Case No. 18-8801

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK JOSEPH TERRY,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

*MITHUN MANSINGHANI
SOLICITOR GENERAL

313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 FAX
mithun.mansinghani@oag.ok.gov
ATTORNEYS FOR RESPONDENT

*Counsel of Record

August 5, 2018

QUESTIONS PRESENTED

Whether the State of Oklahoma had jurisdiction to convict Petitioner for crimes he allegedly committed within the 1867 reservation boundaries of the Ottawa Tribe of Oklahoma.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

REGULATIONS

STATEMENT

This Court should deny this Petition. The history of the Ottawa Tribe demonstrates that it no longer has a reservation in Oklahoma and criminal jurisdiction over the land in question lies with the courts of the State of Oklahoma. In any case, this Petition presents a poor vehicle to answer the question presented because there is insufficient evidence in the record to show that Petitioner is Native American or that the crime occurred within the historical boundaries of the Ottawa Tribe. There are also independent and adequate state grounds to uphold Petitioner's conviction. Finally, assuming this Court is not inclined to deny this Petition outright, the Court should at least stay consideration of the Petition until a decision is rendered in *Sharp v. Murphy*, No. 17-1107, which presents the question of whether another tribe has an existing reservation in Oklahoma.

History of the Ottawa Tribe of Oklahoma.

At the turn of the nineteenth century, the Ottawa Tribe "resided on land in [present-day Ohio] reserved to them in the Treaty of Greenville, [Treaty of August 3, 1795, 7 Stat. 51], but through a series of subsequent treaties ... ceded that land to the United States." *Ottawa Tribe of Oklahoma v. Logan*, 577 F.3d 634, 637 (6th Cir. 2009) (citing *Williams v. City of Chicago*, 242 U.S. 434, 436–37 (1917)). The United States desire for these subsequent treaties, and land, was spurred by the "familiar forces" of westward expansion and the need to make way for white settlers. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 590 (1977). To this end, rather than entering into treaties with Indian tribes wherein the tribes reserved to themselves a portion of

their aboriginal land, the federal government adopted a policy of removing Indians to the west of the Mississippi River after the enactment of the Indian Removal Act in 1830. *See, e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 n.12 (1968).

Soon thereafter "Ottawa chiefs signed the Treaty of 1831 [Treaty of August 30, 1831, 7 Stat. 359] relinquishing all land previously held in Ohio" and in exchange "were granted a land reservation in [present-day] Kansas." *Ottawa Tribe of Oklahoma v. Ohio Dep't of Nat. Res.*, 541 F. Supp. 2d 971, 973–74 (N.D. Ohio 2008), *aff'd, sub nom. Ottawa Tribe of Oklahoma v. Logan*, 577 F.3d 634 (6th Cir. 2009). The United States promised the Ottawas this land "to them and their heirs for ever, as long as they shall exist as a nation, and remain upon the same," and the land will "never be within the bounds of any State or territory" and they will be free from "all interruption or disturbance from any other tribe or nation of Indians and from any other person or persons whatsoever." Arts. 3, 9, 7 Stat. 359. The United States promised to "defray the expense of the removal" and "supply them with a sufficiency of good and wholesome provisions to support them for one year after their arrival at their new residence." *Id.* at Art. 4. Tragically, "[d]uring the seven hundred mile journey to Kansas, nearly half of the roughly three-hundred Ottawas died from hunger and disease." *Ottawa Tribe*, 541 F. Supp. 2d at 974.

Upon arriving in Kansas, the Ottawa Tribe transitioned from hunting and fishing to farming. *Id.* at 974. But even this uneasy transition would not last. Nor would the promises contained in the Treaty of 1831, for the forces of westward

expansion never waned and land containing the Ottawa reservation was being eyed for a new State of the Union, the State of Kansas. *See In re Kansas Indians*, 72 U.S. 737, 753–54 (1866). By the 1860s, the federal government began moving from a removal policy to that of allotment and assimilation. *See DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 432 (1975). And the Ottawas found themselves in the direct line of this policy shift as well. In 1862, while the country was in the throes of the Civil War, the Ottawa Tribe entered into a treaty with the United States in which their reservation would be divided into 80-acre tracts to be allotted to members of the Tribe with the remainder to be sold to white settlers. The proceeds of the sale would go to tribal members. Treaty of June 24, 1862, 12 Stat. 1237 (1862 Treaty).

"In this treaty there is no express repeal of the agreement that the lands should not become a part of the state, but the whole tenor of the treaty is to that effect." *McCullagh v. Allen*, 10 Kan. 150, 155 (Kan. Sup. Ct. 1872). After five years, the United States would transfer the land patent to the Indian allottee, the Indian would become a citizen of the United States, and their "relations with the United States as an Indian tribe [would] be dissolved and terminated." Art. 1, Treaty of June 24, 1862, 12 Stat. 1237 (1862 Treaty).

The first article of the treaty of 1862 summed up the attitude of the time: the federal government proclaimed that the Ottawas could make this transition because they "h[ad] become sufficiently advanced in civilization." *Id.* But as the five-year mark approached, the federal government felt that while "portions of [Ottawas]

desire to dissolve their tribal relations, and become citizens" other "portions ... should be enabled to remove to other lands in the Indian country south of [Kansas]." Act of February 23, 1867, 15 Stat. 513 (1867 Treaty).

The United States bought a small piece of the Shawnee reservation in the Indian Territory, and paid for it "from the funds in the hands of the Government arising from the sale of the Ottawa trust-lands [in Kansas]," as provided in Article 9 of the 1862 Treaty. The remainder of the tribal fund was to be divided among each tribal member. *Id.* at Art. 16. The provision of the 1862 Treaty whereby the Ottawas would become citizens was extended for two years, although an individual member could elect to become a citizen and "be disconnected with the tribe" before then. *Id.* at Art. 17. But those making that election would have to take their portion of the tribal fund at that time and would not be eligible for the final divvying up of tribal assets under federal supervision. *Id.*

It seemed the process of dissolving the federal relationship with the Ottawa tribe which began in the State of Kansas by the 1862 Treaty continued in the Indian Territory by the terms of the 1867 Treaty, albeit extended for two years to July 16, 1869. The 1867 Treaty contained none of the promises found in earlier treaties, such as perpetual right to the land, freedom from disturbance, the right to occupancy, and recognition of tribal sovereignty. *Cf.* Art. III, 1831 Treaty, 7 Stat. 360. Quite the opposite. The treaty only promised that tribal members were to become U.S. citizens and that land would be purchased for them. 1867 Treaty, 15 Stat. 513. On the surface, the Act "simply extend[ed] to July 16, 1869, the time for terminating the tribal

existence and transforming all the members thereof into individual citizens of the United States and the state in which they reside." *Wiggan v. Connolly*, 163 U.S. 56, 61 (1896). But it was widely understood that this Act would create a new reservation. And this Court found that its purpose was for certain members of the Ottawa Tribe who declined to become U.S. citizens to move to the Indian Territory to continue their tribal relations on this reservation. *Id.*

By 1890, the Ottawas in the Indian Territory numbered 137 in all, living on allotments in the 23 square-mile area—about one-half of one percent of the Indian Territory. Census Bureau, *Report on Indian Taxed and Indians Not Taxed in the United States*, 249 (1890) (1890 Census Report). By contrast, the Five Tribes—the Cherokee, Creek, Choctaw, Chickasaw, and Seminole—collectively occupied over 40,000 square miles. The land of the Ottawas, along with the Eastern Shawnee, Modoc, Peoria, Quapaw, Seneca-Cayuga, and Wyandotte, were considered the only "reservations in Indian territory proper ... , situated northeast of the Cherokee nation" and overseen by the Quapaw agency of the Bureau of Indian Affairs. *Id.* at 245. The transition to farming was not easy, but according to federal officials "[the Ottawas] are doing much better as farmers" since taking their allotments under the General Allotment Act. *Id.* at 249. Yet more change was in store for this small tribe.

For two decades, proposals to convert the Indian Territory into a state had been floated in Congress. By the 1890s, these proposals looked to become a reality through the merger of the Indian Territory and the Oklahoma Territory. To prepare, Congress thought it wise to dissolve the reservations and tribal lands created by treaty. An

1890 census report described how this was done:

> Indian reservations existing by virtue of treaty stipulations are usually abolished or reduced in the manner following: an agreement is entered into between the Indians and agents or commissioners appointed by the Secretary of the Interior, with or without authority of Congress, for that purpose; such agreement is submitted to Congress for acceptance and ratification, and provides for the relinquishment, for valuable considerations, of a part or the whole of the lands claimed by the Indians either under treaty stipulations or otherwise.

1890 Census Report at 90. The vast majority of the land in the Indian Territory was owned in fee simple by the Five Tribes. In 1893, Congress appointed a commission, led by Senator Henry Dawes, to "enter into negotiations with the [Five Tribes] for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes," whether by cession, allotment, or some other method, "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory." Act of Mar. 3, 1893, § 16, 27 Stat. 645; *see also Jefferson v. Fink*, 247 U.S. 288, 291 (1918); *Woodward v. de Graffenried*, 238 U.S. 284, 295 (1915); *Stephens v. Cherokee Nation*, 174 U.S. 445, 446 (1899). The Five Tribes were initially resistant to allotment. But a series of acts, including the Curtis Act, Act of June 28, 1898, 30 Stat. 495, which abolished all tribal courts in the Indian Territory and provided that "the laws of the various tribes or nations of Indian shall not be enforce at law or in equity by the courts of the United States in the Indian Territory," pressured the Five Tribes into accepting allotment agreements. Ottawa allotment, on the other hand, was already underway. *See* Act of March 3, 1891, 26 Stat. 989; *see also* 1890 Census Report at 249 (reporting that the Ottawas live on allotments).

So too was the process of unifying all people regardless of race in the Indian Territory under the same system of laws and privileges. In 1897, Congress vested the United States courts in the Indian Territory with "exclusive jurisdiction" to try "all civil causes in law and equity" and all "criminal causes" for the punishment of offenses by "any person" in the Indian Territory. Act of June 7, 1897 (Indian Department Appropriations Act), 30 Stat. 83. And Congress made the laws of the United States and Arkansas in force in the Indian Territory applicable to "all persons therein, *irrespective of race*." *Id.* (emphasis added).

Oklahoma's Enabling Act later extended the laws of the Oklahoma Territory over the Indian Territory, in place of the laws of Arkansas, until the new state legislature provided otherwise. §§ 2, 13, 21, 34 Stat. 268-269, 275, 277-278; *see Jefferson* v. *Fink*, 247 U.S. 288, 294 (1908). The next year, Congress amended the Enabling Act to ensure that "[a]ll [non-federal] criminal cases pending in the United States courts in the Indian Territory" would be "prosecuted to a final determination in the State courts of Oklahoma." § 3, 34 Stat. 1287. The new state courts of Oklahoma were deemed the "successors" to the federal court in the Oklahoma and Indian Territories. §§ 16, 17, 20, 34 Stat. 276-277, as amended by Act of Mar. 4, 1907, § 3, 34 Stat. 1286-1288. Local—as opposed to federal—cases that were pending in federal court were transferred to the new state courts of Oklahoma. Until then, cases arising out of the Quapaw agency, including cases involving the Ottawa, were tried in the district court of Kansas. 1890 Census Report at 245. In reality, unlike most of the Indian Territory, "[c]rime [was] almost unknown on the [Ottawa] reservation"

and the few disputes that arose "the agent settles." *Id.* at 249. All the same, at the incoming of statehood, through the Enabling Act, the laws of the state of Oklahoma were substituted. *See* SAMUEL THOMAS BLEDSOE, INDIAN LAND LAWS: BEING A TREATISE ON INDIAN LAND TITLES IN OKLAHOMA, 291 (1913) (Indian Land Law) (noting the substitution of Oklahoma state law for that of Kansas regarding the law of descent).

Statehood unified the various tribes both together and with the people of the Oklahoma Territory under state law. "Allotments to members of the various Indian tribes in Oklahoma had been substantially completed at the time of the approval of the [Enabling Act], and consequently at the time of the admission of Oklahoma to statehood." *Id.* at 37. The county occupying the very northeast corner of the State was named Ottawa County, for the Ottawa Tribe. In 1909, all restrictions on the sale of the allotments of the Ottawa and other tribes in the Quapaw agency were removed, except for a forty acre homestead, and all remaining tribal lands were put up for sale. §§ 1, 2, Act of March 3, 1909, 35 Stat. 751. The Ottawa had become citizens of the United States and of the state of Oklahoma.

In 1934, the Wheeler-Howard Act, or Indian Reorganization Act (IRA), Act of June 18, 1934, 48 Stat. 984, was passed ending the process of allotment on Indian lands in the United States. The allotment policy for many tribal members led to deplorable living conditions, fractionated land holdings, and huge land loss with little or nothing to show for it. *See The Indian Problem: Resolution of the Committee of One Hundred Appointed by the Secretary of the Interior*, H. R. Doc. No. 149 (1924); THE

INSTITUTE FOR GOV'T RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION, Feb. 21, 1928 (Lewis Meriam ed., 1928. Johns Hopkins Press). The "overriding purpose" of the IRA was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). The IRA stopped allotment and allowed for the acquisition of tribal trust land, the organization of tribal corporate charters, and the adoption of tribal constitutions. 48 Stat. 986-87. By its terms, however, the IRA did not apply to the Five Tribes or the tribes of the Quapaw agency. § 13, 48 Stat. 986-87. Rather, the Ottawa Tribe re-organized with a corporate charter and adopted its Constitution under the Oklahoma Indian Welfare Act, which had similar provisions as the IRA specifically suited for Oklahoma tribes. Act of June 26, 1936, 49 Stat. 1967. This condition persisted for some years.

The Ottawa Tribe however would soon be part of another federal policy shift—one of terminating federal supervision over tribes. *See* House Concurrent Resolution 108, August 1, 1953 (declaring termination of federal supervision over Indian tribes to be official Congressional policy). Under this policy, many smaller tribes were subject to withdrawal of federal recognition, liquidation of tribal assets, including the land base, and transferal of jurisdiction over Indians to the states. In 1956, Congress ended the trust relationship between the federal government and the Ottawa Tribe, cutting off Indian-related services to their members and ending federal recognition of the tribe. Act of Aug. 3, 1956, 70 Stat. 963.

The Ottawa Tribe's status as a federally recognized tribe was terminated.

Congress declared that "[a]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the [Ottawa Tribe]." § 8, 70 Stat. 964. The Ottawas' corporate charter under the Oklahoma Indian Welfare Act was revoked. § 9(a), 70 Stat. 965. The few remaining restrictions on Ottawa allotments or trust land were removed. Members of the tribe received unrestricted title to the land and all money held by the federal government was to be disbursed to tribal members within three years. § 2, 70 Stat. 963. Following protracted litigation in the Indian Court of Claims, provisions for the final payments were not finalized until 1967. Act of Aug. 11, 1967, 81 Stat. 166. Without recognition from the federal government, Ottawa leaders along with leaders from neighboring tribes formerly comprising the Quapaw agency formed a nonprofit corporation, chartered under Oklahoma law, for the health and welfare of their people. *See Report on Conveying Certain Land of the United States to the Intertribal Council, Inc., Miami, Oklahoma,* accompanying S. 2888, Senate Report no. 93-1118 (1974).

Then federal policy swung in the opposite direction. In the 1970s, Congress restored the federal relationships between tribes severed in the 1950s, including the Ottawa Tribe of Oklahoma. Act of May 15, 1978, 92 Stat. 246. While the federal government now again recognized the Ottawa people as Indians, nothing established or re-created a reservation for them.

Indeed, even by the time of termination, the Ottawa Tribe had no recognized land base. A 1976 federal report is telling. It noted that when the federal-tribal relationship with the Menominee Tribe of Nebraska was terminated 3,270 tribal

members were affected as well as 233,881 acres of Indian lands. And for the Klamath Tribe of Oregon 2,133 tribal members and 862,662 acres of Indian lands were affected. But for the Ottawa Tribe of Oklahoma, while 630 members were affected, ***zero*** acres of Indian lands were affected. *See* J. Hunt, *Final Report to the American Indian Policy Review Commission, Report on Terminated and Non-federally Recognized Indians*, 1640 (1976). This fits with how the land has been treated since statehood by courts, the state, the federal government, and the tribe itself. And restoring to tribal members land that had been absolutely unrestricted and therefore changing hands for two decades may not have been practical.

Silence on the question of land status is in sharp contrast to other tribes who had their status re-affirmed around the same time. For example, the acts restoring recognition to the Little Traverse Band of Odawa Indians and the Little River Band of Ottawa Indians specifically provided for lands to be acquired for the respective tribes and that the lands would be part of the tribes' reservations. *See Hayes Township, Michigan v. Midwest Regional Director*, 36 IBIA 303 (2001). There is no such provision for the Ottawa Tribe of Oklahoma. Nevertheless, the Ottawa Tribe of Oklahoma has been operating a casino, convenience store, and tribal headquarters on isolated parcels of land held in trust for it by the United States, which are pursuant to special provisions allowing for trust land on former reservations within Oklahoma. *See, e.g.*, 25 U.S.C.A. § 2719(a).

Case Background.

1. In June of 2012, an unidentified informant notified law enforcement that Petitioner, who was on parole, was manufacturing methamphetamine at his home. *Terry v. State*, 334 P.3d 953, 954 (Okla. Crim. App. 2014). Police officers searched Petitioner's apartment pursuant to the rules and conditions of his parole. *Id.* Inside Petitioner's apartment, officers found items associated with the manufacture of methamphetamine. *Id.* at 954-55. Petitioner was convicted after a non-jury trial of Manufacturing a Controlled Dangerous Substance (Methamphetamine) Within 2,000 Feet of a School (Count 1), Possession of a Controlled Dangerous Substance (Count 2), and Possession of Drug Paraphernalia (Misdemeanor) (Count 3). *Id.* at 954. Petitioner's sentences for the two felony convictions were enhanced by prior felony convictions. *Id.* Petitioner was sentenced to thirty years imprisonment on Count 1, six years imprisonment on Count 2, and one year in the county jail on Count 3. *Id.* The Oklahoma Court of Criminal Appeals (OCCA) affirmed Petitioner's convictions and sentences on direct appeal. *Id.* at 957. This Court denied Petitioner's petition for writ of certiorari. *Terry v. Oklahoma*, 135 S. Ct. 2053, 191 L. Ed. 2d 958 (2015).

2. On September 26, 2014, Petitioner filed an application for a suspended sentence in Ottawa County District Court. The application was denied on October 10, 2014. Petitioner did not appeal. *See Terry v. State*, No. CF-2012-242, slip op. at n.1 (Ottawa Cty. Dist. Ct. May 2, 2016).

3. On February 25, 2016, Petitioner filed an application for post-conviction relief in Ottawa County District Court. Petitioner filed an amendment to his post-conviction application, adding a ground for relief, on March 7, 2016. Petitioner did not raise any claims related to jurisdiction. The district court denied the application on May 2, 2016. *See Terry v. State*, No. CF-2012-242 (Ottawa Cty. Dist. Ct. May 2, 2016). Petitioner's appeal was denied by the OCCA. *See Terry v. State*, No. PC-2016-412 (Okla. Crim. App. July 21, 2016).

4. On December 9, 2016, Petitioner filed a motion asking the state district court to order his transfer to another facility so that he could receive substance abuse treatment. The district court construed the motion as a motion for judicial review of Petitioner's sentence, and denied it. *See Oklahoma v. Terry*, No. CF-2012-242 (Ottawa Cty. Dist. Ct. Jan. 17, 2017).

5. Finally, on April 23, 2018, Petitioner filed the post-conviction application that is the subject of this proceeding. Petitioner alleged in Ottawa County District Court that the state courts lacked jurisdiction pursuant to 18 U.S.C. § 1152. On September 17, 2018, the Ottawa County District Court denied Petitioner's second application for post-conviction relief for two reasons. First, to the extent that Petitioner relied on *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *cert. granted sub nom Royal v. Murphy*, 138 S. Ct. 2026, 201 L. Ed. 2d 277 (2018), *Murphy* applied only to the Creek Nation, and the Tenth Circuit's decision in that case was being reviewed by this Court. Pet. App. A at 4. Second, the court held that the reservation was disestablished by the Public Law 943. Pet. App. A at 6-7.

6. On February 25, 2019, the OCCA affirmed. The OCCA first noted that "Petitioner has not established any sufficient reason why his current grounds for relief were not previously raised" as required by statute. Pet. App. B. at 2 (citing Okla. Stat. tit. 22 § 1086). The OCCA then held that Petitioner had failed to "establish[] that the District Court lacked jurisdiction" Pet. App. B at 2-3. Finally, the OCCA noted that "*Murphy* is not a final decision and Petitioner has cited no other authority that refutes the jurisdictional provisions of the Oklahoma Constitution." Pet. App. B. at 3 (citing "Okla. Const. Art. VII, § 7 (District Courts shall have unlimited original jurisdiction of all justiciable matters in Oklahoma)").

REASONS THE PETITION SHOULD BE DENIED

This petition should be denied for several reasons: Petitioner's conviction can be upheld on independent and adequate state grounds; there is insufficient evidence that Petitioner is Native American or that the crime occurred within the historical boundaries of the Ottawa Reservation; the land in question is not a reservation today; and even if the land is a reservation, the State of Oklahoma has criminal jurisdiction. If this Court does not deny the Petition now, it should await disposing of the Petition until the Court decides related issues in *Sharp v. Murphy*, No. 17-1107.

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

The OCCA began its order with a brief procedural history of the case, after which it asserted that Petitioner had not established that he is entitled to relief. Pet. App. B at 2. The OCCA cited a prior case which established that "it is fundamental that where a post-conviction appeal is filed, the burden is upon the petitioner to

sustain the allegations of his petition" *Id.* (citing *Russell v. Cherokee County District Court*, 438 P.2d 293, 294 (Okla. Crim. App. 1968)). The OCCA then recognized its rule whereby claims not raised on direct appeal are waived and concluded that "Petitioner has not established any sufficient reason why his current grounds for relief were not previously raised." *Id.* (citing Okla. Stat. tit. 22, § 1086. Next, the OCCA noted that Petitioner "trie[d]" to claim that his crimes were committed in Indian Country. *Id.* The court concluded "[h]owever, the prosecution of Petitioner's crimes in that case [CF-2012-242] was a justiciable matter, and thus he has not established that the District Court lacked jurisdiction. Okla. Const. Art. VII, § 7 (District Courts shall have unlimited original jurisdiction of all justiciable matters in Oklahoma)." *Id.* at 2-3. Finally, the OCCA's sole recognition of federal law came when it stated that "[t]he issues raised in Petitioner's application are addressed in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017) and as a result are currently pending before the United States Supreme Court." *Id.* at 3. Noting that the Tenth Circuit stayed its mandate pending this Court's review, the OCCA concluded that "*Murphy* is not a final decision and Petitioner has cited no other authority that refutes the jurisdictional provisions of the Oklahoma Constitution." *Id.*

This Court lacks jurisdiction to review a state court judgment when that judgment rests on adequate and independent state grounds. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The question is whether the state court's decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law" *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). If the state court's decision rests

primarily on federal law, or is interwoven therewith, this Court may review the judgment unless the state court clearly and expressly indicates that its decision "is alternatively based on bona fide separate, adequate, and independent grounds." *Id.* at 1040-41.

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

II. This Case is a Poor Vehicle to Address the Question Presented.

This case is a poor vehicle to address the question for other reasons as well. Before this Court can address whether the land allotted to members of the Ottawa Tribe in 1867 constitutes a reservation today for the purpose of criminal jurisdiction, Petitioner must show two things: (1) that he is an Indian, and (2) that the crime actually occurred within the disputed boundaries. Petitioner shows neither.

First, there is inadequate evidence in the record that Petitioner is a member of the Cherokee Nation or any other Indian tribe within the meaning of 18 U.S.C. § 1153(a). *Cf.* Sup. Ct. Rule 15(2). The state trial noted that Petitioner's jurisdictional

claim must be raised "in a proper manner and provide supporting evidence that the Petitioner is an 'Indian.'" Pet. App. 1. An evidentiary hearing was never conducted on the issue of whether Petitioner is an Indian. Nor was it an element of the underlying crime. The State does not concede that Petitioner is an Indian for purposes of criminal jurisdiction.

Second, there is nothing in the record to indicate that the crime actually occurred on the land at issue. The land purchased from the Shawnee Tribe for Ottawa tribal members in the former Indian Territory is small and diagonal in shape covering only a portion of Miami, Oklahoma near the Neosho River. The only evidence of location in the record—necessary to establish venue in the Ottawa County District Court—is that the crime occurred in Ottawa County. But the Ottawa's former reservation is only a sliver of present-day Ottawa County. Petitioner admits that location of the crime relative the disputed boundaries "remains yet to be resolved." Pet. 19. He has requested evidentiary hearings in state court on the location of the crime and its status as Indian country, but those requests have been denied. Instead, the state court ruled that regardless of the location the area is not an Indian reservation. Pet. App. 5-6. This Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Petitioner claims to "now present[] argument and evidence supporting the conclusion that the location" of the crime "lay geographically within the boundary established by Congress in the 1867 Act." Pet. 19. But Petitioner does not even do that. And the State does not concede that the crime occurred within the disputed area.

In addition, even if the Ottawa reservation was not disestablished, it was at the very least reduced. Before statehood, parts of the Ottawa reservation, along with parts of the connecting Peoria reservation, were opened for allotment of land to non-Indians. *See, e.g.,* Act of March 3, 1891, 26 Stat. 989 (providing for allotments to a Kansas-based corporation); *See also Opening of Indian Reservations to Actual and Bona Fide Homestead Settlers*, H.R. Report No. 1017 (1894) (reporting that 12,714.80 acres of the Ottawa reservation were allotted to the 157 Indians; 557.95 acres were authorized to be sold by act of March 3, 1891. The residue, 1,587.25 acres, unallotted). These provisions, usually in the form of surplus land acts, often effected reservation reduction. *See, e.g.*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994). There is nothing on the record to indicate whether Petitioner's crime occurred within one of the non-Indian allotments—which would raise another set of issues that could not be answered here—or within the other parts of the historical Ottawa reservation.

III. Petitioner's Argument Fails On The Merits.

In any case, the land acquired for Ottawa tribal members in 1867 is not a reservation today. In its own code, the Ottawa Tribe acknowledges that it lacks jurisdiction over the entire area as it would if the area were a reservation. Its liquor ordinance states that its jurisdiction is over its "tribal lands [which] are located on trust land" within the area, not the whole area. *See* Liquor Control Ordinance of the Ottawa Tribe of Oklahoma, June 16, 2006, 71 Fed. Reg. 34958. The Ottawa's land holdings are under special provisions allowing for trust land on former reservations

within Oklahoma. *See, e.g.*, 25 U.S.C.A. § 2719(a).

The reservation was disestablished upon statehood. To be sure, the recorded history of the Five Tribes leading up to statehood paints a clearer picture of congressional intent to disestablish the Five Tribes' reservations upon statehood. But, like those pertaining to the Five Tribes, the acts of Congress both at that time and since statehood demonstrate that the Quapaw agency reservations, including that of the Ottawas, were disestablished as part of the process of allotting Indian lands, granting U.S. citizenship to tribal members, displacing tribal jurisdiction, and establishing the supremacy of state law and state jurisdiction.

Like the rest of the former Indian Territory, the area in question has not been treated as reservation since statehood. The State of Oklahoma has prosecuted offenses committed by or against Indians on these lands. The federal government has never prosecuted a crime under the theory that the land is an Indian reservation. Nor has the Ottawa Tribe. *See Hagen*, 510 U.S. at 421 (noting that the "State ... exercised jurisdiction over the opened lands from the time the reservation was opened" to settlement, and that the "'jurisdictional history' ... demonstrates a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area"); *see also Rosebud Sioux*, 430 U.S. at 603 ("[T]he single most salient fact is the unquestioned actual assumption of state jurisdiction over the [land at issue].").

Even ignoring congressional intent to disestablish the Ottawa reservation upon statehood, the area is not a reservation today because it could not have remained

intact when the tribe was terminated in the 1950s. The loss of federal recognition *in toto* would have necessarily meant the land lost its reservation status. In addition, the disbursement of tribal funds resulting from the sale of tribal lands to individual members, as opposed to the tribe, strongly suggests disestablishment. *See, e.g., Solem v. Bartlett*, 465 U.S. 463, 473-474 (1984). Here, the final proceeds of the sale of Ottawa tribal lands, among other funds, were distributed to individual tribal members, thereby eliminating any continuing tribal function, including tribal interest in the land. §§ 1-2, 81 Stat. 166.

Restored federal recognition of the Ottawa tribal members as Indians did not create a reservation. Nothing in the act even mentions their land base. Indeed, under the policy of tribal recognition of the 1970s, the federal government found that there was no Ottawa land base to restore. Hunt Report at 1640. In other words, the area was not a reservation at the time of tribal termination. At the same time, the federal government found hundreds of thousands of acres affected by the termination of other tribes; and it sought to restore tribal lands back to those tribes. *Id.*; *see also Hayes Township, Michigan v. Midwest Regional Director*, 36 IBIA 303 (2001). But there is no such land acquisition or restoration provision for the Ottawa Tribe of Oklahoma.

IV. At a minimum, this Court should first decide *Murphy* before disposing of this Petition.

A decision in *Sharp v. Murphy*, No. 17-1107 (U.S.), may answer the criminal jurisdiction question regardless of whether the tract at issue in this case is a reservation. In *Murphy*, the Court heard oral argument on the question of whether

the 1866 boundaries of the Creek Nation constitute an Indian reservation today. Afterward, the Court requested supplemental briefing on the question of whether "any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status." *Carpenter v. Murphy*, No. 17-1107, Order (Dec. 4, 2018).

The laws that subjected the Five Tribes to the same criminal laws as non-Indians in the Indian Territory are equally applicable to the tribes of the Quapaw agency, including the Ottawa Tribe. Throughout all of the Indian Territory, Congress abolished tribal courts, barred enforcement of tribal law in U.S. Courts, and ensured that all individuals, "irrespective of race," Act of June 7, 1897 (1897 Act), 30 Stat. 83, were subject to the same laws and to the jurisdiction of the same court, including in criminal matters. Upon statehood, Congress transferred prosecution of all crimes of a local nature to the state courts. Congress designated state courts as "successors" to the United States Court for the Indian Territory, Oklahoma Enabling Act of June 16, 1906, §§ 17-20, 34 Stat. 276-277, as amended by Act of Mar. 4, 1907 (1907 Act), §§ 2, 3, 34 Stat. 1286-1287, and ensured that a uniform body of Oklahoma law would apply in the former Indian Territory, Enabling Act § 21, 34 Stat. 277-278. Resolving whether these laws grant the state of Oklahoma criminal jurisdiction in the former Indian Territory would resolve this Petition as well. In any event, a decision from this Court on the disestablishment question in *Murphy* could be relevant to the question presented in this case. At most, the Court should hold this case pending *Murphy*.

To be clear, however, while it is true that Congress granted criminal jurisdiction over this area to the state of Oklahoma, that is not all Congress did. The best reading of the statutory text, history, and context is that all reservations within the former Indian Territory have been disestablished. Congress did not spend decades erasing distinctions based on race only to *sub silentio* reverse course and reinstate those distinctions in a manner that would subject half of the new state to varied legal schemes based on separate tribal lands.

* * *

The history of the Ottawa Tribe of Oklahoma is unsettling in every sense of the word. Theirs is a story of survival and perseverance. Today, along with the Ottawa people, the many federally recognized tribes in Oklahoma are thriving. Oklahoma tribes are major drivers of Oklahoma's overall economy, making an economic impact of nearly $13 billion, supporting nearly 100,000 jobs, and investing over $1 billion in the community. Kyle Dean, *2017 Oklahoma Native Impact Report* (2017). The cultural and economic impact of its tribes is felt more intensely in Oklahoma than in states that have reservations.[1] This is good for Oklahoma, and a testament to the health of the tribes. But this grew outside the reservation system, and none of it depends on whether Oklahoma has reservations. We need not and should not start over. No good will come from unsettling things again.

[1] Perhaps its closest competition, the State of Alaska, also has no reservations, *see Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), except for the remote Annette Island Reserve.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

MITHUN MANSINGHANI
Solicitor General
Counsel of Record

RANDALL YATES
Asst. Solicitor General

JENNIFER CRABB
Asst. Attorney General

OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 NE Twenty-First St.
Oklahoma City, OK 73105
mithun.mansinghani@oag.ok.gov

Counsel for Respondents