SEMINOLE COUNTY, OKLAHOMA
FILED
IN DISTRICT COURT

AUG 03 2020

KIM A. DAVIS, COURT CLERK
BY ________ DEPUTY

IN THE DISTRICT COURT OF SEMINOLE COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA)
Plaintiff,)
)
vs.) Case No. CF-2019-92
)
COKER DEAN BARKER)
Defendant.)
)

MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION
OVER CRIMES COMMITTED BY INDIAN IN 'INDIAN COUNTRY'

COMES NOW the Defendant, Coker Dean Barker, by and through his attorneys of record, Peter C. Astor and Gretchen Mosley, capital trial counsel for the Oklahoma Indigent Defense System, and prays the Court dismiss with prejudice the charge of first-degree murder and the bill of particulars filed in the above styled case because the State of Oklahoma lacks subject-matter jurisdiction to prosecute Defendant because 1) he is a member of a federally recognized tribe possessing a quantum of Indian blood, and 2) the alleged crime occurred within "Indian country," to wit: the reservation of the Seminole Nation of Oklahoma. See 18 U.S.C. 1151(a); 18 U.S.C. §1153 (Major Crimes Act).

The Alleged Crime of First-Degree Murder

It was established at the preliminary hearing that the body of Michael Kelough was discovered on April 2, 2019 in his car near the intersection of NS3510 Road and EW1250 Road in rural Seminole County, Oklahoma. A witness, William Lozier, testified that he saw Kelough's car parked in front of the house at 1228 Gessel St., in the town of Seminole, Oklahoma. This is a rental house where Coker Barker and Anastacia Little had been living. Lozier was staying at the house across from 1228. Testimonial evidence was introduced

through Lozier that Kelough was beaten to death at the house on Gessel St. His body was moved from 1228 Gessel, placed in the front seat of the car found at 3510 and 1250 Road, and then shot to create a ruse. OSBI Agent Nicholas Rizzi testified about the evidence he discovered at 1228 Gessel St., such as blood spatter on items in the house, which is consistent with a homicide occurring there. At the conclusion of the preliminary hearing, Judge Anderson found probable cause that Mr. Barker and Ms. Little had committed the crime of first-degree murder (AFCF for Mr. Barker) in Seminole County. The State has filed a Bill of Particulars seeking the death penalty.

Federal Law Governing Crimes Committed by or Against Native Americans in Indian Country

Major Crimes Act

The federal Major Crimes Act, 18 U.S.C. §1153(a) provides that within "the Indian country," any "Indian" who commits certain enumerated offenses "against the person or property of another Indian or any other person" "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 States." The offense of murder, which is alleged against Mr. Barker in the above-styled case, is enumerated in §1153(a).

Indian Status

Proof of one's status as an Indian under federal Indian law is necessary before one can claim exemption from prosecution under state law. *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 403. A prerequisite to federal jurisdiction under §1153 is that the perpetrator must be an Indian. *Id.* Under §1152, federal jurisdiction over crimes in Indian country is contingent upon the existence of either an Indian victim or perpetrator. *Langford* at 1197. Thus, Courts have determined for a criminal defendant to be subject to Section 1153, the court "must make factual findings that the defendant (1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government." *Goforth v. State*, 644 P. 2d 114, 116 (Okl.Cr. 1982) See also *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th

Cir. 2001)("[f]or a criminal defendant to be subject to § 1153, the court must make factual findings that the defendant '(1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government.)

Mr. Barker is an enrolled member of the Seminole Tribe, which is a federally recognized tribe. He possesses a CDIB card issued by the Department of Interior showing his degree of Indian blood quantum as "13/16 of the Seminole-Creek-Choctaw Tribe." See Ex. A (attached). As such, he meets the prerequisite of being an "Indian" for purposes of §1153.

Exclusive Federal Jurisdiction

Federal jurisdiction over the offenses covered by the Indian Major Crimes Act is "exclusive" of state jurisdiction." See *United States v. John*, 437 U.S. 634, 651, 98 S.Ct. 2541, 2550, 57 L.Ed.2d 489 (1978) ("a state does not have jurisdiction over an offense that is subject to federal prosecution under §1153); *Cravatt v. State*, 825 P.2d at 279 (recognizing murder prosecutions in Indian Country have been "specifically reserved to the United States"). In Murphy, finding that Congress had never disestablished the Creek reservation, the 10th Circuit reversed the state conviction and death sentence of Patrick Murphy, a member of the Creek Nation, although the victim's murder was carried out within the state boundaries of McIntosh County, Oklahoma.

> "Applying Solem, we conclude Congress has not disestablished the Creek Reservation. Consequently, the crime in this case occurred in Indian country as defined in 18 U.S.C. § 1151(a). Because Mr. Murphy is an Indian and because the crime occurred in Indian country, the federal court has exclusive jurisdiction. Oklahoma lacked jurisdiction."
>
> *Murphy* at 966.

Indian Country

Section 1151(a) defines Indian country as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."

The Major Crimes Act applies to crimes committed within the boundaries of Indian reservations regardless of the ownership of the land on which the crimes were committed. *Murphy* at 1183. Reservation status depends on the boundaries Congress draws, not on who owns the land inside the reservation's boundaries. "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Murphy* at 1183. (internal citations omitted).

The political boundary lines for Seminole County, Oklahoma were fashioned at the state constitutional convention in 1907 and established by the Oklahoma Constitution in Article 17, §8:

> Seminole County. Beginning at a point where the east boundary line of the *Seminole nation* intersects 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. (emphasis added). See App. p. (Map of Seminole County)

The "eastern boundary line of the Seminole Nation" used by the drafters of §8 to fashion a new state county reveals obvious but telling information: it was a boundary line as evident as the South Canadian River, bounding the eastern territory of a nation of Indians whose territory pre-existed Seminole County, Oklahoma. What §8 doesn't make plain is that, after the county line changes direction at the township line between townships 7 and 8 North and traverses eastward to the SW corner S35-T8N-R8E," it has crossed over the western boundary line of the Creek Nation. Any map accurately representing the limits of Seminole County, the Seminole Nation and the Creek Nation

will show that Seminole County embraces the entirety of the Seminole Nation and a small portion of the Creek Nation.

According to holdings *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) and *Murphy v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017), aff'd sub nom. Sharp v. Murphy, 140 S. Ct. 2412 (2020) that portion of Seminole County that lies within the Creek Nation is "Indian country." In *McGirt*, the Supreme Court held that, for purposes of the Indian Major Crimes Act (§1153), "land reserved for the Creek Nation since the 19th century remains "Indian country." The federal government had promised the Creek "a reservation in perpetuity," and although Congress had diminished the reservation and altered the Tribe's authority over time, "Congress has never withdrawn the promised reservation." *Id* at 2482. On the same day, the Supreme Court affirmed the 10th Circuit's opinion that Congress has not disestablished the Creek Reservation. See *Murphy v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017), aff'd sub nom. Sharp v. Murphy, 140 S. Ct. 2412 (2020).

The alleged crimes scenes, 1228 Gessel Street in the town of Seminole and NS3510 Road and EW1250 Road are located in that portion of Seminole County that lies within the limits of the Seminole Nation. Thus, there is not an immediate application of *McGirt* and *Murphy* insofar as neither opinion specifically addressed whether land reserved for the Seminole Nation since the 19th century remains "Indian country." However, by applying *McGirt's* analysis and methodology to the question of the Seminole reservation, the inevitable conclusion is that, like the Creek, Congress "forever secured and guaranteed" the Seminole a reservation and has never disestablished it.

<u>As it did with the Creek Nation, Congress Established a Reservation for the Seminole Nation</u>

History of the Seminole Reservation

At the time of the Spanish discovery and settlement of the Florida Territory in 1512, the land was occupied by "regionalized aboriginal cultures." United States v. Seminole Indians, 180 Ct. Cl. 375, 378 (U.S. 1967). The Seminole are a Muskhogean tribe,

originally made up of emigrants from the Lower Creek towns on the Chattahoochee River who moved down into Florida after 1700. JOHN R. SWANTON, EARLY HISTORY OF THE CREEK INDIANS & THEIR NEIGHBORS 398 (Jerald T. Melanich ed., University Press of Florida 1998 (1922) Their population was increased in 1715 by Native Americans who fled from Carolina after an uprising known as the Yamasee war. Seminole Indians at 380. Further population increases occurred when Spain, seeking to change Indian loyalties from the British "undertook to encourage additional elements among the Lower Creeks to settle in the depopulated areas of northern Florida." Id. Having previously been classed with the Lower Creeks, this native population began to be known as the "Seminole," a Muscogee word that was applied by the Creeks to people who removed themselves from populous towns to live by themselves. SWANTON 398. By the time the United States purchased Florida from Spain in 1821, the Seminole tribe was the dominant aboriginal culture in Florida. Seminole Indians at 383.

In 1823, the Seminoles and the United States signed the Treaty of Camp Moultrie, which established a reservation in central Florida for the Seminoles. Treaty of Camp Moultrie, Sept. 18, 1823 (1823 Treaty) 7 Stat. 224. In exchange, the Seminoles agreed to relinquish all claim and title they had over the territory of Florida. See generally *Miccosukee Tribe of Indians of Fla. v. United States*, 716 F.3d 535, 545-46 (11th Cir. 2013). The tribe received consideration (both monetary and other) totaling $ 152,500. (1823 Treaty) 7 Stat. 224.

After a shift in United States policy and the passage of the Indian Removal Act, in 1832 the Seminoles and the United States entered into a treaty at Payne's Landing. Treaty with the Seminole, May 9, 1832 (1832 Treaty) 7 Stat. 368; Miccosukee Tribe of Indians of Fla. at 546. In Article 1 of the treaty, the Seminoles agreed to "relinquish to the United States" all their claim to the lands then occupied in the territory of Florida, and they agreed to "emigrate to the country assigned to the Creeks, west of the Mississippi river," with the understanding that an "additional extent of territory proportioned to their

numbers should be added to the Creek country, and that they should be received as a constituent part of the Creek Nation. By Article 2 of the 1832 Treaty, the Seminole were to receive $15,400 as consideration for the land cession and as full compensation for any improvements they may have made on the ceded land.

The borders for what was to be a "permanent home to the whole Creek nation of Indians," was established by the Treaty with the Creeks, February 14, 1833 Treaty, preamble, 7 Stat. 418. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2461 (2020). Article 3 established that the "United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty," with the caveat that "the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them." See *McGirt* at 2461. By Article IV, 7 Stat. 417, 419), the Creek agreed that the "Seminole Indians of Florida, whose removal to this country is provided for by [7 Stat. 368] shall also have a permanent and comfortable home on the lands hereby set apart as the country of the Creek nation: and 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."

Pursuant to the terms of the 1832 Seminole Treaty, a special delegation appointed by the Seminole would be permitted to inspect any lands in the Creek's country designated by the United States as a "permanent and comfortable home" before being removed there. Suitable lands were found and approved by the delegation, and on March 28, 1833, the following "tract of country" was assigned to the Seminole as a "separate future residence, forever:

> Now, therefore, the Commissioners aforesaid, by virtue of the power and authority vested in them by the treaty made with Creek Indians on the 14th day of February 1833, as above stated, hereby designate and assign to the Seminole tribe of Indians, for their separate future residence, forever, a tract of country lying between the Canadian river and the north fork thereof, and extending west to where a line running north and south between the main Canadian and north

branch, will strike the forks of Little river, provided said west line does not extend more than twenty-five miles west from the mouth of said Little river. And the undersigned Seminole chiefs, delegated as aforesaid, on behalf of their nation hereby declare themselves well satisfied with the location provided for them by the Commissioners, and agree that their nation shall commence the removal to their new home as soon as the Government will make arrangements for their emigration, satisfactory to the Seminole nation. Treaty with the Seminoles, March 28, 1833, 7 Stat. 423.

In 1856, the United States entered a treaty with both the Creek Nation and Seminole Nation. *Treaty with the Creeks and Seminoles*, Aug. 7. 1856 (1856 Treaty) 11 Stat. 699. By Article 1 the Creek Nation "doth hereby grant, cede, and convey to the Seminole Indians, the tract of country included within the following boundaries, viz:

> beginning on the Canadian River, a few miles east of the ninety-seventh parallel of west longitude, where Ock-hi-appo, or Pond Creek, empties 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. Art. 1, 11. Stat. 699.

Article 2 established the remaining boundaries of the "Creek country." By Article 3, the United States "solemnly guaranteed" that the lands granted to the Seminole by Article 1 and to the Creek in Article 2 " shall respectively be secured to and held by said Indians by the same title and tenure by which they were guaranteed and secured to the Creek Nation by [Art. 14, 7 Stat. 366 (1832 Creek Treaty)], [Art. 3, 7 Stat. 483 (1833 Creek Treaty)], and by the letters-patent issued to the said Creek Nation [in 1852]. Provided however, that no part of the tract of country so ceded to the Seminole Indians, shall ever be sold, or otherwise disposed of without the consent of both tribes legally given."

By Article 4, the United States did "hereby, solemnly agree and bind themselves,

> that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free

> consent of the legislative authority of the tribe owning the same." Lastly, Article 15 assured that the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits . . ."

Following the Civil War, the Creeks and Seminoles renegotiated treaties, under the terms of which they had to agree to land cessions of millions of acres to the United States. The Creeks ceded to the United States the west half of their entire domain, estimated at 3,250,560 acres; Treaty with the Creek Indians, June 14, 1866 (1866 Creek Treaty) 14 Stats. 786; it retained the east half as its permanent national domain. The west half was "to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon." Id. In consideration for the cession, the United States agreed to pay 30 cents per acre, for a sum of $975, 168. The ceded western domain and the Creek's reserved eastern domain were to be "divided by a line running north and south" (Article 3). Article 8 of the treaty made it the duty of the Secretary of the Interior to cause the division line to be accurately surveyed. and Treaty with the Seminole Indians, March 21, 1866 (1866 Seminole Treaty) 14 Stat. 755.

On March 21, 1866, before the 1866 Creek Treaty was finalized (June 14, 1866), the United States concluded the Treaty with the Seminole Indians, 14 Stat. 755. The Seminole were required to cede their entire domain (2,169,080 acres) to the United States to allow the location of "other Indians and freedmen thereon", the United States agreeing to pay 15 cents per acre ($325, 362). Regarding new lands purposed for the Seminole's national domain, Art. III of said Treaty provides in part as follows:

> "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. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to-wit: 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 (June 14, 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. In consideration of said cession of

> two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of One Hundred Thousand ($100,000) Dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written."

The 1866 Seminole Treaty is the first to refer to the Seminole lands as a "reservation." In the preamble to Seminole Treaty of 1866, 14 Stat. 755, the United States, "in view of its urgent necessities for more lands in the Indian territory, requires a cession by said Seminole nation of a part of its *present reservation*, and is willing to pay therefor a reasonable price, while at the same time providing new and adequate lands for them." (emphasis added). Article 6 of this same treaty addresses the necessity of constructing federal agency buildings upon the "new Seminole reservation." Art.6, 14 Stat. 755. Acts of Congress referencing the 'Seminole Reservation.'

> Inasmuch as there are no agency buildings upon the new Seminole reservation, it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand (10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the superintendent of Indian affairs; in consideration whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands upon which said agency buildings shall be directed, [erected,] which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated.

The Creek "dividing line" under the Creek Treaty of June 14, 1866, 14 Stat. 785, was established by Frederick W. Bardwell in 1871, and was approved by the Secretary of the Interior on February 5, 1872. (R. 7).

Thus, by the terms of Article 3, Treaty of March 21, 1866, 14 Stat. 755, the United States granted to the Seminole Nation a national domain of 200,000 acres on land immediately west of the Creek "dividing line." Late in 1866, before the boundaries of the Seminole domain had been located, the Seminoles moved to what was assumed to be their treaty land. *Seminole Nation v. United States*, 316 U.S. 310, 311-12, 62 S. Ct. 1061, 1062 (1942).

The first survey of the line dividing the Creek and the Seminole territories, made by one Rankin, in 1868, under a contract with the Superintendent of Indian Affairs, was not approved by the Department of the Interior. Id. In 1871 one Bardwell re-surveyed the dividing line and placed it seven miles west of the Rankin line. Id. This Bardwell line became the east boundary of the new Seminole National domain granted to the Seminole Nation by the United States under said Seminole Treaty of March 21, 1866, and constituted the base from which the true west line of the Seminole 200,000 acre treaty tract was to have been established. Two months later, at the direction of the federal government, one Robbins ran the western boundary of the Seminole lands so as to include 200,000 acres from the Bardwell line. According to Robbins' calculations, 200,000.03 acres were included between the Canadian river on the south, the north fork of the Canadian river on the north, the Bardwell line on the east and the Robbins line on the west. Id. The Bardwell and Robbins surveys were both approved by the Secretary of the Interior on February 5, 1872. *Id.*

The Bardwell survey disclosed that a considerable area east of the Seminole-Creek dividing line had been occupied by the Seminoles, who had made substantial improvements on this land. Id. At 1063. In order that the Seminoles might retain the lands which they had improved, Congress authorized negotiations with the Creek Nation for the purchase of these lands east of the Bardwell line. Act of March 3, 1873, 17 Stat. 626.

After several years of unsuccessful negotiations between the government and the Creek Nation, an agreement was reached and entered into on February 14, 1881, whereby the Creek Nation ceded land east of the Bardwell line to the United States, the agreement providing that the eastern boundary of the land ceded was to be drawn so that the tract would aggregate 175,000 acres priced at $1 per acre, and thus the Creeks received $ 175,000 for this tract. See *Creek Nation v. United States*, 93 Ct. Cls. 561, 566; Act of August 5, 1882, 22 Stat. 257, 265.

Thus, with the acquisition of the 175,000 acre tract of land east of and contiguous to the 200,000 acre tract (acquired by the 1866 Seminole Treaty) gave the Seminole a domain of 375,000 acres. The boundaries it established define the nation's territory to this day.

By section 8 of Act of March 3, 1885, 23 Stat. 362, Congress authorized the President to "open negotiation with the Creeks, Seminoles, and Cherokees for the purpose of opening to settlement under the homestead laws the unassigned lands in said Indian Territory ceded by them respectively" in the treaties of 1866. The government stipulated by Article 3 of both the 1866 Creek Treaty and the 1866 Seminole Treaty that the lands ceded by each tribe had the reservation and/or condition that the United States would only settle other "civilized Indians" or freedman, and as such they were not in the public domain.

Consequently, on January 19, 1889, delegates of the Creek Nation and the Secretary of the Interior entered into an agreement whereby the Creek Nation "absolutely cedes and grants the United States, without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established" under the 1866 Creek Treaty. In consideration for such cession, the United States agreed to pay a sum $2,280,857.10. Act of March 1, 1889, 25 Stat. 757. The agreement was ratified by Congress March 1, 1889. Id. Section 2 states that "the lands acquired by the United States under said agreement shall be a part of the public domain." Id.at 25 Stat. 759. See also Smith v. Townsend, 1892 OK 5, ¶ 19, 29 P. 80, 82 (the lands acquired by the United States under Section 2 of the agreement shall be a part of the public domain).

Regarding the lands ceded by the Seminole Nation in the 1866 Seminole Treaty, by section 13 of the Act of March 2, 1889, 25 Stat. c. 412, § 12, page 1005, the sum of $1, 912, 942.02 was to be appropriated to "pay in full the Seminole Nation of Indians for all the right, title, interest, and claim which said nation Indians may have in and to certain

lands ceded by article three" of the 1866 Seminole Treaty. By Section 13, Congress declared that "the lands acquired by the United States under said agreement shall be a part of the public domain."

In 1893, Congress enacted legislation which contemplated the dissolution of the tribal organizations and the distribution of the tribal property. Heckman v. United States, 224 U.S. 413, 431-32, 32 S. Ct. 424, 429 (1912) By § 15 of the act of March 3, 1893, c. 209 (27 Stat. 612, 645), it was provided: "The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States, . . . and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

An agreement was made by the Dawes Commission with the Seminoles on December 16, 1897, which was ratified by the act of July 1, 1898. This agreement provided:

> "All lands belonging to the Seminole tribe of Indians shall be divided into three classes, designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents, and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered; giving to each the right to select his allotment so as to include any improvements thereon, owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him, during the existence of the present tribal government, and until the members of said tribe shall have become citizens of the United States. Such allotment shall be made under the direction and supervision of the Commission to the Five Civilized Tribes in connection with a representative appointed by the tribal government; and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him. (30 Stat. 567, c. 542):

In this same act, Congress refers to the lands of the Seminole as a "reservation."

> It being known that the *Seminole Reservation* is insufficient for allotments for the use of the Seminole people, upon which they, as citizens holding in severalty, may reasonably and adequately maintain their families, the United State will make effort to purchase from the Creek Nation, at one dollar and twenty-five cents per acre, two hundred thousand acres of land, immediately adjoining the eastern boundary of the *Seminole Reservation* and lying between the North Fork and South Fork of the Canadian River, in trust for and to be conveyed by proper patent by the United States to the Seminole Indians, upon said sum of one dollar and twenty-five cents per acre being reimbursed to the Untied States by said Seminole Indians; the same to be allotted as herein provided for lands now owned by the Seminoles. (30 Stat. 567, 569) (emphasis added).

The commissioners to the Five Civilized Tribes "found little difficulty in preparing the rolls of the Seminoles or in making the allotments." *Goat v. United States*, 224 U.S. 458, 465-66, 32 S. Ct. 544, 547 (1912). The enrollment following the ratification of the Seminole agreement of 1897 was begun in July, 1898, and was finished in August of that year. Id. The rolls containing the additional names, provision for which was made by the supplemental agreement of 1899, were forwarded to the Department in December, 1900, and were approved by the Secretary of the Interior on April 2, 1901. (Reports of Commission to Five Civilized Tribes, 1900, p. 12; 1901, p. 30.) In June, 1901, the commission undertook the making of allotments and this was practically completed at an early date. Goat at id. In their report for 1903 (pp. 36, 37), the commissioners said: "The last annual report of the Commission showed the completion of allotment in the Seminole Nation, save as to the recording of a small number of allotments, and the issuance of certificates therefor, which was finished early in the past year."

The allottees were to receive their deeds on the expiration of the tribal government which, by the act of 1903, was not to continue longer than March 4, 1906. The act of March 3, 1903, c. 994, § 8 (32 Stat. 982, 1008), contained the following provisions as to the duration of the tribal government, the execution, delivery and recording of deeds and the inalienability of homesteads:

> "SEC. 8. That the tribal government of the Seminole Nation shall not continue longer than March fourth, nineteen hundred and six: Provided; That the

Secretary of the Interior shall at the proper time furnish the principal chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation contained in the Act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes, page five hundred and sixty-seven), and said principal chief shall execute and deliver said deeds to the Indian allottees as required by said Act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee until further legislation by Congress, and such records shall have like effect as other public records: Provided further, That the homestead referred to in said Act shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment. A separate deed shall be issued for said homestead, and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof."

By joint resolution of March 2, 1906, Congress provided for the continuance of "the tribal existence and the present tribal governments" of the Five Civilized Tribes "in full force and effect for all purposes under existing laws," until all the property of the tribes should be distributed (34 Stat. 822). The following month, Congress preserved the "tribal existence" and "present tribal governments" of the Seminole Nation and the other four tribes, continuing them in full force and effect for all purposes authorized by law, "until otherwise provided by law. of the Seminoles and the other four tribes Act of April 26, 1906, §28.

The Oklahoma Enabling Act expressly preserved federal authority over Indians and their lands and property. Indian Country, 829 F.2d at 975, citing Oklahoma Enabling Act, ch. 3335, § 1, 34 Stat. 267, 267 68 (1906); Tiger v. Western Inv. Co., 221 U.S. 286, 309, 31 S.Ct. 578, 584, 55 L.Ed. 738 (1911). Congress was careful to provide that nothing in the creation of the State of Oklahoma should qualify this promise. Thus the Oklahoma Enabling Act (34 Stat. 267) provided that the Oklahoma Constitution should not 'limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.'

McGirt Holding

McGirt holds that Congress had undoubtedly established a reservation for the Creek Nation. *McGirt* at 2460. Although the early treaties did not use the term "reservation" *McGirt* the Supreme Court has found "similar language in treaties from the same era sufficient to create a reservation," *Id. at* 2461, citing *Menominee Tribe v. United States*, 391 U.S. 404, 405, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968) (grant of land " 'for a home, to be held as Indian lands are held,' " established a reservation.)

An 1833 Treaty fixed borders for a "permanent home to the whole Creek Nation of Indians," 7 Stat. 418, and promised that the United States would "grant a patent, in fee simple, to the Creek nation of Indians for the [assigned] land" to continue "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them," id., at 419. The patent formally issued in 1852. Congress not only "solemnly guarantied" the land but also "establish[ed] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians." *McGirt at* 2460. Far from being gratuitous, the 1832 Treaty "acknowledged that "[t]he United States are desirous that the Creeks should remove to the country west of the Mississippi" and, in service of that goal, required the Creeks to cede all lands in the East. *Id.* Further the agreements would be "binding and obligatory upon ratification." *Id.*

As shown above, the treaties *McGirt* referred to are either the same or similar treaties with the Seminole.

McGirt noted that the Treaty with the Creeks and Seminoles of 1856, 11 Stat. 699, contains certain "assurances" in Articles 4 and 15 regarding their territory and its government that, in the Court's estimation, describes a reservation "under any definition." *McGirt* at 2462.

> Article IV. The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either,

> or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same. 11 Stat. 699, 700
>
> Article XV. So far as may be compatible with the constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; excepting, however, all white persons, or their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe; and all persons not being members of either tribe, found within their limits, shall be considered intruders. Id. at 703.

Any doubt that Congress had created a reservation for the Creek is dispelled by later Acts of Congress, which refer to a Creek "reservation." *McGirt* at 2461.

> In 1866, the United States entered yet another treaty with the Creek Nation. This agreement reduced the size of the land set aside for the Creek, compensating the Tribe at a price of 30 cents an acre. Treaty Between the United States and the Creek Nation of Indians, Art. III, June 14, 1866, 14 Stat. 786. But Congress explicitly restated its commitment that the remaining land would "be forever set apart as a home for said Creek Nation," which it now referred to as "the reduced Creek reservation." Arts. III, IX, id., at 786, 788.1 Throughout the late 19th century, many other federal laws also expressly referred to the Creek Reservation. See, e.g., Treaty Between United States and Cherokee Nation of Indians, Art. IV, July 19, 1866, 14 Stat. 800 ("Creek reservation"); Act of Mar. 3, 1873, ch. 322, 17 Stat. 626; (multiple references to the "Creek reservation" and "Creek India[n] Reservation"); 11 Cong. Rec. 2351 (1881) (discussing "the dividing line between the Creek reservation and their ceded lands"); Act of Feb. 13, 1891, 26 Stat. 750 (describing a cession by referencing the "West boundary line of the Creek Reservation").*McGirt* at 2461.
>
> McGirt v. Oklahoma, 140 S. Ct. 2452, 2461 (2020)

As shown above, Congress referred to the Seminole "reservation" in the 1866 Seminole Treaty, and as late as 1898 in the 1897 Seminole Agreement. So there can be no doubt that Congress established a reservation for the Seminole.

What the State Could Not Show in McGirt Regarding Disestablishment of Creek Reservation, It Cannot Show Regarding Seminole Reservation

To determine whether a tribe continues to hold a reservation, "there is only one place we may look: The Acts of Congress." *McGirt* at 2462. "As *Solem* explained, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *McGirt* at Id.

Oklahoma could not show the Supreme Court "any ambiguous language in any of the relevant statutes that could plausibly be read as an act of disestablishment." Id. At 2468. The Court solidly rejected the State's argument that *Solem* required a "three step" approach to arrive at a conclusion of disestablishment, with judicial examination of the relevant statutory text being "merely the first step." Id.

> "To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help clear up ... not create ambiguity about a statute's original meaning. . . And, as we have said time and again, once a reservation is established, it retains that status until Congress explicitly indicates otherwise.... Only Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain" (citation and internal quotation marks omitted) *McGirt* at 2469.

"Congress knows how to withdraw a reservation when it can muster the will." McGirt at 2462. While legislation may explicitly reference cession, an unconditional commitment to compensate the tribe for its opened land or direct the restoration of tribal lands to the public domain, disestablishment has never required any form of words. McGirt at 2462. "But it does require that Congress 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.'" Id.(internal citations omitted).

Congress had used express language of cession and relinquishment in its pre-allotment legislation regarding lands of the Seminoles and Creeks, with total cession of

their lands east of the Mississippi, and later in Indian Territory, diminishment or partial cessions of their reservations. Language not seen in the allotment legislation:

1) (1823 Treaty) 7 Stat. 224: Seminoles agreed to "relinquish all claim and title" for consideration totaling "$152,500;

2) (1832 Treaty) 7 Stat. 368: Seminoles agreed to "relinquish" to the United States all their claim to the lands then occupied in the territory of Florida, receiving $15,400 as "full compensation for any improvements they may have made on the ceded land."

3) (1856 Treaty) 11 Stat. 699. Creek Nation "doth hereby grant, cede, and convey to the Seminole Indians a tract of country included within the following boundaries . . .,"

4) (1866 Creek Treaty) 14 Stats. 786. Creeks "cede and convey to the United States the west half of their entire domain" for a sum of $975, 168.

5) (1866 Seminole Treaty) 14 Stat. 755: Seminoles "cede and convey to the United States" the United States agreeing to pay 15 cents per acre ($325, 362).

6) Act of March 1, 1889, 25 Stat. 757: Creek Nation: "absolutely cedes and grants the United States, without reservation or condition, full and complete title to the entire western half of the domain for a sum "$2,280,857.10., and "the lands acquired by the United States under said agreement shall be a part of the public domain."

7) Act of March 2, 1889, 25 Stat. c. 412, § 12: the sum of $1, 912, 942.02 was to be appropriated to "pay in full the Seminole Nation of Indians for all the right, title, interest. . ." and "the lands acquired by the United States under said agreement shall be a part of the public domain."

As with the Creek allotment legislation, there is no language in the Seminole allotment legislation evincing anything like the "present and total surrender of all tribal interests" in the affected lands.

McGirt rejected that allotment legislation disestablished the Creek reservation.

> "...For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument. Remember, Congress has defined "Indian country" to include "all land within the limits of any Indian reservation ... notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation." 18 U.S.C. § 1151(a). So, the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others. See Mattz, 412 U.S., at 497, 93 S.Ct. 2245 ("[A]llotment under the ... Act is completely consistent with continued reservation status"); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 356–358, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) (holding that allotment act "did no more than open the way for non-Indian settlers to own land on the reservation"); Parker, 577 U. S., at ----, 136 S.Ct., at 1079–1080 ("[T]he 1882 Act falls into another category of surplus land Acts: those that merely opened reservation land to settlement.... Such schemes allow non-Indian settlers to own land on the reservation" (internal quotation marks omitted))*McGirt at 2464.*

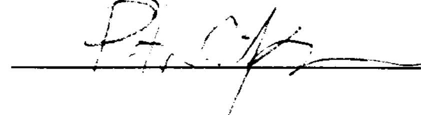
What the McGirt court found "missing" from the Creek allotment statutes is a statute evincing anything like the "present and total surrender of all tribal interests" in the affected lands. McGirt at 6. "Without doubt, in 1832 the Creek "cede[d]" their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. 1832 Treaty, Art. I, 7 Stat. 366. And in 1866, they "cede[d] and convey[ed]" a portion of that reservation to the United States. Treaty With the Creek, Art. III, 14 Stat. 786. But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment." *McGirt* at 2464.

The same can be said of the Seminoles: because there exists no equivalent law terminating what remained, the [Seminole Reservation] survived allotment."

WHEREFORE, ALL PREMISES CONSIDERED, Because Mr. Barker is an Indian, and because the alleged crimes in CF 2019-92 fall under 18 U.S.C §1153, because the alleged crimes occurred within the limits of an "Indian reservation under the jurisdiction

of the United States Government the District Court of Seminole County lacks subject-matter jurisdiction over the State's attempted prosecution and must be dismissed.

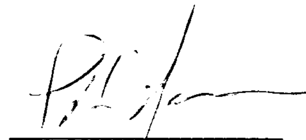
Respectfully submitted,



Peter C. Astor, OBA # 17570
ATTORNEY FOR DEFENDANT
Oklahoma Indigent Defense System
610 S. Hiawatha
Sapulpa, Oklahoma 74066
Tel: (918) 248-5026
Fax: (918) 248-7751

CERTIFICATE OF SERVICE

This is to certify that on the 31st day of July, 2020 a true and correct copy of the above and foregoing motion emailed to District Attorney Paul Smith and Judge Olsen, to be hand-delivered to each upon filing Monday, August 3, 2020.



Peter C. Astor

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

This is to certify that COKER DEAN BARKER

born 05/21/86 is 13/16 degree Indian blood of the SEMINOLE/CREEK/CHOCTAW Tribe.

MAY 02 1995
Date

Issuing Officer

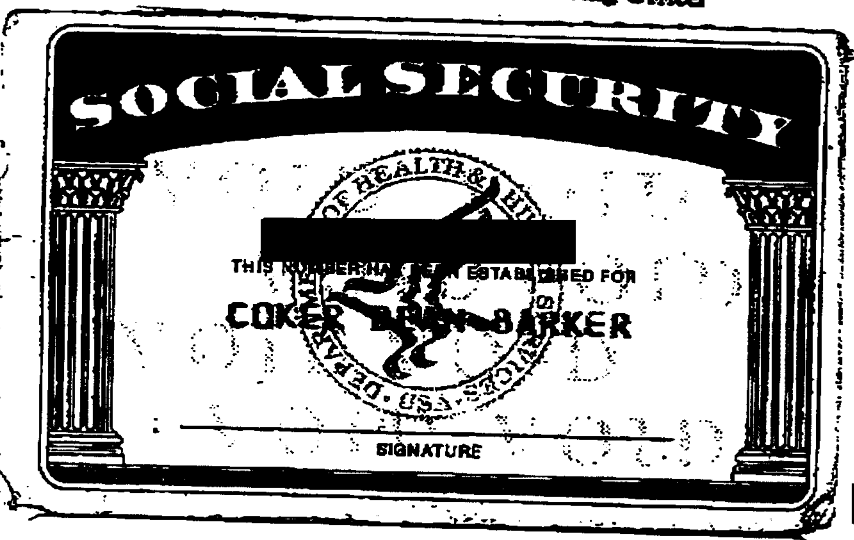
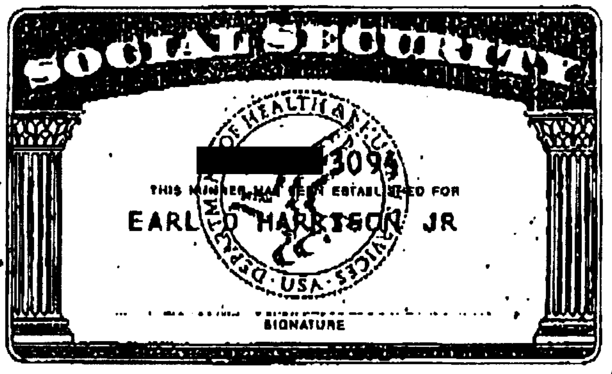


EXHIBIT A

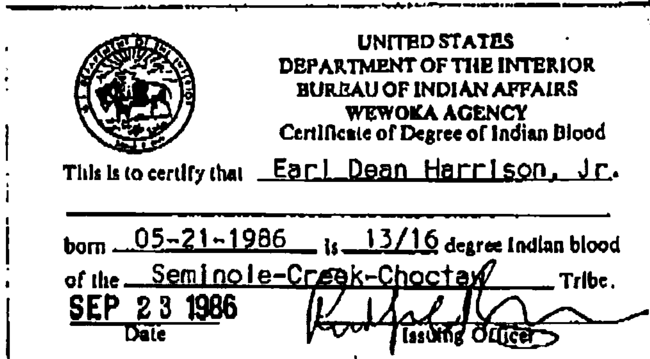

SOCIAL SECURITY

[redacted]3094

THIS NUMBER HAS BEEN ESTABLISHED FOR

EARL D HARRISON JR

SIGNATURE


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

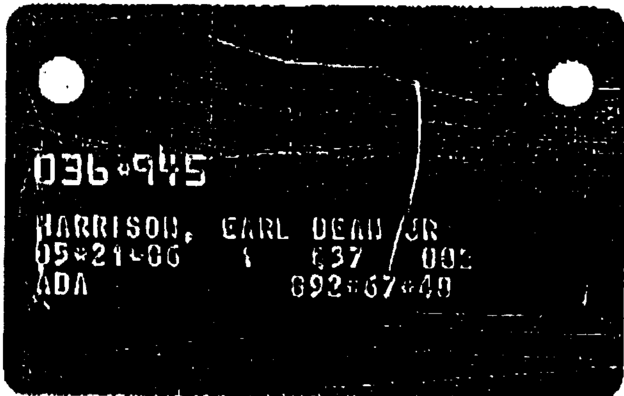
This is to certify that Earl Dean Harrison, Jr.

born 05-21-1986 is 13/16 degree Indian blood

of the Seminole-Creek-Choctaw Tribe.

SEP 23 1986
Date

Issuing Officer


036-945

HARRISON, EARL DEAN JR
05-21-86 637 002
ADA 892-67-40

OKLAHOMA
SEMINOLE TRIBAL
MEMBER

Earl Dean Harrison, Jr.

ROLL NO. 448-86-3094

Signature Earl Dean Harrison Jr

RECOMMENDED IMMUNIZATION SCHEDULE

PRIMARY IMMUNIZATIONS

Age	Vaccines	Comments
2 months	DTP, Polio	DTP 0.5 ml Diphtheria, Pertussis and Tetanus (absorbed type) administered intramuscularly. Polio: Trivalent Oral Polio Vaccine (TOPV)
4 months	DTP, Polio	
6 months	DTP	
15 months	Measles, Rubella, Mumps	M-M-R One dose of Measles/Mumps/Rubella combined, administered subcutaneously OR M-R One dose (0.5 ml) of Measles/Rubella combined, administered subcutaneously
18 months	DTP, Polio	These doses are considered to be an integral part of the primary immunization series

BOOSTER IMMUNIZATIONS

Age	Vaccines	Comments
4 to 6 years	DTP, Polio	Should be given prior to school entry. Substitute 0.5 ml Td (adult strength) for children over 7 and above
Every 10 years thereafter	Td	0.5 ml Td (adult strength) should be given intramuscularly at ten-year intervals to persons age 7 and above

NOTE: Oklahoma law requires no less than three DTP and measles, one rubella, and three polio immunizations before school entry. Measles and rubella must have been received on or after the first birthday.

OFFICIAL IMMUNIZATION RECORD CARD

HARRISON, EARL JR.

05-21-86 135

Last Name First

Date of Birth

Address

Drug Sensitivity

OKLAHOMA STATE BOARD OF HEALTH
OKLAHOMA STATE MEDICAL ASSOCIATION
OKLAHOMA OSTEOPATHIC MEDICAL ASSOCIATION

7-16-004
Wewoka

EXHIBIT A

Certificate of Adoption

(Type or Print)

PART I. The attorney or agency handling the adoption shall complete Part I obtaining, from the adoptive parents, information about themselves AS OF THE TIME OF THIS BIRTH. This information will be used to prepare the new certificate of birth.

ADOPTIVE FATHER		
1. NAME OF FATHER (First, Middle, Last)	[redacted] Barker	2. COLOR OR RACE: Caucasian
3. DATE OF BIRTH	[redacted]	4. PLACE OF BIRTH: Sasakwa, OK
5. USUAL OCCUPATION	[redacted]	6. KIND OF BUSINESS OR INDUSTRY: [redacted]

ADOPTIVE MOTHER		
7. MAIDEN NAME OF MOTHER (First, Middle, Last)	[redacted] Barker	8. COLOR OR RACE: Indian
9. DATE OF BIRTH	[redacted]	10. PLACE OF BIRTH: Wewoka
11. USUAL RESIDENCE (At time of this birth) (Street or rural address, City or town, County, State)	[redacted]	
12. OTHER CHILDREN OF THIS ADOPTIVE MOTHER (Adopted or natural): a. Living at time of this child's birth	[redacted] ... at birth: 0	c. Born dead before this child's birth: 0

ATTORNEY OR AGENCY	
13. PRESENT MAILING ADDRESS OF ADOPTIVE PARENTS	[redacted]
14. NAME OF ATTORNEY OR AGENCY HANDLING CASE / MAILING ADDRESS	Vincent Riley 129 W. Commerce Oklahoma City OK 73109
15. If, in preparing a new certificate of birth, the adoptive parents prefer that the actual place of birth of the child remain unchanged, please check this box.	☑

PART II. The attorney or agency handling the adoption shall complete Part II showing true information at birth of child. It is needed to locate and positively identify the original certificate of birth to be removed from the files and sealed.

CHILD'S PERSONAL DATA			
16. NAME OF CHILD AT BIRTH	Earl Dean Harrison Jr.	17. SEX: M	18. COLOR OR RACE: Indian
19. DATE OF BIRTH	May 21, 1986	20. PLACE OF BIRTH: Ada, Okla.	21. HOSPITAL: Carl Albert

NATURAL PARENTS	
22. NAME OF FATHER	Earl Harrison
23. MAIDEN NAME OF MOTHER	Billye Davis

PART III. The Court Clerk shall complete Part III after the final decree has been entered and forward the certificate to the State Registrar of Vital Statistics.

CERTIFICATION OF COURT CLERK

24. I hereby certify that the child described above was adopted by the above parent(s) on the 20th day of Jan., 1995, and is now to bear the NAME OF Coker Dean Barker as set forth in the decree of adoption made on that date in Case No. JA-94-W09

S-E-A-L

25. SIGNATURE OF COURT CLERK: [signature] Lacetta Nix

26. DATE SIGNED: 2-10-95

27. COURT CLERK FOR COUNTY OF: COURT OF INDIAN OFFENSES WEWOKA AGENCY — STATE OF OKLAHOMA

PART IV. When birth occurred in a State other than the State of adoption, the State Registrar of the State of adoption shall forward this certificate to the proper State Registrar.

EXHIBIT A