ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MICA ALEXANDER MARTINEZ,	**Comanche County District Court Case No. CF-2009-473**
Petitioner,	**Post Conviction Case No. PCD-2020-612**
-vs-	
THE STATE OF OKLAHOMA,	
Respondent.	

Petitioner's Post-Hearing Supplemental Brief in Support of Successive Application for Post-Conviction Relief

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Petitioner,	)	
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	)	**(OCCA No. PCD-2020-612)**
v.	)	
	)	
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Petitioner's Post-Hearing Supplemental Brief
in Support of Successive Application for Post-Conviction Relief

Petitioner, Mica Alexander Martinez, through undersigned counsel, submits this Post-Hearing Supplemental Brief in Support of Successive Application for Post-Conviction Relief pursuant to this Court's Order Remanding for Evidentiary Hearing.

On September 8, 2020, Mr. Martinez filed a Successive Application for Post-Conviction Relief ("Successive APCR") in this Court, along with a Motion for Evidentiary Hearing. In the sole proposition, Mr. Martinez argued *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), confirms the State did not have jurisdiction to prosecute, convict, and sentence him for a murder that occurred within the boundaries of the Kiowa-Comanche-Apache Reservation. On September 25, 2020, this Court remanded Mr. Martinez's case to the District Court of Comanche County for an evidentiary hearing. In its remand order, this Court directed the District Court to answer "two separate questions: (a) his Indian status; and (b) whether the crime occurred in Indian Country." Remand Order at 2.

By an Agreed Order of Consolidation on October 21, 2020, the District Court consolidated the evidentiary hearing in this matter with that of Mr. Joshua Codynah to better serve judicial

economy. On March 12, 2021, an evidentiary hearing was held before the Honorable Emmit Tayloe, District Court Judge.[1] On April 16, 2021, Judge Tayloe issued his Findings of Fact and Conclusions of Law (FFCL). Judge Tayloe accepted the parties' stipulation that Mr. Martinez has 1/4 Comanche blood, and that Mr. Martinez was a member of the Comanche Nation, a federally recognized Indian Tribe, at the time of the crime. (FFCL at 3)

Judge Tayloe further found that in October 1867, the First and Second Treaties of the Medicine Lodge Creek established the boundaries of the Kiowa-Comanche-Apache Reservation. (FFCL at 3-4) In 1887, the General Allotment Act (Dawes Act) empowered the President to allot portions of the reservation to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit. (FFCL at 4) The District Court relied on the language of the Jerome Agreement of June 6, 1900, to find the Tribes agreed to "cede, convey, transfer, relinquish, and surrender, forever, and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands" set out in paragraph 6 of the agreement. (FFCL at 5) And, with that language, Judge Tayloe concluded Congress specifically erased the boundaries of the Kiowa-Comanche-Apache Reservation and disestablished the former reservation. (FFCL at 9)

A. A Brief History of the Kiowa-Comanche-Apache Reservation.

A brief history of the Kiowa, Comanche, and Apache Nations is appropriate to understand how their tribal land never lost its identity as a reservation. Congressional action spanning approximately 153 years highlights a deliberate intent on the part of Congress to establish a

[1] Citation to the transcript of the Evidentiary Hearing held on March 12, 2021, will be as (EH Tr.), exhibits will be (Pet. Evid. Hrg. Exh.) and the Original Record as (Supp.O.R.).

continuing reservation for the Kiowa, Comanche, and Apache Tribe by setting aside lands from 1865 to 2020.

The language in Article II of the Treaty of October 18, 1865, explicitly acknowledged in the Kiowa and Comanche Tribes the right to "absolute and undisturbed use and occupation" of the lands on which the Kiowa and Comanche agreed "to remove to and accept as their permanent home the country embraced within said limits, whenever directed so to do by the President of the United States, in accordance with the provisions of this treaty." Treaty of Oct. 18, 1865, 14 Stat. 717, 718. (Pet. Evid. Hrg. Exh. 2)

Under the October 21, 1867, First Treaty of Medicine Lodge Creek, 15 Stat. 581, 582, (Pet. Evid. Hrg. Exh. 3) the United States ceded certain lands in the Oklahoma Territory to the Kiowa Nation and Comanche Nation described therein as follows. That same day, by a separate treaty –The Second Treaty of Medicine Lodge Creek– the Apache Nation was incorporated with the Kiowa and Comanche and became entitled to share in the benefits of the above-described Reservation. 15 Stat. 589. (Pet. Evid. Hrg. Exh. 4)

Clearly, the First and Second Treaties of Medicine Lodge Creek negotiated new terms between the Tribes and Government, to include the incorporation of the Apache Nation. The Treaties did not waiver from the Government's intent to treat the Kiowa, Comanche, and Apache lands as a reservation. Congress' very deliberate contemporaneous and subsequent actions prove the Government never intended to disestablish that reservation.

This Court should "[s]tart with what should be obvious" as the *McGirt* Court did, 140 S. Ct. 2452, 2460 (2020): Congress established a reservation for the Kiowa, Comanche, and Apache Nations. Like the Creek, the Kiowa, Comanche, and Apache Nations were promised a permanent

home. And also like the Creek, the permanent home created by Congress for the Kiowa, Comanche, and Apache Nations continues to exist, despite the State's claims to the contrary.

B. The District Court's Findings of Fact and Conclusions of Law Must Fail Because Congress Has Not Specifically Erased the Comanche-Kiowa-Apache Nation Boundaries or Disestablished the Reservation.

The District Court's conclusions of law must fail because under the analysis of *McGirt* the boundaries of the Kiowa-Comanche-Apache (KCA) Reservation have not been erased and the reservation still remains intact. In its Conclusions of Law, the District Court relies on numerous United States Supreme Court cases to support the contention that the disestablishment of a reservation must necessarily follow once explicit language of cession has been used in an agreement between an Indian Tribe and the federal government.

The District Court's reliance on *DeCouteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) is misplaced. (FFCL at 7) The Supreme Court found that the Sissiton and Warpeton bands of the Dakota Sioux Indians had used language that plainly showed they willingly conveyed their interest in all of their unallotted lands to the federal government. *DeCouteau*, 420 U.S. at 445, 95 S.Ct. at 1093. The Supreme Court found that the ceded lands were returned to the public domain and, thus, stripped of their reservation status. *Id.*, 420 U.S. at 446, 95 S.Ct. at 1094.

A statutory provision restoring portions of a reservation to the public domain signifies diminishment. In the 19th century, to restore land to the public domain was to extinguish the land's prior use – for example, as an Indian reservation – and return it to the United States either to be sold or set aside for other public purposes. *Nebraska v. Parker*, 577 U.S. 481, 489, 136 S.Ct. 1072, 1089,

194 L.Ed.2d 152 (2016). In contrast to *DeCouteau*, the Jerome Agreement returned 480,000 acres to the KCA Reservation for the sole purpose of grazing.

In Article III of the Agreement, the Secretary of the Interior was directed to, "set aside for the use in common for said Indian tribes four hundred and eighty thousand acres of grazing lands." (Pet. Evid. Hrg. Exh. 41) These 480,000 acres of grazing land were located within the boundaries of the reservation and, therefore, maintained the reservation, not diminished it. Again, the District Court used only one tenet of the holding in *DeCouteau*. The Jerome Agreement explicitly designated 480,000 acres within the reservation for grazing, not for public domain, which kept the characteristic of the reservation intact.

While it is clear that the cases cited by the District Court require more than a reliance upon the text of the agreements, ultimately, the District Court only looked to the General Allotment Act (Dawes Act) and then the Jerome Agreement in making its decision. This provided for an incomplete analysis of the question of disestablishment. The Dawes Act empowered the federal government to allot portions of the KCA reservation to tribal members and sell surplus lands to white settlers. Although the Congresses that passed the surplus land acts anticipated the imminent demise of the reservations and, in fact, passed the acts partially to facilitate the process, the United States Supreme Court has never been willing to extrapolate from that expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land act. *Solem v. Bartlett*, 465 U.S. 463, 468-69, 104 S.Ct. 1161, 1165, 79 L.Ed.2d 443 (1984).

When it comes to disestablishment, Courts do not lightly infer that Congress has exercised its power. *McGirt*, 140 S. Ct. at 2462 (citing *Solem*, 465 U.S. at 470). "[O]nce a reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'" *Id.* at 2469 (quoting

Solem, 465 U.S. at 470). Congressional intent to disestablish a reservation "must be clear and plain." *Id.* (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)) (internal quotation marks omitted).

In conducting a reservation-disestablishment analysis, "the only 'step' proper for a court of law" is "to ascertain and follow the original meaning of the law" before it. *McGirt*, 140 S. Ct. at 2468. "Disestablishment has 'never required any particular form of words.'" *Id.* at 2463 (quoting *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). But, whatever words it chooses to use, Congress must clearly and unequivocally express its intent to disestablish. *McGirt*, 140 S. Ct. at 2463 (quoting *Nebraska v. Parker*, 577 U.S. 481 (2016)) (internal quotation marks omitted).

As *McGirt* makes clear, "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." 140 S. Ct. at 2464. Thus, even if "Congress may have passed allotment laws to create conditions for disestablishment," "to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination." *Id.* at 2465. "If Congress wishes to break the promise of a reservation, it must say so." *Id.* at 2462.

Despite *McGirt*'s clear guidance that courts are to examine all "Acts of Congress" when determining whether a reservation has been disestablished, *see id.* at 2462 (holding that "[t]o determine whether a tribe continues to hold a reservation, there is only one place [courts] may look: the Acts of Congress"), the District Court here truncated its analysis by looking only to the 1900 Act. (FFCL at 6-9). In sharp contrast to the District Court's abbreviated analysis, examining all relevant "Acts of Congress" as required by *McGirt* reveals that for close to seven decades after the 1900 Act

(purportedly ratifying the Jerome Agreement), Congress continued to recognize the "existing KCA Reservation."

The evidence presented at the evidentiary hearing in this case demonstrated clearly that Congress did not disestablish the Kiowa, Comanche, and Apache Reservation. For close to seven decades after the 1900 Act (purportedly ratifying the Jerome Agreement), Congress consistently and repeatedly–and in very clear statutory language–recognized the "existing Kiowa, Comanche, and Apache Reservation."

To start with, in appropriation act after appropriation act, both before and after the Jerome Agreement, Congress consistently and explicitly appropriated funds for the "Kiowa, Comanche, and Apache Reservation," a truly remarkable thing for Congress to do if it had disestablished that very reservation. Congress does not act without a purpose. This Court cannot ignore that Congress continued to appropriate moneys after the Jerome Agreement to the Tribes and the land that it had clearly designated as a reservation. Any other interpretation of these acts would be to assume that Congress acted without guidance and purpose. Petitioner presented evidence to show that Congress appropriated funds, noting each time the appropriation was "[f]or subsistence and civilization of the . . . Apaches, Kiowas, [and] Comanches, . . . *who have been collected upon the reservations set apart for their use and occupation*...." (emphasis added):

- Act of July 4, 1884, C. 180, 23 Stat. 76 at 89, three hundred and ninety thousand dollars, (Pet. Evid. Hrg. Exh. 7);
- Act of March 3, 1885, C. 341, 23 Stat. 362 at 377, three hundred and seventy five thousand dollars, (Pet. Evid. Hrg. Exh. 8);
- Act of May 15, 1886, C. 333, 24 Stat. 29 at 41, three hundred and twenty five thousand dollars, (Pet. Evid. Hrg. Exh. 9);

- Act of March 2, 1887, C. 320, 24 Stat. 449 at 460, three hundred thousand dollars, (Pet. Evid. Hrg. Exh. 10);

- Act of June 29, 1888, C. 503, 25 Stat. 217 at 230, two hundred and seventy five thousand dollars, (Pet. Evid. Hrg. Exh. 11);

- Act of March 2, 1889, C. 412, 25 Stat. 980 at 994, two hundred and fifty thousand dollars, (Pet. Evid. Hrg. Exh. 12);

- Act of August 19, 1890, C. 807, 26 Stat. 336 at 350, two hundred and forty thousand dollars, (Pet. Evid. Hrg. Exh. 13);

- Act of March 3, 1891, C. 543, 26 Stat. 989 at 1004, two hundred and forty thousand dollars, (Pet. Evid. Hrg. Exh. 14);

- Act of July 13, 1892, C. 164, 27 Stat. 120 at 134, one hundred and twenty five thousand dollars, (Pet. Evid. Hrg. Exh. 15);

- Act of March 3, 1893, C. 209, 27 Stat. 612 at 626, one hundred and twenty five thousand dollars, (Pet. Evid. Hrg. Exh. 16);

- Act of August 15, 1894, C. 290, 28 Stat. 286 at 301, one hundred and ten thousand dollars, one hundred and ten thousand dollars, (Pet. Evid. Hrg. Exh. 17);

- Act of June 10, 1896, C. 398, 29 Stat. 321 at 336, one hundred thousand dollars, (Pet. Evid. Hrg. Exh. 18);

- Act of June 7, 1897, C. 3, 30 Stat. 62 at 77, one hundred thousand dollars, (Pet. Evid. Hrg. Exh. 19);

- Act of July 1, 1898, C. 545, 30 Stat. 571 at 584, one hundred thousand dollars, (Pet. Evid. Hrg. Exh. 20);

- Act of March 1, 1899, C. 324, 30 Stat. 924 at 936, seventy five thousand dollars, (Pet. Evid. Hrg. Exh. 21);

- Act of May 31, 1900, C. 598, 31 Stat. 221 at 234, one hundred thousand dollars, (Pet. Evid. Hrg. Exh. 22);

- Act of March 3, 1901, C. 832, 31 Stat. 1058 at 1071, fifty thousand dollars, (Pet. Evid. Hrg. Exh. 23);

- Act of March 3, 1903, C. 994, 32 Stat. 982 at 991, thirty five thousand dollars, (Pet. Evid. Hrg. Exh. 24);
- Act of April 21, 1904, C. 1402, 33 Stat. 189 at 202, twenty five thousand dollars, (Pet. Evid. Hrg. Exh. 25);
- Act of March 3, 1905, C. 1479, 33 Stat. 1048 at 1056, twenty five thousand dollars, (Pet. Evid. Hrg. Exh. 26);
- Act of June 21 1906, C. 3504, 34 Stat. 325 at 361, twenty five thousand dollars, (Pet. Evid. Hrg. Exh. 27);
- Act of March 1, 1907, C. 2285, 34 Stat. 1015 at 1043, twenty five thousand dollars, (Pet. Evid. Hrg. Exh. 28);
- Act of April 30, 1908, C. 153, 35 Stat. 70 at 87, twenty five thousand dollars, (Pet. Evid. Hrg. Exh. 29); and
- Act of March 3, 1909, C. 263, 35 Stat. 781 at 802, twenty five thousand dollars, (Pet. Evid. Hrg. Exh. 30).[2]

The Department of the Interior is part of the Executive Branch and is considered to be administering the laws of the United States when it enforces policies of a particular matter. (EH Tr. 37) As further proof of continuous congressional acts, Petitioner showed that in 1947, the Secretary of the Department of the Interior, at the direction of Congress, restored land "for the use and benefit of the Kiowa, Comanche, and Apache Tribe and are added to and made part of *the existing Kiowa, Comanche, and Apache Reservation.*" 12 Fed. Reg. 849 (1947) (emphasis added) (Pet. Evid. Hrg. Exh. 33). And in a 1948 Act, Congress directed that proceeds from the sale of certain lands be "deposited in the United States Treasury to the credit of the tribal fund of Indians of the said *Kiowa,*

[2] In total, the allotment acts discussed above resulted in $3,490,000 being spent on the Kiowa, Comanche, and Apache Reservation. In the period after the Jerome Agreement was signed, the amount is $1,095,000. To break it down further, after the 1900 Act was passed (which the State now claims extinguished the Kiowa, Comanche, and Apache Reservation forever), another $360,000 was spent in an eight-year period on the allegedly defunct Kiowa, Comanche, and Apache Reservation. Congress knew the Reservation was still in existence and still needed funding.

Comanche and Apache Reservation." Act of July 1, 1948, 62 Stat. 305 (emphasis added) (Pet. Evid. Hrg. Exh. 34).

Likewise, in a 1952 Report, Congress again referred to the land occupied by the Kiowa, Comanche, and Apache Tribes as a "reservation." Report with Respect to the House Resolution Authorizing the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of Indian Affairs, H.R. Rep. No. 2503, 82d Cong., 2d Sess. 834 (1952) (commonly known as "The Doomsday Report"). In a section labeled "Tribes and Indians," *id.* at 722, under the title "Kiowa and Comanche Reservation, Okla.," the report notes: "There were 388 Apache, 2,694 Comanche and 2,696 Kiowa Indians *on this reservation in 1950.*)" *Id.* at 834 (emphasis added). In Table XII of the Report, the Committee lists the status of law and order efforts in each state vis-a-vis the tribes within that state. The entry for Oklahoma states as follows:

> State handles all law and order problems and finances same on county basis. *State jurisdiction exercised on Osage Reservation and all reservations under the Southern Plains Agency is subject to court attack due to absence of congressional authority.*

Id. at 107, 109 n.11 (emphasis added).

On June 24, 1946, Congress returned lands set aside for the Rainy Mountain School Reserve to the Kiowa, Comanche, and Apache Reservation. 60 Stat. 305. (Pet. Evd. Hrg. Exh. 32) And in 1948, again at the direction of Congress, the Secretary of the Department of the Interior directed the council representing the Indians of the *Kiowa, Comanche and Apache Reservation* to convey land for the site of a county hospital. 62 Stat. 1215. (Pet. Evd. Hrg. Exh. 34)

In the 1960s, the federal government continued to acknowledge the existence of the Kiowa, Comanche, and Apache Reservation. For example, in 1967, the Department of the Interior, under congressional authority, "restored [certain lands] to tribal ownership *for the use and benefit of the*

Kiowa, Comanche, and Apache Tribes of Indians, and are added to and made a part of the existing reservation." 32 Fed. Reg. 452-53 (1967).

In fact, the federal government continues to this day to acknowledge the continued existence of the Kiowa, Comanche and Apache Reservation. The Appendix to Chapter I of Title 25 of the Code of Federal Regulations, identifies Executive Orders that extended restrictions on allotments "within the several Indian reservations within the States named." (Pet. Evid. Hrg. Exh. 36) As recently as December 1, 2020, that chart continues to identify the Kiowa, Comanche, and Apache "reservation" in Oklahoma. *Id.* at 4. These continuous "Acts of Congress" show a clear intent by Congress to not only acknowledge the existence of the Kiowa-Comanche-Apache Reservation, but to also ensure that it continued to thrive by granting money and supplies, as well as reinstating land to the reservation.

C. Congress Cannot Unilaterally Disestablish a Reservation.

Furthermore, not only did Congress not intend by its actions to disestablish the Kiowa-Comanche-Apache Reservation, it never had the authority to do so. As the District Court noted, the Tribes never validly consented to the Reservation's entire disestablishment, either in the Jerome Agreement of 1892, or Congress' purported ratification of the Jerome Agreement in its 1900 Act. (*See* FFCL 2-6)

This Court properly directed that the question of "whether Congress specifically erased those boundaries and disestablished the reservation," requires "follow[ing] the analysis set forth in *McGirt*" by the Supreme Court. (Remand Order at 4) The burden to prove Congress specifically erased those boundaries and disestablished the entire Reservation is on the State. (FFCL at 3) The State can not meet its burden of proof. It is undisputed the Supreme Court has never held that

Congress can unilaterally disestablish an *entire* reservation through language of "cession"—language the Supreme Court has recognized by definition requires bilateral consent. *See, e.g., Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 597 (1977).

The District Court made references to the watershed *McGirt* opinion (*see* FFCL at 6-7), but instead of properly applying *McGirt* it looked backward to the Supreme Court's 1903 decision in *Lone Wolf* and Tenth Circuit dicta in *Murphy v. Royal* as conclusively resolving the disestablishment question. (*See* FFCL at 7-9) To the contrary, if that were the case there would have been no reason for this Court's remand. The District Court's hollow citation to *McGirt* was insufficient, as it did not "follow the analysis set out in *McGirt*" (Remand Order at 4).

Adhering to the analysis set forth in *McGirt* requires following *McGirt*'s reaffirmance that Congress' novel ability to disregard promises made to tribes engenders a demanding burden that Congress expressly and emphatically articulate its intention to disestablish. *See McGirt*, 140 S.Ct. at 2462, 2469, 2482. "If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law." *Id.* at 2482. *McGirt*'s demand for exactness on Congress' part, in turn demands that when Congress intends to act unilaterally—particularly as to the disestablishment of an *entire* reservation—it "say so" by using language reflecting action Congress can *unilaterally* take, such as referring to a reservation as "discontinued," "vacated," or "abolished." *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973); *McGirt*, 140 S.Ct. at 2465.

On the other hand, language of "cession" has been acknowledged by the Supreme Court to "require[] bilateral consent," and "[a]s a matter of strict English usage, . . . refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority

of a superior sovereign." *Rosebud*, 430 U.S. at 597. Thus, although such language can be a strong indication of disestablishment, it also demands some degree of consent by the tribe. This is why the District Court recognized "[a]n *agreement* to 'cede . . .'" "constitutes a termination of a reservation" and "'an unmistakable baseline purpose of disestablishment.'" (FFCL at 7)(quoting *DeCoteau*; *Rosebud*) (emphasis added). So too has the Supreme Court recognized that "explicit reference to cession" in exchange for a fixed payment gives rise to a "*presumption*" of Congress' intent to diminish a reservation. *(See* FFCL at 7-8) Such language of "cession" is not fully dispositive because that presumption can be rebutted where, as here, the tribe never reflected its consent; such consent is a particularly important requirement where disestablishment of the entire reservation is at issue, as is also the case here. According to appropriation acts, neither did Congress consent to disestablishment.

The Supreme Court has long agreed, and the Supreme Court cases the District Court cites discuss the relevance of tribal consent. *See Solem, Nebraska, DeCoteau, Rosebud, Yankton*. While the District Court concluded that "[b]ilateral consent is not necessary for cession of lands to *diminish* a reservation," *see* FFCL at 8, when what is at issue is not just the diminishment of a reservation, *i.e.*, its reduction, but as here, its entire disestablishment, the Supreme Court has stated consent is then required when language of "cession" is used. *See DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 448 (1975) (emphasis added). Nor does *Lone Wolf* compel a different result.

In *Lone Wolf*—the same decision *McGirt* cites as establishing the need to hold Congress to a demanding, high bar—the Court upheld Congress' authority to pass the 1900 Act, but never held the Act's effect was to disestablish the Reservation. *Lone Wolf*, 187 U.S. at 566-67. Disestablishment was not before the Supreme Court in that case. *Lone Wolf* was brought by

individual Indians, not the Tribe, and concerned the Indians' personal property rights, not political rights pertaining to the Reservation.

In sum, the District Court erred in concluding the State met its burden of proving disestablishment occurred, contrary to what has been consistent refusal on the part of the Supreme Court to recognize Congress' unilateral disestablishment of an *entire* reservation based upon language of "cession." For more discussion of these issues, see the Comanche Nation's amicus brief. (*See also* EH Tr. 70-81)

Conclusion

In order to carry its burden of proving it has subject-matter jurisdiction, the State points only to the Act of June 6, 1900, 31 Stat. 672, which purported to, but did not, ratify the Jerome Agreement. *See United States v. Kiowa, Comanche, and Apache Tribes of Indians*, 163 F. Supp. 603, 608 (Ct. Cl. 1958) (holding that "Congress did not actually ratify the Jerome Agreement, which was in essence a contract between Indians and the United States, because it was accepted in terms varying materially from the offer"). Reviewing all of the Acts of Congress presented for consideration in this case, as required, *see McGirt*, 140 S. Ct. at 2462, this Court must conclude Congress did not clearly express an absolute intention to disestablish the KCA Reservation.

Congressional designation of the KCA reservation in appropriation acts and acts to return land to the KCA tribes over 70 years goes beyond an informal definition. It is an explicit recognition of an existing KCA reservation. And, congressional language maintained the KCA reservation, despite allotment legislation and cession language. Congress never changed its terminology before, during, or after the ratification of the Jerome Agreement. The posture of Congress and the Executive Branch through Presidential Executive Orders and Secretary of the Interior Executive Orders all

recognize an existing KCA reservation from 1867 to the present day. The State has failed to carry its burden of proving that "Congress specifically erased [the] boundaries and disestablished the reservation."

For all of the above reasons, this Court should find the reservation established in the Medicine Lodge treaties has not been disestablished, and the crimes therefore occurred in Indian Country. The federal government, not the State of Oklahoma, has jurisdiction to prosecute Mr. Martinez.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2021, a true and correct copy of the foregoing was delivered via email and U.S. Mail upon:

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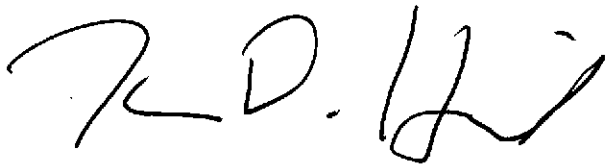

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