

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-9526

JIMCY MCGIRT, PETITIONER

v.

STATE OF OKLAHOMA

ON WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

JOINT APPLICATION OF THE UNITED STATES
AND THE MUSCOGEE (CREEK) NATION
FOR LEAVE TO FILE AMICI BRIEFS EXCEEDING THE WORD LIMITS

Pursuant to Rules 22 and 33 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave for the United States and the Muscogee (Creek) Nation to file briefs in excess of the word limits for briefs as amici curiae in this case. The United States intends to file a brief as amicus curiae in support of respondent State of Oklahoma. The Creek Nation intends to file a brief in support of petitioner, and therefore joins in this application. The United States and the Creek Nation each request leave to file a brief not to exceed 11,000 words. Counsel for both parties have consented to this request.

1. Petitioner was convicted and sentenced under Oklahoma law for first degree rape, lewd molestation, and forcible sodomy. On direct appeal, the Oklahoma Court of Criminal Appeals affirmed petitioner's convictions and sentences.

In 2017, the United States Court of Appeals for the Tenth Circuit held that Congress did not disestablish the Muscogee (Creek) Reservation in Oklahoma and that the State therefore lacked jurisdiction to prosecute Indians for the major offenses described in 18 U.S.C. 1153(a) when those offenses were committed on land within that territory. Murphy v. Royal, 975 F.3d 896 (2017). After this Court granted the State's petition for a writ of certiorari in that case, 138 S. Ct. 2026 (2018), petitioner filed an application for post-conviction relief in state court, in which he claimed that he is an Indian, that the sexual abuse occurred on the Creek Reservation, and that the State therefore lacked jurisdiction to prosecute him. Petitioner's post-conviction application was subsequently denied by the district court, and the Oklahoma Court of Criminal Appeals affirmed that denial.

After receiving briefing, hearing argument, and receiving supplemental briefing in Murphy (No. 17-1107) last Term, this Court did not issue a decision in that case, but instead restored the case to the calendar for reargument. The Court then granted petitioner's petition for a writ of certiorari in this case, which, like Murphy, presents the question whether the State of Oklahoma

has jurisdiction to prosecute Indians for major crimes committed within the boundaries of the Creek Nation's historic territory.

2. The United States and the Creek Nation have distinct and substantial interests in the resolution of this case. Most immediately, petitioner's position that all lands within the original territory of the Creek Nation constitute a present-day Indian reservation under 18 U.S.C. 1151(a) -- and that the State has no jurisdiction over crimes involving Indians on any such lands if those lands do constitute a present-day reservation -- would mean that the federal government, rather than the State, has jurisdiction to prosecute crimes committed by or against Indians within that three-million acre area. There also would be ramifications for allocations of civil jurisdiction and the exercise of other authority by the federal government, the State, and the Creek Nation. The United States and the Creek Nation bring distinct and unique perspectives to these issues and the context of this case.

For the United States, the expansion of criminal jurisdiction would result in a great increase in the federal government's Indian-related law-enforcement responsibilities and the necessary expenditure of resources, and the reasoning underlying petitioner's position could well extend to all of the Five Tribes in eastern Oklahoma. In addition, resolution of the case requires a detailed examination of the history of the United States'

interactions and agreements with the Creek Nation and the Five Tribes more generally, as well as a number of actions that Congress took around the turn of the 20th century in eastern Oklahoma and developments since that time. More broadly, the federal government maintains relationships with many Indian tribes and exercises significant jurisdiction and administrative responsibility over Indian lands. That experience provides the United States with a unique perspective on the issues in this case, including the allocation of jurisdiction among the United States, the States, and tribes in Indian country, and the potential consequences of adopting petitioner's position.

For its part, the Creek Nation is a sovereign tribe whose historic territory is the focus of this case. The Creek Nation is uniquely situated to present its own informed understanding of the Creek Nation's history and of the treaties and statutes governing its relationship with the United States. This includes responding to questions raised concerning whether relevant treaties established a reservation in the first instance and whether such a reservation was disestablished, as well as addressing the actions Congress took around the turn of the 20th century in eastern Oklahoma and developments since that time. The Creek Nation also will address the importance of services it offers throughout the territory in question, and its view of the consequences of the potential outcomes of this case.

3. The United States and the Creek Nation, in identifying the issues to be addressed and developing frameworks for their respective briefs, have concluded that an adequate presentation in the complex setting of this case will require more than the 9,000 words and 8000 words, respectively, allowed by this Court's Rule 33(g)(xii and xiii). That is especially so since it will be necessary to address not only the question of the existence of a present-day Creek Reservation, but the further questions on which the Court ordered supplemental briefing in Murphy concerning whether the State has criminal jurisdiction even if a reservation exists. See 139 S. Ct. 626.

The Court recognized the substantial interests and distinct perspectives of the United States and the Creek Nation in the issues in this case by granting each leave to participate in the oral argument in Murphy. And the Court did so as well in its order directing the Solicitor General and the Creek Nation, along with the parties, to file supplemental briefs and supplemental reply briefs in Murphy, and by providing for each to file briefs of the same number of words as the parties (6000 for the supplemental briefs and 3000 for the supplemental reply briefs).

The United States and the Creek Nation therefore submit that amici briefs not to exceed 11,000 words would be of material assistance to the Court.

For the foregoing reasons, this application for leave for the United States and the Creek Nation to file amici briefs in excess of the word limits provided for in Rule 33(g) of the Rules of this Court should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JANUARY 2020