

Case No. 05-10787

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IN THE SUPREME COURT OF THE UNITED STATES

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**PATRICK DWAYNE MURPHY,**

**Petitioner,**

**v.**

**STATE OF OKLAHOMA,**

**Respondent.**

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**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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**CAPITAL CASE  
QUESTION PRESENTED**

1. Does the Oklahoma Court of Criminal Appeals' determination that a tract of land which was once an Indian allotment but whose surface rights are now completely unrestricted and only 1/12 of the subsurface mineral rights are held by Indian owners in restricted status does not constitute "Indian country" for purposes of the Indian Major Crimes Act, 18 U.S.C. §§ 1151, 1153, comply with the language and purpose of the statute and this Court's related case law?

No. 05-10787

In the

SUPREME COURT OF THE UNITED STATES OF AMERICA

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PATRICK DWAYNE MURPHY,

*Petitioner,*

-vs-

THE STATE OF OKLAHOMA

*Respondent.*

---

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

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**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Order and Judgment of the Oklahoma Court of Criminal Appeals entered December 7, 2005. See *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005).

**STATEMENT OF THE CASE**

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of McIntosh County, Case No. CF-1999-164A, convicting him of first degree murder. Petitioner's conviction is the result of a jury trial in which he was found

guilty beyond a reasonable doubt of murdering George Jacobs. Petitioner's jury also found the existence of two aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel and (2) Petitioner poses a continuing threat to society. At the conclusion of Petitioner's trial, the jury recommended a sentence of death and Petitioner was sentenced accordingly.

From his conviction, Petitioner filed a direct appeal with the Oklahoma Court of Criminal Appeals (OCCA). On May 22, 2002, the OCCA affirmed Petitioner's conviction and sentence. See Murphy v. State, 47 P.3d 876 (Okla. Crim. App. 2002). Thereafter, Petitioner sought certiorari before this Court, which was denied on April 21, 2003. See Murphy v. Oklahoma, 538 U.S. 985 (2003). Petitioner then filed his first application for state post-conviction relief. In a published opinion filed on September 4, 2002, the OCCA rejected all of Petitioner's post-conviction claims except a claim that he was mentally retarded and, therefore, ineligible to be executed. See Murphy v. State, 54 P.3d 556 (Okla. Crim. App. 2002). As for the mental retardation claim, the OCCA remanded the claim to the state district court for an evidentiary hearing. Id. The evidentiary hearing was held on October 29, 2002. After reviewing the record and briefs from both parties, the OCCA denied Petitioner's mental retardation claim in a published opinion filed on March 21, 2003. See Murphy v. State, 66 P.3d 456 (Okla. Crim. App. 2003). Subsequently, Petitioner filed another application for state post-conviction relief. In that application, Petitioner reraised his mental retardation claim as well as the Indian country

jurisdiction claim presented in the instant petition for certiorari. In a published opinion filed on December 7, 2005, the OCCA rejected Petitioner's jurisdictional claim, but granted relief on the mental retardation claim and remanded that claim to the state district court for a jury trial on the issue. Murphy, 124 P.3d 1198. Petitioner's mental retardation trial is currently scheduled for September, 2006. In addition, on January 23, 2006, Ronald A. White, United States District Judge for the Eastern District of Oklahoma, granted Petitioner's application to amend a federal habeas corpus petition, which was, and is currently, pending in his court, with Petitioner's Indian country jurisdiction claim.

#### **STATEMENT OF FACTS**

On the evening of August 28, 1999, Petitioner and his friends Billy Jack Long and Kevin King were driving on Vernon Road, a rural dirt road maintained by McIntosh County, when they passed Mark Sumka and George Jacobs, who were traveling in a car headed in the opposite direction (Trial Tr. III 592-93). Petitioner and Mr. Sumka had known each other for years and stopped their respective vehicles in the middle of the road so they could talk to each other (Trial Tr. III 582, 592). When Petitioner discovered Mr. Jacobs was in Mr. Sumka's car, however, Petitioner ordered Mr. Sumka to turn off his motor and get out of the car (Trial Tr. III 592). Petitioner, who was living with Patsy Jacobs—Mr. Jacobs' ex-wife—at the time, harbored some kind of animosity toward Mr. Jacobs (Trial Tr. 594-95). Ignoring Petitioner's orders, however, Mr. Sumka accelerated his vehicle and attempted to elude Petitioner (Trial Tr. III 593).



Nevertheless, Petitioner was able to catch up to Mr. Sumka's vehicle and pull his truck ahead of Mr. Sumka, forcing Mr. Sumka to stop his car (Trial Tr. III 593). Petitioner's friends then ran to Mr. Sumka's car, started hitting the drunk Mr. Jacobs, and pulled him from the vehicle (Trial Tr. III 593, 595, 597). Mr. Sumka was struck a couple of times by the men, but was able to get away and ran down the road for a distance (Trial Tr. III 595-98). Meanwhile, as his friends held Mr. Jacobs in the middle of the road, Petitioner pulled out a knife, pulled down Mr. Jacobs' pants, and amputated Mr. Jacobs' genitals (Trial Tr. III 603-04, 668-69). Petitioner then slashed Mr. Jacobs' chest, throat, and stomach (Trial Tr. III 603-04, 668-69). Mr. Jacobs was then dragged to a ditch along the side of the road where he was further beaten and left to die.

Mr. Sumka, worried about leaving Mr. Jacobs alone with his attackers, returned to where the vehicles were parked and Petitioner and his friends were still standing (Trial Tr. III 597-98). Mr. Sumka saw Mr. Jacobs lying in the ditch, barely breathing (Trial Tr. III 600-01). Upon returning, Mr. Sumka was greeted by Petitioner and company, who warned him that if he told anyone what they had done to Mr. Jacobs that they would kill him and his family (Trial Tr. III 598). Mr. King then hit Mr. Sumka again (Trial Tr. III 599). Thereafter, Petitioner folded up his knife and threw it into a pasture on the side of the road (Trial Tr. III 600, 605).

Another motorist came upon the scene and noticed a figure lying in the ditch, four other men standing in the road, and a fleshy object and some blood lying in the center of

the road (Trial Tr. II 312). The motorist asked the men if everything was all right and if the man in the ditch needed help, but the men replied that the man was just drunk and then started to approach the motorist's car (Trial Tr. II 310-11). Feeling uneasy with the situation, the motorist drove to his nearby home, called the McIntosh County Sheriff's Office, and then returned to the scene (Trial Tr. II 311-12). When he returned, no one but the man in the ditch was left (Trial Tr. II 313). Mr. Sumka had left with Petitioner, Mr. Long, and Mr. King, in Petitioner's truck (Trial Tr. III 600-02).

Authorities, including McIntosh County sheriff's deputies, Oklahoma State Bureau of Investigation agents, and Creek Nation Lighthorsemen (tribal police), responded to the scene of the homicide. Although tribal officers were at the scene and assisted in the subsequent investigation, no one ever suggested the crime had occurred in Indian country and neither the Muscogee (Creek) Nation authorities nor the United States Attorney's Office for the Eastern District of Oklahoma sought jurisdiction in this case. Additionally, although an OSBI agent's trial testimony that the crime scene was located approximately one mile south of Highway 9 on Vernon Road was inaccurate, contrary to Petitioner's assertion, State officials did not "incorrectly locate[] the crime scene by two and one-half miles" (Petition at 5). In fact, one of the tribal police officers who had worked the scene accurately identified the location of the crime at trial (Trial Tr. II 386).

During the course of the state-court litigation in this case, it has also been established that Petitioner and Mr. Jacobs were both enrolled members of the Muscogee

(Creek) Nation. Murphy, 124 P.3d at 1200. Additionally, the record reflects that the road upon which Petitioner committed his crime is a section line road which runs across a former Indian allotment. Id. at 1201-02. As conceded by Petitioner, the Indian title to all the surface rights of that particular tract have been extinguished (Petition at 12). Furthermore only 1/12 of the subsurface mineral rights in the tract are held in restricted status by Indians. Murphy, 124 P.3d at 1206.

### **REASONS FOR DENYING THE WRIT**

This Court need not review the issues raised in Petitioner's certiorari application because the OCCA's determination that the situs of the crime involved in this case is not Indian country as defined by 18 U.S.C. § 1151 is not an answer to an important federal question which is in such conflict with other state courts of last resort, the United States courts of appeals, or this Court's prior decisions, as to warrant certiorari review in this instance, nor has it decided "an important question of federal law that has not been, but should be, settled by this Court." Rule 10, *Rules of the Supreme Court*. Moreover, the OCCA's thoughtful and reasoned decision, which took into consideration the potential impact it could have on law enforcement across a wide swath of former Indian Territory lands in eastern Oklahoma and which is based, in part, on this Court's opinion in City of Sherrill, N.Y. v. Oneida Indian Nation, 544 U.S. 197 (2005), presents a rational and workable rule for determining criminal law jurisdiction under the Indian Major Crimes Act, 18 U.S.C. § 1153.

I.

**THE OCCA'S OPINION THAT "A FRACTIONAL INTEREST IN AN UNOBSERVABLE MINERAL INTEREST IS INSUFFICIENT CONTACT . . . TO DEPRIVE THE STATE OF OKLAHOMA OF CRIMINAL JURISDICTION" IN THIS CASE IS REASONABLE AND THIS COURT NEED NOT GRANT CERTIORARI TO CORRECT SUCH A REASONABLE DECISION.**

Petitioner contends this Court should grant certiorari to review his case because the OCCA's determination that the situs of the crime involved in this case is not Indian country is incorrect. The OCCA found that, although the crime occurred on a tract of land that was previously an Indian allotment, all Indian title to the surface rights and the vast majority of the subsurface mineral rights had been extinguished prior to the time of the crime and, thus, that the property is not Indian country. Petitioner contends such a ruling runs counter to the mandates of this Court and circuit courts, the letter of Section 1151, various applicable treaties and statutes, and an opinion given by a former Bureau of Indian Affairs official (see Petition at 8). Contrary to Petitioner's assertions, however, the state court's decision is not clearly in conflict with controlling federal law or the decisions of other state courts of last resort or federal circuit courts, but rather reflects a reasonable and rational means of determining jurisdiction in a potentially crippling confusing environment. Because the OCCA's decision does not constitute a decision on "an important federal question" in actual conflict with other state and federal courts or

“relevant decisions of this Court,” this Court need not grant certiorari in this instance.

Rule 10, *Rules of the Supreme Court*.

Acknowledging the language of Section 1151(c), that Indian country includes “all Indian allotments, the Indian titles to which have not been extinguished[,]” the OCCA in this case noted that “the uncontradicted evidence shows that, as to the surface estate, the Indian allotment had been extinguished by conveyances to non-Indian landowners prior to the time of the crime.” Murphy, 124 P.3d at 1206. It further found that “[e]ven as to the remaining Indian allotment mineral estate, the uncontradicted evidence was that all but 1/12th had been extinguished by conveyances to non-Indians.” Id. Emphasizing that “[c]riminal jurisdiction has always been tied to geography, i.e., where the crime occurred[,]” the state court held that “[c]ommon sense tells us that this issue has more to do with surface rights than underground minerals[.]” Id. 124 P.3d at 1207. Therefore, contrary to Petitioner’s assertions, the state court did not dismiss the restricted mineral interests as unimportant or even determine that jurisdiction for non-criminal purposes may not take into account such interests, rather it found for purposes of determining criminal jurisdiction that the surface estate is the most important. Thus, the OCCA concluded, “[a] fractional interest in an unobservable mineral interest is insufficient contact with the situs in question to deprive the State of Oklahoma of criminal jurisdiction.” Id., 124 P.3d at 1206.

Petitioner, however, suggests the OCCA's decision contradicts decisions of this and other federal courts which "have concluded that allotment lands that carry any restrictions in alienation . . . are Indian country" (Petition at 13). As support for his contention, Petitioner cites several cases, none of which indicate the OCCA's decision is incorrect. For instance, the opinions of this Court, which Petitioner has cited, suggest neither that the OCCA's approach to the jurisdictional question presented to it was improper or that its ultimate finding of state jurisdiction was wrong. Rather, both cases simply stand for the proposition that federal governmental control over the parcel in question is vital in determining whether a certain location falls within Indian country. See United States v. Pelican, 232 U.S. 442, 449 (1914) (a pre-Section 1151 holding that Indian allotments are Indian country so long as "restrictions upon alienation or provision for trusteeship on the part of the [federal] government" are attached thereto); United States v. Ramsey, 271 U.S. 467, 471 (1926) (indicating that a primary issue in determining Indian country status is the degree of remaining federal control over the land). The OCCA's finding that "there does not seem to be much federal superintendence" over the tract in this case shows its ultimate decision is not contrary to either Pelican or Ramsey. See Murphy, 124 P.3d at 1208.

The Tenth Circuit cases cited by Petitioner are similarly general in their applications, simply finding that allotted lands, whether in restricted status or held in trust by the federal government, can be Indian country, Mustang Production Co. v. Harrison, 94 F.3d 1382, 1385 (10th Cir. 1996), and that Creek Nation allotments fall within the

general scope of Section 1151, United States v. Sands, 968 F.2d 1058, 1062 (10th Cir. 1992). Therefore, Petitioner's reliance on these cases does not demonstrate that the OCCA's decision under the specific facts of this case was unreasonable or contrary to the language or intent of the Indian Major Crimes Act or other federal law.

The cases cited by Petitioner in support of his claim that severance of the surface and mineral interests of an Indian allotment does not affect its Indian country status are also neither controlling nor particularly persuasive for Petitioner's position in this instance. Such cases do support the OCCA's position, however. For example, the Tenth Circuit's determination in HRI, Inc. v. Environmental Protection Agency, 198 F.3d 1224, 1254 (10th Cir. 2000), that if either the surface or mineral estates of a parcel could be designated as Indian country the EPA could treat the entire parcel as Indian country for purposes of administering safe drinking water standards is clearly distinguishable from the instant case. Unlike criminal jurisdiction, which, as the OCCA noted, is almost always concerned only with surface locations, clean drinking water issues obviously involve both the surface and mineral estates of land. Therefore, the Tenth Circuit's finding in HRI, Inc. that Indian country status as to either surface or mineral estates would control the entire parcel for purposes of the Safe Drinking Water Act actually supports the OCCA's contacts analysis in this case. See Murphy, 124 P.3d at 1206-07. Additionally, the OCCA's prior analysis in Cravatt v. State, 825 P.2d 277, 280 (Okla. Crim. App. 1992), in which the state court determined that a 1/7th unrestricted interest in an Indian allotment

was not sufficient “to justify State intervention in a [criminal] matter that would otherwise be statutorily reserved for the federal government,” also supports, as the OCCA noted, the finding in this case that only a 1/12th restricted mineral interest was not sufficient to bar the State from exercising criminal jurisdiction. See Murphy, 124 P.3d at 1206-07.

In considering the issue under the particular facts of this case, the OCCA held that “[w]hen two jurisdictions are competing for jurisdiction over a particular issue (or seeking to determine which has jurisdiction), it is an established principle of comparative law to look at the contacts each jurisdiction has with the subject matter at issue.” Id. 124 P.3d at 1206. Therefore, because “[t]he land in question had its Indian Country characteristics extinguished through conveyances to non-Indians, thus giving notice to the public that it was no longer Indian land and that the State of Oklahoma’s laws would apply[,]” the OCCA found jurisdiction over the tract in question, at least for criminal matters, rests with the State. Id. Also important to the state court’s decision was the fact that “federal authorities ha[d] never attempted to exercise jurisdiction over this crime in the five years since it occurred.” Id.<sup>1</sup> Thus, the state court’s contacts analysis in determining jurisdiction in this case is neither unreasonable nor contrary to controlling law.

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<sup>1</sup>Petitioner contends that federal authorities could not have asserted jurisdiction due to an alleged mislocation of the crime scene. As noted in the Statement of Facts, however, tribal police officers were at the scene of the crime during the initial investigation and also participated in subsequent aspects of the case. Supra at 5. Moreover, although one witness’ trial testimony regarding the approximate location of the crime scene proved to be somewhat inaccurate, another State’s witness properly identified the exact location of the crime scene at trial. Id.



In arriving at this decision, the OCCA noted that allowing an “unobservable fractional [mineral] interest to control the enforcement of laws on the surface of the land” would seriously burden both the state and federal governments with a system requiring an extensive title search be conducted before jurisdiction in such cases could be established. Murphy, 124 P.3d at 1206-07. The OCCA’s decision was justified by reliance on this Court’s decision in City of Sherrill, 544 U.S. at 219-20, where this Court held “[a] checkerboard of alternating state and tribal jurisdiction in New York State . . . would ‘seriously burde[n] the administration of state and local governments’ and would adversely affect landowners neighboring the tribal patches.” See Murphy, 124 P.3d at 1206. Although City of Sherrill did not involve criminal jurisdiction, this Court’s unwillingness to unleash a flood of legal uncertainty regarding tax liability, zoning ordinances, and other regulations upon the local governments involved in that case, clearly shows the OCCA’s decision in this case, which prevents a similar deluge of uncertainty in law enforcement, is not a decision which needs to be corrected by this Court. Therefore, this Court should refuse to grant Petitioner’s request for certiorari review in this instance.

## II.

**THE OCCA'S DETERMINATION IN THIS CASE THAT THE SITUS OF THE CRIME WAS NOT INDIAN COUNTRY AS IT IS NOT "WITHIN THE LIMITS OF ANY INDIAN RESERVATION" OR A "DEPENDENT INDIAN COMMUNIT[Y]" IS NOT A PROPER VEHICLE FOR CERTIORARI REVIEW OF THE QUESTION PRESENTED.**

Petitioner's second question presented asks this Court to grant certiorari review to determine whether the allotment of Creek lands at the turn of the last century disestablished the Muscogee (Creek) Nation and "thereby remove[d] all lands within tribal boundaries from 'Indian country' as defined by 18 U.S.C. § 1151(a)?" (see Petition at i). This Court should not grant certiorari to review such a question in this case, however, because the instant case is not a proper vehicle for resolving the issue.

In its opinion, the OCCA noted that when presented with an opportunity to determine whether the exterior boundaries of the 1866 Creek Nation lands constituted a reservation and whether such a reservation had been disestablished by the allotment of the Creeks' lands the Tenth Circuit declined to do so and "expressly refused to express an opinion in that regard concerning allotted Creek lands." See Murphy, 124 P.3d at 1207-08 (citing Indian Country, U.S.A., Inc., v. State of Oklahoma, 829 F.2d 967, 975 n. 3, 980 n. 5 (10th Cir. 1987)). As such, the state court held that "[i]f the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here." Murphy, 124 P.3d at 1208. Therefore, as the OCCA, in this case, made no determination

regarding whether a Muscogee (Creek) Nation reservation exists in eastern Oklahoma, its decision is not in conflict with decisions of other state courts of last resort, the federal circuit courts, or this Court. As such, this case is certainly not a proper vehicle for this Court to decide Petitioner's second question presented. Rule 10, *Rules of the Supreme Court*. Therefore, this Court should deny Petitioner's application for certiorari review.

In addition, the plain language of Section 1151 appears to render the three options for finding a particular location Indian country mutually exclusive. That is, a location can be Indian country if it is either (1) "within the limits of any Indian reservation," or (2) part of a "dependent Indian communit[y]," or (3) part of an "Indian allotment[ ], the Indian titles to which have not been extinguished." 18 U.S.C. § 1151. In this case, as the OCCA found the situs of the crime was upon land conveyed to a Creek allottee in the early 1900s, it could not be within the limits of a reservation or part of a dependent Indian community. Murphy, 124 P.3d at 1204. Rather, because the land in question was clearly originally an "Indian allotment," the real question in this case, as the OCCA acknowledged, was whether the Indian titles to the allotment had been extinguished for purposes of criminal jurisdiction. Therefore, the OCCA's refusal to find the existence or non-existence of a reservation and its observation that "[a]s an allotment, it is doubtful this particular tract could qualify as a part of a dependent Indian community" and that, regardless, "there does not seem to be much federal superintendence" of the tract, clearly renders this case an inappropriate vehicle to determine the extent of any overlap between the three categories


of Indian country as defined in Section 1151. Murphy, 124 P.3d at 1208. As such, this Court should refuse to grant Petitioner's request for certiorari review of this case.

**CONCLUSION**

For the reasons stated above, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

**W.A. DREW EDMONDSON  
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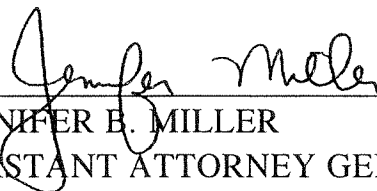
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CERTIFICATE OF SERVICE

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I, Jennifer B. Miller, a member of the Bar of this Court, hereby certifies that 1 copy of the foregoing was mailed by first-class, postage prepaid mail, to the counsel for Petitioner:

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JENNIFER B. MILLER  
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Dated: May 23, 2006