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

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

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

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

Of course, in granting the Seminoles a "national domain," the 1866 Treaty does not use the word "reservation." But the presence of that exact word has never been a prerequisite to finding that Congress indeed created a reservation. ***See McGirt*, 140 S. Ct. at 2461** (noting that in 1866 "that word had not yet acquired such distinctive significance in federal Indian law"); ***e.g., Menominee Tribe of Indians v. United States*,**

391 U.S. 404 (1968) (reservation created when Congress provided for "a home, to be held as Indian lands are held"). In any event, even if the particular word "reservation" was not in the 1866 Treaty, Congress's intent to create a reservation for the Seminoles can be seen in subsequent legislation. ***E.g.*, Act of March 3, 1891, 26 Stat. 989, 1016 (1891)** (referencing the "western boundary line of the Seminole Reservation"); ***see also* 11 Cong. Rec. 2351 (1881)** (referring to the Creek and Seminole "reservations"). Accordingly, just as the 1866 Treaty with the Creeks established a reservation, so too did the 1866 Treaty with the Seminoles.

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

The dividing line was originally drawn by a surveyor named Rankin in 1867, but this survey was never approved by the Department of the Interior. Instead, in 1871, another surveyor, Bardwell, placed the dividing line seven miles *west* of the Rankin line. The Department adopted the Bardwell line, and the dimensions were measured based on that starting point. In the meantime, however, it seemed that a number of Seminoles had settled and "made substantial improvements" on lands to the east of the Bardwell line, i.e., in what appeared to be Creek territory. See ***Seminole Nation v. United States*, 316 U.S. 310, 313 (1942).** Seeking an equitable solution, the United States decided to purchase those lands for the Seminoles. Consequently, in a purchase negotiated in 1881, the Creeks were paid $175,000 – a dollar per acre – and the extra land became part of the Seminole Reservation. ***Id.; see also* 22 Stat. 257, 265 (1882).**

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

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

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

(i) Allotment did not disestablish the Reservation.

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

In 1893, Congress formally authorized allotment of the Five Tribes' reservations. Act of March 3, 1893, 27 Stat. 612, at 645 **(Defendant's Exhibit #9)**. Negotiations were delegated to the Dawes Commission, which reached an agreement with the Seminoles

on December 16, 1897, ratified by Congress on July 1, 1898, **30 Stat. 567 (Defendant's Exhibit #10).** The agreement created three classes of land, to be appraised at $5, $2.50, and $1.25 per acre, respectively. *Id.* Each tribal member would be allotted a share of land of equal value, for which they would have the sole right of occupancy. *Id.* Allotments were inalienable until the date of patent, though leases were allowed under some conditions. *Id.*

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

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

The Seminole Nation acknowledges that Congress has taken measures in the past that have restricted the Nation's sovereignty – indeed, even contemplated the extinguishment of the Nation's government altogether- but none of those actions evinced any explicit intent to disestablish the Reservation.

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

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

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

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

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

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

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

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

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

HONORABLE TIMOTHY L. OLSEN
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 23 day of October, 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 Court of Criminal Appeals Oklahoma Judicial Center 2100 N. Lincoln Blvd., Suite 4 Oklahoma City, Oklahoma 73105	Jamie D. Pybas Division Chief Homicide Direct Appeals Division Oklahoma Indigent Defense System P.O. Box 926 Norman, Oklahoma 73070-0926 Email: Jamie.Pybas@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

Court Clerk/Deputy Court Clerk/Secretary-Bailiff

Dated this 23rd day of October, 2020

HONORABLE TIMOTHY L. OLSEN
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 23 day of October, 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 Court of Criminal Appeals Oklahoma Judicial Center 2100 N. Lincoln Blvd., Suite 4 Oklahoma City, Oklahoma 73105	Jamie D. Pybas Division Chief Homicide Direct Appeals Division Oklahoma Indigent Defense System P.O. Box 926 Norman, Oklahoma 73070-0926 Email: Jamie.Pybas@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

Court Clerk/Deputy Court Clerk/Secretary-Bailiff