

No. 19-8126

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IN THE  
**Supreme Court of the United States**

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GARRY WAYNE WILSON

*Petitioner,*

*v.*

OKLAHOMA,

*Respondent.*

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

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**Brief in Opposition**

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## **QUESTION PRESENTED**

Whether Oklahoma had jurisdiction to convict Petitioner of murder within the historic boundaries of the Cherokee Nation?

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## STATEMENT

1. On September 9, 2016, Petitioner shot Terrel Demond Smith multiple times with a shotgun, killing him. The murder took place at Petitioner's farm in Tulsa County (Tr. 413-14, 639, 713-14). Petitioner was convicted of one count of first degree murder and one count of possession of a firearm while under the supervision of the department of corrections. The trial court ordered Petitioner to serve consecutive sentences of life and ten years imprisonment.

2. Petitioner filed a direct appeal of his convictions, which was denied by the Oklahoma Court of Criminal Appeals ("OCCA"). *See Wilson v. State*, No. F-2018-56 (Okla. Crim. App. May 23, 2019).

3. After the OCCA denied his direct appeal, Petitioner filed an application for post-conviction relief in the District Court of Tulsa County, challenging that court's jurisdiction over his crimes. The district court denied the application and the OCCA affirmed. *See Wilson v. State*, No. PC-2019-670 (Okla. Crim. App. Mar. 2, 2020); *Wilson v. State*, No. CF-2016-5198 (Tulsa Co. Dist. Ct. Sept. 4, 2019).

4. On July 1, 2019, Petitioner filed the application for post-conviction relief that is the subject of the instant petition for writ of certiorari. This application, filed in Tulsa County, alleged the State lacked jurisdiction pursuant to the Indian Major Crimes Act and the General Crimes Act (18 U.S.C. §§ 1151-1153).<sup>1</sup> Petitioner argued

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<sup>1</sup> The petition for writ of certiorari appears to challenge only Petitioner's murder conviction, as that is the only conviction referenced by Petitioner, and he alleged the "crime in this case is a 'major crime' enumerated in 18 U.S.C. § 1153." Pet. at 5.

both that the land on which the crime occurred was allotted or trust land, and that it was within the boundaries of a reservation. On September 4, 2019, the district court denied relief, holding that Petitioner failed to show that he was an Indian because he did not prove that he has some Indian blood. Resp. App. at 3.<sup>2</sup> The court also held that Petitioner's claim failed because: 1) the Tenth Circuit's decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (U.S. May 21, 2018) (No. 17-1107) is not final; 2) independent of *Murphy*, Petitioner had failed "to demonstrate the existence of a Cherokee Reservation"; and 3) Petitioner's assertion that the crimes were committed on a restricted allotment or trust land was wholly unsupported. Resp. App. at 3-4.

5. On appeal, the OCCA found the claim waived because it was not raised on direct appeal. Pet. App. A at 2. The court then determined that Petitioner had "cite[d] no controlling authority that established the District Court lacked jurisdiction in this case." Pet. App. A at 2. For that reason, the court could not "find any sufficient reason to allow [Petitioner's] ground for relief to be the basis of his application for post-conviction relief." Pet. App. A at 2.

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Possession of a firearm while under the supervision of the department of corrections is not a major crime as defined by section 1153(a).

<sup>2</sup> Petitioner's Appendix A includes the OCCA's denial of his post-conviction appeal, followed by the Tulsa County District Court's order denying the post-conviction application. However, page 4 is omitted from the Tulsa County District Court's order. That order is attached as Respondent's Appendix. Thus, when Respondent refers to "Pet. App. A", Respondent cites only the OCCA's decision.

## DISCUSSION

Petitioner alleges that the State of Oklahoma prosecuted him for First Degree Murder without jurisdiction because he is a Cherokee Indian and his crime occurred on an existing Cherokee Reservation. The answer to this question is likely informed by this Court's recent decision in *McGirt v. Oklahoma*, where this Court answered whether the Muscogee (Creek) Reservation exists today. 2020 WL 3848063, 591 U. S. \_\_\_ (2020); *see also Sharp v. Murphy*, No. 17-1107.

After this Court held that the Muscogee (Creek) reservation is still intact, this Court issued orders in *Johnson v. Oklahoma*, No. 18-6098 (Murder in historic lands of Seminole Nation), *Bentley v. Oklahoma*, No. 19-5417 (Manslaughter in historic lands of Citizen Pottawatomie Nation), *Davis v. Oklahoma*, No. 19-6428 (Child Molestation in historic lands of Choctaw Nation), and *Terry v. Oklahoma*, No. 18-8801 (Manufacturing Methamphetamine in historic lands of Ottawa Tribe), which granted certiorari, vacated the judgment, and remanded for further consideration in light of *McGirt v. Oklahoma*.

Given the backgrounds and issues of those cases, Respondent recognizes that this case should be treated the same. In doing so, Respondent does not concede that Petitioner is entitled to his requested relief. In particular, Respondent does not concede that either the Petitioner or the victim of his crime was a tribal member at the time of the murder, that the crime actually occurred within the boundaries of an Indian

reservation as alleged, or that there is not an independent and adequate state ground to affirm Petitioner's conviction.

**CONCLUSION**

For the foregoing reasons, this Court should remand this case for further proceedings in light of its decision in *McGirt v. Oklahoma*.

Respectfully submitted,

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July 20, 2020