No. 19-5417

IN THE

Supreme Court of the United States

TRAVIS WAYNE BENTLEY,

Petitioner,

v.

OKLAHOMA,

Respondent.

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

Brief in Opposition

MIKE HUNTER
Attorney General of Oklahoma

JENNIFER CRABB
Asst. Attorney General

MITHUN MANSINGHANI
Solicitor General
Counsel of Record

RANDALL YATES
Asst. Solicitor General

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

QUESTIONS PRESENTED

Whether the Treaty of Dancing Rabbit Creek deprives a state from exercising criminal jurisdiction over the Petitioner for a crime committed on land that is not Indian country?

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

TABLE OF AUTHORITIES iv

STATEMENT 1

A. Case Background. 1

B. Proceedings Below. 4

REASONS THE PETITION SHOULD BE DENIED 5

I. The decision below rests on independent and adequate state grounds. 5

II. The Treaty of Dancing Rabbit Creek does not exempt Petitioner from prosecution by the State. 6

III. Petitioner did not commit his crime in Indian country. 10

TABLE OF AUTHORITIES

CASES

Bentley v. Bryant,
No. 116,546 (Okla. Dec. 18, 2017).. 3
Bentley v. Bryant,
No. HC-2017-1281 (Okla. Crim. App. May 11, 2018).. 3
Bentley v. State,
No. C-2016-699 (Okla. Crim. App. Feb. 7, 2017)... 2
Bentley v. State,
No. CF-2015-1240 (Cleveland Co. Dist. Ct. Oct. 29, 2019)..................................... 3
Bentley v. State,
No. WH-2019-10 (Cleveland Co. Dist. Ct. Oct. 17, 2019) 4
Coleman v. Thompson,
501 U.S. 722 (1991) 5
DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.,
420 U.S. 425 (1975) 12
In re: Habeas for Travis Wayne Bentley,
No. WH-2019-00002 (Alfalfa Cty. Dist. Ct.) 3
Michigan v. Long,
463 U.S. 1032 (1983) 6
Rosebud Sioux Tribe v. Kneip,
430 U.S. 584 (1977) 16, 17
Royal v. Murphy, 875 F.3d 896 (10th Cir. 2017), *cert. granted sub nom.*,
Sharp v. Murphy, 138 S. Ct 2026 (No. 17-1107) 5, 6, 9
Seminole Nation v. United States,
102 Ct. Cl. 565 (1944)... 13, 14
Solem v. Bartlett,
465 U.S. 463 (1984) 4, 11, 13
South Dakota v. Yankton Sioux Tribe,
522 U.S. 329 (1998) 11, 16
United States v. *John*,
437 U.S. 634 (1978) 10

TABLE OF AUTHORITIES (continued)

Page(s)

STATUTES

18 U.S.C. § 1151 10

18 U.S.C. § 1152 10

18 U.S.C. § 1153 .... 2, 10

Act of Apr. 28, 1904, ch. 1824, § 2,
33 Stat. 573 10

Act of June 30, 1834,
4 Stat. 729 8

Act of March 3, 1891,
26 Stat. 989 .... 12, 13, 14, 16

Act of May 23, 1872,
17 Stat. 159 14

Act of May 29, 1872,
17 Stat. 165 13

Choctaw and Chickasaw Allotment Agreement of July 1, 1902,
32 Stat. 641 9

Choctaw and Chickasaw Treaty of Jan. 17, 1837,
11 Stat. 573 7

Curtis Act of 1898,
30 Stat. 495 9

General Allotment Act,
24 Stat. 388 14

Indian Department Appropriations Act of 1897, ch. 3, § 1,
30 Stat. 83 9

OKLA. STAT. tit. 22, § 1083 4

OKLA. STAT. tit. 22, § 1086 4

Oklahoma Enabling Act of June 16, 1906,
34 Stat. 267 .... 10, 15

Treaty of Dancing Rabbit Creek,
7 Stat. 333 .... 7, 8

Treaty with the Potawatomi, February 27, 1867,
15 Stat. 531 13

TABLE OF AUTHORITIES (continued)

Page(s)

OTHER AUTHORITIES

BENJAMIN HARRISON, PROCLAMATION 311—OPENING TO SETTLEMENT LANDS ACQUIRED FROM THE SAC AND FOX NATION OF INDIANS, OKLAHOMA TERRITORY, Sept. 18, 1891 .... 15, 16

CITIZEN POTAWATOMI NATION, EXPLAINING TRIBAL LAW: RESERVATION V. TRUST LAND, Sept. 7, 2017 17

Luther B. Hill, *A History of the State of Oklahoma* (1910) 15

STATEMENT

A. Case Background.

1. On May 10, 2015, at approximately 10:17 in the morning, Petitioner drove his truck left of center, striking head-on a vehicle driven by Ellis Risenhoover. Mr. Risenhoover was killed. Imogene Risenhoover, a passenger in the vehicle struck by Petitioner, suffered several broken bones. Two empty hypodermic needles and a plastic bag containing a silver spoon and white residue (methamphetamine) were found in the truck that Petitioner was driving that day. A witness at the scene saw Petitioner attempt to dispose of a glass smoking pipe and an additional hypodermic needle. Petitioner was charged in the District Court of Cleveland County, Oklahoma with First Degree Manslaughter (Count I), Driving Under the Influence of Drugs Resulting in Great Bodily Injury (Count II), Unlawful Possession of Drug Paraphernalia (Count III), and Driving Left of Center (Count IV). Petitioner entered a blind plea of guilty to Counts I-III, while Count IV was dismissed. Although the State did not seek to enhance Petitioner's sentences with prior felony convictions, Petitioner admitted having three previous felony convictions. Petitioner was sentenced to twenty-five years imprisonment for Count I, ten years imprisonment for Count II, and one year imprisonment for Count III. Pet. App. A at 1-2.

2. Petitioner filed a motion to withdraw his guilty plea, which was denied by the Cleveland County District Court. Petitioner then filed a petition for writ of certiorari challenging the district court's denial of his motion to withdraw his plea, which

was denied by the Oklahoma Court of Criminal Appeals ("OCCA"). *See Bentley v. State*, No. C-2016-699 (Okla. Crim. App. Feb. 7, 2017).

3. On July 10, 2017, Petitioner initiated the present action when he filed an application for post-conviction relief in Cleveland County District Court, in which he alleged that the statutes which determine his eligibility for good time credits to offset the length of his sentence are unconstitutional, that Oklahoma's lack of sentencing guidelines is unconstitutional, and that appellate counsel was ineffective for failing to raise these challenges in his certiorari appeal. On September 6, 2017, Petitioner supplemented his post-conviction application with a claim that the State lacked jurisdiction over his conviction for manslaughter under the Indian Major Crimes Act, 18 U.S.C. § 1153, because he is a member of the Choctaw Nation and his crimes were committed within the boundaries of the Citizen Pottawatomie Nation. Petitioner subsequently filed two additional supplements to his post-conviction application in which he alleged that the probable cause affidavit supporting his arrest and the Information failed to specify that Petitioner is a member of the Choctaw Nation, that the crimes were committed within the boundaries of the Citizen Pottawatomie Nation, and that the arresting officer was without jurisdiction to arrest him. As explained in more detail below, the Cleveland County District Court denied each of Petitioner's claims and the OCCA affirmed. *See* Pet. App. A & B.

4. On November 20, 2017, while his post-conviction application was still pending, Petitioner filed an application for writ of habeas corpus in the Oklahoma Supreme Court, alleging the State lacks jurisdiction because he committed the crimes in Indian Country. The Oklahoma Supreme Court transferred the case to the OCCA. *See Bentley v. Bryant*, No. 116,546 (Okla. Dec. 18, 2017). The OCCA dismissed the matter based on Petitioner's failure to attach a copy of the district court's order denying relief. *See Bentley v. Bryant*, No. HC-2017-1281 (Okla. Crim. App. May 11, 2018).

5. On November 27, 2018, Petitioner filed a second application for post-conviction relief in Cleveland County District Court in which he raised twenty-eight propositions of error, many of which alleged that Petitioner was actually the victim of the deceased Mr. Risenhoover. On October 29, 2019, the district court denied relief, finding all of Petitioner's claims procedurally barred. *Bentley v. State*, No. CF-2015-1240 (Cleveland Co. Dist. Ct. Oct. 29, 2019).

6. On September 3, 2019, Petitioner filed a petition for writ of habeas corpus in the District Court of Alfalfa County, raising the same Indian country jurisdiction claim he raised in his first post-conviction application. The State filed a motion to dismiss, arguing that Petitioner has used the wrong vehicle—he should have pursued post-conviction relief—and filed his pleading in the wrong county. The matter is still pending. *See In re: Habeas for Travis Wayne Bentley*, No. WH-2019-00002 (Alfalfa Cty. Dist. Ct.).

7. On the same day, September 3, 2019, Petitioner also filed a petition for writ of habeas corpus in the District Court of Cleveland County, again raising the same Indian country jurisdiction claim. The district court denied relief on procedural grounds. *Bentley v. State*, No. WH-2019-10 (Cleveland Co. Dist. Ct. Oct. 17, 2019).

B. Proceedings Below.

1. On July 2, 2018, the Cleveland County District Court denied Petitioner's aforementioned application for post-conviction relief. The court determined that the State had satisfied all three parts of the test set forth in *Solem v. Bartlett*, 465 U.S. 46**3** (1984). Pet. App. B at 3-4. As relevant here, the court concluded that "[t]he State has set forth sufficient evidence and authority to adequately meet the *Solem* test establishing the location of the accident in question did not occur within Indian country as defined by federal law." Pet. App. B at 3 (emphasis in original).

2. On June 25, 2019, the OCCA affirmed. The OCCA first stated that "Petitioner has not raised any issue in this post-conviction proceeding that could not have bene raised prior to the entry of his guilty plea or in a direct appeal from his Judgment and Sentence." Pet. App. A at 2. Specifically with his request for an evidentiary hearing on his Indian country claim, the OCCA noted that that these arguments "could have been previously made; he has not created a material issue of fact; and he has not established sufficient reason to allow his issues to be the basis of this post-conviction application." Pet. App. A at 3 (citing OKLA. STAT. tit. 22, § 1083, 1086). Finally, the OCCA stated in a footnote that "[t]he issue of whether federal courts, rather than

Oklahoma courts, should have exercised jurisdiction over crimes committed by or against Indians in Indian country is pending before the United States Supreme Court and thus binding precedent has not been established." Pet. App. A at 3 n.1 (citing *Royal v. Murphy*, 138 S. Ct. 2026 (May 21, 2018)).

REASONS THE PETITION SHOULD BE DENIED

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

The OCCA in the decision below began with a brief procedural history of the case, after which it asserted that Petitioner had not established that he is entitled to relief. Pet. App. A at 1-2. The OCCA then recognized its state-law rule whereby claims not raised on direct appeal are generally waived and stated that "Petitioner has not raised any issue in this post-conviction proceeding that could not have been raised prior to the entry of his guilty plea or in a direct appeal from his Judgment and Sentence." Pet. App. A at 2. "All issues are therefore waived or procedurally barred," the OCCA continued, "unless this Court finds sufficient reason why a ground for relief was not previously asserted." Pet. App. A at 2. The Court did not find any such reason and therefore affirmed the state court below. Pet. App. A at 2-3.

This Court lacks jurisdiction to review a state court judgment when that judgment rests on adequate and independent state law 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," based on state law. *Id*. at 1040-41. Here, it is clear that the OCCA denied Petitioner's claim on state law procedural grounds, so certiorari would be inappropriate. Specifically with his request for an evidentiary hearing on his Indian law claims, the OCCA held that "Petitioner's arguments concerning federal Indian treaties and other laws could have been previously made" and "he has not established sufficient reason to allow his issues to be the basis of this post-conviction application." Pet. App. A at 3.

The OCCA did state in a footnote that the state's jurisdiction over certain lands in Oklahoma is a question currently "pending before the U.S. Supreme Court" in *Sharp v. Murphy*, No. 17-1107, but for that reason declined to rule on that issue. The OCCA did not analyze the various treaties and statutes which are necessary to a determination of the question at issue in *Murphy*. Instead, 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, and certiorari should be denied.

II. The Treaty of Dancing Rabbit Creek does not exempt Petitioner from prosecution by the State.

On the merits, Petitioner relies solely on the Treaty of Dancing Rabbit Creek and his claim that he is a Choctaw tribal member to assert that state lacked jurisdiction

to convict him. Pet. 3-4. In the Petition, he does not appear to claim that the state lacks jurisdiction because the land is allegedly Indian country—only that as a Choctaw tribal member, he is immune from state prosecution anywhere and everywhere. But Petitioner's reliance on the Treaty of Dancing Rabbit Creek to establish broad immunity of Choctaw tribal members from all state laws is misplaced.

In the 1830s, United States forced the "Five Tribes," including the Choctaws, to abandon their homes in what is now Georgia, Alabama, Mississippi, and northern Florida and migrate west to the designated Indian Territory. One of the treaties that facilitated this forced removal of the Choctaw Indians was the Treaty of Dancing Rabbit Creek, which gave the Choctaw lands in present-day southeastern Oklahoma. 7 Stat. 333.[1] Article II of the Treaty of Dancing Rabbit Creek, as well as the 1860 Choctaw Constitution, makes clear that the land originally granted to the Choctaw and Chickasaw is bounded by the Arkansas border on the east, the present-day Texas border to the south (the Red River) and west, and—most importantly for present purposes—the main fork of the Canadian River to the north. 7 Stat. 333.

Putting aside all the later treaties and congressional enactments that changed both these borders and their significance, Petitioner's crime did not occur within these original Choctaw boundaries. He committed his crime in Cleveland County, which is entirely north of the main Canadian River. Specifically, Petitioner committed his

[1] A subsequent treaty designated a portion of this vast area of Choctaw land as the Chickasaw district. See Choctaw and Chickasaw Treaty of Jan. 17, 1837, 11 Stat. 573

crime on the 14000 block of Banner Road in Lexington, Oklahoma, which is about 11 miles due north of the main Canadian River. Again, this river is the northern border of historic Choctaw country. Indeed, at the district court below, Petitioner did not claim he committed his crime within historic Choctaw country, but instead within historic Citizen Potawatomi Nation lands. *See* Pet. App. B at 3-4.

Nor is it the case that, as Petitioner appears to claim, the Treaty of Dancing Rabbit Creek immunizes Choctaws from state jurisdiction wherever in the United States they may commit a crime, even if outside historic Choctaw borders. That treaty was entered into at a time when Indians were expected to remain on land set aside for them and non-Indians were not allowed on that land without express authorization. *See, e.g.*, 7 Stat. 335, arts. X, XII (prohibiting traders from entering Choctaw country without permission from the Choctaw Nation or the United States and promising to remove all intruders); *see also* Act of June 30, 1834, 4 Stat. 729 (defining Indian country and setting forth restrictions and conditions for United States citizens to enter Indian country). Article IV of the treaty thus guaranteed to the Choctaws that "no part of the land granted them shall ever be embraced in any Territory or State; but the United States shall forever secure said Choctaw Nation from, and against, all laws" except those enacted by the Choctaw government or the U.S. Congress. 7 Stat. 334, art. IV. Petitioner relies on this provision in his attempt to undo his conviction, but nothing in Article IV of the treaty immunizes individual Choctaws from state law for crimes committed *outside* the Choctaw Nation. It only promised that the lands

granted to the Choctaw Nation would not be part of a state or subject to state laws—a promise that was later abrogated by Congress repeatedly. *See infra*.

Petitioner also relies upon Article VI of the Treaty of Dancing Rabbit Creek. Under Article VI, if a Choctaw Indian "commit[s] [an] act[] of violence upon the person or property of a citizen of the U.S." then "such person so offending shall be delivered up to an officer of the U.S. if in the power of the Choctaw Nation…; but if such offender is not within the control of the Choctaw Nation, then said Choctaw Nation shall not be held responsible for the injury done by said offender." 7 Stat. 334. Again, this provision relates to the duties of the Choctaw Nation to handle criminal offenders within their control, *not* to immunize a Choctaw from local law for a crime committed outside the Choctaw Nation's control. Even when signed, the Treaty of Dancing Rabbit Creek was not a guarantee that Choctaws committing crimes in Maryland or Maine would be immune from state criminal law.

In any event, as the briefing in *Sharp v. Murphy* makes clear, the promises in the Treaty of Dancing Rabbit Creek of never allowing Choctaw land to become part of a State or subject to state law were repeatedly abrogated by Congress. *See Sharp v. Murphy*, No. 17-1107, Pet. Br. 22-32, Pet. Suppl. Br. 1-6; *see also*, *e.g*, Indian Department Appropriations Act of 1897, ch. 3, § 1, 30 Stat. 83 (applying Arkansas law to all within Choctaw lands irrespective of race); Curtis Act of 1898, 30 Stat. 495 (abolishing tribal courts and making tribal law unenforceable); Choctaw and Chickasaw Allotment Agreement of July 1, 1902, 32 Stat. 641; Act of Apr. 28, 1904, ch. 1824, § 2,

33 Stat. 573 (confirming that Arkansas law applied to all those in Indian Territory "Indian, freedman, or otherwise"); Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267 (allowing historic Choctaw lands to be embraced within a new State—Oklahoma—and subjecting those lands to the new state's laws and courts). For these reasons, Petitioner is wrong that the Treaty of Dancing Rabbit Creek divests the State of jurisdiction to convict him of his crimes.

III. Petitioner did not commit his crime in Indian country.

Although he does not do so in his Petition, Petitioner had raised in the courts below the theory that the State lacked jurisdiction to convict him because he committed his crime in Indian country, namely, the alleged reservation of the Citizen Potawatomi Nation (CPN). *See* Pet. App. B 3-4. Because this claim has not been raised in the Petition, it cannot be grounds for certiorari. In any event, it is meritless.

A. Reservation disestablishment generally.

Under the Indian Major Crimes Act, and unless Congress indicates otherwise, the federal government exercises jurisdiction to the exclusion of the states over crimes committed by or against an Indian in Indian country. *See* 18 U.S.C. § 1152; *see also United States* v. *John*, 437 U.S. 634, 651 (1978). Federal law defines "Indian country" to include "land within the limits of any Indian reservation under the jurisdiction of the United States." 18 U.S.C. § 1151(a). The Indian Major Crimes Act covers serious offenses such as murder, rape, kidnapping, and manslaughter. 18 U.S.C. § 1153(a). Assuming Petitioner is an Indian for purposes of federal law, it is true that his crime

occurred within the 1872 boundaries of the Potawatomi reservation, but that reservation ceased to exist in 1891.

The "touchstone" to determine whether a given statute or statutes erased reservation boundaries is congressional purpose, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 330 (1998), namely, whether Congress intended the land be "divested of all Indian interests," *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). To determine congressional intent, courts look to (1) the text of the statute, (2) the historical context surrounding the passage of the statute, and (3) the subsequent jurisdictional history and character of the land in question. *Solem, 465 U.S. at* 470. "The most probative evidence of congressional intent" is the first factor, "the statutory language used to open the Indian lands," where:

> 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. When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.

Id. at 470-71. Of course, "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment." *Id.* at 471. Rather, when such provisions are found in a surplus lands statute, it constitutes an "extreme" example of clear congressional intent to diminish the reservation. *Id.* at 469, n. 10.

This Court's decision in *DeCoteau* provides a particularly pertinent example. There, the Act of March 3, 1891, 26 Stat. 989, 1035, expressly stated that the Sisseton-Wahpeton Indian Tribe agreed to "cede, sell, relinquish and convey" all interest in unallotted lands on the Lake Traverse Indian Reservation, and in consideration the Tribe would be compensated by the United States. Furthermore, "South Dakota had exercised jurisdiction over the unallotted lands of the former reservation for some 80 years." *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 449 (1975). This Court held that "'the face of the Act,' and its 'surrounding circumstances' and 'legislative history,' all point unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891." *Id.* at 445.

The allotment agreement of the Sisseton-Wahpeton Indians at issue in *Decoteau* and that of the CPN at issue here were ratified by Congress in the same Act. Both agreements contained express language of cession and relinquishment in consideration for a fixed sum payment to be paid to the respective Tribes by the federal government. *Compare* Pottawatomie Agreement, 26 Stat. 989, 1016 *et seq*. *with* Sisseton-Wahpeton Agreement, 26 Stat. 989, 1035 *et seq*. And similar to *DeCoteau*, Oklahoma's jurisdiction in the former CPN reservation has gone unquestioned for over a century. Thus, this case necessitates the same result as in *DeCoteau*.

B. History of the Citizen Potawatomi Nation

The Potawatomis resided in Michigan and Indiana before they were removed to the Kansas Territory. In preparation for Kansas statehood, certain Potawatomis

were removed from Kansas to Indian Territory, where a 30-mile square tract of land was set aside for "the exclusive use and occupancy of that tribe." Treaty with the Potawatomi, February 27, 1867, 15 Stat. 531. Pursuant to this treaty, members of the tribe could continue to elect to become U.S. citizens as they had under a previous agreement, *id.* at Art. VI, and thus this group that moved from Kansas to the Indian Territory (present-day Oklahoma) would later be known as the Citizen Band Potawatomi Nation (CPN). For the CPN, "a tract of land was selected which lay immediately west of the Seminole country." *Seminole Nation v. United States*, 102 Ct. Cl. 565, 617 (1944). In 1872, Congress appropriated funds for "surveys of exterior boundaries of Indian reservations." Act of May 29, 1872, 17 Stat. 165, 186. In September of that same year, O.T. Merrill was hired to survey the exterior boundaries of the Pottawatomie reservation. *See* 26 Stat. 989, 1016, art. I.[2]

The 1867 Treaty stated that this reservation "shall never be included within the jurisdiction of any State or Territory, unless an Indian Territory shall be organized ... ." *Id.* art. 3. However, as with the Choctaws, this arrangement would not last. The United States entered the allotment era in federal Indian policy and, by divvying up tribal land among members, Congress attempted to push Indians into adopting a more agrarian lifestyle and individualized system of property ownership. *See Solem*, 465 U.S. at 466-67. At first, Congress provided for allotments on a tribe-

[2] "Thereafter, the Pottawatomies occupied the lands up to the west of this line, but it does not appear that a patent to the lands was ever issued to the nation as provided for in the treaty." *Seminole Nation*, 102 Ct. Cl. at 618.

by-tribe basis, including for the Potawatomi tribe. *See, e.g.*, an Act of May 23, 1872, 17 Stat. 159. Then, in 1887, Congress passed the General Allotment Act. 24 Stat. 388. Section 6 of this Act provided that upon completion of allotment and issuance of a fee patent, the Indian allottee "shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 24 Stat. 388, § 6.

After taking 1,400 allotments, by the Act of March 3, 1891 the CPN agreed to "cede, relinquish, and forever and absolutely surrender to the United State all their claim, title and interest of every kind and character" in lands described in the Act and in "consideration for such relinquishment" the United States pledged a fixed "sum of one hundred and sixty thousand dollars." 26 Stat. 989, 1016. This ceded area of land included the location of Petitioner's crime, which was north of the main Canadian River and east of the Indian Meridian. *See id.* art. I. Thus, "the Pottawatomies, by [this agreement], … ceded to the United States the lands assigned to them under the treaty of February 27, 1867." *Seminole Nation v. United States*, 102 Ct. Cl. 565, 618 (1944); *see also id.* at 590 ("By an agreement ratified by the Act of March 3, 1891 (26 Stat. 989, 1016), the Pottawatomies ceded to the United States the lands which had been set apart for them as a reservation…."). In addition, Article II of the 1891 Act confirmed that the provisions of the General Allotment Act govern allot-

ments already made, including Section 6, which provided that allottees who had received their land patent would be "subject to" and have the "benefit of" state or territorial laws.

After allotments were selected and payments made, President Benjamin Harrison issued a proclamation opening the remaining Potawatomi land—along with the land of the Sac and Fox Nation, the Iowa Tribe, and the Absentee Shawnees pursuant to their respective agreements—to settlement. The President found that the Potawatomis "ceded and absolutely surrendered … all their title and interest in and to the lands" in the Oklahoma Territory as "described in Article I of [the 1891 Agreement]." BENJAMIN HARRISON, PROCLAMATION 311—OPENING TO SETTLEMENT LANDS ACQUIRED FROM THE SAC AND FOX NATION OF INDIANS, OKLAHOMA TERRITORY, Sept. 18, 1891. The President further confirmed the allotments made were done "under the provisions of the general allotment act." *Id*.

On November 16, 1907, President Theodore Roosevelt proclaimed Oklahoma a new state, merging the Oklahoma Territory (which contained the former CPN reservation) and the Indian Territory. *See generally* Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267; Luther B. Hill, *A History of the State of Oklahoma* 369-73 (1910). From the territorial government to statehood to the present day, neither the State, nor the federal government, nor the Tribe has treated the area at issue as a reservation.

C. The Citizen Potawatomi Nation reservation was disestablished.

Pursuant to the agreement ratified by Congress on March 3, 1891, the CPN agreed to "cede, relinquish, and forever and absolutely surrender to the United State all their claim, title and interest of every kind and character" in tribal lands and in "consideration for such relinquishment" the United States pledged a fixed "sum of one hundred and sixty thousand dollars." 26 Stat. 989, 1016 *et seq*. This Court has repeatedly said that this language is "precisely suited" to reservation diminishment and the combination of cession language with a lump sum payment creates an "almost insurmountable" presumption that diminishment occurred. *See Yankton Sioux Tribe*, 522 U.S. at 344.

The events surrounding the passage of the Act as well as the land's jurisdictional history serve only to confirm congressional intent here. Months after the Act passed, President Harrison proclaimed the lands opened to settlement after finding that the CPN "ceded and absolutely surrendered … all their title and interest in and to the lands" in the Oklahoma Territory as "described in Article I of [the Pottawatomie Allotment Agreement]." HARRISON PROCLAMATION 311 of Sept.18, 1891. In *Rosebud Sioux*, this Court found that such a presidential proclamation "is an unambiguous, contemporaneous statement, by the Nation's Chief Executive, of a perceived disestablishment" reflecting "the clear import of the congressional action." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603 (1977).

Subsequent events confirm that disestablishment was the universal understanding of the State, the federal government, and the Tribe. Since statehood, 112 years

ago this month, the State of Oklahoma has prosecuted state law crimes committed by or against both Indians and non-Indians in this area. *Cf. Rosebud Sioux*, 430 U.S. at 603 ("[T]he single most salient fact [of subsequent jurisdictional history] is the unquestioned actual assumption of state jurisdiction over the unallotted lands."). Not a single criminal case involving an Indian has been tried in federal court under the Major Crimes Act on the theory that former Potawatomi lands constitute a reservation.

The CPN tribal historic preservation officer similarly acknowledges that "the federal government tried to Americanize Natives by dissolving reservations and allotting a section of land to each tribal member." CITIZEN POTAWATOMI NATION, EXPLAINING TRIBAL LAW: RESERVATION V. TRUST LAND, Sept. 7, 2017, *available at* https://www.potawatomi.org/explaining-tribal-law-reservation-vs-trust-land/. Moreover, she states that, even when national Indian policy shifted allowing tribes to recreate their governments and place land in trust, nothing "recreate[d] our reservation." *Id.* In this very case, the CPN filed an affidavit indicating that "the CPN has historically not operated with any assumption that its original borders established prior to 1891 are still intact." Pet. App. B at 3. Thus, the text of the 1891 Act, as well as the contemporaneous and subsequent history, establish that Congress divested the tribe of all its interest in the land and thereby disestablished the reservation. This leaves no doubt about the State's jurisdiction to prosecute Petitioner for his crime committed on that land.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

MIKE HUNTER
Attorney General of Oklahoma

JENNIFER CRABB
Asst. Attorney General

MITHUN MANSINGHANI
Solicitor General
Counsel of Record

RANDALL YATES
Asst. Solicitor General

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

Counsel for Respondent

November 25, 2019