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OPINION OF THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA, REMANDING WITH INSTRUCTIONS TO DISMISS (APRIL 1, 2021)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

KADETRIX DEVON GRAYSON,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2018-1229

Before: Dana KUEHN, President Judge.,
Scott ROWLAND, Vice President Judge.,
Gary L. LUMPKIN, Judge., David B. LEWIS, Judge.,
Robert L. HUDSON, Judge.

OPINION REMANDING WITH INSTRUCTIONS TO DISMISS

KUEHN, PRESIDING JUDGE:

¶ 1 Kadetrix Devon Grayson was tried by jury and convicted of Counts I and II, First Degree Murder, and Count III, Possession of a Firearm After Former Conviction of a Felony, in the District Court of Semi-

nole County, Case No. CF-2015-370. Following the jury's recommendation, the Honorable George Butner sentenced Appellant to life imprisonment on each of Counts I and II, to run consecutively, and ten (10) years imprisonment on Count III, to run concurrently. Appellant must serve 85% of his sentences on Counts I and II before becoming eligible for parole consideration. Appellant appeals from these convictions and sentences.

¶ 2 Appellant raises five propositions of error in support of his appeal:

1. Counsel was ineffective because he refused to adequately communicate with Mr. Grayson and allow Mr. Grayson to assist in his own defense.

2. Counsel was ineffective for failing to question the medical examiner regarding Ms. Gokey's broken ribs.

3. The trial court lacked jurisdiction because all parties allegedly involved were Native American and the crimes allegedly happened on Seminole Nation Tribal Territory.

4. The trial court abused its discretion in refusing to give a "credibility of informers" instruction.

5. The accumulation of error in this case deprived Mr. Grayson of due process of law and a reliable sentencing proceeding in violation of the Fourteenth Amendment to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution.

¶ 3 In Proposition III Appellant claims the State of Oklahoma did not have jurisdiction to prosecute him. He relies on 18 U.S.C. § 1153 and *McGirt v. Oklahoma,* 591 U.S. ___, 140 S. Ct. 2452 (2020).

¶ 4 On August 25, 2020, this Court remanded this case to the District Court of Seminole County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Appellant's status as an Indian; and (b) whether the crime occurred within the boundaries of the Seminole Nation Reservation. Our Order provided that, if the parties agreed as to what the evidence would show with regard to the questions presented, the parties could enter into a written stipulation setting forth those facts, and no hearing would be necessary.

¶ 5 On October 26, 2020, the District Court filed its Findings of Fact and Conclusions of Law. The parties agreed by stipulation that Grayson is a member of the Seminole Nation, with some Indian blood, and was at the time of the crimes, and that the Seminole Nation is a federally recognized tribe.

¶ 6 The District Court found that Congress established a reservation for the Seminole Nation of Oklahoma. As the State took no position on the issue, the District Court found that these facts are uncontroverted:

1. The Treaty of Payne's Landing, 7 Stat. 368 (1832) (1832 Treaty), provided that the Seminoles would relinquish all claims to the lands they occupied in Florida and emigrate to "the country assigned to the Creek, west of the Mississippi River." *Id.* art. I. The 1832

Treaty was made to implement the Indian Removal Act, Pub. L. 21-148, 4 Stat 411 (1830).

2. The Treaty with the Creeks, 7 Stat. 417 (1833 Creek Treaty), provided that the Seminole Nation shall "have a permanent and comfortable home" by themselves on lands set aside for the Creek Nation. *Id.* art. IV. The Seminoles and the United States entered into the Treaty with the Seminole, confirming the Creek Treaty's provisions on March 28, 1833. Treaty with the Seminoles, art. IV, 7 Stat. 423 (1833) (1833 Seminole Treaty). The Seminole Nation's desire for genuine political autonomy resulted in the Treaty with the Creeks and Seminoles, 11 Stat. 699 (1856) (1856 Treaty). The 1856 Treaty, entered into on August 7, 1856, set forth specific boundaries for the Seminole Nation Reservation. *Id.* art. 1.

3. Ten years later, the United States and the Seminole Nation entered into the Treaty with the Seminole, 14 Stat. 755 (1866) (1866 Treaty). This redefined the boundaries of the Seminole Nation Reservation. For payment of the fixed sum of $325,362.00, the Seminoles ceded and conveyed the entirety of their previous territory to the United States, guaranteed to them under the 1856 Treaty. *Id.* art. 3. The Treaty established a new reservation, carved from part of the western half of the Creek Nation Reservation, to "constitute the national domain of the Seminole Indians." *Id.* art. 3. These boundaries were:

> 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 north 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. *Id.* art. 3.

4. The precise boundaries of the Reservation set forth in the 1866 Treaty depended on the determination of the location of "the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866. . . . " 1866 Treaty, art. 3, 14 Stat. 755. The original line was surveyed by Rankin in 1867 but never formally approved. In 1871, the Department of the Interior instead adopted the line from the Bardwell survey, which was seven miles west of the Rankin line. This discrepancy led to considerable uncertainty for Seminole Nation citizens living within the disputed corridor. In 1881, the United States purchased those lands from the Creek Nation and included them in the Seminole Reservation. *Seminole Nation v. United States,* 316 U.S. 310, 313 (1942); 22 Stat. 257, 265 (1882).

5. The boundaries of the Seminole Nation of Oklahoma Reservation remain those defined

in the 1866 Treaty, plus the land purchased from the Creek Nation in 1881.

¶ 7 The District Court found, and we agree, that the absence of the word "reservation" in the 1866 Treaty is not dispositive. *McGirt,* 140 S. Ct. at 2461. And subsequent acts of Congress referred to the Seminole Reservation. *See, e.g.,* Act of March 3, 1891, 26 Stat. 989, 1016 (1891); 11 Cong. Rec. 2351 (1881). The record supports the District Court's findings that by treaty and purchase, the United States established a reservation for the Seminole Nation of Oklahoma.

¶ 8 The District Court found that Congress has not disestablished the Seminole Nation Reservation. After Congress has established a reservation, only Congress may disestablish it by clearly expressing its intent to do so; usually, this will require "an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt,* 140 S. Ct. at 2463 (internal quotation omitted). The District Court found no explicit indication or expression of Congressional intent to disestablish the Seminole Reservation. The State took no position on this issue, and the Court found:

1. Allotment did not disestablish the Reservation. Allotment of Seminole tribal lands was formally authorized in 1893. Act of March 3, 1893, 27 Stat. 612, at 645. The Dawes Commission and the Seminole Nation reached an allotment agreement on December 16, 1897, ratified by Congress on July 1, 1898. Act of July 1, 1898, 30 Stat. 567, at 567. This created three land classes based on appraised value; each tribal member would be allotted a share of land of equal value, with sole right

of occupancy; the allotments were inalienable until the date of the patent, with some leases allowed. *Id.* Nowhere in either the allotment statute or the agreement is there language indicating an intent to disestablish the Reservation. There is no mention of cession, a fixed sum in return for total surrender of tribal claims, or any other text supporting disestablishment. As *McGirt* made clear, allotment may be a step towards disestablishment but is not itself a clear expression of the intention to disestablish a reservation. *McGirt,* 140 S. Ct. at 2465; *see also Mattz v. Arnett,* 412 U.S. 481, 497 (allotment entirely consistent with continued reservation status).

2. Although Congress has, from time to time, imposed restrictions on the sovereignty of the Seminole Nation, these restrictions did not disestablish the Reservation. For example, the Act of March 3, 1903, stated that the tribal government of the Seminole Nation "shall not continue" past March 4, 1906. Act of March 3, 1903, 34 Stat. 982, 1008 (1903). However, in March 1906, Congress did not terminate the Seminole Nation tribal government. Instead, in the Five Tribes Act, Congress recognized that the existence of the Seminole Nation tribe and tribal government "are hereby continued in full force and effect for all purposes authorized by law." Five Tribes Act, 34 Stat. 137, 148 (1906). This Act restricted the tribal government's power, but it neither terminated the Nation

nor expressly indicated an intent to disestablish the Reservation.

3. Oklahoma statehood did not disestablish the Reservation. The Oklahoma Enabling Act, 34 Stat. 267 (1906), authorized Oklahoma statehood. It contains nothing suggesting that, by allowing statehood, Congress intended to disestablish the Seminole Reservation. The Act expressly prohibited the Oklahoma constitution from limiting the federal government's authority to make laws or regulations respecting Indians living within the new state's boundaries. *Id.,* 34 Stat at 267-68. Congress never disestablished the Seminole Reservation, and it currently exists.

4. The parties stipulated to the current boundaries of the Seminole Nation Reservation. The parties further stipulated that the location of the crimes charged was within the historical boundaries of the Seminole Nation of Oklahoma Reservation.

5. The District Court adopted a map, attached as Exhibit A to the Seminole Nation's brief filed in the District Court, showing those stipulated boundaries. The District Court first noted that, with one deviation, the borders of Seminole County set forth in the Oklahoma Constitution are defined by reference to the Seminole Reservation boundaries:

> Beginning at a point where the east boundary line of the Seminole nation intersect[s] 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 centerline 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 centerline 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.

¶ 9 The District Court described the Reservation northeastern boundary thus: 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.

¶ 10 The District Court found that Congress has never, by treaty or statute, either erased the Seminole Nation Reservation boundaries or expressed an intent to do so or disestablish the Reservation otherwise. The record supports the District Court's findings that the United States has not disestablished the Seminole Nation of Oklahoma Reservation.

¶ 11 After making these findings of fact, the District Court reached the following conclusions of law:

1. The Defendant/Appellant is an "Indian" as defined by the Oklahoma Court of Criminal Appeals.
2. By applying the analysis set out in *McGirt,* Congress established a reservation for the Seminole Nation of Oklahoma.
3. By using the analysis set out in *McGirt,* Congress has not explicitly 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 Crimes that Defendant/Appellant was convicted of occurred in Indian Country.

¶ 12 In its Supplemental Brief, Appellee does not contest the District Court's findings and conclusions. The record supports the findings of fact, and we adopt the conclusions of law. Appellant is a mem-

ber of the Seminole Nation, and the crimes were committed within the boundaries of the Seminole Nation Reservation. The ruling in *McGirt* applies to this case. The District Court of Seminole County did not have jurisdiction to try Appellant.

¶ 13 Accordingly, Proposition III is granted. Propositions I, II, IV, and V are moot.

DECISION

The Judgment and Sentence of the District Court of Seminole County is **VACATED**, and the case is **REMANDED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2020), the **MANDATE** is **STAYED** for twenty (20) days from the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY THE HONORABLE GEORGE BUTNER, DISTRICT JUDGE

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Opinion by: Kuehn, P.J.
Rowland, V.P.J.: Concur
Lumpkin, J.: Concur in Result
Lewis, J.: Specially Concur
Hudson, J.: Concur

LUMPKIN, JUDGE,
CONCURRING IN RESULTS

¶ 1 Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma,* ___ U.S. ___, 140 S. Ct. 2452 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt,* I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas, I was forced to conclude the Majority had totally failed to follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

¶ 2 My quandary is one of ethics and morality. One of the first things I was taught when I began my service in the Marine Corps was that I had a duty to follow lawful orders, and that same duty required me to resist unlawful orders. Chief Justice Roberts's scholarly and judicially penned dissent, actually following the Court's precedents and required analysis, vividly reveals the failure of the majority opinion to

follow the rule of law and apply over a century of precedent and history, and to accept the fact that no Indian reservations remain in the State of Oklahoma.[1] The result seems to be some form of "social justice" created out of whole cloth rather than a continuation of the solid precedents the Court has established over the last 100 years or more.

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[1] Senator Elmer Thomas, D-Oklahoma, was a member of the Senate Committee on Indian Affairs. After hearing the Commissioner's speech regarding the Indian Reorganization Act (IRA) in 1934, Senator Thomas opined as follows:

> I can hardly see where it (the IRA) could operate in a State like mine where the Indians are all scattered out among the whites and they have no reservation, and they could not get them into a community without you would go and buy land and put them on it. Then they would be surrounded very likely with thickly populated white sections with whom they would trade and associate. I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly-settled population. (emphasis added).

John Collier, Commissioner of Indian Affairs, *Memorandum of Explanation* (regarding S. 2755), p. 145, hearing before the United States Senate Committee on Indian Affairs, February 27, 1934. Senator Morris Sheppard, D-Texas, also on the Senate Committee on Indian Affairs, stated in response to the Commissioner's speech that in Oklahoma, he did not think "we could look forward to building up huge reservations such as we have granted to the Indians in the past." *Id.* at 157. In 1940, in the Foreword to Felix S. Cohen, *Handbook of Federal Indian* Law (1942), Secretary of the Interior Harold Ickes wrote in support of the IRA, "[t]he continued application of the allotment laws, under which Indian wards have lost more than two-thirds of their reservation lands, while the costs of Federal administration of these lands have steadily mounted, must be terminated." (emphasis added).

¶ 3 The question I see presented is should I blindly follow and apply the majority opinion or do I join with Chief Justice Roberts and the dissenters in *McGirt* and recognize "the emperor has no clothes" as to the adherence to following the rule of law in the application of the *McGirt* decision?

¶ 4 My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt.* However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.

LEWIS, JUDGE,
SPECIALLY CONCURRING

¶ 1 Based on my special writings in *Bosse v. State,* 2021 OK CR 3, ___ P.3d ___ and *Hogner v. State,* 2021 OK CR 4, ___ P.3d ___, I specially concur. Following the precedent of *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020), Oklahoma has no jurisdiction over an Indian who commits a crime in Indian Country, or over any person who commits a crime against an Indian in Indian Country. This crime occurred within the historical boundaries of the Seminole Nation Reservation and that Reservation has not been expressly disestablished by the United States Congress. Additionally, Appellant is an Indian, thus the jurisdiction is governed by the Major Crimes Act found in the United States Code.

¶ 2 Oklahoma, therefore, has no jurisdiction, concurrent or otherwise, over Appellant in this case. Thus, I concur that this case must be reversed and remanded with instructions to dismiss. Jurisdiction is in the hands of the United States Government.

HUDSON., JUDGE, CONCURRING IN RESULTS

¶ 1 Today's decision applies *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020) to the facts of this case and dismisses convictions from Seminole County for two counts of first degree murder and one count of felonious possession of a firearm. I concur in the results of the majority's opinion based on the stipulations below concerning the Indian status of Appellant and the location of these crimes within the historic boundaries of the Seminole Reservation. Under *McGirt,* the State cannot prosecute Appellant because of his Indian status and the occurrence of the murders and felonious possession of firearm within Indian Country as defined by federal law. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶ 2 I disagree, however, with the majority's adoption as binding precedent that Congress never disestablished the Seminole Reservation. Here, the State took no position below on whether the Seminole Nation has, or had, a reservation. The State's tactic of passivity has created a legal void in this Court's ability to adjudicate properly the facts underlying Appellant's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. We should find no abuse of discretion based on the record evidence presented. But we should not establish as binding precedent that the Seminole Reservation was never disestablished based on this record.

¶ 3 Finally, I write separately to note that *McGirt* resurrects an odd sort of Indian reservation. One where a vast network of cities and towns dominate

the regional economy and provide modern cultural, social, educational and employment opportunities for all people on the reservation. Where the landscape is blanketed by modern roads and highways. Where non-Indians own property (lots of it), run businesses and make up the vast majority of inhabitants. On its face, this reservation looks like any other slice of the American heartland—one dotted with large urban centers, small rural towns and suburbs all linked by a modern infrastructure that connects its inhabitants, regardless of race (or creed), and drives a surprisingly diverse economy. This is an impressive place—a modern marvel in some ways—where Indians and non-Indians have lived and worked together since at least statehood, over a century.

¶ 4 *McGirt* orders us to forget all of that and instead focus on whether Congress expressly disestablished the reservation. We are told this is a cut-and-dried legal matter. One resolved by reference to treaties made with the Five Civilized Tribes dating back to the nineteenth century. Ignore that Oklahoma has continuously asserted jurisdiction over this land since statehood, let alone the modern demographics of the area.

¶ 5 The immediate effect under federal law is to prevent state courts from exercising criminal jurisdiction over a large swath of Greater Tulsa and much of eastern Oklahoma. Yet the effects of *McGirt* range much further. Crime victims and their family members in a myriad of cases previously prosecuted by the State can look forward to a do-over in federal court of the criminal proceedings where *McGirt* applies. And they are the lucky ones. Some cases may not be prosecuted at all by federal authorities because of

issues with the statute of limitations, the loss of evidence, missing witnesses or simply the passage of time. All of this foreshadows a hugely destabilizing force to public safety in eastern Oklahoma.

¶ 6 *McGirt* must seem like a cruel joke for those victims and their family members who are forced to endure such extreme consequences in their case. One can certainly be forgiven for having difficulty seeing where—or even when—the reservation begins and ends in this new legal landscape. Today's decision on its face does little to vindicate tribal sovereignty and even less to persuade that a reservation in name only is necessary for anybody's well-being. The latter point has become painfully obvious from the growing number of cases that come before this Court where non-Indian defendants are challenging their state convictions using *McGirt* because their victims were Indian.

¶ 7 Congress may have the final say on *McGirt.* In *McGirt,* the court recognized that Congress has the authority to take corrective action, up to and including disestablishment of the reservation. We shall see if any practical solution is reached as one is surely needed. In the meantime, cases like Appellant's remain in limbo until federal authorities can work them out. Crime victims and their families are left to run the gauntlet of the criminal justice system once again, this time in federal court. And the clock is running on whether the federal system can keep up with the large volume of new cases undoubtedly heading their way from state court.

DISTRICT COURT OF SEMINOLE COUNTY, STATE OF OKLAHOMA, FINDINGS OF FACT AND CONCLUSIONS OF LAW (SIGNED OCTOBER 23, 2020, FILED OCTOBER 26, 2020)

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

KADETRIX DEVON GRAYSON,

Defendant/Appellant,

v.

THE STATE OF OKLAHOMA,

Plaintiff/Appellee.

Seminole County District Court Case No. CF-2015-370

Court of Criminal Appeals Case No. F-2018-1229

Before: Timothy L. OLSEN, District Court Judge.

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

STATEMENT OF THE CASE

Kadetrix Devon Grayson was tried by jury and convicted in Case No. CF-2015-370, of Counts I and II, First Degree Murder, and Count III, Possession of

a Firearm After Former Conviction of a Felony. In accordance with the jury's recommendation, the Honorable George Butner sentenced Mr. Grayson to life imprisonment on each of Counts I and II, to run consecutively, and ten (10) years imprisonment on Count III, to run concurrently. On August 25, 2020, the Oklahoma Court of Criminal Appeals ordered this Court to hold an evidentiary hearing on Defendant/Appellant's claim in Proposition III of his Brief of Appellant, filed on June 27, 2019, alleging that under 18 U.S.C. § 1153 and *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020), the State of Oklahoma lacked jurisdiction to try him because he is a citizen of the Seminole Nation and the crimes 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 in Support of Mr. Grayson's jurisdictional claim on September 23, 2020.

On September 25, 2020, the Court conducted an evidentiary hearing with the parties, counsel, and the Seminole Nation present. The State of Oklahoma appeared by and through District Attorney Paul Smith and Assistant Attorneys General Theodore Peeper and Joshua Fanelli. The Defendant/Appellant appeared *via* Skype with counsel, Jamie Pybas, The Seminole Nation appeared by and through counsel, Brett Stavin. 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 Kadetrix Grayson's Indian status. The Court of Criminal Appeals in its remand order set out the test for whether Mr. Grayson 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 Mr. Grayson has "some Indian blood" and is "recognized as an Indian by a tribe or by the federal government." *Diaz,* 679 F.3d at 1187.

The parties stipulated that Kadetrix Devon Grayson is an enrolled member of the Seminole Nation, with a Seminole blood quantum of 1/4. His Roll Number is 18454, and his date of enrollment is September 29, 1994. (Joint Exhibit #1)

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. Therefore, the Defendant/Appellant is an "Indian" for purposes of determining criminal jurisdiction.

II. Did the crimes 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 crimes 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.

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 11366 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.

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 Mettz 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?

The parties stipulated to the current boundaries of the Seminole Nation of Oklahoma. (Joint Exhibit #1) The map attached to the Seminole Nation's brief as Exhibit "A" is adopted by the Court.

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/Appellant entered into a stipulation agreeing that the location of the commission of the crimes at issue was within the historical boundaries of the Seminole Nation of Oklahoma (Joint Exhibit #1).

CONCLUSION

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

1. The Defendant/Appellant is an "Indian" as defined by the Oklahoma Court of Criminal Appeals.

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 Crimes that Defendant/Appellant was convicted of occurred in Indian Country.

Dated this 23rd day of October, 2020

/s/ Timothy L. Olsen
Judge of the District Court

COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA, ORDER REMANDING FOR EVIDENTIARY HEARING (AUGUST 25, 2020)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

KADETRIX DEVON GRAYSON,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2018-1229

Before: David B. LEWIS, Presiding Judge., Dana KUEHN, Vice President Judge., Gary L. LUMPKIN, Judge., Robert L. HUDSON, Judge., Scott ROWLAND, Judge.

ORDER REMANDING FOR EVIDENTIARY HEARING

Kadetrix Devon Grayson was tried by jury and convicted of Counts I and II, First Degree Murder, and Count III, Possession of a Firearm After Former Conviction of a Felony, in the District Court of Seminole County, Case No. CF-2015-370. In accordance with the jury's recommendation the Honorable George

Butner sentenced Appellant to life imprisonment on each of Counts I and II, to run consecutively, and ten (10) years imprisonment on Count III, to run concurrently. Appellant must serve 85% of his sentences on Counts I and II before becoming eligible for parole consideration. Appellant appeals from these convictions and sentences.

In Proposition III Appellant claims the District Court lacked jurisdiction to try him. Appellant argues that he is a citizen of the Seminole Nation and the crimes occurred within the boundaries of the Seminole Nation. Appellant relies on 18 U.S.C. § 1153 and *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020).

Appellant's claim raises two separate questions: (a) his Indian status, and (b) whether the crime occurred in Indian Country. These issues require fact-finding. We therefore **REMAND** this case to the District Court of Seminole County, for an evidentiary hearing to be held within sixty (60) days from the date of this Order.

Recognizing the historical and specialized nature of this remand for evidentiary hearing, we request the Attorney General and District Attorney work in coordination to effect uniformity and completeness in the hearing process. Upon Appellant's presentation of *prima facie* evidence as to Appellant's legal status as an Indian, and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.

The hearing shall be transcribed, and the court reporter shall file an original and two (2) certified copies of the transcript within twenty (20) days after the hearing is completed. The District Court shall

then make written findings of fact and conclusions of law, to be submitted to this Court within twenty (20) days after the filing of the transcripts in the District Court. The District Court shall address only the following issues.

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.[1]

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, an/or testimony.

The District Court Clerk shall transmit the record of the evidentiary hearing, the District Court's findings of fact and conclusions of law, and any other materials made a part of the record, to the Clerk of this Court, and counsel for Appellant, within five (5) days after the District Court has filed its findings of fact and conclusions of law. Upon receipt thereof, the Clerk of this Court shall promptly deliver a copy of that record to the Attorney General. A supplemental brief, addressing only those issues pertinent to the evidentiary hearing and limited to twenty (20) pages

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[1] *See, e.g., 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).

in length, may be filed by either party within twenty (20) days after the District Court's written findings of fact and conclusions of law are filed in this Court.

Provided however, in the event the parties agree as to what the evidence will show with regard to the questions presented, they 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. In this event, no hearing on the questions presented is necessary. Transmission of the record regarding the matter, the District Court's findings of fact and conclusions of law and supplemental briefing shall occur as set forth above.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit copies of the following, with this Order, to the District Court of Seminole County: Appellant's Brief in Chief filed June 27, 2019; Appellant's Reply Brief filed September 11, 2019; and Appellee's Response Brief, filed August 22, 2019.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 25th day of August, 2020.

/s/ David B. Lewis
Presiding Judge

/s/ Dana Kuehn
Vice Presiding Judge

/s/ Gary L. Lumpkin
Judge

/s/ Robert L. Hudson
Judge

/s/ Scott Rowland
Judge

ATTEST:

/s/ John D. Hadden
Clerk