IN THE DISTRICT COURT OF SEMINOLE COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA	)	
	)	**Case No. CF-2019-92**
vs	)	
	)	
COKER DEAN BARKER	)	

DISTRICT COURT ORDER –
DECISION ON DEFENDANT'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION OVER CRIMES
COMMITTED BY INDIAN IN 'INDIAN COUNTRY'

COMES ON FOR DECISION Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Over Crimes Committed by Indian in 'Indian Country.' After hearing argument and reviewing the court file, the Court **FINDS** as follows:

SUMMARY OF CASE

On May 7, 2019 the State of Oklahoma charged the Defendant with the crime of First-Degree Murder-Deliberate Intent in the District Court of Seminole County. The District Court Information alleges that on April 2, 2019, the Defendant, with malice aforethought, caused the death of Michael Kelough by blunt force trauma, asphyxia and shooting Michael Kelough in the head. On August 3, 2020, the Defendant filed a Motion to Dismiss for Lack of Jurisdiction Over Crimes Committed by Indian in "Indian Country". The Defendant's Motion contends that 1) he is a member of a federally recognized tribe possessing a quantum of Indian blood, and 2) he is Indian and that the alleged offenses were committed within the Seminole Reservation. He argues that the State of Oklahoma lacks criminal jurisdiction over him because of the opinion of United States Supreme Court in ***McGirt v. Oklahoma***. There, the Court held that the Muscogee (Creek) Reservation remains intact, thus making crimes committed by Indians within that reservation subject to exclusive federal jurisdiction under the Major Crimes Act. The Defendant's position is that the reasoning of McGirt applies equally to the Seminole Nation, as both are among the Five Civilized Tribes ("Five Tribes") and therefore share a similar legal history.

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 Court set forth the following questions in order to decide the Defendant's Motion to Dismiss:

Is the Seminole Nation a reservation and thus Indian Country for purposes of **18 U.S.C. § 1153(a)** as defined by ***McGirt v. Oklahoma***?

If yes, what are the boundaries of the Seminole Nation Reservation?

If yes, did the alleged crimes occur within the Seminole Reservation?

If yes, is the Defendant an "Indian" for purposes of the act and ***McGirt v. Oklahoma***?

The State of Oklahoma filed a response to the Defendant's Motion to Dismiss and the Seminole Nation of Oklahoma filed an *amicus curiae* Brief in Support of Defendant's Motion to Dismiss.

On August 25, 2020 the Court conducted a hearing with the parties, counsel and the Seminole Nation of Oklahoma present. The State of Oklahoma appeared by and through Paul Smith and Candice Irby. The Defendant appeared with counsel, Peter C. Astor. The Seminole Nation appeared by and through counsel, Brett Stavin and Chief Greg Chilcoat. The Court heard arguments, accepted stipulations and received exhibits from the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The facts set forth in the Defendant's brief, Appendix of exhibits and the Seminole Nation's brief setting forth the various treaties between the United States and the Seminole Nation of Oklahoma, historical maps of the Creek and Seminole Nation of Oklahoma are not disputed by the State of Oklahoma. Based on the briefs, exhibits, stipulations and statements of counsel, the Court makes the following findings of fact and conclusions of law as to the dispositive questions:

I. Is the Seminole Nation of Oklahoma a reservation and thus Indian Country for purposes of federal criminal law, specifically Major Crimes Act (MCA) 18 U.S.C. § 1153(a) as defined by McGirt v. Oklahoma?

In ***McGirt v. Oklahoma*** the United States Supreme Court held that Congress established a reservation for the Creek Nation and that the reservation has never been withdrawn or disestablished by Congress. Therefore, the Creek reservation is Indian country for purposes of the MCA. While there is much speculation that ***McGirt v. Oklahoma*** applies to all of the five (5) civilized tribes, as stated by the majority opinion in ***McGirt*** "Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek."

As a result of the Defendant's Motion to Dismiss, this Court must determine whether the Seminole Nation of Oklahoma was granted a reservation by the federal government and if so, whether it has been withdrawn or disestablished.

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

It is obvious from the record before the Court that Congress established a reservation for the Seminole Nation of Oklahoma.

Originally hailing from what is now the State of Florida, the Seminole began their forced westward journey after the Treaty of Payne's Landing. 7 Stat. 368 (1832). 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). 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." *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.*

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. 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 Stat, 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)**. 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.

> **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.***

It was defined in this way:

> 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.

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 State." 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 endures to this day.

B. The Reservation remains intact, as made clear by McGirt.

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.

1. 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. 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. 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.

2. Restrictions on tribal sovereignty did not disestablish the Reservation.

The 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 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). 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). 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. Justice Gorsuch put it well: **"[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 refrained from doing so.

3. ***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.

The reasoning ***McGirt v. Oklahoma*****, 140 S. Ct. 2452 (2020),** as applies to the Seminole Nation's own legal and historical background, makes it clear that the Seminole Reservation was never disestablished.

For all of the above reasons, and as ***McGirt*** now makes clear, the Seminole Reservation endures to this day.

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

The parties agree as to the current boundaries of the Seminole Nation of Oklahoma. The map attached to the Seminole Nation's brief is adopted by the Court.

As explained above, the boundaries of the Seminole Reservation were originally defined in the 1866 Treaty as follows:

> 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.

Art. 3. As mentioned earlier, there was confusion as to how those boundaries were initially drawn. The eastern border was originally the Bardwell line, but it soon became evident that the eastern border should have been just a few miles further east. The discrepancy resulted in a 175,000-acre addition purchased by the United States for the benefit of the Tribe, bringing the total reservation to about 375,000 acres. See *Seminole Nation,* 316 U.S. at 313.

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 Eastwest 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 Seminole Nation's map adopted by the Court displays both the County lines and the Reservation boundaries.

III. Does the State of Oklahoma Have Jurisdiction Over the Defendant for the Crime Charged?

First-degree murder is among the various offenses enumerated under the **Major Crimes Act**, a federal criminal statute which provides that "[a]ny Indian who commits [an enumerated offense] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, ***within the exclusive jurisdiction of the United State.***" **18 U.S.C. § 1153(a)** (emphasis added). The term "Indian country" is defined by the Major Crimes Act as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."

As set forth above, pursuant to ***McGirt v. Oklahoma*** the Seminole Nation of Oklahoma is a reservation, for purposes of federal criminal law jurisdiction. It is undisputed that the alleged crime that Defendant is charged with occurred within the Seminole Nation.

A. Does the Defendant meet the definition of an "Indian" for purposes of federal criminal law?

Under current law, a person is an "Indian" for criminal law jurisdiction if they satisfy two criteria: (1) they have "some Indian blood," ***and*** (2) they are "recognized as an Indian by a tribe or by the federal government." *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). **Both requirements must be shown for the state to lack**

jurisdiction. The first requirement can be shown by a Certificate of Degree of Indian Blood (CDIB) issued by the U.S. Bureau of Indian Affairs. The second requirement can be shown by showing the defendant or victim is enrolled in a tribe or proof the defendant is receiving federal Indian services.

It is undisputed in this case that the Defendant is an "Indian" for purposes of federal criminal law. The exclusive jurisdiction over the Defendant is with the Federal Court.

Based on the findings and analysis set forth above, It is **Hereby Ordered, Adjudged and Decreed** that the Motion to Dismiss for Lack of Jurisdiction Over the Defendant is **Granted.**

It is further Ordered that the findings and orders of the Court contained in this Decision are stayed for a period of 30 days after this Order becomes final. This Order will only become final if the State of Oklahoma does not appeal the decision within the time allowed by law or there is a decision affirming the Order with mandate by the Oklahoma Court of Criminal Appeals.

Pursuant to **22 O.S. § 845, 846** the Defendant is ordered detained by the Seminole County Sheriff for a period of 30 days after this decision becomes final to allow the District Attorney to communicate with the United States Attorney for the Eastern District of Oklahoma and the Seminole Nation to ensure time for a warrant or detainer from the proper jurisdiction.

It is so Ordered this 3 **day of** September **2020**

Timothy L. Olsen
District Judge, Seminole County

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 3 day of September, 2020 a copy of this Order and Notice of Hearing 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	Peter C. Astor Attorney for Defendant 610 S. Hiawatha Sapulpa, OK 74066 Email: Peter.Astor@oids.ok.gov 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

Debbie Joplin

Court Clerk/Deputy Court Clerk/Secretary-Bailiff