IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

STATE ex rel. MARK MATLOFF, DISTRICT ATTORNEY,	)	
Petitioner,	)	
v.	)	Case No. PR-2021-366
THE HONORABLE JANA WALLACE, DISTRICT JUDGE,	)	
Respondent.	)	

BRIEF OF AMICI CURIAE CHEROKEE NATION, CHICKASAW NATION, CHOCTAW NATION OF OKLAHOMA, AND MUSCOGEE (CREEK) NATION IN RESPONSE TO THE OKLAHOMA COURT OF CRIMINAL APPEALS' MAY 21 ORDER

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INTRODUCTION

Amicus curiae the Choctaw Nation of Oklahoma, joined by fellow amici the Cherokee Nation, Chickasaw Nation, and Muscogee (Creek) Nation (collectively, "Nations"), address below whether *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867, must be "applied retroactively to void a state conviction that was final when *McGirt* and *Sizemore* were announced[.]" *State ex rel. Matloff v. Wallace*, 2021 OK CR 15, ¶ 6.

The Nations have sovereign interests in the application of the rule of law established by *McGirt*, *Sizemore*, and this Court's other decisions applying *McGirt*'s principles, and thus in the retroactivity question posed by this Court. These decisions uphold the continuing existence of the Nations' Reservations and then apply those holdings to rule that federal jurisdiction is exclusive over crimes committed on the Nations' Reservations.[1] The Nations' sovereign interest in these decisions stems from their treaty rights, their responsibility for public safety on their Reservations, and their commitment to the just, speedy, and effective implementation of the rule of law.

The Nations' Reservations in eastern Oklahoma are their homelands, secured to them by treaties with the United States, in which the United States recognized the Nations' sovereign authority. Ever since, the Nations have continuously governed their Reservations and asserted

[1] *McGirt*, of course, recognized the continued existence of the Creek Reservation, *see* 140 S. Ct. at 2482, and *Sizemore* did so with respect to the Choctaw Reservation, *see* 2021 OK CR 6, ¶¶ 13-14, 485 P.3d 867, 870-71. This Court has also recognized the Cherokee and Chickasaw Reservations. *See, e.g.*, *Bosse v. State*, 2021 OK CR 3, ¶ 12, 484 P.3d 286, 291, *as corrected* (March 19, 2021), *mandate stayed*, No. 20A161, 2021 WL 2123824 (U.S. May 26, 2021); *Cole v. State*, 2021 OK CR 10, ¶ 19, *mandate stayed*, (May 28, 2021).

territorial jurisdiction within their borders.[2] Those borders have long been known in Oklahoma.[3] The United States has never disestablished those Reservations or the Nations' sovereignty.

The Nations' commitment to maintaining public safety on their Reservations is rooted in their sovereignty and relies on principles of comity to fulfill that commitment. To protect Reservation residents and visitors from crime and to ensure criminal offenses committed on the Reservations are punished under the rule of law requires cooperation between the Nations, the State, and the Federal Government. Towards that end, the Nations are parties to a master cross-deputation agreement providing for the commissioning of state and tribal officers as federal law enforcement within Indian country.[4] And "Oklahoma and its Tribes have proven they can work successfully together as partners" by negotiating intergovernmental agreements to resolve jurisdictional questions in a "spirit of good faith, comity and cooperative sovereignty...." *McGirt*, 140 S. Ct. at 2481 (cleaned up); *see id.* at 2481 n.16.

For these reasons, the Nations are committed to the full implementation of *McGirt* and this Court's decisions applying its principles. They believe the challenges that implementation poses are surmountable and temporary. As the Supreme Court observed in *McGirt*,

> Oklahoma warns of the burdens federal and tribal courts will experience with a wider jurisdiction and increased caseload. But, again, for every jurisdictional reaction there seems to be an opposite reaction: recognizing that cases like Mr. McGirt's belong in federal court simultaneously takes them out of state court. So while the federal prosecutors might be initially understaffed and Oklahoma

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[2] *See* Const. of the Cherokee Nation art. II, https://bit.ly/3w2hmjs; Const. of Chickasaw Nation pmbl., https://bit.ly/3pnJQ4R; Const. of the Choctaw Nation art. 1, § 2, https://bit.ly/3vX1fDR; Muscogee Const. art. I, § 2, https://bit.ly/2TezTec.

[3] *See* Okla. Dep't of Transp., *Tribal Jurisdictions in Oklahoma* (2010), https://bit.ly/3z1uqro; Okla. House of Reps., *Tribal Boundaries and Oklahoma House Boundaries* (n.d.), https://bit.ly/3vUMuS7.

[4] *See Tribal Compacts and Agreements*, Okla. Sec'y of State, https://bit.ly/3fP7brL (last visited June 23, 2021) (enter "Cherokee," "Chickasaw," "Choctaw," or "Creek" and "deputation" into "Doc Type" search and select "Submit"); Deputation Agreement, Doc. No. 41100 (Jan. 23, 2006), https://bit.ly/3zUriOw.

> prosecutors initially overstaffed, it doesn't take a lot of imagination to see how things could work out in the end.

Id. at 2480. Cooperation is the key to success in implementing *McGirt* and this Court's decisions.

The Nations are concerned, however, that the State is not fully committed to this goal, and is instead gearing up for another run at *McGirt*. In so doing, the State blames the *McGirt* decision for the release of criminals convicted in state court notwithstanding that the State eschewed an opportunity to prevent that result in litigating *McGirt* and before that *Murphy v. Royal*, 875 F.3d 896, 907-09, 966 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam). To obtain a decision in *McGirt* on whether the Creek Reservation established by treaty still exists today, the State chose to "put aside whatever procedural defenses it might have" to collateral review of the Oklahoma state court conviction. *McGirt*, 140 S. Ct. at 2460. In *Murphy*, the State deliberately waived any challenge to the Tenth Circuit's ruling on the retroactivity of that decision. *See infra* at 9-12. This enabled the State to describe the impacts of an unfavorable decision in *McGirt* as opening the jails and to paint itself as powerless to prevent that result. *See id.* at 2478-80.

But that was a risky strategy. Now, having lost *McGirt* and its all or nothing strategy having failed, the State seeks to blame the *McGirt* decision for its own mistakes. And rather than seek to implement *McGirt* in good faith, the State seeks to litigate piecemeal the procedural issues it eschewed in *McGirt* and waived in *Murphy*, while obtaining stays in as many cases as possible to freeze the *McGirt* decision before it can be productively implemented. The State's evident strategy is to treat these cases as potential vehicles for Supreme Court review in which the State will challenge the *McGirt* holding and foist blame for its impacts on the Supreme Court rather than

itself, while at the same time slow-walking the decision's implementation.[5] This strategy, at least with regard to the non-retroactivity question the Court poses here, is barred by *Murphy* and *McGirt*, and the State's intentional choices about how to litigate those cases.

The State's litigation strategy also makes it harder to bring the criminal justice system in eastern Oklahoma in compliance with the law. Freezing *McGirt* in place creates uncertainty which efforts to implement it cannot overcome, hindering the decision's effectiveness but serving the State's interest in attacking *McGirt*. And perhaps most absurdly, the State's strategy, if successful, would deny the federal government jurisdiction over some criminal defendants whom the federal government has already arrested or convicted since *McGirt* was decided, like McGirt himself.[6] In short, the State is prolonging the time and effort required to implement *McGirt* and magnifying its challenges—not only for the Nations, but also for the federal government, local governments, and the State itself.

The Nations therefore have a substantial interest in the question the Court has asked the parties and amici to address in this case: Namely, whether the Supreme Court's ruling in *McGirt* and this Court's ruling in *Sizemore* should be applied retroactively. In the Nations' view, this is the time to implement *McGirt*, not to seek to unsettle issues already decided.

STATEMENT OF THE CASE

Relevant procedural history and facts are set forth in the Nations' Brief in Support of Motion for Leave to File at 1-3.

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[5] *See* Appl. to Stay Mandate, *Oklahoma v. Bosse*, No. 20A161 (U.S. filed Apr. 21, 2021), https://bit.ly/3zy1uHD; Br. in Supp. of Mot. to Stay & Abate Proceedings, at 2 n.1, *Logsdon v. State*, No. PC-2020-876 (filed June 3, 2021); Supp'l Br. of Appellee & Request for Stay & Abatement of Appeal, at 3 n.3, *Roth v. State*, No. F-2017-702 (filed June 14, 2021).

[6] *See* U.S. Att'y's Office, E. Dist. of Okla., Press Release, Jimcy McGirt Found Guilty of Aggravated Sexual Abuse, Abusive Sexual Contact in Indian Country (Nov. 6, 2020), https://bit.ly/2UhY0ct.

ARGUMENT

I. The Supreme Court's Retroactivity Precedent Controls Here.

The question presented here is whether *McGirt* and *Sizemore* must be applied retroactively on collateral review of state criminal convictions. *Wallace*, 2021 OK CR 15, ¶ 6. That question must be decided in conformance with the Supreme Court's retroactivity precedents. *See Montgomery v. Louisiana*, 577 U.S. 190, 205 (2016) (upholding federal jurisdiction to decide whether a rule must be given retroactive effect by a state court); *id.* at 198-200 (interpreting *Teague v. Lane*, 489 U.S. 288 (1989) as requiring that when "a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule"); *Stevens v. State*, 2018 OK CR 11, ¶¶ 16-17, 422 P.3d 741, 746.[7] That question is distinct from whether *McGirt* and *Sizemore* must be applied on direct review in civil and criminal cases. The Supreme Court's determinations of the law are always binding on cases brought after, or open on direct review, when they are handed down:

> When th[e Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993); *accord Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final").[8]

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[7] The term "retroactivity" is a misnomer, as what a court "actually determine[s]" in making this analysis is "not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008); *id.* at 271, n.5 ("It may, therefore, make more sense to speak in terms of the 'redressability' of violations of new rules, rather than the 'retroactivity' of such rules," as the retroactivity framing "presupposes [an incorrect] view of our decisions as *creating* the law, as opposed to *declaring* what the law already is.") (quoting *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in judgment)) (alteration in original).

[8] Thus, the issue to be decided here is not whether the Choctaw Reservation existed when Parish committed his crimes. That was unequivocally decided by *McGirt* and *Sizemore*. Nor is the question of whether the existence of the

The question in this case—whether a violation of the rights set forth in *McGirt* and *Sizemore* that occurred prior to their announcement entitles a criminal defendant to relief on collateral review—is subject to settled rules. State courts must, on collateral review, apply "new" substantive rules of federal law but are not required to do so for most "new" procedural rules. *Montgomery*, 577 U.S. at 198-200 (discussing *Teague*).[9] A rule is "new" "'when it breaks new ground or imposes a new obligation' on the government.... 'To put it differently,' ... 'a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (quoting *Teague*, 489 U.S. at 301). On the "flipside[,] *Teague* also made clear that a case does *not* announce a new rule, [when] it [is] merely an application of the principle that governed a prior decision to a different set of facts." *Id.* at 347-48 (quoting *Teague*, 489 U.S. at 307) (cleaned up). In such instances, the law is clear: "when we apply a settled rule ... a person [may] avail herself of [a] decision on collateral review." *Id.* at 347. The law has long been settled that:

> when a decision of th[e Supreme] Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

Reservations applies in civil cases or direct review criminal cases that were not final before *McGirt* and its follow-on cases were decided, which is answered by *Harper* and *Griffith*. Rather, the question is whether petitioners can rely on the Reservations's existence to attack their convictions on collateral review.

[9] "New" rules are "substantive," and thus retroactive, when they "include[] decisions that narrow the scope of a criminal statute by interpreting its terms, as [are] constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (citations omitted). *Teague* also held that "watershed rules" that "implicat[e] the fundamental fairness and accuracy of the criminal proceeding" apply retroactively, even if they are procedural. *Id.* at 352 (citations omitted); *see Teague*, 489 U.S. at 311-314. But the Supreme Court overruled that exception in *Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021).

United States v. Johnson, 457 U.S. 537, 549 (1982) (citations omitted). *Accord Griffith*, 479 U.S. at 324 & n.10 (noting *Griffith* overruled *Johnson* on other grounds, but not this rule of law); *Yates v. Aiken*, 484 U.S. 211, 216, 216 n.3 (1988) (citing *Johnson*, 457 U.S. at 549).

These rules determine the retroactive effect of *McGirt* and *Sizemore* in post-conviction proceedings in state court in criminal cases.[10] As we show next, the Tenth Circuit's decision in *Murphy* conclusively resolved that question by holding that the application of *Solem v. Bartlett*, 465 U.S. 463 (1984)—the basis of the *Murphy* and *McGirt* rulings, and thus of *Sizemore* as well—to a particular reservation *does* apply on collateral review. The Tenth Circuit held that the State had failed to raise the application of *Teague*'s "new" rule exception, and that application of the *Solem* test to any particular reservation does not constitute a "new" rule in any event because the case before it was controlled by decisions that predated the 2003 finality of Murphy's conviction. *Murphy*, 875 F.3d at 907-09, 966. *Murphy* controls here because it is a ruling of federal law and "[i]f a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'" *Montgomery*, 577 U.S. at 205 (quoting *Yates*, 484 U.S. at 218). Accordingly, we now examine its holding.

II. *Murphy* Held That Applications Of *Solem* Do Not Establish "New" Rules, And In *McGirt* The State Relied On The Retroactivity of *McGirt* To Make Its Case.

Murphy presented the same issue as *McGirt*. There, Murphy—an Indian criminal defendant—sought collateral review of his state court conviction of offenses committed on the Creek Reservation that he contended were subject to exclusive federal jurisdiction under the Major Crimes Act, 18 U.S.C. § 1153 ("MCA"). 875 F.3d at 905, 907, 911. He had earlier sought post-

[10] We consider only that issue. Neither *McGirt* nor *Sizemore* considered civil jurisdiction. *McGirt* expressly distinguished the question before it from civil law questions that the State had urged as outcome-determinative concerns. *See* 140 S. Ct. at 2480. *Sizemore* then relied on *McGirt* to decide a question of criminal jurisdiction. *See* 2021 OK CR 6, ¶¶ 8, 9.

conviction relief in the Oklahoma courts, which this Court had denied. *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198. He then sought *habeas corpus* relief in federal district court. On appeal of the denial of his *habeas* petition, the Tenth Circuit applied the three-part *Solem* test for reservation diminishment, *see* 875 F.3d at 920-21, and comprehensively reviewed the facts and legal history of the Creek Reservation's creation, the legal authority authorizing, and circumstances surrounding, allotment of the Reservation, and the subsequent history of the Reservation since allotment, *id.* at 937-66. The court concluded that Congress had never disestablished the Creek Reservation and that as Murphy's crimes were committed on the reservation the federal government had exclusive jurisdiction to try and convict him. *Id.* at 966.

Before proceeding to the merits, however, the court considered several procedural barriers. The court first considered and rejected the State's argument that the Antiterrorism and Effective Death Penalty Act ("AEDPA") barred Murphy's claim.[11] The court then considered whether, independent of AEDPA, that claim was barred by the general rule of *Teague* that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Murphy*, 875 F.3d at 929 n.36 (quoting *Teague*, 489 U.S. at 310; citing *Danforth*, 552 U.S. at 266 n.1). The Tenth Circuit held that "*Teague* does not pose a barrier to Mr. Murphy," *id.*, for three reasons. First, "the State does not argue that *Teague* should preclude relief. In such circumstances, 'a federal court may ... decline to apply *Teague*.'" *Id.* (quoting *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994)). Second, *Teague* was inapplicable

[11] AEDPA provides that federal courts may only grant *habeas* relief when a state court's adjudication of a post-conviction relief claim on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States...." 875 F.3d at 912-13 (quoting 28 U.S.C. § 2254(d)(1)). The Tenth Circuit found that this Court's decision on the merits of Murphy's claim that the Creek Reservation still exists was "contrary to" clearly established Supreme Court precedent, namely *Solem*. 875 F.3d at 913, 919-28.

because Murphy "d[id] not seek the benefit of a rule that falls within *Teague*'s retroactivity bar." *Id.* *Murphy* did not establish a "new" rule because the cases on which Murphy's claim relied, including those decided after his conviction became final in 2003, only "appl[ied] the *Solem* framework to factual scenarios for which the test was developed," and "[a] case does not announce a new rule under *Teague* 'when it is merely an application of the principle that governed a prior decision to a different set of facts.'" *Id.* (quoting *Chaidez v. United States*, 568 U.S. 342 (2013)). As the court explained:

> "A rule of general application," that is, "a rule designed for the specific purpose of evaluating a myriad of factual contexts," will only "infrequently yield a result so novel that it forges a new rule, one not dictated by precedent." When a court "applies a general standard to the kind of factual circumstances it was meant to address, the resulting decision will rarely state a new rule for *Teague* purposes."

Id. (quoting *Chaidez*) (cleaned up). Third, even "if *Teague* required us to limit our analysis to pre-finality law, we would still reach the same result." *Id.* In sum, *Teague*'s retroactivity bar is inapplicable to the *Murphy* decision.[12]

The State never challenged the *Murphy* court's determination that the application of *Solem* to decide Murphy's claims did not establish a "new" rule under *Teague* and was not subject to *Teague's* retroactivity bar. Nor did it challenge that determination in *McGirt*. Rather than attempting to block the release of convicted criminals on collateral review in state court through a

[12] Even if *Murphy*, or *McGirt*, or both, were considered to announce a "new" rule, that rule would apply retroactively because it is plainly a substantive rule of constitutional law which must be given retroactive effect. *Montgomery*, 577 U.S. at 199-200. Substantive rules include "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish," *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (quoting *Schriro*, 542 U.S. at 351-52), and thus includes cases in which "the new ruling was that a trial court lacked authority to convict a criminal defendant in the first place," *Griffith*, 479 U.S. at 324 & n.10 (citing *Johnson*, 457 U.S. at 550). *McGirt* established just such a substantive rule. 140 S. Ct. at 2462 ("Under our Constitution, States have no authority to reduce federal reservations lying within their borders," as that power "belongs to Congress alone"); *id.* at 2462-68, 2474 (Congress did not disestablish the Creek Reservation, which is Indian country under 18 U.S.C. § 1151(a)); *id.* at 2478 ("Only the federal government, not the State, may prosecute Indians for major crimes committed in Indian country.").

challenge to retroactivity, the State instead argued that the Tenth Circuit and Supreme Court should block their release by holding that the Creek Reservation was disestablished. In short, the State made a strategic decision to accept *Murphy*'s retroactivity, so that it could argue that the release of criminals could only be avoided by a holding that the Reservation had been disestablished.

The State's first opportunity to challenge the *Murphy* ruling on retroactivity was in its petition for rehearing or rehearing en banc, which it filed shortly after the panel issued its decision. *See* Pet. for Panel Rehr'g or Rehr'g En Banc, *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017) (Nos. 07-7068, 15-7041) (attached as Ex. 1). There, the State challenged the court's application of AEDPA, *id.* at 11-19, but not the court's determination that its ruling was not subject to *Teague*'s retroactivity bar. Instead, the State relied on the impact of *Murphy* on state convictions to argue for rehearing, accepting the decision's retroactivity to seek a bigger prize:

> Potentially every state conviction involving tribal members in the entire eastern half of the State will be challenged. Respondent estimates that this could result in thousands of petitions for habeas corpus in Oklahoma's federal courts. If those are granted, federal prosecutors will shoulder the burden of re-litigating these cases before federal judges, plus all future such cases going forward.

Id. at 2.

When the court rejected the State's petition for rehearing, 875 F.3d at 901, the State sought certiorari from the Supreme Court and again failed to challenge the Tenth Circuit's conclusion that applications of *Solem* are retroactive on collateral review. *See* Pet. for Writ of Cert., *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (No. 17-1107), 2018 WL 776368. Instead, the State urged that review should be granted because: "[*Murphy*'s] holding has already placed a cloud of doubt over thousands of existing criminal convictions.... Prisoners have begun seeking post-conviction relief in state, federal, and even tribal court, contending that their convictions are void *ab initio*." *Id.* at *2. The State said it would "resist any attempts to overturn valid convictions,"

id. at *21, but suggested that could be futile. It adhered to that view in reply. *See* Reply Br., 2018 WL 1942531, at *1 ("[f]ederal and state courts would face challenges to hundreds, if not thousands, of existing criminal convictions"). But it omitted any challenge to the retroactivity of *Murphy*.

Nor did the State raise the possibility of non-retroactivity in its briefing on the merits or at oral argument, relying instead on "jurisdictional consequences" and the "onslaught" of collateral attacks on convictions to justify reversal. *See* Br. for Pet'r, 2018 WL 3572365, at *4; Reply Br. for Pet'r, 2018 WL 5263260, at *21. At oral argument, the United States apparently relied on this understanding of the law and the State did not seek to correct it. *See* Oral Arg., 2018 WL 6200336, at *31. And in its supplemental briefing after oral argument the State asserted that that there was no way to prevent *Murphy* from being raised on collateral review, because "there are no apparent procedural bars to raising lack of subject matter jurisdiction in state-court collateral challenges to convictions." Supp'l Br. for Pet'r, 2018 WL 6918968, at *3 n.1. The State even attacked any attempts to establish such bars:

> [t]ellingly, the federal defender representing respondent identifies no limits on state collateral review in Oklahoma courts.... The Tribe speculates ... that laches might bar some collateral challenges. But laches and waiver are cut from the same cloth, and the Tribe ignores the mountain of precedent in Oklahoma holding that collateral challenges to subject-matter jurisdiction are never waived and can be raised at *any time* - precedent from which respondent himself benefited.

Supp'l Reply Br. for Pet'r, 2019 WL 181596, at *7.

The State remained committed to this approach in *McGirt*. After the Tenth Circuit decided *Murphy*, McGirt filed a *pro se* petition for certiorari challenging this Court's denial of his petition for post-conviction relief. Pet. for Writ of Cert., *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2019 WL 7372927. The State could have raised the retroactivity issue in response, but instead it asserted that the Court should not grant certiorari in *McGirt* until it decided *Murphy*

because "[t]hat decision will likely dispose of this Petition." Br. in Opp., 2019 WL 7372928, at *12. And after the Court granted certiorari, the State leaned hard on the argument that a decision against the State in *Murphy* or *McGirt* would be retroactive, asserting that "[r]eversal also risks reopening thousands of state convictions, just like this case.... Petitioner acknowledges that Oklahoma allows collateral challenges to subject-matter jurisdiction at any time-a rule that petitioner himself invokes." Br. for Resp't, 2020 WL 1478582, at *43. The State even asserted the possible impacts in the civil jurisdictional realm to support its position, concluding that "[t]hus, like criminal law, civil implications have their own retroactivity problems...." *Id.* at *44. It emphasized the supposed threat of retroactive application of *McGirt* by asserting that "it is unclear how Congress could fix these retroactive problems...." *Id.* at *45. Again, the United States made similar representations at oral argument that went uncorrected by the State. Oral Arg., 2020 WL 2425717, at *87 ("...this [would] jeopardize all the prior [state] convictions ....").

The State's strategy then, has been to concede the retroactivity of *Murphy* and *McGirt* by deliberately bypassing opportunities to seek to limit their retroactive effect in order to make fear of the release of convicted criminals an argument for disestablishment of the Creek Reservation. That strategy did not escape the Court's notice, which remarked in *McGirt* that the State "ha[d] put aside whatever procedural defenses it might have" to collateral review of the Oklahoma state court conviction in order to secure a ruling on the Reservation's existence. 140 S. Ct. at 2460; *see id.* at 2479-80. But now that strategy has failed, and the retroactive effect of *Murphy* and *McGirt* on collateral review of state criminal convictions has been established.

III. The State Is Collaterally Estopped From Challenging *Murphy*'s Retroactivity Conclusion.

The applications of *Solem* in *Murphy* and *McGirt*, the continued existence of Indian reservations in Oklahoma according to those decisions, and the interpretation and application of the MCA in those decisions, are all questions of federal law that were decided by a federal court. Therefore, this Court must apply federal law preclusion principles to determine the preclusive effect of those decisions here. *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994). The preclusion doctrine that applies here is non-mutual collateral estoppel, under which a litigant is barred from re-litigating an issue of fact or law decided in an earlier case where:

> (1) the issue previously decided is *identical* with the one presented in the action in question, (2) the prior action has been *finally adjudicated on the merits,* (3) the party against whom the doctrine is invoked was a *party or in privity with a party* to the prior adjudication, and (4) the party against whom the doctrine is raised had a *full and fair opportunity to litigate* the issue in the prior action.

Stan Lee Media, Inc. v. Walt Disney Co., 774 F.3d 1292, 1297 (10th Cir. 2014) (quotation and paragraph breaks omitted). "The Supreme Court has also advised that the issue decided must be 'essential to the judgment.'" *Id.* (quoting *Arizona v. California*, 530 U.S. 392, 414 (2000)).

In short, "subject to certain well-known exceptions, the general rule is that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (quoting Restatement (Second) of Judgments § 27 (1980) and citing *id.* § 28 (listing exceptions)). The Restatement also makes clear that "[a] party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity

to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue." *Id.* § 29. The State had such a full and fair opportunity in *Murphy* and all of the elements of non-mutual collateral estoppel are met here.[13]

First, the issue previously decided in *Murphy* is identical to the question the Court has asked the parties and amici to answer. The Court has asked for briefing on whether *Ferrell v. State*, 902 P.2d 1113 (Okla. Ct. Crim. App. 1995), *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), and *Edwards*, 141 S. Ct. 1547, permit it to apply "the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations" retroactively on collateral review. *Wallace*, 2021 OK CR 15, ¶ 6. Those cases all considered whether a ruling was retroactive under *Teague* because it was a "new" rule. *See Ferrell*, 902 P.2d at 1114-15; *Cuch*, 79 F.3d at 991; *Edwards*, 141 S. Ct. at 1554-62. And as just shown, *Murphy* also considered whether, under *Teague*, determinations of reservation status made under *Solem* could be applied retroactively and found that they could because they were not "new" rules. *Murphy*, 875 F.3d at 929 n.36.

Second, *Murphy* has been finally adjudicated on the merits. "Finality occurs when direct state appeals have been exhausted and a petition for writ of certiorari from [the Supreme] Court has become time barred or has been disposed of." *Greene v. Fisher*, 565 U.S. 34, 39 (2011). The State sought certiorari review as the final stage of appeal of Murphy's petition for *habeas* relief. The Supreme Court issued a per curiam opinion affirming the Tenth Circuit's decision on the same day that it decided *McGirt*. The time for rehearing has long since passed. S. Ct. Rule 44.1.

Third, the warden in *Murphy* was functionally the same as, or in privity with, the State. The State was a party to *Murphy* because the habeas petition was brought against a state officer in

[13] The fact that the prior proceeding was a habeas action has no impact on these factors' application here. *See Morgan v. U.S. Parole Comm'n*, 304 F. Supp. 3d 240, 250 (D.D.C. 2016).

his official capacity, and "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (citation omitted). Even if the State is considered a nonparty to Murphy's habeas proceedings, it was in privity with the warden, who "adequately represented" the State because they shared "the same interests"—namely upholding a state court conviction of a state prison inmate—and the State's lawyers "assume[d] control" over the litigation. *Taylor v. Sturgell*, 553 U.S. 880, 894-95 (2008) (citations omitted). Indeed, the Oklahoma Attorney General has represented the State, its officers, and county district attorneys in *Murphy*, *McGirt*, this Court's follow-on decisions like *Sizemore*, and the other state direct appeals and collateral challenges and federal *habeas corpus* actions that criminal defendants and petitioners have brought raising reservation diminishment issues.

Fourth, the State had a "full and fair opportunity to litigate the issue" in *Murphy*. Application of this principle rests on the "fundamental fairness of preventing the party from relitigating an issue he lost in a prior proceeding," *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1521 (10th Cir. 1990), and "often will focus on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties," *Stan Lee Media*, 774 F.3d at 1297 (cleaned up) (quotation omitted). No such procedural limitations existed in the prior proceeding. After the panel decision in *Murphy*, the State had multiple opportunities to challenge the panel's decision on retroactivity, including to the court itself and to the Supreme Court, but chose not to do so. The State certainly had the incentive to litigate the issue fully, as its own briefing indicated: The retroactivity of *Murphy* and *McGirt* could impact existing state convictions. And nothing in the nature of the parties limited the State's effective litigation of these

issues—in fact, the petitioners and amicus Muscogee (Creek) Nation in *Murphy* and *McGirt* put the potential procedural bars to retroactive prosecution at issue, and the State rejected their availability in categorical terms. *Supra* at 11-12. So, there is nothing unfair in preventing the State from relitigating now what it chose not to litigate before.

Finally, the *Murphy* court's decision was "essential" to its judgment. By assessing and rejecting the application of *Teague*, and then finding that *Teague* could not bar its decision, the court set aside a jurisdictional barrier to its ruling. The court noted that *Teague* would "impose[] another limitation on habeas relief in certain circumstances." 875 F.3d at 929 n.36. *Teague* itself acknowledged that its general rule provides a complete bar to seeking *habeas* relief, based on important underlying principles of judicial finality:

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*." "[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality."

489 U.S. at 309 (citations omitted).[14] Thus, had *Teague*'s retroactivity bar applied to the post-conviction cases applying *Solem* that Murphy cited, the court could not have ruled as it did.

Finally, while the Supreme Court has concluded that non-mutual collateral estoppel does not apply against the United States, *United States v. Mendoza*, 464 U.S. 154, 159-61 (1984), neither the Supreme Court nor the Tenth Circuit has ever held that non-mutual collateral estoppel is inapplicable to states. *See Hagen v. Utah*, 510 U.S. 399, 409 (1994) (noting that whether state

[14] The fact that *Murphy* found several different reasons why *Teague*'s retroactivity bar was inapplicable does not affect the preclusive effect of that determination. When "there are alternative bases for a determination that is essential to the judgment," then "relitigation of the issue so determined is properly precluded" by collateral estoppel. Restatement (Second) of Judgments § 27, cmt. *i*; Wright & Miller, 18 *Federal Practice & Procedure* § 4421 (3d ed. 2021 update).

was subject to non-mutual collateral estoppel was a "threshold question" but finding it was not properly presented for consideration); *Cuch*, 79 F.3d at 989 n.3 (explicitly recognizing that litigants in underlying state court reservation diminishment cases had not argued the State was collaterally estopped by earlier federal diminishment cases). Nor has the Oklahoma Supreme Court applied *Mendoza* to bar nonmutual collateral estoppel against the State. *See Union Oil Co. of Cal. v. Bd. of Equalization*, 913 P.2d 1330, 1336 (Okla. 1996) (acknowledging *Mendoza*'s application to the federal government). In the absence of Tenth Circuit precedent extending *Mendoza* to state governments, no such exception exists at present, and it would be inappropriate for a state court to invent one. *See In re Stevenson*, 40 A.3d 1212, 1222 n.8 (Pa. 2012); *see also DeCastro v. City of New York*, 278 F. Supp. 3d 753, 764 n.13 (S.D.N.Y. 2017); *Jones v. Cannizzaro*, No. 18-503, 2019 WL 2289470, at *6 (E.D. La. May 28, 2019).[15]

IV. The Court Must Follow The Tenth Circuit's Application Of *Teague*.

Even if the doctrine of non-mutual collateral estoppel did not control the result here, this Court must follow the Tenth Circuit's decision in *Murphy* that *Teague* did not, and could not, bar application on collateral review of *Solem* and progeny to determine that the Creek Reservation was not disestablished. As the Oklahoma Supreme Court has explained,

> Ordinarily, as a matter of comity, we follow Tenth Circuit jurisprudence on substantive federal law. The voluntary deference we pay to our circuit's

[15] If *Mendoza*'s application to states were considered, it would not apply, because the factors on which the Supreme Court relied to bar application of nonmutual collateral estoppel to the United States in the circumstances of that case do not apply here. *Compare* 464 U.S. at 160-61 *with State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 951-52 (Alaska 1995); *see also Benjamin v. Coughlin*, 905 F.2d 571, 576 (2d Cir. 1990). Unlike with the federal system, there is no "desirability" of permitting "several courts of appeals" to explore difficult questions, as this Court is the only state criminal appellate court and appeals are as of right. Okla. Stat. tit. 22, § 1051(a). Because there is only one criminal appeals court, the State "essentially litigates in a single jurisdiction and is faced with a much smaller volume of litigation" than is the federal government. *See Cook Inlet*, 895 P.2d at 952. And the importance of "preserving policy choices for future administrations" is irrelevant here, where the State has litigated the prior case to finality before the U.S. Supreme Court. For these reasons, *Murphy* has preclusive effect here. *But see Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 714 (9th Cir. 2005) (holding that *Mendoza* applies in a suit against a state agency), and *Hercules Carriers, Inc. v. Fla., Dep't of Transp.*, 768 F.2d 1558, 1579 (11th Cir. 1985) (same).

> pronouncements prevents federal law from being dichotomized within the State of Oklahoma into different bodies of legal norms.... Our commitment to comity is founded on sound reasoning and we will not depart from it absent compelling reason. Such a reason exists where the Tenth Circuit interprets a Supreme Court decision in a way which we are convinced is erroneous and where to follow it would be to perpetuate error.

Akin v. Mo. Pac. R.R., 1998 OK 102, ¶ 30, 977 P.2d 1040, 1052 (footnotes omitted). This Court also follows that approach. *See Fitzgerald v. State*, 1998 OK CR 68, ¶ 28, 972 P.2d 1157, 1169.

There is no compelling reason to reject *Murphy*'s application of *Teague* here, and therefore this Court must adopt it. In the first place, as discussed above, the State has undertaken a litigation strategy of assuming the retroactivity of *Murphy* and *McGirt* and using that to argue how the merits of those cases should come out, rather than asserting non-retroactivity to limit the supposed impacts of the *McGirt* ruling. The State should not be able to "dichotomize" federal law in Oklahoma merely to escape the consequences of its own litigation strategy.

Moreover, the Tenth Circuit's decision that *Teague* does not apply is persuasive. *Murphy* followed the Supreme Court's teaching that when a court "appl[ies] a general standard to the kind of factual circumstances it was meant to address, [the resulting decision] will rarely state a new rule for *Teague* purposes." *Chaidez*, 568 U.S. at 348. *Solem* is such a general standard, which the *Murphy* court applied to the "kind of factual circumstances it was meant to address": whether Congress disestablished reservation boundaries. *Murphy* relied on *Nebraska v. Parker*, 577 U.S. 481 (2016), which applied *Solem*'s "well settled" framework," *id.* at 487, *see* 875 F.3d at 930-31, the Tenth Circuit's decisions applying *Solem*, 875 F.3d at 931-32, and *Solem* itself, which the court found was "clearly established law" and that "the State's brief recognize[d]" was controlling, *see id.* at 921-23, for the governing legal test. It recognized that, under *Solem* step one, the statutory language is the "most probative evidence of congressional intent," but that under *Solem* step two,

unequivocal contemporary events can overcome language that "would otherwise suggest reservation boundaries remained unchanged," and under *Solem* step three, subsequent facts are "consider[ed], though '[t]o a lesser extent.'" *Id.* at 920-21 (quoting *Solem*, 465 U.S. at 470-72) (second alteration in original). It then applied that framework, *id.* at 937-66, concluding that "[t]he most important evidence—the statutory text—fails to reveal disestablishment at step one. Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation's borders," and that the other evidence was equivocal, *id.* at 937-38, 960, 966. Thus, under *Chaidez*, the Tenth Circuit's *Murphy* ruling was not "new."

That is also true of the *McGirt* Court's analysis. That holding turned on the following: first, the settled rule that "[o]nly Congress can divest a reservation of its land and diminish its boundaries." 140 S. Ct. at 2462 (quoting *Solem*, 465 U.S. at 470), as Congress "wields significant constitutional authority when it comes to tribal relations," and state authority to disestablish a reservation "would be at odds with the Constitution,'" *id.*; second, an examination of the law and history governing the rights of the Muscogee (Creek) Nation in Oklahoma, *id.* at 2460-74; and third, the rejection of the State's arguments that there was never a Creek Reservation, and the MCA was inapplicable in eastern Oklahoma, *id.* at 2474-78. The first component was resolved simply by reference to precedent. The others required applying the *Solem* precedent to the facts and law. Relying on *Solem*, the Court concluded that Congress never unequivocally disestablished the Creek Reservation, and contrary but equivocal contemporary and subsequent evidence could not undo that conclusion. *Id.* at 2467-68.

Moreover, the *Murphy* Court also concluded that the existence of the Creek Reservation was required by precedents that were not "new" because they were in existence at the time Murphy's criminal conviction became final on April 21, 2003. *Murphy*, 875 F.3d at 929 n.36.

Parish's conviction, of course, became final after Murphy's. *Wallace*, 2021 OK CR 15, ¶ 2. As with Murphy, Parish's challenge to state jurisdiction is controlled by *Solem*, a pre-finality case. *See supra* at 8-9. Thus, the Tenth Circuit's conclusion in *Murphy* that *Teague* does not apply because the case is resolved by pre-finality precedents must govern here, as well.

Neither *Ferrell*, *Cuch*, nor *Edwards* are to the contrary. *Ferrell* and *Edwards* considered earlier cases that had established new rules of criminal procedure, while acknowledging that new substantive rules generally have retroactive effect. *Ferrell*, 902 P.2d at 1114-15; *Edwards*, 141 S. Ct. at 1554-55 & n.3, 1562. Neither *Murphy* nor *McGirt* concerned a "new" rule of criminal procedure. *See supra* at 8-9. And *Cuch* ruled that the Supreme Court's reservation diminishment decision concerning the Ute Indian Reservation should not apply retroactively on collateral review, 79 F.3d at 991-94, but did so without considering *Solem*, on which *Murphy* and *McGirt* turned, *see supra* at 18-19. It also did not consider the different legal and factual contexts which *Murphy* and *McGirt* addressed—in which the Tenth Circuit has since found applying *Solem* does not establish a "new" rule. Even before *Murphy*, *Cuch* had been called into question as a result-driven misapplication of a retroactivity test that the Supreme Court had since abandoned in *Griffith*. *Covey v. United States*, 109 F. Supp. 2d 1135, 1139-40 (D.S.D. 2000). As *Covey* noted in rejecting *Cuch*'s finding of non-retroactivity in the reservation diminishment context, "[e]xigencies of a situation are no basis for a court to confer jurisdiction upon itself for past cases where it recognizes it has no jurisdiction for similarly situated pending or future cases." *Id.* at 1140. For these reasons, the *Murphy* Court's conclusion holds here, not the non-retroactivity rule of *Teague*.

CONCLUSION

For the foregoing reasons, the Court should find that the State, having eschewed the non-retroactivity principle of *Teague* for so long, cannot now avail itself of that principle.

Dated: June 24, 2021

Respectfully submitted,

By: _____

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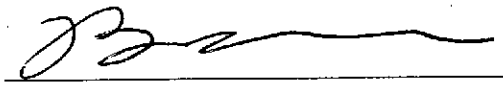

EXHIBIT 1

TO

BRIEF OF AMICI CURIAE CHEROKEE NATION, CHICKASAW NATION, CHOCTAW NATION OF OKLAHOMA, AND MUSCOGEE (CREEK) NATION IN RESPONSE TO THE OKLAHOMA COURT OF CRIMINAL APPEALS' MAY 21 ORDER

Case Nos. 07-7068 & 15-7041

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PATRICK DWAYNE MURPHY,
Petitioner-Appellant,

v.

TERRY ROYAL, WARDEN,
Respondent-Appellee.

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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SEPTEMBER 21, 2017

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RULE 35(b) STATEMENT

The panel decision in this case may precipitate the most significant change in the nature of the State of Oklahoma since formation of the State in 1907. It has the potential of fundamentally altering the answer to the question: What is Oklahoma? This proceeding thus "involves a question of exceptional importance," satisfying Rule 35's criterion for *en banc* or panel rehearing. Fed. R. App. P. 35(a)(2).

In granting habeas corpus relief to Petitioner, the panel held for the first time that the 1866 exterior boundaries of the Creek Reservation have never been disestablished. Thus, the opinion states, the State has no jurisdiction to prosecute any crime, including the murder perpetrated by Petitioner, committed by or against an American Indian in all or parts of eleven Oklahoma counties that include much of the City of Tulsa (Oklahoma's second largest metropolitan area). Panel Op. 124-26. This area comprises over three quarters of a million people.[1] Instantly, the new Creek reservation will become—by far—the largest reservation by population in the United States.[2] Moreover, because the history of the Creek Nation in Oklahoma is similar to the other "Five Civilized Tribes" in the State, those other tribes can be expected to argue that they too possess an existing reservation. *See Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d

[1] U.S. Census Bureau, U.S. Census 2010, 2010 Census Demographic Profiles, interactive map available at https://www.census.gov/2010census/popmap/.

[2] By comparison, the current largest reservation is the Navajo Nation's, which contains just over 100,000 people, and the second largest is the Yakama Nation's, which contains about 30,000 people. *See id.*

967, 970 & n.2 (10th Cir. 1987). The territory thus at stake will encompass about *half* of the State, both in terms of population and land area.[3]

Potentially every state conviction involving tribal members in the entire eastern half of the State will be challenged. Respondent estimates that this could result in thousands of petitions for habeas corpus in Oklahoma's federal courts. If those are granted, federal prosecutors will shoulder the burden of re-litigating these cases before federal judges, plus all future such cases going forward. And evidence of many of the most serious crimes committed twenty or thirty years ago may no longer be available. Eastern Oklahoma will likely become one of the largest federal criminal jurisdictions in the United States.

Beyond criminal law, Oklahoma will likely face protracted litigation regarding its civil and regulatory authority in all of eastern Oklahoma. The State has limited authority to regulate and tax tribal members living and working on Indian Country, *see, e.g., Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993), which includes reservations. States may be preempted from regulating even non-member activity in a reservation based on a "flexible" "balancing test" sensitive to many particular issues and subject to "no rigid rule." *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Thus, the State's civil and regulatory jurisdiction in half the State will likely be subject to decades

[3] The total population in the former territory of the Five Civilized Tribes is over 1.8 million, which is more than 48% of the State's population. Of those, about 12% are Native American. *See* U.S. Census, *supra* n.3.

of litigation—over such fundamental matters as taxation, natural resources, and environmental protection. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989); *Rice v. Rehner*, 463 U.S. 713, 720-35 (1983). Indeed, the civil rights protections of the U.S. Constitution may now be inapplicable to many Oklahoma citizens who, without prior knowledge, suddenly find themselves on a reservation. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). The panel's decision thus presents a question of exceptional importance.

En banc consideration is also "necessary to secure or maintain uniformity of the court's decisions," Fed. R. App. P. 35(a)(1), because the panel's decision cannot be reconciled with this Court's earlier decision in *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010). The Court there held that the Osage Nation's reservation in Oklahoma *was* disestablished because, *inter alia*, the Osage territory underwent the same allotment process as the Creeks "[i]n preparation for Oklahoma's statehood," which had already "extinguished national and tribal title to lands within the territory and disestablished the Creek and other Oklahoma reservations." *Id.* at 1124.

Clearly established Supreme Court precedent does not compel these results. Rather, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") prevents this Court from granting habeas relief.[4] Even assuming the Court rejects

[4] *See, e.g.*, *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (per curiam); *White v. Woodall*, 134 S. Ct. 1697 (2014); *House v. Hatch*, 527 F.3d 1010 (10th Cir. 2008).

Respondent's strong case for rehearing, Respondent asks the Court in the alternative to issue only a limited reversal of the district court's decision below, remanding for an evidentiary hearing on this immensely important issue.

ARGUMENT

I. This Court's decision in *Osage Nation v. Irby* and the congressional plan to extend state jurisdiction over the Creek Nation's former lands requires finding disestablishment.

A. The Court's decision in *Irby* was premised on the understanding that the Creek reservation had been disestablished.

In *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), this Court held that the Osage reservation had been disestablished. The court's analysis began with the language of the relevant legislation leading up to the incorporation of Osage land into the State of Oklahoma. It stated that "neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language" and thus they do "not unambiguously suggest diminishment or disestablishment of the Osage reservation." *Id.* at 1124. Notably, both the 1906 Osage Allotment Act and the 1901 Creek Allotment Act contain substantially similar provisions, having nearly identical operative allotment language that requires "all lands" to be allotted among the members of the tribe. *Compare* "Osage Allotment Act," Act of June 28, 1906, § 2, 34 Stat. 539, 540 *with* "Creek Allotment Act," Act of March 1, 1901, § 3, 31 Stat. 861, 862. Thus, if the panel opinion stands, it would mean that Congress intended the historical lands of the Osage Nation and Creek Nation (which bordered each other) to receive *different* legal treatment despite using largely the *same*

statutory form, separated by about five years, as part of a unified plan to create a State in the relevant territory. This cannot be.

Indeed, the historical circumstances analyzed in *Irby* demonstrate otherwise. Despite somewhat ambiguous statutory language, the court in *Irby* found disestablishment of the Osage reservation based primarily upon "[t]he manner in which the Osage Allotment Act was negotiated," which "reflects clear congressional intent and Osage understanding that the reservation would be disestablished." *Irby*, 597 F.3d at 1124. Specifically: "In preparation for Oklahoma's statehood, the Dawes Commission had already implemented an allotment process with the Five Civilized Tribes that extinguished national and tribal title to lands within the territory and *disestablished the Creek and other Oklahoma reservations*." *Id.* (emphasis added). As a result of these disestablishments, the *Irby* court found, "the Osage felt pressure having observed the Commission's activities with respect to other tribes" to negotiate more favorable terms for their own "bill to abolish their tribal affairs and to get their lands and money fairly divided." *Id.* The Osage did this in full recognition that "*like the Indians of other tribes*, the Osage may very well lose their allotments *after dissolution of the reserve*." *Id.* (emphasis added).

The *Irby* court's analysis of the historical circumstances of Osage allotment concluded with record evidence of historians' explanation of the formation of Oklahoma. This evidence "thoroughly discussed the United States' persistent efforts to end tribal

control in the Indian Territory, which eventually became part of Oklahoma." *Id.* at 1125. It explained that "[t]he Indians of Oklahoma were an anomaly in Indian-white relations" because "*[t]here are no Indian reservations in Oklahoma.*" *Id.* (emphasis added). Accordingly, "while Congress had established many reservations before Oklahoma's statehood, *the last of these reservations* to be dissolved by allotments was that owned and occupied by the Osage." *Id.* (emphasis added) (alterations in original removed).[5]

The analysis of the historical circumstances in *Irby*, which was the primary basis of the decision, began and ended with the idea that Congress and the Osage Nation understood the allotment would disestablish the reservation based on the earlier disestablishment of the Creek and other reservations—all in preparation for creation of the State of Oklahoma. This fundamental notion is irreconcilable with the panel decision in the instant case.

B. The congressional acts as a whole—rather than viewed in isolation—demonstrate intent to disestablish the Creek reservation in formation of the State of Oklahoma.

The panel's unfortunate failure to recognize that the historical circumstances demonstrate disestablishment appears to stem from two principal errors.

First, the panel looked to each act of Congress individually, expecting to find a singular moment of complete divestment of Indian lands, rather than recognizing that

[5] The Supreme Court has expressed a similar view about the existence of reservations in Oklahoma. *See Okla. Tax Comm'n v. United States*, 319 U.S. 598, 602-03, 608-09 (1943); *see also McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 171 (1973).

the transformation of the nature of these lands took place gradually over more than a decade. Other disestablishment cases generally involve a single surplus land act providing a discrete change to a small territory. *See, e.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016); *Solem v. Bartlett*, 465 U.S. 463 (1984). This case is quite different: Congress was trying to create an entirely new State.

In so doing, Congress followed a lengthy process that involved (1) steady dissolution of tribal government, (2) allotment of Indian lands among tribal members with little to no surplus lands (which disestablished the exterior boundaries of the reservation even if it did not mean all those lands instantly lost Indian Country status), (3) removal of alienation restrictions on those allotments (which allowed title to pass to non-Indians, ending federal supervision of those lands and Indian Country status), and (4) creation of a new state.[6] These steps all progressed roughly simultaneously with one another, and although some were not fully completed, they *together* indicate a firm Congressional intent to disestablish the reservation and create a single, unified State of Oklahoma.

The panel's hermetic division between many acts of Congress—rather than viewing the multi-stage historical circumstances leading to Oklahoma's creation as a whole—distorts congressional intent. Even in the context of simple surplus land acts, the Supreme Court has recognized that "an examination of the process leading up to the

[6] Resp. Br. 57-66, 92 n.35.

enactment of" allotment legislation can demonstrate a "continuity in purpose" to disestablish a reservation regardless of the clarity of statutory language. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 592-606 (1977).

Second, the panel opinion repeatedly rejected the relevance of changes to "title and governance" to the question of congressional intent. *See, e.g.*, Panel Op. 73, 91, 97-101, 105, 107, 112. But the panel opinion confuses the question of whether transfer of title and governance *itself* disestablished the reservation with whether, instead, those actions clearly demonstrate that Congress *intended* to disestablish by allotment. Put simply, where Congress allotted with the intent that (1) title may pass out of Indian hands with no restriction, (2) federal supervision of those unrestricted allotments would come to an end, (3) the tribal government would be totally abolished, and (4) a new State of Oklahoma would be created out of that land, the continued existence of a reservation makes no sense. *See Indian Country, U.S.A.*, 829 F.2d at 973 (the term "Indian country ... simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments").

By the time of statehood, Congress had abolished Creek courts, imposed U.S. and Arkansas law in place of Creek law, ended all tribal taxes, conditioned all Creek legislative action and government contracts upon approval of the President, and forced the sale of

most tribal governmental buildings and chattel.[7] Congress had also given the President the power to remove and replace the Tribe's chief, stripped the Tribe of control over the Tribe's schools, which were to remain only "until such time as a public-school system shall have been established under Territorial or State government," and had declared that the Creek government would be abolished as of March 4, 1906.[8] While it is true that Creek tribal government was never *completely* abolished, the salient point is that at the time of allotment this was Congress's *intent* and significant steps had been taken to accomplish it, which demonstrates a clear intent that allotment would disestablish the outer boundaries of the reservation. *See Pittsburg & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387, 1395 (10th Cir. 1990) (intent at the time of allotment controls). Moreover, in every case in which the Supreme Court has found disestablishment or diminishment, the trial *government* remained, but is *reservation*, in material part, did not.[9]

The most telling example of this relates to court jurisdiction. In 1897, Congress provided that federal Indian Territory courts would have jurisdiction over all crimes committed by "all persons" in Indian Territory, "irrespective of race." Act of June 7, 1897, § 1, 30 Stat. 62, 83. In 1898, Congress abolished all tribal courts and made all tribal

[7] Resp. Br. 59-63.

[8] Resp. Br. 61-63.

[9] *See, e.g., South Dakota v. Tankton Sioux Tribe*, 522 U.S. 329 (1998); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. Dist. Cnt. Court for the Tenth Judicial Dist.*, 420 U.S. 425 (1975).

laws unenforceable in Indian Territory courts. Act of June 28, 1898, §§ 26, 28, 30 Stat. 495, 504-05. The Oklahoma Enabling Act ultimately provided for the transfer of the Indian Territory courts' dockets to the state courts of Oklahoma. Act of June 16, 1906, §§ 16–20, 34 Stat. 267, 276-77.

The abolition of Creek courts demonstrates that, by the time of statehood in 1907, Congress could *not* have intended the reservation to continue because it would have created a massive jurisdictional gap. It was already well-established in 1900 that states could not prosecute tribal members for crimes committed inside a reservation. *See United States v. Kagama*, 118 U.S. 375, 382, 384 (1886). Federal courts could only prosecute the seven crimes listed under the Major Crimes Act.[10] Creek courts were abolished. Thus, if the reservation existed, *no court* in the entire eastern half of the new State could adjudicate prosecutions of most crimes between two Indians. Congress could *not* have intended that lawless result. The only conceivable conclusion is that Congress had disestablished the reservation before statehood.

Rather than acknowledge the import of these historical circumstances, the panel opinion regrettably embraces the notion that Congress could retain a full-fledged reservation even while it abolishes tribal courts, abrogates tribal law, nearly eradicates tribal government, parcels out tribal land to members, and lifts federal supervision of

[10] Act of March 3, 1885, § 9, 23 Stat. 385 (Murder, Manslaughter, Rape, Assault with intent to kill, Arson, Burglary, Larceny).

parcels once restrictions on alienation expire, all under the auspices of creating a new State with jurisdiction over the territory. This cannot stand. The statutes in question display Congress's "continuity in purpose"[11] from the creation of the Dawes Commission through allotment and beyond to abolish the Creek Nation reservation, just as it would soon abolish the Osage reservation, and extend State jurisdiction over the territory.

II. AEDPA bars the result reached by the panel opinion.

Even if some ambiguity exists in the historical record currently before the court concerning the Creek reservation, this proceeding is not the appropriate vehicle to resolve that ambiguity. Unlike *Irby*, this case is not brought on *de novo* review in a civil action between the State and the Tribe. This is a habeas case.[12]

Needless to say, there is no "clearly established Federal law," 28 U.S.C. § 2254(d)(1), holding that the Creek reservation has not been disestablished, *see* Panel Op. 120. Nor, given all the evidence cited by Respondent, can it be said that the state courts (and district court) were "unreasonable" in finding disestablishment, since it was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (per curiam).

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[11] *See Rosebud Sioux Tribe*, 430 U.S. at 599, 613–15.

[12] Although *Solem* was also a habeas case, it was decided before the deferential standards of review in AEDPA were enacted.

Rather, the panel opinion declined AEDPA deference altogether by deciding that the state courts failed to apply the "clearly established" test for disestablishment and erroneously placed the burden of disproving state jurisdiction on Petitioner when the law "clearly established" otherwise. The panel erred on both counts.

A. *Solem* does not provide clearly established law on whether the Creek allotment acts disestablished their reservation.

The panel decision held that *Solem*, which recognized the legal test for determining whether a surplus land act disestablished a reservation, constitutes "clearly established Federal law" applicable to this case. Panel Op. 38-40. But even broad legal tests are "clearly established" to apply to a given case only when there is a Supreme Court case with "facts similar to the case sub judice." *House v. Hatch*, 527 F.3d 1010, 1016 (2008); *see also White v. Woodall*, 134 S. Ct. 1697, 1706-07 (2014). While similar facts does not mean identical facts, courts must still "exercise a refined judgment and determine the actual materiality of the lines (or points) of distinction between existing Supreme Court cases and the particular case at issue." *House*, 527 F.3d at 1016 n.5. For example, in *Carey v. Musladin*, 549 U.S. 70 (2006), prior case law had established a broad test for when prosecution courtroom practices prejudiced fair trial rights, but the Court held that this case law did not "clearly establish" a test for when spectator practices violated those same rights. The same is true here: the case law establishing the test for whether surplus land

acts caused disestablishment has not "clearly established" such a test for the types of laws that created Oklahoma, which were not surplus land acts.

Solem and its progeny all involve surplus land acts. *Solem*, 465 U.S. at 466-67, 472-78. Surplus land acts were designed to open up land in reservations to non-Indian settlement. *Id.* at 466-67. They also "force[d] Indians onto individual allotments" as part of Congress's effort to facilitate what Congress believed to be the inevitable demise of Indian reservations. *Id.* at 467-68. However, not every surplus land act was intended to change the boundaries of a reservation. *Id.* at 469.

The Creek Allotment Act, and the statutes at issue in *Irby*, are not stand-alone surplus land acts. *See* Resp. Br. 57-62.[13] Rather, in Oklahoma, Congress began negotiations with all of the "Five Civilized Tribes" with the intention of extinguishing tribal title "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory." Act of March 3, 1893, § 16, 27 Stat. 612; *see also* Resp. Br. at 69-76. The result of negotiations with the Creek tribe was an act that allotted almost all the Creek's land to tribal members (with very few surplus lands), provided for a limited period of time in which the land would be inalienable, and began the process of abolishing the Creek Nation as a polity. Creek Allotment Act, §§ 2-3, 7.

[13] The panel opinion appears to contradict itself on this point. *Compare* Panel Op. 40 (stating Creek acts "'open[ed] up unalloted lands for non-Indian settlement'") (quoting *Solem*, 465 U.S. at 467) *with* Panel Op. 96 (stating "'[s]urplus' Creek lands were not made a part of the public domain or even opened to unrestricted non-Indian settlement").

Whereas surplus land acts used the proceeds of sale of unallotted lands for the benefit of the Tribe,[14] proceeds from the Creek allotment acts were to be distributed among individual allottees[15] (as was the rest of the Tribe's funds),[16] divesting any continuing tribal interest because the Tribe would *cease to exist* as a political entity.

The Supreme Court has not dealt with a similar situation. *Solem* never addresses, for example, whether specific intent to completely dissolve tribal government definitively proves intent to disestablish. *See, supra* n.9 and accompanying text. The difference between a surplus land act and a series of statutes designed to dissolve tribal title and governance in order to create a new State is one "not of degree but of kind." *Bell v. Cone*, 535 U.S. 685, 697 (2002). Even if both types of cases are "similar" in that they both relate to disestablishment, this would "frame[] the issue at too high a level of generality" to meet the "contrary to" test. *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (per curiam). As the Supreme Court has not evaluated a disestablishment question in this "novel factual context," the panel erred in determining that *Solem* is clearly established law that applies in this case. *Wright v. Van Patten*, 552 U.S. 120, 125 (2008).[17]

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[14] *See Solem*, 465 U.S. at 473; *Mattz v. Arnett*, 412 U.S. 481, 495-96 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355-56 (1962).

[15] Creek Allotment Act, §§ 3, 9, 27.

[16] Act of April 26, 1906, § 17, 34 Stat. 137, 143-44; Act of June 30, 1902, § 14, 32 Stat. 500.

[17] *See also Woodall*, 134 S. Ct. at 1706-07 ("relief is available … if, and only if, it is so (continued...)

B. The state court decision was not contrary to *Solem*.

Even if *Solem* "clearly established" the test for cases such as this, the panel opinion incorrectly determined that the state court decision was "contrary to" *Solem*. Panel Op. 46-51. To start, the panel should have never ruled on this issue because Petitioner forfeited any argument that the OCCA did not apply *Solem*. Resp. Br. 51-52; *see Hancock v. Trammell*, 798 F.3d 1002, 1011 (10th Cir. 2015). Nevertheless, the opinion presses forward and primarily faults the state court for not explicitly applying *Solem*. Panel Op. 47-49. However, an analysis under AEDPA must reflect "a presumption that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Federal courts "are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation." *Bell v. Cone*, 543 U.S. 447, 455 (2005).

The panel decision transformed AEDPA's "contrary to" requirement into a "failed to apply" requirement. Panel Op. 47-49 (finding violation of clearly established law because of "Failure to apply *Solem*"). But in *Early v. Packer*, 537 U.S. 3, 10 (2002), the Court explained that "contrary to" is a more "demanding requirement" than "failed to apply." By assuming that the state court's lack of explicit application of *Solem* means its

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[17](...continued)
obvious that a clearly established rule *applies to a given set of facts* that there could be no 'fairminded disagreement' on the question" (emphasis added)). Respondents need not propose an alternative "clearly established" test to *Solem*; there is none. The lack of any clearly established law precludes AEDPA relief. *See House*, 527 F.3d at 1017.

decision must be "contrary to" *Solem*, the panel erred. *Cf. Harrington v. Richter*, 562 U.S. 86, 98 (2011).[18]

There is nothing in the state court opinion indicating it rejected or contradicted *Solem* in reaching its conclusion. Petitioner provided an offer of proof concerning the Creek Nation reservation, which included a copy of *Solem* (but no discussion of the *Solem* test in his briefs) and relevant legislation,[19] and which the state court expressly considered. *Murphy v. State*, 124 P.3d 1198, 1207-08 (Okla. Crim. App. 2005); *see also* Panel Op. 45 (stating that the OCCA "discussed his offer of proof on the reservation issue and said his argument was unpersuasive"). The state court's failure to say more must be viewed in light of the paucity of Petitioner's presentation, which provided little other historical evidence beyond a historian's declaration. *See Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (review "focuses on what the state court knew and did"). Surely AEDPA does not require the OCCA to gather Petitioner's evidence for him. *See Blue Thunder v. Gonzales*, 189 F. App'x 796, 798 (10th Cir. July 26, 2006) (unpublished) (rejecting the petitioner's Indian country jurisdiction argument "because he has failed to create a sufficient factual record for us to address this issue").

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[18] The panel cites to *Lafler v. Cooper*, 566 U.S. 156, 173 (2012), but in that case, the state court affirmatively applied a completely different and conflicting test than that required by clearly established law. Here, there is at most silence as to what test the OCCA applied.

[19] 12/2/2004 Appendix to Defendant's Offer of Proof as to Evidence Excluded from November 18, 2004, Evidentiary Hearing (OCCA No. PCD-2004-321) at 422-32, 524-58.

This Court must give the state court the benefit of any doubt, *Visciotti*, 537 U.S. at 24, particularly when it has "no authority to impose mandatory opinion-writing standards on state courts," *Johnson v. Williams*, 568 U.S. 289, 300 (2013), and conclude that the state court did not *sub silentio* reject *Solem* in adjudicating the case.

C. The panel opinion incorrectly held that *Solem* "clearly established" that the burden of proving the State lacked jurisdiction is on the State.

The panel's final justification for overcoming AEDPA was that the state court erroneously placed the burden of proof on Petitioner, opining that *Solem* "clearly established" otherwise. Panel Op. 47-48. Petitioner made this argument in the state courts, yet deliberately chose to abandon the argument at the district court below and before this Court, and therefore waived this argument. *Hancock*, 798 F.3d at 1017. This waiver should have prevented the panel from overturning the court below, rejecting AEDPA deference, and upending a state court adjudication based on an argument even Petitioner abandoned. *See id.*; *Jones v. Warrior*, 805 F.3d 1213, 1219 n.2 (10th Cir. 2015); *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011).

Even assuming the panel could have reached the issue, *Solem* does not alter the burden of proof typically applicable to federal habeas or state post-conviction proceedings. Instead, *Solem* provides a presumption against disestablishment as an "interpretational policy," *Absentee Shawnee Tribe of Indians of Okla. v. Kansas*, 862 F.2d 1415, 1417 (10th Cir. 1988), requiring congressional intent to be clear before finding

disestablishment based on courts' traditional solicitude for tribal interests, *Solem*, 465 U.S. at 472. The panel decision did not identify a single case from the Supreme Court, or even this Court, that derives from *Solem* any change to an otherwise applicable burden of proof.[20]

Such a result would be in conflict with the burden the *defendant* bears to disprove state jurisdiction over a crime committed within state borders, including the burden to demonstrate that it occurred on Indian Country within the state. *See State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989) (imposing burden of proof on defendant).[21] The panel opinion's holding would effectively require a state to disprove federal jurisdiction in every criminal prosecution bearing any conceivable relationship to Indian Country.[22] The presumed validity of state jurisdiction applies throughout the direct appeal process,[23] and it does not change when considering habeas or post-conviction relief, where a

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[20] *See United States v. Webb*, 219 F.3d 1127, 1131 (9th Cir. 2000) (holding federal criminal defendant bears "heavy burden" to show reservation was diminished).

[21] *See also State v. L.J.M.*, 918 P.2d 898, 902 (Wash. 1996) (*en banc*); *Arizona v. Verdugo*, 901 P.2d 1165, 1167 (Ariz. Ct. App. 1995); *State v. St. Francis*, 563 A.2d 249, 252 (Vt. 1989); *Oregon v. Hill*, 373 P.3d 162, 173 (Or. Ct. App. 2016) (Indian country jurisdiction is an "exception" to state jurisdiction). By contrast, the only authority cited by the panel was an Oklahoma case regarding venue, not Indian country jurisdiction. Panel Op. 50 (citing *Sweden v. State*, 172 P.2d 432 (Okla. Crim. App. 1946)).

[22] The presumption in favor of plenary state criminal jurisdiction stands in contrast to federal criminal jurisdiction, which the federal government always has the affirmative duty of proving. *See United States v. Prentiss*, 206 F.3d 960, 967 (10th Cir. 2000).

[23] *See Klindt*, 782 P.2d at 404; *St. Francis*, 563 A.2d at 251; *New Mexico v. Begay*, 734 P.2d 278, 281 (N.M. Ct. App. 1987).

criminal conviction is presumed valid.[24] *See Primeaux v. Leapley*, 502 N.W.2d 265, 270 (S.D. 1993) (holding state habeas petitioner bears burden of proving Indian Country status); *Arizona v. Verdugo*, 901 P.2d 1165, 1169 (Ariz. Ct. App. 1995) (same). Thus, the "majority of other courts addressing this issue have held that a defendant bears the burden to show facts that would establish an exception to the state court's jurisdiction under the Indian Country Crimes Act." *Verdugo*, 901 P.2d at 1168. Unpublished opinions of this Court have reached the same result. *Eaves v. Champion*, 113 F.3d 1246, *1 (10th Cir. June 2, 1997) (unpublished); *see also Yellowbear v. Atty. Gen. of Wyoming*, 380 F. App'x. 740, 743 (10th Cir. May 25, 2010) (unpublished). The opposite conclusion can hardly be considered "clearly established."

III. If the Court is unpersuaded by Respondent's strong case for relief, the Court should at a minimum remand for an evidentiary hearing.

The shift in burden of proof is immensely relevant to the evidentiary record in this case. Because all courts up until now—both state and federal—agreed with Respondent that the burden of proof regarding jurisdiction was on Petitioner, and that Petitioner failed to meet that burden, Respondent had little reason to put on his own evidence regarding jurisdictional issues.[25] But assuming the panel's decision remains on the burden of proof and the applicability of *Solem*, Respondent respectfully requests that the panel

[24] *See Brecht v. Abrahamson*, 507 U.S. 619, 633-37 (1993).

[25] Although Respondent admits he had previously argued against a hearing, Resp. Br. 47-51, Respondent had no notice he may bear the burden of proof, which was not raised by Petitioner in district court or before this Court.

or *en banc* court withdraw the panel's resolution of the jurisdictional issue and remand for further evidentiary presentations and factual development. *See, e.g., Stouffer v. Trammell*, 738 F.3d 1205, 1218–19 (10th Cir. 2013) (remanding for evidentiary hearing due to record inadequacy); *Littlejohn v. Trammell*, 704 F.3d 817, 856-57 (10th Cir. 2013) (same).

There has never been an evidentiary hearing on the reservation issue in this case. Petitioner first raised the issue in federal habeas proceedings, where it was dismissed as unexhausted. *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1287 (E.D. Okla. 2007). On a second application for post-conviction relief in state court, Petitioner raised the issue, but the state district court refused to hear evidence on the reservation question. *Murphy v. State*, 124 P.3d 1198, 1207 (Okla. Crim. App. 2005).[26] The court allowed Petitioner to make an offer of proof, which introduced only limited evidence. *Id.* Petitioner filed a second federal habeas proceeding, where he did not request an evidentiary hearing and instead asserted that "no relevant facts are in dispute." *Second Amended Petition for a Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254* (W.D. Okla. No. CIV-03-443-WH) dated 12/28/2005, docket number 54 at 11. At this Court, based on Petitioner's failure to challenge the burden of proof and AEDPA's prohibition on considering evidence not before the state court, *see Pinholster*, 563 U.S. at 181, Respondent relied almost exclusively on cases discussing the history of the reservation rather than original sources.

[26] Admittedly, the State opposed such evidence. *Murphy*, 124 P.3d at 1207.

If the Court rejects Respondent's arguments regarding disestablishment on the current record, Respondent requests the opportunity to present evidentiary materials not currently before this Court. This would include primary sources regarding the activities of the Dawes Commission, negotiations with the Creek Nation, legislative history regarding the 1901 Creek Allotment Act, expert testimony of historians regarding the land in question before and after allotment, and numerous instances of the federal, state, and tribal recognition of state jurisdiction in the territory over the past hundred years.

The court should not conclusively hold a Creek reservation exists without these materials. As noted above in the Rule 35(b) statement, enormous implications flow from the panel's decision, potentially altering civil and criminal jurisdiction in half the State and changing the governing body of millions of citizens. The disruption this decision may cause strains the imagination. Respondent urges the court to, at a minimum, stay its hand in ultimately deciding the Creek reservation exists and instead remand the case for an evidentiary hearing and further factual determinations.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court grant rehearing and/or rehearing *en banc*.

Respectfully submitted,

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Ex. 1

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g), I hereby certify that this brief complies with the word limitations in this Court's Order of September 1, 2017. The brief was prepared using WordPerfect X6, in Garamond 14 point font, proportionally spaced, and contains 5,488 words, excluding those items listed in Fed. R. App. P. 32(f).

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/ MITHUN MANSINGHANI

CERTIFICATE OF SERVICE

On this 21st day of September, 2017, a true and correct copy of the foregoing was transmitted to the Clerk of this Court for filing and for transmission to the following:

Patti Palmer Ghezzi
Randy A. Bauman
Michael Lieberman

s/ MITHUN MANSINGHANI

CERTIFICATE OF DIGITAL SUBMISSION

This is to certify that:

1. All required redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the document filed with the Clerk;

2. The digital submissions have been scanned for viruses with Symantec Endpoint Protection, Updated 9/21/17, and according to said program, are free of viruses.

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