No. 15-7041

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PATRICK DWAYNE MURPHY, Appellant/Petitioner, vs. TERRY ROYAL, WARDEN, Oklahoma State Penitentiary, Appellee/Respondent.	Case No. 07-7068 Case No. 15-7041 **DEATH PENALTY CASE** (Brief and attachments submitted digitally and scanned pdf form)

On Appeal from the United States District Court
for the Eastern District of Oklahoma
District Court Case Nos. CIV-03-443-RAW-KEW
CIV-12-191-RAW-KEW
The Honorable Ronald A. White, District Judge

APPELLANT'S RESPONSE TO APPELLEE'S PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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October 24, 2017

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Comes now Patrick Murphy and responds to Respondent's Petition for Rehearing and Rehearing En Banc and the United States' Brief in support of Rehearing.

A. Introduction.

Rehearing is an extraordinary procedure with a high threshold. Rule 35.1(A). *Planned Parenthood Assoc. of Utah v. Herbert*, 839 F.3d 1301, 1308 n.1 (10th Cir. 2016). The State's and the United States' arguments center on myriad speculative fears. Yet, unforeseen impacts, real or imagined, do not make the *legal* issue before the Court one of "exceptional public importance." Rule 35.1(A).

Respondent and the United States simply disagree with the panel's resolution of the arguments advanced below. The United States belatedly injects new facts for this Court's consideration, and Respondent seeks to retract his waiver of an evidentiary hearing. But that simply reinforces the parties' disagreement with the decision and exposes a desire to re-litigate. In the end, these parties offer the same failed arguments, based on the same congressional acts, that they urged regarding Oklahoma's jurisdictional primacy over the Creek Nation's government and territory.[1]

[1] *See Harjo v. Kleppe*, 420 F. Supp. 1110, 1140 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978) (arguing government was terminated); *Indian Country U.S.A. v. State of Okl. ex rel. Oklahoma Tax Com'n* , 829 F.2d 967, 970 (10th Cir. 1987) (arguing state had jurisdiction over tribally owned land); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1440, 1444 (D.C. Cir.

The State has had over thirteen years to develop evidence in support of its position. The exhaustive Opinion carefully considered the facts and applied the controlling law. There are no grounds that justify rehearing.

B. Speculative Impacts.

Though raising a parade of horribles, the State and the United States do not explain why hypothetical impacts should have been considered in deciding the contested *legal* issue. *See Sands*, 968 F.2d at 1063 (recognizing the Court is "not empowered to decide the issue" on arguments law enforcement might be easier if State had jurisdiction).[2]

The assertion of "public" importance does not derive from the decision's impact on the jurisprudence of the Circuit. *Rocha Vigil v. City of Las Cruces*, 119

1988) (arguing the Nation had no power to establish tribal courts); and *United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992) (arguing state had jurisdiction over a restricted Creek allotment).

[2] Respondent estimates federal courts will be flooded with "thousands of petitions for habeas corpus." *Pet.* at 2. This is an exaggeration. First, many inmates will not choose to risk harsher federal penalties from which there is no parole. *Mistretta v. United States*, 488 U.S. 361, 366 (1989). Second, significant procedural barriers exist. *See Paxton v. State*, 903 P.2d 325, 327-28 (Okla. Crim. App. 1995) (applying laches to prevent challenges to long-settled convictions); Title 28 U.S.C. §2244(b) (d) (applying one-year statute of limitations to both initial and successive habeas petitions); and *In re Wackerly*, 2010 WL 9531121 (10th Cir. Sept. 3, 2010) (holding jurisdictional claim raised in successive petition must satisfy successor authorization requirements).

F.3d 871, 871 (10th Cir. 1997). The Court plowed no new jurisprudential ground. Instead, it followed the Supreme Court's "well-settled" analytical structure for assessing disestablishment issues – an analytical structure "fairly clean" even before *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) was decided. *See Nebraska v. Parker*, 136 S. Ct. 1072, 1078 (2016).

The Court knew there would be effects from its decision.[3] And, it recognized it could not preemptively identify or resolve speculative matters. The Court noted more than once that Congress, not the Court, has unilateral power to disestablish reservation boundaries. *Murphy v. Royal*, 866 F.3d 1164, 1185, 1233 (10th Cir. 2017). Hypothetical impacts cannot be resolved by *en banc* consideration of the legal issues.

The separation of powers between the judicial and legislative branches of government is rightfully preserved by the opinion. *Id*. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1148 (10th Cir. 2016) (noting that resolving cases and controversies "calls for neutral decisionmakers who will apply the law as it is, not as they wish it to be") (Gorsuch, concurring). The Opinion represents just such neutral

[3] While there will be a shift in law enforcement, the claim federal caseloads will "drastically" increase "by a factor of ten or more" is unsupported. *U.S. Brf*. at 2.

decision-making.[4]

C. There is No Conflict with *Osage Nation v. Irby*.

This Court's decisions in *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010) and *Murphy* are neither "irreconcilable" nor inconsistent. *Pet*. at 6; *U.S. Brf.* at 16. The allotment negotiations and agreements with the Creeks in Indian Territory and the Osage in Oklahoma Territory had both similarities and substantial differences.[5] The panels applied the most recent Supreme Court precedent in both cases. At step one, applying *Solem* in *Osage Nation* and both *Solem* and *Parker* in *Murphy*, both panels concluded there was no other language supporting disestablishment. *Osage Nation*, 597 F.3d at 1124; *Murphy*, 866 F.3d at 1215.

At step two, the *Osage Nation* panel found the contemporary historical evidence demonstrated unequivocally "that all the parties at the table understood"

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[4] During the confirmation process, Justice Neil Gorsuch noted, "Supreme Court precedents interpreting acts of Congress invariably have effects. It is for Congress to assess the nature of the effects of any particular judicial decision and legislate if it deems appropriate." Nomination of Judge Neil M. Gorsuch, Question for the Record, Submitted March 24, 2017 Available online: https://www.judiciary.senate.gov/imo/media/doc/Gorsuch%20QFR%20Responses.pdf.

[5] The State's reliance on "passing" dictum from *Osage Nation* does not present an intra-circuit split. *Pet*. at 5; *Murphy*, 866 F.3d at 1221 n.63. In briefing the State conceded the *Osage Nation* statement that the Creek reservation was disestablished was "dicta." *Answer* at 93.

the Osage Nation reservation would be disestablished. *Osage Nation*, 597 F.3d at 1125. The *Murphy* panel found the contemporaneous historical evidence, "whether viewed in isolation or in concert," fell "far short" of unequivocally demonstrating Congress intended to disestablish the Creek Nation reservation. *Murphy*, 866 F.3d at 1205, 1226.

At step three, the *Osage Nation* panel found the "uncontested facts support[ed] disestablishment." 597 F.3d at 1126. Here, the "conflicting step-three evidence" did not permit the conclusion Congress disestablished the Creek Reservation. *Murphy*, 866 F.3d at 1226. The *Murphy* panel noted the Supreme Court "has never relied solely on this third consideration to find diminishment," and acknowledged *Parker's* reiteration that the government's later treatment of a land area has limited interpretative value. *Id*. at 1227, 1228-29; *Parker*, 136 S. Ct. at 1081-82. The *Murphy* panel also noted the Nation's "continued presence and activity" within its 1866 boundaries "provides a much stronger case for reservation continuation than in *Parker*, where the . . . Tribe [had been] 'almost entirely absent from the disputed territory for more than 120 years.'" *Id*. at 1232 (quoting *Parker*, 136 S. Ct. at 1081).

Whether a congressional act is intended to extinguish some or all of an existing reservation requires a "case-by-case analysis." *Shawnee Tribe v. United States*, 423 F.3d 1204, 1220-21 (10th Cir. 2005). That is precisely what the panels did. There is

nothing unusual or suspect in the end results being different. As noted, some times the analysis leads to reservation boundaries being extinguished or diminished, *i.e. Pittsburg & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387, 1409 (10th Cir. 1990) and *Wyoming v. EPA*, 849 F.3d 861 (10th Cir. 2017); other times it does not. *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985). There is no intra-circuit split.

D. The Court's Reservation Analysis.

The State has conceded there was no express language disestablishing reservation boundaries in any of the eight laws cited in its step-one analysis. *Murphy*, 866 F.3d at 1215. Neither the State nor the United States identifies any text clearly expressing Congress's disestablishment intent in these laws, as none exists. They accordingly discount this "first and most important step," thereby ignoring that statutory language provides "the most probative" evidence of such intent. *Parker*, 136 S. Ct. at 1079-80; *Solem*, 465 U.S. at 470; *Pet.* at 7; *U.S. Brf.* at 4-11. They claim the panel could have found intent in the context of the "multi-stage" and complex history of the allotment of Creek lands. *Pet*. at 7; *U.S. Brf*. at 12. Contrary to these claims, the Court thoroughly reviewed each of the eight acts "cumulatively," and found no textual "hallmarks" of disestablishment and no language altering

boundaries. *Murphy*, 866 F.3d at 1217.[6]

The State and the United States base their argument concerning a multi-stage review of the laws, to some extent, on the fact the laws were not surplus lands acts. *U.S. Brf.* at 12; *Pet.* at 7. While true the 1901 Agreement and the 1906 Five Tribes Act contained only a few provisions generally concerning unallotted "surplus" lands, as opposed to specific surplus tracts, none of the acts included one of the hallmarks of disestablishment – the return of tribal lands to the public domain. *Murphy*, 866 F.3d at 1197, 1218.[7] The State and United States fail to explain how this absence of hallmark language supports their argument. Although Congress originally expressed a desire to obtain "cession" of Creek lands (for a price) when it enacted the 1893 Appropriations Act, §16, 27 Stat. 645, it eventually abandoned that goal. Respondent and the United States grasp for something that would justify an Oklahoma-specific analysis different from *Parker's* well-settled precedent. It cannot be found in the

[6] The Court also reviewed the historical step-two evidence "in concert" and found it did not unmistakably show Congress intended to disestablish the Creek Nation reservation. 866 F.3d at 1226.

[7] The 1901 Act excluded town sites from allotment and allowed sale to non-Indians in limited circumstances, but nowhere referenced a return of lands to the public domain. ¶¶11-14, 31 Stat. 861, 866. Congress and the Nation ultimately agreed surplus lands would be used to equalize allotments instead of being returned to the public domain. ¶9, 31 Stat. at 864. Then, in the Five Tribes Act, Congress provided that unallotted lands reserved for specific public purposes would revert to the tribe to be disposed of as "other surplus lands." §14, 34 Stat. 137, 142.

treatment of Creek allotted lands.

Neither party explains why Congress did not use simple disestablishment language in any of the eight laws. As recognized by the panel, Congress instead consistently used language in the 1901 Agreement that referenced the Nation's continued territorial existence and continued jurisdiction over "lands of the tribe" and "individuals after allotment." *Murphy*, 866 F.3d at 1202, 1218, citing ¶¶ 10, 20, 37, 41-43, 31 Stat. 861 at 864, 867, 871-72. Indeed, the United States fails to even mention these clear textual references to the Creek Nation in the geographic terms embedded in the very law it deems "the most important." *U.S. Brf.* at 7-8.

And, if the "first and most important" step can be met by teasing language related to other matters from eight congressional acts spanning fourteen years, while ignoring congressional language recognizing the existence of Creek Nation borders, a critical question remains unanswered. On what date was the reservation disestablished? Neither brief supplies that critical, temporal fact.

Respondent's newly minted "continuity of purpose" argument does not explain Congress's lack of clear disestablishment language. *Pet*. at 8. In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), the only case Respondent cites, the Court expressly recognized that a 1904 statute at issue, which concerned a specific area of the Rosebud Sioux Reservation, "incorporated verbatim the language of immediate

cession of the [unratified] 1901 Agreement" and diminished the reservation.[8] *Id*. at 597. Based on this cession language, the Court then found a continuity-of-congressional purpose of the diminishment of reservation boundaries in 1907 and 1910 statutes involving two other areas. Here, the State concedes there is no specific cession language in any of the eight acts it cites. Thus, there is *no* language to be carried forward showing Congress's clear intent. Ambiguity between and among acts does not exist.[9] There is no hallmark diminishment or disestablishment language anywhere.

The State reiterates arguments that Congress disestablished reservation boundaries through allotment, reducing and eliminating certain tribal governmental powers, and creating a "single, unified" state. *Pet*. at 7; *see also U.S. Brf*. at 10. These arguments rest on false premises. First, the existence of individual allotments is "completely consistent with continued reservation status." *Mattz v. Arnett*, 412 U.S. 481, 497 (1973). Reservations often include parcels of land held in fee. *See Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 357 (1962).

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[8] The hallmark cession language was clear – "do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County." *Id*. at 591 n.8.

[9] In any event, ambiguous or "[d]oubtful expressions" are to be resolved in favor of the Creeks. *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

Second, the Creek Nation's governmental powers, while altered in several respects, remained largely intact after allotment and statehood. *Harjo*, 420 F. Supp. at 1143. Third, states may be established notwithstanding the presence of reservations. For example, Congress did not find a need to erase Navajo, Apache, Pueblo, and other reservation boundaries when it authorized New Mexico and Arizona.

Both Respondent and the United States attempt to show congressional intent to disestablish the Creek Reservation with laws impacting the Five Tribes as a group, focusing on §28 of the Curtis Act, which provided for the abolishment of tribal courts. *Answer* at 76, *U.S. Brf.* at 7, *Pet.* at 10. Their position is not supported by the legislative history of the 1897 Act, or the text and legislative history of the Curtis Act.[10] Congress threatened the destruction of tribal courts to force allotment agreements that would result in the execution of deeds by tribal officials, in order to ensure the legality of transfer of title – not in anticipation that destruction of courts was necessary in preparation for statehood, and certainly not because the destruction of tribal courts would somehow obliterate reservation boundaries.

Moreover, the State and United States fail to acknowledge that their

[10] Congress's focus on forcing allotment was no secret. "While we are holding out to them the hand of negotiation we hold in the other hand a bludgeon with which to brain the Indian. . . . this is intended to drive them into an agreement with the Dawes Commission." 29 Cong. Rec. 2310 (Feb. 26, 1897), remarks of Sen. Bate.

interpretation of these acts is inconsistent with *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), where the Eighth Circuit found while "Congress deprived this tribe of all its judicial power, and curtained its remaining authority until its powers of government have become the mere shadows of their former selves," its authority to govern "within its territorial boundaries guarantied by the treaties of 1832, 1856, and 1866 . . . remained undisturbed." *Id*. at 951. Futhermore, while the Creek Allotment Act did not disturb the Curtis Act's treatment of tribal courts, it expressly acknowledged the Nation's authority to legislate with respect to its tribal and allotted lands. ¶42, 31 Stat. at 872.

In the end, Oklahoma and the United States repeat permutations of past failed arguments based on false assumptions that Oklahoma gained jurisdiction over the Nation's reservation, government, and citizens at statehood. The Court thoroughly considered the repackaged arguments and rejected them. Rehearing should not be granted.

E. Clearly Established Federal Law.

Respondent argues there is no "clearly established federal law" because the Supreme Court has never held Congress intended to keep the Creek Nation's reservation intact, or because *Solem*'s analytical framework is not specific enough to apply to land acts in which almost all land was allotted. *Pet.* at 11-13. Such

specificity has never been required. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied'") (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J, concurring in judgment)). These arguments were asserted below and the Court rejected them. *Answer* at 45-47; *Murphy*, 866 F.3d at 1190 ("This point has nothing to do with whether the *Solem* framework applies").

Indeed, the *Solem* framework is what controlled in *Osage Nation*, the case touted by Respondent as "having nearly identical operative allotment language" requiring "all lands" to be allotted. *Pet.* at 4. The *Solem* analysis is not limited to interpreting surplus land acts that returned large land areas to the public domain for non-Indian settlement. *See Shawnee Tribe*, 423 F.3d at 1221 (applying *Solem* analysis in interpreting intent of parties to treaty provisions); *Hackford v. Utah*, 845 F.3d 1325, 1329 (10th Cir. 2017) (applying *Solem* framework to withdrawal of Uintah and Ouray reservation lands for federal reservoir). Respondent's assertion that *Solem* does not control when land acts are designed to "dissolve tribal title and governance in order to create a new State" reiterates its arguments.[11] *Pet.* at 14; *Answer* at 46.

Respondent's "clearly established law" arguments were determined to have

[11] *See Murphy*, 866 F.3d 1218-20 (discussing in detail why the State's title and governance arguments fail).

"miss[ed] the mark." *Murphy*, 866 F.3d at 1190. Indeed, *Solem's* legal rules have provided a clear and consistent path to deciding reservation disestablishment issues for over thirty years. *Solem* applies in different reservation-by-reservation contexts that are "closely-related" and factually "similar." *House v. Hatch*, 527 F.3d 1010, 1016 (10th Cir. 2008). But, as noted, they do not need to be, and in fact, never would be, factually identical. *See McWilliams v. Dunn*, 137 S. Ct. 1790, 1793 (2017) (confirming *Ake v. Oklahoma,* 470 U.S. 68 (1985) was "clearly established law" applied to a similar, but not identical, factual pattern).

Solem's analytical structure is somewhat unique in that it was established to apply in similar, but not identical, contexts. *Solem* provides the mechanism for a court to distinguish congressional acts that disestablished reservations from those that did not. It was meant to apply to different tribes, reservations, treaties, laws, and histories. In this way, it is similar, as the Court recognized, to the standard for analyzing ineffective-assistance-of-counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984); *Murphy*, 866 F.3d at 1190. Indeed, ineffective-assistance-of-counsel claims too must be examined case-by-case. This fact does not make the analytical structure less clear or less "established." *Williams v. Taylor*, 529 U.S. 362, 391 (2000).

Solem established "a clear and consistent path for courts to follow." *Lockyer*

v. Andrade, 538 U.S. 63, 72 (2003). Here, even precedents preceding *Solem*, unlike the precedents in *Lockyer,* establish a "fairly clean analytical structure." *Solem*, 465 U.S. at 470; *Murphy,* 866 F.3d at 1189. *Solem* clearly stated it was the framework for courts to use in determining whether Congress disestablished or diminished reservation boundaries, and it meant it. *See Mathis v. United States*, 136 S. Ct. 2243 (2016) (noting "a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same").

Additionally, Respondent recognized *Solem* was controlling precedent by defending the substantive correctness of OCCA's decision by reference to its three-part test. *Answer* at 56-94 (quoting *Solem* as the "Supreme Court authority" for its lengthy argument "OCCA's decision was correct, both under AEDPA and as a de novo matter),"[12] *Murphy*, 866 F.3d at 1190. Respondent should not be permitted on rehearing to shift positions and present an issue it previously conceded. *United States v. Smith*, 781 F.2d 184 (10th Cir. 1986).

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[12] In defending against the Osage Nation's petition for certiorari, both the State and the United States recognized *Solem* as controlling law. *See Osage Nation v. Irby,* United States Supreme Court No. 10-537 *(Oklahoma Tax Commission, Brief in Opposition*, January 11, 2011 at 6) (noting Circuit . . . "adhered faithfully to the analysis of *Solem* and this Court's other precedents"); *Osage Nation v. Irby*, No. 10-537 (*Brief for the United States as Amicus Curiae,* May 27, 2011, at 9) (noting Circuit "applied the proper analytical framework [*Solem*] for determining whether a reservation has been disestablished").

For the most part, Respondent's arguments on "clearly established law" are simply restated. *United States v. Wiles*, 106 F.3d 1516, 1517 (10th Cir. 1997); *Westcot Corp. v. Edo Corp,* 857 F.2d 1387, 1388 (10th Cir. 1988) (finding reiteration of prior appellate arguments neither "helpful nor persuasive"). *Solem* supplied the "clearly established" law to be applied by OCCA in 2005.

F. "Contrary to."

Respondent argues this Court "incorrectly determined that the state court decision was 'contrary to' *Solem*." *Pet.* at 15.[13] Respondent's three-fold argument is easily countered. First, the Court readily acknowledged OCCA was not required to cite *Solem*. *Murphy*, 866 F.3d at 1193. Second, Respondent's claim "[t]here is nothing in the state court opinion indicating it rejected or contradicted *Solem*" is incorrect. *Pet.* at 16. OCCA was not silent. *Pet.* at 16 n.18. Indeed, the Court quoted every word OCCA said about the reservation issue. *Id.* at 1191-92. OCCA's analysis

[13] Respondent's suggestion Murphy forfeited the argument OCCA's decision was "contrary to" *Solem* is puzzling. *Pet.* at 15. The State challenged Murphy's "contrary to" arguments and argued OCCA's decision was supported by *Solem's* three-step framework. *Answer* at 5, 10, 26, 51-55, 56-78. Petitioner argued, "OCCA did not identify the correct legal principles that control whether a reservation was disestablished" and "made no attempt to apply *Solem* principles." *Reply* at 14-15. Petitioner additionally noted OCCA's "blurring distinctions between allotments and reservations" was contrary to Supreme Court principles that only Congress can disestablish reservation boundaries and that disestablishment or diminishment of reservation boundaries "'will not be lightly inferred.'" *Id.* at 15, citing *Solem*, 465 U.S. at 470.

rejected *Solem* by not even cursorily engaging any of its three factors. *Id*. at 1193. "Instead of heeding *Solem's* 'presumption' that an Indian reservation continues to exist until Congress acts to disestablish or diminish it . . . OCCA flipped the presumption by requiring evidence that the Creek Reservation had *not* been disestablished – that it 'still exists today.'" *Id*. at 1194 (internal citations omitted). Flipping the presumption fits squarely within the Supreme Court's understanding of the words "contrary to." *Id*. citing *Williams* 529 U.S. at 405. Placing an additional burden on a prisoner to establish his constitutional claim presents a classic example of a decision made "contrary to" clearly established law. *Id*. at 394 (holding state court decision was "contrary to" clearly established law of *Strickland* by requiring a separate and additional inquiry); *see Cargle v. Mullin*, 317 F.3d 1196, 1202-05 (10th Cir. 2003) (finding OCCA's decision was "contrary to" *Strickland* because it permitted the merits of the omitted claim to be ignored).

Third, Respondent's suggestion OCCA should be excused for its contradictory analysis of *Solem* because the record presented was somehow inadequate is disingenuous. As the Court correctly noted, "Mr. Murphy put the issue of whether the Creek Reservation had been disestablished *squarely* before the OCCA, but the court decided the claim by ignoring and contradicting *Solem*." *Murphy*, 866 F.3d at 1196 (emphasis added). Respondent concedes Murphy placed *Solem*, relevant legislation,

and a historian's declaration before OCCA.[14] *Pet.* at 16.

The State also concedes it opposed a hearing on the issue. And, Respondent does not suggest he was denied an opportunity to present his own offer of proof or briefing to the trial court. *Pet.* at 20 n.26. The State effectively squandered an opportunity to present countering evidence to OCCA. Indeed, the factual record presented to OCCA was sufficient. OCCA was directed to the historical record of Congress' treatment of the Nation prior to statehood and apprised of the Supreme Court's binding Indian law principles and disestablishment framework.

Blue Thunder v. Gonzales, 189 F. App'x 796 (10th Cir. 2006) (unpublished) does not support the notion OCCA's contradiction of *Solem* was a function of the record it reviewed. *Pet.* at 16. Indeed, *Blue Thunder*, which is not a §2254 case, is inapposite. Blue Thunder had been barred from presenting yet another attack on the validity of his conviction. Using an alternative route, he argued, without presenting

[14] Actually, much more was presented and incorporated in the supplemental brief. Murphy incorporated legal arguments and evidence from his offer of proof. This record included *Solem*, as Respondent admits, but also relevant treaties and congressional acts, and an affidavit from an expert, who had practiced Indian law for more than two decades with the U.S. Department of Interior, concluding the exterior territorial boundaries of the Creek Nation were not altered by congressional acts around the turn of the twentieth century and that the reservation had never been disestablished. Additionally, counsel fully briefed the disestablishment analytical framework from *Seymour v. Superintendent*, 368 U.S. 351 (1961) and *Solem. See* State-Post-Conviction Record, Vol. 1 at 100-08; 151-158; 196-558.

a factual base, that the federal court did not have jurisdiction to prosecute him. This Court "briefly" considered and rejected his jurisdictional argument, discerning from the factual record that the crime occurred at an Indian school located squarely within the Rosebud Indian reservation in South Dakota. *Blue Thunder*, 189 F. App'x at 798.

Finally, Respondent inserts a red herring. The Court did not hold *Solem* "clearly established" that the burden of proving the State lacked jurisdiction was on the State. *Pet.* at 17. Rather, in analyzing whether OCCA's decision was "contrary to" *Solem*, the Court concluded OCCA "contradicted *Solem*" by not heeding *Solem's* presumption that an Indian reservation continues to exist until Congress acts to disestablish or diminish it. *Murphy*, 866 F.3d at 1194; *Solem*, 465 U.S. at 481. This served to establish that OCCA "failed to articulate or apply the proper legal framework anywhere in its opinion." *Murphy*, 866 F.3d at 1194. Murphy made the same observations, specifically noting OCCA's decision was contrary to the *Solem* principles. *Reply* at 15.[15]

The Court's "contrary to" holding does not carry the impact Respondent suggests. *Pet.* at 18 ("The panel opinion's holding would effectively require a state

[15] This aspect of the "clearly established law" argument is not newly minted by the Court, as suggested. *Pet*. at 17-19. Respondent argued below that Petitioner had the burden of proving Congress did not intend disestablishment, as well as the burden to establish federal jurisdiction and overcome AEDPA provisions. *Answer* at 48.

to disprove federal jurisdiction in every criminal prosecution bearing any conceivable relationship to Indian Country"). Nor does it upend a burden of proof Respondent was not already aware of. True, the Court mentioned the unremarkable requirement that the State must allege jurisdictional facts giving it the power to act. *Sweden v. State*, 172 P.2d 432, 435 (Okla. Crim. App. 1946). But a defendant has the burden to challenge those jurisdictional facts, as Murphy did here. Once Murphy asserted continuing reservation status, it is beyond question *Solem* places the "burden of establishing" that Congress intended to disestablish the reservation on the state. *Solem*, 465 U.S. at 475. This burden derives from the mandatory "presumption in favor of the continued existence of a reservation." *Osage Nation*, 597 F.3d at 1122 (citing *Solem*). In making his jurisdictional challenge, Murphy established the crime occurred on land "set aside for an Indian Reservation." This triggered the *Solem* presumption that land "retains its reservation status until Congress *explicitly* indicates otherwise." *Solem*, 465 U.S. at 470 (emphasis added).[16]

The State has not cited a single case placing the burden of proving continued reservation status on a criminal defendant. *Eaves v. Champion*, 1997 WL 291186 *2 (10th Cir. June 2, 1997) (unpublished), was a "dependent Indian community" case.

[16] *See United States v. Celestine*, 215 U.S. 278, 285 (1909) ("when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress").

Yellowbear v. Atty. Gen. of Wyoming, 380 Fed. App'x 740, 741(10th Cir. 2010) (unpublished) was a reservation case in which a habeas petitioner conceded the state court's adjudication was not "contrary to" the clearly established law of *Solem*. *See Yellowbear v. State*, 174 P.3d 1270, 1280-83 (Wyo. 2008) (finding, after thorough analysis in which *Solem* presumption is approved, that reservation was diminished). In *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), the court placed *Solem's* "heavy burden" on Mr. Webb *because he was the party asserting disestablishment. Id*. at 1131 (emphasis added).

Here, OCCA did not heed the *Solem* presumption, thus cementing its decision was "contrary to" *Solem*. The Court understood all of this and agreed Murphy had the burden to present the jurisdictional issue, to establish federal jurisdiction under the AEDPA, and to show OCCA rendered a decision that was "contrary to" clearly established federal law. Murphy met all his burdens. Respondent is trying to create ambiguity over "burden of proof" that does not exist.

G. Belated Request for an Evidentiary Remand.

Respondent requests an evidentiary hearing now, having argued at great length against it, stating, among other things, "the relevant evidence is documentary and

testimony is unnecessary."[17] *Answer* at 50. Respondent now seeks a remand to present this "unnecessary" documentary and testimonial evidence. *Pet*. at 21. Notably, Respondent does not direct this Court to what evidence he would offer.

Respondent waived any request for an evidentiary hearing. *Richison v. Ernest Group, Inc.* 634 F.3d 1123, 1127 (10th Cir. 2011). Respondent did not merely fail to timely request an evidentiary hearing, thus forfeiting his right through neglect. Respondent intentionally relinquished and abandoned a request for an evidentiary hearing. That is a waiver. *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1271 (10th Cir. 2007) ("Waiver is different from forfeiture"). A waiver bars an appeal. *United States v. Hardwell*, 80 F.3d 1471, 1487 (10th Cir. 1996) (finding a party "cannot invite a ruling and then have it set aside on appeal").

The reason for Respondent's belated hearing request is transparent. Instead of owning his reasons for the dramatic shift of position, Respondent blames the Court, claiming the panel's unexpected "shift in burden of proof" is the "reason" he did not previously need to "put on his own evidence regarding jurisdictional issues." *Pet*. at 19. That is not only insincere, it is untruthful. Respondent has had opportunities to

[17] In arguing *against* an evidentiary hearing, Respondent claimed any "evidence" should have been presented to OCCA, the district court, or "appended" to Circuit briefing. The State chose not to avail itself of any of those options. *Answer* at 51.

put on evidence regarding jurisdictional issues, but instead he put up roadblocks to evidentiary hearings in both state and federal courts.[18] Respondent now wants to backtrack, muddling the "burden of proof" issue as an excuse. Respondent's "belated and dramatic shift of position" on whether there should have been an evidentiary hearing should not be permitted. *United States v. Smith*, 781 F.2d at 185 (refusing, on rehearing, to permit Government to change the position previously taken by the United States).

Permitting additional evidence to be presented at this late date would not only be a drain on judicial resources, it would also be futile. Murphy and the Creek Nation "marshalled evidence showing an understanding that the Reservation's borders continued." *Murphy*, 866 F.3d at 1226. Permitting the State to present additional evidence will not turn an equivocal historical record into an unequivocal one. *Id*. ("The step-two evidence is at most debatable, and we need not parse it further because ambiguous evidence cannot overcome the missing statutory text at step

[18] Respondent was allowed to gather "a comprehensive presentation of the evidence relevant to the questions presented." *See* Appellee's Unopposed Motion to Extend Deadline for Filing Response Brief (Sept. 20, 2016) at 2 n.1. The panel specifically considered his presentation, including underlying source documents cited in Respondent's cases. *Murphy*, 866 F.3d at 1220-23. Yet, now the United States in supporting rehearing injects facts beyond the record. *U.S. Brf.* at 14 (presenting documents it concedes "were not presented to the panel"). Rehearing is not the place for new facts and evidence. *Westcot Corp*., 857 F.2d at 1388 ("Attempts to overcome deficiencies in the record. . . will not prompt a change of mind").

one"). *Id.* There should be no remand for an evidentiary hearing.

H. Conclusion

The panel faithfully considered the parties' arguments and evidence and accurately concluded Mr. Murphy's crime occurred within the intact boundaries of the Creek reservation. There being no just grounds for rehearing, the State's petition should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by FED. R. APP. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 5,446 words.

☒ I relied on my word processor to obtain the count and it is: WordPerfect X6.

☐ I counted five characters per word, counting all characters including citations and numerals.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/Patti Palmer Ghezzi
Patti Palmer Ghezzi

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2017, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. The participants in the case are registered CM/ECF users and based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to all counsel of record registered with the court's ECF system.

s/*Patti Palmer Ghezzi*
Patti Palmer Ghezzi

CERTIFICATION OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

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s/Patti Palmer Ghezzi
Patti Palmer Ghezzi