

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 24 2019

JOHN D. HADDEN
CLERK

KENDALL DEAN MITCHELL,

Petitioner,

-vs-

STATE OF OKLAHOMA,

Respondent.

No. PC-2018-1204

**ORDER AFFIRMING DENIAL OF
APPLICATION FOR POST-CONVICTION RELIEF**

The Petitioner has appealed to this Court from an order of the District Court of Washington County denying his application for post-conviction relief in Case No. CF-1988-295. In that case, Petitioner entered a plea of guilty to Murder in the First Degree, and was sentenced to life in prison. Petitioner did not seek to withdraw his pleas within applicable time periods, and thus failed to perfect direct appeal proceedings from his Judgment and Sentence.

Petitioner has failed to establish entitlement to any relief in this post-conviction proceeding. *Russell v. Cherokee County District Court*, 1968 OK CR 45, ¶ 5, 438 P.2d 293, 294 (it is fundamental

that where a post-conviction appeal is filed, the burden is upon the petitioner to sustain the allegations of his petition). Post-conviction review provides petitioners with very limited grounds upon which to base a collateral attack on their judgments and sentences. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. All issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review. 22 O.S.2011, § 1086; *Logan, supra*.

Petitioner claims that he is an Indian and that his crimes in this case were committed in Indian Country. He argues that federal courts had exclusive and sole jurisdiction over his crimes, and has cited *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017) in support of his arguments. However, the United States Court of Appeals for the Tenth Circuit stayed its decision in *Murphy* pending the United States Supreme Court's final disposition of the petition for writ of certiorari. *Murphy v. Royal*, Nos. 07-7068 & 15-7041 (10th Cir. November 16, 2017). The United States Supreme Court has granted the petition for writ of certiorari. *Royal v. Murphy*, __ U.S. __, 138 S.Ct. 2016, 201 L.Ed.2d 277 (May 21, 2018). Therefore, *Murphy* is

not a final decision and any reliance Petitioner places thereon is premature.

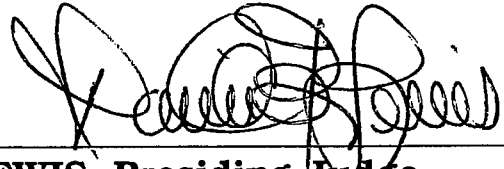
Petitioner claims his application for post-conviction relief is not solely based on *Murphy*, and therefore it should be heard on the merits. However, Petitioner has not established any sufficient reason why his other arguments were not asserted prior to the entry of his guilty plea or in direct appeal proceedings from his Judgment and Sentence. 22 O.S.2011, § 1086; *Logan, supra*. Petitioner has not established that the District Court lacked jurisdiction in this case. Okla. Const. Art. VII, § 7 (District Courts shall have unlimited original jurisdiction of all justiciable matters in Oklahoma).

Therefore, the order of the District Court of Washington County denying Petitioner's application for post-conviction relief in Case No. CF-1988-295 should be, and is hereby, **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the MANDATE is ORDERED issued forthwith upon the filing of this decision with the Clerk of this Court.

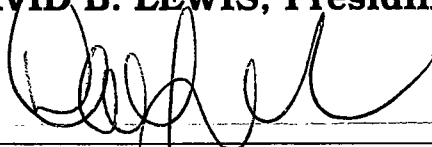
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

24th day of May, 2019.



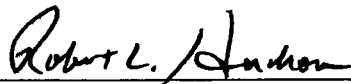
DAVID B. LEWIS, Presiding Judge



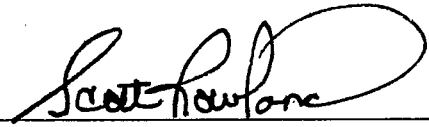
DANA KUEHN, Vice Presiding Judge



GARY L. LUMPKIN, Judge



ROBERT L. HUDSON, Judge



SCOTT ROWLAND, Judge

ATTEST:



Clerk

PA/F

Appendix B

Washington County, Oklahoma
District Court Decision

DISTRICT COURT
WASHINGTON COUNTY, OK
FILED

JILL L. SPITZER
COURT CLERK

BY Shelly Bates DEPUTY

) Case No. CRF-1988-295

Respondent/Appellee.

The Court takes judicial notice of the case file herein.

The Court accepts as true that the Appellant is a member of the Cherokee Nation, and he has attached to his pleadings his tribal card showing him to be a 125/512 member of the Cherokee Nation of Oklahoma.

On April 3, 1989, with counsel present, the Defendant entered a plea of guilty to the charge of Murder In The First Degree, and was sentenced by the Honorable John G. Lanning to Life in prison.

Appellant alleges that the crime for which he was convicted occurred within the boundaries of the Cherokee Nation, pursuant to an 1866 treaty with the federal government.

The record is void of any evidence which claims with any specificity the location of the murder, other than the Information filed on November 2, 1988, alleges the crime occurred in Washington County. The Defendant claims the crime was committed in a certain area of Washington County. An affidavit in the case states it happened "north east of Copan, Oklahoma," which could be anywhere in northern Washington County near the Kansas border. The Court can find no address, county road or section line that would give any clear description for where the event occurred.

The Murphy case only address the Muscogee Creek Nation tribe and does not further elaborate on the application to the other Oklahoma tribes. No guidance is given to lower courts on how said ruling is to be applied in cases like the one at bar that involves a different tribe, or for determining the current boundaries for a certain tribe.

The case is now almost 30 years old and the Defendant has never appealed his conviction. In 1994, a pro se Application For Post-Conviction Relief was filed by the appellant in the District Court of Washington County.

In the 1994 Application, Appellant did not raise any jurisdictional issues, nor reference the location of where the crime occurred. He raised ineffective assistance of counsel and that his plea and acknowledgment of the crime was not adequate. Both claims were denied.

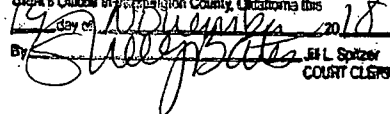
All claims which could have previously been raised but were not are waived, and all claims which were raised in a direct appeal or in previous post-conviction proceedings are barred as res judicata. See Title 22 O.S. 1991 §1086. See Also Fowler v. State, 1995 OK CR 29.

The Murphy case is presently pending before the United States Supreme Court. Until such time as the matter is decided by the Supreme Court and further direction is given to lower courts, this Court will not take action which could have irreversible effects.

For the reasons stated herein, the Application For Post-Conviction Relief is denied.



Judge of the District Court

I, JHL Spitzer, Court Clerk for Washington County, Oklahoma
hereby certify that the foregoing is a true correct and full copy of
this instrument herewith set out as appears of record in the Court
Clerk's Office in Washington County, Oklahoma this
19 day of December 2018
By  JHL Spitzer
COURT CLERK