No. 18-6098

IN THE
Supreme Court of the United States

JOE JOHNSON, JR.,

Petitioner,

v.

OKLAHOMA,

Respondent.

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

Brief in Opposition

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QUESTIONS PRESENTED

This Court is currently deciding whether the historical boundaries of the Creek Nation—one of the "Five Civilized Tribes" occupying what was then known as "Indian Territory"—is an Indian reservation today within the meaning of 18 U.S.C. § 1151(a). *Carpenter v. Murphy*, No. 17-1107 (U.S.). The question currently pending before the Court is whether the State lacked jurisdiction under the Major Crimes Act, 18 U.S.C. § 1153(a), to prosecute an Indian offender within those historical boundaries.

This Petition presents the related question of whether the historical boundaries of the Seminole Nation—one of the other Five Civilized Tribes—is also an Indian reservation today under Section 1151(a). In 1977, Petitioner was convicted of Murder in the First Degree and sentenced to life imprisonment by the State of Oklahoma.

The questions presented are:

1. Whether the prosecution of Petitioner's crime is subject to exclusive federal jurisdiction under the Major Crimes Act.

2. Whether Petitioner's jurisdictional claim is barred.

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STATEMENT

Petitioner raises a question substantially identical to the question currently pending before this Court in *Carpenter v. Murphy*, No. 17-1107. Based on the arguments by the State of Oklahoma in that case, this Court should deny this Petition. At a minimum, this Court should withhold consideration of this Petition until it decides the *Murphy* case.

A. The Formation of Oklahoma.

1. The Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations "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). These tribes once inhabited land stretching across what is now Georgia, Alabama, and northern Florida. 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. The Tribes received patents for land in fee simple, and the United States promised the Fives Tribes that as long as they occupied their lands, they would be able to govern themselves, 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 Creeks and Seminoles arts. I, IV (Aug. 7, 1856), 11 Stat. 699, 700.

During the Civil War, the Seminole Nation allied with the Confederacy. After the war, the United States required the Seminole Nation to emancipate all slaves, to grant these freedmen full citizenship in the Tribe, and to cede lands for their settlement. Treaty of Mar. 21, 1866, art. II & III, 14 Stat. 755. Although the Seminoles' territory originally covered 2,169,080 acres—ceded to them by the Creek Nation in 1856—the 1866 treaty reduced that territory to 200,000 acres. *Id.* art. III. Then in 1873, the Creeks ceded the Seminoles an additional 175,000 acres. Treaty of Mar. 3, 1873, 17 Stat. 626.

Over time, non-Indians began to populate Indian Territory. The absence of a functioning legal system meant that violent crimes went largely unpunished, and business agreements were effectively unenforceable. To remedy this, Congress created federal territorial courts in Indian Territory and extended Arkansas law to govern non-Indians. Act of Mar. 1, 1889, ch. 333, § 1, 25 Stat. 783; Act of Mar. 1, 1895, ch. 145, § 4, 28 Stat. 696. The Indians' communal land tenure also proved problematic, as it prevented Indians and non-Indians alike from developing the land economically. As a result, Congress ultimately decided to abolish the Five Tribes' governance over the land, break up their communal land title, and create the State of Oklahoma.

2. Congress sought to dissolve the Five Tribes "in stages." Jeffrey Burton, *Indian Territory and the United States*, at 194 (1995). Federal officials knew that "[w]hatever proceedings are had in Indian territory as to the final breaking up of Five Tribes and

their becoming citizens of the United States" cannot "be proceeded with in the manner that lands of the reservation wild Indians are allotted" because "they are not on the ordinary Indian reservations, but on lands patented to them by the United States." Census Bureau, Report on Indians Taxed and Not Taxed (1890). 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, ch. 209, § 16, 27 Stat. 645. This was done "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). Congress eventually authorized the Commission to survey Indian Territory and enroll tribal members in preparation for allotment of their lands. Act of June 10, 1896, ch. 398, § 1, 29 Stat. 339, 343. Congress also 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 of 1897, ch. 3, § 1, 30 Stat. 83.

Then in 1898, Congress passed the "Curtis Act," which abolished tribal courts and banned federal courts from enforcing tribal law. Ch. 517, §§ 26, 28, 30 Stat. 495. The Act also directed the Dawes Commission to allot the Five Tribes' land following tribal

enrollment. § 11, 30 Stat. 497. The Seminoles had already entered into an allotment agreement with the United States that provided "[w]hen the tribal government shall cease to exist" the chief will "deliver to each allottee a deed conveying to him all the right, title, and interest of the said Nation … to the lands so allotted to him." Seminole Allotment Agreement, 30 Stat. 567, 568. And in 1901, Congress granted U.S. citizenship to "every Indian in Indian Territory." Act of Mar. 3, 1901, ch. 868, 31 Stat. 1447. In 1904, Congress confirmed and extended Arkansas law to all persons and estates in Indian Territory, "Indian, freedman, or otherwise." Act of Apr. 28, 1904, § 2, 33 Stat. 573.

The Five Tribes' governments were scheduled to terminate by March 4, 1906. Act of Mar. 3, 1903, ch. 994, § 8, 32 Stat. 1008. Just four days before dissolution, Congress temporarily extended the tribal governments, "until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law." S.J. Res. 37, 59th Cong., 34 Stat. 822. This was done primarily to avoid disruption of the ongoing allotment process and to prevent railroad companies from receiving a windfall of contingent land grants.

Then on April 26, 1906, Congress passed the Five Tribes Act, ch. 1876, 34 Stat. 137, to "provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory." Congress closed the tribal rolls, abolished tribal taxes, took control of tribal schools, and directed the Secretary of the Interior to seize and sell all tribal buildings and furniture. The Seminole chief was allowed to immediately start

delivering deeds to tribal members, rather than waiting for complete dissolution. § 6, 34 Stat. 139. The Act also directed federal authorities to sell any unallotted lands, with the proceeds applied to tribal debts and any remainder paid out per capita to tribal members. §§ 16-17, 34 Stat. 143-44. In doing all this, Congress permitted the nominal existence of tribal governments, but with severe limitations on their little remaining operations and authority. § 28, 34 Stat. 148.

Finally, Congress enacted the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906), authorizing the creation of the State through the merger of Indian and Oklahoma Territories. Congress directed the transfer of all cases arising under federal law, pending in territorial courts in the Indian and Oklahoma Territories at the time of statehood, to the newly created U.S. district courts for the Western and Eastern Districts of Oklahoma. § 16, 34 Stat. 276. All other cases were transferred to state court. § 20, 34 Stat. 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. 275. At 9 a.m. on November 16, 1907, President Teddy Roosevelt signed a proclamation authorizing the creation of the State of Oklahoma. Proclamation 780, 35 Stat. 2160 (Nov. 16, 1907). In the 111 years since, the State of Oklahoma has consistently prosecuted Indians for major crimes committed within the historical boundaries of the Seminole Nation. Not once has either the federal government or the tribe prosecuted any crimes in this area on theory that it was a reservation.

B. Case Background.

1. On March 1, 1977, an undersheriff "investigated an abused animal complaint, and during his investigation discovered the body of W. A. Woody Streater." *Johnson v. State*, 597 P.2d 340, 341 (Okla. Crim. App. 1979). Upon examining the body, he discovered that "[t]he deceased had been shot in the chest by a 16 gauge shotgun slug." *Id.* Petitioner ultimately "admitted shooting the deceased through the door of deceased's one room home" and "repeated his confession on May 3, 1977." *Id.* At that time, Petitioner "also took investigators to a location near the crime scene where he unearthed a billfold taken from the [deceased's] body." *Id.* Based on this evidence, Petition was convicted of Murder in the First Degree and sentenced on October 31, 1977 to life imprisonment.

2. Petitioner filed a direct appeal to the Oklahoma Court of Criminal Appeals ("OCCA"), which affirmed his conviction. *Johnson v. State*, 597 P.2d 340 (Okla. Crim. App. 1979). Since that decision, "Petitioner has filed numerous pleadings [and] previous unsuccessful Post Conviction Actions." Pet. App. 5a. To wit, Petitioner has unsuccessfully filed no fewer than eleven petitions for post-conviction relief under state law.

3. Petitioner first sought post-conviction relief in Seminole County District Court in 1988, alleging that he was tried by a biased judge and jury, that the State suppressed exculpatory evidence, that the State presented perjured testimony, and that he was denied the effective assistance of appellate counsel. The district court denied

all of the claims on the merits, after holding an evidentiary hearing on Petitioner's ineffective assistance of appellate counsel claim. The OCCA affirmed the district court's denial of the ineffective assistance of appellate counsel claim, and procedurally barred the remaining claims. *See Johnson, Jr. v. State*, No. PC-1989-27 (Okla. Crim. App. Mar. 15, 1989).

Petitioner also filed a petition for writ of habeas corpus in the Eastern District of Oklahoma, which contained unexhausted claims. *Johnson v. Cody*, 948 F.2d 1294, at *1 (10th Cir. Nov. 15, 1991) (unpublished table decision). After the district court dismissed the petition, Petitioner filed an amended petition containing only exhausted claims. *Id*. Those claims were: (1) suppression of exculpatory evidence; (2) use of perjured testimony; and (3) ineffective assistance of appellate counsel. *Id*. The district court dismissed the petition. *Id*. Petitioner appealed to the Tenth Circuit and included arguments that the preliminary hearing judge was related to the victim, and therefore not impartial. *Id*. The Tenth Circuit found the judicial bias claim was not properly before it and denied the remainder of Petitioner's claims on the merits. *Id*. at *1-2. This Court denied certiorari. *Johnson v. Cody*, 503 U.S. 973 (Apr. 6, 1992).

Petitioner filed two more post-conviction applications in Seminole County in 1992 alleging that the Information by which he was charged was defective, that trial counsel suffered under a conflict of interest, that the preliminary hearing judge was biased, and error in the manner in which judges are appointed. The district court and OCCA found these claims procedurally barred. *See Johnson v. State*, No. PC-1992-

0699 (Okla. Crim. App. Aug. 11, 1992); *Johnson v. Brown*, No. PC-1992-1158 (Okla. Crim. App. Feb. 2, 1993). Petitioner attempted to file a petition for writ of certiorari in this Court from the second of these applications, but failed to properly file it.

In 1993, Petitioner filed another post-conviction application in Seminole County, which was denied by the district court and OCCA. *See Johnson v. State*, No. PC-1193-910 (Okla. Crim. App. Oct. 22, 1993).

Also in 1993, Petitioner filed another federal habeas petition in the Eastern District of Oklahoma,[1] alleging bias on the part of the preliminary hearing judge and that state district court judges were selected in an unconstitutional manner. Petitioner's allegations included a litany of alleged improper relationships, *e.g.*, "Deputy/Sheriff Charles Sisco and Highway Patrol Trooper Roy Sisco both of Seminole County, Oklahoma are blood brothers under anti-nepotism laws." Petitioner further alleged that the prosecution fabricated evidence, suppressed material evidence, and presented perjured testimony. The district court denied the petition, and the Tenth Circuit affirmed. *See Johnson v. Cody*, No. 94-7128 (10th Cir. Oct. 28, 1996); *Johnson v. Cody*, No. CIV-1993-928-S (E.D. Okla. Sept. 8, 1994).

During the pendency of Petitioner's habeas petition, Petitioner filed two petitions for extraordinary writs in the Tenth Circuit, again alleging bias on the part of the preliminary hearing judge. The Tenth Circuit denied relief. *See Johnson v. Oklahoma*

[1] Petitioner first filed a petition in the Northern District of Oklahoma, which was dismissed for lack of jurisdiction.

Dept. of Corr., No. 94-707 (10th Cir. Feb. 23, 1994; *Johnson v. Seay*, No. 94-512 (10th Cir. Feb. 23, 1994).

In 1994, Petitioner filed a state petition for a writ of habeas corpus and for a writ of mandamus in Cleveland County District Court challenging the calculation of prison credits, which was denied. *See Johnson v. Cody*, No. CS-1994-20 (Cleveland Cty. Dist. Ct. Mar. 1, 1995). Petitioner appealed to the OCCA, which denied relief on the merits. *See Johnson v. Cody*, No. H-1995-0237 (Okla. Crim. App. May 23, 1995). Petitioner sought certiorari review from this Court, which was denied. *See Johnson v. Cody*, No. 95-5643 (U.S. Oct. 16, 1995).

In 1995, Petitioner filed three challenges to his conviction in the Oklahoma Supreme Court, which that Court transferred to the OCCA. These pleadings alleged a conflict of interest on the part of trial counsel, double jeopardy and discussed—without presenting an actual legal claim—the fact that all of the participants in Petitioner's trial were white. The OCCA denied relief in all three instances. *See Johnson v. Cody*, No. H-95-791 (Okla. Crim. App. Sept. 20, 1995); *Johnson v. Cody*, No. H-1995-0678 (Okla. Crim. App. Aug. 28, 1995); *Johnson v. Cody*, No. O-1995-562 (Okla. Crim. App. July 5, 1995).

In 1996, Petitioner filed an application for writ of habeas corpus in the District Court of Cleveland County in which he alleged that the State withheld exculpatory evidence, suborned perjury and fabricated evidence, that the prosecutor committed misconduct, that his appellate attorney was ineffective, and that the appellate record

was altered. The district court found Petitioner's application to be an improper attempt to challenge the validity of his conviction, which may only be done via an application for post-conviction relief. *See Johnson v. Hargett*, No. CS-1996-22 (Cleveland Cty. Dist. Ct. Dec. 30, 1996). Petitioner then filed in the OCCA two identical petitions for writ of habeas corpus challenging the Cleveland County District Court's order. The OCCA denied relief. *Johnson v. Hargett*, No. H-1997-0055 (Okla. Crim. App. Mar. 19, 1997); *Johnson v. Hargett*, No. H-1997-0034 (Okla. Crim. App. Mar. 19, 1997).

In 1997, Petitioner filed a post-conviction application in Seminole County alleging his trial attorney had a conflict of interest. The district court found Petitioner's claims related to this alleged conflict of interest to be procedurally barred. On appeal to the OCCA, Petitioner again argued that the judge who presided over his preliminary hearing was biased, and also that the judge who denied the post-conviction application at issue was biased. The OCCA declined jurisdiction of Petitioner's attempted appeal after reviewing its docket and concluding Petitioner had filed at least five previous post-conviction appeals. *See Johnson v. State*, No. PC-1997-0829 (Okla. Crim. App. Aug. 12, 1997).

Petitioner thereafter filed, in the Tenth Circuit, a motion for authorization to file a second or successive habeas petition raising the alleged conflict of interest on the part of trial counsel. This motion was denied. *See Johnson v. Hargett*, No. 97-759 (10th Cir. Sept. 23, 1997). Nevertheless, Petitioner filed a habeas petition alleging the conflict of interest claim in the Eastern District of Oklahoma the following month.

In that proceeding, Petitioner sought to have U.S. District Judge Frank Seay recused.[2] The district court dismissed the petition, and the Tenth Circuit affirmed. *See Johnson v. Hargett*, No. 1998-7060 (10th Cir. Oct. 27, 1998).

In 1999, Petitioner filed an application for post-conviction relief in Seminole County alleging he was incompetent to stand trial. The district court denied relief. The OCCA declined jurisdiction over what it found to be at least Petitioner's seventh post-conviction application, and this Court denied review. *See Johnson v. State*, No. 99-7466 (U.S. Feb. 22, 2000); *Johnson v. State*, No. PC-1999-1163 (Okla. Crim. App. Nov. 1, 1999). Petitioner sought leave from the Tenth Circuit to file a successive habeas petition on this basis, before the OCCA's ruling, which was denied. *See Johnson v. Attorney General*, No. 99-7071 (10th Cir. July 16, 1999).

Also in 1999, Petitioner filed a petition for writ of habeas corpus in Comanche County District Court. Petitioner once again alleged that his trial and appellate attorneys operated under a conflict of interest and that the preliminary hearing judge was biased. Petitioner further asserted that other judges within Seminole County were biased. The court denied the petition. *See Johnson v. Poppell*, No. CJ-1999-455 (Comanche Cty. Dist. Ct. Dec. 28, 1999).

In 2000, Petitioner again filed a habeas petition in Comanche County. Petitioner alleged that a change in parole procedures violated the ex post facto clause, argued

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[2] Petitioner sought a writ of mandamus in the Tenth Circuit to force Judge Seay's recusal, which was denied.

that his race factored into the parole decision, alleged that the Governor's involvement with the parole process creates bias, and challenged his prison classification. The district court denied relief. *See Johnson v. Poppell*, No. CJ-2000-378 (Comanche Cty. Dist. Ct. June 11, 2001).

In 2001, Petitioner filed a petition for writ of mandamus in the Oklahoma Supreme Court seeking recusal of two Seminole County judges from post-conviction proceedings. Upon transfer from the Oklahoma Supreme Court, the OCCA dismissed the petition as untimely. *See Johnson v. Colclazier*, No. MA-2001-0116 (Okla. Crim. App. Feb. 27, 2001). Petitioner filed another petition for writ of mandamus in 2001 in the OCCA, which sought to have the OCCA order the Seminole County District Court to rule on yet another post-conviction application. The OCCA denied the writ, reiterating that all of Petitioner's appeals had been exhausted. *See Johnson v. State*, No. MA-2001-0571 (Okla. Crim. App. May 24, 2001). Petitioner filed a third petition for writ of mandamus that year, asking the OCCA to order a judge in Comanche County to rule on the habeas corpus petition in which he challenged parole procedures. The OCCA ordered a response from the district court, which then denied the habeas petition, rendering the petition for mandamus moot. *See Johnson v. State*, No. MA-2001-0618 (Okla. Crim. App. June 27, 2001).

In 2002, Petitioner filed a post-conviction application in Seminole County alleging that one of the members of the law firm that represented him at trial may have

been the author of a bill authorizing the use of lethal injection as a method of execution. The district court denied the claim as frivolous. The OCCA denied Petitioner's appeal, noting that Petitioner had appealed his conviction no fewer than sixteen times. *See Johnson v. State*, No. PC-2002-1322 (Okla. Crim. App. Dec. 12, 2002).

In 2004, Petitioner filed another petition for writ of habeas corpus, this time in the Western District of Oklahoma challenging a misconduct report he received in prison. The petition was dismissed as time barred. *See Johnson v. Ward*, No. CIV-04-1655-F (W.D. Okla. June 28, 2005).

In 2006, Petitioner filed a post-conviction application in the Seminole County District Court re-urging his claims that trial and appellate counsel operated under a conflict of interest, and that one of the attorneys may have authored the lethal injection bill. The district court found the application to be frivolous and duplicative. The OCCA noted that the appeal was at least Petitioner's ninth post-conviction application, barred the claims, and ordered the court clerk to forward its order to the Director of the Administrative Office of the Courts for consideration of whether Petitioner should be included upon a registry of prisoners who have filed frivolous pleadings pursuant to Okla. Stat. tit. 57, § 566.2(B). *See Johnson v. State*, No. PC-2006-267 (Okla. Crim. App. June 8, 2006).

In 2007, Petitioner challenged a prison disciplinary proceeding in Oklahoma County District Court. That court denied relief and Petitioner appealed to the OCCA,

which affirmed. *See Johnson v. Oklahoma Dept. of Corr.*, No. MA-2007-683 (Okla. Crim. App. Aug. 24, 2007).

Petitioner filed another post-conviction application in Seminole County in 2013, and filed a petition for writ of mandamus in the OCCA to compel a ruling from the district court. The district court then denied the application, and the OCCA found the petition for mandamus to be moot. *See Johnson v. Butner*, No. MA-2013-891 (Okla. Crim. App. Jan. 13, 2014). The application challenged the effectiveness of the attorney who represented Petitioner at the evidentiary hearing on his ineffective assistance of appellate counsel claim, and repeated many of the claims Petitioner had raised previously including that trial and appellate counsel had a conflict of interest. The OCCA found the claims barred. *See Johnson v. State*, No. PC-2013-1151 (Okla. Crim. App. Apr. 23, 2014).

In 2016, Petitioner filed a petition for writ of mandamus in the OCCA, which that court dismissed because Petitioner failed to prove he had first sought relief in district court. *See Johnson v. Oklahoma Cty. Dist. Ct. Clerk*, No. MA-2016-683 (Okla. Crim. App. Aug. 16, 2016).

In 2017, Petitioner filed a pleading asking the Oklahoma Supreme Court to grant relief based on the OCCA's "preconceived opinion." This pleading contained pages of allegations of judicial bias, beginning with the preliminary hearing judge. The Oklahoma Supreme Court transferred the matter to the OCCA. The OCCA construed the pleading as an application for post-conviction relief and dismissed the proceeding

based on Petitioner's failure to first file an application in district court. *See Johnson v. Butner*, No. PC-2017-362 (Okla. Crim. App. Apr. 27, 2017).

Petitioner then filed a post-conviction application in Seminole County which repeated the judicial bias allegations, as well as claims of prosecutorial misconduct, subornation of perjury, juror bias, conflicts of interest on the part of prior counsel and that his confession was coerced. The district court and OCCA found the claims barred. *See Johnson v. State*, No. PC-2017-645 (Okla. Crim. App. Sept. 8, 2017).

Finally, on September 13, 2017, Petitioner filed the post-conviction application that is the subject of this proceeding.[3] Petitioner alleged in Seminole County District Court that the state courts lacked jurisdiction pursuant to 18 U.S.C. § 1153, relying on the Tenth Circuit's decision in *Murphy*. The district court denied the claim as premature, given that the mandate in *Murphy* had been stayed and the case was pending review in this Court. The OCCA denied it on procedural grounds, noting Petitioner's many previous challenges to his conviction. *See Johnson v. State*, No. PC-2018-343 (Okla. Crim. App. July 24, 2018). On May 17, 2018, Petitioner's petition for a writ of certiorari was placed on this Court's docket. The present case is described below.

[3] Petitioner also pursued a writ of mandamus in the OCCA when the district court did not immediately rule on his application. This petition was dismissed as moot.

C. Proceedings Below.

1. On March 29, 2018, the Oklahoma District Court for Seminole County denied Petitioner's 11th and subsequent application for post-conviction relief. The court noted that Petitioner specifically "relies on the 10th Circuit Opinion of *Murphy v. Royal*," *i.e. Carpenter v. Murphy*, No. 17-1107 (U.S.).[4] Pet. App. 6a. The district court correctly noted that "[t]he 10th Circuit's decision in *Murphy* is not binding precedent because there is not a mandate," Pet. App. 6a, as the Tenth Circuit stayed the mandate in that case "until the [U.S.] Supreme Court's final disposition." Order, *Murphy v. Royal*, No. 15-7041, Doc. 01019902688 (Nov. 16, 2017).

The district court also noted that "the *Murphy* ruling is case specific only to the boundaries of the 1866 muscogee creek [sic] nation reservation boundaries." Pet. App. 6a. The court reasoned that because "Petitioner was convicted of a crime that did not occur within the boundaries of the Muscogee Creek Nation," and because the reasoning in *Murphy* "has not been extended to the Seminole Nation," his petition for post-conviction must be denied. Pet. App. 7a.

2. On June 24, 2018, the OCCA affirmed. Pet. App. 1a. The court concluded that "Petitioner has failed again to establish entitlement to any relief." Pet. App. 2a. In

[4] The case *Murphy v. Royal*, No. 15-7041 (10th Cir.) was restyled *Royal v. Murphy* on appeal to the U.S. Supreme Court. *See* Pet. ii. During the pendency of that case, Mike Carpenter was automatically substituted for Terry Royal when the former was named Interim Warden of the Oklahoma State Penitentiary. Pet. Br. at ii. The case is currently styled as *Carpenter v. Murphy*, No. 17-1107 (U.S.).

particular, the court affirmed the district court's decision "denying his motion to dismiss [the conviction] under the major crimes act." Pet. App. 3a. In arriving at this conclusion, the OCCA noted that Petitioner "has not provided any reason why the arguments he ma[de] in this subsequent application for post-conviction relief were not asserted or were inadequately raised in his numerous prior applications." Pet. App. 3a. The OCCA held that "Petitioner's arguments are waived and procedurally barred and his state remedies are and have been deemed exhausted on all issues raised in his petition in error, brief, and any prior appeals or post-conviction proceedings." Pet. App. 3a (citing Rule 5.5, Rules of the Oklahoma Court of Criminal Appeals).

3. There is inadequate evidence in the record, and the State does not concede, (1) that Petitioner is a member of an Indian tribe within the meaning of 18 U.S.C. § 1153(a) or (2) that Petitioner committed his crime within the historical boundaries of the Seminole Nation, which he alleges constitutes a reservation within the meaning of 18 U.S.C. § 1153(a). *Cf.* Sup. Ct. Rule 15(2).

REASONS THE PETITION SHOULD BE DENIED

I. This Court's Decision In *Carpenter v. Murphy* May Render This Petition Moot.

Petitioner's first question presented is substantially identical to the question presented in *Carpenter v. Murphy*, No. 17-1107 (U.S.), which is currently being reviewed by this Court. In that case, a member of the Muscogee (Creek) Nation murdered another member of the Creek Nation within the former boundaries of that tribe. *Murphy,* 875 F.3d at 904-05. The question presented is "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)." Pet. i. This Court heard oral argument on that question on November 27, 2018. The Court requested supplemental briefing to be completed by January 11, 2019. Order (Dec. 4, 2018).

Both the Creek Nation and the Seminole Nation are among the "Five Civilized Tribes" that were removed to eastern Oklahoma 150 years ago. These two nations have a closely shared history. It has therefore been acknowledged by all litigants in *Murphy* that, in spite of subtle differences in the histories of the Five Tribes, whatever this Court decides regarding the Creek Nation's former territorial boundaries, that holding will likely be highly relevant, if not dispositive, to related claims involving the four other Tribes—including the Seminole Nation. *See, e.g.*, *Murphy v. Royal*, No. 15-7041, Pet. Br. at 3; U.S. Br. at 22; Resp. Br. at 36; Tr. at 30:5-9, 44:6-45:1,

52:24-53:4. Indeed, the Seminole Nation joined the Creeks' amicus brief submitted to the Tenth Circuit "due to the parallels between the histories of the Creek and Seminole Reservations." Br. of Muscogee (Creek) Nation and the Seminole Nation of Oklahoma, Doc. 01019675499, at 1 (10th Cir. Aug. 12, 2016).

Because Petitioner in this case solely and specifically "relies on the 10th Circuit Opinion of *Murphy v. Royal* [875 F.3d 896 (10th Cir. 2017)]," Pet. App. 6a, it would be inappropriate for this Court to grant certiorari on this question before resolving *Murphy*. That decision will likely dispose of this Petition's first question presented. At most, this Court should hold this case pending *Murphy*.

II. Petitioner's Second Question Presented May Not Alter The Judgment In This Case.

Petitioner's second question presented may similarly rise and fall with the *Murphy* case. Petitioner's second question presented is a procedural claim alleging that the state court erred by not considering the merits of his first question presented. But if, after *Murphy*, it becomes clear that Petitioner's first question presented fails on the merits, then the second question presented cannot affect the judgment below.

This Court has long stated that it "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956); *Williams v. Norris*, 12 Wheat. [25 U.S.] 117, 120

(1827)). On appellate review, "[t]he question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed." *McClung v. Silliman*, 6 Wheat. [19 U.S.] 598, 603 (1821). Thus, this Court decides cases only "in the context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959). Because Petitioner's substantive claim may fail as a result of this Court's decision in *Murphy*, this Court should not grant review of his procedural claim, which would not affect the judgment if his substantive claim fails.

Nor, as stated above, is it even clear that Petitioner is an Indian within the meaning of 18 U.S.C. § 1151, or that Petitioner in fact committed his crime within the historical boundaries of the Seminole Nation. *Supra* at C.3. If not, this would render any decision by this Court a mere advisory opinion.

III. Petitioner's Argument Fails On The Merits.

Finally, for the reasons explained by the State in *Murphy*, Petitioner's substantive claim cannot succeed on the merits.

The authorities Petitioner cites here that are not discussed in *Murphy* do not support Petitioner's claim. Petitioner principally relies upon *Seminole Nation v. United States*, 316 U.S. 310 (1942). Petitioner reads that case as having "adjudicated and determined" "[t]he four corners of the Seminole Nation boundaries." Pet. 4. But that

case only concerned an accounting procedure before the U.S. Court of Claims. As noted, the Seminole Nation had originally been promised 200,000 acres of land in 1866; when it was discovered that the Seminoles had received 11,550.54 acres short of this sum, the U.S. government secured another 175,000 acres of land for the Seminoles at the expense of the Creek Nation. *Supra* at 2. The only question before this Court was whether this later disbursement compensated the Seminole Nation for its loss, as a general matter, or whether the Court of Claims was required to quantify the precise monetary harm the Seminole Nation originally experienced and compare that to the subsequent windfall from the new lands. This Court ultimately held that the Seminole Nation was entitled to a precise accounting. 316 U.S. at 316. But this question of administrative procedure has no bearing on the State's criminal jurisdiction in the disputed area.

Petitioner also cites in his favor *Cobb v. Board of Commissioners of Seminole County*, 151 P. 220 (Okla. 1915). But that case *upheld* the imposition of county taxes on lands originally given to the Seminoles by treaty but then validly conveyed and so made subject to state taxation.

The other cases cited by Petitioner merely relate to claims of inadequate compensation for lands allotted by the federal government in breaking up the Seminole Nation at Statehood. *Seminole Nation of Indians v. United States*, 112 F. Supp. 231 (Ct. Claims 1953) (dismissing petition against United States for insufficient evidence of unfair dealings); *Seminole Nation v. United States*, 92 Ct. Cl. 210, 1940 WL 4090 (Ct.

Claims 1940) (same); *see also Davenport v. State*, 202 P. 18 (Okla. Crim. App. 1921) (upholding conviction for embezzlement of public funds); *Godfrey v. Iowa Land & Trust Co.*, 95 P. 792 (Okla. 1908) (permitting Seminole citizen to execute deed to part of his allotment not designated as his homestead after removal of restrictions on the alienation of the allotted land). Far from supporting Petitioner's claim, these cases only further prove the point that Congress intended to break up communal ownership of the land in order to make way for the State of Oklahoma. In other words, these authorities support the disestablishment of the historical Seminole territory.

Petitioner also ignores the unbroken 111-year history of state prosecution of major crimes in Seminole County. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014); *Mistretta v. United States*, 488 U.S. 361, 401 (1989). Nor does Petitioner acknowledge the significant consequences that this theory would unleash.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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