

HABEAS CORPUS PETITION 2254

FILED

AUG 10 2018

By PATRICK KEANEY
Clerk, U.S. District Court
Deputy Clerk

SHAWN MICHAEL BARBRE

Name

757178
Prison Number

JAMES CRABTREE CORRECTIONAL
CTR

Place of Confinement

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SHAWN MICHAEL BARBRE, *Petitioner*
(Full Name)

v.

JASON BRYANT, *Respondent*
(Name of Warden, Superintendent, Jailor or
authorized person having custody of
Petitioner)

CIV 18 - 259 - RAW
CASE NO. _____
(To be supplied by the Clerk)

PETITION FOR A WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY

NOTE: If Petitioner is attacking a judgment, which imposed a sentence to be served in the future, Petitioner must fill in the name of the state where the judgment of conviction was entered. If the Petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.

- 1) Name and location of the court which entered the judgment of conviction under attack:
District Court of Muskogee County, 220 State Street, Muskogee, Oklahoma 74401
- 2) Date judgment of conviction was entered:
- 3) Case number: **CF - 2015-644**
- 4) Length and terms of sentence: **15 years imprisonment**
- 5) Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion?
Yes No
- 6) Nature of the offense involved (all counts): **Assault and Battery with Deadly Weapon**
- 7) What was your plea? (*check one*)
a) Not Guilty b) Guilty c) Nolo Contendere
- 8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement: **I agreed to the sentence as pronounced**
- 9) Kind of trial (*check one*) **N/A**
a) A jury b) A judge without a jury
- 10) Did you testify at trial (if any)?
Yes No
- 11) Did you appeal from the judgment of conviction?
Yes No
- 12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order)

- 13) If you did not appeal, explain briefly why you did not: **I was led to believe by my**

attorney that I could not appeal.

- a) Did you seek permission to file a late appeal?
Yes No
- 14) Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes No

15) If your answer to 14 was "Yes", give the following information:

- a) 1) Name of court: **District Court of Muskogee County**
- 2) Nature of proceeding: **Application for Post-Conviction Relief**
- 3) Grounds raised: **Trial Court did not have jurisdiction in that Petitioner and the victims are Indian within the meaning of federal law and the crime occurred in Indian County as defined by 18 USC § 1151**
- 4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No
- 5) Result: **relief denied**
- 6) Date or result: **May 31, 2018**
- 7) Did you appeal the result to the highest state court having jurisdiction?
Yes No

If you did appeal, give the name of the court where the appeal was filed, the result, the case number, citation and date of the court's decision (or attach a copy of the court's opinion or order)

Oklahoma Court of Criminal Appeals, denial of relief affirmed; PC-2018-518, July 13, 2018

8) If you did not appeal, briefly explain why you did not _____



- 16) State *concisely* every ground on which you can claim that you are being unlawfully held. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in the petition all available grounds for relief, which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A) (1) **Ground One: Trial Court did not have jurisdiction in that Petitioner and the victim are Indians within the meaning of federal law and the crime occurred in Indian Country as defined by 18 USC § 1151**

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim) **Petitioner is a member of the Tunica-Biloxi Tribe, a federally recognized tribe [See, Tribal Card attached hereto] and the alleged crime occurred in 903 Louisiana Street, Muskogee, Muskogee County, Oklahoma, 74403 which is entirely within the Cherokee Nation Reservation. The offenses described in the Information occurred on what constitutes “Indian Country” as defined by 18 U.S.C. §1151 (a)—(c) and Petitioner is an “Indian” within the meaning of 25 U.S.C. §1321-1326. In cases of Indians committing offenses on Indian Land, the United States has exclusive jurisdiction to prosecute the offense in cases of certain enumerated crimes. See, 18 U.S.C. §1153; and, *Cravitt v. State*, 825 P.2d 277 (1992); *U.S. v. Sands*, 968 F.2d 1058 (1992); *Murphy v. Royal*, 875 F3d 896 (2017). In other cases, the tribe or the federal government may prosecute. But, in no case is the state authorized to prosecute.**

The District Court did not, and does not

have jurisdiction in cases of a crime committed by an Indian in Indian Country. See People v. Klindt, 782 P.2d 401 (1989).

In Oklahoma, “issues of subject matter jurisdiction are never waived and can therefore be raised on collateral appeal.” Wallace v. State, 935 P.2d 366, 372 (Okla. Crim. app. 1997)

(3) Statement of Exhaustion of State Remedies to Ground One:

Direct Appeal

(a) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(b) If you did not raise this issue in your direct appeal, explain briefly, why you did not?

I did not appeal because trial counsel failed to advise me of the jurisdictional issues related to Indian status.

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(d) If your answer to (c) is “Yes”, state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number (*if known*), the result and the date of the Court’s decision

**Application for Post-Conviction Relief, Muskogee County
District Court, 220 State Street, Muskogee, Oklahoma 74401;
CF-2015-644, relief denied, May 31, 2018**

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes No

(f) Did you appeal from the denial of your motion or petition?

Yes No

- (g) If you answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes No , and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order)

**Oklahoma Court of Criminal Appeals, denial of relief affirmed;
PC-2018-518**

- (h) If your answer to questions (e), (f) or (g) is "No", briefly explain

Other Remedies

- (i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue

17) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes No

18) If you answered "No" to question 17, state which grounds have not been so presented and briefly give your reason(s) for not presenting them

19) If any of the grounds listed in 16 (A), (B) and (C) were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them

20) Have you previously failed any type of petition, application, or motion in a federal court regarding the conviction under attack? Yes No If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed

21) Do you have any petition, application, motion or appeal now pending in any court, either state or federal, regarding the conviction under attack? No If "Yes", state the location of the court, case file number (*if known*), and the nature of the proceeding

22) Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:

- (a) At preliminary hearing: **Dan Medlock, 520 West Broadway, Muskogee, Oklahoma 74401**
- (b) At arraignment and plea: **Dan Medlock, 520 West Broadway, Muskogee, Oklahoma 74401**
- (c) At trial: **N/A**
- (d) At sentencing: **Dan Medlock, 520 West Broadway, Muskogee, Oklahoma 74401**
- (e) On appeal: **n/a**
- (f) In any post-conviction proceeding; *pro se*
- (g) On appeal from any adverse ruling in a post-conviction proceeding; *pro se*

23) Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes No

24) Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No

(a) If so, give name and location of court which imposed sentence to be served in the future _____

(b) And give date and length of service to be served in the future

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No

Wherefore, Petitioner prays that the Court grant him such relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)



Signature

(Attorney's full address and telephone number)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares (or certifies, verifies, or states) under penalty of perjury that he is the Petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. § 1746; 18 U.S.C. § 1621. **I also affirm under the penalty of perjury that I placed the foregoing with first-class postage prepaid in the prison mailing system on this 7th day of August, 202018**

Executed at James Crabtree Correctional Center, 216 N. Murray St., Helena, Oklahoma 73741, on August 7, 20 18.

Shan Boat
Signature

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 13 2018

SHAWN MICHAEL BARBRE,)
)
Petitioner,)
)
v.)
)
STATE OF OKLAHOMA,)
)
Respondent.)

No. PC 2018-0518

ORDER AFFIRMING DENIAL OF APPLICATION
FOR POST-CONVICTION RELIEF

On May 22, 2018, Petitioner, *pro se*, filed an appeal of the order of the District Court of Muskogee County, Case No. CF-2015-644, denying his application for post-conviction relief. The record reflects Petitioner pled guilty to Assault and Battery with Deadly Weapon. He was sentenced to fifteen years imprisonment.

In the District Court Petitioner raised the sole proposition that the District Court was without jurisdiction to prosecute him because he is an Indian and the crime occurred in Indian Country. On post-conviction appeal Petitioner argues the District Court erred in denying him relief without an evidentiary hearing and that he is entitled to relief. Petitioner submits that *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), involves the Muskogee Creek Nation reservation

borders, but that his claim is not dependent on *Murphy* because the crime to which he pled guilty occurred on the Cherokee Nation Reservation and that he is a member of the Tunica-Biloxi Tribe.

In an order filed May 31, 2018, the District Court denied Petitioner's post-conviction application based upon *Murphy*. The trial court found that the litigation in *Murphy* is ongoing, not final, and that until the matter in *Murphy* is settled, Petitioner's case is denied.

The Tenth Circuit order issued November 16, 2017, in *Murphy* stayed the unopposed motion to stay the mandate pending the filing of a Petition for Writ of Certiorari in the United States Supreme Court. Mandate was stayed for ninety days and/or until the deadline passed for filing a certiorari petition in the Supreme Court. If the certiorari petition was filed, the Tenth Circuit ordered that the stay would continue until the Supreme Court's final disposition. As a petition for a writ of certiorari was filed in the United States Supreme Court on February 6, 2018, the matter is, therefore, stayed until the Supreme Court's final disposition.

Petitioner's post-conviction application based upon the Tenth Circuit's holding in *Murphy* and the application of its holding to other Indian lands is premature. Accordingly, the denial of Petitioner's

PC 2018-0518, Barbre v. State

application for post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

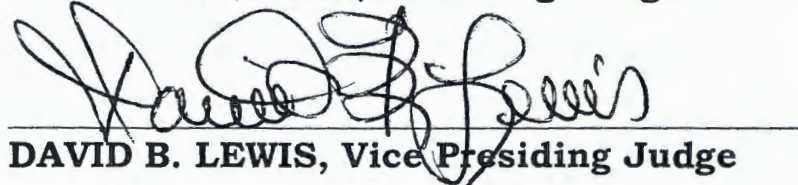
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

13th day of July, 2018.



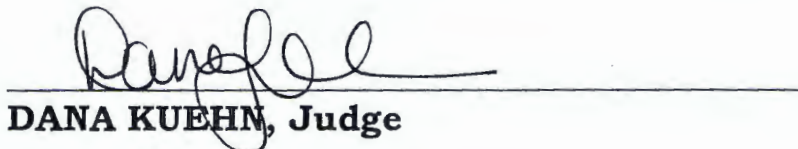
GARY L. LUMPKIN, Presiding Judge



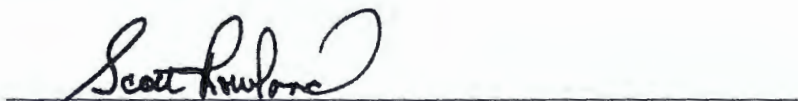
DAVID B. LEWIS, Vice Presiding Judge



ROBERT L. HUDSON, Judge



DANA KUEHN, Judge



SCOTT ROWLAND, Judge

ATTEST:



Clerk

OA