ORIGINAL

Case No. F-2018-1229

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KADETRIX DEVON GRAYSON,

Appellant,

vs.

THE STATE OF OKLAHOMA,

Appellee.

Appeal from the
District Court of Seminole County
District Court Case No. CF-2015-370

SUPPLEMENTAL BRIEF OF APPELLANT - POST *McGIRT* HEARING

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November 16, 2020

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SUPPLEMENTAL BRIEF OF APPELLANT – POST *McGIRT* HEARING

This brief is submitted on behalf of Kadetrix Devon Grayson, following an evidentiary hearing ordered by this Court regarding 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. Pursuant to this Court's remand order (Order), issued on August 25, 2020, the parties were directed to address only the following two issues: (1) whether the Appellant is an "Indian," and (2) whether the crime occurred in "Indian Country." (O.R. 3) As to the first issue, this Court directed the district court to determine whether Mr. Grayson had some "Indian blood," and whether he was recognized as an "Indian" by a tribe or the federal government. (*Id.*) As to the second issue, the district court was ordered to determine whether Congress established a reservation for the Seminole Nation and, if so, whether Congress specifically erased those boundaries and disestablished the

reservation. (*Id.*)

On September 25, 2020, the District Court conducted the remanded evidentiary hearing with the parties, counsel, and the Seminole Nation present.[1] The State of Oklahoma appeared by and through District Attorney Paul Smith and Assistant Attorneys General Theodore Peeper and Joshua Fanelli. The 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.

On October 23, 2020, the district court issued an Order addressing the two issues required by this Court. (O.R. 78-91)[2] First, the district court found that Mr. Grayson had been enrolled as a member of the Seminole Nation since September 29, 1994, Roll Number 18454, with a Seminole blood quantum of 1/4.[3] (O.R. 80) The court found that based upon the evidence presented, the test for Indian status was met and Mr. Grayson was an "Indian" for purposes of determining criminal jurisdiction. (*Id.*) Second, the district court found that the crime occurred within the historical boundaries of the Seminole Nation Reservation, a reservation that had been established by Congress, and that because Congress had never explicitly indicated an intent to disestablish the Seminole

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[1] The district court invited the Seminole Nation to participate in the proceedings and the Seminole Nation filed an amicus curiae Brief in Support of Mr. Grayson's jurisdictional claim on September 23, 2020.

[2] Citations to the Original Record (O.R.) and the Transcript (Tr.) within this brief refer to the Original Record and Transcript produced during the remanded hearing pursuant to this Court's August 25, 2020, Order. Any citation to exhibits (Ex.) are to exhibits introduced at that hearing.

[3] The parties stipulated to this fact. (*See* Joint Ex. 1, attached to Transcript of Evidentiary Hearing)

Nation Reservation – by language of cession or otherwise – the Reservation remains intact.[4] (O.R 81-90) Thus, under the two-prong *McGirt* analysis, the district court concluded that the crime occurred in Indian Country.

This Court should affirm the district court's findings. This Court applies an "abuse of discretion" standard of review to the district court's factual findings. *Young v. State*, 2000 OK CR 17, ¶ 109, 12 P.3d 20, 43. The factual findings are well supported.

1. Appellant's Status as an "Indian."

As to the question of Mr. Grayson's Indian status, the record conclusively supports the district court's finding that Mr. Grayson meets the definition of an Indian. The letter from the Seminole Nation (Joint Ex. 1) verifying his enrollment in the Seminole Tribe as well as showing his blood quantum as 1/4th degree of Indian blood easily satisfies the test, cited by this Court in its remand order, in *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). There, the court simply held that "some" degree of Indian blood and recognition as an Indian by a tribe or the federal government was sufficient to find someone an "Indian" under federal law.

2. Whether the Crimes Occurred in "Indian Country."

The district court also found, as a factual matter, that the crime occurred in Indian Country in that Congress had established a reservation for the Seminole Nation, and Congress had never disestablished that reservation. These facts, too, are amply supported by the record.

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[4] The parties stipulated to the fact that the crime occurred within the historical boundaries of the Seminole Nation of Oklahoma. (*See* Joint Ex. 1) The State took no position on whether those historic boundaries were a "reservation," nor whether Congress had disestablished the reservation, if it existed. (O.R. 80; Tr. 12)

a. Whether Congress Established a Reservation for the Seminole Nation.

In regard to the Indian Country question, the district court first addressed the issue of whether Congress established a reservation for the Seminole Nation. (O.R. 80) The district court found that Congress had clearly established a reservation for the Seminole Nation of Oklahoma, based on the following uncontroverted history provided by the Seminole Nation. (O.R. 81-85)

Originally hailing from what is now the State of Florida, three different treaties resulted in the eventual removal of the Seminoles from their land in Florida. In 1823, the Seminoles and the United States entered into a treaty, commonly known as the Treaty of Moultrie Creek, in which the Seminoles relinquished all claims to land in the Florida Territory in exchange for a reservation in the center of the Florida peninsula, and certain payments, supplies, and services. *See* Defendant/Appellant's Ex. 1, Treaty of Moultrie Creek, Sept. 18, 1823 (1823 Treaty), 7 Stat. 224. *See generally Miccosukee Tribe of Indians of Fla. v. United States*, 716 F.3d 535, 545-46 (11th Cir. 2013).

After the election of Andrew Jackson in 1828, the movement to transfer all Indians west of the Mississippi River grew, and in 1830, the United States Congress passed the Indian Removal Act, Pub. L. 21-148, 4 Stat. 411 (1830), which authorized President Jackson to negotiate with the southeastern tribes for their removal west. In May, 1832, the Seminoles were called to a meeting at Payne's Landing on the Oklawaha River and forced to "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 Creeks, west of the Mississippi River." *See* Defendant/Appellant's Ex. 2, Treaty of Payne's Landing, 7 Stat. 368, Art. I (1832). This treaty called for the Seminoles to move west if the

land was found to be suitable.

In 1833, the United States entered the Treaty with the Creeks, 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 . . . ." *See* Defendant/Appellant's Ex. 3, February 14, 1833 Treaty, preamble, 7 Stat. 418, (1833 Treaty). *McGirt v. Oklahoma*, 140 S. Ct. 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. Seven chiefs toured the area for several months and conferred with the Creeks who had already settled there. Suitable lands were found and approved by the delegation, and a "tract of country" was assigned to the Seminole as a "separate future residence." *See* Defendant/Appellant's Ex. 4, Treaty with the Seminoles, March 28, 1833, 7 Stat. 423.

This arrangement brought about tension between the two tribes. The Seminoles desired their own sovereign government and political autonomy, entirely separate from the Creeks. Eventually the two tribes entered into a new treaty. *See* Defendant/Appellant's Ex. 5, Treaty with the Creeks and Seminoles, Aug. 7, 1856 (1856 Treaty), 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 States and the Seminoles entered into yet another treaty, signed on March 21, 1866. *See* Defendant/Appellant's Ex. 6, 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 Reconstruction, westward expansion continued its relentless pace. Settlers demanded more land, and Congress accommodated. The 1866 Treaty was designed to make peace between the Seminole Nation and the federal government, but 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. Article 3 established a new reservation for the Seminoles, made of lands that the United States had just recently acquired from the Creeks, described 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

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. at 313. 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* Defendant/Appellant's Ex. 8, 22 Stat. 257, 265 (1882). This area of approximately 375,000 acres constituted the Seminole Nation's Reservation when Indian Territory was joined with Oklahoma Territory and admitted as a single state in 1907.

As a result of the treaty provisions referenced above and related federal statutes, the district court found that Congress did establish a reservation for the Seminole Nation under the analysis set out in *McGirt*, 140 S.Ct. at 2460-62. (O.R. 85, 88) The court found this Reservation, first defined in the 1866 Treaty and then supplemented with the 1881 land purchase from the Creeks, constitutes the Seminole Nation of Oklahoma Reservation and endures to this day. (O.R. 85)

The parties stipulated to the current boundaries of the Seminole Nation of Oklahoma. *See* Joint Ex. 1. The district court adopted the map attached to the Seminole Nation's amicus brief as Exhibit A as an accurate depiction of the current boundaries. (O.R. 89) Specifically, the Seminole Nation Reservation boundaries mainly track the borders of Seminole County. 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 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.

Okla. Const., Art. 17, § 8.

As the constitutional description shows, the boundaries of Seminole County are defined largely by reference to the Seminole Nation 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. This strip of land along the northeast boundary is part of the Creek Reservation. The district court accepted the parties stipulation that the location of the crimes at issue was within the historical boundaries of the Seminole Nation of Oklahoma. *See* Joint Ex. 1; (O.R. 90)

b. Whether Congress Specifically Erased the Seminole Nation Boundaries or Disestablished the Reservation.

As to the second part of question two, whether Congress specifically erased or disestablished these boundaries, the district court found that there was no evidence presented that Congress had explicitly expressed an intent to disestablish the Seminole Nation Reservation, therefore it remains intact. (O.R. 85) The district court findings are supported by the record, and should be adopted by

this Court.

As the district court noted, there is a presumption that the Seminole Nation Reservation continues to exist until Congress acts to disestablish it. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). (O.R. 85) Courts do not lightly infer that Congress has exercised its power to disestablish a reservation. *McGirt*, 140 S.Ct. at 2463, citing *Solem*, 465 U.S. at 470. Once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S.Ct. at 2469, citing *Solem*, 465 U.S. at 470. Congressional intent to disestablish a reservation "must be clear and plain." *Id.*, citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Congress must clearly express its intent to disestablish, commonly by "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt,* 140 S.Ct. at 2463, citing *Nebraska v. Parker*, 577 U.S. 481, __, 136 S.Ct. 1072, 1079 (2016).

The State of Oklahoma did not point to any congressional statute where Congress specifically erased the Seminole Nation boundaries and disestablished the Seminole Nation Reservation. No evidence or argument was presented by the State specifically regarding disestablishment or boundary erasure of the Seminole Nation Reservation. As shown below, the district court's conclusion that the reasoning and analysis of *McGirt* clearly supports the ultimate conclusion that Congress never disestablished the Seminole Nation Reservation is correct and should be affirmed by this Court.

As the district court discussed, none of the allotment acts disestablished the Seminole Nation Reservation. (O.R. 85-86) 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. *See* Defendant/Appellant's Ex. 11. Although much of the Seminole land passed into non-Indian hands during this period of allotment, the Seminole Nation Reservation was never disestablished. The Seminole Allotment Act contained no language of disestablishment.

In 1893, Congress formally authorized allotment of the Five Tribes' reservations. *See* Defendant/Appellant's Ex. 9, Act of March 3, 1893, 27 Stat. 612, 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. *See* Defendant/Appellant's Ex. 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 Nation Reservation. Allotment alone does not disestablish a reservation. *Id.* (citing *Mattz v. Arnett*, 412 U.S. 481, 496-97 (1973)(explaining that Congress's expressed policy during the allotment era "was to continue the reservation system," and that allotment can be "completely consistent with continued reservation status"); and *Seymour v.*

Superintendent of Wash. State Penitentiary, 368 U. S. 351, 356–358 (1962)(allotment act "did no more than open the way for non-Indian settlers to own land on the reservation")). 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. Accordingly, the district court correctly found that the Seminole Nation Reservation maintained its existence during and after the allotment process. (O.R. 86)

Second, the district court also correctly determined that restrictions on tribal self-governance did not disestablish the Seminole Nation Reservation. (O.R. 86-87) There were numerous actions on Congress's part in the past that threatened the Seminole Nation's rights to self-governance. The Act of 1903 contemplated that "the tribal government of the Seminole Nation shall not continue longer than [March 4, 1906]." *See* Defendant/Appellant's Ex. 12, 34 Stat. 982, 1008 (1903). Just four days before dissolution, Congress temporarily extended the tribal governments, "until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law." S.J. Res. 37, 59th Cong., 34 Stat. 822. This was done primarily to avoid disruption of the ongoing allotment process and to prevent railroad companies from receiving a windfall of contingent land grants.

Then on April 26, 1906, Congress passed the Five Tribes Act, ch. 1879, 34 Stat. 137, which 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." *See* Defendant/Appellant's Ex. 13, 34 Stat. 137, 148 (1906). The Five Tribes Act did not contain any

language expressly indicating an intent to disestablish the Seminole Reservation.

The district court noted that although Congress did not always live up to its trust responsibilities to the Seminole Nation, and that discrete aspects of the Nation's sovereignty had been targeted from time to time, there was nothing in any of the relevant Acts of Congress referencing any intent to erase the boundaries of the Seminole Nation.

Third, the district court concluded that the Oklahoma Enabling Act did not disestablish the Seminole Nation Reservation. (O.R. 88) 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. *See* Defendant/Appellant's Ex. 14. Nothing in the Oklahoma Enabling Act contained any language suggesting that Congress intended to terminate the Seminole Nation Reservation. In fact, if anything, the Oklahoma Enabling Act showed 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. (O.R. 88)

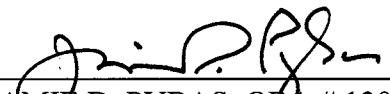
Applying the reasoning in *McGirt* to the Seminole Nation's legal and historical background, the district court correctly concluded that because there is no evidence Congress explicitly indicated an intent to disestablish the Seminole Nation Reservation – by language of cession or otherwise – the Seminole Nation Reservation was never disestablished and remains intact. (O.R. 88)

CONCLUSION

As Mr. Grayson meets the definition of an "Indian," and the crime occurred in "Indian Country," the State was without jurisdiction to prosecute Mr. Grayson. *See Cravatt v. State*, 1992 OK CR 6, ¶ 16, 825 P.2d 277, 279 ("The State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country."). As such, this Court must find the judgment and sentence in this case is null and void and reverse with instructions to dismiss.

Respectfully submitted,

KADETRIX DEVON GRAYSON,

By: 

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CERTIFICATE OF SERVICE

I certify that on the date of filing of the above and foregoing instrument, a true and correct copy of the same was delivered to the Clerk of this Court with instructions to deliver said copy to the Office of the Attorney General of the State of Oklahoma.

JAMIE D. PYBAS