this order to submit briefs of not more than twenty pages, addressing the following question:

> In light of *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *Edwards v. Vannoy* (No. 19--5807), 593 U.S. —— (May 17, 2021), cases cited therein, and related authorities, should the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* be applied retroactively to void a state conviction that was final when *McGirt* and *Sizemore* were announced?

¶7 Representatives of the Attorney General of Oklahoma and the Choctaw Nation are also invited to enter appearances and file briefs according to these guidelines. The Clerk is directed to immediately forward copies of this order to the following parties and counsel:

The Honorable Jana Wallace Associate District Judge 302 S.W. B Antlers, OK 74523	Debra K. Hampton Attorney at Law 3126 S. Blvd. #304 Edmond, OK 73103
Clifton Parish #473315 Mack Alford CC P.O. Box 220 Stringtown, OK 74569	Mike Hunter Attorney General 313 N.E. 21st St. Oklahoma City, OK 73105
Mark Matloff District Attorney 204 S.W. 4th St. #6 Antlers, Oklahoma 74523	Jacob Keyes Choctaw Nation P.O. Box 1210 Durant, OK 74702

¶8 **IT IS SO ORDERED.**

/s/ DANA KUEHN, Presiding Judge

/s/ SCOTT ROWLAND, Vice Presiding Judge

/s/ GARY L. LUMPKIN, Judge

/s/ DAVID B. LEWIS, Judge

/s/ ROBERT L. HUDSON, Judge

All Citations

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Footnotes

1 *Walker v. State*, 1997 OK CR 3, ¶ 3 n.7, 933 P.2d 327, 330 n.7 (citing *Teague v. Lane*, 489 U.S. 288, 295, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989))(defining a final conviction as one where judgment was rendered, the availability of appeal exhausted, and the time to petition for certiorari had elapsed).

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