

No. 18-9526

IN THE
Supreme Court of the United States

JIMCY MCGIRT,

Petitioner,

v.

OKLAHOMA,

Respondent.

**On Petition for a Writ of Certiorari to the
Oklahoma Court of Criminal Appeals**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This Court is currently deciding whether the historical boundaries of the Muscogee (Creek) Nation is an Indian reservation today within the meaning of 18 U.S.C. § 1151(a). *Sharp v. Murphy*, No. 17-1107 (U.S.). The question pending before the Court in *Murphy* is whether the State lacked jurisdiction to prosecute an Indian offender within those historical boundaries. After this Court granted certiorari in *Murphy*, Petitioner in this case, who claims to be an enrolled tribal member, sought release from incarceration by arguing that the state lacked jurisdiction to convict him for sex crimes committed against a child within the historical Creek boundaries. The court below affirmed the denial of his postconviction petition as premature pending this Court's decision in *Murphy*. Thus, the question presented remains: Whether the prosecution of Petitioner's crimes is subject to exclusive federal jurisdiction.

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No. 18-9526
STATEMENT

Petitioner raises the same question currently pending before this Court in *Sharp v. Murphy*, No. 17-1107 (U.S.). Based on the arguments by the State of Oklahoma in that case and on the grounds set forth in the opinion of the Oklahoma Court of Criminal Appeals, this Court should deny this Petition. At a minimum, this Court should withhold consideration of this Petition until it decides *Murphy*.

A. The Formation of Oklahoma.

1. The Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations “were collectively known almost universally as the Five Civilized Tribes because many of them had adopted so many elements of white culture that reformers often pointed to them as models for what assimilation could accomplish.” Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893–1914*, at 1 (1999). These tribes once inhabited land stretching across what is now Georgia, Alabama, and northern Florida. In the 1830s, the United States forced the Five Tribes to abandon their homes and migrate west to the designated “Indian Territory” in present-day Oklahoma. The Five Tribes received patents for land in fee simple, and the United States promised that as long as they occupied their lands, they would be able to govern themselves, they would never be subject to the laws of any State or Territory, and their land would never be made part of any State or Territory. Treaty with the Creeks and Seminoles arts. I, IV (Aug. 7, 1856), 11 Stat. 699, 700.

After the Civil War and in response to the Creek Nation’s alliance with the Confederacy, the United States forced the Creek Nation to cede the entire western half

of its land. The United States obtained similar cessions from the other four tribes. Parts of those lands were used for settlement of other tribes, but the rest—which became Oklahoma Territory—was eventually opened to non-Indian settlement beginning with the historic land run of 1889. Angie Debo, *And Still the Waters Run*, at 6 (1940). The remainder of the Five Tribes’ land maintained its status as Indian Territory.

Over time, non-Indians began to populate Indian Territory. The absence of a functioning legal system for non-Indians meant that violent crimes went largely unpunished, and business agreements were effectively unenforceable. To remedy this, Congress created federal territorial courts in Indian Territory and extended Arkansas law to govern non-Indians located there. Act of Mar. 1, 1889, ch. 333, § 1, 25 Stat. 783; Act of Mar. 1, 1895, ch. 145, § 4, 28 Stat. 696. The Indians’ communal land tenure also proved problematic, as it prevented Indians and non-Indians alike from developing the land economically. As a result, Congress ultimately decided to abolish the Five Tribes’ governance over the land, break up their communal land title, and create the State of Oklahoma.

2. Congress sought to dissolve the Five Tribes “in stages.” Jeffrey Burton, *Indian Territory and the United States*, at 194 (1995). Federal officials knew that “[w]hatever proceedings are had in Indian territory as to the final breaking up of Five Tribes and their becoming citizens of the United States” cannot “be proceeded with in the manner that lands of the reservation of wild Indians are allotted” because “they are not

on the ordinary Indian reservations, but on lands patented to them by the United States.” Census Bureau, Report on Indians Taxed and Not Taxed (1894).

At the time, the federal government usually abolished or reduced reservations by entering “an agreement ... between the Indians and agents or commissioners appointed by the Secretary of the Interior ... for that purpose.” *Id.* at 90. In 1893, Congress appointed a commission, led by Senator Henry Dawes, to “enter into negotiations with the [Five Tribes] for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes,” whether by cession, allotment, or some other method, “to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory.” Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645. This was done “in pursuance of a policy which looked to the final dissolution of the tribal government.” *Tiger v. W. Inv. Co.*, 221 U.S. 286, 300 (1911). Congress eventually authorized the Commission to survey Indian Territory and enroll tribal members in preparation for allotment of their lands. Act of June 10, 1896, ch. 398, § 1, 29 Stat. 339, 343. Congress also rendered tribal courts obsolete by conferring exclusive jurisdiction on federal courts to try all civil and criminal cases, and by subjecting all people in Indian Territory “irrespective of race” to Arkansas and federal law. Indian Department Appropriations Act of 1897, ch. 3, § 1, 30 Stat. 62, 83.

Then in 1898, Congress passed the “Curtis Act,” which abolished tribal courts and banned federal courts from enforcing tribal law. Ch. 517, §§ 26, 28, 30 Stat. 495. The

Act also directed the Dawes Commission to allot the Five Tribes' land following tribal enrollment. § 11, 30 Stat. 497. These Acts pressured the Creek Nation into an allotment agreement. The Creek Allotment Agreement, ch. 676, 31 Stat. 861 (1901), provided "for a permanent enrollment of the members of the tribe, for appraising most of the lands and allotting them in severalty with appropriate regard to their value, for using the tribal funds in equalizing allotments, for distributing what remained, for issuing deeds transferring the title to the allotted lands to the several allottees, and for ultimately terminating the tribal relation." *Sizemore v. Brady*, 235 U.S. 441, 447 (1914). That same year, Congress granted U.S. citizenship to "every Indian in Indian Territory." Act of Mar. 3, 1901, ch. 868, 31 Stat. 1447. And in 1904, Congress confirmed and extended Arkansas law to all persons and estates in Indian Territory, "Indian, freedman, or otherwise." Act of Apr. 28, 1904, § 2, 33 Stat. 573.

The Five Tribes' governments were scheduled to terminate by March 4, 1906. Act of Mar. 3, 1903, ch. 994, § 8, 32 Stat. 1008. But as that date approached, Congress feared that the dissolution of tribal governments before allotment was complete would trigger a land grant to railroad companies in which they would receive a windfall of land and natural resources within the new state. 59 Cong. Rec. 2974, 3256-57 (1906). Congress sought to prevent this, ultimately deciding to temporarily extend 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.

Then on April 26, 1906, Congress passed the Five Tribes Act, ch. 1876, 34 Stat. 137, to “provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory.” Congress closed the tribal rolls, abolished tribal taxes, took control of tribal schools, and directed the Secretary of the Interior to seize and sell all tribal buildings and furniture. The Act also directed federal authorities to sell any unallotted lands, with the proceeds applied to tribal debts and any remainder paid out per capita to tribal members. §§ 16-17, 34 Stat. 143-44. In doing all this, Congress permitted the nominal existence of tribal governments, but with severe limitations on their little remaining operations and authority. § 28, 34 Stat. 148.

Finally, Congress enacted the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906), authorizing the creation of the State through the merger of Indian and Oklahoma Territories. Congress directed the transfer of all cases arising under federal law, pending in territorial courts in the Indian and Oklahoma Territories at the time of statehood, to the newly created U.S. district courts for the Western and Eastern Districts of Oklahoma. § 16, 34 Stat. 276. All other cases were transferred to state court. § 20, 34 Stat. 277. Congress also extended the laws of Oklahoma Territory to Indian Territory (supplanting Arkansas law), until the new Oklahoma legislature provided otherwise. § 13, 34 Stat. 275. At 9 a.m. on November 16, 1907, President Theodore Roosevelt signed a proclamation authorizing the creation of the State of Oklahoma. Proclamation 780, 35 Stat. 2160 (Nov. 16, 1907). In the 111 years since,

the State of Oklahoma has consistently prosecuted Indians for major crimes committed within the historical boundaries of the Creek Nation. Not once has either the federal government or the tribe prosecuted any crimes in this area on the theory that it was a reservation.

B. Case Background.

1. In 1996, Petitioner and his wife were taking care of Petitioner's wife's granddaughter, four-year-old B.B., while B.B.'s mother was on vacation. While Petitioner's wife was at work, Petitioner penetrated B.B.'s vagina with his finger and his tongue, and forced B.B. to touch his "private." Petitioner was convicted of first degree rape, lewd molestation, and forcible sodomy. The jury recommended sentences of five hundred years each for first degree rape and lewd molestation, and life imprisonment without the possibility of parole for forcible sodomy. On direct appeal, the Oklahoma Court of Criminal Appeals (OCCA) affirmed Petitioner's convictions and sentences, recognizing that Petitioner had two prior convictions for forcible sodomy. *See McGirt v. State*, No. F-1997-967 (Okla. Crim. App. Aug. 26, 1998).

2. On August 8, 2017, the Tenth Circuit held in *Murphy v. Royal* that Congress had never disestablished the Creek Reservation and that the state therefore lacked jurisdiction pursuant to the Major Crimes Act (18 U.S.C. § 1153) to convict an Indian offender for a murder committed on that land. 866 F.3d 1164 (10th Cir. 2017). A little over a month later, on September 29, 2017, Petitioner filed a petition for writ of habeas corpus in Alfalfa County District Court, in which he similarly argued that the

State of Oklahoma lacked subject matter jurisdiction under the Major Crimes Act, 18 U.S.C. § 1153. The court dismissed the petition, holding that the appropriate procedure would be for Petitioner to file a post-conviction application in Wagoner County, where he was convicted. *See McGirt v. Bryant*, No. WH-17-22 (Alfalfa Cty. Dist. Ct. Nov. 6, 2017). Petitioner filed an untimely appeal to the OCCA. *See McGirt v. Bryant*, No. HC-2018-131 (Okla. Crim. App. Mar. 2, 2018); *McGirt v. Bryant*, No. HC-2017-1169 (Okla. Crim. App. Nov. 29, 2017).

3. On December 13, 2017, Petitioner filed a petition for writ of habeas corpus in the Oklahoma Supreme Court raising the same claim. The Oklahoma Supreme Court transferred the matter to the OCCA, which is the highest state court for criminal matters. *See McGirt v. Bryant*, No. 116,611 (Okla. Feb. 5, 2018). The OCCA considered this transferred original habeas petition along with the attempted appeal of the Alfalfa County District Court's denial of a writ of habeas corpus and dismissed both as untimely. *See McGirt*, No. HC-2018-131 (Okla. Crim. App. Mar. 2, 2018). Petitioner then asked the Oklahoma Supreme Court to review the OCCA's dismissal. The Oklahoma Supreme Court declined to assume jurisdiction. *See McGirt*, No. 116,873 (Okla. May 21, 2018).

4. On May 21, 2018, this Court granted certiorari to review the *Murphy* case. 138 S. Ct. 2026 (2018). A few weeks later, on June 18, 2018, Petitioner filed the post-conviction application that is the subject of this proceeding. On August 21, 2018, the

Wagoner County District Court denied Petitioner's application for post-conviction relief because Petitioner's arguments "mirror the arguments in the Tenth Circuit *Murphy v. Royal* case," which was pending this Court's review, "and no further action will be taken until a final decision has been made by the United States Supreme Court." Pet. App. B.

5. On February 25, 2019, the OCCA affirmed the district court. Pet. App. A at 3. The OCCA first noted that "Petitioner has not established any sufficient reason why his current grounds for relief were not previously raised," as required by statute. Pet. App. A at 2 (citing OKLA. STAT. tit. 22, § 1086). The OCCA then held that, apart from his *Murphy* claim, Petitioner had failed to "establish[] that the District Court lacked jurisdiction." Pet. App. A at 2-3. The OCCA held that "*Murphy* is not a final decision and Petitioner has cited no other authority that refutes the jurisdictional provisions of the Oklahoma Constitution." Pet. App. A at 3.

6. On April 17, 2019, Petitioner's petition for a writ of certiorari was placed on this Court's docket.

REASONS THE PETITION SHOULD BE DENIED

I. The decision below rests on independent and adequate state grounds.

The OCCA began its order with a brief procedural history of the case, after which it asserted that Petitioner had not established that he is entitled to relief. Pet. App. A. The OCCA cited a prior case which established that “it is fundamental that where a post-conviction appeal is filed, the burden is upon the petitioner to sustain the allegations of his petition” *Id.* at 2 (citing *Russell v. Cherokee Cty. Dist. Ct.*, 438 P.2d 293, 294 (Okla. Crim. App. 1968)). The OCCA then recognized its rule whereby claims not raised on direct appeal are waived and stated that “Petitioner has not established any sufficient reason why his current grounds for relief were not previously raised.” *Id.* (citing OKLA. STAT. tit. 22, § 1086). Next, the OCCA noted that Petitioner “trie[d]” to claim that his crimes were committed in Indian Country.” *Id.* The court concluded “[h]owever, the prosecution of Petitioner’s crimes in that case [CF-1996-355] was a justiciable matter, and thus he has not established that the District Court lacked jurisdiction. OKLA. CONST. art. VII, § 7 (District Courts shall have unlimited original jurisdiction of all justiciable matters in Oklahoma).” *Id.* at 2-3. Finally, the OCCA’s sole recognition of federal law came when it stated that “[t]he issues raised in Petitioner’s application are addressed in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017) and as a result are currently pending before the United States Supreme Court.” *Id.* at 3. Noting that the Tenth Circuit stayed its mandate pending this Court’s review, the OCCA concluded that “*Murphy* is not a final decision and Petitioner has cited no

other authority that refutes the jurisdictional provisions of the Oklahoma Constitution.” *Id.*

This Court lacks jurisdiction to review a state court judgment when that judgment rests on adequate and independent state grounds. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The question is whether the state court’s decision “fairly appears to rest primarily on federal law, or to be interwoven with the federal law.” *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). If the state court’s decision rests primarily on federal law, or is interwoven therewith, this Court may review the judgment unless the state court clearly and expressly indicates that its decision “is alternatively based on bona fide separate, adequate, and independent grounds.” *Id.* at 1040-41.

The OCCA’s denial of Petitioner’s post-conviction application does not rest primarily on federal law, nor is it interwoven with federal law. Rather, the OCCA determined that Petitioner, relying only on arguments that are pending this Court’s decision in *Murphy*, had failed to overcome the Oklahoma Constitution’s grant of jurisdiction on state district courts. The OCCA did not analyze the various treaties and statutes which are necessary to a determination of whether state jurisdiction was divested by the federal government. In effect, the OCCA denied Petitioner’s claim as premature, given that the *Murphy* case has yet to be decided. As the OCCA’s judgment was not based on or interwoven with federal law, this Court does not have jurisdiction to review it.

II. This Court’s decision in *Sharp v. Murphy* will render this Petition moot, and the arguments raised by the State in *Murphy* demonstrate that Petitioner’s arguments are incorrect on the merits.

Petitioner’s question presented is identical to the question presented in *Sharp v. Murphy*, No. 17-1107 (U.S.), which is pending before this Court. In that case, a member of the Muscogee (Creek) Nation murdered another member of the Creek Nation within the former boundaries of the Creek Nation. *Royal v. Murphy*, 875 F.3d 896, 904-05 (10th Cir. 2017). The question presented is “Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an ‘Indian reservation’ today under 18 U.S.C. § 1151(a).” Pet. i. This Court heard oral argument on that question on November 27, 2018. Afterward, the Court requested supplemental briefing on the question of whether “any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area’s reservation status.” *Sharp v. Murphy*, No. 17-1107, Order (Dec. 4, 2018). On June 27, 2019, the Court restored the case to the calendar for reargument.

Like respondent in *Murphy*, Petitioner claims his crime was committed “within the federally recognized reservation boundaries of the federally recognized Mvskoke Nation of Oklahoma” and that “Oklahoma courts lack subject matter jurisdiction” within that alleged reservation. Pet. 13. Because Petitioner in this case presents the same question as presented in *Murphy*, it would be inappropriate for this Court to

grant certiorari on this question before resolving *Murphy*. That decision will likely dispose of this Petition. In any event, for the reasons explained by the State in *Murphy*, Petitioner's substantive claim cannot succeed on the merits. For both these reasons, the Petition should be denied. At most, this Court should hold this Petition pending *Murphy*.

CONCLUSION

The Petition for Certiorari should be denied.

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