No. 17-

IN THE

Supreme Court of the United States

TERRY ROYAL, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

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).

PARTIES TO THE PROCEEDING

Petitioner Terry Royal is the Warden of the Oklahoma State Penitentiary. Petitioner was the respondent in the district court and the appellee in the Tenth Circuit.

Respondent Patrick Murphy was the petitioner in the district court and the appellant in the Tenth Circuit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 875 F.3d 896 (10th Cir. 2017). App. 1a. The district court's opinion is reported at *Murphy v. Sirmons*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007). App. 134a. The opinion of the Oklahoma Court of Criminal Appeals is reported at *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005). App. 203a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment on August 8, 2017. The court denied rehearing and issued an amended opinion on November 9, 2017. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1153(a) of Title 18, United States Code, provides, in relevant part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder … within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

Section 1151 of Title 18, United States Code, provides, in relevant part: "[T]he term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."

STATEMENT

In a decision that strikes at the core of Oklahoma's identity and sovereignty, the Tenth Circuit held that the State lacks jurisdiction to prosecute a capital murder committed in eastern Oklahoma by a member of the Creek Nation. The panel held that Congress never disestablished the 1866 boundaries of the Creek Nation, and all lands within those boundaries are therefore "Indian country" subject to exclusive federal jurisdiction under 18 U.S.C. § 1153(a) for serious crimes committed by or against Indians. This holding has already placed a cloud of doubt over thousands of existing criminal convictions and pending prosecutions.

The former Creek Nation territory encompasses 3,079,095 acres and most of the City of Tulsa. Whether an area this large and populous is an Indian reservation warrants certiorari. But there is more. Litigants have invoked the decision below to reincarnate the historical boundaries of all "Five Civilized Tribes"—the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles. This combined area encompasses the entire eastern half of the State. The decision thus threatens to effectively redraw the map of Oklahoma.

Prisoners have begun seeking post-conviction relief in state, federal, and even tribal court, contending that their convictions are void *ab initio*. Civil litigants are using the decision to expand tribal jurisdiction over non-members. All of this creates intolerable uncertainty for over 1.8 million Oklahomans who may now live on an Indian reservation, with all the civil, criminal, and regulatory consequences that could flow from that determination.

Chief Judge Tymkovich stated below that "this challenging and interesting case makes a good candidate for Supreme Court review" and that "this may be the rare case where the Supreme Court wishes" to revisit the governing standard for the disestablishment of Indian reservations. App. 232a. The United States joined Oklahoma's petition for rehearing en banc, both because the "panel erred, and because this is a case of exceptional importance" with "significant and wide-ranging implications for law enforcement." U.S. Br. in Supp. of Reh'g at 1–2 (filed Oct. 10, 2017).

The Tenth Circuit believed that this Court's precedents foreclosed the court from fully accounting for Oklahoma's unique history. As Chief Judge Tymkovich observed, "the square peg" of this Court's Indian reservation decisions "is ill suited for the round hole of Oklahoma statehood." App. 232a. But Oklahoma's history is dispositive here. Oklahoma was formed by the merger of Oklahoma Territory to the west and Indian Territory to the east. The latter encompassed the land of all Five Tribes, which covered the eastern half of present-day Oklahoma. To prepare the Indian Territory for statehood, Congress systematically dismantled tribal governments and their communal ownership of lands. The birth of our forty-sixth State marked the culmination of a two-decade legislative campaign to dissolve the Five Tribes' communal territories.

If not corrected, the decision below could result in the largest abrogation of state sovereignty by a federal court in American history. It has been universally understood since statehood that the historical boundaries of the Five Tribes' territories are not reservations. Since its founding, the State has prosecuted offenses committed by or against Indians on lands within the former Indian Territory. Meanwhile, nei-

ther the federal government nor the tribes have prosecuted such crimes under the theory that the land is an Indian reservation. Because the decision below casts that century of precedent aside and has already unleashed a torrent of litigation and confusion, this Court's immediate attention is warranted.

A. Historical background

The Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations form their own unique chapter in American history. "These tribes 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).

The Five Tribes once inhabited land stretching across what is now Georgia, most of Alabama, and the Florida panhandle. 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. Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes* (1972 ed.). Unlike other tribes, for whom the United States set aside federal lands as reservations where the Indians would live under federal patronage, *see, e.g.*, Treaty with the Florida Tribes of Indians, Sept. 18, 1823, 7 Stat. 224; Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743, the Five Tribes received patents for land in fee simple. The United States promised the Five Tribes that as long as they occupied their lands, 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 Creek Tribe of Indians art. XIV, Mar. 24, 1832, 7 Stat. 366, 368.[1]

After the Civil War, in response to the tribe'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* 6 (1940). The remainder of the Five Tribes' land maintained its status as Indian Territory.

Congressional promises of perpetual independence and seclusion could not withstand the relentless tide of western settlement. Railroads, burgeoning coal and cattle industries, and the settlement of the Western frontier facilitated migration of non-Indians onto tribal lands. Non-Indians could not legally own land in the Five Tribes' territories, since communal title to that land was vested in the tribes, and even Indians enjoyed only rights of use or occupation. *See Barnett v. Way*, 119 P. 418, 419 (Okla. 1911). But that did not stop the encroachment. Within two generations after their arrival west of the Mississippi, Indians were a slim majority of the population in Creek territory, and just 28% of the entire population of the territory of the Five Tribes. Census Office, *Extra*

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[1] Convention with the Cherokees pmbl., May 6, 1828, 7 Stat. 312; Convention with the Chickasaws art. II, May 24, 1834, 7 Stat. 450; Convention between the Choctaws and Chickasaws art. I, Jan. 17, 1837, 7 Stat. 605; Treaty with the Choctaws art. IV, Sept. 27, 1830, 7 Stat. 333; Treaty with the Creeks and Seminoles arts. I, IV, Aug. 7, 1856, 11 Stat. 699, 700.

Census Bulletin: The Five Civilized Tribes in Indian Territory 4 (1894).

The tribal governments were ill-equipped to govern the rapidly increasing non-Indian population. Rampant disorder and lawlessness reigned. In the Creek Nation, Indians were subject to harsh laws and penalties under the tribal code, *see* Arrell Gibson, *Oklahoma: A History of Five Centuries* 137 (2d ed. 1981), but non-Indians lived beyond the reach of tribal courts. Federal district courts in neighboring Arkansas (and later in Kansas and Texas) had criminal jurisdiction over cases involving U.S. citizens arising in Indian Territory. *See* Jeffrey Burton, *Indian Territory and the United States* 71 (1995). But given the distance, "only the most depraved—and least fortunate—of bandits were hauled before … the Fort Smith bench of 'Hanging Judge' Isaac Parker." Danney Goble, *Progressive Oklahoma* 71 (1980). Violent crime went largely unpunished, and business agreements were effectively unenforceable. *Id.* Congress responded by creating federal territorial courts in Indian Territory and extending Arkansas law to govern non-Indians in the Territory. Act of Mar. 1, 1889, ch. 333, § 1, 25 Stat. 783; Act of Mar. 1, 1895, ch. 145, § 4, 28 Stat. 693, 696.

The increasing assertion of federal authority in Indian Territory signaled Congress's broader repudiation of the policy of seclusion in favor of assimilation and eventual statehood for the Indian Territory. Proposals to convert the area—an enclave of mineral-rich, untilled land with a booming non-Indian population—into one or more States had been floated in Congress every year since 1870. Carter, *supra*, at 2. But because Congress had promised the Five Tribes communal land ownership and autonomous governments according to their territorial boundaries, erad-

icating these foundations was a prerequisite for the incorporation of Indian Territory into a new State. Gibson, *supra*, at 193–94; *see also* Luther B. Hill, *A History of the State of Oklahoma* 337–45 (1910).

The "steady drift across the [Missouri] border for many years, and the presence among the Indians of hundreds of thousands of persons who were outlanders under their own flag finally made it necessary to abolish the tribal organization." Roy Gittinger, *The Formation of Oklahoma* 211 (1939); *see also Marlin v. Lewallen*, 276 U.S. 58, 61 (1928). "Congress finally assumed complete control over [the Creek Nation] and undertook to terminate their government and distribute the tribal lands among the individuals." *McDougal v. McKay*, 237 U.S. 372, 381 (1915).

With the goal of statehood in mind, Congress proceeded to dissolve the Five Tribes' communal land tenure and to end self-rule. In 1893, Congress appointed a three-person 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. 612, 645; *see also Jefferson v. Fink*, 247 U.S. 288, 291 (1918); *McDougal*, 237 U.S. at 380–81; *Woodward v. de Graffenried*, 238 U.S. 284, 295 (1915); *Stephens v. Cherokee Nation*, 174 U.S. 445, 446 (1899).

Concomitant with the creation of a new State was "the dissolution of the Five Civilized Tribes." Gittinger, *supra*, at 236. Congress established the Com-

mission "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); *Marlin*, 276 U.S. at 61 (same). As the Secretary of the Interior impressed upon the Commission, "success in your negotiations will mean the total abolition of the tribal autonomy of the Five Civilized Tribes and the wiping out of the quasi-independent governments within our territorial limits. It means, also, ultimately, … the admission of another state or states in the Union." Carter, *supra*, at 3 (quoting letter from Secretary Hoke Smith to Henry Dawes).

Negotiations failed, and "when the tribal governments refused to cooperate in their own demise," Congress used its legislative power to force the completion of the Commission's work. *Id.* at ix. In annual congressional reports, the Dawes Commission painted a bleak picture of Indian Territory plagued by corruption, misrule, and crime. In 1895, the Commission wrote: "It is … the imperative duty of Congress to assume at once the political control of the Indian Territory." S. Rep. No. 54-12, at 20. The Commission considered the Five Tribes' "so-called governments … wholly corrupt, irresponsible, and unworthy to be longer trusted" to govern. *Id.* at 19; *see Woodward*, 238 U.S. at 296–98; *Heckman v. United States*, 224 U.S. 413, 434–35 (1912).

Motivated by a desire to break up the tribes' communal land tenure and in response to the disorder it perceived in Indian Territory, *see* Debo, *supra*, at 24–25, the Commission recommended the establishment of a territorial government and the extension of U.S. jurisdiction over all matters relating to the use and occupation of tribal lands, S. Rep. No. 54-12, at 20. Congress thereafter authorized the Commission to survey Indian Territory and enroll tribal

members in preparation for allotment, with or without tribal consent. Act of June 10, 1896, ch. 398, § 1, 29 Stat. 321, 339, 343. Congress extended the authority of the federal courts, while steadily diminishing the tribal courts and tribal laws. Hill, *supra*, at 318. In a concerted campaign to abolish race-based jurisdictional distinctions in Indian Territory, Congress in 1897 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, ch. 3, § 1, 30 Stat. 62, 83 (1897); *Marlin*, 276 U.S. at 61–62; *Washington v. Miller*, 235 U.S. 422, 424–25 (1914).

In 1898, Congress passed the Curtis Act, ch. 517, 30 Stat. 495, "to complete the destruction of the tribal governments." Carter, *supra*, at 34. To that end, Congress abolished tribal courts, § 28, 30 Stat. at 504–05, and banned federal courts from enforcing tribal law, § 26, 30 Stat. at 504. Senator William Bate—one of few dissenting voices to the Act's passage—called the Curtis Act the "consummation" of the United States' abrogation of its treaties with the Five Tribes. The Act "sweeps all the laws of the Indians away, all their courts of justice, all their juries, all their local officers, and all the rights they have under the treaties which they have been given and guaranteed by the Government of the United States. … [W]e go along and encroach upon them inch by inch, Congress after Congress, until at last you have got to the main redoubt, and here it is destroyed." 31 Cong. Rec. 5593 (1898).

The Curtis Act also directed the Dawes Commission to allot the Five Tribes' land following tribal enrollment. § 11, 30 Stat. at 497. The Seminoles, Choc-

taws, and Chickasaws had already reached allotment agreements with the United States, and the Creeks and Cherokees quickly capitulated. 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); *accord Marlin*, 276 U.S. at 63. Congress provided that each of the Five Tribes' governments would terminate by March 4, 1906. Creek Allotment Agreement § 46, 31 Stat. at 872; Curtis Act § 29, 30 Stat. at 512 (Choctaw and Chickasaw); Act of July 1, 1902, ch. 1375, § 63, 32 Stat. 716, 725 (Cherokee); Act of Mar. 3, 1903, ch. 994, § 8, 32 Stat. 982, 1008 (Seminole).

All told, the Dawes Commission considered 300,000 claims to tribal membership, enrolled more than 100,000 tribal members, and allotted 15,794,400 acres of land in Indian Territory—an area twice the size of Maryland. Gibson, *supra*, at 195. This "was a vast and difficult undertaking; and no previous disposition of either lands or tribes afforded precedents for guidance." Hill, *supra*, at 323. By this time, tribal governments "were little more than consulting agents in the management of the business of the tribes." Gittinger, *supra*, at 233. The Five Tribes "had ceased to exist except as financial corporations," *id.* at 234, whose assets were being liquidated and affairs wound up.

In April 1906, Congress passed the Five Tribes Act, providing for "the final disposition of the affairs

of the Five Civilized Tribes in the Indian Territory." Ch. 1876, 34 Stat. 137. Congress closed the tribal rolls, abolished tribal taxes, ended the tribes' control of tribal schools, and directed the Secretary of the Interior to seize and sell all tribal buildings and furniture. Unallotted lands were to be sold by the government, with the proceeds applied to the Tribe's debts and any remainder paid out per capita to individual tribal members. §§ 16–17, 34 Stat. at 143–44. Congress extended tribal governments, but with severe limitations on their operations and authority. § 28, 34 Stat. at 148.

As the governor of the Choctaw Nation put it in November 1906, the tribal government was "only a shell of a government, it is hardly anything. … I do not feel any longer that I act as chief, that I have any authority. … Now, the only authority that I have is to sign deeds." S. Rep. No. 59-5013, pt. 1, at 886 (1907). In his 1908 address to the Creek National Council, Chief Moty Tiger said, "the affairs of the Creek are so nearly closed up, insofar as any notion of the tribal authorities will affect the same, that there is but little I can call to your attention." Gaston Litton, *Creek Papers 1870–1930*, at 401 (1937), https://goo.gl/Jm17L6. One federal judge similarly commented that tribal governments were "a continuance of the tribe in mere legal effect, just as in many states corporations are continued as legal entities after they have ceased to do business, and are practically dissolved, for the purpose of winding up their affairs." *United States v. Allen*, 171 F. 907, 921 (E.D. Okla. 1909).

Two months after passing the Five Tribes Act, Congress enacted the Oklahoma Enabling Act, authorizing the creation of the State through the merger of Indian and Oklahoma Territories. Ch. 3335, 34

Stat. 267 (1906). Congress directed the transfer of all cases arising under federal law, pending in territorial courts in Indian and Oklahoma Territory at the time of statehood, to the newly created U.S. district courts for the Western and Eastern Districts of Oklahoma. § 16, 34 Stat. at 276. *All* other cases were transferred to state court. § 20, 34 Stat. at 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. at 275.

The stage was thus set for Oklahoma's accession to statehood. When President Theodore Roosevelt signed a proclamation admitting Oklahoma to the Union on November 16, 1907, Indians constituted just 5% of the population of the new State. Census Bureau, *Population of Oklahoma and Indian Territory* 8 (1907). From Oklahoma's entrance to the Union to the present day, the State has exercised criminal jurisdiction over all of its citizens, Indians and non-Indians alike, on the understanding that the former Indian Territory is not a reservation. Conversely, neither federal nor tribal prosecutors have treated the former Indian Territory as a reservation.

B. Factual background and proceedings below

1. On August 28, 1999, Patrick Murphy mutilated and murdered his girlfriend's former lover, a man named George Jacobs. Both men are members of the Creek Nation. The crime began when Mr. Murphy used his vehicle to force Mr. Jacobs' car off the road late at night in a rural area of Henryetta, Oklahoma. Mr. Murphy and two accomplices pulled Mr. Jacobs out of the car and began to beat him. Over the course of five minutes, Mr. Murphy and his accomplices severed Mr. Jacobs' genitals with a folding knife and

stuffed them into Mr. Jacobs' mouth, pulled Mr. Jacobs into a roadside ditch, slashed his throat and chest, and "tried to stomp on [his] head like a pancake." App. 140a. They left Mr. Jacobs to die beside the deserted road. Mr. Murphy then instructed his accomplices to drive to a nearby home to kill Mr. Jacobs' son, George Jr. Someone in the house intervened, saving George Jr.'s life. Later that evening, Mr. Murphy confessed to both his girlfriend and his cousin. *Id.* Mr. Murphy was convicted in state court for first-degree murder and sentenced to death. App. 203a. His conviction and sentence were affirmed on appeal. *Id.*

2. In his second application for state post-conviction relief, in 2004, Mr. Murphy argued that Oklahoma courts lacked jurisdiction to convict him because he is an Indian and, he alleged, he committed his crime within the boundaries of the Creek reservation and thus could only be tried in federal court under the Major Crimes Act. That Act gives federal courts exclusive jurisdiction over certain crimes in "Indian Country," 18 U.S.C. § 1153, and defines "Indian Country" to include an "Indian reservation," *id.* § 1151(a). The state court concluded that Oklahoma's jurisdiction was proper. The Oklahoma Court of Criminal Appeals agreed and denied post-conviction relief, finding no authority to support Mr. Murphy's theory that the 1866 boundaries of the Creek territory remained intact as a "reservation." *See* App. 222a–224a.[2]

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[2] The state courts also rejected Mr. Murphy's claim that the crime occurred in Indian Country under §§ 1151(b) and (c), which pertain to "dependent Indian communities" and "Indian allotments." App. 215a–222a, 224a–225a.

Mr. Murphy petitioned for a writ of certiorari on the question whether his crime was committed within Indian Country. *Murphy v. Oklahoma*, No. 05-10787. In response to this Court's invitation, the United States filed a brief expressing the view that Congress has extinguished the historic boundaries of the Creek Nation. U.S. Br. at 15–20, 2007 WL 1319320. This Court denied certiorari. 551 U.S. 1102 (2007).

3. On federal habeas review under 28 U.S.C. § 2254, Mr. Murphy asserted that the Oklahoma Court of Criminal Appeals had misapplied federal law on the question whether he committed the crime in Indian Country. The district court held that the state court's decision rejecting Mr. Murphy's jurisdictional challenge was neither contrary to nor an unreasonable application of clearly established federal law and denied federal habeas relief. App. 184a–195a.

4. The Tenth Circuit reversed. The court held that federal law clearly established that Mr. Murphy's crime occurred in Indian Country under 18 U.S.C. § 1151(a), because Congress never disestablished the 1866 boundaries of the Creek territory, which encompassed the land where the murder occurred. App. 132a–133a. The panel applied the three-part framework set forth in *Solem v. Bartlett*, 465 U.S. 463 (1984), which looks to statutory text, surrounding circumstances, and subsequent history. In an extended analysis of the main statutes at issue, App. 78a–102a, the Tenth Circuit concluded that the State's argument failed at the first step because no text "expressly" disestablished or diminished the boundaries of the Creek Nation. App. 96a. The court further concluded that the contemporaneous and subsequent history did not "unequivocally reveal"

congressional intent to erase the historical boundaries of the Creek territory. App. 107a, 119a (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1080 (2016)).[3]

The Tenth Circuit denied rehearing on November 9, 2017. Chief Judge Tymkovich concurred separately to urge "further attention by the Supreme Court." App. 230a. The panel stayed issuance of the mandate to permit Oklahoma to seek this Court's review. App. 233a.

REASONS THE PETITION SHOULD BE GRANTED

I. The question presented is critically important

The question of whether the historical boundaries of the Creek Nation, or the Five Tribes more generally, constitute Indian Country under 18 U.S.C. § 1151(a) has enormous ramifications for the State, the federal government, the Five Tribes, and over 1.8 million Oklahoma residents. Since the birth of the State, the universal understanding has been that the former Indian Territory, *i.e.*, the eastern half of the State, is not reservation land. The Tenth Circuit upended that understanding in one fell swoop, creating massive disruption. This Court's review is urgently needed to restore stability and certainty regarding the State's ability to govern its citizens.

A. The affected area is massive

Whether an Indian reservation exists raises "issues of importance pertaining to this country's relationship to its Indian wards." *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 353–

[3] In his appeal, Mr. Murphy also argued that the crime occurred on an Indian allotment. Because the Tenth Circuit held that the crime occurred on an Indian reservation, the panel did not address Mr. Murphy's allotment argument. App. 15a.

54 (1962). This Court thus routinely grants review to address that question, even absent any apparent conflict among the lower courts. *E.g.*, *id.*; *Parker*, 136 S. Ct. 1072; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585 (1977); *Mattz v. Arnett*, 412 U.S. 481, 485 (1973).

The importance of that issue is magnified exponentially here. The sheer size of the territory sets this case apart from any prior disestablishment dispute in our country's history. The 1866 boundaries of the Creek Nation alone encompass over 4,600 square miles of land populated by more than 750,000 people, as shown below:

The 1866 boundaries also include most of Tulsa, the State's second largest city and home to more than 403,000 Oklahomans. Census Bureau, *QuickFacts: Tulsa city, Oklahoma* (2016), https://goo.gl/2jK19d. A reconstituted Creek territory would be by far the largest Indian reservation by population in the United States. For comparison, the largest reservation is currently the Navajo Nation, with a total population of 174,000, only 4,300 of whom are non-native. Census Bureau, *The American Indian and Alaska Native Population: 2010*, at 14 & tbl.6 (2012), https://goo.gl/Nw37yg.

Moreover, the decision below could extend to the other tribes whose lands collectively constituted Indian Territory. "The history of the removal of the Muskogee or Creek Nation from their original homes to land purchased and set apart for them … in the territory west of the Mississippi river does not differ greatly from that of the others of the Five Civilized Tribes." *Woodward*, 238 U.S. at 293. The Five Tribes confronted the same issues that culminated in the allotment of their lands, the dissolution of their governments, and the merger of all their former territory with Oklahoma Territory to form Oklahoma. *Id*. at 293–96. Thus, although details vary from tribe to tribe, the Five Tribes share an overlapping statutory history that reflects Congress's deliberate extinguishment of their territorial sovereignty during the period leading up to Oklahoma statehood.

The land constituting the Five Tribes in the former Indian Territory covers nearly *half the State* in terms of area and population:

The 1866 boundaries of the Five Tribes include 29,965 square miles, about 43% of Oklahoma's land mass. The current population of this region is over 1.8 million—roughly 48% of Oklahoma's population.

See Census Bureau, *Interactive Population Map*, https://goo.gl/YF8sb8.

B. The question presented implicates fundamental questions of sovereignty

Whether this vast expanse of land is now Indian Country under 18 U.S.C. § 1151(a) strikes at the heart of Oklahoma's sovereignty.

1. The implications for criminal jurisdiction—the context of this case—are staggering. States lack criminal enforcement jurisdiction over offenses in Indian Country if either the defendant or victim is an Indian, regardless whether the Indian is an enrolled member of the tribe whose land is at issue. *Solem,* 465 U.S. at 463 n.2; Dep't of Justice, *Indian Country Criminal Jurisdictional Chart* (2017), https://goo.gl/uXKgQT. The federal government has exclusive criminal jurisdiction in such cases, aside from certain minor offenses subject to tribal court jurisdiction when both defendant and victim are Indians. 18 U.S.C. §§ 1152–53; 25 U.S.C. § 1302(a)(7). For over a century, Oklahoma has prosecuted offenses committed by or against Indians on the understanding that no reservations exist in the former Indian Territory. That will change overnight if this Court does not grant review.

Approximately 9% of Tulsa residents self-identify as Native American. That percentage is the highest of any large city in the United States other than Anchorage, Alaska. Census Bureau, *American Indian*, *supra*, at 12. Losing jurisdiction over crimes committed by or against Native Americans throughout a large and populous part of the State would inflict an enormous blow to the State's power to prosecute within its own borders. That result would impose a corresponding burden on federal authorities

and courts. In urging rehearing below, the United States estimated that the Tenth Circuit's decision could require federal authorities to investigate and prosecute hundreds (if not more than a thousand) of new cases *each year* within the boundaries of the Creek Nation alone—amounting to a tenfold increase in the caseload in the Northern and Eastern Districts of Oklahoma. U.S. Br. in Supp. of Reh'g, *supra*, at 2. These new responsibilities would overwhelm current federal resources in the region. *Id*. (noting that the FBI has the equivalent of just seven agents for all of eastern Oklahoma).

2. "Although [the] definition [of Indian Country] by its terms relates only to federal criminal jurisdiction," this Court has recognized "that it also generally applies to questions of civil jurisdiction." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998). Absent this Court's review, the decision below will open up a Pandora's Box of questions regarding the State's regulatory power. For example, the State has limited power to tax tribal members on reservations. *See Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 126 (1993). Reservation status also calls into question the State's ability to regulate non-Indians in areas ranging from taxation to natural resources. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980) (balancing test for State regulatory jurisdiction over non-Indians on reservations). Likewise, regulatory jurisdiction under major federal environmental statutes could shift from the State to the U.S. Environmental Protection Agency, absent EPA approval to delegate such responsibilities to the State. *See Okla. Dep't of Envtl. Quality v. Envtl. Prot. Agency*, 740 F.3d 185, 190–91, 194 (D.C. Cir. 2014) (Clean Air Act).

Moreover, affected residents and businesses would suddenly discover that their legal rights were radically altered overnight because they now reside on a reservation. *Cf. Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978). For instance, they would potentially be subject to tribal regulatory jurisdiction for matters ranging from taxation and tribal liquor ordinances, *e.g.*, *Parker*, 136 S. Ct. 1072; *Rice v. Rehner*, 463 U.S. 713 (1983), to land-use, zoning, and employment codes, *see Montana v. United States*, 450 U.S. 544, 565–66 (1981). Non-members could be subject to tribal-court jurisdiction in civil cases involving tribal members and may have to exhaust jurisdictional challenges in tribal court before litigating in federal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16–19 (1987); *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 171–77 (5th Cir.), *aff'd by an equally divided court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (extent to which tribal courts have jurisdiction to adjudicate tort claims against non-members).

Indeed, some federal statutes vest tribal courts with *exclusive* jurisdiction over disputes arising within a reservation, despite the presence of non-Indian parties. *See, e.g.*, Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 101(a), 92 Stat. 3069, 3071. And while non-Indians will be subject to tribal jurisdiction, they have no role in shaping tribal laws that could apply to them. Non-members may not vote in tribal elections, and only Creek citizens with at least one-quarter blood quantum may hold office. Muscogee (Creek) Nation Const. art. III, § 4; *id.* art. IV.

C. The decision below is creating enormous disruption and uncertainty

1. The Tenth Circuit's decision has already triggered a wave of litigation, including dozens of collateral challenges to existing convictions. To date, criminal defendants have invoked the decision, in at least 46 cases in both Oklahoma state and federal courts, arguing that their crimes occurred on a reservation and thus fall outside state jurisdiction. *See, e.g.*, *Wade v. Martin*, No. WH-17-12 (Beckham Cty., Okla.) (Choctaw member claiming two 1986 murders occurred on Creek reservation); *Sims v. State*, No. F-17-635 (Okla. Crim. App.) (claiming victim was a member of Creek Nation); *In re Brown*, No. 17-7078 (10th Cir.) (claiming victim may have been a member of Cherokee Nation).

Although the State will resist any attempts to overturn valid convictions, the Tenth Circuit's decision raises the specter that hundreds or thousands of state convictions involving tribal members in the eastern half of Oklahoma will be subject to collateral attack. If any convictions are vacated, federal prosecutors must decide whether to retry those cases, many of which are decades old. Because older convictions typically include the most heinous crimes, violent criminals that the federal government is either unwilling or unable to retry may be released into the public. Inmates have even taken the unprecedented step of suing Oklahoma in *tribal court*. For instance, a Cherokee member convicted in 1989 for first-degree murder has sought a declaratory judgment in tribal court that the Cherokee reservation boundaries have not been diminished and that his conviction was void *ab initio*. *Mitchell v. Hunter*, No. CV-17-680 (Cherokee Nation Dist. Ct.). Although that challenge was

ultimately unsuccessful, such litigation will only multiply absent this Court's review.

2. This Court's review also is urgently needed to remove the jurisdictional cloud over current criminal prosecutions—*i.e.*, those that have yet to become final—as well as over any crimes that occur in the future. The decision below has inspired numerous defendants in ongoing state-court trials or direct-appeal proceedings to claim that either the defendant or the victim was a tribal member and that the crime occurred on a reservation of the Five Tribes. For example, a Choctaw tribe member under indictment for murder in the drowning death of his two-year-old daughter has cited the decision below, claiming the crime occurred on the Choctaw reservation and thus requesting transfer to federal court. *State v. Sizemore,* CF-16-593 (Pittsburg Cty., Okla.). Many similar examples exist.[4]

Perhaps as a sign of things to come, days after the Tenth Circuit issued its decision, one defendant—a former police officer charged with killing his daughter's boyfriend—obtained identification documents from the Creek Nation, claiming to be 1/128th Creek, and argued to the Oklahoma state court that the crime occurred on the Creek reservation. *See State v. Kepler*, CF-14-3952 (Tulsa Cty., Okla.); Samantha Vicent, *Shannon Kepler cites Creek Nation citizenship, 'Indian Country' ruling in asking for*

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[4] *See, e.g.*, *State v. Martin*, CF-16-782A (Carter Cty., Okla.) (Choctaw member claiming manslaughter occurred on Chickasaw reservation); *State v. Shriver*, CF-15-395 (Rogers Cty., Okla.) (Cherokee defendant claiming crimes, including second degree murder, occurred on Cherokee reservation); *State v. Mize*, CF-17-3891 (Tulsa Cty., Okla.) (Indian defendant claiming manslaughter occurred on Creek reservation).

murder case to be tossed, Tulsa World, Aug. 11, 2017, https://goo.gl/F2zwSn. He was recently convicted and sentenced to 15 years in prison but has filed his notice of appeal. The jurisdictional uncertainty clouding this and similar cases cries out for this Court's review.

3. The disruption also extends into the civil arena. The Cherokee Nation has cited the decision below to assert tribal-court jurisdiction over a dispute involving pharmaceutical companies on the theory that the borders of the Cherokee Nation were never disestablished. Suppl. Mem., *McKesson Corp. v. Hembree*, No. 17-cv-323 (N.D. Okla. Aug. 16, 2017); *id*., 2018 WL 340042 (N.D. Okla. Jan. 9, 2018) (enjoining tribal-court proceedings). And the Comanche Nation has sued the federal government in an attempt to undo the acquisition of land into trust for the Chickasaw Nation, alleging, based on *Murphy,* that the Chickasaw's territorial borders were never disestablished. *Comanche Nation of Oklahoma v. Zinke,* No. 17-cv-887 (W.D. Okla.). Absent this Court's intervention, the decision below will impose intolerable and destabilizing uncertainty throughout half the State.

II. The decision below is wrong

Oklahoma's accession to statehood in 1907 marked the culmination of Congress's elimination of the boundaries of the Five Tribes' territories. Congress did not retain, in the form of "Indian Country" under Section 1151, a replica of the Indian Territory that Congress spent the prior twenty years dismantling. The notion that the tribes had sovereignty that could oust the State of jurisdiction over its citizens, or that the federal government bore responsibility to prosecute Indians living in former Indian Territory,

would have been anathema to the Congress that enabled Oklahoma to join the Union.

In reaching a contrary result as to the Creek Nation, the Tenth Circuit held that, under the three-part test set forth in *Solem*, 465 U.S. 463, Congress never disestablished the tribe's external borders. App. 132a–133a. But *Solem* addressed individual surplus land acts, and its application makes little sense here. The creation of Oklahoma on equal footing with other States stripped the external boundaries of Oklahoma's two constituent territories—as well as the internal tribal boundaries in Indian Territory—of any jurisdictional significance, including criminal jurisdiction.

Oklahoma was not required to prove disestablishment by pointing to talismanic statutory language or a magic date. The Five Tribes' political existence was founded on treaty promises guaranteeing independent, sovereign governments and the right to occupy land patented to them in fee simple as long as the tribes existed. To convert the Indian Territory to a new State, Congress supplanted the Five Tribes' communal land tenure, dismantled all material vestiges of tribal governments, and ensured that the State would thereafter prosecute its citizens regardless of race. Nothing more was needed. By statehood, tribal boundaries were a historical artifact.

A. Congress dismantled Indian Territory and tribal boundaries to create Oklahoma

Indian reservations are defined by "the right of reservation Indians to make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959), and by tribal "ability to exercise … sovereign functions" within reservation borders, *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S.

832, 837 (1982). This case fails that standard by a long shot. The Five Tribes had lost all indicia of territorial sovereignty by 1907. Congress had stripped the tribal governments of their most basic executive, legislative, and judicial functions in order to bestow those powers upon the new State.

Beginning in 1893, Congress engaged in an extensive and systematic legislative campaign to abolish tribal courts, eliminate tribal law, and dissolve tribal government—all to pave the way for Oklahoma's entry to the Union. Congress authorized the Interior Secretary to remove the principal chiefs of the Five Tribes and to appoint their successors, prohibited tribal governments from congregating more than 30 days per year, and barred them from enacting legislation or entering into contracts involving their funds or land without the President's approval. Five Tribes Act §§ 6, 28, 34 Stat. at 139, 148. Congress abolished tribal taxes, § 11, 34 Stat. at 141, and commandeered tribal schools until they could be replaced with state schools, § 10, 34 Stat. at 140. Congress took possession of tribal buildings and sold all their furniture. § 15, 34 Stat. at 143. And the Dawes Commission dramatically usurped one of the most foundational attributes of tribal sovereignty—the ability to determine tribal membership. *Supra* pp. 6–11. Congress continued the tribal governments beyond 1906 because the Dawes Commission had yet to finish the rolls, but tribal powers were limited to "winding up their affairs." *Allen*, 171 F. at 921. In the end, the tribes were left with no authority except "to sign deeds." S. Rep. No. 59-5013, pt. 1, at 886.

The court below brushed aside this 20-year history on the ground that tribal governance had no bearing on reservation status. App. 105a–107a. But whether Congress intended the State to have "juris-

diction over the disputed areas" or, conversely, whether Congress intended tribes to retain governmental authority over activities within that territory, has always been essential to determining whether tribal borders persist. *Rosebud*, 430 U.S. at 599 n.20. Thus, in *Solem*, this Court found significant that a surplus land act did not speak to the issue of "jurisdiction over the opened areas." 465 U.S. at 478. By contrast, congressional intent here is unmistakable: Congress stripped the Five Tribes of any meaningful vestige of sovereignty. By statehood, the land formerly occupied by the Creek Nation was not an Indian reservation in any sense of that term.

B. Congress conferred judicial authority over Indian Territory to Oklahoma

Congress systematically transferred to the State general criminal jurisdiction over Indians in the former Indian Territory. Beginning in 1897, Congress abolished tribal courts, made tribal law unenforceable, and established federal territorial courts to hear criminal cases under Arkansas law regardless of the defendant's race. *Supra* p. 9; Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573 (mandating that Arkansas law "embrace all persons and estates in Indian Territory, whether Indian, freedman, or otherwise"). The Oklahoma Enabling Act then transferred all pending federal-question and diversity cases to the newly created federal courts in Oklahoma. § 16, 34 Stat. at 276. But, significantly, Congress transferred *all* other cases to the newly created state courts. §§ 17–20, 34 Stat. at 276–77. These statutory provisions render it inconceivable that Congress dismantled Indian Territory but simultaneously created a jurisdictional "Indian Country" in its wake.

If any of the Five Tribes' territories remained intact as a reservation, the jurisdictional transfer to state courts would have clashed with the Major Crimes Act, which conferred "exclusive jurisdiction" to federal courts for any major crime committed in a State by an Indian "within the limits of any Indian reservation." Ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153(a)). Because the Enabling Act directed a different course, state courts became the "legal successor" to the territorial courts for offenses committed before statehood, even by Indians. *Haikey v. State*, 105 P. 313, 314 (Okla. Crim. App. 1909).

For instance, in *Jones v. State*, 107 P. 738 (Okla. Crim. App. 1910), a federal grand jury indicted a Choctaw tribal member for murder occurring before statehood, but he "was tried after statehood by the district court of Atoka county." *Id.* at 738–39.[5] And another case involving a defendant, victim, and witnesses, "all being Indians," transferred from territorial court to state court after statehood. *Phillips v. United States*, 103 P. 861, 861 (Okla. Crim. App. 1909). Many similar cases exist.[6] Likewise, the State assumed jurisdiction over major crimes committed by

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[5] Mr. Jones identified himself as a Choctaw in his brief before this Court. Mot. for Leave to File Pet. for Writ of Habeas Corpus at 4, *In re Jonas Jones*, 231 U.S. 743 (1913).

[6] *Sharp v. United States*, 118 P. 675 (Okla. Crim. App. 1911); *Wilson v. United States*, 111 P. 659 (Okla. Crim. App. 1910); *Bailey v. United States*, 104 P. 917 (Okla. Crim. App. 1909); *Keys v. United States*, 103 P. 874 (Okla. Crim. App. 1909); *Price v. United States*, 101 P. 1036 (Okla. Crim. App. 1909). The Indian identity of defendants in these cases and in *Haikey*, *supra*, appears on the Dawes rolls. *See* Oklahoma Historical Society, *Search the Final Dawes Rolls and Applications*, http://www.okhistory.org/research/dawes.

Indians in former Indian Territory immediately after statehood. *E.g.*, *Rollen v. State*, 125 P. 1087, 1088 (Okla. Crim. App. 1912) (defendant "was a Cherokee citizen"); *Bigfeather v. State*, 123 P. 1026 (Okla. Crim. App. 1912).

This Court, too, understood from the outset that Oklahoma had jurisdiction over Indians in the former Indian Territory. In *Hendrix v. United States*, 219 U.S. 79 (1911), an Indian defendant indicted for murder in Indian Territory had successfully moved to transfer his case to a federal court in Texas, under a special venue statute for fair trials. Relying on the Enabling Act's transfer of jurisdiction to state courts, the defendant argued after statehood that the federal court lacked jurisdiction to try him. *Id.* at 89. In rejecting that argument, the Court notably did not hold that federal courts had exclusive jurisdiction under the Major Crimes Act, but rather that the specific venue statute continued to apply to pending cases. *Id.* at 90–91. The United States acknowledged that, but for the temporal venue provision, Congress gave the State jurisdiction over crimes involving Indians. U.S. Br. at 12, *Hendrix v. United States*, No. 319 (U.S. 1910) ("[T]he enabling act … and the subsequent organization of the State withdrew [Indian Territory] from the exclusive jurisdiction of the United States.").

The purported existence of reservations following statehood also would have left an implausible jurisdictional gap given the abolition of Creek courts in 1898. After statehood, federal courts had jurisdiction over *major* crimes committed by Indians against Indians on reservations. Ch. 341, § 9, 23 Stat. at 385. If, on the Tenth Circuit's theory, state courts possessed no criminal jurisdiction over Indians in the former Indian Territory, *no* court could have prosecuted In-

dians for committing such crimes as assault, bribery, forgery, and rioting against other Indians within the former Creek territory until Congress authorized the reestablishment of tribal courts in Oklahoma in 1936. *See* Act of June 26, 1936, ch. 831, § 2, 49 Stat. 1967. Given Congress's hyper-focus on rampant lawlessness in Indian Territory, *supra* p. 6, Congress could not plausibly have created a jurisdictional gap that would reintroduce the very misrule that Congress spent decades trying to eradicate.

C. *Solem* does not support the decision below

Notwithstanding this overwhelming evidence of congressional intent, the panel below held that the State could not prevail under the three-part framework set forth in *Solem*, 465 U.S. 463, because no singular statutory provision contained sufficiently clear language of land cession and because the contemporaneous and subsequent historical evidence of disestablishment was "mixed." App. 74a. That holding is wrong for two reasons. First, the panel erred at the threshold in holding *Solem* was the sole lens through which the court could ascertain congressional intent. Second, clear congressional intent is discernable even applying *Solem*.

1. This Court's *Solem* cases involve whether land designated by the federal government as Indian reservations within a pre-existing State retained reservation status when Congress opened the area for non-Indian settlement of surplus lands remaining after allotment.[7] In considering whether Congress al-

[7] *See, e.g.*, *Parker*, 136 S. Ct. 1072 (Omaha Indian Reservation in Nebraska); *Solem*, 465 U.S. 463 (Cheyenne Reservation in South Dakota); *Mattz*, 412 U.S. 481 (Klamath River/Hoopa Val-

tered the boundaries of a reservation by "special legislation in order to assure a particular reservation was in fact opened to allotment," *Mattz*, 412 U.S. at 496–97, this Court has held that land presumptively retains reservation status "until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470; *see United States v. Celestine*, 215 U.S. 278, 285 (1909). This presumption reflects the notion that allotment and non-Indian settlement may be "completely consistent with continued reservation status" "in a manner which the Federal Government … regarded as beneficial to the development of its wards." *Mattz*, 412 U.S. at 497. *Solem* thus governs how to determine whether "any particular surplus land act" "formally sliced a certain parcel of land off one reservation." *Solem*, 465 U.S. at 468, 472; *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

This case is markedly different. The General Allotment Act that spawned surplus land acts excluded the Five Tribes. Ch. 119, § 8, 24 Stat. 388, 391 (1887). The Five Tribes' territories also were not "reservations" in the traditional sense, but rather lands held by the tribe through patents in fee simple. *See* Census Office, *Report on Indians Taxed and Not Taxed* 298 (1894). This case does not involve a sale of surplus land to non-Indians. In short, Oklahoma prosecuted Mr. Murphy not because he committed a crime on a parcel of land that Congress opened to non-Indian settlement, but because the exterior and internal boundaries of Indian Territory had evaporated by the formation of Oklahoma.

Allotment of the Five Tribes' lands was inextricably intertwined with Congress's systematic and de-

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ley Reservation in California); *Seymour*, 368 U.S. 351 (Colville Reservation in Washington).

liberate liquidation of the Five Tribes as territorial sovereigns to pave the way for the merger of Indian Territory and Oklahoma Territory to create a new State. *Solem*'s framework was not designed to analyze this situation. At a minimum, the panel erred in holding that the state court's decision was contrary to clearly established federal law under 28 U.S.C. § 2254(d). App. 44a.[8]

The court of appeals also erroneously faulted the State for not identifying specific language in a given statute that extinguished the Creek boundaries with words equivalent to "cede," a "lump-sum payment," or restoration of the land to "public domain." App. 76a. Those terms would have been unnecessary or senseless under these unique circumstances. Congress would not have "restored" to the "public domain" lands that were not federal domain, but rather communally owned fee lands with tribal deeds. Congress did not need to use the term "cede," when it was not seeking cession of lands but rather the dissolution of communal ownership. Likewise, Congress would never offer a "lump-sum payment" because the Tribes' lands were conveyed through allotment to their own members rather than to the government. As a jurisdictional matter, the result was identical. By dissolving the Tribes' communal title and distributing communal property through allotment while also divesting the Tribes of governmental authority, Congress eliminated territorial boundaries.

2. The Tenth Circuit's application of *Solem* was also flawed. The "touchstone to determine whether a

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[8] The State argued below that *Solem* was inapposite. Okla. C.A. Br. 46–47, 91; *see also* App. 44a–45a (addressing State's arguments).

given statute diminished or retained reservation boundaries is congressional purpose." *Yankton*, 522 U.S. at 343. *Solem*'s factors are just a guide for discerning that intent. *Hagen v. Utah*, 510 U.S. 399, 411 (1994); *Rosebud*, 430 U.S. at 588 & n.4. A "traditional approach to diminishment cases" requires an examination of "all the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S. at 412. "Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton*, 522 U.S. at 351. Thus, this Court has insisted that related statutes be read together. *Rosebud*, 430 U.S. at 606 n.30; *accord Hagen*, 510 U.S. at 415. In *Rosebud*, although the legislation opening the reservation did not explicitly diminish the reservation, an earlier but unratified agreement had established an "unmistakable baseline purpose of disestablishment" that was "carried forth and enacted" in subsequent legislation. 430 U.S. at 591–92.

The panel below misapplied these principles in parsing each statute seriatim and in isolation, thereby looking for one specific statute with specific terminology. That exercise missed the forest for the trees: Congress had spent the better part of two decades eviscerating tribal governments and destroying communal land tenure to form Oklahoma. Congress created the Dawes Commission in the first place 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 … 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. 612, 645 (emphasis added). That extinguishment of title could be effected "either by cession of the same or some part thereof to the United States, *or by the allotment and division of the same in severalty* among the Indians of such nations or tribes." *Id*. (emphasis added). Congress viewed cession and allotment as equivalent means to the same end.

Congress reaffirmed this intent in later statutes allotting the land of the Creek Nation and divesting the tribe of each and every important feature of its sovereignty. *Supra* pp. 6–11. Additionally, in contrast to surplus land acts in which Congress directed the Treasury to retain proceeds for the tribe's benefit, allotment in the Five Tribes' territories mandated the division of all tribal land among tribal members as a prelude to the dissolution of the tribal government. *E.g.*, Creek Allotment Agreement §§ 3, 9, 31 Stat. at 862, 864. Congress directed any remaining tribal funds be distributed pro rata among the tribe's members. Supplemental Allotment Agreement, ch. 1323, § 14, 32 Stat. 500, 503 (1902); *see also* Five Tribes Act § 17, 34 Stat. at 143.

The *Solem* cases also require careful consideration of subsequent history and demographics—a "practical acknowledgement" of disestablishment—to avoid upsetting "the justifiable expectations of people living in the area." *Hagen*, 510 U.S. at 421; *accord Rosebud*, 430 U.S. at 604–05; *see also Yankton*, 522 U.S. at 356–57; *DeCoteau v. District Cty. Ct.*, 420 U.S. 425, 449 (1975). A "longstanding assumption of jurisdiction by the State" is inconsistent with reservation status. *Rosebud*, 430 U.S. at 604–05; *see also Yankton*, 522 U.S. at 357.

After statehood, Congress stripped away restrictions on alienation of most allotments, subjected

unrestricted allotments to state taxation regardless whether the allotments were still owned by tribal members, and applied state laws of succession and disposition on the remaining restricted allotments. Act of May 27, 1908, ch. 199, §§ 1, 4, 35 Stat. 312; *see also* Act of Apr. 10, 1926, ch. 115, § 1, 44 Stat. 239; Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731. Moreover, Congress required the tribes, on pain of fine or imprisonment, to transfer possession of all tribal property and funds, and for all tribal officers and representatives to surrender "all books, documents, records or any other papers" to the Secretary of the Interior. Act of May 27, 1908, ch. 199, § 13, 35 Stat. 312, 316.

These events extend beyond simple "de facto" disestablishment. App. 230a–232a. For a century, Oklahoma has governed the former Indian Territory, and no court until now has held that the State lacks criminal jurisdiction over Indians across the entire former Creek territory. Stripping Oklahoma of criminal jurisdiction over all Indians in this densely populated area, or even worse, in the entire eastern half of the State, would render Oklahoma a fractured, second-class State. *Cf. Coyle v. Smith*, 221 U.S. 559 (1911).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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February 6, 2018

APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 07-7068 & 15-7041

PATRICK DWAYNE MURPHY,
Petitioner-Appellant,

v.

TERRY ROYAL, Warden, Oklahoma State Penitentiary,
Respondent-Appellee.

MUSCOGEE (CREEK) NATION; SEMINOLE NATION OF OKLAHOMA; UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA,
Amici Curiae.

Appeal From The United States District Court For The Eastern District Of Oklahoma
(D.C. Nos. 6:03-CV-00443-RAW-KEW and 6:12-CV-00191-RAW-KEW)

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Klint A. Cowan, Fellers, Snider, Blankenship, Bailey & Tippens, P.C., Oklahoma City, Oklahoma, appearing for amicus United Keetoowah Band of Cherokee Indians in Oklahoma.

Before TYMKOVICH, Chief Judge, MATHESON, and PHILLIPS, Circuit Judges.

MATHESON, Circuit Judge.

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Patrick Dwayne Murphy asserts he was tried in the wrong court. He challenges the jurisdiction of the Oklahoma state court in which he was convicted of murder and sentenced to death. He contends he should have been tried in federal court because he is an Indian and the offense occurred in Indian country. We agree and remand to the district court to issue a writ of habeas corpus vacating his conviction and sentence.

The question of whether the state court had jurisdiction is straightforward but reaching an answer is not. We must navigate the law of (1) federal habeas corpus review of state court decisions, (2) Indian country jurisdiction generally, (3) Indian reservations specifically, and (4) how a reservation can be disestablished

or diminished. Our discussion on each of these topics reaches the following conclusions.

First, we assume that a federal habeas court must give deference to a state court's determination that it had jurisdiction. Nonetheless, in this case, the Oklahoma court applied a rule that was contrary to clearly established Supreme Court law. We must apply the correct law.

Second, when an Indian is charged with committing a murder in Indian country, he or she must be tried in federal court. Mr. Murphy is a member of the Muscogee (Creek) Nation. Because the homicide charged against him was committed in Indian country, the Oklahoma state courts lacked jurisdiction to try him.

Third, Congress has defined Indian country broadly to include three categories of areas: (a) Indian reservations, (b) dependent Indian communities, and (c) Indian allotments. *See* 18 U.S.C. § 1151. The reservation clause concerns us here. All land within the borders of an Indian reservation—regardless of whether the tribe, individual Indians, or non-Indians hold title to a given tract of land—is Indian country unless Congress has disestablished the reservation or diminished its borders.

Fourth, only Congress may disestablish or diminish an Indian reservation. Applying the Supreme Court's test to determine whether Congress has done so as to the Creek Reservation, we conclude it has not.

Mr. Murphy and the State agree that the offense in this case occurred within the Creek Reservation if Congress has not disestablished it. We conclude the Reservation remains intact and therefore the crime was committed in Indian country. Mr. Murphy, a

Creek citizen, should have been charged and tried in federal court.[1]

I. BACKGROUND

We begin with the facts of the crime as presented by the Oklahoma Court of Criminal Appeals ("OCCA").[2] We then discuss the procedural journey Mr. Murphy's case has traveled.

A. Factual History

In August 1999, Mr. Murphy lived with Patsy Jacobs. *Murphy v. State*, 47 P.3d 876, 879 (Okla. Crim. App. 2002). Ms. Jacobs was previously in a relationship with the victim in this case, George Jacobs, and had a child with him, George, Jr. *Id.* at 879–80. Mr. Murphy had an argument with her about Mr. Jacobs and said he was "going to get" Mr. Jacobs and his family. *Id.* at 879.

On August 28, 1999, Mr. Jacobs spent the day drinking with his cousin, Mark Sumka. *Id.* Around 9:30 p.m., Mr. Sumka was driving to a bar in Henryetta, Oklahoma, with Mr. Jacobs passed out in the back seat. *Id.* Mr. Murphy was driving on the same road in the opposite direction with two passengers—Billy Long and Kevin King. *Id.* After the cars passed each other, they stopped. *Id.* Mr. Murphy backed up and told Mr. Sumka to turn off the car, but Mr. Sumka drove off. *Id.*

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[1] Mr. Murphy raises eight issues in this appeal. Because we resolve his first issue by concluding the state courts lacked jurisdiction over this case, we do not address his other seven issues.

[2] *See* 28 U.S.C. § 2254(e)(1) (providing federal habeas court must presume state court's factual determinations are correct); *see also Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir. 2015) ("The presumption of correctness also applies to factual findings made by a state court of review based on the trial record." (quotations omitted)).

Mr. Murphy and his passengers pursued and forced Mr. Sumka off Vernon Road, which runs through an area that is "remarkably rural [and] heavily treed . . . without any sort of improvement . . . except perhaps a rickety barbed wire fence." *Murphy v. State*, 124 P.3d 1198, 1206 (Okla. Crim. App. 2005); *see also* 47 P.3d at 879.

Mr. Murphy exited the car and confronted Mr. Sumka. 47 P.3d at 879. Mr. Long and Mr. King began hitting Mr. Jacobs. *Id.* at 880. Mr. Murphy approached Mr. Jacobs, trading places with Mr. Long, who went over and hit Mr. Sumka. *Id.* at 880. Mr. Sumka briefly ran off but came back about five minutes later. *Id.*

When he did, he saw Mr. Murphy throw a folding knife into the woods, and he saw Mr. Jacobs lying in a ditch along the road, barely breathing. *Id.* Mr. Murphy and his companions threatened to kill Mr. Sumka and his family if he said anything, and Mr. King struck Mr. Sumka in the jaw. *Id.*

Following Mr. Murphy's instructions, Mr. Sumka left the scene with the other men. *Id.* During the car ride away, they told Mr. Sumka they had cut Mr. Jacobs's throat and chest and had severed his genitals. *Id.* The group later went to Mr. King's home, where Mr. Jacobs's son, George, Jr., was staying, in an apparent attempt to kill him. *Id.* Mr. King's mother intervened and "thwarted [their] plan." *Id.* Mr. King went inside, and the rest of the group left. *Id.*

A passerby found Mr. Jacobs in the ditch with his face bloodied and slashes across his chest and stomach. *Id.* His genitals had been cut off and his throat slit. *Id.* According to a state criminalist, Mr. Jacobs had been dragged off the road after his genitals were severed. *Id.* His neck and chest had been cut on the side of the road, where he bled to death over the course

of four to twelve minutes, though it may have taken longer. *Id.*

After Mr. Murphy returned home and confessed to Ms. Jacobs, he was arrested. *Id.* The State of Oklahoma charged him with Mr. Jacobs's murder and sought the death penalty.

B. Procedural History

A jury convicted Mr. Murphy of murder in Oklahoma state court and imposed the death penalty. His appeal and post-conviction proceedings have since moved through the Oklahoma and federal courts as recounted below.

Although the overall history of Mr. Murphy's case is complex, the history of the jurisdictional claim we resolve here can be succinctly summarized. After Mr. Murphy's conviction and death sentence were affirmed on direct appeal, he applied for state post-conviction relief in 2004, arguing the Oklahoma state courts had lacked jurisdiction to try him. The OCCA ordered an evidentiary hearing. Following the hearing, the state district court concluded Oklahoma's jurisdiction was proper because the crime did not occur in Indian country. The OCCA affirmed that conclusion in 2005. Mr. Murphy then sought federal habeas relief, but the federal district court denied relief in 2007. Mr. Murphy now appeals.

In the interest of thoroughness, and because Mr. Murphy's case has until now proceeded in a disjointed fashion, we provide a complete procedural history below.

1. Trial

In 2000, a jury in McIntosh County, Oklahoma, convicted Mr. Murphy of first degree murder under Okla. Stat. tit. 21 § 701.7(A) (1999). In the penalty

phase, the jury found aggravating circumstances supported the death penalty. *Murphy*, 47 P.3d at 879. In accordance with the jury's verdict, the trial court imposed a death sentence. *Id.*

2. Direct appeal

Mr. Murphy raised a variety of trial issues in a direct appeal to the OCCA. On May 22, 2002, the OCCA affirmed his conviction. *Id.* at 888. The court also performed a statutorily mandated sentencing review in which the court considered the aggravating circumstances in light of the mitigating evidence, including Mr. Murphy's "mild mental retardation," and concluded his death sentence was "factually substantiated and appropriate." *Id.* at 887–88.[3]

3. First Application for State Post-Conviction Relief

On February 7, 2002, while his direct appeal was pending in the OCCA, Mr. Murphy filed his first application for state post-conviction relief. *See Murphy v. State*, 54 P.3d 556, 560 (Okla. Crim. App. 2002). He asked that his application be held in abeyance, *id.* at 566, until the Supreme Court decided its then-pending case of *Atkins v. Virginia*, 536 U.S. 304 (2002), which addressed whether the Eighth Amendment prohibits the execution of "mentally retarded persons," *id.* at 306.

On June 20, 2002, about a month after the OCCA affirmed on direct appeal, the Supreme Court held in *Atkins* that the Eighth Amendment "places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id.* at 321 (quotations

[3] On April 21, 2003, the U.S. Supreme Court denied Mr. Murphy's petition for a writ of certiorari. *See Murphy v. Oklahoma*, 538 U.S. 985 (2003)

omitted). *Atkins* "[left] to the States the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 317 (brackets and quotations omitted).

On September 4, 2002, the OCCA denied relief on all of the issues Mr. Murphy had raised in his first application for state post-conviction relief except his *Atkins* claim. 54 P.3d at 570. The OCCA used Mr. Murphy's case to adopt new, post-*Atkins* procedures to shield "mentally retarded" persons from execution. *See id.* at 567–69. These procedures, the OCCA explained, would govern "until such time" as the Oklahoma legislature enacted an alternative framework. *Id.* at 568. The OCCA remanded to the state district court "for an evidentiary hearing on the sole issue of [Mr. Murphy's] claim of mental retardation in accordance with" the OCCA's newly announced procedures. *Id.* at 570.

On remand, the state district court concluded Mr. Murphy "had not raised sufficient evidence to create a fact question on the issue of mental retardation." *Murphy v. State*, 66 P.3d 456, 458 (Okla. Crim. App. 2003). On March 21, 2003, the OCCA ruled this conclusion was "not clearly erroneous" and affirmed Mr. Murphy's death sentence. *Id.* at 458, 461.

4. Filing of First Application for Federal Habeas Relief

On March 5, 2004, Mr. Murphy filed a federal habeas application under 28 U.S.C. § 2254 asserting 13 grounds for relief.

On August 30, 2004, the U.S. District Court for the Eastern District of Oklahoma concluded Mr. Murphy's application contained some claims that had not been exhausted in Oklahoma state court. The federal district court directed Mr. Murphy to drop his unexhausted claims.

On September 10, 2004, Mr. Murphy did so by filing an amended application containing eight claims, all of which were exhausted. His amended application remained pending in the federal district court while he pursued additional relief in state court.[4]

5. Second Application for State Post-Conviction Relief

On March 29, 2004—shortly after he filed his original federal habeas application—Mr. Murphy returned to state court and filed a second application for post-conviction relief to exhaust claims he had dropped from his federal habeas application. His second application for state post-conviction relief alleged:

1. Oklahoma lacked jurisdiction because the Major Crimes Act gives the federal government exclusive jurisdiction to prosecute murders committed by Indians in Indian country.[5]

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[4] The same day he filed his amended application, Mr. Murphy launched a short-lived appeal. He sought our review of the district court's order denying his request to stay the federal proceedings while he pursued his unexhausted claims in state court. Another panel of this court dismissed the appeal for lack of jurisdiction. *See Murphy v. Mullin*, No. 04-7094 (10th Cir. Dec. 16, 2004).

[5] In Oklahoma, "issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal." *Wallace v. State*, 935 P.2d 366, 372 (Okla. Crim. App. 1997); *see also Triplet v. Franklin*, 365 F. App'x 86, 95 (10th Cir. 2010) (unpublished) (recognizing that, in Oklahoma, issues of subject matter jurisdiction are not waivable and can be raised for the first time in collateral proceedings); *Wackerly v. State*, 237 P.3d 795, 797 (Okla. Crim. App. 2010) (considering jurisdictional claim that crime occurred on federal land raised in prisoner's second application for post-conviction relief); *Magnan v. State*, 207 P.3d 397, 402

2. The OCCA's earlier denial of a jury trial on the issue of his "mental retardation" had violated his constitutional rights.
3. Oklahoma's lethal injection protocol violated the Eighth Amendment.

See Murphy, 124 P.3d at 1200, 1208–09. The OCCA ordered an evidentiary hearing on the jurisdictional claim. *Id.* at 1199.[6]

a. Evidentiary hearing

The state district court held a one-day evidentiary hearing. *Id.* at 1201. Mr. Murphy argued Oklahoma lacked jurisdiction because the crime occurred in Indian country and 18 U.S.C. § 1153 provides for exclusive federal jurisdiction over murders committed by Indians in Indian country.[7] The parties agreed that

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(Okla. Crim. App. 2009) (considering Indian country jurisdictional challenge and explaining subject matter jurisdiction may be challenged at any time).

[6] The OCCA ordered that the hearing answer the following six questions:

(1) Where exactly did the crime occur?

(2) Who "owns" title to the property upon which the crime occurred?

(3) If some or all of the crime occurred on an easement, how does that factor into the ownership question?

(4) How much of the crime occurred, if any, on an easement?

(5) Did the crime occur in "Indian County," as defined by 18 U.S.C. § 1151?

(6) Is jurisdiction over the crime exclusively federal?

124 P.3d at 1201 n.3 (paragraph breaks added).

[7] "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any

Mr. Murphy and Mr. Jacobs, both members of the Muscogee (Creek) Nation, were Indians, but they disputed whether the crime occurred in Indian country, a term defined in 18 U.S.C. § 1151:

> [T]he term "Indian country" . . . means
>
> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (paragraph breaks added). An area qualifies as Indian country if it fits within any of these three categories. Mr. Murphy argued the crime occurred in Indian country under all three categories.[8]

In December 2004, the state district court concluded state jurisdiction was proper because the crime had occurred on state land. *See* 124 P.3d at 1200, 1202. The court, however, addressed only one of Mr. Murphy's three theories. *Id.* at 1207. It concluded the land was

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of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

[8] In this appeal, however, he argues the location of the crime qualifies under the reservation clause of subsection (a) and the allotment clause of subsection (c). Because we agree with him that the crime occurred on an Indian reservation, we do not reach his allotment argument.

not an Indian allotment under § 1151(c), but it failed to address whether the location was (a) part of the Creek Reservation or (b) part of a dependent Indian community. *See id.* (noting the state district court failed to address these questions although the OCCA had "clearly asked" it to do so). Although the state district court viewed these matters as outside the scope of the evidentiary hearing, it allowed Mr. Murphy to make an offer of proof on his other two theories. *Id.*[9] The court ultimately ruled the State's exercise of criminal jurisdiction was proper and denied relief. *Id.* at 1202.

b. Appeal to the OCCA

Mr. Murphy appealed to the OCCA. On December 7, 2005, the OCCA denied relief on his jurisdictional and Eighth Amendment claims but granted limited relief on the *Atkins* claim. *See id.* at 1209.

On the jurisdictional issue, the OCCA found the record did not support some of the state district court's determinations, but it affirmed the ultimate determination that Oklahoma's jurisdiction was proper.

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[9] On the reservation question that concerns us here, Mr. Murphy argued:

> [T]he homicide occurred within the boundaries of the Creek Nation, which qualifies as Indian county because of its status as a reservation under federal jurisdiction. Unlike some other tribes, the Creek treaty lands were not disestablished or diminished by the acts of allotment and other federal legislation adopted in the early 20th century. As of 1999, the entirety of the historic Creek Nation lands thus remained Indian country, regardless of non-Indian ownership of particular tracts within those boundaries.

Def. Tr. Br. at 12 (filed Nov. 16, 2004), State Post-Conviction Record, OCCA Case No. PCD-2004-321, Vol. 1 at 66 (citing *Solem v. Bartlett*, 465 U.S. 463 (1984)).

Id. at 1201–08. The OCCA accepted the state district court's findings regarding where the crime unfolded, but it rejected the court's conclusion that Oklahoma owned the road and the ditch abutting it. *Id.* at 1202. Rather, the OCCA concluded, Oklahoma's "interest in the area in question is in the nature of an easement or right-of way." *Id.* The Creek Nation had long owned the land in question when, under a statute enacted in 1902, Oklahoma received the right to build a public highway. *Id.* at 1203. Tracing the history of the specific tract where the crime occurred, the OCCA concluded it had passed in the early twentieth century from the Creek Nation to Lizzie Smith, a member of the Creek Nation, and that all interest in the land—except for a restricted 1/12 mineral interest—had since been conveyed to non-Indians. *See id.* at 1204–06. The OCCA concluded this Indian interest was insufficient to qualify the land as an Indian allotment under § 1151(c): "A fractional interest in an unobservable mineral interest is insufficient contact with the situs in question to deprive the State of Oklahoma of criminal jurisdiction." *Id.* at 1206.[10]

The OCCA criticized the state district court for not addressing whether the crime was committed within the Creek Reservation or within a dependent Indian community, but it concluded the error was harmless because Mr. Murphy had been afforded a chance "to make an extended offer of proof." *Id.* at 1207. The OCCA said that the evidence, had it been admitted, was "insufficient" to show "that the tract in question

[10] We discuss the OCCA's decision regarding Mr. Murphy's allotment theory under § 1151(c) because it forms part of the procedural history of this case, but we offer no comment on the merits of the OCCA's decision on this front. Our opinion is limited to the reservation question under § 1151(a).

qualifies as a reservation or dependent Indian community." *Id.*

With respect to the reservation theory, the OCCA acknowledged our decision in *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988), where we recognized the Creek Reservation still exists but reserved the question whether its 1866 boundaries remain intact, 829 F.2d at 975–76. *See* 124 P.3d at 1207–08 (discussing *Indian Country, U.S.A.*). The OCCA stated: "If the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here." *Id.* at 1208.[11]

As for the two non-jurisdictional issues Mr. Murphy raised in his second post-conviction application, the OCCA granted limited relief on one and denied relief on the other. First, it reversed course on the *Atkins* issue and found Mr. Murphy *had* provided sufficient evidence to create a factual question for a jury on his "mental retardation claim." *Id.* It therefore ordered the case remanded. *Id.* Second, the OCCA ruled Mr. Murphy had waived his Eighth Amendment challenge to Oklahoma's lethal injection protocol by failing to raise it earlier. *Id.* at 1209.

In summary, the OCCA rejected the jurisdictional challenge and the Eighth Amendment claim, but it remanded for a jury trial on Mr. Murphy's *Atkins* claim.[12]

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[11] The OCCA also rejected the dependent Indian community theory under § 1151(b). See 124 P.3d at 1208. That ruling is not before us because Mr. Murphy now raises only the allotment and reservation theories.

[12] Mr. Murphy petitioned the U.S. Supreme Court for certiorari on two aspects of the OCCA's jurisdictional decision: (1) whether Oklahoma lacked jurisdiction because the crime occurred on a restricted Indian allotment under § 1151(c) and (2) whether

c. *Atkins* trial and appeal

Following a September 2009 trial in the state district court, a jury in McIntosh County rejected Mr. Murphy's claim of "mental retardation." *Murphy v. State*, 281 P.3d 1283, 1287 (Okla. Crim. App. 2012) (discussing jury trial). But the trial judge declared a mistrial based on an error of state law and reset the case for a new trial. *Id.*[13]

Before the re-trial, the State moved to terminate further proceedings. A state statute had supplanted the OCCA's *Atkins* procedures and provided that no defendant who received an intelligence quotient ("I.Q.") score of 76 or above could "be considered mentally retarded." Okla. Stat. tit. 21 § 701.10b(C); *see also* 281 P.3d at 1287–89. Because Mr. Murphy had received an I.Q. score of 80 on one test and 82 on another, the trial court granted the State's motion and terminated proceedings on January 27, 2011. 281 P.3d at 1288.

Mr. Murphy appealed and raised four propositions of error to the OCCA. *Id.* at 1287. On April 5, 2012, the OCCA ruled the district court had properly relied on the new state law. *Id.* at 1289. The OCCA rejected all

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Oklahoma lacked jurisdiction because the crime occurred within the limits of an Indian reservation under § 1151(a). The Supreme Court called for the views of the United States, and the Solicitor General filed a brief arguing the Court should deny Mr. Murphy's petition because the OCCA had correctly determined that the crime was not within the exclusive jurisdiction of the federal government. *See* Brief for the United States as Amicus Curiae, *Murphy v. Oklahoma*, No. 05-10787, 2007 WL 1319320, at *4. The Supreme Court denied Mr. Murphy's petition for certiorari without comment. *Murphy v. Oklahoma*, 551 U.S. 1102 (2007).

[13] The court declared a mistrial because neither side had been afforded its full complement of peremptory challenges—a structural error under Oklahoma law at the time. *See* 281 P.3d at 1287 & n.1.

of Mr. Murphy's claims, thus concluding proceedings on the second post-conviction application. *Id.* at 1294.

6. Federal District Court Proceedings on First Federal Habeas Application

On December 28, 2005, after the OCCA rejected his jurisdictional and Eighth Amendment claims but before the conclusion of the *Atkins* proceedings, Mr. Murphy moved to amend his federal habeas application. The district court granted the motion and allowed Mr. Murphy to add two newly exhausted claims: (1) the challenge to Oklahoma's jurisdiction, and (2) the Eighth Amendment lethal-injection challenge. These two claims were added to Mr. Murphy's eight previously exhausted federal claims, which were still pending.

On August 1, 2007, the district court entered an opinion and order denying all ten claims in Mr. Murphy's habeas application. *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1294–95 (E.D. Okla. 2007).

On the jurisdictional claim, Mr. Murphy argued the crime had occurred in Indian country under just two theories: (1) the land was part of the Creek Reservation under § 1151(a) and (2) the land was an Indian allotment under § 1151(c). *Id.* at 1288. Applying the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), the district court ruled that the OCCA's decisions against Mr. Murphy on these theories were neither contrary to nor an unreasonable application of clearly established federal law. *See* 497 F. Supp. 2d at 1286–92.

The district court rejected Mr. Murphy's other claims but granted him three certificates of appealability ("COAs")[14] to challenge his counsel's effectiveness, one

[14] "[A] prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or

of the death-eligibility aggravating circumstances, and the trial court's failure to define life without parole for the jury.

7. First Appeal to the Tenth Circuit (No. 07-7068)

Mr. Murphy appealed to this court. On November 16, 2007, we abated the appeal to await resolution of Mr. Murphy's then-pending *Atkins* claim in Oklahoma state court.

8. Second Application for Federal Habeas Relief

On April 26, 2012, following the OCCA's final denial of his *Atkins* claim, Mr. Murphy filed a second § 2254 application in the Eastern District of Oklahoma that challenged the OCCA's resolution of the *Atkins* issue.[15] The district court denied relief. *Murphy v. Trammell*, No. CIV-12-191-RAW-KEW, 2015 WL 2094548, at *13 (E.D. Okla. May 5, 2015) (unpublished).

9. This Consolidated Appeal

Mr. Murphy sought to appeal from the district court's denial of relief on his second § 2254 habeas application. We consolidated that appeal (No. 15-7041) with his appeal from the denial of his first habeas application (No. 07-7068) to form this case.

Mr. Murphy raises eight issues. Because he obtained COAs for each one,[16] our jurisdiction is proper under 28 U.S.C. § 2253(a), (c)(1)(A).

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judge" before an appeal can be heard. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *see* 28 U.S.C. § 2253(c).

[15] The district court treated the application as second and successive and transferred it to this court. We concluded that at least a portion of Mr. Murphy's *Atkins* challenge could proceed and ordered a partial remand. *In re Murphy*, No. 12-7055, at 2 (10th Cir. Nov. 1, 2012) (unpublished order).

[16] The district court granted Mr. Murphy three COAs and we granted five more. The district court granted COAs for Mr. Murphy's arguments regarding: (1) ineffective assistance of

As to one of the issues—whether Oklahoma or the federal government had jurisdiction over the murder case—we granted the motion of the Muscogee (Creek) Nation and the Seminole Nation of Oklahoma to file a joint amici brief.[17] We likewise permitted the United Keetoowah Band of Cherokee Indians in Oklahoma to file an amicus brief. The Tribes also participated at oral argument.

II. LEGAL BACKGROUND

We conclude the crime occurred on the Creek Reservation and therefore the Oklahoma courts lacked jurisdiction. This section addresses the law applicable to the jurisdictional issue. We begin with (A) our standard of review and then address (B) the substantive law of Indian country jurisdiction.

A. Standard of Review

The parties disagree over the standard of review that should apply to Mr. Murphy's jurisdictional claim. The State contends AEDPA's deferential standard should apply. Mr. Murphy disagrees and argues we

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counsel, (2) the "heinous, atrocious, or cruel" aggravating circumstance, and (3) the trial court's failure to define "life without parole" for the jury. In June 2015, we ordered Mr. Murphy to file a motion for additional COAs across both appeals. We granted COAs for his claims regarding: (1) victim-impact statements, (2) Oklahoma's jurisdiction, (3) the district court's refusal to stay and abate proceedings on his first federal habeas application, (4) Oklahoma's procedural handling of his *Atkins* claim, and (5) cumulative error. *Murphy v. Warrior*, Nos. 07-7068 & 15-7041, at 1–2 (10th Cir. Jan. 6, 2016) (unpublished order). All eight issues are properly before us in this appeal, but our resolution of the jurisdictional claim obviates the need to address the other seven issues.

[17] Because this case concerns the Creek Reservation, we refer to the Tribes' joint brief with the shorthand "Creek Nation Br."

should review his claim de novo. We begin by discussing this disagreement, but we choose not to resolve it because Mr. Murphy prevails even under AEDPA review. Because we assume the AEDPA standard applies, we then go on to describe it.

1. The Parties' Dispute

As we discuss in greater detail below, AEDPA generally requires federal habeas courts to defer to state court decisions. Mr. Murphy argues AEDPA does not apply when, as here, a state court denies a defendant's challenge to the state court's subject matter jurisdiction. AEDPA deference, he maintains, "presupposes" the state court had jurisdiction to decide a given claim in the first place. Aplt. Br. at 26. Because the question of Indian country jurisdiction implicates tribal and federal sovereignty interests, he also contends that federal courts, unconstrained by AEDPA, must make the final determination over the jurisdictional issue. And he argues that applying AEDPA to jurisdictional claims would pose separation-of-powers and other constitutional problems.

The State responds that nothing in AEDPA says subject matter jurisdiction claims should be reviewed de novo. It notes Mr. Murphy has failed to cite a case in support of his view that AEDPA does not apply to jurisdictional questions. It argues Mr. Murphy has waived any argument against AEDPA's application because he supported the district court's application of AEDPA below. The State also disputes his constitutional arguments.

We need not decide whether this issue is waivable, whether Mr. Murphy has waived it here, or even whether AEDPA is the appropriate standard. We choose to assume without deciding that AEDPA applies.

We took this approach in *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013). Both sides agree *Magnan* left open the question of whether AEDPA applies to Indian country jurisdictional claims. *Magnan* concerned an Indian defendant whom an Oklahoma state court had sentenced to death. *Id.* at 1160–61. The defendant challenged the state court's jurisdiction. *Id.* at 1163. We assumed without deciding that AEDPA applied and concluded that, even under AEDPA's deferential standard, the OCCA had erred in concluding Oklahoma had jurisdiction over the case. *Id.* at 1160–61, 1164.[18] We held the crime occurred in Indian country, making jurisdiction exclusively federal. We ordered Mr. Magnan released from state custody without resolving the "difficult question" of whether AEDPA constrains federal court review of a state court's jurisdictional ruling regarding Indian country. *Id.* at 1164, 1176–77.[19] As in *Magnan*, we can assume without deciding that AEDPA applies because Mr. Murphy is entitled to relief even under that formidable standard of review.

2. The AEDPA Standard

We first discuss AEDPA's general framework and then focus on the statute's "contrary to" clause because that provision guides our analysis.

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[18] *See also Yellowbear v. Att'y Gen. of Wyo.*, 380 F. App'x 740, 743 (10th Cir. 2010) (unpublished) (leaving open the question of whether AEDPA applies and concluding on federal habeas review of state murder case that Wyoming Supreme Court's ruling on Indian reservation issue in favor of state jurisdiction should be affirmed regardless of whether de novo or AEDPA standard applied).

[19] Mr. Magnan was later convicted in federal court of three counts of murder in Indian country. We affirmed his convictions. *See United States v. Magnan*, __ F.3d __, No. 16-7043, 2017 WL 3082157, at *1, *4 (10th Cir. July 20, 2017).

a. Overview

"AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013). When a state court adjudicates a claim on the merits, AEDPA prohibits federal courts from granting habeas relief unless the state court's adjudication of the claim:

> (1) 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; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2). "If this standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).[20]

Section 2254(d) provides three ways to overcome AEDPA deference. Two appear in § 2254(d)(1), which provides that a state prisoner can qualify for habeas relief by showing a state court decision was (1) "contrary to" or (2) "involved an unreasonable application of" federal law that was clearly established by the Supreme Court. 28 U.S.C. § 2254(d)(1); *see Bell v. Cone*, 535 U.S. 685, 694 (2002) (explaining the "contrary to" and "unreasonable application" clauses each

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[20] AEDPA concerns federal court deference to the decisions of state courts. Our review of the federal district court's application of AEDPA is de novo. *See Frost v. Pryor*, 749 F.3d 1212, 1223 (10th Cir. 2014) ("[W]e review the district court's legal analysis of the state court decision de novo and its factual findings, if any, for clear error." (quotations omitted)).

carry "independent meaning"). The third way, in § 2254(d)(2), requires a state prisoner to show that a state court decision was based on an unreasonable factual determination. *See* 28 U.S.C. § 2254(d)(2). Thus, "[e]ach of AEDPA's three prongs—contrary to clearly established federal law, unreasonable application of clearly established federal law, and unreasonable determination of the facts—presents an independent inquiry." *Budder v. Addison*, 851 F.3d 1047, 1051 (10th Cir. 2017).

Mr. Murphy makes arguments based on all three, but because we need apply only § 2254(d)(1)'s "contrary to" provision to resolve this case, we restrict our discussion to that clause.

b. The "contrary to" clause

When a state court adjudicates a prisoner's federal claim on the merits, review under § 2254(d)(1)'s "contrary to" clause proceeds in three steps.

First, we must decide whether there is clearly established federal law that applies to the claim. *See House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008) ("Whether the law is clearly established is *the* threshold question under § 2254(d)(1)."). In discerning what law is "clearly established," we must look only to the decisions of the Supreme Court, *see Parker v. Matthews*, 567 U.S. 37, 48–49 (2012) (per curiam) (explaining circuit precedent "cannot form the basis for habeas relief under AEDPA"), and we must "measure state-court decisions against [the Supreme] Court's precedents as of the time the state court renders its decision," *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (emphasis and quotations

omitted).[21] Within this set of cases, "'clearly established Federal law' for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (brackets and quotations omitted).

Second, if we can identify clearly established law, we then must assess whether the state court's decision was "contrary to" that law. *See* 28 U.S.C. § 2254(d)(1); *see also House*, 527 F.3d at 1018. "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (controlling opinion of O'Connor, J.) (quoting Webster's Third New International Dictionary 495 (1976)). A state court decision violates the "contrary to" clause if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Id.* If the state court identifies and applies "the correct legal rule," its decision will not be "contrary to" federal law, but the state court's application of the correct rule can still be evaluated under § 2254(d)(1)'s "unreasonable application" clause. *Id.* at 406.

Third, if the state court rendered a decision that was "contrary to" clearly established Supreme Court precedent by applying the wrong legal test, we do not necessarily grant relief; rather, we review the claim applying the correct law. Put differently, "it is . . . a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review," but habeas relief does not "automatically issue if a prisoner satisfies the AEDPA standard." *Horn v. Banks*, 536 U.S. 266, 272 (2002). By showing the state court

[21] Similarly, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

decision was "contrary to" clearly established federal law, the prisoner surmounts AEDPA, and the federal habeas court "must then resolve the claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *see also Williams*, 529 U.S. at 406 (explaining that if "the state-court decision falls within" the "contrary to" clause, "a federal court will be unconstrained by § 2254(d)(1)"); *Milton v. Miller*, 744 F.3d 660, 670–71 (10th Cir. 2014) (concluding OCCA's decision was "contrary to" clearly established federal standard and reviewing claim de novo).

As previously mentioned, we choose to assume that AEDPA supplies our standard of review and now turn to the substantive law governing Indian country jurisdiction.

B. Indian Country Jurisdiction

Understanding the Indian country jurisdiction issue in this case requires background knowledge about (1) reservations, (2) the Major Crimes Act, (3) the meaning of "Indian country," and (4) how a reservation can be disestablished or diminished. We address these topics below.

1. Reservations

The federal government began creating Indian reservations during the nineteenth century. *See* Felix S. Cohen's Handbook of Federal Indian Law 60 (Nell Jessup Newton ed., 2012) [hereinafter "Cohen"]. "During the 1850s, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence or use of tribal Indians, regardless of origin." *Id.* at 190 91. "[T]he term ['Indian reservation'] has come to describe federally-protected Indian tribal lands, meaning those lands which Congress has set apart for tribal and federal jurisdiction."

Indian Country, U.S.A., 829 F.2d at 973 (citation and quotations omitted). As we explain further below, the term "Indian country" includes not only reservations but other lands as well.

2. The Major Crimes Act

The Major Crimes Act is the jurisdictional statute at the heart of this case. It applies to enumerated crimes committed by Indians in "Indian country." When the Major Crimes Act applies, jurisdiction is exclusively federal. *See Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) ("[F]ederal jurisdiction over the offenses covered by the Indian Major Crimes Act is exclusive of state jurisdiction." (quotations omitted)); *United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992) ("The State of Oklahoma does not have jurisdiction over a criminal offense committed by one Creek Indian against another in Indian country."); *Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) ("[Q]uite simply the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country." (quotations omitted)). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

The current version of the Major Crimes Act provides in relevant part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153(a). If the Major Crimes Act applies to an Indian defendant, he or she "shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States." 18 U.S.C. § 3242.

The parties agree that Mr. Murphy and Mr. Jacobs, both members of the Creek Nation, qualify as Indians for purposes of the Major Crimes Act. *See* 124 P.3d at 1200; *see also* Aplt. Br. at 20; Aplee. Br. at 11.[22] Murder is among the Act's enumerated offenses. *See* 18 U.S.C. § 1153(a). The dispute centers on whether the crime occurred in Indian country, in particular on the Creek Reservation. Before we discuss the meaning of Indian country, we provide the following history of the Major Crimes Act because it aids our analysis.

In *Ex parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that federal and territorial courts lacked jurisdiction to try an Indian for the murder of another Indian committed in Indian country. *Id.* at 572. In response, Congress passed the Major Crimes Act in 1885. *See* Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385; *Keeble v. United States*, 412 U.S. 205, 209–10 (1973) (discussing *Ex parte Crow Dog* and legislative response). As originally enacted, the Major Crimes Act provided:

> [A]ll Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder . . . within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes

[22] Whether the Major Crimes Act applies does not depend on whether the victim is an Indian. *See* 18 U.S.C. § 1153(a) (reaching crimes against an Indian "or other person").

> . . . ; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

§ 9, 23 Stat. at 385. Thus, unlike the current law, which applies in "Indian country," the original Act applied to crimes committed in federal territories and "within the boundaries of any State of the United States, and within the limits of any Indian *reservation*." *Id.* (emphasis added); *see also United States v. Kagama*, 118 U.S. 375, 377–78, 383–85 (1886) (discussing original Act and upholding its constitutionality).

In cases decided in the late nineteenth and early twentieth centuries, the Supreme Court explained that the Major Crimes Act applied to crimes committed within the boundaries of Indian reservations regardless of the ownership of the particular land on which the crimes were committed. *See United States v. Celestine*, 215 U.S. 278, 284–87 (1909); *United States v. Thomas*, 151 U.S. 577, 585–86 (1894). The Court explained in *Celestine* that reservation status depends on the boundaries Congress draws, not on who owns the land inside the reservation's boundaries: "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." 215 U.S. at 285. This understanding of reservations has continued. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian

Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." (citing *Celestine*, 215 U.S. at 285)).

3. Indian Country

In 1948, Congress amended the Major Crimes Act and codified the definition of "Indian country." *See* Act of June 25, 1948, ch. 645, 62 Stat. 683, 757; *see also Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 528–30 (1998) (discussing term's case-law origins); Cohen at 189–90 (discussing codification). Within the definition, Congress included the boundaries-based concept of reservations that had developed in the case law under the Major Crimes Act.[23] Under 18 U.S.C. § 1151, "Indian country" means:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

[23] Before the 1948 codification, Congress in 1932 had also provided that the Major Crimes Act would apply to enumerated crimes committed by Indians "on and within any Indian reservation under the jurisdiction of the United States Government, including rights of way running through the reservation." Act of June 28, 1932, 47 Stat. 336, 337.

> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (paragraph breaks added).[24] If an area qualifies under any of these definitions, it is Indian country. *See Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) ("Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States."); *see also Indian Country, U.S.A.*, 829 F.2d at 973 ("A formal designation of Indian lands as a 'reservation' is not required for them to have Indian country status."). *Id.*

At the same time Congress enacted this definition of Indian country, it also amended the Major Crimes Act so that it would apply in Indian country as defined in the statute. *See* 62 Stat. at 758. Thus, the Major Crimes Act now applies in all of Indian country, *see* 18 U.S.C. § 1153(a), not only reservation land.

Within § 1151's definition of Indian country, the § 1151(a) reservation clause concerns us here. Congress provided that "Indian country" includes "*all land within the limits of any Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a) (emphasis added). Thus, land within the boundaries of an Indian reservation is in "Indian country."

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[24] "Indian country" carries a different meaning for certain laws relating to intoxicants. *See* 18 U.S.C. §§ 1154, 1156; *see also* 18 U.S.C. § 1151 (defining "Indian country" "[e]xcept as otherwise provided in sections 1154 and 1156 of this title"). These exceptions are not relevant here.

The Supreme Court confirmed this understanding in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). In that case, an Indian sought federal habeas relief after being convicted in Washington state court of burglary, one of the Major Crimes Act's enumerated offenses. *See* 18 U.S.C. § 1153(a); *see also Seymour*, 368 U.S. at 352 n.2. He argued the United States had exclusive jurisdiction because the crime occurred within an Indian reservation and therefore within Indian country. *See* 368 U.S. at 352–54. The State of Washington argued that even though the crime occurred on land within the reservation's borders, the particular parcel was owned by a non-Indian. *See id.* at 357. Ruling for the Indian petitioner, the Supreme Court said Congress's definition of Indian country in § 1151(a) "squarely put to rest" this argument. *Id.* "Since the burglary with which [the defendant] was charged occurred on property plainly located within the limits of [the] reservation, the courts of Washington had no jurisdiction to try him for that offense." *Id.* at 359. Under § 1151(a), therefore, all lands within the boundaries of a reservation have Indian country status.

4. Reservation Disestablishment and Diminishment

Only Congress can disestablish or diminish a reservation.[25] In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Supreme Court said Congress has the

[25] The terms "disestablished" and "diminished" "have at times been used interchangeably," but "disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size of a reservation." *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1017 (8th Cir. 1999). Here, the State argues Congress disestablished the Creek Reservation.

power to unilaterally abrogate treaties made with Indian tribes. *Id.* at 566. "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). This includes the power to eliminate or reduce a reservation against a tribe's wishes and without its consent. *See Solem*, 465 U.S. at 470 n.11 (explaining the *Lone Wolf* Court "decided that Congress could diminish reservations unilaterally"). Because "only Congress can alter the terms of an Indian treaty by diminishing a reservation," the Supreme Court has said the "touchstone" of whether a reservation's boundaries have been altered is congressional purpose. *Yankton Sioux Tribe*, 522 U.S. at 343; *see also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977) ("The focus of our inquiry is congressional intent.").

Having recognized Congress's power to disestablish and diminish Indian reservations, the Supreme Court also has developed a framework to determine whether Congress has exercised its power with respect to a given reservation. We next discuss (a) the presumption against disestablishment and diminishment, (b) Congress's pursuit of a policy called allotment and its relationship to reservation borders, and (c) the Supreme Court's three-part *Solem* test for determining whether Congress has altered a reservation's boundaries.

a. Presumption against disestablishment and diminishment

Courts do not lightly infer that Congress has exercised its power to disestablish or diminish a reservation. *See DeCoteau v. Dist. Cty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 444 (1975) ("[The Supreme] Court does not lightly conclude that an

Indian reservation has been terminated."). Indeed, the Supreme Court has said courts must approach these issues with a "presumption" that Congress did not intend to disestablish or diminish a reservation. *Solem*, 465 U.S. at 481; *see also Absentee Shawnee Tribe v. Kansas*, 862 F.2d 1415, 1417 (10th Cir. 1988) ("With regard to acts of Congress subsequent to the establishment of the reservation, the courts adopt an interpretational policy against diminishing an Indian reservation."). [26] Congress can do so, but its intent "must be 'clear and plain.'" *Yankton Sioux Tribe*, 522 U.S. at 343 (quoting *United States v. Dion*, 476 U.S. 734, 738–39 (1986)); *see also Solem*, 465 U.S. at 470 (explaining Congress must "clearly evince an intent to change boundaries before diminishment will be found" (quotations omitted)); *id.* at 476 (discussing a statute's lack of "explicit expression of congressional intent to diminish" and finding reservation preserved); *DeCoteau*, 420 U.S. at 444 ("[The Supreme Court] requires that the congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." (ellipsis in original) (quotations omitted)).

b. The policy of allotment

The Supreme Court's test, discussed below, for determining whether Congress intended to disestablish or diminish a reservation developed after Congress pursued a policy known as allotment.

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[26] The presumption against reservation disestablishment and diminishment accords with the general principle that an intent "to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (quotations omitted); *see also South Dakota v. Bourland*, 508 U.S. 679, 687 (1993).

Following decades of setting aside "large sections of the western States and Territories . . . for Indian reservations," Congress in the late nineteenth century adopted "the view that the Indians tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately-owned parcels of land." *Solem*, 465 U.S. at 466. [27] This policy involved Congress dividing, or "allotting," communal Indian lands into individualized parcels for private ownership by tribal members. Not incidentally, the policy also "open[ed] up unallotted lands for non-Indian settlement," allowing these "surplus" lands to be sold to non-Indians. *Id.* at 467. Laws designed "to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement" are often referred to as "surplus land acts." *Id.*

Allotment on its own does not disestablish or diminish a reservation. *See Mattz v. Arnett*, 412 U.S. 481, 497 (1973) (explaining allotment can be "completely consistent with continued reservation status"). But Congress, in passing surplus land acts, has altered the boundaries of some reservations. *See Solem*, 465 U.S. at 469 ("[S]ome surplus land acts diminished reservations, and other surplus land acts did not." (citations omitted)).

Congress pursued the allotment policy on a national scale in the 1887 General Allotment Act. *See* Act of

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[27] Or, as the Supreme Court described the policy at the time, "Of late years a new policy has found expression in the legislation of Congress,[] a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes . . . ." *In re Heff*, 197 U.S. 488, 499 (1905), *overruled in part by United States v. Nice*, 241 U.S. 591, 601 (1916).

Feb. 8, 1887, ch. 119, 24 Stat. 388.[28] That law, however, did not affect all Indian tribes and reservations. The Creek Nation was not included in the General Allotment Act. *See* § 8, 24 Stat. at 391. By the early twentieth century, "Congress was dealing with the surplus land question on a reservation-by-reservation basis, with each surplus land act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." *Solem*, 465 U.S. at 467.

During the allotment era, Congress "anticipated the imminent demise" of reservations. *Id.* at 468; *see also id.* ("[M]embers of Congress voting on the surplus land acts believed to a man that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist."); *see also Yankton Sioux Tribe*, 522 U.S. at 343 (explaining Congress "assumed that the reservation system would fade over time").

The Supreme Court has said this general hostility to reservations and Indian communal life does not establish that a particular reservation was disestablished:

> Although the Congresses that passed the surplus land acts anticipated the imminent demise of the reservation and, in fact, passed the acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land act. Rather, it

[28] The policy of the General Allotment Act, the Supreme Court has said, "was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished." *Mattz*, 412 U.S. at 496.

> is settled law that some surplus land acts diminished reservations, and other surplus land acts did not.

Solem, 465 U.S. at 468–69 (citations omitted); *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1395 (10th Cir. 1990) (explaining congressional belief "that all reservations would be temporary is irrelevant in determining whether the boundaries of a *specific* reservation were being diminished by the language of a given statute"). Whether there was "a specific congressional purpose" to disestablish or diminish a particular reservation "depends on the language of the act and the circumstances underlying its passage." *Solem*, 465 U.S. at 469. To distinguish congressional acts that changed a reservation's borders from those "that simply offered non-Indians the opportunity to purchase land within established reservation boundaries," the Supreme Court has developed a three-part framework. *Id.* at 470.

c. *Solem* factors

In *Solem v. Bartlett*, a member of the Cheyenne River Sioux Tribe sought habeas relief after a state court in South Dakota convicted him of attempted rape. *Id.* at 465; *see also id.* at 465 n.2 (explaining offense fell within Major Crimes Act). The defendant argued the state court lacked jurisdiction because the crime occurred on the reservation. *Id.* The Supreme Court developed and applied its three-part framework to assess whether the reservation had been diminished. *See id.* at 470–80. It concluded the reservation had not been diminished and granted habeas relief because the federal government had exclusive jurisdiction. *Id.* at 481. *Solem*'s three factors are as follows:

First, *Solem* instructs courts to examine the text of the statute purportedly disestablishing or diminishing

the reservation. Statutory language is "[t]he most probative evidence of congressional intent." *Id.* at 470. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* When such language is combined with language committing Congress to compensate the tribe for its land with a fixed sum, Congress's intent to diminish a reservation is especially clear. *Id.* at 470–71. No "particular form of words," however, is necessary to diminish a reservation. *Hagen v. Utah*, 510 U.S. 399, 411 (1994).

Second, *Solem* requires courts to consider "events surrounding the passage" of the statute. 465 U.S. at 471. Even when the statutory language "would otherwise suggest reservation boundaries remained unchanged," the Court has been willing to find that Congress altered the borders if evidence at step two "unequivocally reveal[s] a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Id.* Step-two contemporary historical evidence includes "the manner in which the transaction was negotiated with the tribes . . . and the tenor of legislative reports presented to Congress." *Id.*

Third, *Solem* considers, though "[t]o a lesser extent," "events that occurred after the passage" of the relevant statute. *Id.* This evidence can include "Congress's own treatment of the affected areas" as well as "the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands." *Id.* Later demographic history—evidence of "who actually moved onto opened reservation lands"—also offers a "clue as to what Congress expected would

happen once land on a particular reservation was opened to non-Indian settlers." *Id.* at 471–72.

In conducting this three-part inquiry, "[t]here are . . . limits to how far" courts can "go to decipher Congress's intention in any particular surplus land act." *Id.* at 472. "Throughout the inquiry," courts must "resolve any ambiguities in favor of the Indians" and remember that disestablishment and diminishment are not to be lightly found. *Hagen*, 510 U.S. at 411. The "rule by which legal ambiguities are resolved to the benefit of the Indians" is applied to its "broadest possible scope" in disestablishment and diminishment cases. *DeCoteau*, 420 U.S. at 447. Absent "substantial and compelling evidence" courts are "bound by . . . traditional solicitude for the Indian tribes" to conclude "that the old reservation boundaries survived." *Solem*, 465 U.S. at 472.

* * * *

Having addressed AEDPA, the substantive law of Indian country jurisdiction, and reservation disestablishment and diminishment, we turn now to our analysis.

III. DISCUSSION

Our analysis addresses three issues:

(A) Whether there was clearly established federal law as determined by the Supreme Court when the OCCA addressed Mr. Murphy's jurisdictional claim. We conclude the *Solem* framework constituted clearly established law.

(B) Whether the OCCA rendered a decision contrary to this clearly established law when it resolved Mr. Murphy's jurisdictional claim. We conclude that it did because the OCCA failed to apply the *Solem* framework and took an approach incompatible with it.

(C) Whether the federal government has exclusive jurisdiction over Mr. Murphy's case. We conclude that it does because, under the *Solem* framework, Congress has not disestablished the Creek Reservation.

Because the crime occurred in Indian country, Oklahoma lacked jurisdiction. We therefore reverse the district court's denial of habeas relief and remand with instructions to grant Mr. Murphy's application for a writ of habeas corpus under 28 U.S.C. § 2254.

A. Clearly Established Federal Law

Our first inquiry under § 2254(d)(1) is whether clearly established federal law governed Mr. Murphy's claim. *See House*, 527 F.3d at 1015. The OCCA issued its jurisdictional decision on December 7, 2005. *See Murphy*, 124 P.3d 1198. Our survey of clearly established federal law is therefore limited to decisions of the Supreme Court before that date. *See* 28 U.S.C. § 2254(d)(1); *Greene*, 565 U.S. at 38. We conclude the three-part *Solem* framework supplied the OCCA with clearly established federal law to decide Mr. Murphy's claim.

1. *Solem*—Clearly Established Law in 2005

The Supreme Court decided *Solem* in 1984, more than two decades before the OCCA decided Mr. Murphy's case. Even in 1984, the *Solem* Court recognized the three-part framework it applied was not a new development in the law. The *Solem* Court explained its precedent had already "established a fairly clean analytical structure" for deciding whether Congress altered a reservation's borders. 465 U.S. at 470. The Court's pre-*Solem* decisions relied on the factors discussed in *Solem* to assess reservation disestablishment and diminishment. *See Rosebud Sioux Tribe*, 430 U.S. at 587 (reservation diminished);

DeCoteau, 420 U.S. at 427–28 (reservation disestablished); *Mattz*, 412 U.S. at 505 (reservation not disestablished); *Seymour*, 368 U.S. at 359 (reservation not disestablished); *see also Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1476 n.30 (10th Cir. 1987) ("Although the Tribe refers to *Solem* as 'significant new authority,' *Solem* is rather one of a line of cases construing the dimensions of 'Indian country.'" (citation omitted)).

Between 1984 when *Solem* was decided and 2005 when the OCCA issued its decision in Mr. Murphy's case, the Supreme Court did nothing to call *Solem* into doubt. Rather, it reaffirmed *Solem*'s three-part framework and applied it to other reservations in the 1990s. *See Yankton Sioux Tribe*, 522 U.S. at 333, 344 (discussing three factors and concluding reservation was diminished); *Hagen*, 510 U.S. at 410–11, 421 (concluding Congress diminished reservation and explaining *Solem* directs courts "to look to three factors").

In the years before the OCCA's decision, federal appeals courts, including this court, recognized *Solem* provided the governing framework. *See, e.g.*, *Shawnee Tribe v. United States*, 423 F.3d 1204, 1221 (10th Cir. 2005) (discussing *Solem* and explaining that "we look to three factors to determine whether a reservation's boundaries have been altered"); *United States v. Webb*, 219 F.3d 1127, 1131 (9th Cir. 2000) (identifying *Solem* as "well established Supreme Court precedent"); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022–23 (8th Cir. 1999) (explaining *Solem* provides "the standard rules of interpretation"); *Yazzie*, 909 F.2d at 1395 ("The current analytic structure has been summarized in *Solem*."). So did state high courts. *See, e.g.*, *State v. Greger*, 559 N.W.2d 854, 860–61 (S.D. 1997) (explaining *Hagen* retained *Solem*'s "traditional approach to diminishment questions"); *State v. Davids*, 534 N.W.2d

70, 72 (Wis. 1995) (noting *Solem* Court "identif[ied] the governing principles of diminishment"); *State v. Perank*, 858 P.2d 927, 935–36 (Utah 1992) (reciting *Solem* framework as governing law).

The Supreme Court has recognized that a legal framework for evaluating a given type of claim can constitute clearly established law under § 2254(d)(1). For example, the Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), announced a two-part test for evaluating claims of ineffective assistance of counsel, *see id.* at 687 (discussing performance and prejudice), and the Court has since said this framework constitutes clearly established law, *Williams*, 529 U.S. at 391 (controlling opinion of Stevens, J.) ("It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" (quoting 28 U.S.C. § 2254(d)(1))). Although claims of lawyer ineffectiveness are each unique and require fact-intensive analysis, *Strickland*'s framework still applies, and the variety of fact patterns "obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by [the Supreme] Court." *Id.*

We conclude *Solem*'s three-part framework for evaluating whether Congress has disestablished or diminished an Indian reservation was clearly established when the OCCA rendered its decision. The State's arguments to the contrary miss the mark.

2. The State's Arguments

The State acknowledges the Supreme Court has applied the *Solem* framework to "surplus land acts, which provided for the sale of large areas of land for white settlement," but it argues that, with respect to the Creek Nation, Congress allotted almost all of the

Reservation to tribal members. Aplee. Br. at 46–47. This point has nothing to do with whether the *Solem* framework applies, though it does suggest Congress did not intend to disestablish the Creek Reservation. The State offers no explanation for why the proportion of land allotted to tribal members relative to the land opened to non-Indian settlement makes a difference to whether *Solem* applies. In making its disestablishment case, the State relies on statutes that allotted the Creek Reservation, and we discuss these laws below. Those statutes, like the statute in *Solem*, "force[d] Indians onto individual allotments carved out of [a] reservation[] and . . . open[ed] up unallotted lands for non-Indian settlement." *Solem*, 465 U.S. at 467. Whether Congress disestablished the Creek Reservation through those statutes is the kind of question the *Solem* framework was built to answer.

The State also argues that Congress, in addition to allotting Creek lands, "took a number of steps toward[] the complete abolition of the Creek Nation as a political entity." Aplee. Br. at 46; *see also id.* at 47. Below, we consider the State's arguments about political dissolution as they relate to reservation disestablishment. But the State offers no explanation or legal authority for why legislation dealing with a tribe's political status would make the *Solem* framework anything less than clear when it comes to reservation disestablishment—the issue before us.

Despite its arguments that there is no clearly established law, the State's brief recognizes *Solem* is controlling. It defends the substantive correctness of the OCCA's decision by reference to *Solem*'s three-part test. Nowhere does the State argue that some other legal framework applies.

* * * *

Because clearly established Supreme Court law governs Mr. Murphy's Indian country jurisdictional claim, we proceed to the next step of the § 2254(d)(1) inquiry: whether the OCCA rendered a decision that was "contrary to" the *Solem* framework.

B. The OCCA Decision—Contrary to Clearly Established Federal Law

Before we address whether the OCCA's decision was "contrary to" *Solem*, we consider—and reject—Mr. Murphy's threshold argument that the OCCA failed to adjudicate his reservation claim on the merits. We then consider whether the OCCA's merits decision was "contrary to" the clearly established *Solem* framework discussed above. We conclude it was.

1. The OCCA's Merits Decision

The following is the entirety of the OCCA's discussion of the jurisdictional issue with respect to the Reservation:

> The remaining issue, under proposition one, is whether or not the land in question is part of a Creek Nation reservation that has never been disestablished or is part of a dependent Indian community.[29] Unfortunately, the District Court decided, based upon the Assistant

[29] As already mentioned, Mr. Murphy pursued three theories for Indian country jurisdiction before the OCCA. This part of the OCCA's discussion addressing Mr. Murphy's reservation argument under § 1151(a) followed its rejection of his allotment theory under § 1151(c). We omit the OCCA's discussion of the "dependent Indian community" theory under § 1151(b) because that issue is not before us. And although Mr. Murphy again raises the allotment theory in this appeal, we do not reach that issue because we agree with him that the crime occurred within the Creek Reservation.

> District Attorney's urging, that these questions were beyond the scope of the evidentiary hearing, even though we clearly asked the Court to determine if the tract in question was Indian country under 18 U.S.C. § 1151.
>
> Be that as it may, the error was alleviated when the District Court allowed Petitioner's[30] counsel to make an extended offer of proof regarding the testimony and evidence that would have been presented on these two questions had that opportunity been given. Accordingly, we find the error was harmless. Even if the evidence had been admitted, it is insufficient to convince us that the tract in question qualifies as a reservation or dependent Indian community.
>
> Petitioner's proffered expert, Monta Sharon Blackwell, stated by affidavit that "[t]here was never a formal Creek Nation 'reservation' but for practical purposes" certain treaty language was "tantamount to a reservation under Federal law." Thus, the "Creek Nation, historically and traditionally, is a confederacy of autonomous tribal towns, or Talwa, each with its own political organization and leadership."[31]

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[30] The OCCA referred to Mr. Murphy as "Petitioner."

[31] As part of his offer of his proof on the reservation issue, Mr. Murphy submitted an affidavit from Ms. Blackwell, an attorney with more than two decades of experience practicing Indian law with the U.S. Department of the Interior. *See* Blackwell Aff. ¶¶ 3–4, State Post-Conviction Record, Vol. 1 at 151. Ms. Blackwell stated the tract of land where the crime occurred "falls within the territorial boundaries of the Muscogee (Creek) Nation." *Id.* ¶ 13. As the OCCA pointed out, she stated "[t]here was never a formal Creek Nation 'reservation'" because the Creek

Ms. Blackwell and Jeff Dell[32] both took the position that the historical boundaries of the Creek Nation remained intact even after the various Creek lands were subjected to the allotment process, but no case is cited for the position that the individual Creek allotments remain part of an overall Creek reservation that still exists today.[18]

18 It seems redundant, however, to treat lands as both a reservation and an allotment. Section 1151 clearly makes a distinction between the two.

The best authority on this point is *Indian Country, U.S.A., Inc. v. State of Oklahoma*, 829 F.2d at 975, which treats the Creek Nation lands as a "reservation" as of 1866.[19] However, the Tenth Circuit declined to answer the question of whether the exterior boundaries of the 1866 Creek Nation have been disestablished and expressly refused to express an opinion in that regard concerning

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Nation had "acquired the land at issue in this case through treaty with the United States." *Id.* ¶ 14. But there is no dispute that the Creek Nation had a reservation; the State agrees it was intact in 1900, *see* Aplee. Br. at 75 n.25. Rather, the dispute is whether Congress has disestablished the Creek Reservation. In Ms. Blackwell's opinion, "[t]he exterior territorial boundaries of the Creek Nation were not altered" by congressional acts around the turn of the twentieth century. Blackwell Aff. ¶ 21. She concluded "the Muscogee (Creek) Nation has not been disestablished" and that "regardless of title ownership as Indian or non-Indian, the [tract where the crime occurred] is Indian country within the meaning of Federal Law." *Id.* ¶ 22.

[32] Mr. Dell, "an Assistant Realty Officer for the Creek Nation, rendered a title opinion on behalf of the State." 124 P.3d at 1203.

> allotted Creek lands. *See id.* at 975 n. 3, 980 n. 5.
>
> > 19 The case finds the term "reservation," for purposes of defining 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." 829 F.2d at 973.
>
> If the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here.

Murphy, 124 P.3d at 1207–08 (paragraph numbers omitted).

Mr. Murphy, focusing mainly on the court's last sentence, argues the OCCA refused to adjudicate his reservation claim on the merits. The State maintains the OCCA decided the reservation issue on the merits because it considered Mr. Murphy's evidence, found it insufficient, and denied relief.

Whether the OCCA adjudicated the jurisdictional claim "on the merits" as that phrase is used in 28 U.S.C. § 2254(d) determines our standard of review. As discussed above, we have chosen to assume (without deciding) that AEDPA applies to jurisdictional claims of the type Mr. Murphy raises. But even when a type of claim can qualify for AEDPA review, federal courts do not apply AEDPA deference when the state court did not adjudicate the specific claim "on the merits." *See Cone v. Bell*, 556 U.S. 449, 472 (2009); *Stouffer v. Duckworth*, 825 F.3d 1167, 1179 (10th Cir. 2016) ("[I]f the state court did not decide the claim on the merits, the stringent principles of deference under 28 U.S.C. § 2254 are inapplicable." (quotations omitted)), *cert. denied*, 137 S. Ct. 1226 (2017). If the

state court did not adjudicate the claim "on the merits," there is no decision to which the federal court can defer. *See Stouffer v. Trammell*, 738 F.3d 1205, 1213 (10th Cir. 2013) (explaining that, when AEDPA does not apply, "[w]e consider legal questions de novo and factual findings, if any, for clear error").

The Supreme Court has explained that a state court's decision is "on the merits" even when it denies the prisoner's claim "without an accompanying statement of reasons." *Richter*, 562 U.S. at 92. Indeed, "it may be *presumed* that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 99 (emphasis added); *see also Johnson v. Williams*, 133 S. Ct. 1088, 1091, 1094–96 (2013). Thus, outside of the "unusual circumstances" when the presumption of a merits adjudication is rebutted, *Johnson*, 133 S. Ct. at 1096, federal habeas relief is available to state prisoners only under the limited circumstances stated in § 2254(d).

Although the OCCA's opinion gives both sides something to draw on, we agree with the State that the court rendered a merits decision.[33] The OCCA remarked in conclusion that it "refuse[d] to step in," 124 P.3d at 1208, but Mr. Murphy's argument ignores the rest of the OCCA's discussion in which the court discussed his offer of proof on the reservation issue and said his argument was unpersuasive. We do not read the OCCA's final sentence as a refusal to decide the reservation question at all but rather as a refusal to decide it in Mr. Murphy's favor. Even if Mr. Murphy's reading is plausible, ambiguity is insufficient to overcome the presumption that the OCCA's adjudication

[33] Because we agree with the State, we need not address its alternative contention that Mr. Murphy waived his merits-determination argument.

was on the merits. *See Richter*, 562 U.S. at 92 (discussing presumption of merits adjudication). Thus, because the OCCA's adjudication of the reservation issue was on the merits, AEDPA applies and Mr. Murphy cannot receive habeas relief withoutshowing the OCCA's decision meets the standard set out in § 2254(d). *See Lay v. Royal*, 860 F.3d 1307, 1317 (10th Cir. 2017) ("Because the OCCA addressed the merits . . . we may only grant habeas relief if we find that the OCCA's decision was contrary to . . . settled federal law . . . ." (citation omitted)). We turn to that question next.

2. The OCCA's Decision Was Contrary to *Solem*

Mr. Murphy argues that, if the OCCA decided the reservation jurisdiction issue, its decision was "contrary to" clearly established Supreme Court authority. We agree.

a. No citation to *Solem*

Nowhere in its discussion of the reservation issue—nor anywhere else in its opinion—did the OCCA cite *Solem*, *Hagen*, *Yankton Sioux Tribe*, or any of the Supreme Court's other Indian reservation disestablishment precedent.[34] This failure to cite governing law, however, does not on its own mark the OCCA decision as "contrary to" that law. *See Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (per curiam) ("A state court's decision is not contrary to clearly established Federal law simply because the court did not cite [the Supreme Court's] opinions." (alterations and quotations omitted)). State courts can apply clearly established federal law without citing to it. *See Early v.*

[34] The OCCA included *Rosebud Sioux Tribe*, 430 U.S. 584, in one footnoted string citation, but it was in the context of the allotment issue, not the reservation question. *See* 124 P.3d at 1205 n.14.

Packer, 537 U.S. 3, 8 (2002) (per curiam). Indeed, AEDPA "does not even require [state court] *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.*

Here, the OCCA did not merely fail to cite controlling Supreme Court authority, it failed to apply it, and in deviating from *Solem*, the OCCA's reasoning contradicted clearly established law.

b. Failure to apply *Solem*

Setting aside the absence of citations, the substance of the OCCA's analysis lacks even cursory engagement with any of the three *Solem* factors. The OCCA did not evaluate any statute to see if Congress had disestablished the Creek Reservation. It also did not evaluate the historical context of any laws. Nor did the OCCA evaluate later treatment of the area in question or demographic history. The OCCA's decision failed to apply the required legal standard to the facts.

What the OCCA did say in its analysis contradicted *Solem*. Instead of heeding *Solem*'s "presumption" that an Indian reservation continues to exist until Congress acts to disestablish or diminish it, *see* 465 U.S. at 481, the OCCA flipped the presumption by requiring evidence that the Creek Reservation had *not* been disestablished—that it "still exists today," 124 P.3d at 1207. In other words, the OCCA improperly required Mr. Murphy to show the Creek Reservation had *not* been disestablished instead of requiring the State to show that it had been. This "contradicts" governing law. *Williams*, 529 U.S. at 405 (controlling opinion of O'Connor, J.); *see id.* ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases."); *see also*

Lafler v. Cooper, 566 U.S. 156, 173 (2012) ("[T]he [State] Court of Appeals identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it. . . . By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law."). The OCCA applied the wrong law.

Instead of applying the *Solem* factors, the OCCA looked for federal court decisions holding that the Reservation continues to exist. This yielded the OCCA's single citation to legal authority—our decision in *Indian Country, U.S.A.*, which was not a disestablishment case. *See* 829 F.2d at 975 ("In the present case, we need not decide whether the exterior boundaries of the 1866 Creek Nation have been disestablished."). The OCCA called *Indian Country, U.S.A.*, the "best authority" for the position that there is still a Creek Reservation. 124 P.3d at 1207. Indeed, we held there *is* still a Creek Reservation, but we had no occasion to determine whether the Reservation's 1866 boundaries remained intact. *See* 829 F.2d at 975 n.3, 976 (holding lands at issue "still retain their reservation status within the meaning of 18 U.S.C. § 1151(a)"); *id.* at 980 n.5 (setting aside boundary question).

The Supreme Court has occasionally faulted federal habeas courts for concluding state courts issued decisions that were "contrary to" federal law when the federal court failed to give the "benefit of the doubt" to the state court. *See, e.g.*, *Holland v. Jackson*, 542 U.S. 649, 655 (2004) (per curiam); *see also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). In those cases, state courts properly articulated the governing legal test in one part of their opinions but went on to misstate the standard or give the impression that what was actually applied deviated from binding

federal law. *See Holland*, 542 U.S. at 654; *Woodford*, 537 U.S. at 22–24.

This is not one of those cases. The OCCA failed to articulate or apply the proper legal framework anywhere in its opinion, and its analysis is incompatible with the *Solem* framework. At oral argument, we questioned the State about whether the OCCA had applied *Solem*:

> THE COURT: Is there anything to indicate [the OCCA] applied [*Solem*]? Anything? Did they mention steps one, two, and three?
>
> THE STATE: They did not, Your Honor.
>
> THE COURT: Did [the OCCA] say anything that would fit in steps one, two, and three?
>
> THE STATE: They—No.

Oral Arg. at 46:00–46:13. The State argues the OCCA's decision was not contrary to *Solem*. But the OCCA applied the wrong law in adjudicating Mr. Murphy's reservation claim. Its adjudication was "contrary to" clearly established law.

c. The State's arguments

The State, repeating the OCCA's mistake in reversing the presumption against disestablishment, argues Mr. Murphy "failed to present evidence that Congress did *not* intend disestablishment." Aplee. Br. at 48 (emphasis added). But under *Solem*, that is not the test. *Solem* and every case applying it presume that a reservation continues to exist unless Congress has legislated otherwise. As demonstrated above, the OCCA not only ignored but also reversed this presumption. So does the State. We will not make the same mistake here.

The State further argues that Mr. Murphy "bears the burden of establishing federal jurisdiction, and the

burden under AEDPA." *Id.* Of course, the burden of showing federal jurisdiction—our jurisdiction in this proceeding—is on Mr. Murphy. He has carried that burden. Our jurisdiction is proper under 28 U.S.C. § 2253(a), (c)(1)(A), because he secured COAs for the issues on appeal. And his burden under AEDPA is to show that the OCCA rendered a decision that was "contrary to" clearly established federal law. He has.

The State also argues that our deference to the OCCA should be "at its apex" when the clearly established law states a general standard. Aplee. Br. at 52. Although the State is correct that "the more general the rule at issue . . . the more leeway state courts have in reaching outcomes in case-by-case determinations," *Renico v. Lett*, 559 U.S. 766, 776 (2010) (brackets and quotations omitted), and although we further agree *Solem* supplies a general standard meant for application to various disestablishment and diminishment cases, these principles do not entitle the OCCA's decision to deference. The State's argument concerns § 2254(d)(1)'s "unreasonable application" clause, but that clause does not come into play here because, to benefit from the wide berth federal courts give state courts in applying general standards, the state court must actually apply the standard. *See Eizember v. Trammell*, 803 F.3d 1129, 1140 (10th Cir. 2015) ("The Supreme Court has long recognized that a state court's identification of the correct governing legal standard and the reasonableness of its application of that standard to the facts are two distinct statutory inquiries."). The OCCA did not unreasonably apply *Solem*; it didn't apply it at all.

The State reminds us that our review under AEDPA is limited to the record before the OCCA. But we have no need to expand the record. The State acknowledges that the state-court evidentiary hearing determined

Mr. Murphy's status as an Indian as well as the precise location of the crime. The OCCA relied on these facts, and we do not question them. Our analysis requires us only to compare the OCCA's adjudication of Mr. Murphy's claim with the Supreme Court's clearly established law. That comparison reveals the OCCA's decision is contrary to *Solem*.

Mr. Murphy put the issue of whether the Creek Reservation had been disestablished squarely before the OCCA, but the court decided the claim by ignoring and contradicting *Solem*. Its decision was thus "contrary to . . . clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). Consequently, we must review his jurisdictional claim without AEDPA deference. *See Milton*, 744 F.3d at 670–71 (explaining that "satisfaction of the § 2254(d)(1) standard" does not entitle the prisoner to habeas relief but it does "effectively remove[] AEDPA's prohibition on the issuance of a writ"). We now apply the *Solem* framework to analyze Mr. Murphy's jurisdictional claim.

C. Exclusive Federal Jurisdiction

Mr. Murphy has overcome AEDPA's barrier to habeas relief, and we must now decide his jurisdictional claim de novo.[35] In this section, we begin by (1) addressing additional legal authority. Although our evaluation of the OCCA's decision under AEDPA was limited to clearly established Supreme Court law decided before December 2005, our de novo analysis of Mr. Murphy's claim must account for Supreme Court and Tenth

[35] "[T]he Supreme Court has applied, without comment, a de novo standard of review in determining congressional intent regarding reservation boundary diminishment." *Wyoming v. EPA*, 849 F.3d 861, 869 (10th Cir. 2017) (brackets and quotations omitted).

Circuit authority post-dating the OCCA's decision. *See Lafler*, 566 U.S. at 173 (explaining that, when "AEDPA does not present a bar to granting" relief because the state court "failed to apply" the correct legal test, the federal habeas court "can determine the principles necessary to grant relief"); *Williams*, 529 U.S. at 406 (explaining that when a state-court decision falls within the "contrary to" clause, "a federal court will be unconstrained by § 2254(d)(1)"); *see also Brown v. Uphoff*, 381 F.3d 1219, 1225 (10th Cir. 2004).[36] After addressing this recent legal authority,

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[36] Independent of AEDPA, the Supreme Court's *Teague* doctrine, *Teague v. Lane*, 489 U.S. 288 (1989), imposes another limitation on habeas relief in certain circumstances. *See Brown*, 381 F.3d at 1225–26; *see also Horn*, 536 U.S. at 272 ("[T]he AEDPA and *Teague* inquiries are distinct."). *Teague* does not pose a barrier to Mr. Murphy.

For one thing, the State does not argue that *Teague* should preclude relief. In such circumstances, "a federal court may . . . decline to apply *Teague*." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Even if we were to raise *Teague* on the State's behalf, it would not affect our analysis.

Teague provides that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310 (plurality opinion); *see also Danforth v. Minnesota*, 552 U.S. 264, 266 n.1 (2008) (explaining that "[a]lthough *Teague* was a plurality opinion . . . the *Teague* rule was affirmed and applied by a majority of the Court shortly thereafter"). "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*, 565 U.S. at 39.

Teague has two exceptions. "First, the bar does not apply to rules forbidding punishment of certain primary conduct or to rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Beard v. Banks*, 542 U.S. 406, 416 (2004) (brackets and quotations omitted). "The second exception is for watershed rules of criminal procedure

we (2) recap relevant history of the Creek Nation, which provides important context for the critical period in this case—the years around the turn of the twentieth century. Finally, we (3) apply *Solem*'s three-part framework and conclude that Congress has not diminished or disestablished the Creek Reservation.

1. Additional Legal Background

We review the Supreme Court's and our court's most recent applications of *Solem*.

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implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 417 (quotations omitted).

Mr. Murphy's conviction became "final" on April 21, 2003—the date the Supreme Court denied his petition for certiorari following his direct appeal to the OCCA. *See* 538 U.S. 985. (This is before the OCCA adjudicated his jurisdictional claim on post-conviction review in 2005.) Mr. Murphy has no need for *Teague*'s exceptions because he does not seek the benefit of a rule that falls within *Teague*'s retroactivity bar. The post-2003 cases we discuss in our de novo analysis are applications of the *Solem* framework. We need not decide whether these cases qualify as "constitutional" and "procedural" under *Teague* because, even if they do, they are not "new." 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." *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (brackets and quotations omitted). "[A] rule of general application," that is, "a rule designed for the specific purpose of evaluating a myriad of factual contexts," will only "infrequent[ly] . . . yield[] a result so novel that it forges a new rule, one not dictated by precedent." *Id.* (quotations omitted). 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." *Id.*; *see also id.* at 1107–08 (explaining "garden-variety applications" of the *Strickland* framework "do not produce new rules"). The post-finality cases we discuss apply the *Solem* framework to factual scenarios for which the test was developed; none of the cases created a new rule. Moreover, even if *Teague* required us to limit our analysis to pre-finality law, we would still reach the same result.

a. Supreme Court authority

In *Nebraska v. Parker*, the Supreme Court unanimously recommitted to the "well settled" *Solem* framework. 136 S. Ct. 1072, 1078 (2016). The Court held Congress did not diminish the Omaha Indian Reservation in Nebraska and that the land at issue remained part of the Reservation. *Id.* at 1082. The Court reiterated that only Congress can divest land of its reservation status "and its intent to do so must be clear." *Id.* at 1078–79. *Parker* shed light on how the *Solem* factors interact and further underscored the importance of discerning congressional intent from statutory text, which is "the first and most important step" of the *Solem* framework. *Id.* at 1080.

Before examining the 1882 statute at issue, the Court reviewed its precedent and identified "[c]ommon textual indications" of a congressional intent to alter reservation boundaries. *Id.* at 1079. "[H]allmarks of diminishment" include:

- explicit references to cession or surrender of tribal interests,
- unconditional congressional commitments to compensate the tribe with a fixed sum for the total surrender of tribal claims to opened lands, and
- provisions restoring reservation lands to "the public domain."

Id. The statute in *Parker* featured none of these hallmarks. *Id.* Rather, it provided for a government survey and appraisal of certain lands and for sales to non-Indians. *Id.* The Court contrasted the statute with earlier nineteenth century treaties between the Omaha Tribe and United States that had addressed other lands and had "terminated the Tribe's jurisdiction over their land in unequivocal terms." *Id.* at 1080

(quotations omitted). The Court concluded the 1882 statute did not diminish the Reservation's boundaries. *Id.*

Turning to the second *Solem* step, the *Parker* Court determined the "mixed historical evidence" around the law's passage could not "overcome the lack of clear textual signal that Congress intended to diminish the reservation." *Id.* To find diminishment, step-two evidence must "'*unequivocally* reveal[] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.'" *Id.* (emphasis added by *Parker* Court) (quoting *Solem*, 465 U.S. at 471). Floor statements by members of Congress cutting both ways, the Court ruled, "are far from the clear and plain evidence of diminishment required." *Id.* (quotations omitted).

The Court then considered step three—the later treatment of the area and its demographic history. *Id.* at 1081. Step-three evidence, the Court explained, "might reinforce a finding as to diminishment or non-diminishment based on the text" of the statute, but "never" has the Court "relied solely on this third consideration to find diminishment." *Id.* (alteration and quotations omitted).

The step-three evidence in *Parker* strongly favoring diminishment helps illustrate the significance *Solem* places in step-one statutory text. In *Parker*, "the Tribe was almost entirely absent from the disputed territory for more than 120 years." *Id.* It did not enforce any regulations in the area, nor did it "maintain an office, provide social services, or host tribal celebrations or ceremonies." *Id.* For more than a hundred years, the federal government treated the lands as belonging to Nebraska. *Id.* at 1082. Of the people living in the town on the disputed site, most were not associated with the Tribe, and, since the early twentieth century, less

than two percent of the Tribe's members lived in the disputed area. *Id.* at 1078.

This history was nonetheless insufficient, the Supreme Court said, to "overcome the statutory text, which is devoid of any language indicative of Congress' intent to diminish." *Id.* at 1082 (quotations omitted). Despite the "compelling" justifiable expectations of non-Indian settlers stemming "from the Tribe's failure to assert jurisdiction" over a long period of time, the Court held such non-Indian expectations "cannot diminish reservation boundaries." *Id.* "Only Congress has the power to diminish a reservation." *Id.* And as *Parker* makes clear, the Supreme Court looks first and foremost to statutory text when attempting to discern Congress's intent.

b. Tenth Circuit authority

This court has addressed Indian reservation disestablishment and diminishment issues on numerous occasions. *See, e.g.*, *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010); *Shawnee Tribe*, 423 F.3d 1204; *Yazzie*, 909 F.2d 1387; *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *overruled by Hagen*, 510 U.S. 399.

Most recently, in *Wyoming v. EPA*, 849 F.3d 861 (10th Cir. 2017), we applied *Solem*'s "well-settled approach" and concluded that Congress diminished the Wind River Reservation when it enacted a 1905 agreement the federal government negotiated with the Eastern Shoshone and Northern Arapaho Tribes. *Id.* at 865, 869.

Applying the "hierarchical, three-step framework" of *Solem*, we began with the statutory text. *Id.* at 869–74. We held the following language evinced Congress's intent to diminish the Reservation:

> The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within said reservation, except the lands within and bounded by the following lines . . . .

Id. at 870 (emphasis omitted) (quoting Act of March 3, 1905, ch. 1452, 33 Stat. 1016, 1016). We called this "express language of cession" notwithstanding the absence of the words "sell" or "convey." *Id.* at 871.[37] "There are no magic words of cession required to find diminishment. Rather, the statutory language, whatever it may be, must establish an express congressional purpose to diminish." *Id.* at 869–70 (brackets and quotations omitted).

Turning to step two—the historical context surrounding the passage of the Act—we found it "further confirm[ed] Congress intended to diminish the Wind River Reservation." *Id.* at 874 (majority opinion). A history of failed congressional attempts to sever the area north of the Big Wind River from the Reservation informed our evaluation of the eventually enacted law that accomplished that diminishment. *Id.* at 874–79.

Our analysis at step three—concerning the later treatment and demographics of the area—was "brief and ultimately d[id] not impact our conclusion." *Id.* at 879. "Unsurprisingly," from the "volumes of material" unearthed by the parties, "each side . . . managed to uncover treatment by a host of actors supporting its respective position," but because we could not "discern clear congressional intent" from the conflicting evidence, we found the later history held little value. *Id.*;

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[37] The Act elsewhere used the word "conveyed." *See id.* at 872.

see also id. at 887–88 (Lucero, J., dissenting) (agreeing with majority that step three "comes into play only at the margins" and that the post-act history was too "muddled" to provide clear evidence of congressional intent).

* * * *

This more recent case law, though unavailable to the OCCA in 2005, informs our de novo review of Mr. Murphy's claim. Indeed, we are bound by this precedent. Before turning to apply the *Solem* framework, we discuss relevant aspects of the Creek Nation's history, which provides important context for our *Solem* analysis.

2. Additional Factual Background—Creek Nation History

The following overview of the Tribe's history provides important context for the parties' arguments and our application of *Solem*.

a. Original homeland and forced relocation

The Creek Nation once exercised domain over much of present day Alabama and Georgia. *See Indian Country, U.S.A.*, 829 F.2d at 971. "In the 1820's, the federal government adopted a policy to forcibly remove the Five Civilized Tribes[38] from the southeastern United States and relocate them west of the Mississippi River, in what is today Oklahoma." *Id.*; *see also Woodward v. De Graffenried*, 238 U.S. 284, 293 (1915) ("The history of the removal of the Muskogee or Creek Nation from their original homes to lands purchased and set apart for them by the government of the United States in the territory west of the Mississippi

[38] "The Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles historically have been referred to as the 'Five Civilized Tribes.'" *Indian Country, U.S.A.*, 829 F.2d at 970 n.2.

river does not differ greatly from that of the others of the Five Civilized Tribes . . . ."). *See generally* Cohen at 49–50 (discussing Creek Nation's forced removal).

The federal government and the Creek Nation entered into several treaties related to this forced relocation. In 1826, the Creek Nation "cede[d] to the United States" certain lands in Georgia. Treaty with the Creeks, art. 2, Jan. 24, 1826, 7 Stat. 286, 286, *available at* 1826 WL 2688. In an 1832 treaty, "the Creeks ceded their eastern homelands to the United States, in exchange for lands west of the Mississippi River" in present-day Oklahoma. *Indian Country, U.S.A.*, 829 F.2d at 971 (discussing Treaty with the Creeks, Mar. 24, 1832, 7 Stat. 366, *available at* 1832 WL 3599). "In a subsequent [1833] treaty regarding these lands, the United States agreed to grant 'a patent, in fee simple, to the Creek nation.'" *Id.*; *see* Treaty with the Creeks, art. 3, Feb. 14, 1833, 7 Stat. 417, 419, *available at* 1833 WL 4533. Thus, "[t]he Creek Tribe had a fee-simple title, not the usual Indian right of occupancy with the fee in the United States." *United States v. Creek Nation*, 295 U.S. 103, 109 (1935); *see also Woodward*, 238 U.S. at 293 ("Pursuant to treaty provisions, the Creeks held their lands under letters patent issued by the President of the United States, dated August 11, 1852, vesting title in them as a tribe, to continue so long as they should exist as a nation and continue to occupy the country thereby assigned to them." (citations omitted)). In sum, by the mid-nineteenth century, treaties with the federal government had given the Creek Nation a vast tract of land in modern Oklahoma.

b. Nineteenth century diminishment

After the Creek Nation's relocation west, its land was diminished on multiple occasions in the mid-

nineteenth century. "In 1856, the Creeks agreed to cede to the Seminole Tribe a portion of their lands." *Indian Country, U.S.A.*, 829 F.2d at 971. In the 1856 treaty, the federal government reaffirmed the Creek Nation's title and tenure to its remaining Reservation. It guaranteed "that 'no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians,' and the United States pledged that 'no portion of either of the tracts of country defined in [the treaty] shall ever be embraced or included within, or annexed to, any Territory or State.'" *Id.* (quoting Treaty with the Creek and Seminole Tribes, art. 4, Aug. 7, 1856, 11 Stat. 699, 700, *available at* 1856 WL 11367).

Following the Civil War, an 1866 treaty required "the Tribe . . . to cede the western portion of its domain." *Id.* "The Creek Nation retained title to its 'reduced . . . reservation,'" which the United States promised would be "'forever set apart as a home for said Creek Nation.'" *Id.* (alteration in original) (quoting Treaty with the Creeks, arts. 3, 9, June 14, 1866, 14 Stat. 785, 786, 788, *available at* 1866 WL 18777).[39] The Creek Nation also agreed to new governance arrangements in the 1866 treaty by permitting "such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian [T]erritory,"[40] including the establishment of courts in the Indian Territory "with such

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[39] As discussed below, the Creek Nation contends the 1866 borders remain the Reservation's boundaries today.

[40] "Although most of what is today Oklahoma was once the 'Indian Territory,' after the creation of Oklahoma Territory in 1890, the phrase referred to the eastern portion of present-day Oklahoma encompassing the lands of the Five Civilized Tribes, plus lands of other tribes situated in the extreme northeastern

jurisdiction and organized in such manner as Congress may by law provide." 1866 Treaty, art. 10, 14 Stat. at 789. The Treaty also guaranteed Congress would not "interfere with or annul . . . present tribal organization, rights, laws, privileges, [or] customs." *Id.*

c. 1867 Constitution and government

"In 1867, the Creeks established a written constitutional form of government which included a separation of powers into executive, legislative and judicial branches." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988).

d. Early congressional regulation of modern-day Oklahoma

"In 1889, Congress created a special federal court of limited jurisdiction in the Indian Territory, which at that time encompassed most of present-day Oklahoma." *Indian Country, U.S.A.*, 829 F.2d at 977.

In 1890, "Congress carved the Territory of Oklahoma out of the western half of the Indian Territory." *Id.* "The lands in the east held by the Five Civilized Tribes remained Indian Territory, subject only to federal and tribal authority." *Id.* Also in 1890, "Congress expanded the civil and criminal jurisdiction of the special United States court in the diminished Indian Territory." *Id.* Congress provided that certain laws from neighboring Arkansas would apply in Indian Territory, provided they were "not locally inapplicable or in conflict . . . with any law of Congress." *Id.* (quotations omitted). "The tribes, however, retained exclusive jurisdiction over all civil and criminal disputes involving only

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corner of the state." *Indian Country, U.S.A.*, 829 F.2d at 969 n.2. "No territorial government was ever created in the reduced Indian Territory, and it remained subject directly to tribal and federal governance." *Id.* at 974.

tribal members, and the incorporated laws of Arkansas did not apply to such cases." *Id.*

e. The push for allotment

"During the 1880s and 1890s, the white population within the Indian Territory grew dramatically." *Id.* at 977. "[T]he white newcomers were frustrated by the communal tenure of the Indian lands, and pressured Congress to break up the tribal land base, attach freely alienable individual title to the land, and eventually create a new state." *Id.*

As already mentioned, the objectives, among others, of this allotment policy "were to end tribal land ownership and to substitute private ownership, on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 & n.1 (1976) (discussing General Allotment Act). The General Allotment Act did not apply to the Five Civilized Tribes, *see Indian Country, U.S.A.*, 829 F.2d at 977, but by separate means Congress encouraged the Five Civilized Tribes to allot their lands.

"In 1893, reflecting federal policies to forcibly assimilate Indians into the non-Indian culture and to eventually create a new state in the Indian Territory, Congress created the Dawes Commission to negotiate with the Five Civilized Tribes . . . ." *Id.* "The Five Civilized Tribes, however, refused to negotiate with the Dawes Commission, and Congress—still unsure of the scope of its authority to forcibly dispose of tribal lands[41]—began to force the issue by placing restrictions on the Indian governments . . . ." *Id.*

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[41] In 1903, the Supreme Court decided Congress can unilaterally abrogate treaties with Indian nations. *See Lone Wolf*, 187

In 1897, Congress imposed several measures to force the Creek Nation's agreement to the allotment policy. Congress (1) "provid[ed] that the body of federal law in Indian Territory, which included the incorporated Arkansas laws, was to apply irrespective of race"; (2) broadened federal court jurisdiction, thereby divesting Creek tribal courts of exclusive jurisdiction over cases involving only Creeks; and (3) subjected Creek legislation to presidential veto. *Id.* at 978 (quotations omitted).

An 1898 law, the Curtis Act, continued the campaign for allotment by "abolish[ing] the existing Creek court system and render[ing] then-existing tribal laws unenforceable in the federal courts." *Id.* It also "provided for forced allotment and termination of tribal land ownership without tribal consent unless the tribe agreed to allotment." *Muscogee (Creek) Nation*, 851 F.2d at 1441.

f. Allotment and aftermath

"In 1901, the Creek Nation finally agreed to the allotment of tribal lands." *Indian Country, U.S.A.*, 829 F.2d at 978. The 1901 Original Allotment Agreement ("Original Agreement" or "Agreement") provided: "All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe . . . so as to give each an equal share of the whole in value . . . ." Original Agreement, ch. 676, ¶ 3, 31 Stat. 861, 862 (Mar. 1, 1901). "Although the vast majority of Creek Nation lands were allotted or sold, some lands remained in tribal ownership under the original treaty-based fee patents." *Indian Country, U.S.A.*, 829 F.2d at 978. The Agreement exempted certain lands from allotment, such as railroad sites and lands for Creek schools and

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U.S. at 566–68; *see also Parker*, 136 S. Ct. at 1081 n.1; *Woodward*, 238 U.S. at 294, 304–05; Cohen at 198 & n.121.

courthouses. ¶ 24, 31 Stat. at 868. It also allowed some non-Indians to purchase lands within town sites. *See* ¶¶ 10–11, 31 Stat. at 865–66. In 1902, a Supplemental Allotment Agreement ("Supplemental Agreement") made certain amendments. *See generally* Supplemental Agreement, ch. 1323, 32 Stat. 500 (June 30, 1902).[42]

The Original Agreement, in addition to providing for allotment, addressed governance. It made clear the Creek courts, already abolished in 1898, were not being reestablished. ¶ 47, 31 Stat. at 873. The Agreement continued presidential review of Creek laws "affecting the lands of the tribe, of individuals after allotment." ¶ 42, 31 Stat. at 872. Further, it anticipated the total elimination of the Creek government: "The tribal government of the Creek Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper." ¶ 46, 31 Stat. at 872.

As the termination date approached, however, "much remained to be done." *Harjo v. Kleppe*, 420 F. Supp. 1110, 1126 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). "[I]t was apparent that the affairs of the tribes could not be wound up by the date set," and "Congress in early 1906 debated and enacted the 'Five Tribes Act.'" *Id.* (citing ch. 1876, 34 Stat. 137 (Apr. 26, 1906)).

In the Five Tribes Act, "Congress expressly delayed any plans to terminate the tribes, and provided that the tribal governments 'are hereby continued in full force and effect.'" *Indian Country, U.S.A.*, 829 F.2d at 978 (quoting § 28, 34 Stat. at 148). Congress never

[42] We discuss these statutes in greater detail below as part of our step-one *Solem* analysis.

dissolved the Creek government; it has enjoyed continuous and uninterrupted existence. Even while Congress contemplated the future dissolution of the tribal government, the Creek Nation continued to exercise taxing authority within its boundaries as confirmed by a decision of the Eighth Circuit, our predecessor court, which then had jurisdiction over the Indian Territory. *See Buster v. Wright*, 135 F. 947, 951–52 (8th Cir. 1905) (concluding the Creek Nation retained power "to fix the terms upon which noncitizens might conduct business within its territorial boundaries" and had not "los[t] the power to govern the people within its borders"), *appeal dismissed*, 203 U.S. 599 (1906).

g. Creation of Oklahoma

Months after preserving and extending the Creek tribal government in 1906, Congress passed the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (June 16, 1906). It allowed the Territory of Oklahoma, together with the Indian Territory, to apply for statehood. This law and its 1907 amendment "provided that federal Article III courts would succeed the special United States court in the Indian territory with respect to all cases arising under the Constitution, laws, or treaties of the United States." *Indian Country, U.S.A.*, 829 F.2d at 978. In addition, new state courts "were to succeed the Indian territory courts with respect to the remaining nonfederal cases." *Id.* "The enabling act also provided that 'the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State.'" *Id.* (emphasis omitted) (quoting § 13, 34 Stat. at 275). "Finally, the enabling act preserved the authority of the federal government over Indians and their lands, and required the State to disclaim all right and title to such lands." *Id.* (quotations omitted). Oklahoma entered the Union

in 1907. *See* Proclamation, 35 Stat. 2160–61 (Nov. 16, 1907).

h. Away from allotment

The 1930s saw another shift in federal policy as "Congress repudiated the practice of allotment" and passed the Indian Reorganization Act ("IRA"). *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001). *See generally* Cohen at 79–84. The IRA, enacted in 1934, revitalized tribal "self-government pursuant to constitutions" and allowed "tribes to organize for economic purposes pursuant to corporate charters." *Muscogee (Creek) Nation*, 851 F.2d at 1442. The Creek Nation was excluded from the IRA, but, two years later in 1936, Congress passed the Oklahoma Indian Welfare Act ("OIWA"), which covered the Creek Nation and, "like the IRA, provided for constitutional governments and corporate charters." *Id.*; *see* OIWA, ch. 831, 49 Stat. 1967 (June 26, 1936).

In a 1943 case concerning Oklahoma real estate taxes, the Supreme Court acknowledged the Creek Nation's continuing vitality: "Thus far Congress has not terminated [its guardianship] relation with respect to the Creek Nation and its members. That Nation still exists, and has recently been authorized to resume some of its former powers." *Bd. of Cty. Comm'rs v. Seber*, 318 U.S. 705, 718 (1943) (citations and footnote omitted) (citing OIWA). In sum, following allotment, Congress re-empowered the Creek Nation's government, which it had never dissolved.

i. Public Law 280

Policy shifted again in the post-World War II period, known as the "termination era," as Congress focused on assimilating Indians and ending the United States' trust relationship with many Indian tribes. *See* Cohen at 92–93.

One important law enacted in 1953, "Public Law 280," addressed state jurisdiction. It allowed some states "to assert limited civil and broad criminal jurisdiction in Indian country." *Indian Country, U.S.A.*, 829 F.2d at 980 (citing ch. 505, 67 Stat. 588 (Aug. 15, 1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–26, 28 U.S.C. § 1360)). Public Law 280, "delegat[ed] to five, later six, states jurisdiction over most crimes . . . throughout most of the Indian country within their borders." Cohen at 537 (footnotes omitted).[43] It "offered any other state the option of accepting the same jurisdiction," until a 1968 amendment "made subsequent assumptions of jurisdiction subject to Indian consent." *Id.* at 537–38; *see* 25 U.S.C. §§ 1321(a), 1322(a), 1326.

Oklahoma chose not to use Public Law 280 to assert jurisdiction. State officials regarded the law as unnecessary because, in their view, Oklahoma already had full jurisdiction over Indians and their lands. *Indian Country, U.S.A.*, 829 F.2d at 980 n.6. But "[t]he State's 1953 position that Public Law 280 was unnecessary for Oklahoma . . . [has] been rejected by both federal and state courts." *Id.* (citing Tenth Circuit and Oklahoma cases). Oklahoma has not obtained tribal consent following the 1968 amendment and has thus never acquired jurisdiction over Indian country through Public Law 280. *See Cravatt*, 825 P.2d at 279 ("The State of Oklahoma has never acted pursuant to Public Law 83–280." (quoting *State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989))); *see also* Cohen at 537–38 & n.47.

The termination era began to fade in the late 1950s as federal Indian policy shifted again toward tribal

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[43] The six states are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *See id.* at 537 nn.44–45.

self-government and self-determination. *See* Cohen at 93.

j. A new Creek Constitution

In 1979, under OIWA, the Creek Nation adopted a new constitution "providing for three separate branches of government, including a judiciary." *Muscogee (Creek) Nation*, 851 F.2d at 1442. In 1982, when the tribe sought funding from the Bureau of Indian Affairs ("BIA") for its court system, the D.C. Circuit confronted the question whether the Creek Nation could operate a court system at all in light of Congress's earlier abolition of the tribal courts. The D.C. Circuit held that OIWA had repealed the earlier elimination of Creek courts. *Id.* at 1444–46. "[T]he Muscogee (Creek) Nation has the power to establish Tribal Courts with civil and criminal jurisdiction, subject, of course, to the limitations imposed by statutes generally applicable to all tribes." *Id.* at 1446–47 (emphases omitted).

k. Our decision in *Indian Country, U.S.A.*

In 1987, we held in *Indian Country, U.S.A.*, that the Creek Reservation continues to exist, at least in some form. The case arose when Oklahoma tried to tax a bingo operation located on Creek Nation land that had never been allotted and was still held by the Tribe. 829 F.2d at 970. Oklahoma argued the site was not a reservation and therefore subject to the State's taxation. *Id.* at 973. We rejected that argument and explained the site at issue was "part of the original treaty lands still held by the Creek Nation, with title dating back to treaties concluded in the 1830s and patents issued in the 1850s. These lands historically were considered Indian country and still retain their reservation status within the meaning of 18 U.S.C. § 1151(a)." *Id.* at 976. Accordingly, we invalidated the

Oklahoma tax. *Id.* at 987. Our holding, however, was limited. Because the case concerned land that had never been allotted and was still held by the Tribe, we had—as we twice made clear—no cause to decide whether Congress had disestablished the Reservation's 1866 exterior boundaries. *Id.* at 975 n.3, 980 n.5.

We now confront that question.

3. Applying *Solem*

We must apply the *Solem* framework to determine whether Congress has disestablished the Creek Reservation. If the Reservation's boundaries are still intact, the crime occurred within them. *See* Aplt. Br. at 20; Aplee. Br. at 11–12. The State argues, however, that Congress disestablished the Creek Reservation in the early twentieth century. Mr. Murphy and the Creek Nation disagree.

We conclude Congress has not disestablished the Creek Reservation. The 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. The evidence of contemporaneous understanding and later history, which we consider at steps two and three, is mixed and falls far short of "*unequivocally* reveal[ing]" a congressional intent to disestablish. *Parker*, 136 S. Ct. at 1080 (emphasis in original) (quoting *Solem*, 465 U.S. at 471). Because our application of the *Solem* framework shows Congress has not disestablished the Creek Reservation, the crime in this case occurred within the Reservation's boundaries. The State of Oklahoma accordingly lacked jurisdiction to prosecute Mr. Murphy.

a. Step One: Statutory Text

The State argues the Creek Reservation did not survive a series of statutes that allotted Creek lands

and created the State of Oklahoma. The State "acknowledges that no relevant act of Congress contains language which expressly disestablished the Creek Nation reservation through the use of such words as 'cede' or 'relinquish.'" Aplee. Br. at 57. It attempts to show disestablishment based on the collective weight of eight different laws enacted between 1893 and 1906.

At oral argument, we asked whether the State was relying on any particular statutory language in any of these laws for its step-one argument:

> THE COURT: Where do you find your strongest statutory language that the Creek Reservation was diminished or disestablished?
>
> THE STATE: You have to start before the 1901 Allotment Act. . . . In 1893, Congress passed the law which set up the Dawes Commission.
>
> THE COURT: I asked for statutory language, not a general overview of a statute. Where in any of these acts is there language that disestablished the Reservation?
>
> THE STATE: In that 1893 Act, Congress said that they were appointing the Dawes Commission to negotiate with the Tribes in whatever means necessary in order to create a State embracing the Indian Territory and to substitute for the tribal governments a State government.
>
> THE COURT: But that didn't happen.
>
> THE STATE: The—well, I think that's what we're arguing about here today.
>
> THE COURT: Well, let's go to 1901. . . . .

THE COURT: Where's the disestablishment in the Act? You haven't given us in your brief or anything you said today any language from any act that shows disestablishment. And isn't that the first *Solem* factor?

THE STATE: Well, yes, Your Honor, but [Congress does not] have to use the words . . . .

THE COURT: Well, okay, even if they don't use the words. Can you give us some examples?

THE STATE: Of course—

THE COURT: Counsel, on the same point, I think . . . what we're looking for is what has been given in other Supreme Court cases where they have seized on language whether it's 'public domain' or whether it's the word 'cede' or whether it's a lump-sum payment. Those—there are words in a sentence in those acts, and what we're asking is can you show us words in a sentence in the acts that you're talking about that are equal or equivalent of those words rather than a general summary sort of an answer? We're looking for specific language.

THE STATE: Other than the entire context of what happened, I cannot. . . . I still argue that the acts themselves are sufficient, but, if not, under *Osage Nation*, when you look at the step-two evidence here, it's overwhelming.

THE COURT: Well, so your answer is that you don't have any language?

THE STATE: I do not have a specific section that I can look at and say this is—

> THE COURT: And so the argument that I just heard is that it's context. Your word.
>
> THE STATE: Correct. If you look at all of the acts together, which the Supreme Court has said you can do—no I can't—when you look at the specific language which provides for the allotment, it doesn't use words [like] 'cession,' it doesn't provide for a fixed sum, those sorts of things that have happened in other cases. But when you go all the way back to when Congress started passing acts that led up to the 1901 Act, it's very clear that their purpose was to substitute for the tribal government a State government and put the area of the Five Tribes under State law.

Oral Arg. at 50:23–54:07. This exchange aligns with the position taken in the State's brief. *See* Aplee. Br. at 57. At step one, the State does not rely on any particular statutory text but rather on all eight acts in general because it does not "have a specific section" in any law that accomplished disestablishment. Oral Arg. at 53:18–21.

We question whether the State's argument based on the overall thrust of eight different laws deserves to be called a step-one argument. At step one, "we start with the *statutory text*." *Parker*, 136 S. Ct. at 1079 (emphasis added); *see also Solem*, 465 U.S. at 470 ("The most probative evidence of congressional intent is the statutory *language* used to open the Indian lands." (emphasis added)); *Wyoming*, 849 F.3d at 869 ("*First*, we look to the text of the statute . . . ."). The State does not present us with any particular statutory language to analyze. Our independent review of the laws has not uncovered a provision on which the State might rely, either.

Assuming the State's cumulative-effect argument belongs in step one where we consider text, as opposed to step two where we consider context, we proceed to (i) review each of the eight statutes the State relies on, paying particular attention to the 1901 Original Allotment Agreement, and then (ii) conduct our step-one analysis based on those laws. The absence of statutory language in any of these acts disestablishing the Creek Reservation leads us to conclude the State "ha[s] failed at the first and most important step." *Parker*, 136 S. Ct. at 1080. In fact, the step-one evidence shows Congress recognized the existence of the Creek Nation's borders. And the State's attempts to shift the inquiry into questions of title and governance are unavailing.

i. The statutes

We discuss the State's eight statutes in chronological order.

1) Act of March 3, 1893, ch. 209, 27 Stat. 612 ("1893 Act")

The State first draws our attention to an appropriations law providing money for the federal government to fulfill treaty obligations with Indian tribes throughout the country. With respect to the Creek Nation, the 1893 Act provided funding for treaties from 1790 to 1866 to pay for, among other things, annuities, blacksmithing, iron, steel, and interest on other funds. *See* 27 Stat. at 616–17.

In addition to providing funds, Congress gave "the consent of the United States" to the allotment of lands "within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and

[S]eminoles." § 15, 27 Stat. at 645. [44] Congress instructed the President to appoint a commission, which became known as the Dawes Commission, to negotiate with the Creek Nation and the other 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, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such and adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory.

§ 16, 27 Stat. at 645. Congress provided the negotiators' priorities should be "first" to procure an allotment of lands "as may be agreed upon as just and proper to provide for each such Indian a sufficient quantity of

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[44] The law provided that tribal members who accepted an allotment would be deemed U.S. citizens. § 15, 27 Stat. at 645. The Supreme Court has explained that "the extension of citizenship status to Indians does not, in itself, end the powers given Congress to deal with them." *United States v. John*, 437 U.S. 634, 653–54 (1978). "Nor has [U.S.] citizenship prevented the Congress . . . from continuing to deal with the tribal lands of the Indians." *Tiger v. W. Inv. Co.*, 221 U.S. 286, 312 (1911). *See generally* Cohen at 922–24 (discussing citizenship).

land for his or her needs." § 16, 27 Stat. at 646. "[S]econdly," the negotiators were to "procure the cession, for such price and upon such terms as shall be agreed upon, of any lands not found necessary to be so allotted or divided, to the United States." *Id.* Although Congress wanted to pursue both allotment and the sale of surplus lands to the United States, it granted the commissioners

> power to negotiate any and all such agreements as . . . shall be found requisite and suitable to such an arrangement of the rights and interests and affairs of such nations, tribes, bands, or Indians, or any of them, to enable the ultimate creation of a Territory of the United States with a view to the admission of the same as a state in the Union.

Id. The 1893 Act established the Dawes Commission to commence negotiations; it did not disestablish the Creek Reservation.

2) Act of June 10, 1896, ch. 398, 29 Stat. 321 ("1896 Act")

The State next relies on an 1896 appropriations law in which Congress again provided money to fulfill treaty obligations with the Creek Nation. 29 Stat. 326–27. The 1896 Act declared it "the duty of the United States to establish a government in the Indian Territory" for the purpose of "rectify[ing] the many inequalities and discriminations" in the Territory and "afford[ing] needful protection to the lives and property of all citizens and residents thereof." 29 Stat. at 340. The Dawes Commission was directed "to continue the exercise of the authority already conferred upon them by law and endeavor to accomplish the objects heretofore prescribed to them." 29 Stat. at 339. Nothing in this law altered the Reservation's boundaries.

3) Act of June 7, 1897, ch. 3, 30 Stat. 62 ("1897 Act")

The State's third statute is an 1897 appropriations statute in which Congress again approved funds to satisfy obligations arising from treaties with the Creek Nation. *See* 30 Stat. at 68. Congress also provided that, beginning in 1898, the United States courts would have "original and exclusive jurisdiction" over both civil and criminal cases in the Indian Territory. 30 Stat. at 83. The laws of the United States and of neighboring Arkansas, which were already in force in the Indian Territory, would apply "to all persons therein, irrespective of race." *Id.* In addition, Congress legislated that, beginning in 1898, "all acts, ordinances, and resolutions" of the legislative bodies of the Five Civilized Tribes would be subject to presidential veto. 30 Stat. at 84. This provision did not apply to tribal legislation related to negotiations with the Dawes Commission. *Id.* The law also provided that if any of the Tribes reached a negotiated agreement with the Dawes Commission, that new agreement, once ratified, would "suspend" any provisions of the 1897 Act inconsistent with the agreement. *Id.* In sum, this statute altered federal and tribal governance arrangements in the Indian Territory, but it did not erase the Creek Reservation's borders.

4) "Curtis Act," ch. 517, 30 Stat. 495 (June 28, 1898)

In 1898, Congress imposed new limitations on the powers of tribal governments in the Indian Territory. Under the Curtis Act, tribal courts would be abolished within the year. § 28, 30 Stat. at 504–05. All cases would be transferred to the United States court in the Indian Territory, and tribal laws would be unenforceable. §§ 26, 28, 30 Stat. at 504–05. Congress instructed

the Secretary of the Interior ("Secretary") to stop directing federal payments to tribal governments and to begin paying individual tribal members directly. § 19, 30 Stat. at 502. The Curtis Act included a default allotment scheme that would take effect following completion of the tribal citizenship rolls and survey of tribal lands. § 11, 30 Stat. at 497–98.[45] But, as discussed in the next section, Congress and the Creek Nation later agreed to a different allotment plan. The Curtis Act made the most significant governance changes to date, but it did not address the Creek Reservation's borders.

5) "Original Allotment Agreement," ch. 676, 31 Stat. 861 (March 1, 1901)

The Creek Nation reached a negotiated agreement with the federal government for the allotment of tribal lands, and Congress passed it into law in 1901. The Original Agreement, supplemented by another agreement we discuss below, specified that its terms would control over conflicting federal statutes and treaty provisions, but it "in no wise affect[ed]" treaty provisions consistent with the Agreement. ¶¶ 41, 44, 31 Stat. at 872. Our discussion of the Original Agreement covers (a) the allotment of Creek lands, (b) provisions concerning town sites, (c) lands reserved for tribal purposes, and (d) the Agreement's plan for future governance within the borders of the Creek Reservation.

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[45] The Curtis Act also contained a proposed agreement between the federal government and the Creek Nation providing for the allotment of tribal lands, *see* § 30, 30 Stat. at 514–19, but the Creek Nation did not ratify the agreement. A different allotment agreement was reached in 1901, and we discuss it in the next section.

a) Allotment

The Agreement's central purpose was to facilitate a transfer of title from the Creek Nation generally to its members individually. It provided that "[a]ll lands belonging to the Creek tribe," except for town sites and lands reserved for public purposes, should be appraised and allotted "among the citizens of the tribe." ¶¶ 2–3, 31 Stat. at 862–63.[46] Tribal citizenship rolls determined an individual's eligibility for an allotment. ¶¶ 3, 28, 31 Stat. at 862–63, 869–70.[47] The United States would bear the costs of "the survey, platting, and disposition" of lots, except where town authorities undertook those efforts. ¶ 34, 31 Stat. at 871.

Creek citizens would receive an allotment of 160 acres valued at $6.50 per acre. ¶ 3, 31 Stat. at 862. Recognizing that the tracts would not have the same value, the Act provided that "the residue of lands" not otherwise allotted or reserved—the surplus lands—would be used "for the purpose of equalizing allotments." ¶ 9, 31 Stat. at 864. Creek citizens with more valuable lots could have the excess value charged against their entitlement to other tribal funds. ¶ 3, 31 Stat. at 862–63. The Tribe's funds from earlier treaties were made available to equalize allotments. ¶ 27, 31 Stat. at 869.

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[46] The Agreement defined "citizen" as "a member . . . of the Muskogee tribe or nation of Indians." ¶ 1, 31 Stat. at 862. The Act stipulated "the words 'Creek' and 'Muskogee'" were synonymous. *Id.*

[47] The Agreement provided citizens of the Seminole Nation who had settled in lands belonging to the Creeks were allowed to take allotments in Creek lands, and the same terms were extended to Creek citizens in Seminole lands. ¶ 36, 31 Stat. at 871.

The assignment of allotments was not random. Creek citizens who had built improvements or possessed particular lands could select those lands. *See* ¶¶ 3, 5–6, 31 Stat. at 862–63.[48] The Agreement provided for dispute resolution when Creek citizens contested their right to select certain tracts. ¶ 6, 31 Stat. at 863.

The Tribe's principal chief was assigned the task of transferring title from the Tribe to the individual allottees. ¶ 23, 31 Stat. at 867–68. Each deed conveyed to the allottee "all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in [the] allotment certificate." ¶ 23, 31 Stat. at 868. For the allottee, acceptance of the deed represented "assent to the allotment and conveyance of all the lands of the tribe" and a "relinquishment of all his right, title, and interest in" the rest of the allotted lands as provided in the Agreement. *Id.*

The Secretary of the Interior was supposed to approve the conveyances, and this approval would serve "as a relinquishment" to the Creek citizen "of all the right, title, and interest of the United States in and to the lands embraced in [the] deed." *Id.*[49] But the Agreement provided for various forms of continuing

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[48] For members of the Creek Nation unable to select lands for themselves—children, "prisoners, convicts, and aged and infirm persons"—the Agreement provided a mechanism for selection on their behalf and in "the best interests of such parties." ¶ 4, 31 Stat. at 863; *see also* ¶¶ 7, 23, 31 Stat. at 863–64, 867–68.

[49] The United States was understood to have a reversionary interest in the Tribe's lands. *See* 1833 Treaty, art. 3, 7 Stat. at 419 (providing the Creek Nation's fee simple interest would continue "so long as they shall exist as a nation, and continue to occupy the country hereby assigned them"); § 15, 27 Stat. at 645 (consenting that "upon the allotment of the lands held by [the Five Civilized Tribes] the reversionary interest of the United States therein shall be relinquished and shall cease").

federal supervision. For example, it restricted the ability of allottees to encumber or alienate their lands without approval from the Secretary. ¶ 7, 31 Stat. at 863–64. A five-year restriction period applied to allotted lands generally, but a 21-year restriction applied to a subset of an allottee's lands—the 40 acres selected as a homestead. *Id.* Creek citizens were allowed to rent their allotments, subject to restrictions. ¶ 37, 31 Stat. at 871.

b) Town sites

The Agreement excluded "town sites" from allotment. ¶¶ 2, 24(a), 31 Stat. at 862, 868. Towns "in the Creek Nation" with more than 200 people would be "surveyed, laid out, and appraised." ¶ 10, 31 Stat. at 864. Town commissions, which were to include Creek commissioners, would administer the sale of town lots "for the benefit of the tribe." ¶ 10, 31 Stat. at 865. "Any person," not just Creek citizens, "in rightful possession of any town lot having improvements thereon" was given the opportunity to purchase the lot. ¶ 11, 31 Stat. at 866; *see also* ¶¶ 12–13, 31 Stat. at 866 (providing similar purchase opportunities to people with residential or business holdings in towns). Town sites lacking improvements would be sold at public auction within 12 months of their appraisal. ¶ 14, 31 Stat. at 866. Once sold, town lots were subject to municipal taxation. ¶ 17, 31 Stat. at 867.[50]

Some town sites were not available for purchase. The Agreement instructed town surveyors to set aside lands for cemeteries, ¶ 18, 31 Stat. at 870, and lots where church houses had been erected were conveyed

[50] The Agreement gave municipal corporations authority to issue bonds and borrow money for public projects such as for "the construction of sewers, lighting plants, waterworks, and schoolhouses." ¶ 25, 31 Stat. at 869.

to the churches at no cost, ¶ 21, 31 Stat. at 867. Educational institutions in Muskogee and other towns "in the Creek Nation" were given the chance to purchase lands at a discount. ¶ 20, 31 Stat. at 867. The United States reserved a right to "purchase, in any town in the Creek Nation, suitable land for courthouses, jails, and other necessary public buildings for its use, by paying the appraised value thereof." ¶ 19, 31 Stat. at 867.

c) Lands reserved for tribal purposes

In addition to town sites, the Agreement provided certain other lands would be "reserved from the general allotment" scheme. ¶ 24, 31 Stat at 868. Most of the reserved lands were for tribal purposes: Creek schools and orphan homes, ¶ 24(c)–(*l*), 31 Stat. at 868; cemeteries, ¶ 24(m), 31 Stat. at 868; a university, ¶ 24(n), 31 Stat. at 868–69; Creek courthouses, ¶ 24(o), 31 Stat. at 869; and churches and schools outside of towns, ¶ 24(p), 31 Stat. at 869. If and when these lands were no longer "needed for the purposes for which they are at present used," the Agreement provided they should be sold at auction "to citizens only." ¶ 24, 31 Stat. at 869.

d) Future governance

The Agreement contemplated roles for both the Tribe and the federal government in the post-allotment governance of the Creek Nation. It recognized Creek jurisdiction as continuing but also limited and temporary. It also provided for ongoing federal regulation and defined federal responsibilities by reference to the Creek Nation's borders.

A continuing role for the tribal government was apparent in a provision recognizing Creek legislative authority over both unallotted tribal lands and allotted lands. ¶ 42, 31 Stat. at 872. "[A]ct[s], ordinance[s],

[and] resolution[s]" of the Creek National Council remained subject to presidential approval, but the Agreement recognized the Creek government's authority to regulate "the lands of the tribe" as well as lands belonging to "individuals after allotment." *Id.*; *see also id.* (providing for Creek regulation, with presidential oversight, of "the moneys or other property of the tribe, or of the citizens thereof"). The Agreement also provided that Creek law would determine issues of descent and distribution. ¶¶ 7, 28, 31 Stat. at 864, 870.[51]

Under the Agreement, the Tribe continued to exercise authority over its finances: "No funds belonging to said tribe shall hereinafter be used or paid out for any purposes by any officer of the United States without consent of the tribe, expressly given through its national council, except as herein provided." ¶ 33, 31 Stat. at 870; *see also* ¶ 31, 31 Stat. at 870 (requiring that the federal government provide monthly, itemized financial reports to the principal chief regarding the Tribe's funds in the U.S. Treasury). The Agreement assigned the Creek National Council responsibility for appropriating money to operate tribal schools. ¶ 40, 31 Stat. at 872. It also authorized lawsuits "in the name of the principal chief, for the benefit of the tribe" to enforce liens against the property of people who defaulted on their purchase of property in towns. ¶ 30, 31 Stat. at 870.

Despite these recognitions of continuing Creek governmental authority, the Agreement contemplated this authority would be temporary. It said the tribal government would not continue past March 4, 1906, "subject to such further legislation as Congress may

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[51] Creek courts, already abolished under the Curtis Act, were not reestablished. ¶ 47, 31 Stat. at 873.

deem proper." ¶ 46, 31 Stat. at 872. In other words, the Agreement set a date for the dissolution of the tribal government while recognizing a later Congress could change course. Congress did change course, and dissolution never happened.

In addition to providing a limited role for tribal government, the Agreement assigned powers and responsibilities to the United States, many of which were expressly tied to the Creek Nation's territorial boundaries. For example, the Secretary was authorized to collect a grazing tax when cattle were brought "into the Creek Nation" and grazed on unallotted lands. ¶ 37, 31 Stat. at 871. Revenue from the tax was "for the benefit of the tribe." *Id.* Similarly, although Creek citizens could dispose of timber on their allotments, no timber could be taken from unallotted lands "without payment of [a] reasonable royalty" and under conditions prescribed by the Secretary. ¶ 38, 31 Stat. at 871. The mineral-leasing provisions from the Curtis Act were not to apply "in the Creek Nation." ¶ 41, 31 Stat. at 872. And the United States agreed to maintain strict laws against the introduction of liquor "in said nation." ¶ 43, 31 Stat. at 872.[52]

To summarize, the Original Agreement shifted communal Creek land into individual allotments and provided for dissolution of the tribal government in the future. It also reserved from allotment lands for tribal

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[52] The task of removing "objectionable" persons from the lands of Creek citizens fell to the Secretary of the Interior and the United States Indian agent. ¶ 8, 31 Stat. at 864.

The Secretary was also to administer the Creek school fund, and Creek schools were to be governed under the Secretary's rules and regulations as well as "under Creek laws" subject to the Secretary's oversight. ¶ 40, 31 Stat. at 871–72. The Agreement included a hiring preference for Creek citizens in teaching positions. ¶ 40, 31 Stat. at 872.

purposes and repeatedly recognized the continuing existence of the Creek Nation's borders.

6) "Supplemental Allotment Agreement," ch. 1323, 32 Stat. 500 (June 30, 1902)

The 1902 Supplemental Allotment Agreement clarified the Original Agreement and made several amendments. Allotment-eligible lands would be appraised at no more than $6.50 per acre, not including improvements. ¶ 2, 32 Stat. at 500. The Dawes Commission was assigned exclusive jurisdiction to resolve the disputes of Creek citizens over the selection of particular allotments. ¶ 4, 32 Stat. at 501.[53] The Supplemental Agreement made corrections to the Creek Nation's citizenship rolls and addressed the situation of citizens entitled to an allotment who died before receiving it. ¶¶ 7–9, 32 Stat. at 501–02.

The Supplemental Agreement provided that Arkansas law, not Creek law, would govern inheritance but said "only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation." ¶ 6, 32 Stat. at 501. Noncitizen heirs could inherit when there was no Creek descendent. *Id.*

Anti-encumbrance and alienation provisions were reaffirmed and set to run from the date of the Supplemental Agreement. ¶ 16, 32 Stat. at 503. Restrictions on leases were also clarified. *See* ¶ 17, 32 Stat. at 504 (addressing leases for mineral extraction (prohibited), grazing (limited to one year), and agricultural purposes (limited to five years)). Other parts of the Supplemental Agreement addressed public resources. *See* ¶ 13, 32 Stat. at 503 (providing for the purchase of land for parks within towns); ¶ 15, 32 Stat. at 503 (subjecting Creek courthouse lands to allotment); ¶ 18,

[53] *See also* ¶ 5, 32 Stat. at 501 (providing for corrections when selected land did not include allottee's home)

32 Stat. at 504 (regulating introduction of cattle "into the Creek Nation").

The Supplemental Agreement left in place the planned dissolution of the tribal government. It required the Secretary, following dissolution of the tribal government, to pay the Tribe's remaining funds to the citizens of the Creek Nation. ¶ 14, 32 Stat. at 503; *see also* ¶ 19, 32 Stat. at 504 (requiring the Secretary "during the continuance of the tribal government" to defend allottees against claims on their land arising from illegal leases and conveyances).

Overall, the Supplemental Agreement continued the policies embodied in the Original Agreement. It did not address the Creek Reservation's borders except to recognize their existence.

7) "Five Tribes Act," ch. 1876, 34 Stat. 137, April 26, 1906[54]

The State relies on two more statutes, both from 1906.[55] The first is the Five Tribes Act, in which Congress recognized and extended the Creek government's existence while also imposing new limitations

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[54] The Five Tribes Act was passed after March 4, 1906, the date the Original Agreement had set for the dissolution of the Creek government, *see* ¶ 47, 31 Stat. at 872, but Congress extended the Creek government's existence before the deadline on March 2, 1906, *see* 34 Stat. 822. As this section discusses, the Five Tribes Act extended the Creek government again, this time indefinitely.

[55] The State contends these laws "carry less weight" because they were passed after the allotment agreements. Aplee. Br. at 62. This suggests the State considers the 1901–02 allotment agreements to be the legislative enactments in which Congress disestablished the Creek Reservation, yet the State includes the 1906 statutes in its step-one argument. We consider the text of the 1906 laws as step-one evidence, as opposed to step-three, later-history evidence, because statutory text is the concern of step one. *See Parker*, 136 S. Ct. at 1079 ("[W]e start with the statutory text . . . .").

on its authority. It provided the Creek Nation's "tribal existence and present tribal government[]" would "continue[] in full force and effect for all purposes authorized by law, until otherwise provided by law." § 28, 34 Stat. at 148. It continued presidential oversight of tribal legislation, and further restricted tribal legislative functions by limiting tribal governments to 30-day legislative sessions each year. *Id.*

The Five Tribes Act gave new authority to the President and Secretary of the Interior. The President received authority to appoint a tribal citizen as principal chief when the principal chief died, became disabled, or refused or neglected to perform his duties. § 6, 34 Stat. at 139. The Secretary received power to approve land conveyances if the principal chief failed to act. *Id.* The Act also authorized the Secretary to "assume control and direction" of the Tribes' schools in 1906 with the goal of retaining "tribal educational officers" and "the present system so far as practicable" until a "public school system" was established under a future territorial or state government. § 10, 34 Stat. at 140–41. The Secretary received authorization to bring suit in the United States courts in the Indian Territory for the recovery of money or lands claimed by the Creek Nation. § 18, 34 Stat. at 144.[56]

The Five Tribes Act continued many of the restrictions on allotted lands and amended others. Congress continued the Original Agreement's provisions for the equalization of Creek allotments. § 2, 34 Stat. at 137–38. It also clarified that lands reserved for public purposes would "revert to the tribe and be disposed of

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[56] Congress also assigned new powers at the town level. It provided for the operation of light and power companies within the Indian Territory and granted new taxing powers to towns with more than two thousand people. *See* §§ 25–26, 34 Stat. at 146–48.

as other surplus lands" when the land was no longer used for the public purpose for which it was reserved. § 14, 34 Stat. at 142. The Secretary was instructed to sell unallotted lands not otherwise provided for and deposit the proceeds into the Treasury for the Tribe's benefit. § 16, 34 Stat. at 143.[57] New 25-year restriction periods against alienation and encumbrance were imposed on allotted lands, but allotted lands were immune from taxation "as long as the title remain[ed] in the original allottee." § 19, 34 Stat. at 144. Allottees remained free to lease their lands, subject to restrictions. §§ 19–20, 34 Stat. at 144–45.[58]

The Five Tribes Act provided for the future distribution of tribal property to Creek citizens. It abolished tribal taxes and instructed the Secretary to wind up claims against the Tribe following the dissolution of the tribal government. § 11, 34 Stat. at 141. Tribal citizenship rolls would be finalized by March 4, 1907. §§ 1, 2, 34 Stat. at 137–38. The Secretary would eventually take possession of and sell tribal buildings, furniture, and lands. § 15, 34 Stat. at 143. Local governments—be they state, territorial, county, or municipal—received the first chance to buy; proceeds would be deposited in the Treasury for the benefit of

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[57] Purchasers of town lots who failed to make timely payments were liable to forfeit the purchase and have the Secretary re-sell the land at public auction. § 12, 34 Stat. at 141–42.

[58] Congress made several changes to the laws of descent and inheritance. For allottees who died intestate and without heirs, their lands would revert to the Tribe or escheat to the future state or territorial government. § 21, 34 Stat. at 145. Adult Indian heirs were permitted to sell the lands they inherited, subject to the Secretary's approval. § 22, 34 Stat. at 145. Adult Indians were permitted to make wills, subject to court oversight when the will disinherited certain closely related family members. § 23, 34 Stat. at 145.

the Tribe. *Id.*[59] As had been the case in earlier acts, the Secretary was required to distribute the proceeds from the sale of tribal property to the Tribe's members on a per capita basis. § 17, 34 Stat. at 143–44.

In a section labeled "Tribal lands to be held in trust," the Act provided that, upon dissolution of the Five Tribes, tribal lands "shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit" of the Tribes' members and their heirs. § 27, 34 Stat. at 148. And, as mentioned above, the Act extended the tribal governments' existence without setting a date for dissolution, providing only that they would continue "until otherwise provided by law." § 28, 34 Stat. at 148. The Five Tribes Act thus recognized that the Creek Nation's government continued to exist in "full force and effect," and that, in the event of the future dissolution of the tribal government, "the land[] belonging to the . . . Creek [Nation]" would be held in trust by the United States for the Tribe. *Id.* It did not terminate the Reservation's borders.

8) "Oklahoma Enabling Act," ch. 3335, 34 Stat. 267 (June 16, 1906)

In the Oklahoma Enabling Act, the final statute the State relies on, Congress did not dissolve the Creek government, but it granted permission to the inhabitants of both the Territory of Oklahoma and the Indian Territory to adopt a constitution and seek admittance into the Union as the State of Oklahoma. § 1, 34 Stat. at 267–68. Congress imposed restrictions on the new

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[59] Later in 1906, Congress delayed the implementation of § 15—providing for the sale of tribal property—and clarified it would "not take effect until the date of the dissolution of the tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes." Act of June 21, 1906, ch. 3504, 35 Stat. 325, 342.

state's ability to affect Indians and Indian property. "[N]othing" in the state constitution was

> to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise . . . .

Id. Further, Congress required the people of the territories to

> forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

§ 3, 34 Stat. at 270. Congress also prohibited the new state from allowing the liquor trade for 21 years within the Indian Territory, the bordering Osage Reservation, and "any other part of said State which existed as Indian reservations" as of 1906. § 3, 34 Stat. at 269.

Oklahoma was awarded five seats in the House of Representatives. § 6, 34 Stat. at 271–72. Congress instructed that the third district must "comprise all the territory now constituting the Cherokee, Creek, and Seminole nations, and the Indian reservations lying northeast of the Cherokee Nation, within said State." *Id.*

The United States granted Oklahoma certain townships for the State's school system but withheld "any lands embraced in Indian, military, or other reservations of any character" and specified that "land owned by Indian tribes or individual members of any tribe" were excluded "until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain." § 7, 34 Stat. at 272.

Upon Oklahoma's admission as a State, the territorial laws in force within the Territory of Oklahoma would take effect statewide, and all applicable federal laws would take effect as they applied elsewhere in the country. § 21, 34 Stat. at 277–78.

The Oklahoma Enabling Act, as this court has already said, does not "contain express termination language." *Osage Nation*, 597 F.3d at 1124.

* * * *

The foregoing statutes show the Creek Nation accepted an allotment scheme that retained "surplus" lands for tribal citizens, and Congress established the State of Oklahoma. We now consider further whether, as the State insists, these laws also disestablished the Creek Reservation.

ii. Analysis

None of these statutes disestablished the Creek Reservation. The State's case for termination of the Creek Reservation thus falters at "the first and most important step." *Parker*, 136 S. Ct. at 1080. The State argues the cumulative effect of the eight laws demonstrate that Congress disestablished the Creek Reservation. For three reasons, we disagree. First, the statutes lack any of the textual "hallmarks" demonstrating congressional intent to disestablish, and no other language shows Congress altered the Creek

Reservation's boundaries. *See id.* at 1079. Second, specific statutory language—"[t]he most probative evidence of congressional intent," *Solem*, 465 U.S. at 470—shows Congress continued to recognize the Reservation's borders. Third, the State's reliance on the statutes' reforms of title and governance arrangements within the Reservation is unavailing because these changes did not disestablish the Reservation.

1) No hallmarks of disestablishment or diminishment

Congress never expressly terminated the Creek Reservation in any of the statutes, nor did it use the kind of language recognized by the Supreme Court as evidencing disestablishment. It has long been clear "the Congresses that passed the surplus land acts" were hostile to the reservation system; indeed they "anticipated [its] imminent demise" and "passed the acts partially to facilitate the process," but *Solem* prevents courts from "extrapolat[ing]" this general congressional expectation into "a specific congressional purpose" with respect to a given reservation. 465 U.S. at 468–69; *see also Shawnee Tribe*, 423 F.3d at 1220 & n.18 (explaining that, notwithstanding the "Congressional desire to end the reservation system," the question of "[w]hether a particular treaty or Congressional act was intended to extinguish some or all of an existing reservation requires a case-by-case analysis"). "The effect of any given surplus land act depends on *the language* of the act and the circumstances underlying its passage." *Solem*, 465 U.S. at 469 (emphasis added). Here at step one, we consider the language and find no congressional purpose to disestablish the Creek Reservation's borders.

We have not identified termination language in any of the statutes the State cites. Indeed, the State concedes that not one of the eight statutes contains particular language that disestablished the Creek Reservation.

The absence of such language is notable because Congress is fully capable of stating its intention to disestablish or diminish a reservation, as the following examples illustrate:

- "[T]he Smith River reservation is hereby discontinued." Act of July 27, 1868, ch. 248, 15 Stat. 198, 221; *see Mattz*, 412 U.S. at 504 n.22 (citing statute as an example of "clear language of express termination").
- "That subject to . . . allotment . . . a [legislatively defined] portion of the Colville Indian Reservation . . . is hereby, vacated and restored to the public domain . . . ." Act of July 1, 1892, ch. 140, § 1, 27 Stat. 62, 62–63; *see Mattz*, 412 U.S. at 504 n.22 (citing as example of "clear language of express termination"); *Seymour*, 368 U.S. at 354 (discussing as example of diminishment language).
- "Subject to the allotment of land . . . and for the considerations hereinafter mentioned . . . [the] Comanche, Kiowa, and Apache Indians hereby cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following-described tract of country in

the Indian Territory . . . .” Act of June 6, 1900, ch. 813, art. 1, 31 Stat. 672, 676–77; *see Tooisgah v. United States*, 186 F.2d 93, 97 (10th Cir. 1950) (discussing statute as example of language “disestablish[ing] the organized reservation”).

- “[A]ll the unallotted lands within said reservation shall be restored to the public domain.” Act of May 27, 1902, ch. 888, 32 Stat. 245, 263; *see Hagen*, 510 U.S. at 412 (discussing statute and explaining that “Congress considered Indian reservations as separate from the public domain”).
- “[T]he reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished.” Act of April 21, 1904, ch. 1409, 33 Stat. 189, 218; *see Mattz*, 412 U.S. at 504 n.22 (citing as example of “clear language of express termination”).
- “The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation, except the lands within and bounded by the following lines . . . .” Act of March 3, 1905, ch. 1452, art. 1, 33 Stat. 1016, 1016; *see Wyoming*, 849 F.3d at 870 (calling this language “precisely suited to diminishment” (quotations omitted)).[60]

[60] Additional examples can even be found within the statutes the State cites, but not with respect to the Creek Nation. In the

Indeed, Congress has had no difficulty addressing the boundaries of the Creek Reservation, and, as the following treaties show, Congress used clear language on these occasions:

- "The Creek Nation of Indians cede to the United States all the land belonging to the said Nation in the State of Georgia, and lying on the east side of the middle of the Chatahoochie river. And, also, another tract of land lying within the said State, and bounded as follows . . . ." 1826 Treaty, art. 2, 7 Stat. at 286–87.
- "The Creek tribe of Indians cede to the United States all their land, East of the Mississippi river." 1832 Treaty, art. 1, 7 Stat. at 366.
- "The United States hereby agree . . . that the Muskogee or Creek country west of the Mississippi, shall be embraced within the following boundaries . . . ." 1833 Treaty, art. 2, 7 Stat. at 418.

1893 appropriations law—the State's first statute—Congress provided money to satisfy sum-certain purchases of Indian lands under agreements previously negotiated with two Tribes. First, Congress approved $30,600 "to pay the Tonkawa tribe of Indians in the Territory of Oklahoma for all their right, title, claim, and interest of every kind and character in and to four townships of land . . . conveyed and relinquished to the United States." § 11, 27 Stat. at 643–44. Second, Congress appropriated $80,000 "to pay the Pawnee tribe of Indians in Oklahoma, formerly a part of the Indian Territory, for all their right, title, claim, and interest of every kind and character in and to all that tract of country between the Cimarron and Arkansas rivers embraced within the limits of seventeen specified Townships of land, ceded, conveyed, and relinquished to the United States." § 12, 27 Stat. at 644. Further, Congress declared these newly acquired lands to be "part of the public domain." § 13, 27 Stat. at 644.

- "The Creek Nation doth hereby grant, cede, and convey to the Seminole Indians, the tract of country included within the following boundaries . . . ." 1856 Treaty, art. 1, 11 Stat. at 699; *see also id.* at art. 2, 11 Stat. at 700 ("The following shall constitute and remain the boundaries of the Creek country . . . ."); *id.* at arts. 5–6, 11 Stat. at 700–02 (providing for release of Creek claims to specified lands in consideration of $1 million paid by United States).
- "[T]he Creeks hereby cede and convey to the United States . . . the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands, being retained by them, shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; and in consideration of said cession of the west half of their lands . . . the United States agree to pay the sum of . . . nine hundred and seventy-five thousand one hundred and sixty-eight dollars . . . ." 1866 Treaty, art. 3, 14 Stat. at 786; *see also id.* at art. 9, 14 Stat. at 788 (providing for the construction of buildings "in the reduced Creek reservation").

The Supreme Court has said that when earlier treaties contained unequivocal language of disestablishment or diminishment and a later enactment "speaks in much different terms," "[t]he change in language . . . undermines [the] claim that Congress intended to do the same with the reservation's boundaries in [the later statute] as it did in [the earlier treaties]." *Parker*, 136 S. Ct. at 1080; *see also Mattz*, 412 U.S. at 504

("Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the [relevant statute]. This being so, we are not inclined to infer an intent to terminate the reservation."); *Seymour*, 368 U.S. at 355 (comparing earlier statute "expressly vacating the South Half of the reservation and restoring that land to the public domain" with later statute and finding that later statute "repeatedly refer[red] to the Colville Reservation in a manner that makes it clear that the intention of Congress was that the reservation should continue to exist as such").

Although the State contends the cumulative force of the eight statutes disestablished the Creek Reservation, Congress again discussed Creek boundaries in direct terms immediately following passage of the State's final statute. The Oklahoma Enabling Act was passed on June 16, 1906. 34 Stat. at 267. Days later, on June 21, Congress recommitted to the boundary separating "the Creek Nation" and "the Territory of Oklahoma." Act of June 21, 1906, ch. 3504, 34 Stat. 325, 364. The line, surveyed in 1871 and reestablished by the U.S. Geological Survey in 1895 and 1896, was "declared to be the west boundary line of the Creek Nation." *Id.* In the same statute, Congress established a new recording district in the Indian Territory and did so by reference to "the north line of the Creek Nation." 34 Stat. at 343. These references to the lines and boundaries of the Creek Nation undercut the State's contention that its eight statutes cumulatively disestablished the Creek Reservation.

As we recently said in *Wyoming*, "[t]here are no magic words of cession required to find diminishment. Rather, the statutory language, whatever it may be, must 'establish an express congressional purpose to diminish.'" 849 F.3d at 869–70 (quoting *Hagan*, 510

U.S. at 411). There are no traditional textual signs of disestablishment in any of the statutes, and our review uncovers no other language to overcome the presumption that the Creek Reservation continues to exist. *See Solem*, 465 U.S. at 481. In fact, the Original Agreement recognized the Reservation's boundaries.

2) Signs Congress continued to recognize the Reservation

The eight statutes not only lack textual evidence that Congress disestablished the Creek Reservation, the Original Agreement contains language recognizing the existence of the Creek Nation's borders. *See, e.g.*, ¶ 10, 31 Stat. at 864 (discussing towns "in the Creek Nation"); ¶ 25, 31 Stat. at 869 (municipal corporations "in the Creek Nation"); ¶ 37, 31 Stat. at 871 (introduction of cattle "into the Creek Nation"); ¶ 41, 31 Stat. at 872 (application of other laws and treaties "in the Creek Nation"); ¶ 42, 31 Stat. at 872 (notice through publication in newspapers "having a bona fide circulation in the Creek Nation"); ¶ 43, 31 Stat. at 872 (maintenance of liquor laws "in said nation"). And so did other statutes. *See, e.g.*, Supplemental Agreement, ¶¶ 11, 13, 17–18, 32 Stat. at 502–04; Five Tribes Act, §§ 12, 14, 16, 24, 27, 34 Stat. at 141–43, 146, 148; Oklahoma Enabling Act, § 6, 34 Stat. at 272.

The Original Agreement also reserved lands for tribal purposes. *See* ¶ 24, 31 Stat. at 868. *Solem* explained that retention of lands for tribal purposes "strongly suggests" continued reservation status. *See* 465 U.S. at 474 (explaining "[i]t is difficult to imagine why Congress would have reserved lands for such purposes" if the land was no longer a reservation). "Surplus" Creek lands were not made a part of the public domain or even opened to unrestricted non-

Indian settlement. Congress and the Tribe instead agreed lands not initially claimed as allotments would be used for the Tribe's benefit by equalizing the allotments of Creek citizens. *See* ¶¶ 3, 9, 31 Stat. at 862, 864; *see also* § 7, 34 Stat. at 272.

And instead of making a sum-certain payment to the Creek Nation for all—or even a portion of—its land, the Agreement provided the Tribe would receive an uncertain amount of revenue based on future sales to non-Indian settlers of surveyed town lots. *See* ¶¶ 11–15, 31 Stat. at 866; *see also Parker*, 136 S. Ct. at 1079 (finding no intent to diminish where Tribe did not "receiv[e] a fixed sum for all of the disputed lands" because "the Tribe's profits were entirely dependent upon how many nonmembers purchased the appraised tracts of land"); *id.* at 1080 ("Such schemes allow non-Indian settlers to own land on the reservation. But in doing so, they do not diminish the reservation's boundaries." (citation and quotations omitted)).

Thus, not only do the State's statutes lack any language showing disestablishment, they show Congress's continued recognition of the Reservation's boundaries.

3) The State's title and governance arguments

The State's arguments for disestablishment based on Congress's general goals of extinguishing tribal title and establishing a new state government fail. Relying on its first statute—the 1893 appropriations law in which Congress announced the commencement of negotiations—the State argues Congress intended to disestablish the Creek Reservation because Congress aimed for (1) the "extinguishment" of tribal title and (2) the "ultimate creation" of one or more state governments in the Indian Territory. Aplee. Br. at 58

(quoting § 16, 27 Stat. at 645). Congress largely achieved both goals,[61] but the State's arguments fail because they confuse questions of title and governance with the issue before us—the Reservation's boundaries.

a) Title

Whether a reservation has been disestablished or diminished depends on whether its boundaries were erased or constricted, not on who owns title to land inside the lines. "This distinction between a property's title and a reservation's territory is important." *Shawnee Tribe*, 423 F.3d at 1220 n.17. Congress has defined "Indian country" to include "all land within the limits of any Indian reservation." 18 U.S.C. § 1151(a). Based on this definition, the Supreme Court has accepted the "inescapable" conclusion that allotment alone does not terminate a reservation. *Mattz*, 412 U.S. at 504. "[A]djudicating reservation boundaries is conceptually quite distinct from adjudicating title to the same lands. One inquiry does not necessarily have anything in common with the other, as title and reservation status are not congruent concepts in Indian law." *Navajo Tribe*, 809 F.2d at 1475 (footnote and quotations omitted). In other words, who has title is not the same question as whether Congress has erased or altered a reservation's boundaries. *See Yazzie*, 909 F.2d at 1394 (observing "the distinction between title and boundary [is] an important one"); *see also Solem*, 465 U.S. at 470 ("[N]o matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.").

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[61] Tribal title was never fully extinguished because, as we explained in *Indian Country, U.S.A.*, the Creek Nation has retained title to some lands within the Reservation. 829 F.2d at 976.

The allotment of Creek lands—the transfer of title from the Tribe to its members—does not mean Congress disestablished the Creek Reservation. Allotment can be "completely consistent with continued reservation status." *Mattz*, 412 U.S. at 497; *see Navajo Tribe*, 809 F.2d at 1475 ("[A]llotment in severalty to individual Indians and subsequent entry by non-Indians is entirely consistent with continued reservation status." (quotations omitted)); *see also Solem*, 465 U.S. at 469 ("[I]t is settled law that some surplus land acts diminished reservations, and other surplus land acts did not." (citations omitted)). *Solem* provides the framework for the required case-by-case evaluation, and here the State presents no language showing Congress altered the Creek Reservation's boundaries. Its focus on the extinguishment of tribal title and the shift to individual ownership misses the mark because "the Supreme Court has required that specific congressional intent to diminish *boundaries* and not just Indian land titles be clearly established." *Yazzie*, 909 F.2d at 1394–95. As the Creek Nation explains, the allotment of Creek lands "effectuate[d] an uncompensated change from communal title to title in severalty," but this "transfer of title sa[id] nothing about reservation boundaries." Creek Nation Br. at 15.

b) Governance

Neither do changes in governance over the Creek Reservation show that Congress disestablished the Reservation. The State argues the erosion of Creek governmental authority and the creation of Oklahoma demonstrate Congress disestablished the Creek Reservation. For three reasons, we disagree.

First, a tribal government's *powers* and its reservation's *boundaries* are not the same thing. At times, the State's brief recognizes this point. *See* Aplee. Br. at 89

(arguing Mr. Murphy has "confuse[d] the question of whether the Nation was dissolved as a political entity with the issue in this case, i.e., whether the reservation was disestablished"); *see also id.* at 84 n.33 (noting "the Creek Nation continued to exist as a political entity"). But the State's attempt to tie Congress's regulation of the Creek government's authority to what Congress must have intended regarding the Reservation's borders fails to satisfy *Solem*'s step one. *See* 465 U.S. at 470 (explaining Congress must "clearly evince an intent to change boundaries" (quotations omitted)).[62]

Second, even if the State could show that dissolution of a tribal government is relevant to disestablishing a reservation, that would not mean the Creek Reservation has been disestablished. This is so because Congress never dissolved the Creek government. Even when Congress contemplated the *future* dissolution of the Creek government, it continued to recognize the Tribe's governmental authority within the Reservation's boundaries. *See, e.g.*, Original Agreement, ¶ 42, 31 Stat. at 872. Thirty years ago, this court explained:

> Although Congress at one time may have envisioned the termination of the Creek Nation and complete divestiture of its territorial sovereignty, the legislation enacted in 1906 reveals that Congress decided not to implement that goal, and instead explicitly perpetuated the Creek Nation and recognized its continuing legislative authority. Congress

[62] The State's contention that regulation of the tribal government indirectly reveals what Congress thought about the Reservation's borders may more appropriately be a step-two argument about the contemporary understanding of the Acts, rather than a step-one textual argument. Either way, it fails to show Congress disestablished the Creek Reservation's boundaries.

> subsequently repudiated its earlier policies of termination and enacted legislation designed to restore governmental powers to the Oklahoma tribes.

Indian Country, U.S.A., 829 F.2d at 981 (citation omitted). And, as all parties agree, the Creek government continues to exist today.

Third, Oklahoma's admission into the Union is compatible with the Creek Reservation's continuation. States and reservations co-exist throughout the country. *See, e.g.*, *Parker*, 136 S. Ct. at 1076 (Omaha Indian Reservation within Nebraska); *Solem*, 465 U.S. at 465–66 (Cheyenne River Sioux Reservation within South Dakota); *Indian Country, U.S.A.*, 829 F.2d at 976 (Creek Reservation within Oklahoma); *see also Donnelly v. United States*, 228 U.S. 243, 270–72 (1913) (holding California's admission did not affect federal jurisdiction over murder on Indian reservation).

In sum, the eight statutes do not, individually or collectively, show that Congress disestablished the Creek Reservation. They lack any of the "hallmarks of diminishment," *Parker*, 136 S. Ct. at 1079, and what they do say supports the view of Mr. Murphy and the Creek Nation that the 1866 Reservation borders continue to exist. The State's arguments about tribal title and governance miss the mark. Its case for disestablishment has "fail[ed] at the first and most important step." *Id.* at 1080.

b. Step Two: Contemporary Historical Evidence

When the statutory text at step one does not reveal that Congress has disestablished or diminished a reservation, such a finding requires "unambiguous evidence" that "*unequivocally* reveals" congressional intent. *Parker*, 136 S. Ct. at 1080–81 (alterations

and quotations omitted); *see also Solem*, 465 U.S. at 478 ("[I]n the absence of some clear statement of congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish [a reservation].").

At step two of the *Solem* analysis, courts consider how pertinent legislation was understood to affect the reservation when it was enacted. Evidence of this contemporary understanding may include the negotiations between the tribe and the federal government, congressional floor debates, and committee reports about the relevant statues. *See Solem*, 465 U.S. at 476–78; *see also Wyoming*, 849 F.3d at 874–75 (considering earlier, failed legislation as indicative of intent).

We have relied on step-two evidence to find disestablishment. In *Osage Nation*, we concluded Congress had disestablished the Osage Reservation, despite an absence of clear textual evidence, because we found "the legislative history and the negotiation process [made] clear that all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act." 597 F.3d at 1125.[63]

The State argues the contemporary historical evidence shows Congress intended to disestablish the Creek Reservation. Mr. Murphy and the Creek Nation contend there is no unequivocal historical evidence of

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[63] In *Osage Nation,* we referred in passing to the Creek Reservation as disestablished, *see* 597 F.3d at 1124, but the disestablishment or diminishment of the Creek Reservation was not before us in that case; the Creek Nation was not a party and therefore was not heard; and the court performed no *Solem* analysis regarding the Creek Reservation. The State acknowledges *Osage Nation* does not bind us here. *See* Aplee. Br. at 93 ("[T]his Court's statement that the Creek reservation was disestablished was dicta . . . .").

disestablishment. Instead, they argue the evidence supports continued recognition of the Creek Nation's borders during the relevant period. The mixed evidence we discuss below falls short of "*unequivocally* reveal[ing]" that Congress disestablished the Creek Reservation. *Parker*, 136 S. Ct. at 1080 (quotations omitted).[64]

i. The State's evidence

The State's step-two evidence comes from the years preceding the 1901 Original Allotment Agreement. On their own, pre-1901 understandings do little to advance the analysis because the State "does not dispute that the reservation was intact in 1900." Aplee. Br. at 75 n.25. But we understand the State to argue that Congress had a pre-1900 intention to disestablish the Creek Reservation and that this intention carried through later legislation. *See Wyoming*, 849 F.3d at 878–79 (finding a "continuity of purpose" and stating "Congress's consistent attempts . . . to purchase the disputed land compel the conclusion that this intent continued through the passage of the 1905 Act").

The State largely relies on court decisions discussing Creek history as opposed to primary sources from the relevant time period. *See* Aplee. Br. at 69–70 (citing *Woodward*, 238 U.S. at 293; *Sizemore v. Brady*, 235

[64] Had the State chosen to present its eight-statute, cumulative-effect argument as step-two contextual evidence—as opposed to step-one textual evidence—we would still conclude Congress did not disestablish the Creek Reservation. The eight statutes reveal a congressional hostility to Creek independence consistent with the assimilationist impulse of the era. *See Solem*, 465 U.S. at 466–69. But they do not show, and certainly not unequivocally, "a specific congressional purpose" to disestablish the Reservation's borders. *Id.* at 469. As our step-two discussion demonstrates, the contemporary historical evidence that the Reservation was disestablished is mixed.

U.S. 441, 447 (1914); *Stephens v. Cherokee Nation*, 174 U.S. 445, 483 (1899); *United States v. Hayes*, 20 F.2d 873, 888 (8th Cir. 1927); *Harjo*, 420 F. Supp. at 1110). Many of these cases were decided years after the allotment of Creek lands and after Oklahoma became a state, thus providing second-hand evidence of any contemporaneous historical understanding. To the extent the State's cases discuss legislative documents from the era, we look to the documents themselves.

1) 1892 Senate debate

The State cites *Hayes* for its earliest historical evidence of Congress's intent to disestablish the Creek Reservation. *Hayes*, a 1927 decision by the Eighth Circuit, discussed an 1892 Senate floor debate in which Senators Jones and Platt opposed a joint resolution proposing to create a commission to negotiate with the Five Civilized Tribes to induce them to allot their lands. *See* 20 F.2d at 879–82 (summarizing debate). Senator Jones argued the government's goal should be to induce the Indians "to abandon their tribal organizations and their tribal governments and to become citizens of the United States." 24 Cong. Rec. 98 (Dec. 13, 1892). Allotment should be offered, he said, *in exchange for* the dissolution of tribal governments. *Id.* He argued the joint resolution would "give away the single advantage we have." *Id.*

Senator Platt thought the "real question" was whether the country could "endure five separate, independent, sovereign, and almost wholly foreign governments within the boundaries of the United States." *Id.* at 100. Although acknowledging "[t]he United States conveyed to each of the five civilized tribes their lands in fee simple, and agreed that they should never be included in any Territorial or State government, so long as the tribes continued to exist and occupy the

lands," he contended things had changed. *Id.* The "original idea" had been "that white people were not to dwell in that country," but he thought the influx of white settlers into the Indian Territory showed the Tribes no longer wished to remain isolated. *Id.* The changing demographic situation required new governing structures. *Id.* at 101–02. Elimination of the tribal governments, he argued, would eventually have to happen with or without the Tribes' consent. *Id.* at 102. Senator Platt also pointed out the Committee on Indian Affairs was drafting a bill to create a commission "much wider in scope than is contained in the joint resolution." *Id.*

The joint resolution "died upon the table without reference to committee," *Hayes*, 20 F.2d at 880 (quotations omitted), but, as discussed above, Congress created the Dawes Commission the next year though the 1893 Act, which instructed the Commission to pursue the purchase or allotment of tribal lands and to secure conditions "suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory," § 16, 27 Stat. at 645.

This legislative history of a failed resolution falls far short of what would permit us to find disestablishment. "[I]solated statements" from a few legislators do not show that Congress disestablished a reservation, *Parker*, 136 S. Ct. at 1080, especially when, as here, the discussion concerns tribal title and governance rather than a reservation's boundaries.

2) 1894 Senate committee report

Next, the State looks to an 1894 report from a Senate select committee on the Five Civilized Tribes discussed in *Stephens*, an 1899 Supreme Court decision involving the constitutionality of laws regulating

the Indian Territory. *See* 174 U.S. at 483. The report noted 1890 census figures showing the white population in the Indian Territory greatly outnumbering the Indian population. S. Rep. No. 53-377, at 6 (1894). Within the Indian Territory there were "[f]lourishing towns . . . composed wholly of white people." *Id.* To the committee, this state of affairs undercut the isolationist notion undergirding earlier treaties:

> It must be assumed . . . that the Indians themselves have determined to abandon the policy of exclusiveness, and to freely admit white people within the Indian Territory, for it cannot be possible that they can intend to demand the removal of the white people either by the Government of the United States or their own. They must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time it was abandoned forever.

Id. at 7.

The committee report also commented on the state of land ownership and governance within the Indian Territory. Although the Tribes held title for the benefit of all their citizens, the report found that some tribal citizens, "frequently not Indians by blood but by intermarriage," had managed to take effective control over large swaths of the best agricultural land and earn private income by renting out sections of the land. *Id.* at 11–12. The report observed that this development disadvantaged many tribal citizens and the United States might have to intervene to ensure that tribal holdings were administered for the benefit of all a Tribe's members. *Id.* The report viewed the Tribes in the Indian Territory as incapable of reforming the situation, labelling "their system of government" as

"not only non-American" but "radically wrong." *Id.* at 12. "There can be no modification of the system. It can not be reformed. It must be abandoned and a better one substituted." *Id.* Convinced change was needed, but "not car[ing] to . . . suggest what . . . will be the proper step for Congress to take," the committee simply noted that the Dawes Commission was hard at work, and said it would "wait and see." *Id.* at 12–13.

This report describing 1890s conditions does not address whether Congress understood its later reforms would disestablish the Creek Reservation. And again, the State's contextual evidence concerns title and governance and does not speak to the reservation question.

3) Other sources

The State references an 1895 report from the Dawes Commission to Congress, which stated that the "so-called governments" in the Indian Territory were "wholly corrupt, irresponsible, and unworthy to be longer trusted" with the lives and property of Indian citizens. Dep't of the Interior, H.R. Doc. No. 54-5, at XCV (1st Sess. 1895). The Commission predicted the situation would not "remain peaceabl[e]" if the white population were excluded from the governance arrangement and stressed the United States was "bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed." *Id.* at XC.

The State argues an 1897 report by the Secretary of the Interior similarly found that a uniform system of government would have to be provided for the Indian Territory. The State also observes that the Creek Nation and the Dawes Commission negotiated agreements that were rejected by either the Tribe or Con-

gress before both sides agreed to the Original Allotment Agreement, but the State does not cite any particular provisions in these earlier, proposed deals to argue they reveal a contemporary understanding that Congress intended to disestablish or diminish the Creek Reservation.

These materials fail to show that Congress intended to disestablish the Creek Reservation by enacting any of the eight statutes.

ii. Mr. Murphy's and the Creek Nation's evidence

Mr. Murphy contends there is no unequivocal historical evidence supporting disestablishment. To the contrary, he and the Tribe cite sources from both before and after the 1901 Original Agreement to argue the Creek Nation's borders remain intact.

1) 1894 Dawes Commission records

The Creek Nation points to records from the Dawes Commission's early years. Its 1894 report to Congress discussed the Commission's negotiations and explained the Tribes had refused to discuss changes "in respect either to their form of government or the holdings of their domains." Dep't of the Interior, H.R. Doc. No. 53-1, at LIX–LX (3d Sess. 1894). The Commission explained to Congress it had proposed allotment after "abandon[ing] all idea of purchasing" tribal lands because "the Indians would not, under any circumstances, agree to cede any portion of their lands to the Government." *Id.* at LVX. The same report included a copy of the terms the Commission had submitted to the Creek Nation—the propositions "upon which [the Commission] proposed to negotiate." *Id.* at LX–LXI. The eighth proposition stated that, if an agreement was reached, Congress would be allowed to form a

territorial government "over the territory of the Creek Nation." *Id.*

2) 1895 Dawes letter

Next, the Tribe points to an 1895 letter from Chairman Dawes to the Creek Nation's principal chief explaining:

> [T]he Commission have not come here to interfere at all with the administration of public affairs in these nations, or to undertake to deprive any of your people of their just rights. On the other hand, it is their purpose and desire, and the only authority they have, to confer with you upon lines that will result in promoting the highest good of your people and securing to each and all of them their just rights under the treaty obligations which exist between the United States and your nation.

H.R. Doc. No. 54-5, at LXXXI. These treaty obligations, the Creek Nation argues, included the 1866 treaty's recognition of the Tribe's territorial integrity.

3) 1900 Attorney General opinion

The Creek Nation also relies on a 1900 Attorney General opinion, which addressed the "conditions now existing in the Indian country occupied by the Five Civilized Tribes" to argue the 1898 Curtis Act did not affect the Reservation's boundaries. 23 U.S. Op. Att'y Gen. 214, 215 (1900), *available at* 1900 WL 1001. Responding to an inquiry from the Secretary of the Interior about the presence of non-Indians in the Indian Territory, the Attorney General explained that the Tribes, even after passage of the Curtis Act, still had the power to exclude intruders and to set the terms upon which non-members could enter the

Tribes' lands. *See id.* at 215–18. The opinion said the Tribes could regulate activity within their borders because, although outsiders could purchase town lots, "the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation." *Id.* at 217. Tribal laws "requiring a permit to reside or carry on business in the Indian country" were still in effect. *Id.* Non-members grazing cattle or otherwise occupying Indian lands were "simply intruders" who "should be removed, unless they obtain such permit and pay the required tax, or permit, or license fee." *Id.* at 219. The Attorney General concluded the Secretary of the Interior had

> the authority and duty . . . to remove all persons of the classes forbidden by treaty or law, who are there without Indian permit or license; to close all business which requires a permit or license and is being carried on there without one; and to remo[v]e all cattle being pastured on the public land without Indian permit or license, where such license or permit is required; and this is not intended as an enumeration or summary of all the powers or duties of your Department in this direction.

Id. at 220; *see also Maxey v. Wright*, 54 S.W. 807, 809–10, 812 (Indian Terr.) (upholding Creek occupancy tax imposed on non-member lawyers practicing law within the Creek Nation), *aff'd*, 105 F. 1003 (8th Cir. 1900).

4) Post-allotment evidence

Mr. Murphy and the Tribe argue contemporary historical evidence shows an understanding that the Creek Nation's borders continued after allotment. In its report to Congress in 1900, the Dawes Commission

reflected on what its negotiations had—and had not—achieved:

> Had it been possible to secure from the Five Tribes a cession to the United States of the entire territory at a given price, the tribes to receive its equivalent in value, preferably a stipulated amount of the land thus ceded, equalizing values with cash, the duties of the commission would have been immeasurably simplified, and the Government would have been saved incalculable expense. . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment . . . it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment, no matter how simple its evolutions.

Dep't of the Interior, H.R. Doc. No. 56-5, at 9 (2d Sess. 1900).

Mr. Murphy points out that, in the years immediately following passage of the allotment agreements, the regional federal circuit court with jurisdiction over the Indian Territory continued to recognize the Creek Nation's borders. In *Buster*, federal agents enforced the Creek Nation's licensing fee on trade "within its borders" by closing the businesses of non-Indians who had refused to pay. 135 F. at 949–50. The non-Indian business owners sought to enjoin federal enforcement of the tax and argued the Creek Nation's power had been withdrawn by the Original and Supplemental Allotment Agreements, which authorized the presence of individuals in lawful possession of town lots. *Id.* at 950. The Eighth Circuit held that, although allotment had altered title arrangements, the Creek Nation's power to govern the area was "not conditioned or

limited by the title to the land." *Id.* at 951. "Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders . . . by the ownership [or] occupancy of the land within its territorial jurisdiction by citizens or foreigners." *Id.* at 952. The Creek Nation retained "its power to fix the terms upon which noncitizens may conduct business *within its borders*." *Id.* (emphasis added). The Eight Circuit said in summation:

> The ultimate conclusion of the whole matter is that purchasers of lots in town sites in towns or cities within the original limits of the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns, and that the Secretary of the Interior and his subordinates may lawfully enforce those laws by closing the business of those who violate them, and thereby preventing the continuance of that violation.

Id. at 958.[65]

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[65] The Supreme Court has questioned *Buster*'s approach to Indian taxing authority, but we consider the case only as a contemporary source revealing an understanding that Congress had not disestablished the Creek Reservation.

In *Atkinson Trading Co.*, the Supreme Court invalidated a hotel occupancy tax challenged by a non-Indian who owned a hotel within the borders of the Navajo Reservation. 532 U.S. at 647–48, 659. In doing so, the Court made clear that it has never endorsed *Buster*'s broad statement "that an Indian tribe's 'jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it." *Id.* at 653 n.4 (quoting 135 F. at 951). For our purposes, the correctness

iii. Analysis

The State's evidence at step two largely speaks to changes (or anticipated changes) in title and governance. It does not show that Congress understood it was disestablishing the Creek Reservation. Although Mr. Murphy and the Creek Nation present counter evidence showing a continuing understanding that the Creek Reservation's borders remained intact, we need not settle which side has the stronger argument about the contemporary historical evidence. Under *Solem*, our inquiry is simpler. Because no clear textual evidence shows Congress disestablished the Creek Reservation at step one, it is enough for us to say at step two that the "historical evidence in no way '*unequivocally* reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Parker*, 136 S. Ct. at 1080 (alteration and emphasis in original) (quoting *Solem*, 465 U.S. at 471).

None of the step-two evidence, whether viewed in isolation or in concert, shows unmistakable congressional intent to disestablish the Creek Reservation. The State's historical evidence supports the notion that Congress intended to institute a new government in the Indian Territory and to shift Indian land ownership from communal holdings to individual allotments. But this does not show, unequivocally or otherwise, that Congress had erased or even reduced the Creek Reservation's boundaries. Even if the State's evidence offers some suggestion of a contemporary understanding that the Creek Reservation was disestablished, Mr. Murphy and the Creek Nation have

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of *Buster*'s pronouncements on Indian taxing authority is irrelevant. Mr. Murphy and the Creek Nation rely on *Buster* simply as contemporary historical evidence.

marshalled evidence showing an understanding that the Reservation's borders continued. The step-two evidence is at most debatable, and we need not parse it further because ambiguous evidence cannot overcome the missing statutory text at step one. *See Hagen*, 510 U.S. at 411 ("Throughout the inquiry, we resolve any ambiguities in favor of the Indians . . . .").

After the first two steps, the statutory-text analysis fails to show that Congress disestablished or diminished the Creek Reservation, and there is no unequivocal evidence of a contemporaneous understanding that the legislation terminated or redrew the Creek Nation's borders at step two. We turn to step three.

c. Step Three: Later History

We consider at step three "federal and local authorities' approaches to the lands in question and . . . the area's subsequent demographic history." *Shawnee Tribe*, 423 F.3d at 1222; *see Solem*, 465 U.S. at 471; *see also Parker*, 136 S. Ct. at 1081 (considering tribal presence in contested territory). "Congress's own treatment of the affected areas," especially in the years immediately following passage of legislation that opens a reservation to non-Indian settlement, "has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities" treated the disputed area. *Solem*, 465 U.S. at 471. Step three also concerns "who actually moved onto opened reservation lands," *id.*, but later demographic facts are "the least compelling" evidence for disestablishment or diminishment because "[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation." *Yankton Sioux Tribe*, 522 U.S. at 356.

Solem provides that, as compared to steps one and two, step-three evidence is considered "[t]o a lesser extent." 465 U.S. at 471. In its most recent decision applying *Solem*, the Supreme Court observed that although it has "suggest[ed]" step-three evidence "might reinforce" a conclusion based on statutory text, it "has never relied solely on this third consideration to find diminishment." *Parker*, 136 S. Ct. at 1081 (alterations and quotations omitted); *see also Wyoming*, 849 F.3d at 879 ("[S]ubsequent events cannot undermine substantial and compelling evidence from an Act and events surrounding its passage." (quotations omitted)).

We proceed to discuss (i) the treatment of the area and (ii) its demographic history. The conflicting step-three evidence discussed below does not allow us to say that Congress disestablished the Creek Reservation.

i. Treatment of the area

1) Congress

Both sides cite evidence to show what later Congresses understood about the Creek Reservation's existence. We start with the earliest examples.

The Creek Nation cites the following statutes in arguing Congress continued to recognize the Reservation's boundaries following passage of the allotment agreements: Act of April 21, 1904, ch. 1402, 33 Stat. 189, 204 (granting Secretary of the Interior authority to sell "the residue of lands in the Creek Nation"), *repealed by* Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1072 (revoking Secretary's authority); Act of March 3, 1909, ch. 263, 35 Stat. 781, 805 (providing for "equalization of allotments in the Creek Nation"); and Act of May 25, 1918, ch. 86, 40 Stat. 561, 581 (appropriating money for "the common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations"). We find these laws carry some weight

because, within step three, *Solem* emphasizes the years "immediately following" passage of the relevant laws. *See* 465 U.S. at 471; *see also Hagen*, 510 U.S. at 420 (repeating the Court's "longstanding observation that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" (brackets and quotations omitted)).

The Creek Nation cites other statutes showing that reservations continued to exist in Oklahoma, though they do not speak directly to the Creek Reservation. *See* Act of May 29, 1924, ch. 210, 43 Stat. 244, 244 (regulating oil and gas leases on "unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation"); Act of June 26, 1936, ch. 831, 49 Stat. 1967, 1967 (authorizing Secretary of the Interior to acquire land and water rights "within or without existing Indian reservations" in Oklahoma).

The State points to more recent statutes in which Congress defined "reservation" to include, among other things, "former Indian reservations in Oklahoma." Aplee. Br. at 85.[66] These laws also include existing reservations within their definitions, however, and none of them reference the Creek Reservation as being disestablished in particular. Congress's choice to include former reservation lands in Oklahoma within various regulatory programs does not show that Congress has disestablished the Creek Reservation.

The State also cites two congressional committee reports. First, a 1935 report by a Senate committee

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[66] The State cites the following examples: 12 U.S.C § 4702(11); 16 U.S.C. § 1722(6)(C); 25 U.S.C. §§ 1452(d), 2020(d)(1)–(2), 3103(12), 3202(9); 29 U.S.C. § 741(c); 33 U.S.C. § 1377(c); 42 U.S.C. §§ 2992c(2), 5318(n)(2). Within 29 U.S.C. § 741, "reservation" is actually defined in subsection (d), and within 42 U.S.C. § 2992c, "Indian reservation" is defined in subsection (3).

said that in Oklahoma, as the result of allotment, "Indian reservations as such have ceased to exist." S. Rep. No. 74-1232, at 6 (1935). But as the Creek Nation argues, the legislation associated with the report, the Oklahoma Indian Welfare Act, referenced "existing Indian reservations." *See* § 1, 49 Stat. at 1967. Second, the State argues "[a] survey in 1952 referred to the lands of the Five Civilized Tribes as areas, rather than reservations." Aplee. Br. at 85 (citing H.R. Rep. No. 82-2503, at 745, 753, 777, 793, 952 (1952)). Mr. Murphy and the Creek Nation do not address this report, but the State does not explain why "areas" and "reservations" cannot refer to the same land.

Altogether, these conflicting signals from later Congresses do not overcome the lack of evidence at steps one and two. Given "the textual and contemporaneous evidence" in this case, "confusion in the subsequent legislative record does nothing to alter our conclusion" that the Creek Reservation's borders still exist. *Hagen*, 510 U.S. at 420; *see also id.* ("The subsequent history is less illuminating than the contemporaneous evidence.").

2) Executive

The parties' evidence from the executive branch also is mixed. The Creek Nation contends that the Bureau of Indian Affairs continued to regard the Reservation as intact in the early years of the twentieth century. The BIA's annual reports following Creek allotment and Oklahoma statehood consistently included the Creek Nation in tables summarizing reservation statistics. *See* Creek Nation Br., App'x B. Similarly, the Department continued to include the Creek Nation on its "Maps Showing Indian Reservations within the Limits of the United States." *See id.* App'x C (maps from 1900–14).

But the State argues a later BIA regulation concerning land acquisition policies shows that the BIA concluded the Creek Reservation was disestablished because the regulation defined "Indian reservation" to mean:

> that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.

25 C.F.R. § 151.2(f) (2016).[67] Even if this evidence supports the State, it merely creates a conflict with the other BIA evidence.

The Supreme Court has said that government officials' later treatment of the disputed area "has 'limited interpretive value.'" *Parker*, 136 S. Ct. at 1082 (quoting *Yankton Sioux Tribe*, 522 U.S. at 355); *see also Solem*, 465 U.S. at 469 ("The first and governing principle is that only *Congress* can divest a reservation of its land and diminish its boundaries." (emphasis added)). And, more generally, the "subsequent treatment of the disputed land cannot overcome the statutory text" when the relevant laws are "devoid of any language" indicating Congress intended to disestablish a reservation. *Parker*, 136 S. Ct. at 1082.

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[67] The regulation dates to 1980. *See* Land Acquisitions, 45 Fed. Reg. 62034, 62036 (Sept. 18, 1980) (announcing regulation's finalization).

3) Federal courts

Both sides point to passing references in federal court decisions across the decades that reveal conflicting understandings of the Creek Reservation's status.

The State invokes a handful of twentieth-century cases "indicat[ing], in dicta, a widely held belief that the reservation was disestablished." Aplee. Br. at 78–79 (citing *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 171 (1973); *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 602–03, 608 (1943); *Grayson v. Harris*, 267 U.S. 352, 353 (1925); *Woodward*, 238 U.S. at 285; *McDougal v. McKay*, 237 U.S. 372, 383 (1915); *Washington v. Miller*, 235 U.S. 422, 423 (1914); *Harjo*, 420 F. Supp. at 1143). But the State's characterization of these cases is overstated. *McClanahan*, for instance, does not discuss the Creek Nation at all. And in *Woodward*, the Supreme Court described the case as involving a 160-acre tract "formerly part of the domain of the Creek Nation," but, in the next sentence, the opinion explained "[t]he tract was allotted to Agnes Hawes, a Creek freedwoman." 235 U.S. at 285. The Court's description of the land is consistent with the transfer of title from the Creek Nation, which formerly owned it, to Ms. Hawes. As previously explained, a change in title from tribal to individual ownership does not disestablish a reservation. Other cases the State cites suffer the same flawed understanding that allotment had terminated the reservation. *See Grayson*, 267 U.S. at 353, 357 (describing allotted lands "lying within the former Creek Nation"); *Washington*, 235 U.S. at 423 (referring to "lands within what until recently was the Creek Nation in the Indian Territory"). To the extent the State's cases reflect a later understanding that the Creek Reservation had been disestablished, these references, as the State acknowledges, are dicta.

The Creek Nation argues that "[f]ederal courts in the decades after allotment sometimes subscribed to [the] erroneous assumption" that the Creek Reservation had been disestablished based on a mistaken belief that the tribal government had been dissolved. Creek Nation Br. at 32. For example, in *Turner v. United States*, the Court of Claims remarked—incorrectly—that the "Creek Nation of Indians kept up their tribal organization . . . until the year 1906, at which date the tribal government was terminated by the general provisions of [the Original Allotment Agreement]." 51 Ct. Cl. 125, 127 (1916), *aff'd*, 248 U.S. 354 (1919). But, as discussed above, Congress extended the tribal government beyond 1906 and has never dissolved it. *See* § 28, 34 Stat. at 148. The Supreme Court affirmed the Court of Claims' decision and repeated its mistake that "[o]n March 4, 1906, the tribal organization was dissolved pursuant to" the Original Agreement. *Turner*, 248 U.S. at 356. But, as the Court later recognized, the Creek Nation "still exists" and has "resume[d] some of its former powers." *Seber*, 318 U.S. at 718 & n.23.

As we have explained, the question of tribal governmental powers is distinct from reservation boundaries, but the Creek Nation persuasively argues these clear errors are an "indication of just how shaky such judicial assumptions were" in the decades after allotment. Creek Nation Br. at 32–33.

Scattered dicta in later court decisions do not justify a conclusion that Congress disestablished the Creek Reservation. We have undertaken the three-part *Solem* analysis *because* no Supreme Court or Tenth Circuit case has addressed the question. *See Indian Country, U.S.A.*, 829 F.2d at 975 (reserving issue of "whether the exterior boundaries of the 1866 Creek Nation have been disestablished").

4) Oklahoma

The Creek Nation acknowledges the State "asserts considerable governmental authority over the Creek reservation." Creek Nation Br. at 37. Oklahoma's general exercise of authority over the former Indian Territory has included criminal prosecutions of Indians, but we agree with Mr. Murphy and the Creek Nation that the exercise of State authority has not disestablished the Creek Reservation.

In *Ex parte Nowabbi*, Oklahoma convicted a member of the Choctaw Tribe in state court of murdering another tribal member on the victim's allotment. 61 P.2d 1139, 1141–42 (Okla. Crim. App. 1936), *overruled by Klindt*, 782 P.2d 401. The defendant argued the federal district court had exclusive jurisdiction. *Id.* at 1143. The OCCA concluded state jurisdiction was proper and said Congress had failed to reserve federal jurisdiction for crimes committed within the former Indian Territory. *Id.* at 1154, 1156.[68]

Since then, however, the state courts have changed course. In 1989, the OCCA concluded *Nowabbi* had erred in holding Oklahoma had jurisdiction to prosecute an Indian defendant for a murder committed on an Indian allotment. *See Klindt*, 782 P.2d at 404 ("There is ample evidence to indicate that the *Nowabbi* Court misinterpreted the statutes and cases upon which it based its opinion. . . . *Nowabbi* is hereby overruled."); *see also Cravatt*, 825 P.2d at 280 (vacating Indian defendant's state-court conviction

[68] The Oklahoma Attorney General similarly concluded in 1979 that Oklahoma has jurisdiction over the former Indian Territory: "Due to the dissolution of the Indian tribes of former 'Indian Territory' as *governments of limited sovereignty*, there is no 'Indian country' in said former 'Indian Territory' over which tribal and thus federal jurisdiction exists." 11 Okla. Op. Att'y. Gen. 345 (1979), *available at* 1979 WL 37653, at *8–9.

for murder committed on allotment). These cases addressed allotments, not the reservation question. Still, they show that Oklahoma has shifted away from its earlier position that there is no Indian country in the former Indian Territory.

The State has not provided us with other examples of Oklahoma prosecuting Indians for murders committed within the Creek Reservation,[69] but such cases would be of little value because the Supreme Court has explained that even when a state's exercise of jurisdiction goes unquestioned, lands retain their Indian country status until Congress decides otherwise. In *United States v. John*, 437 U.S. 634 (1978), the Supreme Court rejected an argument by the State of Mississippi that the federal government's failure to assert its jurisdiction had made the State's exercise of jurisdiction proper:

> [The State argues] that since 1830 the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State, and that the Federal Government long ago abandoned its supervisory authority over these Indians. Because of this abandonment, and the long lapse in the federal recognition of a tribal organization

[69] In the 1990s, we rejected an attempt by the federal government to allow Oklahoma to prosecute a Creek citizen for the murder of another Creek citizen. *Sands*, 968 F.2d at 1061. We did not address the reservation issue, however, because we determined the crime occurred on an allotment—and thus in Indian country under 18 U.S.C. § 1151(c). *Id.* at 1062. After prosecuting the defendant in federal court, the federal government "urge[d] us to adopt its frequently raised, but never accepted, argument that the State of Oklahoma retained jurisdiction over criminal offenses in Indian country." *Id.* at 1061. We rejected the argument and affirmed the defendant's federal conviction. *Id.* at 1061–63, 1067.

> in Mississippi, the power given Congress "to regulate Commerce . . . with the Indian Tribes," Const. Art. I, § 8, cl. 3, cannot provide a basis for federal jurisdiction. To recognize the Choctaws in Mississippi as Indians over whom special federal power may be exercised would be anomalous and arbitrary.
>
> We assume for purposes of argument, as does the United States, that there have been times when Mississippi's jurisdiction over the Choctaws and their lands went unchallenged. But . . . we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.

Id. at 652–53 (brackets and footnote omitted); *see also Indian Country, U.S.A.*, 829 F.2d at 974 ("[T]he past failure to challenge Oklahoma's jurisdiction over Creek Nation lands, or to treat them as reservation lands, does not divest the federal government of its exclusive authority over relations with the Creek Nation or negate Congress' intent to protect Creek tribal lands and Creek governance with respect to those lands.").

Oklahoma's exercise of jurisdiction within the Creek Reservation is not a proper basis for us to conclude that Congress disestablished the Reservation.

5) Creek Nation

The Creek Nation has maintained a significant and continuous presence within the Reservation. The tribal government, which was never extinguished, saw many of its powers restored when Congress passed OIWA in 1936. *See Indian Country, U.S.A.*, 829 F.2d at 981. Later, "[i]n 1979, the Creeks reorganized their tribal government . . . and adopted a new Creek Constitution, which was approved by the United States Department of the Interior." *Id.* at 970. Today, the tribal government maintains a capital complex in Okmulgee and provides extensive services within the Creek Nation's borders. *See* Creek Nation Br., App'x D (maps reflecting Tribe's capital complex and locations of community centers, medical centers, and emergency response teams throughout the Reservation). The Creek Nation further contends it applies its traffic laws throughout the territory and supports traditional churches and ceremonial grounds on the Reservation. *Id.* at 37.[70] Mr. Murphy also observes the Creek Nation has entered into deputation agreements for law enforcement services "within the exterior boundaries of the

Muscogee (Creek) Nation." Aplt. Br., Attach. F. The Creek Nation's continued presence and activity provides a much stronger case for reservation continuation than in *Parker*, where the Supreme Court held a reservation was intact notwithstanding the fact that "the Tribe was almost entirely absent from the disputed territory for more than 120 years." 136 S. Ct. at

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[70] *See also* The Muscogee (Creek) Nation, http://www.mcn-nsn.gov/services/# (providing overview of tribal services including, among others, language programs, environmental services, family violence prevention programs, historical and cultural preservation programs, senior services, and education and transportation programs) [https://perma.cc/Q82C-ZVZY].

1081. The value of this evidence may be slight, but it weighs in favor of Mr. Murphy and the Creek Nation.[71]

ii. Demographics

There is a large, non-Indian population within the Creek Reservation. The State argues that, even "[b]y 1906, four-fifths of the persons living in Indian Territory were non-Indian." Aplee. Br. at 86 (citing H.R. Rep. No. 59-496, at 10 (1906)). In 2000, the year Mr. Murphy was convicted in McIntosh County,[72] the census determined that—of a total county population of 19,456—14,123 people were white (73%) compared to 3,152 people who identified as American Indian or Alaska Native (16%).[73] And within the Reservation but beyond McIntosh County lies the city of Tulsa with a population, the State maintains, that is only 5.3% Indian. *Id.* at 86 (citing 2015 census figures).

Mr. Murphy argues this demographic evidence is unhelpful because "[t]he increase of non-Indian intruders into Indian Territory was occurring before the allotment acts and Enabling Act were passed," and even before allotment and Oklahoma statehood, "the [Creek] Nation's citizens were the minority within

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[71] Mr. Murphy has submitted other step-three materials in the form of reports and legislative history criticizing the Oklahoma probate courts for their handling of Indian estates in the years after allotment. *See* Aplt. Br., Attach. E. Similarly, he cites a lengthy 1928 report commissioned by the Department of the Interior, *see id.* at 42 n.19 (citing Institute for Government Research, "The Problem of Indian Administration" (1928)), on which the State also draws. We have considered these materials, but they do not affect our conclusion.

[72] The 1866 boundaries of the Creek Reservation, however, cover more than McIntosh County.

[73] *See* United States Census Bureau, "American FactFinder," Profile of General Demographic Characteristics: 2000 [https://perma.cc/LH7M-32WX].

their own territory." Aplt. Br. at 65–66. Although many non-Indians have come to live in the area, the Tribe points out that approximately half of its members continue to live within the 1866 borders of the Reservation.

The demographic evidence does not overcome the absence of statutory text disestablishing the Creek Reservation. *See Parker*, 136 S. Ct. at 1082 (explaining it is not the "role" of courts to "rewrite" earlier statutes "in light of . . . subsequent demographic history" (quotations omitted)). *Solem* acknowledged that "[r]esort to subsequent demographic history is . . . an unorthodox and potentially unreliable method of statutory interpretation." 465 U.S. at 472 n.13; *see also Wyoming*, 849 F.3d at 887 n.6 (Lucero, J., dissenting) (applying step three but observing "[t]he demographic makeup of an area decades or more following passage of a statute cannot possibly tell us anything about the thinking of a prior Congress"). We take account of it as part of our step-three analysis but do not rest our decision upon it.

iii. Step-three concluding comment

When steps one and two "fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," courts must accord "traditional solicitude" to Indian tribes and conclude "the old reservation boundaries" remain intact. *Solem*, 465 U.S. at 472. Such is the case here. None of the step-three evidence allows us to conclude that Congress disestablished the Creek Reservation.

IV. CONCLUSION

Applying *Solem*, we conclude Congress has not disestablished the Creek Reservation. Consequently, the crime in this case occurred in Indian country as defined in 18 U.S.C. § 1151(a). Because Mr. Murphy is

an Indian and because the crime occurred in Indian country, the federal court has exclusive jurisdiction. Oklahoma lacked jurisdiction. *See* 18 U.S.C. § 1153(a).

Mr. Murphy's state conviction and death sentence are thus invalid. The OCCA erred by concluding the state courts had jurisdiction, and the district court erred by concluding the OCCA's decision was not contrary to clearly established federal law. We therefore reverse the district court's judgment and remand with instructions to grant Mr. Murphy's application for a writ of habeas corpus under 28 U.S.C. § 2254. The decision whether to prosecute Mr. Murphy in federal court rests with the United States. Decisions about the borders of the Creek Reservation remain with Congress.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. CIV-03-443-RAW-KEW

PATRICK DWAYNE MURPHY,

Petitioner,

vs.

MARTY SIRMONS, Warden, Oklahoma State Penitentiary,

Respondent.

OPINION AND ORDER

Petitioner Patrick Dwayne Murphy was convicted following a jury trial in the District Court of McIntosh County, Case No. CF-1999-164A, of First Degree Murder in violation of 21 O.S.Supp. 1996, § 701.7(A). In accordance with the jury's verdict, Petitioner was on May 18, 2000 sentenced to death. On direct appeal, the Oklahoma Court of Criminal Appeals affirmed his conviction and death sentence. *Murphy v. State*, 47 P.3d 876 (Okla. Crim. App. 2002), *cert. denied*, 538 U.S. 985, 123 S.Ct. 1795, 155 L.Ed.2d 678 (2003).

On February 7, 2002, Petitioner filed an Application for Post-Conviction Relief in Oklahoma Court of Criminal Appeals Case No. PCD-2001-1197. On September 4, 2002, the Court granted relief on the sole issue of Petitioner's claim of mental retardation and remanded the case for an evidentiary hearing. *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002). The trial court held an evidentiary hearing and concluded that insufficient evidence existed to create a fact question on the

issue of Petitioner's claim of mental retardation. *See*, Findings filed on November 6, 2002, in the District Court of McIntosh County, Case No. CF-1999-164A. Thereafter, the Oklahoma Court of Criminal Appeals denied Petitioner's application for post-conviction relief and again affirmed Petitioner's sentence. *Murphy v. State*, 66 P.3d 456 (Okla. Crim. App. 2003).

On March 29, 2004, Petitioner filed a second Application for Post-Conviction Relief with the Oklahoma Court of Criminal Appeals raising three grounds for relief, to-wit: 1) the State of Oklahoma lacked jurisdiction to try him because the crime occurred in Indian country; 2) his mental retardation claim had been treated differently than all subsequent mental retardation claims, thereby depriving him of equal protection, and a deprivation of rights guaranteed by the Fifth, Eighth and Fourteenth Amendments; and 3) Oklahoma's protocol and procedures dealing with execution by lethal injection violated the United States Constitution against cruel and unusual punishment. On December 7, 2005, the Oklahoma Court of Criminal Appeals denied relief on issues one and three and remanded the issue of mental retardation to the district court in McIntosh County for a jury trial. *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005).[1] Petitioner now seeks relief from his death sentence pursuant to 28 U.S.C. § 2254.

As a preliminary matter the Court notes that Marty Sirmons is currently the Warden at Oklahoma State Penitentiary. The Court finds, pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Marty Sirmons is the proper substituted Respondent and the

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[1] The District Court of McIntosh County has continued this trial several times. Currently, the matter is set for trial on September 10, 2007. *See*, McIntosh County District Court Case No. CF-99-00164A.

Court Clerk shall be directed to note such substitution on the record.

I. RECORDS REVIEWED

This Court has reviewed (1) the First Amended Petition for Writ of Habeas Corpus filed on September 10, 2004; (2) the Second Amended Petition for Writ of Habeas Corpus filed on December 28, 2005; (3) the Combined Response[2] to the First Amended and Second Amended Petitions for Writ of Habeas Corpus filed on April 6, 2007; (4) the Reply filed on May 10, 2007; (5) transcript of Preliminary Hearing held on December 1, 1999 and December 10, 1999, Volumes I and II, respectively; (6) transcript of Motion proceedings held on February 24, 2000; (7) transcript of Motions proceedings held on March 30, 2000; (8) transcript of Motions hearing held on April 6, 2000; (9) transcript of Jury Trial held on April 10, 11, 12, and 13, 2000, Volumes I, II, III, IV, IVA, and V; (10) transcript of Sentencing Proceedings held on May 18, 2000; (11) transcript of Evidentiary Hearing proceedings held on November 18, 2004, Volumes I and II, including exhibits attached thereto; and (12) all other records before the Oklahoma Court of Criminal Appeals which were transmitted to this Court. Although not listed specifically, this Court has reviewed all items filed in this case, with the exception of the transcript of proceedings held on October 29, 2002, including exhibits attached thereto and the transcript of the deposition of Faust Bianco, Jr., Ph.D, taken on October

[2] On March 30, 2007, this Court ordered Respondent to file a complete response to Petitioner's First Amended Petition and Seconded Amended and Supplemental Petition to allow Respondent an opportunity to exclude those portions of its original response which were no longer applicable to the actual issues herein.

25, 2002, including exhibits attached thereto.[3] *See* Inventory of State Court Record, Dkt. No. 21, filed on July 16, 2004 and Inventory of State Court Record, Dkt. No. 52, filed on November 16, 2006.

As a result, this court finds that the records, pleadings and transcripts of the state proceedings provide all the factual and legal authority necessary to resolve the matters in the petition and, therefore, an evidentiary hearing is unnecessary. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)(*Sumner I*); *Sumner v. Mata*, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982) (*Sumner II*).

II. STATEMENT OF THE FACTS

Historical facts found by the state court are presumed correct, unless the petitioner rebuts the same by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Since Petitioner has failed to rebut the facts, as set forth by the Oklahoma Court of Criminal Appeals, this Court hereby adopts the factual findings made by the Oklahoma appellate court.

> In August of 1999, [Petitioner] was living with Patsy Jacobs, his alleged "common-law" wife. Ms. Jacobs had previously lived for three years with George Jacobs, the victim in this case, and had a child by him. [Petitioner] and Patsy had an argument about Jacobs a

[3] Although these transcripts were designated by the parties, the issue before the state court in the evidentiary hearing held on October 29, 2002, is not currently before this Court. The deposition of Dr. Bianco was apparently introduced in that hearing. Accordingly, other than ascertaining that both of these transcripts relate to an evidentiary hearing on the issue of Petitioner's mental retardation, this Court has not read these transcripts.

couple of days before Jacobs was murdered. [Petitioner] told Patsy that he was going to get Jacobs and his family one by one.

On August 28, 1999, George Jacobs and his cousin Mark Sumka spent most of the day drinking and driving around Okmulgee, Okfuskee, and McIntosh counties. They reportedly drank two bottles of whiskey and numerous beers that day. At 9:30 p.m., they were headed to a Henryetta bar in Jacobs's Dodge Sedan. Jacobs was passed out in the back seat, and Sumka was driving. (Jacobs's post mortem blood alcohol level would later be determined to be .23)

Sumka and Jacobs passed [Petitioner] as he was driving in the opposite direction. Both cars stopped, and [Petitioner] backed up. [Petitioner] told Sumka to kill the car and get out. Meanwhile, two occupants of [Petitioner's] car, Billy Long and Kevin King, exited the car. Alarmed, Sumka drove away.

[Petitioner] and his companions pursued Sumka in [Petitioner's] car. [Petitioner] was eventually able to force Sumka to stop. At that point, someone from [Petitioner's] car arrived at Sumka's car and began hitting Jacobs.

Sumka got out of his car, but was stopped by [Petitioner] who said he was going to do to Jacobs what they had done to him. Sumka could hear the other two men hitting Jacobs. Sumka told [Petitioner] "that was enough, you know, he's passed out." [Petitioner] went over to Jacobs, while Long came over and hit Sumka in the nose. Sumka then saw King drag Jacobs out of a ditch.

Sumka fled momentarily, about one hundred yards from the assault. After five minutes, he decided to return. Upon his arrival, [Petitioner] and his two cohorts told Sumka if he said anything they would kill him and his family. King then smacked Sumka in the jaw. [Petitioner] reportedly instructed King and Long not to hit Sumka again.

Sumka testified that [Petitioner] then took a folding knife he was holding and tossed it into the woods. (The police later recovered this knife.)

Sumka ran over to where Jacobs was laying in a ditch. Jacobs was "barely breathing." Anderson Fields then drove up in another car and asked what was wrong with the guy in the ditch. (He also noticed a fleshy object and blood in the road.) The men told him Jacobs was drunk. They began approaching Fields's car, but he drove away. Fields then phoned the police and drove back to the scene. Everyone was gone. Jacobs lay in the ditch and was barely breathing. Fields found a slash across Jacobs's stomach and chest. His throat had been cut, his face was bloody, and his genitals had been cut off.

Upon [Petitioner's] instructions, Sumka had left the scene with [Petitioner], Long, and King. During the car ride, [Petitioner] told Sumka they had cut Jacobs's throat and chest and had cut off his privates. King told Sumka they had stuffed Jacobs's genitals into Jacobs's mouth. [Petitioner] then told everyone to take off their clothes because he was going to burn them.

The group later went to the home of Mark Taylor, [Petitioner's] cousin. [Petitioner] told Taylor he had killed Jacobs. [Petitioner] said he had cut Jacobs's stomach and throat, had "cut his dick and his nuts off," had shoved his genitalia into his mouth, and had tried to stomp on the victim's head like a pancake.

The group then traveled to King's house, where Jacobs's son George, Jr. was staying. [Petitioner] said he was going to do the same thing to Jacobs's son. But King's mother came out of the house and thwarted this plan. King went inside, and the rest of the group left. [Petitioner] then burned the bag of incriminating clothes.

When [Petitioner] arrived home that night, he told Patsy Jacobs that George Jacobs had been killed and that he had sliced his throat and stomach. Patsy testified [Petitioner] also said he had cut off Jacobs's genitals so "he won't fuck anyone anymore," including her.

When [Petitioner] was arrested, he admitted kicking Jacobs in the ribs and testicles and cutting his penis. He also admitted hearing Jacobs groan during the attack. He said Jacobs was left alive in a ditch; He was breathing and saying, "Oh."

A state criminalist testified that, after the victim's penis was severed, he was dragged to the side of the road, where his neck and chest were cut. Bloodstains on Jacobs's shoes indicate he had been in an upright position for part of the attack. The medical examiner described the cause of death as blood loss from the various cutting wounds, primarily

> the genital and neck wounds. Death was not immediate. Jacobs bled to death in somewhere between four to twelve minutes, perhaps even longer. He described the multiple lacerations and fractures the victim suffered to his face, neck, chest, and abdomen.

Murphy v. State, 47 P.3d 876, 879–880 (Okla. Crim. App. 2002).

Additional facts will be discussed as they become relevant.

III. PETITIONER'S CLAIMS FOR RELIEF

Petitioner's Second Amended Petition (Dkt. No. 54) incorporates by reference his First Amended Petition (Dkt. No. 33) and his Amended Reply to the State of Oklahoma's Response to Petition for A Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (Dkt. No. 34), both of which were filed herein on September 10, 2004. In his First Amended Petition, Petitioner raised eight (8) grounds for relief. Two (2) additional grounds were added in Petitioner's Second Amended Petition. Respondent, at the direction of the Court, filed a Combined Response to Petitioner's First and Second Amended Petition on April 6, 2007 (Dkt. No. 56). Petitioner filed a Reply on May 10, 2007 (Dkt. No. 65).

Petitioner's alleged errors can be summarized as follows: (1) ineffective assistance of counsel during the second stage of trial; (2) (a) the evidence was insufficient to support Oklahoma's "heinous, atrocious, or cruel" aggravator; (b) the jury instructions regarding this aggravating circumstance were inadequate; and (c) this aggravator is unconstitutionally vague and overbroad; (3) Oklahoma's "continuing threat" aggravating circumstance is unconstitutionally vague and overbroad; (4) failure to require the

jury to find the aggravating factors outweighed the mitigating factors beyond a reasonable doubt violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights; (5) the victim impact evidence violated Petitioner's constitutional rights to a fundamentally fair sentencing proceeding as guaranteed by the Fifth, Eighth and Fourteenth Amendments; (6) failure to define life without parole denied Petitioner due process of law and the right to a fundamentally fair sentencing proceeding in violation of his Fifth, Eighth and Fourteenth Amendment rights; (7) the trial court erred in admitting Petitioner's post-arrest statement thereby violating Petitioner's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments; (8) the cumulative errors in Petitioner's case warrant habeas relief; (9) the state court proceedings were void *ab initio* because the state court lacked jurisdiction over the crime; and (10) Oklahoma's lethal injection protocol and procedures violate the Eighth Amendment.

IV. STANDARD OF REVIEW

Since Petitioner filed his original petition in May, 2002, this case is governed by the statute as amended by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). *See Lindh v. Murphy,* 521 U.S. 320, 326–327, 117 S.Ct. 2059, 2063, 138 L.Ed.2d 481 (1997). Pursuant to the AEDPA, this Court is precluded from granting habeas relief on any claim adjudicated on the merits by a state court

> unless the adjudication of the claim—
>
> (1) 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; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the Court defined "contrary to" as a state-court decision that is "substantially different from the relevant precedent of this Court." *Id.*, at 405, 120 S.Ct. at 1519. A decision can be "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth" in Supreme Court case law or "if the state court confronts a set of facts that are materially indistinguishable from" a decision of the Supreme Court, but nonetheless arrives at a different result. *Early v. Packer,* 537 U.S. 3, 8, 123 S.Ct. 362, 365, 154 L.Ed.2d 263 (2002), citing *Williams v. Taylor*, 529 U.S. at 405–406. Whereas, the "unreasonable application" provision is implicated when "the state court identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams v. Taylor,* 529 U.S. at 407. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, — U.S. —, — S.Ct. —, 2007 WL 1387923 (2007). Finally, the Supreme Court has made it clear that a state court is not required to cite Supreme Court caselaw, or even be aware of it, "so long as neither the reasoning nor the

result of the state-court decision contradicts [Supreme Court precedent]." *Early*, 537 U.S. at 8.

V. PETITIONER'S ALLEGED ERRORS

1. Ineffective Assistance of Counsel

Petitioner first claims his trial lawyer failed to investigate, prepare, and present to the jury readily available and compelling mitigating evidence which, if presented, would likely have led to a different sentencing outcome thereby depriving Petitioner of his Sixth, Eighth and Fourteenth Amendment rights. Petitioner first raised this claim in his state court application for post-conviction relief. The Oklahoma Court of Criminal Appeals denied relief, holding Petitioner was not deprived reasonably competent assistance of counsel under prevailing professional norms. *Murphy v. State*, 54 P.3d 556, 565 (Okla. Crim. App. 2002). Furthermore, the state appellate court, after viewing affidavits and evidentiary materials submitted in the post-conviction proceeding, said, in accordance with *Williams v. Taylor*, *supra*, there was no "reasonable probability that the result of the sentencing proceeding would have been different" if competent counsel had presented the additional mitigating evidence now identified by Petitioner and explained its significance. *Id*. Respondent asserts nothing presented by Petitioner establishes that the Oklahoma Court of Criminal Appeals decision denying relief on this issue was either contrary to or an unreasonable application of federal law.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the legal standards which apply to claims of ineffective assistance of counsel in a criminal proceeding. First, the Court indicated that the defendant must establish that the representation

was deficient because it fell below an objective standard of reasonableness under prevailing professional norms. In order to establish that counsel's performance was deficient, Petitioner must establish counsel made errors so serious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Second, the defendant must establish that the deficient performance prejudiced the defense. *Id*. Failure to establish either prong of the *Strickland* standard will result in a denial of Petitioner's Sixth Amendment claims. *Id.* at 696.

While ensuring that criminal defendants receive a fair trial, considerable judicial restraint must be exercised. As the Supreme Court cautioned in *Strickland*,

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are

> countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689. (citations omitted).

In deciding whether counsel was ineffective, a court must judge the reasonableness of the challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A defendant attacking an attorney's assistance must identify the particular acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment and then the court must determine, in light of all of the circumstances, whether the identified acts were outside the wide range of professionally competent assistance. *Id*. at 690. Courts are free to address the performance and prejudice components in any order and need not address both where a defendant fails to make a sufficient showing of one. *Id*. at 697.

While the failure to present available mitigating evidence is not *per se* ineffective assistance of counsel, reviewing courts must evaluate the reasons for counsel's failure to present mitigating evidence and then decide whether the failure, if due to an attorney's deficient performance, prejudiced the defendant. *Hale v. Gibson*, 227 F.3d 1298, 1314 (10th Cir. 2000) (quoting *Breechen v. Reynolds*, 41 F.3d 1343, 1365–1368 (10th Cir. 1994)). One of counsel's basic obligations is to make the adversarial testing process work. Since this testing process generally cannot function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, the Supreme Court has indicated a defense attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

Strickland, 466 U.S. at 691. *See also, Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999). A reasonable investigation includes an investigation of the defendant's background for possible mitigating evidence. *Breechen*, 141 F.3d at 1366. In a capital case, this duty is strictly observed. *Williamson v. Ward*, 110 F.3d 1508, 1514 (10th Cir. 1997).

In deciding whether Petitioner's trial counsel rendered effective assistance with respect to the second stage of the proceedings, the Oklahoma Court of Criminal Appeals appears to have correctly applied Supreme Court precedent to the facts of this case, focusing on the prejudice prong of *Strickland*. Specifically, the Court said:

> . . . . we must review the mitigating evidence presented in Petitioner's trial, compare it to the mitigation evidence presented in the post-conviction record, and decide if the post-conviction evidence raises "a reasonable probability that the result of the sentencing proceeding would have been different" if competent counsel had presented and explained the significance of all the available evidence.

Murphy v. State, 54 P.3d 556, 562 (Okla. Crim. App. 2002) (citation omitted).

The state court then undertook a thorough review of the mitigating evidence submitted in both stages of the trial and the jury instruction which told the jurors to consider a list of mitigating evidence which had been presented at trial. Next, the state court enumerated the additional "mitigating" evidence which was contained in the post-conviction affidavits. The state court then found that "the post-conviction affidavits and evidentiary materials do not demonstrate a failure by Petitioner's trial counsel to present mitigating evidence of a constitutionally deficient magnitude,

as that in *Williams*." *Id.* at 564. Ultimately, the state court found Petitioner had failed to establish prejudice as a result of counsel's performance. *Id.*

Petitioner argues, however, that the Oklahoma Court of Criminal Appeals decision regarding ineffective assistance of counsel was wrong because "counsel cannot 'strategically' decide to not use information he did not investigate and develop." First Amended Pet., at pp. 18–19. While that critique may be logical syllogistically, contrary to Petitioner's assertions, the affidavit submitted by trial counsel, James Bowen, makes it clear that counsel actively pursued mitigation evidence and after completing a thorough investigation of Petitioner's background, he developed a reasonable trial strategy. *See*, State Post-Conviction Exhibit 14. In fact, counsel's affidavit indicates, prior to trial, counsel personally had several interviews with not only Petitioner's mother and Petitioner in preparation for trial, but also other family members and witnesses.[4] *Id*. at ¶¶ 8 and 9. Although post-conviction counsel was able to obtain affidavits from the defendant's mother and another family member which established abuse of alcohol by Petitioner's mother while she was pregnant with Petitioner, despite numerous conversations with Petitioner's mother prior to trial, Petitioner's mother was not as forthcoming with trial counsel as she was with post-conviction counsel. Rather, Ms. Murphy "always maintained that her use of alcohol was minimal [while she was pregnant with Petitioner.]" *Id*. at ¶ 9. Trial counsel also spoke with other family members and witnesses, but "none ever contradicted Ms. Murphy's assertions."

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[4] *See also*, State Post-Conviction Exhibit 7, ¶ 2 (one of the "mitigating" witnesses admits she was contacted prior to trial and questioned about Petitioner's background).

Id. Further, Petitioner acknowledged to Dr. Sharp that although "both of his parents consumed alcohol, it was his perception that his mother did not having (sic) a drinking problem, but that his father was most probably alcoholic." *See*, Defendant's Jury Trial Exhibit 4. Nonetheless, after Petitioner was evaluated by Dr. Jeanne Russell, counsel pursued this issue further by discussing the "absence of any visible characteristics of Fetal Alcohol Syndrome" with Dr. Russell. *Id*. If counsel had known this information prior to trial, he may have been ineffective for failing to develop and present it to the jury. Nevertheless, counsel cannot be deemed ineffective where potential witnesses, including family members, change their stories after trial. Further, based upon the active investigation counsel conducted, he developed a trial mitigation strategy which entailed presenting to the jury that Petitioner "was a low risk [for] future violence, that he was chemically dependent, and mentally retarded." *See*, State Post-Conviction Exhibit 14 at ¶ 10. Further, counsel indicates he attempted "to focus on Petitioner's mental retardation and not present evidence that would possibly contradict, or call into question the fact that he was mentally retarded." *Id*. at ¶ 11. Moreover, as recognized by the Oklahoma Court of Criminal Appeals, the post-conviction affidavits conflict with each other and with the testimony at trial; they contain information which would have been as aggravating as it was mitigating; and they contain unreliable hearsay statements which would not have been admissible at trial. *See*, *Murphy v. State*, 54 P.3d 556, 565 (Okla. Crim. App. 2002). The affidavits certainly would have cast doubt upon evidence portraying Petitioner as mentally retarded. Consequently, failure to introduce this testimony cannot be deemed unreasonable trial strategy.

Petitioner also complains counsel was ineffective in failing to use his low IQ score advantageously, in further developing evidence that Petitioner had organic brain damage, and emphasizing Petitioner was unlike most criminals because he was not psychopathic. Despite Petitioner's assertions, evidence was presented to the jury to show Petitioner had tested in the mildly retarded range, that he potentially had organic brain damage from various head injuries as well as the amounts of alcohol he regularly consumed, and that he was not a psychopath.[5]

Next, Petitioner argues, because counsel tried several death penalty cases in a relatively short period of time, he failed to allocate a reasonable amount of time to investigate Petitioner's life history. In support of this conclusory allegation, Petitioner cites two things. First, Petitioner asserts the ABA Guidelines mandated counsel spend 1800 hours on this case and since counsel tried four death penalty cases within a space of ten calendar months, he could not have allocated a reasonable amount of time to investigate Petitioner's life. The ABA Guidelines cited by Petitioner, however, were not adopted until February 2003, or approximately three years after Petitioner's trial. Further, the ABA Guidelines make it clear that many things other than the number of cases assigned to an attorney would have to be considered in ascertaining a reasonable workload for a given attorney.

Second, Petitioner asserts that trial counsel not only ignored his obligation to allot a reasonable amount of time to Petitioner's case, counsel "did virtually nothing with the time he had." To support this assertion, Petitioner inserts a footnote in his First Amended

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[5] J.T.Tr. Vol. IV, pp. 875–898, 926–934, and Vol. V, pp. 1234–1239, and 1287–1314.

Petition which states, in part: "Trial counsel failed to investigate the scene of the crime" and counsel "did not view the scene of the crime." First Amended Petition at p. 27, footnote 7. No affidavit has ever been submitted to this Court or to the Oklahoma Court of Criminal Appeals to support Petitioner's bald assertions.[6] Additionally, whether or not counsel properly investigated the scene of the crime has absolutely no bearing on Petitioner's assertion that counsel was ineffective in investigating and/or uncovering potentially mitigating evidence. Here, counsel submitted an affidavit detailing actions he took during his investigation of potentially mitigating evidence in this particular case. Petitioner has never raised an ineffective assistance of counsel claim as it relates to the first stage of trial. Nonetheless, all of these attacks on the Oklahoma Court of Criminal Appeals decision are misplaced. The state court did not rest its decision on the first prong of *Strickland*, whether or not counsel was ineffective; but chose instead to focus on the second prong, whether Petitioner was prejudiced by counsel's actions.

Petitioner asserts counsel's failure to properly investigate prejudiced him because he did not have "a good life and raising" as argued by the prosecutor during second stage closing arguments and counsel did not put on evidence to counter these arguments. Despite Petitioner's assertions, the jury heard evidence that Petitioner's childhood was not "good." Specifically, Ms. Murphy testified that Petitioner's father was not around and because of his mixed-race heritage,

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[6] While evidence at a hearing on jurisdiction established the crime scene had been described incorrectly by a witness at trial, neither the witness explaining the discrepancy nor any other witness testified regarding actions taken by trial counsel in preparation for trial. *See*, Evid. Hrg. Tr. Vol. I, at pp. 30–32 and 49–52.

Petitioner had to endure cruel teasing from extended family members. Despite these shortcomings, both Petitioner and his mother testified he was a good child who could be proud of his accomplishments. J.T.Tr., Vol. V, at pp. 1318–1340. *See also,* Second Stage Jury Instruction No. 13, O.R. 413 (enumerates an exhaustive list of evidence which might be considered mitigating).

Furthermore, in assessing prejudice during the second stage, a court should "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 2542, 156 L.Ed.2d 471 (2003). This Court does not believe that the additional evidence regarding Petitioner's non-idyllic childhood would have outweighed the aggravating circumstances found by the jury of continuing threat and the especially heinous, atrocious and cruel nature of the murder. This is particularly true where, as in this case, (1) significant evidence from an expert was introduced to establish that Petitioner would not be a continuing threat to society were he locked up in a secure facility and prevented from consuming alcohol;[7] and (2) the jury found the crime was especially heinous, atrocious or cruel, based in part, upon Petitioner's own admissions regarding slitting the victim's throat, cutting his stomach, cutting off of his genitalia and then leaving the victim out on a dark road to bleed to death.[8]

To the extent the Oklahoma Court of Criminal Appeals viewed not only the evidence submitted at trial, but also the evidence which could have been submitted, before deciding that Petitioner was not

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[7] J.T.Tr. Vol. V, at pp. 1227–1261.

[8] J.T.Tr. Vol. II, at pp. 343–345 and Vol. III, at pp. 603, 668–669, 709–710; Vol. IV, 1025 and State's Trial Exh. No. 5.

prejudiced by counsel's actions (*i.e.*, there is not "a reasonable probability that the result of the sentencing proceeding would have been different," *Murphy v. State*, 54 P.3d 556, 565 (Okla. Crim. App. 2002)), this Court finds, based upon the record herein, that the Oklahoma court's decision regarding prejudice was not an unreasonable application of Supreme Court precedent to the facts of this case. Accordingly, Petitioner's claim for relief based on ineffective assistance of counsel is denied.

2. Heinous, Atrocious, or Cruel Aggravator

In his second ground for relief, Petitioner argues the evidence was insufficient to support Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance and that the jury instructions surrounding this aggravating circumstance were so deficient that they violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights. Respondent asserts the aggravator is not unconstitutionally infirm and the Oklahoma court's determination that the jury instructions accurately stated the applicable law is not contrary to, nor an unreasonable application of, clearly established federal law.

A. Sufficiency of the Evidence

The United States Supreme Court held, in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), *reh. denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979), in a federal habeas proceeding challenging the sufficiency of the evidence in a state trial, that a reviewing court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Further, the Court indicated following conviction, a judicial review of

the "evidence is to be considered in the light most favorable to the prosecution." *Id.* In *Lewis v. Jeffers*, 497 U.S. 764, 782, 110 S.Ct. 3092, 3103, 111 L.Ed.2d 606 (1990), the Court said the principles enunciated in *Jackson* apply with equal force to federal habeas review of a state court's finding of aggravating circumstances.

> Although aggravating circumstances are not "elements of any offense, see *Walton, Id.,* 497 U.S., at 648–649, 110 S.Ct., at 3054–3055, the standard of federal review for determining whether a state court has violated the Fourteenth Amendment's guarantee against wholly arbitrary deprivations of liberty is equally applicable in safeguarding the Eighth Amendment's bedrock guarantee against the arbitrary or capricious imposition of the death penalty. Like findings of fact, state court findings of aggravating circumstances often require a sentencer to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson, supra*, 443 U.S., at 319, 99 S.Ct., at 2789.

Lewis v. Jeffers, 497 U.S. at 782.

As previously indicated, determinations of factual issues by a state court are presumed correct. 28 U.S.C. § 2254(e)(1). "A state court's finding of an aggravating circumstance in a particular case . . . is arbitrary or capricious if and only if no reasonable sentencer could have so concluded." *Id.* at 783.

Petitioner first raised this issue during his direct appeal. In rejecting the claim on the merits, the Oklahoma Court of Criminal Appeals found:

> The crux of [Petitioner's] argument, . . . , is that the evidence of torture was insufficient because there was "nothing, absolutely nothing, in the record to show that (Jacobs) was consciously aware of the injury being inflicted." (citation omitted).
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> We disagree. [Petitioner] told the police Jacobs was groaning during the attack, and that he was still alive, breathing, and saying "oh" when they left him bleeding by the side of the road. The process of bleeding to death took as little as four minutes, possibly more than twelve. There was testimony that his severed genitals were placed in his mouth at one point, and, if true, the victim may still have been alive after this point, for the genitals were found at a distance from the body. There was also testimony that Jacobs had been in an upright position at one point, for blood was found on the top of his shoes. The medical examiner testified that, although the victim had a blood alcohol content of .23, a normal person would be impaired, but still able to function, at this level.
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> . . . . . Accordingly, we find the evidence admitted at trial, when viewed in a light most favorable to the State, was sufficient to find beyond a reasonable doubt that the murder was especially heinous, atrocious or cruel. (citation omitted)

Murphy v. State, 47 P.3d 876, 883 (Okla. Crim. App. 2002).

Under Oklahoma law, before a jury can find that a murder was especially heinous, atrocious or cruel there must be proof that death was preceded by tor-

ture or serious physical abuse. *Turrentine v. State*, 965 P.2d 955, 976 (Okla. Crim. App. 1998). *See also*, OKLA. STAT. tit. 21, § 701.12(4) (1999). Two kinds of cases have been identified by the Oklahoma Court of Criminal Appeals in which "torture or serious physical abuse" will be found: "those characterized by the infliction of "great physical anguish" and those characterized by the infliction of "extreme mental cruelty." *Thomas v. Gibson*, 218 F.3d 1213, 1226 (10th Cir. 2000) (citing *Cheney v. State*, 909 P.2d 74, 80 (Okla. Crim. App. 1995)). In *Spears v. State*, 900 P.2d 431, 443 (Okla. Crim. App. 1995), the court held "[t]o support a finding of serious physical abuse, the State must show the victim endured *conscious* physical suffering prior to death." (emphasis in original) *See also*, *Cheney v. State*, 909 P.2d 74, 81 (Okla. Crim. App. 1995) (Footnote 20 contains a summary of Oklahoma cases requiring conscious suffering to support evidence of heinous, atrocious or cruel aggravating circumstance).

Petitioner asserts there was no evidence to prove beyond a reasonable doubt that the victim was conscious at the time of the murder. Petitioner then recounts only evidence favorable to his assertion. While it is true the victim did not have any defensive wounds,[9] unlike the facts in *Thomas*, the evidence clearly established the victim was groaning during the attack as Petitioner admitted "telling Agent Jones he was alive when we left, breathing, he was saying 'Oh.'"[10] Furthermore, the medical examiner indicated, even with a .23 blood alcohol content, a person would still possess the ability to speak, to function (although impaired), and to feel pain.[11] Although the medical

[9] *See*, J.T.Tr., Vol. III, at p. 767.
[10] *Id.*, Vol. IV, at p. 1041.
[11] *Id.*, Vol. III, at p. 773.

examiner did not note any defensive wounds, he was unable to say whether or not the victim was unconscious at any particular point in time during the attack, other than saying he would have lapsed into unconsciousness immediately before death.[12] The jury also heard evidence that blood spatter indicated the victim would have been, at least partially, upright during part of the attack and there were blood stains on the top of the victim's shoes.[13] To the extent the medical examiner indicated the process of bleeding to death took at least four to five minutes[14] and Petitioner admitted the victim was saying "oh," this Court finds the determination by the Oklahoma Court of Criminal Appeals that there was sufficient evidence for a jury to determine beyond a reasonable doubt that the victim was conscious during at least part of the attack is not an unreasonable determination of the facts in light of all the evidence heard by the jury. In this Court's opinion, the evidence viewed in the light most favorable to the prosecution overwhelmingly establishes the victim endured conscious physical suffering prior to death sufficient to support the jury's finding that this murder was "heinous, atrocious or cruel." Accordingly, Petitioner has failed to establish, pursuant to 28 U.S.C. § 2254(d)(2), that he is entitled to relief on this issue.

B. Jury Instructions

Next, Petitioner argues the jury instructions were insufficient on the heinous, atrocious or cruel aggravator because they were not particularized to Petitioner's individual conduct. As a general rule, improper jury instructions do not form the basis for federal habeas

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[12] *Id.*, at pp. 774–775.
[13] *Id.*, at pp. 453–454 and 473.
[14] *Id.*, at p. 772.

corpus relief. *Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). In attempting to set aside a state conviction based on erroneous jury instructions, a habeas petitioner has a heavy burden. Such errors are ordinarily not reviewable in a federal habeas proceeding, "unless they are so fundamentally unfair as to deprive petitioner of a fair trial and to due process of law." *Nguyen v. Reynolds*, 131 F.3d 1340, 1357 (10th Cir. 1997) (citing *Long v. Smith*, 663 F.2d 18, 23 (6th Cir. 1981)).

> "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736–37, 52 L.Ed.2d 203 (1977) (footnote omitted). The question in this proceeding is not whether the instruction is "undesirable, erroneous, or even 'universally condemned,'" but whether the instruction so infected the trial that the resulting conviction violates due process. *Id.* (quoting *Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Id.* at 155, 94 S.Ct. at 404.

Maes v. Thomas, 46 F.3d 979, 983 (10th Cir. 1995).

First, Petitioner asserts the jury should have been instructed not only whether the "murder" was heinous, atrocious, or cruel but whether Petitioner's individual conduct resulted in a death that was heinous, atrocious, or cruel. Petitioner seems to be arguing that he was not personally tied to the pre-

death torture or serious physical abuse and, therefore, this aggravating circumstance could not be applied to any of his conduct. Based upon the evidence at trial, however, this argument is absurd. Petitioner admitted and bragged to at least three different people about amputating the victim's genitalia, as well as cutting the victim's throat and abdomen and stomping on his head.[15] Further, Petitioner told his cousin after he had cut the victim's "dick and nuts off," that he shoved them in the victim's mouth.[16] Such admissions individually tied Petitioner to the conduct supporting this aggravating circumstance.

Next, Petitioner complains the jury instructions were inadequate because they did not instruct the jury that they had to find the victim had consciously suffered before finding the aggravator applied to the facts of his case. Petitioner's jury was instructed that "the term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others." O.R. 404. *See also*, Oklahoma Uniform Jury Instruction 4–73. The jury was further instructed, "[t]he phrase 'especially heinous, atrocious, or cruel' is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse." O.R. 404. The Tenth Circuit Court of Appeals has consistently rejected challenges that this aggravator is unconstitutionally vague and upheld the use of Oklahoma's uniform jury instruction limiting this aggravator to those crimes where the death of the victim was preceded by torture or serious physical abuse of the

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[15] J.T.Tr., Vol. III, at pp. 603, 667–668, 697, 709–711.

[16] *Id.*, at p. 668.

victim. *See Workman v. Mullin*, 342 F.3d 1100, 1115–1116 (10th Cir. 2003) and cases cited therein. The instructions given in Petitioner's case clearly advised the jury that they could not find this aggravating circumstance unless they first determined the victim was tortured or physically abused such that a high degree of pain was inflicted upon him. *See* O.R. 404.

Finally, Petitioner asserts the Oklahoma Court of Criminal Appeals unreasonably applied federal law because *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), required the jury to find the victim "consciously suffered" beyond a reasonable doubt. The necessary finding by the jury, however, was that "the death of the victim was preceded by torture of the victim or serious physical abuse." A finding by the jury of either of these two elements beyond a reasonable doubt was sufficient to support this aggravating circumstance. *See*, *Turrentine v. State*, 965 P.2d 955, 975 (Okla. Crim. App. 1998). Since the jury necessarily found one or both of these elements prior to finding the aggravator applicable to Petitioner, Petitioner's claim that the Oklahoma Court of Criminal Appeals decision upholding the jury's sentence was contrary to, or an unreasonable application of, clearly established federal law lacks merit. Furthermore, to the extent Petitioner argues he was deprived of his Fourteenth Amendment rights, this Court finds that because Petitioner's jury was properly instructed regarding this aggravating circumstance, Petitioner was not deprived of any constitutional rights. Therefore, Petitioner's claim for relief is denied.

3. Continuing Threat Aggravator[17]

While acknowledging that the Tenth Circuit has repeatedly found Oklahoma's "continuing threat" aggravating circumstance constitutional, Petitioner nonetheless argues, in essence, that this aggravating factor is always unconstitutional because it is so vague and broad that it is a "standardless catchall" and it was unconstitutionally applied to his case in violation of his Sixth, Eighth, and Fourteenth Amendment rights. Further, Petitioner asserts the Oklahoma Court of Criminal Appeals' interpretation of *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) is unreasonable as applied to this case. Respondent counters that the Oklahoma Court's rejection of Petitioner's claims was neither contrary to nor an unreasonable application of clearly established federal law. Thus, Respondent urges this Court, pursuant to 28 U.S.C. § 2254(d)(1), to defer to the Oklahoma Court's decision.

In *Jurek*, the Court upheld the use of the language "continuing threat to society" where the jury was allowed to consider any mitigating circumstances offered by the defendant. *See also Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Blystone v. Pennsylvania*, 494 U.S. 299, 307, 110 S.Ct. 1078, 1083, 108 L.Ed.2d 255 (1990). Notwithstanding the severity of the crime or a defendant's potential to commit similar crimes in

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[17] Oklahoma's "continuing threat" aggravating factor authorizes the imposition of the death penalty if the jury finds "the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." OKLA. STAT. tit. 21, § 701.12(7).

the future, ". . . sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, . . ." *Abdul-Kabir v. Quarterman*, — U.S. —, 127 S.Ct. 1654 (2007). *See also*, *Brewer v. Quarterman*, — U.S. —, 127 S.Ct. 1706 (2007) and *Smith v. Texas*, — U.S. —, 127 S.Ct. 1686 (2007).

While Oklahoma's capital-sentencing system differs in some major aspects from the one upheld in *Jurek*, the use of the "continuing threat" language as an aggravator which would limit those upon whom the death penalty may be imposed is quite similar. First, an Oklahoma jury must find that the aggravating circumstances outweigh the mitigating circumstances before it is authorized to consider the death penalty. OKLA. STAT. tit. 21, § 701.11. In order to convince a jury that the death penalty should not be imposed, a defendant has the right to present "any relevant evidence . . . bearing on his character, prior record or the circumstances of the offense." *Chaney v. State*, 612 P.2d 269, 279–280 (Okla. Crim. App. 1980) (construing OKLA. STAT. tit. 21, § 701.10 which governs sentencing proceedings in a first degree murder case). The jury, in this case, was so instructed.[18] As a result, this Court finds Petitioner's jury received sufficient guidance to enable it to make an informed decision regarding whether or not the death penalty was the appropriate punishment. The Oklahoma Court of Criminal Appeals' decision rejecting each of Petitioner's claims is neither contrary to, nor an unreasonable application of *Jurek* to the facts of this case.

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[18] *See* Jury Instruction Nos. 3–6 and 10–15, O.R. 403–406 and 410–415, respectively.

Furthermore, the Tenth Circuit Court of Appeals has consistently held the continuing threat factor used in Oklahoma's statutory sentencing scheme is constitutional. *Nguyen v. Reynolds,* 131 F.3d 1340, 1352–54 (10th Cir. 1997), *cert. denied,* 525 U.S. 852, 119 S.Ct. 128, 142 L.Ed.2d 103 (1998). *See also*, *Ross v. Ward,* 165 F.3d 793, 800 (10th Cir. 1999) (citing *Castro v. Ward,* 138 F.3d 810, 816 (10th Cir.), *cert. denied,* 525 U.S. 971, 119 S.Ct. 422, 142 L.Ed.2d 343 (1998) and *Nguyen*) and *Fowler v. Ward*, 200 F.3d 1302, 1313 (10th Cir. 2000), *cert. denied*, 531 U.S. 932, 121 S.Ct. 317, 148 L.Ed.2d 254 (2000). Since Petitioner has cited no new authority or compelling arguments, this Court finds this claim is unpersuasive. Accordingly, it is denied.

4. Jury Instructions Re: Balancing Aggravating and Mitigating Factors

Issues regarding whether a jury was properly instructed are questions of law. *United States v. Voss*, 82 F.3d 1521 (10th Cir. 1996). Accordingly, in order to grant relief on this issue, the decision of the Oklahoma Court of Criminal Appeals must be "contrary to . . . clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

Petitioner admits the jury was properly instructed that, in the event they found the aggravating factors outweighed the mitigating circumstances, they could consider the sentence of death.[19] Petitioner argues, however, that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), required the jury to also be instructed that aggravating factors must outweigh mitigating factors

[19] *See* Jury Instruction Nos. 10 and 14, O.R. 410 and 414, respectively.

beyond a reasonable doubt. Since the jury was not so instructed, Petitioner asserts his Sixth, Eighth and Fourteenth Amendment due process rights were violated. In considering this claim during post-conviction proceedings, the Oklahoma Court of Criminal Appeals held:

> On numerous occasions, prior to *Apprendi*, when criminal defendants have presented similar arguments to the one Petitioner raises here, this Court has stated its firm position that "specific standards for balancing aggravating and mitigating circumstances are not required" under Oklahoma's capital sentencing scheme. (citations omitted) Our position on this point has not changed as a result of the *Apprendi* decision, for the reasons set forth below.
>
> First, *Apprendi* was a five to four, non-capital decision that resulted in five separate opinions from the Supreme Court justices on distinguishable facts. Second, *Apprendi's* language does not, in our opinion, extend so broadly as to require a jury to find aggravating circumstances which have already been found by a jury to exist beyond a reasonable doubt, outweighed the mitigating circumstances beyond a reasonable doubt. Third, the United States Supreme Court's recent decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), while apparently extending *Apprendi's* holding to capital sentencing schemes, sheds no further light on the precise issue here. (footnote omitted) Fourth, under Oklahoma's capital sentencing scheme, jurors are required to unanimously find statutory aggravating cir-

> cumstances exist beyond a reasonable doubt, before the death penalty can be considered. At that point, the death penalty is in fact the maximum penalty, and the jury is simply deciding which of the three available punishments is proper, so long as aggravating circumstances outweigh mitigating circumstances.

Murphy v. State, 54 P.3d 556, 566 (Okla. Crim. App. 2002).

In *Kansas v. Marsh*, — U.S. —, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006), the Supreme Court indicated as long as the state is required to prove aggravating circumstances beyond a reasonable doubt before a defendant is considered death-eligible, the "State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighted." Accordingly, Petitioner has failed to establish that the Oklahoma Court's adjudication of this claim was contrary to or an unreasonable application of relevant Supreme Court precedent. Petitioner is, therefore, not entitled to habeas relief on this issue.

5. Victim Impact Evidence

In his fifth ground for relief, Petitioner asserts the victim impact evidence which explicitly called for his execution exceeded what is constitutionally permissible and violated his rights to a fundamentally fair sentencing proceeding as guaranteed by the Fifth, Eighth and Fourteenth Amendments. Petitioner raised this issue during direct appeal, and the Oklahoma Court of Criminal Appeals adjudicated the issue on the merits. Although Petitioner objected to specific comments contained within the victim impact statements immediately before the second stage proceedings

began, he did not reurge his objections when the statements were actually read in court. As a result, the Oklahoma Court of Criminal Appeals held Petitioner had waived all but plain error. *Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002). Petitioner now asserts the Oklahoma Court of Criminal Appeals' "finding that trial counsel did not make a 'contemporaneous' objection strains credulity and is clearly unreasonable." First Amended Pet., at p. 70. Thus, Petitioner claims this Court is "free to depart from the OCCA's factual analysis of the claim." *Id*.

It is well-settled, however, that the contemporaneous objection rule is an independent and adequate state procedural ground. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Where a state court declines to address a claim based upon a state procedural requirement, the state court judgment is considered to rest on independent and adequate state procedural grounds. *Coleman v. Thompson*, 501 U.S. 722, 729–730, 111 S.Ct. 2546, 2554, 115 L.Ed.2d 640 (1991), citing *Wainwright v. Sykes*, *supra*. Therefore, Respondent asserts the Oklahoma court's determination that Petitioner's failure to follow the state's contemporaneous objection rule waived review for all but plain error does not give this Court the right to review *de novo* Petitioner's victim impact claims.

Even though the Oklahoma Court of Appeals held Petitioner had waived all but plain error, it nonetheless considered all of the alleged errors in the victim impact statements in light of the principles enunciated in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). As a result, the issue before this Court is whether the decision of the Oklahoma Court of Criminal Appeals was contrary to, or an unreasonable application of clearly established federal

law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).

The issue of victim impact evidence has been squarely addressed by the Supreme Court on several occasions. First, in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the Court in a 5-to-4 decision held that the Eighth Amendment prohibits a jury from considering a victim impact statement at the sentencing phase of a capital trial. The Court made clear that the admissibility of victim impact evidence was not to be determined on a case-by-case basis, but that such evidence was per se inadmissible in the sentencing phase of a capital case except to the extent that it "relate[d] directly to the circumstances of the crime." Thereafter, in *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), the Court extended *Booth* to include prosecutorial statements to the sentencing jury regarding the personal qualities of the victim.

Later, in *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), the Court overruled *Booth* and *Gathers* holding:

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

See also, *Jones v. United States*, 527 U.S. 373, 395, 119 S.Ct. 2090, 2105, 144 L.Ed.2d 370 (1999)(Eighth Amendment allows a capital sentencing jury to con-

sider evidence of victim's personal characteristics and the emotional impact of the murder on the victim's family.) If, however, the evidence introduced is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne* 501 U.S. at 825 (citing *Darden v. Wainwright*, 477 U.S. 168, 179–183, 106 S.Ct. 2464, 2470–2473, 91 L.Ed.2d 144 (1986)). As stated in *Darden*, the question a reviewing court must consider is whether the evidence introduced "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden,* U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974)).

The Oklahoma Court of Criminal Appeals decision specifically discussed these relevant Supreme Court decisions holding:

> . . . . . [Petitioner] claims the victim impact evidence admitted in his trial exceed (sic) what is constitutionally permissible, i.e., it "characterized the offense, the perpetrator, and recommended the punishment", and thus deprived him of a fair trial and due process under the United States Constitution and the Supreme Court decisions in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) and *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). He claims Oklahoma's governing statute, 22 O.S.Supp. 1998, § 984(1) and this Court's interpretation thereof are unconstitutional. He also claims the statements were far more prejudicial than probative and that they contained hearsay and conjecture components.

[Petitioner] specifically complains of the following from the written, but brief, victim impact statements that were read to jurors. First, the victim's brother Rueban stated he could not understand why [Petitioner] would want to kill his brother and that [Petitioner] "should get the death penalty for taking an innocent life. I pray that he will not ever get out of jail and do bragging." Second, the victim's brother Frank stated, "I believe in the Bible. I believe an eye for any (sic) eye and that they should be put to death." Third, the victim's sister Irene's statement commented on her anger at the "way (George) was murdered" and took the position that her brother "had a right to be here and alive today." Irene also stated, "I hope you see that no one in the world should ever be free who committed such a crime." Fourth, the victim's sister Nadine stated, "I just hope and pray that these killers get the most severe punishment. There is no mercy for them." [Petitioner] claims these statements amounted to super-aggravators.

[Petitioner] did not object to the statements when they were read in court, thus waiving all but plain error. *Miller v. State*, 2001 OK CR 17, ¶ 36, 29 P.3d 1077, 1085. We find no plain error occurred.

In at least three decisions, this Court has taken the position that *Payne* appears to have overruled *Booth* with respect to the issue of whether or not victim impact statements could include characterizations of the defendant, the crime, and opinions in regard to sentencing. *See*, *e.g., Turrentine v. State*, 1998

OK CR 33, ¶ 94, 965 P.2d 955, 980, *cert. denied*, 525 U.S. 1057, 119 S.Ct. 624, 142 L.Ed.2d 562 (1998) (finding characterizations and opinions about the crime, the defendant, and the appropriate punishment no longer barred by Supreme Court); *Ledbetter v. State*, 1997 OK CR 5, ¶ 27, 933)P.2d 880, 890–91 (*Booth's* Eighth Amendment prohibition against such evidence has been apparently overruled by *Payne*); *Conover v. State*, 1997 OK CR 6, ¶ 60, 933 P.2d 904, 920 (*Payne* "implicitly overruled that portion of *Booth* regarding characterizations of the defendant and opinions of the sentence.").

We note here, however, that in footnote two of *Payne's* majority opinion and in Justice O'Connor's concurring opinion, the Supreme Court left open the question about admissibility of victim impact evidence regarding characterizations and opinions about the crime, the defendant, and the appropriate sentence because no such evidence was presented in that case. *Payne*, 501 U.S. at 830, 833, 111 S.Ct. at 2611–13.

Nevertheless, we note the Supreme Court has denied certiorari in *Turrentine*, and since that time, we have continued to approve of such evidence in other capital cases. *See Young v. State*, 2000 OK CR 17, ¶ 83, 12 P.3d 20, *cert. denied*, 532 U.S. 1055, 121 S.Ct. 2200, 149 L.Ed.2d 1030 (2001) ("victim impact witness' opinion as to the appropriateness of the death penalty is admissible, but is limited to the simple statement of the recommended sentence without amplification."); *Welch v. State*, 2000 OK CR 8, ¶ 40, 2 P.2d 356, 373,

cert. denied, 531 U.S. 1056, 121 S.Ct. 665, 148 L.Ed.2d 567 (2000) ("victim impact testimony may include information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion of a recommended sentence."). We therefore reject [Petitioner's] contention that our interpretation of *Payne* and *Booth*, or for that matter our own statute, is erroneous or unconstitutional.

Furthermore, we find no plain error in the admission of the victim impact statements in question. While the brief testimony from the victim's brother—regarding his belief in the Bible and an "eye for an eye"—was an inappropriate overamplification that should have been stricken, taken as a whole, the testimony was within the bounds of admissible evidence, and its focus did not have such a prejudicial effect or so skew the presentation to divert the jury from its duty to reach a reasoned moral decision on whether to impose the death penalty. *Short v. State*, 1999 OK CR 15, ¶ 59, 980 P.2d 1081, 1101, *cert. denied*, 528 U.S. 1085, 120 S.Ct. 811, 145 L.Ed.2d 683 (2000). The *Cargle v. State*, 1995 OK CR 77, 909 P.2d 806 instruction was given, thereby insuring jurors understood the proper weight to give such evidence, including any that was borderline or that crossed over the line.

Accordingly, we find the victim impact evidence was not "so unduly prejudicial that it render(ed) the trial fundamentally unfair." *Payne*, 501 U.S. at 825, 111 S.Ct. at 2608. We further find the evidence did not act as a super-aggravator, nor do we find any support

> for [Petitioner's] bare claim that the statements "contain hearsay and conjecture components."

Murphy v. State, 47 P.3d 876, 884–886 (Okla. Crim. App. 2002) (footnotes omitted).

Even though the challenged evidence was admitted pursuant to 22 O.S. § 984(1),[20] Petitioner argues the Oklahoma Court of Criminal Appeals' assertion that *Payne* had overruled *Booth* in its entirety is contrary to, or an unreasonable application of, clearly established Supreme Court law. In support of his argument, Petitioner cites the Tenth Circuit's opinion in *Hain v. Gibson*, 287 F.3d 1224, 1238 (10th Cir. 2002), which expressly held "that the portion of *Booth* prohibiting family members of a victim from stating 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' during the penalty phase of a capital trial survived the holding in *Payne* and remains valid." Respondent, on the other hand, argues the Tenth Circuit's decision in *Hain* does not constitute "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Where the Supreme Court has not definitively ruled on a specific issue, it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law." *Carey v. Musladin*, — U.S. —, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006). The Supreme Court has, on

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[20] This statute provides: "Victim impact statements" means information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, *and the victim's opinion of a recommended sentence*; . . ." (Emphasis added).

numerous occasions, discussed what can be considered "clearly established Federal law" relevant to death penalty cases. Some of those discussions were summarized in *Booth*, when the Court stated:

> It is well settled that a jury's discretion to impose the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.); *California v. Ramos*, 463 U.S. 992, 999, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983). Although this court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision, the Constitution places some limits on this discretion. See, *e.g., id.*, at 1000–1001, 103 S.Ct. at 3452–3453. Specifically, we have said that a jury must make an "*individualized* determination" whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983) (emphasis in original). See also *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982). And while this Court has never said that the defendant's record, characteristics, and the circumstances of the crime are the only permissible sentencing considerations, a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's "personal responsibility and moral guilt." *Enmund v.*

> *Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378, 73 L.Ed.2d 1140 (1982). To do otherwise would create the risk that a death sentence will be based on considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." See *Zant v. Stephens*, *supra*, 462 U.S. at 885, 103 S.Ct. at 2747.

Booth, 482 U.S. at 502.

In *Payne* the Court made a special effort to acknowledge that the portion of the *Booth* decision which "held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment" was not before the Court.[21] As a result, at least five circuit courts have expressly recognized that this portion of *Booth* survived the holding in *Payne* and remains valid. *See United States v. Brown*, 441 F.3d 1330, 1352 (11th Cir. 2006); *Humphries v. Ozmint*, 397 F.3d 206, 217 (4th Cir. 2005) (en banc); *Parker v. Bowersox*, 188 F.3d 923, 931 (8th Cir. 1999); *Hain v. Gibson*, 287 F.3d 1224, 1238–39 (10th Cir. 2002); *United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir. 1998); and *Woods v. Johnson*, 75 F.3d 1017, 1038 (5th Cir. 1996).

Looking at Petitioner's arguments, it is clear that some of the victim impact testimony fell within the parameters authorized in *Payne*; but other portions of the testimony were improperly admitted. As can be seen from the recitation of the testimony by the Oklahoma Court of Criminal Appeals, *supra*, all four of the second-stage witnesses presented by the prosecution made remarks that they thought Petitioner should get "the death penalty" or should "never be free

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[21] *See*, *Payne*, 501 U.S. at 830, 111 S.Ct. at 2611, n. 2.

to commit such a crime" or should "just get the most severe punishment."[22] Additionally, in the state's final closing argument, the prosecutor again re-emphasized portions of what each victim had told the jury, including that two of the family members thought the Petitioner should get death.[23] Since the testimony clearly exceeded the personal characteristics of the victim and the emotional impact of the crimes on the family, this Court finds the Oklahoma Court of Criminal Appeals decision is contrary to "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Therefore, this Court must decide two issues. First, in looking at the testimony which should not have been admitted, was the constitutional error resulting from the admission of the improper portions of the victim impact statements harmless beyond a reasonable doubt? *Welch v. Sirmons*, 451 F.3d 675, 703–704 (10th Cir. 2006) and cases cited therein. Second, was the overall victim impact evidence so unduly prejudicial that it rendered Petitioner's trial fundamentally unfair? *Payne*, *supra*, 501 U.S. at 825, 111 S.Ct. at 2597.

After carefully examining the trial transcript, this Court concludes any error was harmless, in that the objectionable portion of the victim impact evidence did not have a substantial and injurious effect or influence in determining the jury's recommended death sentence. Furthermore, when the overall victim impact evidence is considered in conjunction with all of the evidence introduced in both the first and second stages of Petitioner's trial, this Court agrees with the Oklahoma Court of Criminal Appeals' conclusion that this evi-

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[22] J.T.Tr., Vol. V, at pp. 1219–1225.

[23] J.T.Tr., Vol. V, at pp. 1398.

dence was not so unduly prejudicial that it rendered Petitioner's trial fundamentally unfair. Specifically, the prosecution alleged, and the jury found, the existence of two aggravating factors, both of which were amply supported by the evidence. In light of the jury's finding that the murder was especially heinous, atrocious, or cruel and that Petitioner posed a continuing threat to society, this Court finds that the improper aspects of the victim impact evidence simply did not play and could not have played a substantial role in the jury's assessment of the death penalty in this particular case. Further, the overall length of the victim impact testimony relative to the length of the entire trial and the fact Petitioner offered four witnesses after the objectionable portion of the testimony, convinces this Court that the evidence did not infect the trial with unfairness such that the resulting conviction was a denial of due process. *Darden.* Accordingly, Petitioner's claim for relief is denied.

6. Failure to Define Life Without Parole

Relying on *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), Petitioner's sixth ground for relief alleges that failure to define the sentencing option of "life without parole" where the jury was asked to consider future dangerousness deprived him of due process of law and the right to a fundamentally fair sentencing proceeding in violation of the Fifth, Eighth, and Fourteenth Amendments. Respondent again asserts the Oklahoma Court of Criminal Appeals' decision is neither contrary to nor an unreasonable determination of clearly established federal law.

In *Simmons*, the Supreme Court held where the State argues in a capital sentencing proceeding that the petitioner presents a future threat, due process

requires that he be permitted to inform the jury that he is parole ineligible. In this case, the jury was given three discrete sentencing options when the trial court instructed them as follows:

> The defendant in this case has been found guilty by you, the jury, of the offense of murder in the first degree. It is now your duty to determine the penalty to be imposed for this offense.
>
> Under the law of the State of Oklahoma, every person found guilty of murder in the first degree shall be punished by death, or imprisonment for life without the possibility of parole, or imprisonment for life with the possibility of parole.

O.R. 401, Second Stage Jury Instruction No. 1. The Tenth Circuit has consistently held that instructing on these three options, without any additional explanation, satisfies *Simmons*. *Johnson v. Gibson*, 254 F.3d 1155, 1165 (10th Cir. 2001), *cert. denied*, 534 U.S. 1029, 122 S.Ct. 566, 151 L.Ed.2d 439 (2001) (citing *Mayes v. Gibson*, 210 F.3d 1284, 1294 (10th Cir. 2000)).

As can be gleaned from the summary of Petitioner's arguments by the Oklahoma appellate court and the ruling thereon, it is clear that Petitioner's jury received more information than is constitutionally mandated or has ever been required by controlling Supreme Court precedent. Specifically, the Oklahoma Court of Criminal Appeals summarized Petitioner's arguments before the trial court and on appeal as follows:

> . . . . . [Petitioner] claims the trial court's failure to define life without parole denied him due process of law and a fundamentally

fair trial. To support this proposition, [Petitioner] points to a motion he filed prior to trial in which he requested the trial court to allow testimony or "evidence" regarding "the effects and conditions of a sentence of life without the possibility of parole."

Contrary to [Petitioner's] claim, this motion was not a request for the trial court to provide the jury with instructions regarding the actual meaning of life without parole. Rather, it was a request to produce *evidence* to the jury during the second stage regarding distinctions between the sentencing options, relief available from the Department of Corrections, and the conditions and restrictions associated with a sentence of life without parole.

Be that as it may, the motion was not denied, as [Petitioner] suggests. Rather, the trial judge ruled he would allow argument regarding this issue, but no evidence. (O.R. at 192). The trial judge specifically stated defense counsel could write the words "life without parole" for jurors during arguments, and underline the words "without parole." He also allowed defense counsel to tell jurors that "life without parole means life without parole." Defense counsel went even further than this, telling jurors that they had the option of "putting him in prison for the rest of his life . . . don't give him the possibility of parole."

This is not a case where a specific instruction was requested and refused, nor is it a case where the jury sent back a note asking for additional information on what life

> without parole means. Indeed, this is a case where jurors were told, essentially, that life without parole means what it says.
>
> Moreover, this Court has, in numerous instances, stated that the meaning of life without parole is self-explanatory and that an instruction on its meaning is not required. *Powell v. State*, 2000 OK CR 5, ¶ 127, 995 P.2d 510, 536, *cert. denied*, 531 U.S. 935, 121 S.Ct. 321, 148 L.Ed.2d 258 (2000); *Howell v. State*, 1998 OK CR 53, ¶ 8, 967 P.2d 1221, 1225, *cert. denied*, 528 U.S. 834, 120 S.Ct. 93, 145 L.Ed.2d 79 (1999); *McCracken v. State*, 1994 OK CR 68, ¶ 49, 887 P.2d 323, 334, *cert. denied*, 516 U.S. 859, 116 S.Ct. 166, 133 L.Ed.2d 108 (1995). Accordingly, we find [Petitioner] was not denied due process or a fundamentally fair trial when the trial judge allowed even more information on this issue than is currently required.

Murphy v. State, 47 P.3rd 876, 886 (Okla. Crim. App. 2002). After reviewing the record below, this Court finds the decision of the Oklahoma Court of Criminal Appeals on this issue was not an unreasonable determination of clearly established federal law as determined by the Supreme Court of the United States. Thus, Petitioner is not, pursuant to 28 U.S.C. § 2254(d), entitled to relief on this issue.

7. Admission of Petitioner's Post-arrest Statements

In his seventh ground for relief, Petitioner asserts the state court improperly denied his request to suppress his post-arrest statements to police because the statements were neither voluntarily or knowingly given. Petitioner argues, under the totality of the facts,

his post-arrest waiver of his right to counsel was not the product of a rational intellect and a free will as required by *Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960).[24] Respondent asserts this claim lacks merit and that the Oklahoma Court of Criminal Appeals' determination that Petitioner's statement was properly admitted is not based on an unreasonable assessment of the facts from the record nor contrary to, or an unreasonable application of, clearly established federal law.

Without question, Petitioner was entitled to the rights recognized by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), which imposed upon the police a duty, prior to the initiation of questioning, to "fully apprise the suspect of the State's intention to use his statements to secure a conviction, and must inform him of his rights to remain silent and to 'have counsel present . . . if [he] so desires.'" *Moran v. Burbine*, 475 U.S. 412, 420, 106 S.Ct. 1135, 1140, 89 L.Ed.2d 410 (1986) (quoting *Miranda*, 384 U.S. at 468–470, 86 S.Ct. at 1624–1626). "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, [or if he] states that he wants an attorney, the interrogation must cease." *Miranda*, 384 U.S. at 473–474, 86 S.Ct. at 1627. *See also*, *Edwards v. Arizona*, 451 U.S 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). A suspect may, however, waive his *Miranda* rights so long as the waiver is "made voluntarily, knowingly and intelligently." *Moran*, 475 U.S. at 421, 106 S.Ct. at 1141. An inquiry into whether an accused effectively waived his right to counsel, involves two distinct inquiries.

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[24] This is the only authority Petitioner cites in support of this ground for relief.

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. (quoting *Fare v. Michael C*., 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979). Finally, in *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994), the Supreme Court stated:

> . . . if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . . . Rather, the suspect must unambiguously request counsel.

In this case, Petitioner argues not that he was intimidated, coerced or deceived into waiving his rights, but that he was "confused about his rights." First Amended Pet. at p. 78. Respondent argues Petitioner did not unequivocally request an attorney. Combined Response at p. 34. Respondent further argues Petitioner has failed to show that the Court of Criminal Appeals' decision involved an unreasonable application of the law to the facts. *Id*. at p. 36.

In considering Petitioner's claim on the merits, the Oklahoma Court of Criminal Appeals made the following factual determinations:

> . . . . .[Petitioner] claims a custodial statement he gave after his arrest violated his right to counsel. He claims the statement should have been suppressed, and the trial court erred by admitting it at trial, following the *Jackson v. Denno* hearing held on its admissibility. In that hearing, the trial judge found [Petitioner] voluntarily and knowingly waived his right to counsel.
>
> [Petitioner] specifically points to transcript excerpts of his interrogation in which he seemed to have been confused about whether or not he was entitled to an attorney, whether or not he was going to ask for an attorney, and whether or not he could speak to the officers with an attorney present.
>
> For example, after receiving the *Miranda* warning and being asked if he desired to speak to police officers, [Petitioner] stated, "Well, I can't answer that right now. I don't know this, this I'm not for sure if I'm gonna have an attorney." The police then told [Petitioner], "It is your right to have an attorney. Do you want one or do you want to talk to us? It's your choice. Do you want an attorney yes or no?" [Petitioner] asked, "Well, can I still talk to ya'll and still have an attorney present?" The officers responded, "Do you want, you want an attorney? You can have an attorney. If not, you can talk to us right now. It's your choice. I can't tell you what to do." [Petitioner] replied, "I mean, I mean, your (sic) saying I can't do both?" The

> officer said, "Yeah. Eventually sure. If you want an attorney, we'll get you an attorney. If that's what your (sic) saying."
>
> Similar exchanges continued until [Petitioner] eventually agreed to talk to the police without an attorney present. He then signed a waiver to that effect.

Murphy v. State, 47 P.3d 876, 881 (Okla. Crim. App. 2002). Petitioner has not shown, by clear and convincing evidence, that these factual determinations are incorrect. Therefore, this Court must presume the factual determinations to be correct. 28 U.S.C. § 2254(e)(1).

The appellate court then applied the principles enunciated by the Supreme Court in *Davis, supra*, to determine whether or not Petitioner had unambiguously requested counsel, holding:

> We see no violation of [Petitioner's] constitutional right to counsel from these transcripts or from the testimony given at the *Jackson v. Denno* hearing. Like *Dennis v. State*, 1999 OK CR 23, 990 P.2d 277, [Petitioner's] proposition rests entirely on his ability to get this Court to agree that his vague and noncommittal statements to police officers somehow invoked his right to counsel. However, we find his statements do "not even reach the level of an ambiguous request for counsel, and of course, police are not required to stop questioning when faced with an ambiguous request." *Dennis*, 1999 OK Cr 23, ¶ 6, 990 P.2d at 279–80 (construing *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994)).

Murphy v. State, 47 P.3d 876, 881–882 (Okla. Crim. App. 2002).

This Court finds the Oklahoma Court of Criminal Appeals applied the correct legal standards enunciated by the Supreme Court in *Davis*. Based upon the state court's application of the proper legal standard to the facts of this case, this Court finds Petitioner has failed to establish that he is entitled to relief on this issue, pursuant to 28 U.S.C. § 2254(d).

8. State Court Jurisdiction

Petitioner argues in his Second Amended Petition (Dkt. No. 54) the State of Oklahoma lacked jurisdiction to try him for murder because both he and the victim are Indian and his crime occurred in "Indian country." Thus, Petitioner asserts jurisdiction over the crime rested exclusively in the federal government pursuant to 18 U.S.C. § 1153. Petitioner first raised this issue in his Original Petition for Writ of Habeas Corpus filed herein on March 5, 2004. Dkt. No. 14, at p. 18. At the time of filing his original petition, however, Petitioner recognized that the claim had not been presented to the state court, but advised the Court since jurisdiction presented a federal question, it should never be subjected to procedural bar. Subsequent to the filing of his Petition in this Court, on March 29, 2004, Petitioner filed a second or subsequent application for post-conviction relief in the Oklahoma Court of Criminal Appeals. *Murphy v. State*, Case No. PCD-2004-321. On August 30, 2004, this Court entered an order, pursuant to *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), "that the petition [would] be dismissed on September 13, 2004 unless, prior to that time, the petition [was] amended to drop all unexhausted claims" (Dkt. No. 27). Thereafter, on September 10,

2004, Petitioner filed his First Amended Petition which omitted this particular claim (Dkt. No. 33).

In the second post-conviction proceeding, the Oklahoma Court of Criminal Appeals granted an evidentiary hearing which was held in the state district court on November 18, 2004. Thereafter, on December 7, 2005, the Oklahoma Court of Criminal Appeals denied relief on Petitioner's challenge to jurisdiction, finding Petitioner did not commit his crime in Indian country, and therefore, the State of Oklahoma had properly exercised jurisdiction over Petitioner. *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005), *cert. denied*, — S.Ct. —, 2007 W.L. 1582962 (2007). Petitioner claims the Oklahoma appellate court's decision is clearly contrary to and/or an unreasonable application of federal law to the facts of the case. Respondent, on the other hand, argues the decision was neither contrary to nor an unreasonable application of clearly established federal law as determined by the Supreme Court.

Petitioner admits, following the evidentiary hearing in state court and the Oklahoma Court of Criminal Appeals' adjudication of this issue, there are no relevant facts in dispute. Accordingly, this Court's consideration of the legal issues involved herein are based upon the following findings of fact of the Oklahoma Court of Criminal Appeals:

> The record reflects Petitioner is an enrolled member of the Muscogee (Creek) Nation, as was the victim, George Jacobs. Both are "Indians" for purpose (sic) of 18 U.S.C. § 1153, as both sides readily admit.

Murphy v. State, 124 P.3d 1198*,* 1200 (Okla. Crim. App. 2005) (footnote omitted).

> We readily accept the District Court's findings as to the source of the fatal wound and where it was inflicted. For jurisdictional purposes, the crime took place on both the northbound lane of Vernon Road (i.e., the road's eastern side in the N/2 SW/4 and the S/2 NW/4 of Section 27, Township 9 North, Range 13 East, McIntosh County) and the adjacent ditch. Plus, as the parties and District Court agree, both sites (the site of the fatal wound and the ditch where George Jacobs died) are within the boundaries of the three-rod (49.5 feet) area created along the section line by a 1902 Creek Nation Treaty with the United States. *See* Act of June 30, 1902, 32 Stat. 500, 502, § 10.
>
> . . . . .We find the record, witness testimony, treaty language, and relevant cases all support a finding that the State of Oklahoma's interest in the area in question is in the nature of an easement or right-of-way.

Id. at 1202.

> . . . . . .In the instant case, the record shows the crime occurred on land originally allotted to Lizzie Smith, a member of the Creek Nation. However, all surface rights to the property have since been conveyed away to non-Indians. Thus, non-Indians own the actual physical property upon which the crime occurred, ...
>
> However, not all of the fee interest in the original allotment has been conveyed to non-Indians. According to the evidentiary hearing record, while non-Indians own the surface and eleven twelfths of the minerals in the tract where the crime occurred, one twelfth of

the mineral interest remains restricted with the Indian heirs of Lizzie Smith.

Id. at 1204.

George Jacobs was murdered in McIntosh County in August of 1999. The crime occurred on a county section line road in a remarkably rural, heavily treed location, without any sort of improvement noticeable in the photographs, except perhaps a rickety barbed wire fence. The crime occurred approximately one mile north of the small town of Vernon, a town supposedly established by freed black slaves, and four or so miles from the equally small town of Hanna.

Authorities investigated the matter during the relevant time period. As a result state murder charges and a bill of particulars were filed against Petitioner. Trial was held in April of 2000, and Petitioner was convicted of First Degree Murder. Since then the matter has been continuously on appeal.

. . . . .federal authorities have never attempted to exercise jurisdiction over this crime in the five years since it occurred. Meanwhile, the State of Oklahoma has spent considerable time and money prosecuting and defending Petitioner in the district and appellate courts.

This case presents two separate and distinct estates in land, i.e., a surface estate and a mineral estate, each subject to being severed and separately conveyed. The uncontradicted evidence shows that the surface estate was separated from the mineral estate on the land where the crime occurred. Also, the uncontradicted evidence shows that, as to

> the surface estate, the Indian allotment had been extinguished by conveyances to non-Indian landowners prior to the time of the crime.
>
> Even as to the remaining Indian allotment mineral estate, the uncontradicted evidence was that all but 1/12th had been extinguished by conveyances to non-Indians.

Id. at 1206.

Petitioner asserts the decision of the Oklahoma Court of Criminal Appeals is clearly contrary to and/or unreasonably applied federal law because the crime scene is "Indian country." Petitioner asserts the land is "Indian country" under two separate theories. First, Petitioner argues the crime scene is a restricted Indian allotment in which all Indian right and title has never been extinguished. Second, Petitioner alleges the crime scene falls entirely within the historical territorial boundaries of the Muscogee (Creek) Nation and, thus qualifies as "land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). Respondent asserts the Oklahoma Court of Criminal Appeals' decision that Petitioner's crime was not committed in "Indian country" for purposes of the Indian Major Crimes Act is neither contrary to, nor an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.

At the outset, this Court would note that Oklahoma exercised jurisdiction over all of the lands of the former Five Civilized Tribes based on longstanding caselaw from statehood until the Tenth Circuit in *Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) found a small tract of tribally-owned

treaty land existed along the Arkansas River in Tulsa County, Oklahoma. *See*, *Marlin v. Lewallen*, 276 U.S. 58, 48 S.Ct. 248, 72 L.Ed. 467 (1928) (detailing history of the Creek Nation and the treaties and/or congressional enactments applicable to Creek lands, recognizing "tribal courts were abolished" and a "body of laws adopted from the statutes of Arkansas and intended to reach Indians as well as white persons, except as they might be inapplicable in particular situations or might be superseded as to any of the Five Civilized Tribes by future agreements."); *Ex Parte Nowabbi*, 61 P.2d 1139 (Okl. Crim. App. 1936); *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 602, 63 S.Ct. 1284, 1286, 87 L.Ed. 1612 (1943) (Court distinguished the treatment of five-civilized tribes from treatment of other Indian tribes observing, "*Worcester v. Georgia*, 6 Pet 515, 8 L.Ed. 483, held that a state might not regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status – *a condition which has not existed for many years in the State of Oklahoma.*" (emphasis added)); and *United States v. Hester*, 137 F.2d 145, 147 (10th Cir. 1943) ("Indians residing in Oklahoma are citizens of that State, and they are amenable to its civil and criminal laws.") Thereafter, because no Supreme Court case had ever addressed the issue of jurisdiction as it relates to lands within the former "Indian territory," the Oklahoma Courts began to reverse criminal cases involving jurisdictional controversies holding "Indian country" jurisdiction was not precluded in what was "Indian Territory" before statehood. *See*, *State v. Brooks*, 763 P.2d 707 (Okla. Crim. App. 1988), *cert. denied*, 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989); *State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989) (overruling *Ex Parte Nowabbi*, 61 P.2d 1139 (Okla.

Crim. App. 1936) and holding State of Oklahoma never assumed criminal and civil jurisdiction over any "Indian country" within its borders)[25] and *Cravatt v. State*, 825 P.2d 277 (Okla. Crim. App. 1992).

Title 18 U.S.C. § 1151 defines "Indian country,"[26] in relevant part, as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, ... and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

In *Worcester v. Georgia*, 31 U.S. 515, 520, 6 Pet. 515, 8 L.Ed. 483 (1832), the Supreme Court, in effect, defined an Indian reservation as "a distinct community, occupying its own territory, with boundaries accurately described, in which . . . [state laws] can have no force. . ." While the historical boundaries of once tribally owned land within Oklahoma may still be determinable today, there is no question, based on the history of the Creek Nation, that Indian reservations do not exist in Oklahoma. State laws have applied over the lands within the historical boundaries of the Creek nation for over a hundred years. *See*, Oklahoma

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[25] Since historically Oklahoma exercised civil and criminal jurisdiction over all lands within the former "Indian territory," despite what the Oklahoma Court of Criminal Appeals said in *Klindt*, it could be argued that Oklahoma had, in fact, assumed jurisdiction prior to the enactment of 67 Stat. 588, one of the statutes relied upon by the Oklahoma Court of Criminal Appeals to overturn *Ex parte Nowabbi*, and thus, no further action was required to maintain jurisdiction.

[26] This statute was first enacted on June 25, 1948. 62 Stat. 757.

Enabling Act, 34 Stat. 267 and other cases cited herein. *See also*, *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 215, 125 S.Ct. 1478, 1490, 161 L.Ed.2d 386 (2005) (acknowledging "jurisdictional history" and the fact that "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area" are proper considerations in determining Indian issues.) Further, even Petitioner's expert witness admitted "[t]here was never a formal Creek Nation 'reservation' . . . . ." *Murphy v. State*, 124 P.3d 1198, 1207 (Okla. Crim. App. 2005).

Petitioner argues, however, that the crime scene falls entirely within the historical boundaries of the Muscogee (Creek) Nation and thus falls within the "Indian reservation" prong of the definition of "Indian country" because the Muskogee (Creek) Nation has never been disestablished. *See*, Second Amended Pet. at p. 22. Petitioner cites numerous Supreme Court cases dealing with general principles of Indian law. Petitioner does not, however, attempt to explain how the Supreme Court's recognition that the Five Civilized Tribes have always been treated differently than other Indian tribes affects the application of these general principals of Indian law. *See Worcester v. Georgia*, *supra*. In *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 603, 63 S.Ct. 1284, 1286, 87 L.Ed.1612 (1943), the Supreme Court recognized that the underlying principles of Indian law applicable in tax cases "do not fit the situation of the Oklahoma Indians."

While Petitioner is correct that the question of disestablishment "turns on the facts and circumstances under which the treaties between the Creek Nation and the United States were signed," Second Amended Pet. At p. 23, another important consideration is the subsequent treatment of the lands. *See*

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343–344, 118 S.Ct. 789, 798, 139 L.Ed.2d 773 (1998); *Hagen v. Utah*, 510 U.S. 399, 410–411, 114 S.Ct. 958, 965–966, 127 L.Ed.2d 252 (1994); and *Solem v. Bartlett*, 465 U.S. 463, 470–472, 104 S.Ct. 1161, 1166–1167, 79 L.Ed.2d 443 (1984). A careful review of the Acts of Congress which culminated in the grant of statehood to Oklahoma in 1906, as well as subsequent actions by Congress, leaves no doubt the historic territory of the Creek Nation was disestablished as a part of the allotment process. *See*, *Marlin v. Lewallen*, *supra*; *Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987); Act of May 27, 1908, ch. 199, 35 Stat. 312; Act of June 14, 1918, ch. 101, 40 Stat. 606; Act of April 10, 1926, ch. 115, § 1, 44 Stat. 239; Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731; S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (Senate Committee on Indian Affairs recognized in connection with the enactment of the Oklahoma Indian Welfare Act that "all Indian reservations as such have ceased to exist" in Oklahoma) and 25 U.S.C.A. § 1452(d) (Congress defined the term "reservation" to encompass "former Indian reservations in Oklahoma"). For these reasons, this Court finds the Oklahoma Court of Criminal Appeals' decision refusing to find the crime occurred on an Indian "reservation" is not contrary to nor an unreasonable application of Federal law as determined by the United States Supreme Court.

Further, in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972), the Court defined an "allotment" as "a term of art in Indian law. U.S. Dept. of the Interior, Federal Indian Law 774 (1958). It means a selection of specific land awarded to an individual allottee from a common holding." *Id*. 406 U.S. at 142, 92 S.Ct. at 1466. The Oklahoma Court found the title to the land upon which

the situs of the crime occurred, "was conveyed to the Creek allottees who owned the property abutting the road." *Murphy v. State*, 124 P.3d 1198, 1204 (Okla. Crim. App. 2005). While recognizing that the situs of the crime contained a 1/12th restricted mineral interest, however, the Oklahoma Court of Criminal Appeals also noted that such an interest would be "unobservable." There can be no question, based on the facts herein, that all Indian title to the surface interest of the subject property, including the right-of-way, has long been extinguished. While restricted Indian interests to the mineral estate still exists, the Major Crimes Act was not enacted to cover crimes occurring on subsurface unobservable mineral interests. Rather, the crimes enumerated in the Act are crimes which would occur on the surface of the land, *i.e.* murder, manslaughter, kidnapping, maiming, incest, etc. Congress simply was not, by enacting the Major Crimes Act, concerned with crimes which could occur on the mineral interest of an Indian allotment. Furthermore, Petitioner fails to identify any arguable nexus between the restricted Indian mineral interest and the crime of murder.

Petitioner cites no authority to support his argument that retention of a fractional subsurface mineral interest is sufficient to subject the surface interests of the land to exclusive federal criminal jurisdiction pursuant to 18 U.S.C.§ 1151(c). Rather, Petitioner simply cites Supreme Court authority which stands for the general proposition that Indian allotments are considered "Indian country." The facts in each of the cases cited, however, are clearly distinguishable from the facts in this case in that the surface estates had not been transferred to non-Indians. *See*, *United States v. Ramsey*, 271 U.S. 467, 470–72, 46 S.Ct. 559, 560, 70 L.Ed. 1039 (1926) (original Osage Indian

allotment conveyed in fee and subject to a restriction against alienation for a period of 25 years, which period had not elapsed, and restrictions against alienation had not been removed); *United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914) (holding "trust allotment" during the trust period remains "Indian country"); *United States v. Hellard*, 322 U.S. 363, 64 S.Ct. 985, 88 L.Ed. 1326 (1944) (United States had interest in restricted Indian allotment partition proceedings brought by full blood heirs).

Finally, Petitioner asserts the Oklahoma court's observation that recognizing retention of "Indian country" status based solely on restricted subsurface mineral estates would seriously burden both the state and federal governments is contrary to Supreme Court law which recognizes that ". . . checkerboard jurisdiction is not novel in Indian law. . ." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). This Court finds, however, that "checkerboard" jurisdiction based not upon the observable surface estates, but upon the subsurface estates, would indeed be not only a novel approach, but also a totally unworkable and unenforceable approach. Such an approach would require an extensive title research prior to assumption of jurisdiction by either the state or federal court every time a crime occurs. Additionally, as recognized by the Oklahoma Court of Criminal Appeals, in situations where supposed heirs of the original allottee have never been judicially determined, a quiet title suit would have to be initiated before assumption of jurisdiction by either governmental entity could occur thereby returning Oklahoma to the anarchy which existed prior to the establishment

of federal courts in the former Indian territory.[27] Accordingly, this Court finds the Oklahoma Court of Criminal Appeals determination that the land in question had its "Indian country" characteristics extinguished through conveyances to non-Indians is neither contrary to nor an unreasonable interpretation of Federal law as determined by the Supreme Court.

10. Lethal Injection

In his second amended petition, Petitioner asserts that lethal injection under the protocols and procedures currently in force in Oklahoma places him at an unnecessary risk of conscious pain and suffering in violation of the Eighth Amendment. Respondent argues this claim is improperly raised in this federal habeas proceeding and should, therefore, be denied. Alternatively, Respondent asserts Petitioner's claim is procedurally barred.

Petitioner first raised this issue in the original petition for writ of habeas corpus filed herein on March 5, 2004 (Dkt. No. 14). As indicated previously, on August 30, 2004, Petitioner was notified his Petition would be dismissed on September 13, 2004, unless prior to that time, the Petition was amended to drop all unexhausted claims (Dkt. No. 27). On September 10, 2004, Petitioner filed his First Amended Petition which did not include this issue as a ground for relief (Dkt. No. 33).

Thereafter, Petitioner filed a second application for post-conviction relief with the Oklahoma Court of Criminal Appeals. In refusing to consider this issue, the Oklahoma court, after summarizing the narrow

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[27] *See*, *Harjo v. Kleppe*, 420 F.Supp. 1110, 1121 (D.D.C. 1976) (discussing the recurrent problems as a result of an inadequate court system to resolve civil and criminal disputes).

scope of review available under Oklahoma's Post-Conviction Procedure Act, OKLA. STAT., tit. 22, § 1089(C)(1), stated:

> In proposition three, Petitioner claims, for the first time, that Oklahoma's lethal injection procedure violates the Eighth Amendment prohibition against cruel and unusual punishment. He claims Oklahoma's "protocols" for carrying out such executions create a substantial risk of conscious suffocation or conscious suffering of excruciating pain and that several such Oklahoma executions have "gone wrong."
>
> Petitioner has waived any error relating to this claim by failing to raise it in his May 3, 2001 direct appeal brief and his February 7, 2002 post-conviction application. He admits the claim was available in March of 2001. Moreover, the statute upon which such executions are based, 22 O.S. 2001, § 1014(A), has not been amended since 1977.

Murphy v. State, 124 P.3d 1198, 1209 (Okla. Crim. App. 2005) (footnotes omitted).

As a general rule, if a petitioner has failed to present a claim to the state courts in the manner prescribed by the procedural rules of the state, the state court may deem the claim defaulted. *Wainright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Where a state prisoner defaults his federal claims in state court based upon an independent and adequate state procedural rule, federal review of his habeas claims will be barred. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 2553–54, 115 L.Ed.2d 640 (1991). If the state court's finding is separate and distinct from federal law, it will be considered "independent." *See Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84

L.Ed.2d 53 (1985); *Duvall v. Reynolds*, 139 F.3d 768 (10th Cir. 1998), *cert. denied,* 525 U.S. 933, 119 S.Ct. 345, 142 L.Ed.2d 284 (1998). If the finding is applied "evenhandedly to all similar claims", it will be considered "adequate." *Maes v. Thomas*, 46 F.3d 979 (10th Cir. 1995), *cert. denied* 514 U.S. 1115, 115 S.Ct. 1972, 131 L.Ed.2d 861 (1995) (citing *Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 2426, 72 L.Ed.2d 824 (1982)). Where the state-law default prevented the state court from reaching the merits of the federal claim, the claim ordinarily cannot be reviewed in the federal courts. *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). "Review is precluded 'unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.'" *See Breechen v. Reynolds*, 41 F.3d 1343, 1353 (10th Cir. 1994), *cert. denied*, 515 U.S. 1135, 115 S.Ct. 2564, 132 L.Ed.2d 817 (1995) and cases cited therein. As noted in *Jackson v. Shanks*, 143 F.3d 1313, 1317 (10th Cir. 1998), *cert. denied,* 525 U.S. 950, 119 S.Ct. 378, 142 L.Ed.2d 312 (1998), the procedural default rule is not a jurisdictional rule; rather, it is based upon the principles of comity and federalism.

Petitioner argues, however, that the Oklahoma Court of Criminal Appeals finding as to when Petitioner first could have raised this issue was incorrect. Specifically, Petitioner claims the information only became available on January 12, 2004, when the State revealed through an affidavit of Warden Mike Mullin certain information regarding Oklahoma's lethal injection procedures. Additionally, Petitioner argues Oklahoma's procedural bar is not fairly and evenhandedly applied because the Oklahoma Court of

Criminal Appeals allowed his jurisdictional and mental retardation claims to be raised in his second post-conviction application. As Respondent points out, Petitioner's "Indian country" issue went to jurisdiction and therefore, could be raised at any time. Additionally, Petitioner's mental retardation issue arose as a result of new Supreme Court caselaw. Therefore, Respondent urges this Court to apply a procedural bar to Petitioner's claim.

The Tenth Circuit has held Oklahoma's post-conviction statute, OKLA. STAT., tit. 22 § 1089, which bars review of claims that could have been raised on direct appeal including issues involving fundamental, constitutional rights, is an "adequate, as well as independent, state ground" which can effectively bar federal habeas review. *Steele v. Young*, 11 F.3d 1518, 1521 (1993). Merely because the Oklahoma court authorized two of Petitioner's claims to be raised in a subsequent post-conviction application does not establish that the rule is not evenhandedly applied.

Petitioner also argues he can establish "cause and prejudice" for failing to develop this claim sooner. While a showing that a factual or legal basis for a claim was not previously available to counsel has been deemed "cause," the record in this case does not support Petitioner's assertion that the issue was not discoverable. Rather, the Oklahoma Court specifically found that the factual basis of the claim was available before Petitioner ever filed his direct appeal. *Murphy v. State*, 124 P.3d 1198, 1209 (Okla. Crim. App. 2005). This finding of fact by the Oklahoma court is presumed correct. 28 U.S.C. § 2254(e)(1). Accordingly, this Court finds Petitioner's claim regarding Oklahoma's lethal injection protocol is procedurally barred.

Assuming arguendo, that this claim were not procedurally barred, this Court would find Petitioner's

claim lacks merit. Specifically, Petitioner alleges that lethal injection causes unnecessary pain and suffering or that any number of accidents could occur with the equipment, personnel, or chemicals involved in the process which might lead to unnecessary pain and suffering. Many other forms of execution which are undoubtedly more painful or intrusive than lethal injection have withstood Eighth Amendment cruel and unusual punishment challenges. *Compare Campbell v. Wood*, 18 F.3d 662, 681–683 (9th Cir. 1994), *cert. denied*, 511 U.S. 1119, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994) (holding hanging is not cruel and unusual simply "because there may be some pain associated with death"); *Felker v. Turpin*, 101 F.3d 95, 97 (11th Cir. 1996), *cert. denied*, 519 U.S. 989, 117 S.Ct. 450, 136 L.Ed.2d 345 (1996) (holding no merit to Petitioner's claim that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments); and *Gray v. Lucas*, 710 F.2d 1048, 1061 (5th Cir. 1983), *cert. denied*, 463 U.S. 1237, 104 S.Ct. 211, 77 L.Ed.2d 1453 (1983) (holding the pain and terror resulting from death by cyanide gas does not render such execution method unconstitutional).[28] Furthermore, in *Hamilton v. Jones*, 472 F.3d 814 (10th Cir. 2007), *cert. denied*, — U.S. —, 127 S.Ct. 1054, 166 L.Ed.2d 783 (2007), the Tenth Circuit held Petitioner had failed to show "a substantial likelihood of prevailing on the merits" on a similar claim that Oklahoma's lethal injection protocol violates the Eighth Amendment's cruel and unusual punishment prohibition. Accordingly, this Court finds Petitioner's claim is frivolous.

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[28] *But see*, *Hill v. McDonough*, — U.S. —, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006) (holding, without ruling on constitutionality thereof, that cruel and unusual challenge to a particular method of lethal injection was properly raised as § 1983 action).

11. Cumulative Error

Petitioner asserts, in his eighth ground for relief, that the cumulative effect of the errors in his case warrant relief. Even though the Oklahoma Court of Criminal Appeals, in addressing this issue in Petitioner's direct appeal, held: "We have found no error, and thus we find no cumulative error." *Murphy v. State*, 47 P.3d 876, 887 (Okla. Crim. App. 2002), Petitioner asserts this ruling cannot be deemed an adjudication of the issue within the meaning of 28 U.S.C. § 2254(d). Petitioner then suggests this Court should review this issue *de novo*. However, cumulative error analysis should only be implemented where there are two or more actual errors. *See United States v. Rivera*, 900 F.2d 1462, 1470–1471 (10th Cir. 1990)(holding that a cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors). Although this Court found a harmless error occurred in admitting some of the victim impact evidence, that is the only error which was found in this case. Thus, cumulative error analysis does not apply. *See Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998), *cert. denied*, 526 U.S. 1025, 119 S.Ct. 1266, 143 L.Ed.2d 362 (1999) and *Jackson v. Shanks*, 143 F.3d 1313 (10th Cir. 1998), *cert. denied*, 525 U.S. 950, 119 S.Ct. 378, 142 L.Ed.2d 312 (1998). Accordingly, this argument also lacks merit.

VI. CONCLUSION

After a thorough review of the Second Amended Petition for Writ of Habeas Corpus, the Respondent's Response, Petitioner's Reply, and the state court records filed herein, this Court finds Petitioner has failed to establish that he is currently in custody in violation of the Constitution, laws or treaties of the

United States as required by 28 U.S.C. § 2254(a). Therefore, for the reasons stated herein, Petitioner's Second Amended Petition for Writ of Habeas Corpus (Dkt. No. 54) is hereby denied. Additionally, for the reasons set forth herein, Petitioner's request for an Evidentiary Hearing is denied.

Finally, on May 10, 2007, Petitioner filed a Second Motion for Stay and Abeyance of Habeas Proceedings arguing, since this Court denied his first request for a stay (Dkt. No. 30) the Supreme Court in *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005), granted a district court authority to stay and hold in abeyance federal habeas petitions in limited circumstances. In *Rhines*, however, the Court indicated in order to ensure that the purposes of the AEDPA are not thwarted

> . . .stay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.

Id., U.S. at 277, S.Ct. at 1535.

Petitioner claims he has shown good cause because he "has two claims currently pending in other courts, both of which he has demonstrated are at least potentially meritorious."[29] Dkt. 66, at p. 6. Respondent,

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[29] The two claims Petitioner is referring to are: (1) jurisdiction and (2) mental retardation.

however, asserts Petitioner's abeyance "should be denied as nothing more than a deliberate dilatory attempt 'to prolong [his] incarceration and avoid execution of the sentence of death.'" Dkt. 67, at p. 3 (citation omitted).

Since the filing of this motion, the United States Supreme Court has denied certiorari on the issue of jurisdiction. *Murphy v. Oklahoma*, — S.Ct. —, 2007 W.L. 1582962 (2007). The issue of mental retardation is not currently pending before this Court. Therefore, any state court proceedings addressing that issue are not relevant to the issues currently before this Court. For these reasons, this Court finds Petitioner has failed to establish good cause for this Court to grant a stay in this matter.

ACCORDINGLY IT IS HEREBY ORDERED THAT:

1. Marty Sirmons is substituted for Gary Gibson as the party Respondent and the Court Clerk is directed to note such substitution on the record.

2. Petitioner's request for habeas relief (Dkt. No. 54) is denied.

3. Petitioner's request for an evidentiary hearing, contained within his Petition, is denied.

4. Petitioner's Motion for Stay and Abeyance of Habeas Proceedings (Dkt. 66) is hereby denied.

It is so ordered on this 1st day of August, 2007.
Dated this 1st Day of August 2007.

/s/ Ronald A. White
Ronald A. White
United States District Judge
Eastern District of Oklahoma

APPENDIX C

2005 OK CR 25

COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. PCD-2004-321

PATRICK DWAYNE MURPHY,

Appellant

v.

STATE OF OKLAHOMA,

Appellee.

Dec. 7, 2005

Gary Peterson, Kari Y. Hawkins, Oklahoma City, OK, for petitioner on appeal.

W.A., Drew Edmondson, Attorney General of Oklahoma, Preston Saul Draper, Assistant Attorney General, Oklahoma City, OK, for the State on appeal.

OPINION GRANTING IN PART PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF

LUMPKIN, Vice-Presiding Judge.

Petitioner Patrick Dwayne Murphy was convicted of First Degree Murder in McIntosh County District Court case no. CF-1999-164A and sentenced to death. He appealed his conviction in case no. D-2000-705. We affirmed his conviction and sentence. *Murphy v. State,* 2002 OK CR 24, 47 P.3d 876. Petitioner then applied for post-conviction relief, but was denied. *Murphy v. State,* 2002 OK CR 32, 54 P.3d 556 (resolving all claims, except mental retardation); *Murphy v. State,*

2003 OK CR 6, 66 P.3d 456 (denying mental retardation claim).

Petitioner filed his second post-conviction application, raising three issues. We remanded the matter to the District Court for an evidentiary hearing on his first claim, relating to jurisdiction. That hearing was held in December of 2004. The parties have since submitted supplemental briefs on the issues adjudicated therein. The last brief was submitted by the State on February 2, 2005.

On numerous occasions this Court has set forth the narrow scope of review available under the amended Post-Conviction Procedure Act. *See e.g., McCarty v. State,* 1999 OK CR 24, ¶ 4, 989 P.2d 990, 993, *cert. denied,* 528 U.S. 1009, 120 S.Ct. 509, 145 L.Ed.2d 394 (1999). The Post-Conviction Procedure Act was neither designed nor intended to provide applicants another direct appeal. *Walker v. State,* 1997 OK CR 3, ¶ 3, 933 P.2d 327, 330, *cert. denied,* 521 U.S. 1125, 117 S.Ct. 2524, 138 L.Ed.2d 1024 (interpreting Act as amended). The Act has always provided petitioners with very limited grounds upon which to base a collateral attack on their judgments. Accordingly, claims that could have been raised in previous appeals but were not are generally waived; claims raised on direct appeal are *res judicata. Thomas v. State,* 1994 OK CR 85, ¶ 3, 888 P.2d 522, 525, *cert. denied,* 516 U.S. 840, 116 S.Ct. 123, 133 L.Ed.2d 73 (1995).

The new Act makes it more difficult for capital post-conviction applicants to avoid procedural bars. *Walker,* 1997 OK CR 3, 1 4, 933 P.2d at 331. Under 22 O.S.2001, § 1089(C)(1), only claims that "[w]ere not and could not have been raised" on direct appeal will be considered. A capital post-conviction claim could not have been raised on direct appeal if: (1) it is an ineffective assistance of trial or appellate

counsel claim which meets the statute's definition of ineffective counsel; or (2) the legal basis of the claim was not recognized or could not have been reasonably formulated from a decision of the United States Supreme Court, a federal appellate court, or an appellate court of this State, or is a new rule of constitutional law given retroactive effect by the Supreme Court or an appellate court of this State. 22 O.S.2001, §§ 1089(D)(4)(b), 1089(D)(9).

Should a Petitioner meet this burden, this Court shall consider the claim only if it "[s]upport(s) a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." 12 O.S.Supp.2001, § 1089(C)(2). As we said in *Walker:*

> The amendments to the capital post-conviction review statute reflect the legislature's intent to honor and preserve the legal principle of finality of judgment, and we will narrowly construe these amendments to effectuate that intent. Given the newly refined and limited review afforded capital post-conviction applicants, we must also emphasize the importance of direct appeal as the mechanism for raising all potentially meritorious claims. Because the direct appeal provides appellants their only opportunity to have this Court fully review *all* claims of error which might arguably warrant relief, we urge them to raise all such claims at that juncture.

Walker, 1997 OK CR 3, 1 5, 933 P.2d at 331 (omitted, emphasis in original). We now turn to Petitioner's claims.

In proposition one, Petitioner raises, for the first time, a jurisdictional issue. Petitioner claims that he and the victim are Indians and that the crime occurred

in Indian country. Thus Petitioner claims jurisdiction is exclusively federal under 18 U.S.C. § 1153. As such, he claims his state court proceedings are void and that he should be immediately released from the State's custody.

The crucial issue here is decidedly simple, yet remarkably difficult to resolve. The record reflects Petitioner is an enrolled member of the Muscogee (Creek) Nation, as was the victim, George Jacobs. Both are "Indians" for purpose of 18 U.S.C. § 1153,[1] as both sides readily admit.

The decisive issue, then, is whether or not the crime occurred in "Indian country,"[2] for if it did Oklahoma has no jurisdiction over the crime. *See Cravatt v. State,* 1992 OK CR 6, 1 7, 825 P.2d 277, 280 (murder prosecutions in Indian country have been "specifically reserved to the United States"); *State v. Klindt,* 1989 OK CR 75, 1 3, 782 P.2d 401, 403 ("Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.").

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[1] "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder. within the Indian Country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

[2] "Indian Country" is defined as: "(a) all land within the limits of *any Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all *dependent Indian communities* within the borders of the United States whether within the original or subsequently acquired territory thereof, whether within or without the limits of a state, and (c) *all Indian allotments, the Indian titles to which have not been extinguished,* including rights-of-way running through the same." 18 U.S.C. § 1151 (emphasis added).

The issue is fairly fact intensive at first, for we must pinpoint where exactly the crime occurred. But then, the matter becomes primarily legal, involving the definition of Indian country under federal law.

18 U.S.C. § 1151 has three categories of Indian country: Indian reservations; dependent Indian communities; and Indian allotments, the Indian titles to which have not been extinguished. *Eaves v. State,* 1990 OK CR 42, 1 2, 795 P.2d 1060, 1061. Petitioner's claim falls primarily under subsection (c), Indian allotments, although he also presented evidence that the area was part of a Creek reservation and a dependent Indian community.

We were sufficiently concerned about the factual and legal merits of this claim to remand the matter to the McIntosh County District Court for an evidentiary hearing.[3] This Court does not remand for evidentiary hearings on a whim. An application for evidentiary hearing and supporting affidavits "must contain sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2004). Thereafter, if this Court determines "the requirements of Section 1089(D) of Title 22 have been met and issues of fact must be

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[3] The hearing addressed the following issues: (1) Where exactly did the crime occur? (2) Who "owns" title to the property upon which the crime occurred? (3) If some or all of the crime occurred on an easement, how does that factor into the ownership question? (4) How much of the crime occurred, if any, on an easement? (5) Did the crime occur in "Indian County," as defined by 18 U.S.C. § 1151? (6) Is jurisdiction over the crime exclusively federal?

resolved by the District Court, it shall issue an order remanding to the District Court for an evidentiary hearing." Rule 9.7(D)(6), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2004).

At the evidentiary hearing, the parties presented diametrically opposed positions concerning whether or not the crime occurred in Indian country.

The State argued the crime occurred on a county road owned by the State of Oklahoma, a road that was never made a part of an Indian allotment and that is currently maintained by McIntosh County. Alternatively, the State argued that, should this Court find the title to the road was part of a former Creek Nation allotment, the Indian title thereto has been extinguished by prior conveyances from Creek allottees to non-Indians.

Petitioner, however, claimed the county road was an easement or right-of-way and that fee title to the land beneath that road was owned by a Creek allottee, not the State. The surface rights had since been conveyed away, but the allottee's heirs had maintained a mineral interest. Petitioner thus claimed the Indian title to the property had not been fully extinguished as required by federal statute and for that reason the whole tract remains Indian country.[4]

This issue—i.e., whether the conveyance of all surface rights to an Indian country allotment extinguishes the Indian title thereto, or whether the reservation of a small mineral interest (1/12th) by the Creek Indian allottees preserves the Indian title so that criminal jurisdiction remains federal appears to

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[4] The District Court did not admit any of Petitioner's evidence pertaining to the issue of a "dependent Indian community." This was error. Fortunately, however, Petitioner made an offer of proof and submitted substantial materials on this issue, as we discuss below.

be novel. The parties have submitted numerous cases that are, to varying degrees, relevant to the crucial issue and somewhat analogous on certain points. But none of the cases deal directly with the issue presented here.

We are thus left interpreting federal statutes, federal decisions, and state cases construing federal law in an attempt to resolve a matter of utmost importance: who has jurisdiction over the murder of George Jacobs?

The evidentiary hearing lasted one day. Following the hearing the Associate District Judge made findings of fact and conclusions of law.

As for the facts, the District Court found: the fatal wound (amputation of the victim's genitals) was inflicted while the victim was on the traveled portion of Vernon Road; the victim died in the ditch just off the east edge of Vernon Road, after his attackers dragged him there; all of Vernon Road, including the ditch where the victim was found, lies within a three rod area granted to the public for highway purposes by the Supplemental Creek Agreement of 1902;[5] 100 % of the surface and 11/12ths of the minerals to the tract of land adjacent to and directly east of the crime scene is wholly unrestricted property, owned by non-Indians; and the remaining 1/12th mineral interest appears to be a restricted interest retained by Indian heirs of a Creek allottee.

The District Court's legal conclusions were as follows: Vernon Road lies on land ceded to the State, not an easement; the original Creek allottees took their land subject to the grant for a public highway; thus the land upon which the road lies was not part of the allotment; the State of Oklahoma owns title to the

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[5] 32 Stat. 500, 502.

property on which the crime occurred; the crime did not occur in Indian country; assuming, *arguendo,* that Vernon Road does lie on an easement, said easement is perpetual and therefore not Indian country; assuming, *arguendo,* that the land under Vernon Road was conveyed to the Creek Indian allottees, the Indian title thereto has since been extinguished, as only a 1/12th mineral interest continues to be owned by Creek Indians; and criminal jurisdiction thus lies with the State pursuant to the reasoning of *Cravatt v. State.*

We agree with many of the District Court's findings and conclusions. But we cannot find factual or legal support for them all.

We readily accept the District Court's findings as to the source of the fatal wound and where it was inflicted. For jurisdictional purposes, the crime took place on both the northbound lane of Vernon Road (i.e., the road's eastern side in the N/2 SW/4 and the S/2 NW/4 of Section 27, Township 9 North, Range 13 East, McIntosh County) and the adjacent ditch. Plus, as the parties and District Court agree, both sites (the site of the fatal wound and the ditch where George Jacobs died) are within the boundaries of the three-rod (49.5 feet) area created along the section line by a 1902 Creek Nation Treaty with the United States. *See* Act of June 30, 1902, 32 Stat. 500, 502, § 10.

However, the record does not support the District Court's finding that the area in question lies on land that was "ceded to the State." We find the record, witness testimony, treaty language, and relevant cases all support a finding that the State of Oklahoma's interest in the area in question is in the nature of an easement or right-of way.[6]

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[6] This Court is not typically in the business of resolving title matters pertaining to Oklahoma property. Due to Oklahoma's

The June 30, 1902 Act, which ratified an agreement between the United States and the Creek Nation, provided, in Paragraph 10, that "Public highways or roads 3 rods in width, being 1 and one-half rods on each side of the section line, may be established along all section lines without any compensation being paid therefor; and all allottees, purchasers, and others *shall take the title to such lands subject to this provision.*" (emphasis added). The language gives no indication that Oklahoma, which became a state in 1907, was granted fee simple title to the strip in question.

Prior to the passage of this Act, the Creek Nation already owned this same land in fee, as those lands had been long ago granted by the United States to the Creek Nation in exchange for the Creek's agreement to cede their land in Alabama and Georgia. *See Indian Country, U.S.A. v. State of Oklahoma,* 829 F.2d 967, 971 (10th Cir.1987). Even in 1890 when the Creek Nation's lands became part of what became Oklahoma Territory—the land reserved for the Five Civilized Tribes—the Creek's property remained Indian country owned in fee. *Id.* at 974, 977. When the lands were subsequently allotted to Creek Indians as per the Creek Allotment Act in 1901, "Congress was careful to preserve the authority of the government of the United States over the Indians, their land and property, which it had prior to the passage of the act." *Id.* at 979

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unique appellate court system, which places authority for resolving civil matters with the Oklahoma Supreme Court and criminal matters with this Court, matters of this type, i.e., who owns title to the strip of land upon which Vernon Road and the adjacent ditch lie, would ordinarily arise in the Oklahoma Supreme Court. However, it is our job to determine if the property is Indian Country for purposes of criminal jurisdiction.

(quoting *Tiger v. Western Inv. Co.,* 221 U.S. 286, 309, 31 S.Ct. 578, 584, 55 L.Ed. 738 (1911)).

The language pertaining to public roads in the 1902 Act was the Creek Nation's acknowledgement of the future State of Oklahoma's right to establish public highways along the section lines, without compensating the Creek Nation therefore. The Act thus creates an easement or right-of-way for public highways, with title to the underlying lands remaining in the Creek Nation and its subsequent allottees, who took their allotment subject to the right-of-way.[7]

This interpretation is consistent with testimony and exhibits admitted at the remanded evidentiary hearing. A title opinion admitted at the hearing and rendered by attorney Keith Ham[8] finds as follows:

> We understand that there is a roadway located upon the West side of captioned property, along or upon the Section 27 and Section 28 section line. Inasmuch as we did not find any easement or other conveyance for roadway purposes in favor of the State of Oklahoma (or agency thereof) or McIntosh County, the only apparent legal basis for the establishment or the existence of a roadway . . . is pursuant to 32 Stat. 500. This statute provided that highways or roads may be established along all section lines located

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[7] Paragraph 17 of the same Act allows the Creek allottees to lease the minerals to their lands, "with the approval of the Secretary of the Interior, and not otherwise."

[8] Ham is an attorney in Bristow. He specializes in the area of title and regularly renders title opinions for banks, title companies, and the Creek Nation. He is a past president of the Creek County Bar Association and Muscogee (Creek) Nation Bar Association. Ham is well versed in the area of the Creek Allotment process.

> within the Creek or Muscogee Nation . . . . Captioned property is located within the boundaries of the Creek or Muscogee Nation and thus this statutory easement would apply to the above captioned property. This easement for roadway establishment *did not alter the fact that the allottee took title to his or her allotment and owned the fee simple title in and to their entire allotted land.* It is our opinion that the ownership of the minerals and mineral rights as owned by Joe McGilbray and Roy T. Ussrey[9] as restricted interests as set forth above *extends to the Section 27 and Section 28 section line.* In the event the roadway in the area of the Section 27 and Section 28 section line is located upon any portion of captioned property, *it is our opinion that Joe McGilbray and Roy T. Ussrey own their respective restricted ownership interest as set forth above in and under said roadway* insofar as the same is located upon captioned property.

(emphasis and added).

The State presented no expert testimony on title to the land in question that disagreed with Mr. Ham's opinion. Jeff Dell, an Assistant Realty Officer for the Creek Nation, rendered a title opinion on behalf of the State concerning the entire tract (N/2 SW/4 and S/2 NW/4 of Section 27, Township 9 North, Range 13 East, McIntosh County), which had originally been allotted to Lizzie Smith (and which is sometimes referred to as the "Busby tract"). The opinion was silent regarding any ownership in this tract by the State of Oklahoma.

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[9] McGilbray and Ussrey are Indian heirs to original Creek allottee Lizzie Smith.

However, in an affidavit attached to Petitioner's Reply to the State's Response to Petitioner's Second Application for Post-Conviction Relief, Dell stated:

> I understand that the State of Oklahoma has taken the view that the restricted ownership interest of the Busby tract is immaterial to state jurisdiction because the section line county road known as the Vernon Road, also known as NS 398, which runs on the west side of the Busby tract is the situs of the mortal wounds to the victim in Mr. Murphy's case and the road is maintained by McIntosh County. I can express no opinion regarding the significance to jurisdiction of where the injuries occurred to the victim in Petitioner's case. I can, however, clarify that the State of Oklahoma does not own the Vernon Road as it runs on the west side of the Busby tract. The Busby tract ownership, pursuant to 32 Stat. 500, 502 (1902), runs to the section line and title thereto is vested in the owners of the Busby tract and not the State of Oklahoma.

During the evidentiary hearing Dell testified the entire tract was within the historical boundaries of the Creek Nation. Moreover, some documents appear to indicate that the current non-Indian landowners of property abutting Vernon Road pay taxes with respect to the Vernon Road tract.

The Associate District Judge relied on Section 2, Article 16 of the State Constitution in finding the land in question was owned by the State and was not an easement. However, this constitutional provision was long ago studied by the Oklahoma Supreme Court in *Mills v. Glasscock,* 1909 OK 77, 110 P. 377, 378–79. There, the Court at all times treated the Constitutional provision as indicative of the State's acceptance

of an easement or right-of-way along section lines for purpose of public highways.

As for other cases, *Kansas Natural Gas Co. v. Haskell,* 172 F. 545 (C.C.E.D.Okla.1909), and cases cited therein, is particularly instructive. There, in construing similar language from similar treaties between the United States and the Cherokees, the Federal Circuit Court for the Eastern District of Oklahoma found:

> The fee to the rural public highways in that portion of this state formerly comprising Indian Territory, and now the Eastern district, does not vest in the state for the benefit of the whole people, as premised by the defense; but it does vest in the abutting landowners. The public have only a perpetual servitude or easement therein . . . . It is clear, therefore, that the fee to the land comprising rural highways in what was formerly Indian Territory vests in the abutting landowners, subject only to the easement granted the public for highway purposes, following the rule of common law.

Id. at 567–68; *see also Paschall Properties v. Board of County Commis,* 1987 OK 6, ¶ 6, 733 P.2d 878, 879 (finding similar language in Cherokee Allotment Act means allottees "take their title to these lands subject to this ability to establish roads"); *Oldfield v. Donelson,* 1977 OK 104, ¶ 7, 565 P.2d 37, 40 (State has an easement in Osage Nation section line roads).

It seems clear that title to the land upon which Vernon Road lies was conveyed to the Creek allottees who owned the property abutting the road. But now we must ascertain whether the Indian title to this particular tract has since been extinguished before state criminal jurisdiction may be exercised.

This is a challenging issue. Criminal jurisdiction is determined according to where a crime occurred, which is largely a geographic fact determination. In the instant case, the record shows the crime occurred on land originally allotted to Lizzie Smith, a member of the Creek Nation. However, all surface rights to the property have since been conveyed away to non-Indians. Thus, non-Indians own the actual physical property upon which the crime occurred, which suggests jurisdiction rightly belongs with the State.

However, not all of the fee interest in the original allotment has been conveyed to non-Indians. According to the evidentiary hearing record, while non-Indians own the surface and eleven twelfths of the minerals in the tract where the crime occurred, one twelfth of the mineral interest remains restricted with the Indian heirs of Lizzie Smith. The question is whether this small mineral interest is sufficient to qualify the property as an Indian allotment, the Indian title to which has not been extinguished, under 18 U.S.C. § 1151(c).[10]

We've found no definitive answer to this question.

The Associate District Judge, however, found the Indian title had indeed been extinguished:

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[10] A variation of this question might be whether the 1/12th mineral interest remains part of "Indian country" while the remaining interest is not. In other words, does title to the entire allotment have to be extinguished or can that allotment lose its Indian title distinction piece by piece? For example, if Lizzie Smith had conveyed the entire surface and minerals to the south half of her allotment, did that southern half lose its Indian Country label, or does it retain that label until all of the northern half is conveyed to non-Indians? And does this situation change if the conveyance was a one-half interest in the allotment as a whole?

> Even if the crime scene could be defined as Indian country based on the 1/12th restricted mineral interest remaining in the adjacent property, the wholly unrestricted surface ownership on both sides of Vernon Road, coupled with the State's compelling interest in enforcing its penal laws and protecting its citizens would permit the State to exercise jurisdiction in this case.

And yet, no witness at the evidentiary hearing took this position. Monta Sharon Blackwell, former Deputy Commissioner of Indians Affairs at the Department of the Interior, testified that the Indian title to the allotment formerly owned by Lizzie Smith had not been extinguished and that it remained Indian country as that expression is used under federal law. Ms. Blackwell testified that the Department of the Interior considered Indian mineral interests, as the dominant interests in the land, to be worthy of protection and that the mineral estate in this particular area was quite valuable. Furthermore, whenever an Indian attempted to sell an allotment, Department of the Interior representatives would encourage them to retain one half of the minerals. When asked if she would agree that the Indian title to the surface had been extinguished, Ms. Blackwell expressed doubt one could divide the surface and mineral estates "in that way." But she admitted she knew of no case that stood for the question presented here, i.e., whether a fractional restricted mineral interest is sufficient to confer criminal jurisdiction.

We, too, have not found a case that stands for that exact position,[11] although we have found several

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[11] But we've also been unable to find a case stating otherwise, i.e., that Indian title to a former allotment has been extinguished

cases that are close,[12] analagous,[13] or at least somewhat relevant.[14] But considering those authorities, the

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even though Indians have retained a fractional restricted mineral interest in the allotment.

[12] In *Cravatt v. State,* 1992 OK CR 6, 825 P.2d 277, the victim was killed on a former Indian allotment, the title of which was mixed—a 1/7th interest in the fee had been conveyed away to non-Indians. (Unlike the instant case, the surface and minerals had not been separated.) This Court found Oklahoma lacked criminal jurisdiction, ruling: "We do not find that this small interest in the property is sufficient to justify State intervention in a matter which would otherwise be statutorily reserved for the federal government." *Id.* at ¶ 19, 825 P.2d at 280. The Court then stated, "[W]e do not find that the State's interest, only marginally justified, outweighs the federal preemption in this case." *Id.* At ¶ 20; *but see Hanes v. State,* 1998 OK CR 74, 973 P.2d 330, 337 (a curiously convoluted case where the Court seems to find Indian title to the western half of the Grand river "at the location of the Miami city park" had been extinguished by conveyance in fee simple to the city of Miami).

[13] *See, e.g., C.M.G. v. State,* 1979 OK CR 39, ¶ 7, 594 P.2d 798, 801 (finding a truism of Indian law is that doubtful expressions in Indian treaties and Acts of Congress dealing with Indians are to be resolved in favor of the Indians and that cases in which land claimed to be Indian country was found not to be have involved land to which the Indians "clearly and specifically had ceded all claim, right, title, and interest to the lands without any reservation whatsoever."); *United States v. Soldana,* 246 U.S. 530, 532–33, 38 S.Ct. 357, 358, 62 L.Ed. 870 (1918) (rejecting a claim that Crow reservation Indian title to the soil on which a railroad platform stood had been extinguished, regardless of whether or not the strip in question, which was owned by non-Indians, was a mere easement or limited fee.); *Ahboah v. Housing Authority of Kiowa Tribe,* 1983 OK 20, ¶ 16, 660 P.2d 625, 629, ("[T]he Supreme Court has held that an interest in Indian lands in less than fee simple, held by a non-Indian, does not deprive the lands of their Indian character.")

[14] In *State v. Burnett,* 1983 OK CR 153, ¶ 8, 671 P.2d 1165, 1167, *overruled, in part, on a separate issue in State v. Klindt,* 1989 OK CR 75, ¶ 6, 782 P.2d 401, 403, the Court found the language "all Indian allotments, the Indian titles to which have

evidentiary hearing testimony, and the entire record before us, we remain unconvinced that the crime occurred on Indian country, at least under 18 U.S.C. § 1151(c), pertaining to allotments.

George Jacobs was murdered in McIntosh County in August of 1999. The crime occurred on a county section line road in a remarkably rural, heavily treed location, without any sort of improvement noticeable in the photographs, except perhaps a rickety barbed wire fence. The crime occurred approximately one mile north of the small town of Vernon, a town supposedly established by freed black slaves, and four or so miles from the equally small town of Hanna.

Authorities investigated the matter during the relevant time period. As a result state murder charges and a bill of particulars were filed against Petitioner. Trial was held in April of 2000, and Petitioner was convicted of First Degree Murder. Since then the matter has been continuously on appeal.

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not been extinguished" in 18 U.S.C. § 1151(c) was "broad enough to encompass all Indian allotments while the title to same shall be held in trust by the Government, *or while the same shall remain inalienable by the allottee without the consent of the United States.*" (emphasis added) (The testimony at the evidentiary hearing indicated the U.S. would have to approve any leases as to the remaining 1/12th restricted mineral interest.) *See also HRI, Inc. v. Environmental Protection Agency,* 198 F.3d 1224, 1254 (10th Cir.2000) (finding the "split nature of the surface and mineral estates does not alter the jurisdictional status of these lands" for Safe Drinking Water Act purposes: "[I]f ownership of mineral rights and the surface estate is split, and either is considered Indian lands, the Federal EPA will regulate the well under the Indian land program."); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604–605, 97 S.Ct. 1361, 1372, 51 L.Ed.2d 660 (1977) *("The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and land use," may create "justifiable expectations.")*

We find it significant that federal authorities have never attempted to exercise jurisdiction over this crime in the five years since it occurred. Meanwhile, the State of Oklahoma has spent considerable time and money prosecuting and defending Petitioner in the district and appellate courts.

This case presents two separate and distinct estates in land, i.e., a surface estate and a mineral estate, each subject to being severed and separately conveyed. The uncontradicted evidence shows that the surface estate was separated from the mineral estate on the land where the crime occurred. Also, the uncontradicted evidence shows that, as to the surface estate, the Indian allotment had been extinguished by conveyances to non-Indian landowners prior to the time of the crime.

Even as to the remaining Indian allotment mineral estate, the uncontradicted evidence was that all but 1/12th had been extinguished by conveyances to non-Indians.

A fractional interest in an unobservable mineral interest is insufficient contact with the situs in question to deprive the State of Oklahoma of criminal jurisdiction. When two jurisdictions are competing for jurisdiction over a particular issue (or seeking to determine which has jurisdiction), it is an established principle of comparative law to look at the contacts each jurisdiction has with the subject matter at issue.[15] Here, the subject matter is criminal

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[15] For example, in the area of Due Process, the United States Supreme Court looks to a nonresident defendant's "minimum contacts" with a state to determine if jurisdiction can be exercised over that defendant. *International Shoe Co. v. State of Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). The Court determines if a defendant's conduct and connection with the forum state are such that he should

jurisdiction, and the State of Oklahoma's contacts and interests in the subject property overwhelm the fractional interest an Indian heir may own in an unseen mineral estate.

To allow this unobservable fractional interest to control the enforcement of laws on the surface of the land would be analogous to condoning the type of serious problems enunciated by the U.S. Supreme Court this term in *City of Sherrill, N.Y. v. Oneida Indian Nation,* 544 U.S. ——, 125 S.Ct. 1478, 1493, 161 L.Ed.2d 386 (2005), i.e., a "checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at OIN's behest" that "would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." While that case dealt with a tribe attempting to reestablish sovereignty over land purchased in fee from non-Indians, the principle still applies.

The land in question had its Indian Country characteristics extinguished through conveyances to non-Indians, thus giving notice to the public that it was no longer Indian land and that the State of Oklahoma's laws would apply. While some authorities suggest, to varying degrees, that "Indian country" status may still be attached to the property in question, we have found no case holding that the retention of small (although not insignificant) mineral interest is enough in and of itself to prevent the Indian title from being considered extinguished under federal law, especially in the context of criminal jurisdiction.

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reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

Criminal jurisdiction has always been tied to geography, i.e., where the crime occurred. Common sense tells us that this issue has more to do with surface rights than underground minerals, since it is virtually impossible to commit a crime against a person within a mineral interest sub-surface strata. Plus, we see little, if any, value in a system that would require a title search to the extent required here, i.e., researching allotments, heirs of allottees, and fractional mineral interests,[16] in order to determine whether criminal jurisdiction is state or federal. Such a system would seriously burden both the state and federal governments.[17]

We therefore agree with the District Court's most important conclusion: that, pursuant to the reasoning in *Cravatt,* the Indian title to the tract formerly allotted to Lizzie Smith has been extinguished for purposes of criminal jurisdiction over the crime in question. Absent clear authority requiring a different interpretation, we refuse to vacate the state murder conviction and death sentence based on a theoretical interpretation of federal law.

The remaining issue, under proposition one, is whether or not the land in question is part of a Creek Nation reservation that has never been disestablished or is part of a dependent Indian community. Unfortunately, the District Court decided, based upon the

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[16] For example, some of the evidence presented on title takes the position that the heirs of Lizzie Smith (and one of her supposed heirs) have never been judicially determined. As such, we would need a quiet title suit in order to be certain that all surface rights have been conveyed to non-Indians.

[17] Furthermore, if Petitioner's position is correct, then a great portion, if not most, of eastern Oklahoma would still be considered Indian country today. The tax implications alone would be staggering.

Assistant District Attorney's urging, that these questions were beyond the scope of the evidentiary hearing, even though we clearly asked the Court to determine if the tract in question was Indian country under 18 U.S.C. § 1151.

Be that as it may, the error was alleviated when the District Court allowed Petitioner's counsel to make an extended offer of proof regarding the testimony and evidence that would have been presented on these two questions had that opportunity been given. Accordingly, we find the error was harmless. Even if the evidence had been admitted, it is insufficient to convince us that the tract in question qualifies as a reservation or dependent Indian community.

Petitioner's proffered expert, Monta Sharon Blackwell, stated by affidavit that "[t]here was never a formal Creek Nation 'reservation' but for practical purposes" certain treaty language was "tantamount to a reservation under Federal law." Thus, the "Creek Nation, historically and traditionally, is a confederacy of autonomous tribal towns, or Talwa, each with its own political organization and leadership."

Ms. Blackwell and Jeff Dell both took the position that the historical boundaries of the Creek Nation remained intact even after the various Creek lands were subjected to the allotment process, but no case is cited for the position that the individual Creek allotments remain part of an overall Creek reservation that still exists today.[18]

The best authority on this point is *Indian Country, U.S.A., Inc. v. State of Oklahoma,* 829 F.2d at 975, which treats the Creek Nation lands as a "reservation"

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[18] It seems redundant, however, to treat lands as both a reservation and an allotment. Section 1151 clearly makes a distinction between the two.

as of 1866.[19] However, the Tenth Circuit declined to answer the question of whether the exterior boundaries of the 1866 Creek Nation have been disestablished and expressly refused to express an opinion in that regard concerning allotted Creek lands. *See id.* at 975 n. 3, 980 n. 5.

If the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here.

Regarding the issue of dependent Indian communities, the evidence supporting that claim is thin, especially in regard to the issue of dependency. Petitioner has submitted photos of some Indian cemeteries and churches within three to four miles of the site, and there is an Indian community center near the town of Hanna. Petitioner has also submitted evidence that the Creek Tribal Town of Weogufkee, reportedly one of the 44 original tribal towns and founded in 1858, is somewhere nearby. Also, there is evidence of Creek Nation voting districts in the area. No evidence was submitted regarding the exact Indian demographics of this region as it stands today.[20]

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[19] The case finds the term "reservation," for purposes of defining 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." 829 F.2d at 973.

[20] No data from the U.S. Census Bureau was offered. However, Courts have often taken judicial notice of such data. *See e.g., Village Bank v. Seikel,* 1972 OK 123, 503 P.2d 550, 553. Hypothetically, were we to do the same here, it appears we would find that only 16.2 % of the residents of McIntosh County reported being American Indian, i.e., approximately 3,200 people over the entire county. On the other hand, white persons constituted 72.6 %, African Americans 4.1%, and Hispanics 1.3%. www.quickfacts.census.gov.

However, an affidavit states that Weogufkee had a population of 750, but that was in 1935.

A dependent Indian Community refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements: first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 527, 118 S.Ct. 948, 953, 140 L.Ed.2d 30 (1998). As an allotment, it is doubtful this particular tract could qualify as a part of a dependent Indian community. But, more importantly, there does not seem to be much federal superintendence. Most certainly, there is much less federal control in this case than there was in *Eaves v. State,* 1990 OK CR 42, 795 P.2d 1060, 1063, a case where we found a housing project owned by the Osage Tribal Housing Authority was not a dependent Indian community under 18 U.S.C. § 1151. We believe this case falls within the teaching of *United States v. Blair,* 913 F.Supp. 1503, 1512 (E.D.Okla.1995), and the tract in question is simply a "typical slice of rural eastern Oklahoma occupied by a mixed culture of people attempting to hold on to their agrarian roots." Proposition one thus fails.

In proposition two, Petitioner claims he was denied the right to a jury trial on the issue of mental retardation by our decision in his first post-conviction appeal. *See Murphy v. State,* 2003 OK CR 6, 66 P.3d 456. He claims this was arbitrary and capricious, a denial of equal protection, and a deprivation of rights guaranteed by the Fifth, Eighth, and Fourteenth Amendments.

This Court's mental retardation jurisprudence has been in a state of flux since *Atkins v. Virginia* was

handed down. Petitioner's mental retardation claim was the first such claim addressed by this Court in the aftermath of *Atkins,* and various procedural changes have taken place since that time. While the trial judge and our prior cases have voiced strong doubts about Petitioner's mental retardation claim, a majority of this Court now finds he has provided sufficient evidence in his post-conviction appeals to raise a fact question on this issue, thereby warranting a trial on Petitioner's mental retardation claim.[21]

In proposition three, Petitioner claims, for the first time, that Oklahoma's lethal injection procedure violates the Eighth Amendment prohibition against cruel and unusual punishment.[22] He claims Oklahoma's "protocols" for carrying out such executions create a substantial risk of conscious suffocation or conscious suffering of excruciating pain and that several such Oklahoma executions have "gone wrong." [23]

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[21] I personally disagree with the Court's resolution of proposition two for the following reasons. First, Petitioner is not mentally retarded. Second, he never made a *prima facie* showing of his claim, as his abbreviated IQ test was insufficient to get him past the required threshold of providing at least one IQ test score under 70. Third, the matter is *res judicata,* as three judges from this Court (myself, Judge C. Johnson, and Judge Lile) have previously rejected this identical claim in a previous appeal. And finally, the fact that Petitioner is the only defendant who was unable to sufficiently raise a fact question concerning his mental retardation claim does not mean he was treated differently. But I defer to the majority on this issue.

[22] Petitioner also claims the procedure violates the Fifth and Fourteenth Amendments, but he never explains how.

[23] The specific allegations (chronicled by a report from an euthanasia panel and affidavits from Oklahoma State Penitentiary Warden Mike Mullin, physician Mike Heath, and two attorneys who witnessed the execution of Loyd La-fevers on January 30, 2001) are disconcerting. If true, they merit serious attention from the legislature and/or those in charge of the

Petitioner has waived any error relating to this claim by failing to raise it in his May 3, 2001 direct appeal brief and his February 7, 2002 post-conviction application. He admits the claim was available in March of 2001. Moreover, the statute upon which such executions are based, 22 O.S.2001, § 1014(A),[24] has not been amended since 1977.

DECISION

After carefully reviewing Petitioner's post-conviction application and supporting documentation, along with all matters from the remanded evidentiary hearing, we find relief is warranted with respect to his mental retardation claim. Accordingly, Petitioner's Application for Post-Conviction Relief is hereby DENIED with respect to propositions one and three, but GRANTED with respect to proposition two. This matter is hereby REMANDED to the District Court of McIntosh County for a jury trial on Petitioner's mental retardation claim, consistent with this opinion and the procedures adopted by this Court in our recent mental retardation jurisprudence.

CHAPEL, P.J., C. JOHNSON, A. JOHNSON and LEWIS, JJ.: concur.

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statutorily based responsibility of carrying out the execution "according to accepted standards of medical practice." (See below.) However, it appears Oklahoma's protocols, i.e., the exact drugs and distribution method, are not statutorily based. Corrections officials change those protocols from time to time, as new information is gathered. If Petitioner's allegations have merit, we have every reason to believe the necessary changes will be implemented.

[24] The punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician, according to accepted standards of medical practice.

APPENDIX D

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed 11/09/2017]

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Nos. 07-7068 & 15-7041
(D.C. No. 03-cv-443-RAW-KEW)
(E.D. Okla.)

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PATRICK DWAYNE MURPHY,
Petitioner-Appellant,
v.
TERRY ROYAL Warden, Oklahoma State Penitentiary,
Respondent-Appellee.
MUSCOGEE (CREEK) NATION; SEMINOLE NATION OF OKLAHOMA; KEETOOWAH BAND OF CHEROKEE INDIANS,
Amici Curiae.

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ORDER

Before TYMKOVICH, Chief Judge, MATHESON, and PHILLIPS, Circuit Judges.

These matters are before the court on the respondent's *Petition for Panel Rehearing or Rehearing En Banc.* We also have responses from the petitioner and the United Keetoowah Band of Cherokee Indians, in addition to amici curiae briefs from the United States and The Muscogee (Creek) Nation. We also have several motions pending seeking to file additional amici curiae briefs.

Upon consideration, the request for panel rehearing is denied by the original panel members. For clarification, however, the panel has decided, *sua sponte*, to amend the original decision at pages 49–50. A copy of the amended decision is attached to this order, and the clerk is directed to reissue the opinion *nunc pro tunc* to the original filing date of August 8, 2017. In addition, Chief Judge Tymkovich has filed a concurrence to the denial of rehearing, and that concurrence is likewise attached.

The *Petition*, the responses, the amici filings and the amended opinion were also circulated to all the judges of the court in regular active service who are not recused. *See* Fed. R. App. P. 35(a). As no judge on the original panel or the en banc court requested that a poll be called the request for en banc review is denied.

Finally, the motions filed by the Oklahoma Independent Petroleum Association, the Oklahoma Municipal League, and the Oklahoma Oil and Gas Association, et al., seeking leave to file amici curiae briefs are granted. Those briefs will be shown filed as of the date of this order.

Entered for the Court
/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk

Nos. 07-7068 & 15-7041, *Murphy v. Royal*

TYMKOVICH, Chief Judge, concurring in the denial of rehearing en banc.

En banc review is not appropriate when, as here, a panel opinion faithfully applies Supreme Court precedent. An en banc court would necessarily reach the same result, since Supreme Court precedent precludes any other outcome. I write only to suggest this case might benefit from further attention by the Supreme Court.

As the panel opinion explains, the three-part framework of *Solem v. Bartlett*, 465 U.S. 463 (1984), governs evaluating whether Congress has disestablished an Indian reservation. But strictly applying *Solem*'s three-part framework in this context, which strongly suggests *de facto* disestablishment, evokes "the thud of square pegs being pounded into round holes." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1193 (9th Cir. 2005) (Kozinski, J., concurring), *rev'd and remanded*, 551 U.S. 701 (2007), *and vacated*, 498 F.3d 1059 (9th Cir. 2007).

In 1893, Congress created the Dawes Commission to negotiate with the Creek Nation for the express purpose of extinguishing national title to lands held by the Creek Nation, preferably through allotment. Act of Mar. 3, 1893, § 16, 27 Stat. 212 at 645. The Creek Nation refused to negotiate, so Congress began imposing restrictions. Over the following five years, Congress destroyed the Creek legal system and threatened to terminate Creek land ownership unless the tribe agreed to allotment. Faced with this threat, the Creek Nation agreed to allotment in 1901. Most land owned by the Creek Nation was then allotted to individual members of the tribe. *Murphy v. Royal*, 866 F.3d 1164, 1201–02 (10th Cir. 2017).

The parties hotly dispute the inferences to be drawn from the history of the Creek Nation. I am not without sympathy for Oklahoma's argument that Congress's series of actions here effectively constitute disestablishment, but the panel properly rejected that argument: *Solem* is clear that "[o]nce a block of land is set aside for an Indian Reservation and *no matter what happens to the title of individual plots within the area*, the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470 (emphasis added); *see also Murphy*, 866 F.3d at 1219 (explaining that allotment alone cannot terminate a reservation under Supreme Court precedent).

Supreme Court precedent thus requires that evidence of intent to disestablish be "unequivocal[]." *Nebraska v. Parker*, 136 S. Ct. 1072, 1080–81 (2016). History, however, is not always well suited to provide the unequivocal evidence of disestablishment that *Solem* requires. Sometimes history is ambiguous, making it impossible to decide between competing narratives. Historians have been debating the Fall of Rome for millennia. Sometimes there will be unequivocal evidence one way or another. But sometimes not. When confronted with contemporaneous history that is far from unequivocal, *Solem* gives the edge to the tribes.

Solem itself recognized that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character . . . *de facto*, if not *de jure*, diminishment may have occurred." 465 U.S. at 471. But, the *Solem* Court continued, this recognition only extends so far: "When both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule

that diminishment did not take place and that the old reservation boundaries survived the opening." *Id.* at 472. And *Parker* confirmed this approach. *See Murphy*, 866 F.3d at 1198 (discussing how *Parker* illustrates the significance *Solem* places in statutory text, even in the face of strong subsequent demographic evidence).

This case may present the high-water mark of *de facto* disestablishment: the boundaries of the Creek Reservation outlined by the panel opinion encompass a substantial non-Indian population, including much of the city of Tulsa; and Oklahoma claims the decision will have dramatic consequences for taxation, regulation, and law enforcement. The panel faithfully applied Supreme Court precedent holding that such "demographic evidence [cannot] overcome the absence of statutory text disestablishing the Creek Reservation." *Murphy*, 866 F.3d at 1232. But this may be the rare case where the Supreme Court wishes to enhance Steps Two and Three of *Solem* if it can be persuaded that the square peg of *Solem* is ill suited for the round hole of Oklahoma statehood. As Justice Cardozo wrote, "[e]xtraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal." *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 105–06 (1934).

In sum, this challenging and interesting case makes a good candidate for Supreme Court review.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed November 16, 2017]

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Nos. 07-7068 & 15-7041
(D.C. No. 03-cv-443-RAW-KEW)
(E.D. Okla.)

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PATRICK DWAYNE MURPHY,
Petitioner-Appellant,

v.

TERRY ROYAL Warden, Oklahoma State Penitentiary,
Respondent-Appellee.

MUSCOGEE (CREEK) NATION, *et al*.,
Amici Curiae.

———

ORDER

Before TYMKOVICH, Chief Judge, MATHESON, and PHILLIPS, Circuit Judges.

These matters are before the court on the respondent's *Unopposed Motion to Stay the Mandate Pending the Filing of a Petition for Writ of Certiorari*. Upon consideration, the motion is GRANTED.

Issuance of the mandate is stayed for 90 days and/or until the deadline passes for filing a certiorari petition in the Supreme Court. If this court receives notice the respondent has filed a petition the stay will continue until the Supreme Court's final disposition. *See* Fed. R. App. P. 41(d)(2)(B).

Entered for the Court
/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk