No. 19-6428

IN THE

Supreme Court of the United States

KEITH ELMO DAVIS

Petitioner,

v.

OKLAHOMA,

Respondent.

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

Brief for Respondent

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QUESTION PRESENTED

This Court is currently deciding whether Oklahoma can exercise jurisdiction to prosecute crimes involving members of an Indian tribe within the historical boundaries of the Creek Nation, one of the "Five Civilized Tribes" that occupied Eastern Oklahoma in what was then known as "Indian Territory." *McGirt v. Oklahoma*, No. 18-9526 (U.S.).

This Petition presents the related question of whether the state has such jurisdiction within the historical boundaries of the Choctaw Nation—one of the other Five Civilized Tribes. In 2005, Petitioner was convicted of forcible sodomy and lewd or indecent proposals to a child under 16 and sentenced to 20 and 15 years of imprisonment by the State of Oklahoma. The question presented is:

Whether the State of Oklahoma had jurisdiction to prosecute Petitioner's crimes.

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STATEMENT

Petitioner raises a question closely related to the question currently pending before this Court in *McGirt v. Oklahoma*, No. 18-9526. This Court should withhold consideration of this Petition until it decides the *McGirt* case, and then dispose of it as appropriate.

1. In the summer of 2003, fifteen-year-old C.D. and fourteen-year-old T.E. visited Petitioner at his home (Tr. I 134-37, 183-85). Petitioner was C.D.'s grandfather, and T.E.'s step-great-grandfather (Tr. I 134, 183-84). During their stay, Petitioner knelt in front of C.D., asked to touch his penis and began to unzip C.D.'s pants (Tr. I 188-90). T.E. happened to walk into the room and Petitioner stood up (Tr. I 188-90). At another time, Petitioner was alone in the bathroom with T.E., who had insect bites near his groin (Tr. I 144-45). After placing medication on the bites, Petitioner performed oral sodomy on T.E. (Tr. I 144-47). Petitioner was convicted of one count of forcible sodomy, for which he was sentenced to twenty years imprisonment, and one count of lewd or indecent proposal to a child under sixteen, for which he was sentenced to fifteen years imprisonment. The trial court ordered Petitioner to serve the sentences consecutively.

2. Petitioner filed a direct appeal of his convictions, which was denied by the Oklahoma Court of Criminal Appeals ("OCCA"). *See Davis v. State*, No. F-2005-1044 (Okla. Crim. App. Dec. 15, 2006). During the pendency of the direct appeal, Petitioner

filed a post-conviction application, which the district court dismissed without prejudice due to the possibility that it might overlap with claims raised on direct appeal, or contain claims that should be raised on direct appeal. *See State v. Davis*, No. CF-2004-65 (Latimer Co. Dist. Ct. Dec. 4, 2006).

3. After the OCCA denied his direct appeal, Petitioner refiled his post-conviction application, which the district court denied. *See State v. Davis*, No. CF-2004-65 (Latimer Co. Dist. Ct. May 23, 2007). Petitioner did not appeal this denial to the OCCA.

4. Petitioner then filed another application for post-conviction relief, which the district court denied. *See State v. Davis*, No. CF-2004-65 (Latimer Co. Dist. Ct. Jan. 2, 2008). The OCCA affirmed the district court's orders. *See Davis v. State*, No. PC-2008-73 (Okla. Crim. App. Apr. 8, 2008).

5. Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Oklahoma, which was denied. *See Davis v. Jones*, No. CIV-08-235-JHP (E.D. Okla. Oct. 20, 2010). Petitioner failed to timely perfect an appeal to the United States Court of Appeals for the Tenth Circuit. *See Davis v. Jones*, 421 F. App'x 829 (10th Cir. 2011).

6. Next, Petitioner filed another application for post-conviction relief, which was denied by the district court. *See State v. Davis*, No. CF-2004-65 (Latimer Co. Dist. Ct. Mar. 20, 2012). The OCCA denied Petitioner's appeal. *See Davis v. State*, No. PC-2012-338 (Okla. Crim. App. Apr. 4, 2013).

7. Petitioner then filed a motion to vacate the judgment alleging, for the first time, that the State lacked jurisdiction. Petitioner alleged the crime occurred on allotted land, although he did not allege, much less attempt to prove, that the land was an Indian allotment subject to restrictions against alienation.[1] The district court treated the motion as a subsequent application for post-conviction relief, and denied it. *See State v. Davis*, No. CF-2004-65 (Latimer Co. Dist. Ct. July 6, 2012). Petitioner did not appeal.

8. Petitioner sought authorization from the Tenth Circuit to file a second or successive federal habeas petition, which was denied. *See In re: Keith Elmo Davis*, No. 13-7076 (10th Cir. Nov. 26, 2013). Petitioner did not raise any challenges to the State's exercise of jurisdiction in his proffered habeas petition.

9. Petitioner next filed a state petition for a writ of habeas corpus in Beckham County, in which he alleged the State lacked jurisdiction over his crimes pursuant to *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). The court dismissed the petition for lack of venue. *Davis v. Martin*, No. WH-2017-16 (Beckham Co. Dist. Ct. Nov. 22, 2017). The OCCA declined jurisdiction of Petitioner's attempted appeal because Petitioner failed to give adequate notice to the warden. *Davis v. Martin*, No. HC-2017-1295 (Okla. Crim. App. Jan. 18, 2018). Petitioner then properly perfected an appeal,

[1] The Petition for Certiorari does not allege the State lacked jurisdiction because the crime occurred on Indian country as defined by 18 U.S.C. § 1151(c) ("all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same").

which the OCCA denied because this Court had not yet reviewed the Tenth Circuit's decision in *Murphy*, and because Petitioner had failed to pursue post-conviction relief. *Davis v. Martin*, No. HC-2018-85 (Okla. Crim. App. June 12, 2018).

10. Finally, on July 3, 2018, Petitioner filed the application for post-conviction relief that is the subject of the instant petition for writ of certiorari. This application, filed in Latimer County, alleged the State lacked jurisdiction over his crimes pursuant to *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). Petitioner filed a petition for writ of mandamus in the OCCA when a decision was not immediately forthcoming from Latimer County, which the OCCA denied. *See Davis v. Oklahoma*, No. MA-2019-173 (Okla. Crim. App. June 24, 2019).

11. On June 10, 2019, the Latimer County District Court denied Petitioner's application for post-conviction relief. Petitioner alleged that he is 3/16ths Cherokee, that his victims are also Native American, and that the crime occurred within the historic boundaries of the Choctaw Nation. As relevant here, the court concluded that Petitioner's crimes were not one of the enumerated crimes within the terms of the Major Crimes Act (18 U.S.C. § 1153(a)). Pet. App. B at 2-3.

12. On August 20, 2019, the OCCA affirmed. The OCCA stated that "Petitioner's claims turn on the outcome of" *Royal v. Murphy*, 138 S. Ct. 2026 (2018). Pet. App. A at 1-2. The OCCA then held that, "As the Supreme Court has yet to decide *Murphy*, we find Petitioner's claims to be premature." Pet. App. A at 3.

ARGUMENT

The issues raised by the Petitioner are substantially similar to the question presented in *McGirt v. Oklahoma*, No. 18-9526 (U.S.), which is currently before this Court. In *McGirt*, the petitioner—who claims membership in the Seminole Tribe and who raped and molested a four-year-old girl—raises the question of whether the State has jurisdiction to prosecute his crimes committed within the 1866 boundaries of the Creek Nation. Briefing on the merits in that case is ongoing. *See also Sharp v. Murphy*, No. 17-1107 (U.S.).

Petitioner presents nearly identical questions as they relate to 1866 Choctaw boundaries. Because both the Creek and the Choctaw are members of the "Five Tribes," they share a common history, especially as it relates to Congress's dismantlement of the Indian Territory to create the State of Oklahoma, which was to exercise jurisdiction over those lands. Thus, this Court's decision in *McGirt* will be highly relevant to, if not dispositive of, the questions presented in this Petition. This Court should therefore withhold consideration of this case until *McGirt* is decided.

This Court should not grant the Petition based on Petitioner's dependent Indian community theory. Neither the state district court nor the OCCA addressed this claim, likely because Petitioner did not raise it in the district court and fails to muster any substantial argument on this theory. To start, Petitioner's dependent Indian community theory conflicts with his claim that the land on which he committed his crime is an Indian reservation. Dependent Indian communities "refers to a limited category

of Indian lands that are neither reservations nor allotments." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998). For an area to be considered a dependent Indian community the land must (1) "have been set aside by the Federal Government for the use of the Indians as Indian land," and (2) "be under federal superintendence." *Id.*[2] Petitioner does not show the location of the lewd molestation meets either of the criteria necessary to establish a dependent Indian community. Petitioner did not present anything to the lower court showing that Congress had set aside the land on which his crime occurred for Indian use or that the federal government exercised superintendence over it.[3]

Accordingly, Petitioner has not raised a substantial question with respect to whether the land on which he committed his crime is a dependent Indian community.

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[2] "[L]and simply conveyed by Congress to individual Indians or tribes that they are then 'free to use ... for non-Indian purposes' or sell as they wish does not qualify" as a dependent Indian community. *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1149 (10th Cir. 2010) (en banc) (quoting *Venetie*, 522 U.S. at 533).

[3] The Tenth Circuit's reference to Choctaw and Chickasaw land as dependent Indian communities in *Choctaw Nation v. Atchison, T. & S. F. Ry. Co.*, 396 F.2d 578, 580 (10th Cir. 1968), referred only to the state of affairs in 1906 when Congress passed an act to "provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory." 34 Stat. 137. As described in the *Murphy* briefing and the forthcoming briefing in *McGirt*, the Choctaw Nation's interests in the land were divested by Congress, and the U.S. government quickly removed federal restrictions on the land, such that the former Choctaw and Chickasaw lands are no longer entirely set aside for the use of Indians as Indian land and superintended by the federal government.

Nor would any such question raise issues worthy of certiorari except as such issues relate to the ones pending in the *McGirt* case.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should await disposition until this Court decides the pending *McGirt* case, and then be disposed of as appropriate.

Respectfully submitted,

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February 12, 2020